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Kavanaugh, Brett - Subject Files

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Michigan Affirmative Action Cases [4]

FRC ID:
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FOLDER TITLE:
Michigan Affirmative Action Cases [4]

FRC ID:
9699

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*53 Baylor L. Rev. 289, **

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Baylor Law Review

Spring, 2001

53 Baylor L. Rev. 289

LENGTH: 25558 words

ARTICLE: Strict Scrutiny of Facially **Race**-Neutral State Action and the Texas Ten Percent Plan *

* The author would like to thank Richard Fallon and Stuart Buck for their helpful comments on this Article. He would especially like to thank Charles Fried, who advised this project from its inception.

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SUMMARY:
... The Equal Protection Clause subjects to strict scrutiny both direct efforts to discriminate on the basis of **race,** such as explicit racial classifications, as well as indirect efforts to discriminate on the basis of **race,** such as raceneutral manipulations that achieve the same substantive result as the explicit classifications. ... " Thus, just as in the disparate impact and segregation equal protection cases, legislative action changing the racial composition of something can be subjected to strict scrutiny in "mixed motive" cases. ... Then-Justice Rehnquist, on the other hand, was content to consider only the legislative purposes advanced by the state's lawyers: ... As shown above, there is a solid case for subjecting the Ten Percent Plan to strict scrutiny under the racial effect of disparate impact. ... As this Article explains below, the Plan should also be subjected to strict scrutiny because it caused the racial effect of a change in the racial composition at the University of Texas at Austin and was "predominately" motivated to achieve this effect. ... The above analysis shows that the Ten Percent Plan should be subjected to strict scrutiny for an additional reason: the Plan had the racial effect of increasing the racial composition of blacks and Hispanics admitted to the University of Texas at Austin coupled with the predominant motivation to cause this effect. ...

TEXT:
[*290]

I. Introduction

Texas, California, and Florida have embarked on ambitious plans to change the way their state universities admit students. Stung by the realization that the racial preference admissions policies that they had been employing were illegal, these states erected novel admissions schemes with the hope of maintaining the composition of racial minorities on campus, but without all of the litigation that had accompanied their old affirmative action programs. As this Article endeavors to show, although these novel admissions schemes are facially **race**-neutral, they are no less unconstitutional than the racial preference policies they replaced.

Texas, California, and Florida each recently lost the ability, or thought it soon would lose the ability, to consider **race** when making university admissions decisions. In response to this predicament, each state, beginning with Texas, adopted a novel university admissions scheme that automatically admitted any applicant who graduated from an in-state high school and who had achieved a certain class rank. In Texas, any student who graduates in the top 10% of his high school class is automatically admitted into the state university of his choice without regard to the quality of the student's high school, the quality of the student's curriculum, or the student's performance on standardized tests. In California, any student in the top 4% [1], and in Florida, the top 20% [2], is automatically admitted, but in neither case is the student afforded unfettered discretion as to which state university he will attend.

The only plan that has been operational for any meaningful period of time is the Texas plan, dubbed the "Texas Ten Percent Plan." Thus, this Article focuses on Texas as a case study to explain why each of these states' novel admissions schemes is most likely unconstitutional. **[*291]**

The Constitution often prohibits state actors from doing indirectly that which they are prohibited from doing directly. [3] One such example is the Fourteenth Amendment's prohibition on racial discrimination. The Equal Protection Clause subjects to strict scrutiny both direct efforts to discriminate on the basis of **race,** such as explicit racial classifications, as well as indirect efforts to discriminate on the basis of **race,** such as raceneutral manipulations that achieve the same substantive result as the explicit classifications. For example, in Keyes v. School District No. 1, the Supreme Court held that it was just as unconstitutional to manipulate raceneutral attendance zones and student transfer policies in order to achieve racially segregated schools as it would be to mandate statutorily that schools be racially segregated. [4]

Indirect efforts to practice racial discrimination fall under what has come to be known as the Supreme Court's doctrine of facially **race**-neutral state action. This doctrine holds that facially **race**-neutral state actions that achieve the effects of racial discrimination and that are motivated by the purpose to achieve these effects are subjected to strict scrutiny under the Equal Protection Clause, just as would be explicit racial classifications. In other words, a state actor cannot circumvent the Equal Protection Clause by formally changing the face of a statute while simultaneously angling to accomplish the same substantive result. In this way, the Fourteenth Amendment focuses on substance, not form.

As this Article endeavors to show below, some very recent examples of efforts to circumvent the Equal Protection Clause in this way are the new state university admissions schemes in Texas, California, and Florida. In Texas, the state university system recently lost the ability to consider **race** when making admissions decisions because of a federal court decision, **[*292] Hopwood** v. Texas. [5] In response to the specter of declining admissions of blacks and Hispanics as a result of this loss, Texas revamped its admissions procedures to emphasize certain criteria and de-emphasize other criteria in a facially **race**-neutral way, but with an eye toward maintaining the same number of black and Hispanic students as had existed when its procedures explicitly considered **race.** The result of this effort was the Texas Ten Percent Plan, which automatically admits roughly half of each class at state universities based solely on a student's class rank and without regard to the quality of the student's high

school, the quality of the student's curriculum, or the student's performance on standardized tests. Under the new scheme, the percentage of black and Hispanic students admitted to the state's top undergraduate school is now virtually identical to the percentage admitted when the school explicitly considered **race** as a factor in admission. However, the Texas Ten Percent Plan is no more constitutional than the illegal admissions system it replaced.

During the adoption of the Ten Percent Plan, it did not go unnoticed among Texas legislators that some people interpreted the Ten Percent Plan as an attempt to gerrymander university admissions criteria to do indirectly what had been prohibited directly by **Hopwood.** During the debate in the Texas House of Representatives over the Plan, for example, one state legislator asked the following question in response to "some of the opponents" of the Plan who asserted that the Plan operated as "a backdoor approach to compensate for the recent decreases in minority enrollment by not considering **race,** but by granting automatic admission": "Is there anything wrong if the original motive of [the Ten Percent Plan] is to create diversity that is so, so important to the educational experience of the students in our state?" [6] As this Article shows, the short answer to this question is yes, there is something wrong, indeed, unconstitutional, with a legislative motive to increase the percentage of one racial group in a state university at the expense of another. It is not enough to say that the Ten Percent Plan "is **race**-neutral, it is gender neutral, so it meets the criteria that the court ruled in the **Hopwood** decision," as one legislator argued. [7] The Fourteenth Amendment requires more than formal, facial **race**-neutrality. **[*293]**

In the pages below, this Article constructs a framework that makes sense of the Supreme Court's entire jurisprudence applying strict scrutiny to facially **race**-neutral state action. Next, this Article applies this framework to the new university admissions scheme enacted in Texas. [8] This Article concludes that one can make a strong argument that this new admissions scheme should be subjected to strict scrutiny, that it fails strict scrutiny, and that it is therefore unconstitutional.

II. Background: The Texas Ten Percent Plan

Beginning in the 1970s, the State of Texas employed admission procedures at state universities that considered an applicant's **race** in order to boost the number of blacks and Hispanics attending them. [9] Some of these efforts were compelled by the federal government and some were not. [10] These efforts resulted in a large disparity in the average academic qualifications of admitted blacks and Hispanics, on the one hand, and **[*294]** admitted whites and Asians, on the other hand. [11] In 1994, several white applicants denied admission to the University of Texas Law School's entering class of 1992 sued the school for discriminating against them on the basis of **race** in admissions. In **Hopwood** v. Texas, the Fifth Circuit vindicated the claims of these plaintiffs and held that the school's admission process violated the Equal Protection Clause, because the process considered an applicant's **race** without a compelling reason for doing so. [12] Subsequently, all public universities in Texas ended the consideration of an applicant's **race** in their admissions procedures. [13] As a result, the number of blacks and Hispanics enrolled in top Texas graduate and undergraduate schools noticeably declined. [14] Much of the drop in enrollment was caused by a decline in the percentage of minorities admitted. [15] For example, the percentage of resident blacks and Hispanics in the freshman class admitted to the University of Texas at Austin in the fall of 1997, the first class admitted post-**Hopwood,** noticeably declined from the pre-**Hopwood** years. [16] The absence of racial preferences in the **[*295]** admissions process resulted in a corresponding increase in the percentage of whites and Asians among the admitted class of 1997. [17]

After the number of minorities admitted to top Texas universities dropped in the wake of **Hopwood,** the Texas Legislature passed a law redesigning the process of admissions to undergraduate schools. The new design is known as the "Texas Ten Percent Plan" and it began with applicants to the freshman class of 1998. The Ten Percent Plan establishes a dual

admissions scheme, the first aspect of which is particularly novel: Texas residents graduating in the top ten percent of their high school class, no matter which Texas high school they attended--whether public or private, suburban or urban--are automatically admitted to the Texas university of their choice. [18] The automatic admissions fill only a portion of the undergraduate classes each year; the remaining students are admitted through more traditional criteria. The Texas Legislature set forth several different factors that universities could consider when admitting the remainder of the freshman class, including the applicant's high school record, standardized test scores, and socioeconomic background. [19]

It is fair to say that the automatic admission aspect of the Ten Percent Plan is revolutionary. Admission is automatically granted under the Ten Percent Plan without regard to a student's standardized test scores and without regard to the quality of the high school a student attended. [20] In 1997, around 1000 Texas high schools, well more than half of the high schools in the state, did not send a single student to the University of Texas at Austin's freshman class. [21] With the enactment of the Ten Percent Plan, every one of these 1000 schools can potentially send the top 10% of each graduating class to the flagship university in the state.

The **Hopwood** decision and the resulting decrease in black and Hispanic admission to the top Texas universities caused an outcry in some quarters. [22] **[*296]** As this Article shows below, the Ten Percent Plan was quite explicitly enacted by the legislature to undo the damage to black and Hispanic admissions caused by **Hopwood's** elimination of racial preferences. [23] By all accounts the Ten Percent Plan has been a smashing success at undoing the damage to black and Hispanic admissions. Black and Hispanic enrollment numbers at the University of Texas at Austin rebounded almost precisely to their pre-**Hopwood** levels, a fact heralded by observers in Texas and beyond. [24]

III. Constitutionality of the Texas Ten Percent Plan

A. Strict Scrutiny Framework for Facially **Race**-Neutral State Action

When the federal government or a state government explicitly classifies its citizens according to **race,** a court will subject the state action to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. [25] A court will strike down the state action as unconstitutional unless the actor can prove that it acted in order to further a compelling state interest and that the action was narrowly tailored to that state interest. [26] Courts have struck down a variety of explicit racial classifications by government actors, including state action using **race** to determine who receives government contracts [27] and university admissions, [28] and state action explicitly mandating racial segregation in schools. [29]

Even if a state actor classifies citizens along dimensions other than **race** while implementing state programs--that is, "facially **race**-neutral" state action--such action will nonetheless be subjected to strict scrutiny if a plaintiff can show that the state action resulted in a racially discriminatory **[*297]** effect and was motivated by a racially discriminatory purpose. [30] The Equal Protection Clause prevents a state actor from doing indirectly that which it cannot do directly.

In the remainder of Part III.A., this Article constructs a framework that makes sense of the Supreme Court's entire jurisprudence applying strict scrutiny to facially **race**-neutral state action. This framework interprets the Supreme Court's cases to tie the discriminatory effect requirement and the discriminatory purpose requirement together such that facially **race**-neutral state action is subjected to strict scrutiny only if (1) the state action resulted in one of three identified racial effects and (2) the state took the action with the "purpose" of achieving such an effect. First, this Part identifies the three racial effects: disparate impact, segregation, and change in racial composition. Second, this Part shows that "purpose" in this context means the same thing as "purpose" in the criminal law context of mens rea, as

explicated in the Model Penal Code, with the racial effect serving as the analogue of the "result element" of a criminal offense. Finally, this Part identifies the corresponding level of "purpose" with which the state must act with regard to each of these three racial effects in order to subject the state action to strict scrutiny. The framework is presented in summary form in Figure 1. Figure 1: Facially **Race**-Neutral State Action Subjected to Strict
[SEE TABLE IN ORIGINAL]
Scrutiny if: **[*298]**

1. The Three Racial Effects

In Palmer v. Thompson, the Supreme Court first articulated the doctrine that proof of a racial effect is a necessary condition to prevailing on an Equal Protection challenge to facially **race**-neutral action. [31] In Palmer, the Court held that a discriminatory purpose behind a law, by itself, was insufficient to subject the law to strict scrutiny review: "No case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." [32] The plaintiffs in Palmer brought suit against the city of Jackson charging that the city had closed all of its public swimming pools, in the wake of a court declaration that the city's segregated public swimming pools were unconstitutional, for a racially discriminatory purpose. [33] The Court acknowledged that "some evidence" supported the plaintiffs' contention with regard to the legislative purpose, but held their Equal Protection challenge could not succeed absent a showing that the "state action affected blacks differently than whites." [34]

As explained below, Supreme Court cases can be read to prohibit state actions resulting in three types of racial effects (when accompanied by the requisite discriminatory purpose): disparate impact, segregation, and change in racial composition.

a. Disparate Impact

A racial disparate impact occurs when the state distributes a benefit or burden in a way that gives more of the benefit to or imposes more of the burden on one racial group than another. For example, in Washington v. Davis, the Supreme Court noted that the test used by the District of Columbia Police Department to select new officers resulted in a disparate impact, because four times as many blacks failed the test than did whites. [35] In addition, in Hunter v. Underwood, the Court held that a provision in the Alabama Constitution disenfranchising people convicted of crimes of moral turpitude resulted in a disparate impact because it disenfranchised **[*299]** several times as many blacks as whites. [36] Similarly, a state's decision to use welfare money to fund a lower percentage of the need of AFDC welfare recipients than of aged and infirm welfare recipients resulted in a disparate impact, because the former recipients were disproportionately black and Hispanic. [37] Also, a preference for military veterans in hiring state employees resulted in a disparate impact because the preference almost exclusively benefited men and not women. [38] Finally, in the context of creating electoral districts, a state creates a disparate impact when it dilutes the votes of one racial group relative to another. [39]

b. Segregation

It should be noted at the outset that the effect of segregation is not a subset of the effect of disparate impact. Even if blacks and whites attend schools that are on average "equal", and therefore, the educational scheme does not cause an educational disparate impact upon one group relative to the other, if the schools are segregated, "separate but equal," then the educational scheme may be unconstitutional. [40]

The Supreme Court has recognized that de jure segregation in violation of the Fourteenth Amendment occurs not only when state action explicitly mandates racial segregation, but, also, when facially **race**-neutral state action results in the effect of segregation coupled with

the purpose to **[*300]** achieve such an effect. [41] Such facially **race**-neutral state action has included: "gerrymandering of student attendance zones," selective construction of new schools, "excessive use of mobile classroom units," designating "feeder" schools, drafting student transfer policies, transportation of students, and assignment of faculty. [42]

It is less clear what precisely constitutes a segregated effect, because in the absence of explicitly mandated racial segregation, it is unlikely the schools will be comprised entirely of students of one **race.** [43] The Supreme Court has set forth a rather murky definition of segregation. For example, in Keyes, Justice Powell framed the inquiry in the following way:

A prima facie case of constitutional violation exists when segregation is found to a substantial degree in the schools of a particular district. It is recognized, of course, that this term is relative and provides no precise standards. But circumstances, demographic and otherwise, vary from **[*301]** district to district and hard-and-fast rules should not be formulated. The existence of a substantial percentage of schools populated by students from one **race** only or predominantly so populated, should trigger the inquiry. [44]

The Supreme Court has approved findings of the effect of segregation where a majority of the schools in a district are comprised of between 70% and 90% of students of the same **race.** [45]

c. Change in Racial Composition

The Supreme Court has recently recognized a third racial effect in its cases on racial gerrymandering of electoral districts. Racial gerrymandering of electoral districts occurs when a state redraws electoral districts in order to concentrate a certain number of a particular racial group inside the district, often for the purpose of improving the chances a person from that racial group will be elected to office. These redistricting decisions are facially **race**-neutral because they explicitly classify persons with regard to geographic location, not with regard to skin color. [46] But, like facially **race**-neutral state action in other contexts, electoral redistricting can be subjected to strict scrutiny just like explicit racial classifications. [47] In these cases, the Court has effectively held that state action which changes a racial composition that it set out to change is subject to strict scrutiny. **[*302]**

At the outset, it is important to realize that the Supreme Court's redistricting cases of the last decade deviate from the doctrine regarding the two racial effects discussed above. [48] In these cases, the Court extended the Equal Protection Clause's reach to a new racial effect beyond the traditional racial effects of disparate impact and segregation.

First, in the redistricting context, the effect of a racial disparate impact means a dilution in voting power of one racial group relative to another. [49] But, in Shaw v. Reno, the Court held that a plaintiff was not required to "demonstrate that the challenged practice had the purpose and effect of diluting a racial group's voting strength" before the practice could be subjected to strict scrutiny. [50] In doing so, the Court "recognized a claim 'analytically distinct' from a vote dilution claim." [51]

Second, the Court's racial gerrymandering cases cannot be squared with its jurisprudence on the effect of segregation. Although Justice Kennedy tried to tie the gerrymandering cases to the segregation cases in his majority opinion in one of these cases, [52] the racial compositions of the gerrymandered districts did not reach the 70% or greater of a single **race** typically necessary to constitute the effect of "segregation." [53] **[*303]**

The gerrymandering cases effectively held that any change in the racial composition of an electoral district can be subjected to strict scrutiny so long as the state had the requisite

purpose to affect that change. In the words of Miller, strict scrutiny is applied if "**race** was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," [54] regardless of the resulting racial composition. Thus, the racial effect recognized in the recent redistricting cases is simply "placing a significant number of voters within or without a particular district"--in other words, changing the racial composition of voters in an electoral district. [55]

One question left unanswered by the gerrymandering cases is whether the new racial effect of change in racial composition extends to contexts outside electoral districts, such as to the educational institutions at the heart of this Article. The rationale behind the gerrymandering cases suggests that they should extend to educational institutions.

The Court subjected facially **race**-neutral gerrymandering of electoral districts to strict scrutiny because such efforts sent harmful racebased **[*304]** messages to society. [56] The Court argued that two "special harms" inhered in all "efforts to separate voters into different districts on the basis of **race**": (1) the efforts "reinforced the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls," and (2) the efforts "signaled to elected officials that they represent a particular racial group rather than their constituency as a whole." [57] Commentators have labeled these injurious social meanings "expressive harms." [58] The Court prohibited state redistricting efforts predominantly motivated by **race** because it believed these expressive harms inhere in any such efforts. [59] At least one of these expressive harms inheres in any effort to establish university admissions standards predominately motivated by a desire to change the racial composition of the student body. [60] **[*305]**

The first "expressive harm" recognized in Shaw involved the perpetuation of racial stereotypes. The Court argued that aggregating voters of a certain **race** in an electoral district in order to increase the chances of electing a representative of that **race** "reinforced the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike, share the same political interests, and will prefer the same candidates at the polls." [61] The Court has similarly scolded states in prior decisions for changing university admissions standards in order to increase the number of minorities admitted. For example, in Regents of the University of California v. **Bakke,** Justice Powell, in the course of invalidating a racial set-aside in admission to a state medical school, argued that "preferential programs may only reinforce common stereotypes such as that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." [62] Thus, insofar as the goal of preferential programs like the one in **Bakke** may have been to debunk social stereotypes regarding the inferiority of blacks, the programs might have actually undermined that goal in the same way perpetuating racial stereotypes in Shaw might have "exacerbated the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." [63] **[*306]**

In addition to furthering notions of racial inferiority, some have argued that changing university admissions standards for the purpose of increasing the racial "diversity" of the student body perpetuates racial stereotypes that people of a certain **race** think alike--the precise stereotype the Supreme Court guarded against in Shaw. [64] For example, the Fifth Circuit in **Hopwood** rejected the notion that increasing racial diversity for the purpose of selecting those students "who will contribute the most to the 'robust exchange of ideas'" can serve as a justification for racial preferences in admissions, because such classifications might "promote improper racial stereotypes" insofar as they assume "that a certain individual possesses characteristics by virtue of being a member of a certain racial group." [65] The court added: "To believe that a person's **race** controls his point of view is to stereotype him." [66] Therefore, the case law supports the argument that the expressive harm of perpetuating racial stereotypes inheres in efforts to alter university admissions standards in order to change the racial composition of the university in the same way it inheres in efforts to change electoral district boundaries in order to change the racial composition of the district.

Thus, a facially **race**-neutral university admissions plan should be subjected to strict scrutiny upon the same showing required of a facially **race**-neutral electoral redistricting plan. [67] **[*307]**

2. The Purpose Behind the State Action

In two cases in the 1970s, the Supreme Court established the doctrine that one must show that the purpose behind the facially raceneutral state action was to cause a racial effect in order to prevail on an Equal Protection challenge. In Jefferson v. Hackney, the Court for the first time hinted that an impermissible racial effect was not alone enough to violate the Fourteenth Amendment. [68] In Jefferson, the Court rejected an Equal Protection challenge to a state welfare system that compensated the predominately white beneficiaries of one welfare program at a higher rate than the predominately non-white beneficiaries of another program. [69] The Court rejected the challenge, because the plaintiffs failed to show that the "difference in treatment" resulted from "racial motivation." [70] In Washington v. Davis, the Supreme Court further developed the purpose requirement. [71] In Davis, the Court reinstated summary judgment for the District of Columbia in a discrimination action brought by unsuccessful black applicants to the police department. [72] The Court noted that, although the applicants may have shown the test used by the police department to select new officers effectuated a negative disparate impact on black applicants, they had not shown that the test was implemented for the purpose of achieving this disparate impact. [73] The Court held that a racial effect, **[*308]** "standing alone, . . . does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." [74] To the contrary, a facially **race**-neutral law will encounter such scrutiny only when "the invidious quality of a law claimed to be racially discriminatory is ultimately . . . traced to a racially discriminatory purpose." [75]

The Supreme Court clarified the meaning of "discriminatory purpose" in the context of Equal Protection challenges to facially neutral state action in Personnel Administrator v. Feeney, another disparate impact case. [76] In Feeney, a female plaintiff challenged a state employment preference for war veterans, noting that over 98% of the veterans in Massachusetts were male. [77] The Court held that the preference did not violate the Equal Protection Clause, despite the severe disparate impact against women, because the plaintiff did not show that the "purpose" behind the preference was to discriminate against women. [78] In the process, the Court offered its most extensive discussion on what it means to enact legislation with a "discriminatory purpose" in the Equal Protection context:

It cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. [79] **[*309]**

This passage is notable for establishing two aspects of the definition of discriminatory purpose. First, the Court defined discriminatory purpose as a particular "state of mind" on the part of the government body toward the effects of the government action. This approach inextricably intertwines the purpose prong of the facially **race**-neutral state action test to the effects prong. Contrary to the suggestions of some commentators, it is irrelevant whether the state actors harbor ill will or animus towards a particular **race** when passing legislation. [80] Instead, state actors run afoul of the Constitution only if they act with a particular "state of mind" toward certain effects of their action. What effects might these be? The effects are the three racial effects that this Article outlined in Part III.A.1, above. Second, the "state of

mind" the Court selected for its discriminatory purpose test is something akin to the criminal law mens rea of "purpose" as it is defined by the Model Penal Code. This is made clear by the Court's decision to require government bodies to act with more than "knowledge" that one of the three racial effects would result from the action. Instead, state actors must have chosen their path "because of" its potential to produce one of these racial effects. In other words, the fact that the state action would result in one of the three racial effects must have been a desirable quality in the minds of the state actors. In this sense, mere "awareness" that one of the racial effects would result and state action "in spite of" these effects is not sufficient. This is precisely how the Model Penal Code defines the mens rea of "purpose" with regard to a "result element" [81] of a criminal offense: "A person acts purposely with respect to a result element of an offense when . . . it is his conscious object to . . . cause such a result . . . ." [82] The Model Penal Code distinguishes the mens rea of "knowledge" from the mens rea of "purpose": "A person acts knowingly with respect to a result element of an offense when . . . he is aware that it is practically certain that his conduct will cause such a result." [83] **[*310]**

Thus, the net of these two aspects of Feeney is a discriminatory purpose test that operates essentially the same way the Model Penal Code test for "purpose" does where the three racial effects this Article described above play the role of result elements of a criminal offense. Although Feeney involved only the effect of a gender disparate impact, its definition of purpose has been followed in racial disparate impact cases [84], and in cases resulting in the racial effects of segregation [85] and change in racial composition. [86]

The inquiry into the purpose behind state action has been complicated by the fact that state actors often act with several motivations. As explained below, the Supreme Court has resolved the proper standard of legislative purpose in favor of a "but for" motivation test in the cases of the first two racial effects, disparate impact and segregation. Interestingly, the Supreme Court has deviated from this standard in the case of the third racial effect, change in racial composition, favoring instead a "predominant" motivation test.

a. Disparate Impact and Segregation

Many legislative actions involve multiple purposes, only one of which may be to effectuate a racial effect. The Court noted that this may have been the case in Palmer: the record supported both the inference that the swimming pools "were closed because of ideological opposition to racial integration" as well as the inference that "the pools were closed because . . . they could not be operated safely and economically on an integrated basis." [87] **[*311]**

The Court has held that products of "mixed" legislative purpose can be subjected to strict scrutiny if the purpose to effectuate a racial effect was a "but for" motivation of the legislation. In Arlington Heights v. Metropolitan Housing Development Corp., the Court reinstated the district court's determination that a rezoning denial did not run afoul of the Equal Protection Clause. [88] The Court held that the plaintiff was not required "to prove that the challenged action rested solely on racially discriminatory purposes" in order for the Court to subject the action to strict scrutiny because "rarely can it be said that a legislature or administrative body . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." [89] Thus, the plaintiff needed only to prove that "a discriminatory purpose has been a motivating factor in the decision." [90] However, in an important footnote, the Court limited its holding to those illicit motivating factors that were a "but for" cause of the action:

Proof that the decision . . . was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the defendant the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. [91]

Although Arlington Heights was a case in which the plaintiffs alleged the racial effect of

disparate impact, the Court, in general, has followed the purpose standard of the disparate impact cases in cases involving the racial effect of segregation. [92] Thus, facially **race**-neutral state action resulting in a disparate impact or in segregation is subjected to strict scrutiny when those laws were enacted with the "but for" motivation of achieving that impact or segregation. **[*312]**

b. Change in Racial Composition

The requisite purpose behind the third racial effect was established in Miller v. Johnson, in which the Court held that strict scrutiny was triggered on a showing that "**race** was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." [93] By "predominant," the Court meant that "the legislature subordinated traditional **race**-neutral districting principles . . . to racial considerations." [94] Thus, just as in the disparate impact and segregation equal protection cases, legislative action changing the racial composition of something can be subjected to strict scrutiny in "mixed motive" cases. [95] However, unlike the disparate impact and segregation cases, the racially discriminatory purpose must be more than merely the "but for" motivation of the state action--it must be the "predominant motivation" of the action. [96] The distinction between the two standards became clear in Bush v. Vera. [97] In Vera, the five Justice majority split into two camps. Justice Thomas argued in concurrence [98] that strict scrutiny should apply whenever the legislature "intentionally created . . . a majority-minority district[]," where "intentional" meant that the "legislature affirmatively undertakes to create a majority-minority district that would not have existed but for" racial motivations. [99] In her plurality opinion, Justice O'Connor disagreed. [100] She argued that because redistricting was facially **race**-neutral state action, strict scrutiny did not "apply to all cases of intentional creation of majority-minority districts," but only to those creations in which "**race** was the predominant factor." [101] Thus, facially **race**-neutral state action resulting in a change in some racial composition is **[*313]** subjected to strict scrutiny when the state acted with the "predominant" motivation of achieving that change.

B. Application of the Framework to the Texas Ten Percent Plan

A few commentators have acknowledged the constitutional issues implicated by the Texas Ten Percent Plan, but most of these commentators have cursorily dismissed the constitutional concerns by emphasizing the facially **race**-neutral features of the plan. [102] Other commentators acknowledge that the constitutional issues cannot be dismissed as easily, but have left their analysis incomplete.

All of the commentators that have considered the constitutional issues in any detail agree, and, as this Article argues, correctly, that the driving motivation behind the alteration of the undergraduate admissions process in favor of the Ten Percent solution was the desire to restore the number of minority students enrolled to pre-**Hopwood** levels. [103] But these commentators have also rejected the notion that the Plan results in one of the racial effects. [104] This Article shows that this latter conclusion is incorrect.

As this Article explains, application of the strict scrutiny framework presented above demonstrates that there is a strong argument that the **[*314]** Texas Ten Percent Plan should be subjected to strict scrutiny. [105] First, although it is by no means a slam dunk, one could argue that university admissions data show that the Ten Percent Plan has resulted in the racial effect of a disparate impact favoring Hispanic and black students over white students. Moreover, and this is more clear, legislative history materials and other circumstantial evidence show that the Ten Percent Plan was enacted with the "but for" motivation to increase the admission of Hispanics and blacks relative to whites. Second, there is no question that university admissions data show that the Ten Percent Plan resulted in the racial effect of an increase in the percentage of Hispanic and black students admitted to top state universities. Moreover, although this is less clear due to the nature of the

inquiry, one could argue that the legislative history and other circumstantial evidence show that the Ten Percent Plan was enacted with the "predominant" motivation to increase the percentage of Hispanic and black students admitted. [106]

1. Disparate Impact + "But For" Motivation

a. Disparate Impact

As it was defined above, a disparate impact occurs when the state action in question impacts one racial group more than another. It is surprisingly difficult to show that the Ten Percent Plan operates in a way that **[*315]** disadvantages whites relative to Hispanics and blacks. The easiest way to show a disparate impact in the context of university admissions would be to compare the racial composition of the applicants to the racial composition of those admitted, which is to compare the acceptance rate of each racial group. [107] The applicant pool-admitted pool comparison was the one employed in Washington v. Davis, where the Supreme Court found a disparate impact by comparing the racial composition of those who applied to become police officers to the racial composition of those who passed the written exam. [108] However, this comparison fails to show a disparate impact under the Texas Ten Percent Plan.

The Ten Percent Plan operates two different admissions schemes: the automatic admissions scheme, under which applicants who graduated with a class rank in the top 10% of their high school class are admitted at a 100% rate, and a traditional scheme, under which applicants are admitted at a lower rate and judged upon a variety of criteria. In the three years during which the Ten Percent Plan has operated thus far, roughly half of the freshman class was admitted through the automatic scheme. [109] If the applicant pool-admitted pool comparison is limited just to the automatic admissions scheme, it is obvious that no disparate impact can be shown, because the acceptance rate for all racial groups is 100%. In addition, even if the applicant pool-admitted pool comparison is extended to the entire admissions process, combining both the automatic and traditional schemes, no disparate impact can be shown because university admissions data shows that for years 1998-2000 the overall acceptance rate of white applicants actually exceeded those of Hispanic and black applicants. [110] This data is presented in Figure 2. Interestingly, the acceptance rate of instate white applicants exceeded the acceptance rates of in-state Hispanic and black applicants even before **Hopwood.** The gap between these acceptance rates increased after **Hopwood,** and this widened gap persists under the Ten Percent Plan. Thus, white students cannot show a disparate impact under the Ten Percent Plan with this comparison. [111] **[*316]** Figure 2: Acceptance Rates of In-State Students to the University of Texas at Austin [112]
[SEE TABLE IN ORIGINAL]

The fact that the overall acceptance rates show no disadvantage to white applicants is not fatal to a disparate impact claim, however, according to **[*317]** the Supreme Court in Connecticut v. Teal. [113] In Teal, the Supreme Court held that merely because an employer promoted black workers at a greater rate than white workers, the employer was not shielded from a disparate impact claim by black employees with respect to one of the criteria on which promotion was based, a written examination. [114] Teal stands for the proposition that the components of a selection decision are subject to disparate impact analysis even though the overall selection decision does not support a disparate impact claim. [115] Although Teal was a Title VII case, there is no reason to think that its disparate impact teachings do not extend to the Fourteenth Amendment context in the same way that most other Title VII disparate impact teachings do. Commentators have not shied from breaking admissions processes into their components to isolate disparate impacts that do not exist on the whole. [116] Moreover, Jefferson v. Hackney, discussed below, confirms that it is proper under the Fourteenth Amendment to break selection decisions into components in order to subject them to disparate impact scrutiny. [117]

Admissions data from the University of Texas at Austin shows that the automatic admissions aspect of the admissions process has been a much greater boon to black and Hispanic applicants than it has been to white applicants. Under the Ten Percent Plan, about half of the in-state students admitted to the University of Texas at Austin have been admitted automatically based on their standing in the top ten percent of their high school class. [118] The other half have been admitted based on more traditional criteria, including standardized test scores, extracurricular activities, etc. [119] The portion of each racial group's admitted students attributable to automatic admission is shown in Figure 3. Figure 3 shows that the automatic admissions component of the Texas Ten Percent Plan benefited Hispanic and black students much more than it benefited white students in years 1998-2000, because far more of the total number of Hispanic and black in-state students admitted were admitted through the automatic admission component than white students. For example, in 2000, 55% of the black students admitted and 58% of the Hispanic **[*318]** students admitted were admitted through the automatic admissions component, whereas only 44% of admitted white students were admitted through this component. Figure 3: Percentage of In-State Admitted Students from Automatic Top Ten Percent Admission [120]
[SEE TABLE IN ORIGINAL]

The trouble is that even though the automatic admissions component has been a greater boon to black and Hispanic applicants than it has been to white applicants, isolating the automatic admissions aspect is not sufficient to establish a disparate impact, because, unlike Teal, there is no racial disparity in the admissions rate under this one aspect of the admissions plan. In Teal, although black employees were promoted at a greater rate than white employees, the written examination aspect of the promotion process failed a greater percentage of black employees than white employees. [121] Thus, in Teal, black employees could claim a disparate impact on the written examination even though none existed with respect to the overall promotion decision. White applicants to the University of Texas at Austin have no such luck, because the automatic admissions aspect of the admissions process admits white, Hispanic, and black applicants at the same 100% rate. Thus, white students cannot make out a disparate impact claim using overall admissions rates, nor can they do so using just the automatic admissions component of the Ten Percent Plan.

There is one final way in which white applicants might be able to show a disparate impact, and that is to compare the two aspects of the admissions process to each other to determine whether the Ten Percent Plan weights some admissions criteria more than others in a manner that helps some racial groups gain admission more than others. This type of disparate impact analysis was implicitly approved in Jefferson v. Hackney. [122] In Jefferson, a class of plaintiffs challenged Texas's welfare funding decisions, arguing that Texas funded some welfare recipients at a greater **[*319]** percentage of need than others in a manner that unconstitutionally discriminated against blacks and Hispanics. [123] The plaintiffs in Jefferson did not make the argument that the average black recipient of welfare received a lower proportion of his need funded than the average white recipient, which would be the analogue to comparing the overall university acceptance rates of each racial group under the Ten Percent Plan. Instead, the plaintiffs argued that if one were to separate all welfare payments into the components of AFDC benefits and non-AFDC benefits, one saw that Texas funded AFDC welfare recipients at lower rates (75% of need) than non-AFDC recipients (95-100% of need). [124] The plaintiffs argued that this constituted a disparate impact because the "proportion of AFDC recipients who are black or Hispanic is higher than the proportion of the other welfare recipients who fall within these minority groups." [125] Although the Equal Protection challenge in Jefferson failed because the disparate impact was "lacking in racial motivation," the Court appeared to accept the argument that a "difference in treatment" existed insofar as Texas more generously allocated welfare money to the group of recipients with the relatively lower proportion of blacks and Hispanics. [126] The disparate impact advanced in Jefferson is shown in Figure 4. Figure 4: Racial Composition of Welfare Programs

funded in Jefferson v. Hackney
[SEE TABLE IN ORIGINAL]

One can make a Jefferson disparate impact argument by comparing the racial composition of applicants in each aspect of the university admissions **[*320]** process to each other. The Ten Percent Plan essentially admits two groups of students at different rates: those with a high school class rank in the top ten percent are automatically admitted, and, therefore, admitted at a rate of 100%, and those with a lower high school class rank are admitted at a lower rate. In 2000, this lower rate was 52%. As one can see from Figure 5, the group admitted at the 100% rate is comprised of a greater proportion of blacks and Hispanics than the group admitted at the lower rate. Thus, white applicants can establish the precise disparate impact advanced in Jefferson: Texas more generously allocates admissions spots to the group of applicants with the relatively greater proportion of blacks and Hispanics. Figure 5: Racial Composition of In-State Students Admitted to the University of Texas at Austin, 2000 [127]
[SEE TABLE IN ORIGINAL]

As I show below, this disparate impact was no accident. The Texas legislature purposefully decided to admit students based on class rank at a higher rate than those admitted based on other **race**-neutral admission criteria because class rank was the **race**-neutral criterion on which blacks and Hispanics performed the best relative to other raceneutral criteria.

b. "But For" Motivation

Whether state action was motivated by the purpose to cause one of the three racial effects is a question of fact. [128] It is rare, of course, that such a purpose appears on the face of a statute. Consequently, legislative purpose **[*321]** is most frequently gleaned from "circumstantial evidence" [129] and the "totality of the relevant facts." [130] The factors giving rise to an inference of discriminatory purpose that have been most influential in Supreme Court jurisprudence include: the sequence of events giving rise to the state action, statements in the legislative history of the state action, and the extent of the discriminatory effect. [131]

Application of these various factors to the circumstances surrounding the enactment of the Ten Percent Plan leads to the easy inference that one of the "but for" purposes motivating the Plan was the desire to increase the percentage of blacks and Hispanics admitted to top state universities. [132] This Article considers and rejects arguments that the Ten Percent Plan is sufficiently explainable by purposes other than the motivation to cause a racial effect and that the strict scrutiny inquiry makes the actual legislative purpose irrelevant in favor of the conceivable legislative purposes offered during litigation. Thus, I conclude that the Ten Percent Plan should be subjected to strict scrutiny, given the existence of the disparate impact described above and the "but for" purpose to cause such an effect described below.

i. Historical Sequence of Events Leading Up to State Action

One piece of evidence that the Court in Arlington Heights argued was important to show discriminatory purpose was the "specific sequence of events leading up to the challenged decision." [133] This view was echoed lucidly in Rogers v. Lodge: **[*322]**

Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo. [134]

Examples of a suspicious sequence of events might include, in the context of Arlington Heights, a decision to suddenly rezone property that "always had been zoned" in a particular way when the city learned of "plans to erect integrated housing." [135] Or it might include, in the context of redistricting, acquiescence to Justice Department demands to create electoral districts comprised of a certain percentage of citizens for a particular racial group. [136]

The historical sequence of events strongly supports the inference that the Ten Percent Plan was enacted for the purpose of increasing the number of blacks and Hispanics admitted to top state universities. In fact, the language quoted from Rogers v. Lodge is precisely on point. There is no question that "discriminatory practices were commonly utilized by Texas." [137] The history of admissions to state universities shows that Texas universities had been using **race** in admissions in order to increase the number of black and Hispanic students admitted for at least two decades prior to the **Hopwood** decision. [138] There is similarly no question that these discriminatory practices "were abandoned when enjoined by courts or made illegal by civil rights legislation[,]" [139] because the **Hopwood** decision invalidated these practices. [140] Finally, these practices were nonetheless "replaced by laws and practices which, though neutral on their face, serve to maintain the status quo[,]" because the Ten Percent Plan, though neutral on its face, has reversed declines in black and Hispanic admission and caused their racial share to rebound to their precise pre-**Hopwood** levels. [141] **[*323]**

One might object to the last part of this analysis, that the Ten Percent Plan has maintained the status quo because, although the percentage of blacks and Hispanics enrolled is the same, the Ten Percent Plan radically alters the type of students that are admitted to top state universities. For example, the Ten Percent Plan makes eligible for admission the top ten percent of graduating classes from hundreds of schools that did not send any students to the University of Texas at Austin in the year before the Plan was enacted. [142]

This objection fails because it attempts to disassociate the object of the "status quo" from the constitutional violation. The **race** of students admitted is the object relevant to the constitutional violation of racial discrimination in contravention of the Equal Protection Clause and it is the racial composition of students that has remained the same from the illegal pre-**Hopwood** admissions programs to the Ten Percent Plan. A student's socioeconomic background, geographic location, or high school is irrelevant to the constitutional violation and any divergence from the status quo along these dimensions is therefore irrelevant to drawing an inference of racially discriminatory purpose.

ii. Legislative History

In Arlington Heights, the Supreme Court held that the "legislative or administrative history may be highly relevant" as proof of discriminatory purpose, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." [143] The legislative history of the Ten Percent Plan shows that there were several motivations behind the Plan, but perhaps no motivation was as significant as the restoration of the pre-**Hopwood** level of racial diversity in top Texas universities. Examination of the legislative history shows that the legislature sought to emphasize certain admissions criteria and deemphasize other criteria in order to increase the percentage of racial minorities admitted to top Texas universities.

At the outset, it is important to note that the specter of **Hopwood** and the declining admission of racial minorities pervaded the committee hearings and floor debate on the Plan in the Texas House of Representatives and in the Texas Senate. House Representative Irma Rangel, the author of the Plan, introduced it in the House Committee on Higher Education as a **[*324]** response to the "situation with **Hopwood**" and "what has occurred in the Fifth Circuit." [144] The Senate sponsor of the Plan, Gonzalo Barrientos, introduced it in the Senate Committee on Education as a necessary solution to "changing demographic trends" and the "dramatic decreases in minority enrollments in our colleges and universities since the

Hopwood decision." [145] Most of those testifying before the House Committee disparaged **Hopwood** and the corresponding decline in the number of racial minorities in Texas universities. Professor of Law Gerald Torres declared that "the **Hopwood** case . . . created the crisis that people felt in higher education." [146] Professor of History David Montejano said in the wake of **Hopwood,** "we have witnessed the dismantling of admissions and scholarship programs that were created to generate diversity on the campuses of public universities and colleges." [147] The tone during the floor debate in the House and Senate was very similar. House Representative Kamel minced no words when he declared of the Plan: "This piece of legislation was born out of the fact of the **Hopwood** decision" and "this is a solution to **Hopwood.**" [148] Although there was little to no debate on the Plan on the floor of the Senate, [149] Senator Barrientos, the sponsor of the Plan in the Senate, devoted all of his comments on the floor to minority admissions and the **Hopwood** decision. After noting the "changing demographic trends of Texas" and the "dramatic decreases" in "minority enrollments at our universities since the **Hopwood** decision," he concluded that "we need this bill in order to blunt the negative impact of the **Hopwood** decision." [150] **[*325]**

Moreover, the legislative history identifies standardized tests, such as the SAT and ACT, as the primary barrier to greater access by racial minorities in top Texas universities. Albert Kaufman of the Mexican American Legal Defense and Educational Fund testified before the House Committee on Higher Education that "the performance on standardized test scores has been a tremendous detracting effect, reduced the amount of minority participation in universities, and also reduced the participation of low income whites in universities." [151] Dr. Miguel Medolla, Jr. , who sat on the admissions committee of a Texas medical school, argued that low standardized test scores were the greatest obstacle to the educational achievement of Hispanic and black students; he urged the legislature to "outlaw" using standardized tests for medical school admission. [152] Statements by legislators on the House floor confirmed the proponents' aversion to standardized testing during a debate over whether to amend the Plan to automatically admit high school students who perform in the top tenth percentile of standardized test takers in Texas, as well as those who graduate in the top ten percent of their high school class. [153] The amendment failed, and its opponents urged opposition because it would increase the weight given to standardized test scores in admissions. [154]

Finally, the legislative history shows that the Ten Percent Plan was selected to boost the percentage of racial minorities admitted to top universities because it could circumvent the problem of poor performance by racial minorities on standardized tests by automatically admitting racial minorities based on class rank alone. Albert Kaufman of the Mexican American Legal Defense and Education Fund noted in testimony before the House Committee on Higher Education that "one of the philosophies behind the bill is that the university system in Texas has to be reflective of our future populations in the state, which we all know is going to be increasingly diverse." [155] He added:

Whatever growth there is in higher education is almost surely going to be all Latino population and to have admissions criteria which will allow that population [to succeed in higher education] is very, very important. . . . To the extent that this bill . . . might **[*326]** reduce the reliance on standardized tests, it would be a much stronger effort. And we recommend that you do weigh the standardized tests in less of a way. [156]

He declared his support for "using the sort of admissions criteria" in the Ten Percent Plan because "having admissions criteria which will enrich that diversity are very, very important." [157] The University of Texas Chancellor Dr. William Cunningham supported the Plan because the automatic admission of the top ten percent of each high school "will help us achieve our goal of creating an outstanding, diverse student body." [158] Echoing this sentiment, Representative Giddings crafted the following soliloquy: "With Texas becoming a state where people of color will be in the majority soon, we need to make sure that all have an opportunity to get a good education so that all can prepare themselves to contribute. After all, our future will be in their hands and this bill is about educational diversity." [159] One other

commentator has agreed that the goal of Ten Percent Plan was to "redefine . . . merit through an emphasis on grade point average, rather than on standardized test scores." [160]

That eliminating the consideration of standardized test scores for students graduating in the top ten percent of their high school class would boost the percentage of racial minorities admitted to top Texas universities was not mere conjecture; legislators knew the Plan would boost the admission of racial minorities at top state universities because they took notice of studies that predicted such a result largely due to the racially segregated nature of Texas high schools. [161] As Professor of Law Michael Olivas noted in testimony before the House Committee on Higher Education:

Ten percent rank in class is going to be particularly efficacious in the state of Texas, ironically, as a result of the extreme racial isolation of its high schools. Because of that racial isolation, many rural and urban minority schools will have a number of minority students in the top ten **[*327]** percent of their class who will have an opportunity to be considered at flagship institutions where they are not presently able to do so because of the lower test scores that these groups tend to present. [162]

Leo Salavedra, Deputy Chancellor of Texas A & M University agreed; he predicted that as a result of the Plan, there is "definitely going to be an increase in diversity within our institutions." [163] In the hearings before the Senate Committee on Education, Senator Royce West asked a representative of the Texas Higher Education Coordinating Board whether he had "had an opportunity . . . to do an analysis of this particular bill to determine whether or not it would . . . have the impact of lessening or zero-outing the impact of the **Hopwood** decision." [164] The representative had done such an analysis and reported that the Plan could result in a racial composition at "selective" universities of 66% white students, 16% Hispanic students, and 6% black students, which he noted was a higher percentage of minorities than that which was enrolled after **Hopwood.** [165] He concluded that "this kind of bill would increase . . . the diversity of the pool of students that's available to institutions in Texas, particularly the most selective institutions." [166] In the hearings before the House Committee, Professor David Montejano, citing the Texas Coordinating Board's predictions, assured the committee that "this legislation will maintain a minimum floor for diversity at our state universities without the use of **race** or ethnic criteria," and that "just by adopting a ten percent threshold . . . we can maintain some sort of diversity without using **race** or ethnic criteria." [167] Commentators who have studied the adoption of the Plan agree: "The Texas legislators knew that the 10 percent plan would change the post-**Hopwood** racial composition of entering classes and that was the purpose of the measure." [168] **[*328]**

This is not to say that other motivations for enacting the Ten Percent Plan besides boosting the percentage of racial minorities admitted to top state universities are not manifest in the legislative history. Representative Berlanga engaged in a bit of class warfare by publishing an exhibit showing that students in most House districts would gain seats in state universities at the expense of students in a minority of wealthy House districts. [169] Representative Rangel, the sponsor of the Plan, made an odd appeal to Texas "patriotism" in urging legislators to prevent the standardized test makers in Massachusetts and New Jersey from telling Texans which students were qualified for higher education. [170] Other statements manifested an interesting motivation to affect the psyche of racial minorities by sending a message to minority students that they were still welcome at state universities. Citing a drop in minority applications to the University of Houston, Professor of Law Michael Olivas testified before the House Committee on Higher Education to express his "hope that this bill will go a long way toward encouraging minority students to reapply in future years . . . ." [171] Sponsor Rangel echoed this sentiment: "Many feel as if the doors have been closed on them as a result of the **Hopwood** case. We want this legislation to serve as a message to students to let them know that the doors have not been closed." [172]

In addition, several speakers expressed a desire not only to increase racial diversity at top

state universities through the Ten Percent Plan, but socioeconomic and geographic diversity as well. Professor of Law Gerald Torres testified before the House Committee on Higher Education that it "is critical for us to change the idea of diversity as it has been used, that diversity can't be understood as merely a body count of racial or ethnic students; we have to think about diversifying . . . across a range of factors, and this means diversifying the white students as well." [173] Representative Giddings echoed this view during the floor debate:

This bill is **race**-neutral. We have said all year long in view of the **Hopwood** decision that that is what we wanted and this is what we have advocated. But this bill does encourage diversity, and not just ethnic diversity. This bill **[*329]** benefits folks of all colors and all backgrounds; it doesn't just benefit people of color. We need a mix of rural and urban and suburban. And we need a mix of conservative and liberal. We need to value people from all backgrounds. [174]

Finally, two legislators, Representatives Davila and Rangel, engaged in an interesting exchange on the House floor which suggested that they were motivated by a desire to compensate for the fact that the innate equality of all Texas children had been disrupted by the unequal opportunities random chance had bequeathed to them:

Davila: Do you believe all children are born with the same potential?

Rangel: Of course they are.

Davila: But you further believe that due to no fault of their own, based on where they were born or to whom they were born, that their lot in life is drastically affected by the opportunities they are afforded?

Rangel: Very much so.

Davila: And many times those opportunities are altered by discrimination, by inequities in resources, by the neighborhood they live in. . . . Is there anything wrong if the original motive of your bill is to create diversity that is so, so important to the educational experience of the students in our state? [175]

c. Conclusion

The analysis above shows that one can easily draw the inference that "but for" the desire among some legislators to reverse the decline in black and Hispanic admission after **Hopwood,** the Texas legislature would not have enacted the Ten Percent Plan. Although, as this Article explained above, legislators purported to support the Plan for several reasons unrelated to increasing the admissions prospects of blacks and Hispanics during the debate on the Plan, if only a few legislators were motivated by the desire to increase the admissions prospects of blacks and Hispanics, **[*330]** then such a motivation would be the "but for" cause of the Ten Percent Plan. [176] This is the case because the Plan passed the House by a small margin of 74-65. [177] Thus, if only five legislators voting in favor of the Plan had switched their vote, the Plan would not have passed. [178] Given the strong circumstantial case that can be made on the basis of the historical sequence of events that led to the Ten Percent Plan, following as closely as it did on the heels of **Hopwood** and public concern regarding black and Hispanic admissions prospects, and the weight of the legislative history of the Plan showing the legislative desire to reverse the decline in black and Hispanic admission to top state universities after **Hopwood,** one could easily infer that at least five legislators voting in favor of the Plan would not have done so if they did not think the Plan would have increased the admissions prospects of blacks and Hispanics. [179]

Indeed, the drafters of the Ten Percent Plan shrewdly recognized that standardized test scores were the primary obstacle to greater black and Hispanic admission rates and that de-

emphasizing this admissions criterion in favor of an admissions criterion that would take advantage of the de facto residential segregation lingering in Texas, such as class rank, would virtually guarantee an increase in black and Hispanic admissions. And, of course, the drafters predictions came true, as black and Hispanic enrollment numbers are now almost precisely where they were before **Hopwood.** The Texas Legislature successfully achieved pre-**Hopwood** levels of racial diversity through the manipulation of **race**-neutral admissions criteria: Texas admitted students at a rate of 100% on the criterion that blacks and Hispanics performed the best and admitted students at a rate of 52% on the criteria that blacks and Hispanics did not fare as well--see Figure 5. It is one thing to ascribe weight to **race**-neutral admissions criteria behind a racial veil of ignorance with the goal of admitting the most promising students. It is quite another thing to ascribe **[*331]** weight to **race**-neutral admissions criteria through a racial microscope with the goal of admitting students in a certain racial composition. If nothing else, the former is constitutional and the latter is not, absent especially compelling circumstances.

It is important to note that this Article is not arguing that the only inference a reasonable factfinder could draw is one in favor of a discriminatory purpose. That is, this Article is not arguing that the Texas Ten Percent Plan would not survive summary judgment. Determinations of legislative purpose are highly circumstantial, factual inquiries and it is rare that circumstances are such that the inquiry can be resolved on summary judgment. [180] The only point here is that plenty of evidence exists to draw the inference that five legislators supported the Ten Percent Plan because it would increase black and Hispanic admissions prospects to top state universities at the expense of white students.

Another objection to the conclusion that strict scrutiny should apply to the Plan because of its resulting disparate impact is one that criticizes the search for the actual legislative purpose behind the Plan. The discussion up to this point has assumed that the constitutional determination of discriminatory purpose looks to the actual legislative motivation behind the state action as opposed to conceivable legislative motivations offered during litigation. However, there has been a long debate in constitutional jurisprudence between those who advocate conditioning constitutional prohibitions on the actual purposes behind legislation and those who advocate conditioning constitutional prohibitions on the often more magnanimous purposes advanced by legal counsel during litigation. This debate was eloquently engaged in Kassel v. Consolidated Freightways Corp., a dormant commerce clause case. [181] Justice **Brennan** supported the search for actual purpose:

[The Powell and Rehnquist opinions are both] predicated upon the supposition that the constitutionality of a state regulation is determined by the factual record created by the State's lawyers in trial court. But that supposition cannot be correct, for it would make the constitutionality **[*332]** of state laws and regulations depend on the vagaries of litigation rather than on the judgments made by the State's lawmakers. [182]

He continued in a footnote:

Where there is no evidence bearing on the actual purpose for a legislative classification, our analysis necessarily focuses on the suggestions of counsel. . . . But where the lawmakers' purposes in enacting a statute are explicitly set forth, or are clearly discernable from the legislative history, this Court should not take . . . the extraordinary step of disregarding the actual purpose in favor of "some imaginary basis or purpose." The principle of separation of powers requires, after all, that we defer to the elected lawmakers' judgment as to the appropriate means to accomplish an end, not that we defer to the arguments of lawyers. . . . I consider it contrary to precedent as well as to sound principles of constitutional adjudication for the courts to base their analysis on purposes never conceived by the lawmakers. [183]

Then-Justice Rehnquist, on the other hand, was content to consider only the legislative purposes advanced by the state's lawyers:

Justice **Brennan** argues that the Court should consider only the purpose the Iowa legislators actually sought to achieve . . . and not the purposes advanced by Iowa's lawyers in defense of the statute. . . . The problems with [this view] are apparent. To name just a few, it assumes that individual legislators are motivated by one discernable "actual" purpose, and ignores the fact that different legislators may vote for a piece of legislation for widely different reasons. How, for example, would a court adhering to [this view] approach a statute, the legislative history of which indicated that 10 votes were based on safety considerations, 10 votes were based on protectionism, and the statute passed by a vote of 40-20? **[*333]** What would the actual purpose of the legislature have been in that case? [184]

Thus, if allowed to leave the realm of legislative history and other indicia of legislative purpose, one might take the view that any number of permissible purposes for the Ten Percent Plan could be advanced. For example, one commentator has argued that the Ten Percent Plan will improve public schools because it makes lower quality schools more desirable. [185] That is, because all schools can send the top 10% of each class to the best university in the state, and it is easier to graduate in the top 10% at a poor performing school than at a top school, parents of talented children will have an incentive to transfer their children from top schools to poor schools, thereby improving the quality of schools overall. [186] Although the soundness of this argument is plausible, it would be inappropriate to dismiss the weight of the evidence suggesting the actual purposes behind the Ten Percent Plan were unconstitutional on the mere fact that Texas's lawyer is wise enough to argue a constitutional purpose when he gets to court.

First, although the Supreme Court repeatedly spurns actual purpose inquiry in Equal Protection cases involving rational basis scrutiny, [187] the Court does rely on actual purpose inquiry in cases attracting heightened scrutiny, [188] which is the scrutiny applicable to the Ten Percent Plan. **[*334]** Indeed, the Court's doctrines of "but for" motivation and "predominant" motivation in the heightened scrutiny context are premised on a search for actual purpose, which is why these searches call for inquiries into legislative history. [189]

Second, the primary objection to actual purpose inquiry registered by then-Justice Rehnquist, the fallacy of deriving one actual purpose, is mitigated in cases in which the object is merely to identify one actual purpose among many. In these "mixed motive" cases, from which the doctrines of "but for" and "predominant" motivation have arisen, it is no fallacy at all to identify the "but for" or "predominant" motivation. This can be shown by considering then-Justice Rehnquist's own numerical example. If ten of the forty prevailing legislators voted with motivation A, and ten of the forty with motivation B, and the legislation prevailed forty to twenty, then both A and B are "but for" motivations because the legislation would not have garnered a majority without the support of either group of ten legislators.

Although not the only possible conclusion, one can very easily draw the inference that one of the "but for" purposes behind the Ten Percent Plan was to increase the admissions prospects of black and Hispanic students by manipulating admissions criteria. This manipulation resulted in a disparate impact favoring black and Hispanic students and disfavoring white students. When this disparate impact is combined with the easy inference of a "but for" motivation to cause this disparate impact, it becomes clear that the Ten Percent Plan should be subjected to strict scrutiny.

2. Change in Racial Composition + "Predominant" Motivation

As shown above, there is a solid case for subjecting the Ten Percent Plan to strict scrutiny under the racial effect of disparate impact. It is not, however, the only case for subjecting the Plan to strict scrutiny. As this Article explains below, the Plan should also be subjected to strict scrutiny because it caused the racial effect of a change in the racial composition at the

University of Texas at Austin and was "predominately" motivated to achieve this effect. **[*335]**

It is important to realize that this second case for subjecting the Plan to strict scrutiny is both stronger and weaker than the first case. It is stronger because the racial effect of a change in racial composition is undeniable, whereas the racial effect of disparate impact is a bit more convoluted. It is weaker because it is more challenging to infer that a particular purpose was the "predominant" motivation behind a state action than it is to infer a mere "but for" motivation.

a. Change in Racial Composition

The Ten Percent Plan undoubtedly increased the composition of black and Hispanic students admitted and enrolled at top state universities at the expense of white students. During the first three years of the Ten Percent Plan, 1998-2000, the percentages of blacks and Hispanics admitted and enrolled have increased compared to the year prior to operation of the Plan, 1997, which was the first year in which **race** was not considered in admissions. During this same time, the percentages of white students admitted and enrolled decreased. The admissions and enrollment data for the University of Texas at Austin are shown in Figure 6.
Figure 6: Racial Composition of Admitted and Enrolled In-State Students at UT-Austin (in percentages) [190]
[SEE TABLE IN ORIGINAL]

b. "Predominant" Motivation

The analysis above shows that one can easily draw the inference that "but for" the desire to reverse the decline in black and Hispanic admission after **Hopwood,** the Texas legislature would not have enacted the Ten Percent Plan. Although it is a bit less certain, one can additionally draw the inference that increasing the percentage of black and Hispanic students admitted to top state universities was the "predominant" purpose behind the Plan. **[*336]**

The Supreme Court has not provided much guidance on how one might go about establishing that a particular legislative motivation was "predominant," as opposed to merely a "but for" cause, beyond pointing out the obvious fact that it is more difficult to make such a showing: "The search for legislative purpose is often elusive enough without a requirement that primacy be ascertained." [191] The Court did hold in Miller, however, that, if a plaintiff shows traditional **race**-neutral decisionmaking principles were "subordinated" to the motivation to change a racial composition, then this would be sufficient to establish that the racial motivation was predominant. [192] In the redistricting context, these traditional principles included "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests." [193] Analogous traditional **race**-neutral principles in the context of university admissions might include preferences for students who have high standardized test scores, who have strong high school grades, who have taken a challenging high school curriculum, who have shown a commitment to extracurricular activities, or who have inspired positive teacher recommendations. The Ten Percent Plan subordinated all these traditional principles to high school class rank by admitting roughly half of each freshman class to the University of Texas at Austin solely on the basis of class rank. [194] Because the provision for automatic admission based on class rank was inspired by a desire to change the racial composition of top state universities, one could draw the inference that this racial motivation was "predominant."

c. Conclusion

The above analysis shows that the Ten Percent Plan should be subjected to strict scrutiny for an additional reason: the Plan had the racial effect of increasing the racial composition of

blacks and Hispanics admitted to the University of Texas at Austin coupled with the predominant motivation to cause this effect. **[*337]**

C. Surviving Strict Scrutiny

As shown above, the Texas Ten Percent Plan should meet with strict scrutiny because of its racial effects and the legislature's purpose to achieve these effects when enacting the Plan. Although the hurdle of strict scrutiny is a high one, it is not necessarily insurmountable. [195] This is the case because state action can survive strict scrutiny if the state can prove that its "legislation is narrowly tailored to achieve a compelling interest." [196] Thus, the constitutionality of the Ten Percent Plan turns on whether Texas has a compelling interest that will justify its purposeful causation of two racial effects. Why might have Texas sought to increase the admission of blacks and Hispanics at the expense of whites? Texas might advance a variety of reasons for adopting the Plan, but, as this article explains below, none of these reasons rise to the high standard of "compelling."

Two of the possible reasons Texas might have sought to increase the admission of black and Hispanics with the Ten Percent Plan were rejected by the Fifth Circuit in **Hopwood** when that court struck down the explicit use of **race** in admission to the University of Texas at Austin School of Law. The Fifth Circuit rejected the argument that the educational benefits of a "diverse student body" constitute a compelling interest. [197] In addition, the Fifth Circuit rejected the argument that racial preferences in the University of Texas at Austin School of Law could be justified by the compelling government interest of "remedying the present effects of past discrimination." [198] The Fifth Circuit's rejection of these compelling interests appears correct. Moreover, there is every reason to think that the Fifth Circuit's rejection of these compelling interests in the context of the explicit use of **race** classifications carries over to the context of the facially **race**-neutral Ten Percent Plan.

First, with regard to the notion that the educational benefits of racial diversity can serve as a compelling interest, the Fifth Circuit correctly noted that the only shred of Supreme Court precedent for the notion that diversity could serve as a compelling interest was the one-Justice opinion of Justice Powell in **Bakke** and, of course, the thoughts of one Justice do **[*338]** not rise to the level of binding precedent. [199] Moreover, in the only instance in which a majority of the Court addressed the diversity justification for racial preferences, it concluded that diversity only rose to the level of an "important interest" under "intermediate scrutiny," not a "compelling interest" under the more exacting test of "strict scrutiny" applicable here. [200] The Fifth Circuit's conclusion that the Supreme Court has never held that the educational benefits of racial diversity rise to the level of a compelling interest has since been joined by the Eleventh Circuit, [201] as well as by federal district courts in Michigan. [202]

It should be noted, however, that the Fifth Circuit's conclusion regarding the precedential weight of Justice Powell's opinion in **Bakke** has received a serious challenge from the Ninth Circuit's recent opinion in Smith v. University of Washington, Law School. [203] In Smith, the Ninth Circuit acknowledged that no other Justice joined Justice Powell's discussion of diversity, but concluded nonetheless that his discussion of diversity constitutes the holding of the Court in **Bakke.** [204] The Ninth Circuit reached this conclusion by applying the Supreme Court's test, established in Marks v. United States, [205] for identifying the holding of a decision where no one opinion speaks for a majority: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." [206] The Ninth Circuit concluded that, because Justice Powell favored a more limited use of **race** in university admissions than did the other Justices that considered the question--Justices **Brennan,** White, Marshall, and Blackmun--his approach, including his view that diversity constituted a compelling interest, was the "narrowest grounds" on which **[*339]** the judgment in **Bakke** rested. [207] The Ninth Circuit's conclusion regarding the "narrowest grounds" for the judgment in **Bakke** is most

certainly wrong. [208] This becomes clear upon a careful parsing of the many opinions in **Bakke.**

At the outset, it is important to realize that the Supreme Court's **Bakke** decision produced two judgments. The first judgment was to affirm the lower court ruling that the admissions set-aside program utilized by the University of California at Davis Medical School was illegal. Justice Powell announced this judgment on the ground that the set-aside program violated the Equal Protection Clause. [209] Chief Justice Burger, and Justices Stewart, Stevens, and Rehnquist concurred in this judgment, in a separate opinion written by Justice Stevens, on the ground that the set-aside program violated Title VI. [210]

The second judgment in **Bakke** was to reverse the lower court's declaration that the University could not in the future use **race** as a factor in admitting students. With regard to this judgment, five Justices joined Part V-C of Justice Powell's opinion for the Court, which stated the following:

In enjoining petitioner from ever considering the **race** of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive **[*340]** consideration of **race** and ethnic origin. For this reason, so much of the California court's judgment as enjoins the petitioner from any consideration of the **race** of any applicant must be reversed. [211]

The four Justices joining this part of Justice Powell's opinion for the Court were Justices **Brennan,** White, Marshall, and Blackman. The other four Justices did not join this part because they did not think the declaration prohibiting any consideration of **race** was before the Court on appeal. [212]

The second judgment in **Bakke** was the focus of the discussion in Smith. Five Justices--Justices Powell, **Brennan,** White, Marshall, and Blackmun-agreed that there existed some set of circumstances in which **race** could be used to admit students to a university. These five Justices did not agree, however, on precisely the same set of circumstances in which **race** could be used. Justice Powell thought that **race** could be used only when it satisfied the strict scrutiny test--that the state have a compelling interest justifying its use of **race** and that its use of **race** be narrowly tailored to achieve that interest. [213] Justice Powell opined that the category of permissible governmental interests included the educational benefits of racial diversity. [214] Justices **Brennan,** White, Marshall, and Blackmun, by contrast, thought **race** could be used whenever it satisfied the intermediate scrutiny test--that the state have merely an important interest justifying its use of **race** and that its use of **race** be substantially related to achievement of that interest. [215] They opined that the category of permissible governmental interests included remedying the plausible effects of past **societal discrimination.** [216]

The question under the Marks inquiry is whether there is any overlap in the circumstances Justice Powell and Justice **Brennan,** et. al., approved the use of **race** in university admissions. If not, the Court's holding on the **[*341]** second judgment in **Bakke** is reduced to a rather innocuous statement that **race** can be used in some unspecified circumstances. In making this determination, it is important to realize that the Marks test does not look for the "narrowest opinion" or the "narrowest analysis," but rather the "narrowest grounds" for the judgment. That is, if only one aspect of the analysis in Justice Powell's opinion overlaps with one aspect of the analysis in Justice **Brennan's** opinion, then only that one aspect constitutes the "holding" of the Court.

A close reading of Justice Powell's opinion in **Bakke** as well as Justice **Brennan's** separate opinion, which was joined by Justices White, Marshall, and Blackmun, reveals that Justice Powell and Justice **Brennan,** et. al., were rather explicit about the overlapping circumstances

in which they would permit the use of **race** in university admissions, and, contrary to the conclusion of the Ninth Circuit, these circumstances had nothing to do with the educational benefits of racial diversity. In addition to the educational benefits of racial diversity, Justice Powell articulated a second governmental interest that could justify the use of **race** in university admissions: "The state certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." [217] That is, the state could use **race** in admissions in order to "vindicate[]" the "legal rights of the victims" of past discrimination, so long as the past discrimination was verified by "judicial, legislative, or administrative findings of constitutional or statutory violations." [218]

Justice **Brennan,** et. al., also thought using racial classifications in order to remedy the identified effects of past discrimination was constitutionally permissible, but they would have gone much further than Justice Powell and allowed the use of racial classifications to remedy past discrimination in the absence of findings by judicial, legislative, or administrative bodies. [219] Justice **Brennan,** et. al., would have, instead, required only that the state have a "sound basis for believing that the problem of underrepresentation of minorities . . . was attributable to handicaps imposed on minority applicants by past and present racial discrimination." [220] Thus, at least insofar as remedying past discrimination was concerned, the circumstances in which Justice Powell would have **[*342]** permitted the use of **race** in admissions--whenever the past discrimination had been identified by governmental findings--were a subset of the circumstances in which Justice **Brennan,** et. al., would have permitted the use of **race** in admissions--whenever there had been past discrimination without regard to governmental findings. Indeed, Justice **Brennan,** et. al., explicitly said as much. [221]

Thus, it seems surprisingly obvious that the overlapping circumstance in which Justice Powell and Justice **Brennan,** et. al., agreed to allow the use of **race** in university admissions was pursuant to the governmental interest of remedying past discrimination that has been identified by judicial, legislative, or administrative findings. Indeed, Justice **Brennan** himself believed that this was the "narrowest grounds" of the second judgment in **Bakke.** In the opening paragraph of his concurring opinion, Justice **Brennan** said:

The difficulty of the issue presented . . . has resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take **race** into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area. [222]

Justice **Brennan** performed the Marks analysis for us, and his analysis identified the governmental interest in remedying past discrimination, not the interest of diversity, as the "narrowest grounds" for the second judgment in **Bakke.** [223] Moreover, it is not surprising that Justice Powell and Justice **Brennan,** et. al., would agree that it was permissible to use racial classifications to further the governmental interest of remedying past discrimination. Virtually every Justice who has sat on the Supreme Court since the Civil Rights Movement has agreed with that proposition; it is **[*343]** more uncontroversial than perhaps any other proposition involving the Equal Protection Clause.

Thus, the view that the governmental interest in remedying past discrimination constitutes the "narrowest grounds" for the second judgment in **Bakke** is supported by evidence both plentiful and explicit. By contrast, the evidence in support of the Ninth Circuit's view that the governmental interest in diversity constitutes the "narrowest grounds" for this judgment can only be described as imaginary. As the Ninth Circuit itself conceded, Justice **Brennan** never even mentioned the educational benefits of diversity in his concurring opinion. [224] Indeed, if anything, Justice **Brennan,** et. al., implied that they did not countenance such a justification. For example, they intimated that, in their view, the educational benefits of diversity would not save an admissions plan like the "Harvard Plan" advocated by Justice Powell because it

could survive under their approach only if it was predicated on remedying past discrimination. [225] It is therefore safe to conclude that if the Fifth Circuit's holding in **Hopwood** with regard to the educational benefits of diversity is to be reconsidered, it should not be reconsidered on the basis of existing Supreme Court precedent. [226]

Moreover, there is no reason to believe the rationale behind the Fifth Circuit's rejection of the educational benefits of diversity as a compelling interest applies with less force to undergraduate schools than it did to law **[*344]** schools. The court concluded that using **race** as a "proxy" for someone who could contribute to the educational environment of a school was based on the "stereotype" that "a person's **race** controls his point of view." [227] The court found such stereotyping in violation of the constitutional command that government should treat citizens as individuals, instead of as mere representatives of racial groups. [228] The court also concluded that the use of such stereotypes "served to stigmatize." [229] The Ten Percent Plan's manipulation of **race**-neutral admissions criteria in order to increase the number of blacks and Hispanics admitted to top universities, when done for the purpose of achieving the purported educational benefits of racial diversity, is the product of the same impermissible stereotypes and poses the same threat of stigmatization. [230] Other courts have similarly noted that impermissible stereotypes and stigmatization underlie the diversity rationale for increasing minority presence in educational institutions. [231]

With regard to the second compelling interest rejected in **Hopwood,** although remedying past discrimination is undoubtedly a viable compelling governmental interest under the strict scrutiny test, the Fifth Circuit's rejection of Texas's ability to invoke this interest appears equally sound. The court argued that preferences in the university system could not be justified on the basis of past discrimination among primary and secondary schools because Supreme Court precedent limits the basis of a compelling interest only to that past discrimination caused by the educational unit employing the preferences. [232] Considering only the educational unit at issue in **Hopwood,** the Fifth Circuit held that the plaintiffs could not show **[*345]** any present effects of past discrimination perpetrated by the Law School. [233] Although the court's analysis of the lack of the present effects of past discrimination caused by the Law School does not carry over to analysis of the present effects caused by the different educational unit of the Texas undergraduate schools at issue with the Ten Percent Plan, because the admissions policies of the undergraduate schools underwent approximately the same evolution over the past several decades as the Law School's admissions policies, it is difficult to see how one can put forth a convincing argument that the Ten Percent Plan is justified by the compelling interest of remedying the present effects of past discrimination any more than was the admissions plan under consideration in **Hopwood.** [234] Thus, the fact that the public primary and secondary school system in Texas is still largely segregated (although not at the behest of a state actor and therefore not in violation of the Constitution) cannot serve as a compelling interest with regard to the university admissions under the Ten Percent Plan.

The justifications rejected in **Hopwood** cannot serve as a compelling interest in the context of the Ten Percent Plan for another important reason: there was little to no mention of either the educational benefits of diversity or a desire to overcome past discrimination in the legislative history of the Plan. The Supreme Court has made very clear over the past two decades that only those interests actually motivating the legislative activity are eligible to overcome heightened scrutiny in the equal protection context, whether the heightened scrutiny applies to an explicit classification [235] or a **[*346]** facially neutral law. [236] Thus, justifications for racial discrimination offered in litigation cannot serve as a compelling interest absent a showing that the justification was the actual reason the state acted. [237] There was no mention in the legislative history of remedying the present effects of past discrimination and very little mention in the legislative history of the educational benefits of racial diversity, which makes it unlikely that a court would accept either of these reasons as the actual interest behind Texas's purposeful causation of a racial effect. [238] Besides trying to undo the **Hopwood** decision, the most repeated state interests behind the Ten Percent Plan

were appeals to socioeconomic and geographic diversity. There is no reason to believe that courts would be any more receptive to the idea that the purported educational benefits resulting from these types of diversity rise to the level of a compelling state interest than they have been with respect to the purported benefits from racial diversity. But even if socioeconomic and geographic diversification did count as a compelling interest, it does nothing to justify the purposeful causation of racial effects because socioeconomic and geographic diversification could be accomplished without increasing the admission of black and Hispanic students. Thus, Texas is still without an actual interest justifying the racial effects it purposefully caused. **[*347]**

IV. Conclusion: Texas and Beyond

Strict scrutiny accompanies indirect efforts to discriminate on the basis of **race** just as surely as it accompanies direct efforts to discriminate on the basis of **race.** That is, the Constitution does not prohibit, absent compelling justification, only explicit racial classifications, but also **race**-neutral efforts to achieve the same substantive result. The prohibition on indirect efforts to discriminate on the basis of **race** prevents state actors from passing laws that result in certain racial effects with the purpose of achieving those effects.

The Texas Ten Percent Plan falls under this prohibition. When confronted with the inability to continue the use of explicit racial classifications, the Texas Legislature did what so many legislators have done before it in different contexts: it manipulated **race**-neutral criteria to achieve the same racial results that it had achieved under its old, illegal regime. Members of the Texas Legislature shrewdly identified class rank as the **race**-neutral university admissions criterion on which blacks and Hispanics performed better than any other (largely due to the lingering de facto segregation in the state). In order to exploit this criterion, these members decided to admit roughly half of the students at the state's flagship university upon this criterion alone. By admitting students at a higher rate based upon the criterion on which blacks and Hispanics performed the best, the university admissions process resulted in a disparate impact. Moreover, given the narrow margin by which the Ten Percent Plan passed, there is little doubt that those in the Legislature who sought to achieve this disparate impact made the difference in the final tally. That is, "but for" the desire to achieve this disparate impact, the Texas Ten Percent Plan would not have been enacted. This discriminatory effect and discriminatory purpose means the Ten Percent Plan should meet with strict scrutiny. The Texas Ten Percent Plan should meet with strict scrutiny for an additional reason: the Plan was very successful. The Plan accomplished its ultimate purpose of increasing the percentage of blacks and Hispanics in the state's top universities. This fact, coupled with the fact that this purpose was probably the "predominant" motivation behind the Plan, constitutes count two against the Ten Percent Plan.

The success of the Texas Ten Percent Plan has led both Florida and California to enact similar admissions plans for their state universities. Neither of these plans has been in operation long enough to measure their results. Thus, because the constitutional prerequisites for strict scrutiny of facially **race**-neutral state action include the causation of a racial effect, it is impossible to determine with certainty that either of these plans will be subjected to the strict scrutiny test. Nonetheless, a cursory review of newspaper accounts shows that government officials in both California and **[*348]** Florida were preoccupied with how the new admissions plans might affect black and Hispanic enrollments. [239] In addition, in California, not unlike Texas, the new plan was adopted on the heels of an amendment enacted by the voters to the state constitution prohibiting racial classifications in university admissions. [240] Likewise, in Florida, the new plan was enacted to head off an effort to amend the state constitution with language identical to that used in California. [241] The proximity of the enactment of the plans to the loss or anticipated loss of the use of racial classifications will weigh in favor of a finding that California and Florida purposefully caused any racial effects that might result from the plans. Finally, California and Florida are two states well-situated to repeat the successful results of the Texas Ten Percent Plan: like Texas, the high schools in

these states suffer from considerable racial segregation. [242] The smart money would bet that the results in California and Florida will show the same disparate impact and increases in the admission and enrollment of blacks and Hispanics that occurred in Texas.

Although the Texas Ten Percent and its derivatives in Florida and California may be more politically palatable than the racial classifications that preceded them, they are no more legally palatable. When it comes to the Fourteenth Amendment, the Constitution is more concerned with substance than form. Manipulating **race** neutral admissions criteria to achieve the same results that had been illegally obtained by explicit racial classifications is an attempt to flout the Constitution. The Texas Ten Percent Plan should be struck down just as quickly as the racial preference scheme it replaced.

FOOTNOTES:

n1 For a concise summary of the evolution of admissions policies at the University of California in the wake of Proposition 209, which prohibited the use of **race** in admissions, see Jeffrey Selingo & Jeffrey Brainard, Call to Eliminate SAT Requirement May Reshape Debate on Affirmative Action, Chron. Higher Educ., Mar. 2, 2001, at A21. The University of California is considering a proposal to extend its automatic admissions plan to the top 12.5% of each high school, as well as a proposal to eliminate the admissions requirement of submitting SAT scores. See id.

n2 See Florida Ends **Race** as Factor in College Entry, N.Y. Times, Feb. 23, 2000, at A14; Rick Bragg, Florida Plan Would Change **Race**-Based College Admissions, N.Y. Times, Nov. 11, 1999, at A18.

n3 See, e.g., W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 198-202 (1994) (holding that a general tax on all milk sales to Massachusetts retailers coupled with a subsidy only to Massachusetts dairy farmers was unconstitutional under the dormant commerce clause, because it sought to indirectly impose a tax only on out-of-state products, something the state was prohibited from doing directly); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 495 (1987) (holding that a state pollution law was preempted by federal law, because, otherwise, "the inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly--regulate the conduct of out-of-state sources"); Williams v. Illinois, 399 U.S. 235, 243 (1970) (holding that imprisoning a person for the failure to pay a fine was a violation of equal protection on the basis of indigency, because a "statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly").

n4 413 U.S. 189, 201-02 (1973).

n5 78 F.3d 932, 962 (5th Cir. 1996).

n6 Debate on Tex. H.B. 588 on the Floor of the House of Representatives, 75th Leg., R.S. (Apr. 15, 1997) [hereinafter Debate] (statement of Rep. Davila) (tapes available from Office of the House Comm. Coordinator).

n7 Id. (statement of Rep. Kamel).

n8 Some commentators have recognized that the **race**-neutral responses to the decline of explicit racial classifications might raise constitutional questions. See Ian Ayres, Narrow Tailoring, 43 UCLA L. Rev. 1781, 1791-93 (1996) (arguing that **race**-neutral alternatives to explicit racial classifications enacted for racial motivations should encounter strict scrutiny); Chapin Cimino, Comment, Class-Based Preferences in Affirmative Action Programs after Miller v. Johnson: A **Race**-Neutral Option, or Subterfuge?, 64 U. Chi. L. Rev. 1289, 1297-1305 (1997) (arguing that class-based preferences enacted for racial motivations are

unconstitutional after Miller v. Johnson); William E. Forbath & Gerald Torres, Merit and Diversity after **Hopwood,** 10 Stan. L. & Pol'y Rev. 185, 188 (1999) (concluding after a cursory analysis that the response in Texas will be constitutional because it is **race**-neutral); Kim Forde-Mazrui, The Constitutional Implications of **Race**-Neutral Affirmative Action, 88 Geo. L.J. 2331, 2346-48, 64-82 (2000) (assuming that these responses will incur strict scrutiny, but arguing that they will survive such scrutiny); Danielle Holley & Delia Spencer, The Texas Ten Percent Plan, 34 Harv. C.R.-C.L. L. Rev. 245, 259-60 (1999) (concluding, after a cursory analysis, that the response in Texas will be constitutional because it is raceneutral); Mark R. Killenbeck, Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action, 87 Cal. L. Rev. 1299, 1368 (1999) (concluding, after cursory analysis, that the Ten Percent Plan "should survive quite easily if challenged, for while undoubtedly directed toward an increase in the enrollment of minority students, at no point does the Policy expressly mention that objective"); David Orentlicher, Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality, 74 Notre Dame L. Rev. 181, 193-97 (1998) (arguing that the response in Texas does not violate the constitutional test for discriminatory effect); Kathleen M. Sullivan, After Affirmative Action, 59 Ohio St. L.J. 1039, 1047-54 (1998) (arguing that the response in Texas does not violate the constitutional tests for either racially discriminatory purpose or effect).

n9 See **Hopwood** v. Texas, 861 F. Supp. 551, 558 (W.D. Tex. 1994), rev'd, 78 F.3d 932 (5th Cir. 1996).

n10 See id. at 555-60.

n11 For example, at some levels of standardized test scores and undergraduate grade point averages, the University of Texas at Austin Law School admitted virtually all black and Hispanic applicants and virtually no white applicants. **Hopwood,** 78 F.3d at 937 (5th Cir. 1996).

n12 Id. at 934.

n13 See Orentlicher, supra note 8, at 185.

n14 See Holley & Spencer, supra note 8, at 251-52; Texas House of Representatives Research Organization, Texas After **Hopwood:** Revisiting Affirmative Action, Session Focus, Apr. 22, 1997, at 5-6. The percentage of Hispanics enrolled in the freshman class of the University of Texas at Austin dropped from a range of 14.5% to 14.7% in 1994-1996 to 12.6% in 1997. Holley & Spencer, supra note 8, at 251-52. The percentage of blacks dropped from a range of 4.1% to 5.3% in 1994-1996 to 2.7% in 1997. Id.

n15 The percentage of resident blacks and Hispanics among students who filed applications also dropped after **Hopwood,** but not as much as the drop in the percentage among the admitted pool. See Gary M. Lavergne & Cindy Hargett, A Gender and Racial-Ethnic Breakdown of Applicants, Admits, and Enrolled Students and Subgroup HB588 Students in the University of Texas at Austin from 1995-2000 (unpublished manuscript, on file with the author). The percentage of blacks in the in-state applicant pool was virtually unchanged at 4.6% from 1996 to 1997, but the percentage of Hispanics in the applicant pool declined from 16.4% in 1996 to 15.1% in 1997. See id. (providing raw data for this calculation). This decline does not explain all of the decline in the percentage of Hispanics in the admitted pool. For these numbers, see infra note 16.

n16 See Lavergne & Hargett, supra note 15. The percentage of Hispanics in the in-state admitted class dropped from 16.1% in 1996 to 14.2% in 1997. The percentage of resident blacks dropped from 3.9% in 1996 to 3.5% in 1997. Id.

n17 See id. The percentage of whites in the in-state admitted class increased from 63.8%

in 1996 to 64.7% in 1997. The percentage of Asians increased from 15.3% to 16.8%. Id.

n18 Tex. Educ. Code Ann. § 51.803(a) (Vernon Supp. 2001).

n19 Id. § 51.805(b).

n20 Although not considered for purposes of admission, some of the public universities in Texas, including the University of Texas at Austin, require students who are automatically admitted to submit standardized test scores to the university in order to identify students who may need extra help academically to succeed, as well as to study the effects of the Ten Percent Plan. See Forbath & Torres, supra note 8, at 185 n.3.

n21 Holley & Spencer, supra note 8, at 266.

n22 See, e.g., **Hopwood** Decision a Time Warp to Pre-Affirmative Action Days, Some Say, Dallas Morning News, July 7, 1997, at 7A; Jim Phillips, Ruling Ripples Beyond UT Law School, Austin Am. Statesman, Mar. 20, 1996, at A1.

n23 See infra text accompanying notes 143-68.

n24 See Jodi Wilgoren, New Law in Texas Preserves Racial Mix in State's Colleges, N.Y. Times, Nov. 24, 1999, at A1.

n25 See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

n26 See id. ("Racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

n27 See id.; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989).

n28 See Regents of the Univ. of Cal. v. **Bakke,** 438 U.S. 265, 270-71 (1978).

n29 See **Brown** v. Bd. of Educ., 347 U.S. 483, 495 (1954).

n30 See, e.g., Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979) ("Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."); Laurence H. Tribe, American Constitutional Law, § 16-20, at 1320 (2d ed. 1988) (tracing the development of the "doctrine that facially **race**-neutral governmental action will be strictly scrutinized only if it is discriminatory in both impact and purpose").

n31 403 U.S. 217, 224-26 (1971).

n32 Id. at 224.

n33 Id. at 218-19.

n34 Id. at 225.

n35 426 U.S. 229, 235, 246 (1976) (citing the different failure rates as evidence of "disproportionate impact" and "differential racial effect," but ultimately rejecting the Equal Protection challenge for failure to show the test was motivated by a discriminatory purpose).

n36 471 U.S. 222, 227 (1985) (noting that at the turn of the century the provision had

disenfranchised ten times as many blacks as whites, and that a disenfranchisement disparity of 1.7 times as many blacks as whites persisted to the present day).

n37 See Jefferson v. Hackney, 406 U.S. 535, 548 & n.17 (1972) (rejecting, however, the equal protection challenge because the plaintiffs failed to show a "racial motivation" to cause the disparate impact).

n38 See Pers. Adm'r v. Feeney, 442 U.S. 256, 269-73 (1979).

n39 See Rogers v. Lodge, 458 U.S. 613, 617 & n.5 (1982) (noting that "diluting the voting strength of racial minorities" was a "differential impact" that could run afoul of the Equal Protection Clause upon a showing that the impact was caused purposefully); White v. Regester, 412 U.S. 755, 765-66, 769 (1973) (holding that "multimember" electoral districts diluted the ability of Mexican-Americans to elect a state representative of their choice); Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno, 92 Mich. L. Rev. 483, 492 n.43 (1993).

n40 See **Brown** v. Bd. of Educ., 347 U.S. 483, 492-95 (1954) (holding that segregated schools were unconstitutional due to the message such schools sent to society, even though the physical facilities and other tangible factors of the schools were equal); see also Johnson v. Virginia, 373 U.S. 61, 62 (1963) (holding that segregated seating in courtrooms was unconstitutional); Watson v. City of Memphis, 373 U.S. 526, 529, 539 (1963) (holding that segregated public parks and playgrounds were unconstitutional); Burton v. Wilmington Parking Auth., 365 U.S. 715, 72526 (1961) (holding that segregated restaurants in public buildings were unconstitutional).

n41 E.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 455 (1979) (finding unconstitutional segregation because "the Board's conduct at the time of trial and before not only was animated by an unconstitutional, segregative purpose, but also had current, segregative impact"); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413 (1979) ("The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board." (citing Washington v. Davis, 426 U.S. 229, 239 (1976))):

Where mandatory segregation by law of the **races** in the schools has long since ceased, [the court must] first determine whether there was any action in the conduct of the business of the School Board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff.

Id. at 420; Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 198 (1973) ("In the case of a school system . . . where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action."); see also John M. Jackson, Comment, Remedy for Inner City Segregation in the Public Schools: The Necessary Inclusion of Suburbia, 55 Ohio St. L.J. 415, 424, 427-28 (1994) (observing that both proof of "segregative impact and intent" are necessary to prevail on a challenge to facially raceneutral school segregation). It should be noted that, although most of the Supreme Court's segregation decisions deal with pre-college education, the Supreme Court has held that the jurisprudence applies just as well to college education. See United States v. Fordice, 505 U.S. 717, 743-44 (1992) (O'Connor, J., concurring) ("I join the opinion of the Court, which requires public universities, like public

elementary and secondary schools, to affirmatively dismantle their prior de jure segregation . . . .").

n42 Keyes, 413 U.S. at 192, 201-02; see also Penick, 443 U.S. at 460-62.

n43 Jackson, supra note 41, at 448 ("The Supreme Court has provided the lower courts with little, if any, idea of what constitutes a significant segregative effect.").

n44 Keyes, 413 U.S. at 224 n.10 (Powell, J., concurring in part and dissenting in part). A segregated school is not solely defined in terms of the student composition of the school. Id. at 196.

What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration.

Id.

n45 Penick, 443 U.S. at 452-54 (approving 80%-90%); Brinkman, 443 U.S. at 529 & n.1 (approving 90%); Keyes, 413 U.S. at 196, 206 (approving 70%-90%). Lower courts have put forth the most thorough discussion of segregative effects. See, e.g., Brinkman v. Gilligan, 503 F.2d 684, 693-95 (6th Cir. 1974) (analyzing data regarding racial composition of schools).

n46 Hunt v. Cromartie, 526 U.S. 541, 547 (1999) ("Districting legislation ordinarily, if not always, classifies tracts of land, precincts, or census blocks, and is **race**-neutral on its face.").

n47 Shaw v. Reno, 509 U.S. 630, 643 (1993) (observing that strict scrutiny may "apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although **race** neutral, are, on their face, 'unexplainable on grounds other than **race**'" (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977))).

n48 See Pamela S. Karlan & Daryl J. Levinson, Why Voting is Different, 84 Cal. L. Rev. 1201, 1213-16 (1996) (explaining that Shaw and Miller deviated from traditional equal protection doctrine both because "the Court has proceeded on the assumption that the very use of **race**--and not some additional adverse effect--constitutes the injury," and because the Court required plaintiffs to show that "**race** was the predominant factor," rather than the "motivating factor" of the legislature's decision).

n49 See Rogers v. Lodge, 458 U.S. 613, 617 & n.5 (1982) (noting that "diluting the voting strength of racial minorities" was a "differential impact" that could run afoul of the Equal Protection Clause upon a showing that the impact was caused purposefully); White v. Regester, 412 U.S. 755, 765-66, 769 (1973) (holding that "multimember" electoral districts diluted the ability of Mexican-Americans to elect a state representative of their choice); Pildes & Niemi, supra note 39, at 492 n.43.

n50 509 U.S. at 649-50; see also Pildes & Niemi, supra note 39, at 493.

n51 Miller v. Johnson, 515 U.S. 900, 911 (1995).

n52 See id. ("Just as the state may not, absent extraordinary justification, segregate citizens on the basis of **race** in its public parks, buses, golf courses, beaches, and schools, so did we recognize in Shaw that it may not separate its citizens into different voting districts on the basis of **race.**" (citations omitted)).

n53 See id. at 931 (Stevens, J., dissenting) ("Our desegregation cases redressed the exclusion of black citizens from public facilities reserved for whites. In [this case], in contrast, any voter, black or white, may live in the [gerrymandered district]. What appellees contest is the inclusion of too many black voters in the district as drawn."). The districts challenged in Miller v. Johnson were between 52% and 61% black. Johnson v. Miller, 864 F. Supp. 1354, 1366 n.12 (S.D. Ga. 1994), aff'd, 515 U.S. 900, 928 (1995). The districts challenged in Bush v. Vera, were between 66% and 71% black and Hispanic. 517 U.S. 952, 965, 973 (1996) (plurality opinion). The districts challenged in Shaw v. Barr were approximately 53% black. Appellee's Brief at 13a-24a, Shaw v. Barr, 506 U.S. 1046 (1993) (No. 92-357).

n54 515 U.S. at 916 (emphasis added).

n55 Id. Another way to read the modern redistricting cases is to see them as dropping the effects prong altogether and, thereby, invalidating all "**race** conscious" state action. Karlan & Levinson, supra note 48, at 1214 ("Ultimately, the Court has proceeded on the assumption that the very use of **race**--and not some additional adverse effect--constitutes the injury."); Melissa L. Saunders, Equal Protection, Class Legislation, and Colorblindness, 96 Mich. L. Rev. 245, 246 (1997).

All of [the Supreme Court's] great equal protection battles--over racial segregation, state legislative reapportionment, gender discrimination, and affirmative action--have been fought on the assumption that such a discriminatory effect is a necessary element of an equal protection claim. On this fundamental aspect of its equal protection jurisprudence, the Court has long displayed remarkable unanimity--that is, until the racial gerrymandering cases of the last few years.

Id. This reading is incredulous, overbroad, and unnecessary. It is incredulous, because this reading interprets the cases to grossly deviate from its prior facially **race**-neutral state action jurisprudence without any acknowledgement from the Court that it was doing so. It is overbroad, because if every piece of legislation in which **race** entered the minds of the legislators was subject to strict scrutiny, events such as raising the Confederate flag above the statehouse or naming a school after Martin Luther King, Jr. would be unconstitutional. It is unnecessary, because there are plausible racial effects underlying the Court's decisions, such as the one this Article offers.

n56 Interestingly, the normative basis of much of the Court's Equal Protection racial discrimination jurisprudence rests on a desire to prevent state actors from sending harmful **race**-based messages. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on **race** carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); **Brown** v. Bd. of Educ., 347 U.S. 483, 494 (1954) (holding "separate but equal" educational institutions unconstitutional because such institutions "generated a feeling of inferiority" among black children); see also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (subjecting "benign" racial discrimination to strict scrutiny, because it "teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their

patronizing indulgence" and because it "stamps minorities with a badge of inferiority"); Regents of the Univ. of Cal. v. **Bakke,** 438 U.S. 265, 298 (1978) ("Preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."). This is in contrast to the predominant normative basis of philosophical opposition to racial discrimination, which rests on principles of utilitarianism, see, e.g., Richard A. Posner, The Economics of Justice 373-74 (1981), and meritocracy, see, e.g., William A. Henry, In Defense of Elitism 76-77 (1994). See generally John E. Morrison, Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action, 79 Iowa L. Rev. 313, 324-34, 344-55 (1994).

n57 Shaw v. Reno, 509 U.S. 630, 647-50 (1993).

n58 Pildes & Niemi, supra note 39, at 506-07.

n59 See Saunders, supra note 55, at 322-28 (arguing that the modern redistricting cases assume that injury inheres "whenever [the state] deals with [a person] as a component of a particular racial group, rather than as an individual").

n60 Although one can make a strong argument that the first expressive harm recognized in Shaw inheres just as strongly in facially **race**-neutral university admissions classifications promulgated for a racially discriminatory purpose as it does in facially **race**-neutral redistricting classifications promulgated for the same reason, see infra text accompanying notes 61-67, it is more difficult to make a similar argument with regard to the second expressive harm recognized in Shaw: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." 509 U.S. at 648. The most obvious difficulty with making the analogy with the second harm is that the product of the state action in the university admissions context is not an "elected official" as it is in the redistricting context, and, thus, does not implicate damage to democratic ideals. To overcome this difficulty, one might argue that admitting a student because of the contribution his **race** makes to the educational environment teaches the student that he must "represent his **race**" in the classroom. Although such a message would not undermine the democratic ideals protected in Shaw, it does undermine the arguably analogous educational ideals of intellectual self-determination.

n61 Shaw, 509 U.S. at 647.

n62 438 U.S. 265, 298 (1978); see also William Van Alstyne, Rites of Passage: **Race,** the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775, 787 n.38 (1979) ("Without question, this is a systematic racial tagging by government--a communication to others that the **race** of the individual they deal with bespeaks a **race**-related probability, created solely by the government itself, of lesser qualification than others holding equivalent positions."); cf. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); **Brown** v. Bd. of Educ., 347 U.S. 483, 494 (1954).

n63 Shaw, 509 U.S. at 648.

n64 See also Miller v. Johnson, 515 U.S. 900, 914 (1995)(arguing that redistricting based on **race** "is based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens" (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting))).

n65 **Hopwood** v. Texas, 78 F.3d 932, 943, 944-48 (quoting **Bakke,** 438 U.S. at 313); see also Posner, supra note 56, at 366-72; cf. Metro Broad., Inc., 497 U.S. at 618 (O'Connor, J., dissenting) (rejecting the "diversity of viewpoint" argument in the radio and television broadcasting context because such an argument "impermissibly" presumes "that persons think in a manner associated with their **race**").

n66 **Hopwood,** 78 F.3d at 946.

n67 One might object to this conclusion by arguing that the racially gerrymandered electoral district cases do not carryover to educational institutions because the former implicate the "fundamental right" of voting, see Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966); Tribe, supra note 30, at § § 16-10, 4648, whereas the latter do not implicate a fundamental right. Although the Court and many commentators insist that the "suspect classification" and "fundamental right" strands of equal protection are entirely separate, see, e.g., Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (distinguishing between suspect class and fundamental right strands); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1077-84 (1979), other commentators read the Court's equal protection cases to, in effect, apply a lower burden of proof to "suspect classification" equal protection challenges implicating fundamental rights. See Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105, 1119-42 (1989) (arguing that the Court imposes a lesser burden of proving discriminatory purpose on plaintiffs challenging state action implicating the fundamental rights of "jury selection, voting, and education"). Thus, if one believed the racially gerrymandered electoral district cases made it easier--that is, that they created a lower burden--to prove a constitutional violation than did the disparate impact and segregation cases, one following these latter commentators might argue that the gerrymandering cases do not extend to contexts not involving fundamental rights, such as education. There are two responses to this objection. First, it is unclear that the electoral district cases make it easier to prove a constitutional violation because a plaintiff must satisfy a heightened purpose requirement--"predominant" motivation as opposed to merely "but for" motivation. See infra text accompanying notes 93-101. Second, although the Supreme Court has explicitly found education not to be a fundamental right for equal protection purposes, see San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28-39 (1973), many commentators have argued that the Court's subsequent cases have established a pattern of treating education as a fundamental right "in fact if not in name." Tribe, supra note 30, § 16-7, at 1454 n.6; see also Ortiz, supra at 1137.

n68 406 U.S. 535, 547-49 (1972).

n69 Id. at 548-49.

n70 Id. at 548.

n71 426 U.S. 229, 235 (1976).

n72 Id. at 248.

n73 Id. at 235.

n74 Id. at 242 (citations omitted).

n75 Id. at 240; see also Rogers v. Lodge, 458 U.S. 613, 617, 617 n.5 (1982) (applying the Washington v. Davis standard to a claim that the redistricting plan "unconstitutionally diluted the voting strength of racial minorities" by noting that "purposeful racial discrimination

invokes the strictest scrutiny of adverse differential treatment" and "absent such purpose, differential impact is subject only to the test of rationality").

n76 442 U.S. 256, 279 (1979).

n77 Id. at 259, 270.

n78 Id. at 271-80.

n79 Id. at 278-79 (citations omitted).

n80 See Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 288-89 (1997). One needs to look no further than the Court's decisions striking down racial gerrymandering of electoral districts for confirmation of the point that the Court's discriminatory purpose test does not require animus because states engaging in such gerrymandering did so to help racial minorities elect candidates of their own **race.** See id. at 288-89 n.37.

n81 The "result element" of a criminal offense simply refers to the "result of conduct" that is "included in the description of the forbidden conduct in the definition of the offense," as opposed to the other elements of a criminal offense, such as the "conduct element" and the "attendant circumstances element." Model Penal Code § 1.13(9) (1974).

n82 Id. § 2.02(2)(a)(i).

n83 Id. § 2.02(2)(b)(ii).

n84 See, e.g., City of Mobile v. Bolden, 446 U.S. 55, 71-72 n.17 (1980) (adopting Feeney standard).

n85 E.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979) ("Forseeable consequences, without more, do not establish [requisite purpose for] a constitutional violation."); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979) ("We have never held that as a general proposition the forseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination and shifts the burden of producing evidence to the defendants

. . . .").

n86 E.g., Miller v. Johnson, 515 U.S. 900, 916 (1995) (distinguishing "being aware of racial considerations" and "being motivated by them," with only proof of the latter giving rise to strict scrutiny of the state action).

n87 Palmer v. Thompson, 403 U.S. 217, 224-25 (1971). The latter inference might have been plausible, despite the context of Southern resistance to integration, because Jackson had desegregated its public parks, auditoriums, golf courses, and the city zoo in the wake of the same court decision that found its segregated swimming pools to be unconstitutional. Id. at 219.

n88 429 U.S. 252, 270-71 (1977).

n89 Id. at 265 (quoting McGinnis v. Royster, 410 U.S. 263, 276-77 (1973)).

n90 Id. at 265-66 (emphasis added).

n91 Id. at 270-71 n.21; see also Hunter v. Underwood, 471 U.S. 222, 231-32 (1985)

(invalidating a provision of the state constitution because, even if the provision was enacted with both permissible and impermissible motivations, the motivation to discriminate against blacks was "a 'but-for' motivation for the enactment").

n92 Jackson, supra note 41, at 427-31 (explaining that the rule of Arlington Heights "applies to the school desegregation cases" as well).

n93 515 U.S. 900, 916 (1995) (emphasis added).

n94 Id.

n95 Bush v. Vera, 517 U.S. 952, 959 (1996) (plurality opinion) (affirming invalidation of electoral districts in "mixed motive suit" because "**race** was the 'predominant factor' in the drawing of each of the districts").

n96 See id. at 959, 1001.

n97 See id. at 959.

n98 Justice Scalia joined Justice Thomas's concurring opinion. Id. at 999.

n99 Id. at 1001 (Thomas, J., concurring) (emphasis added).

n100 Chief Justice Rehnquist and Justice Kennedy joined Justice O'Connor's plurality opinion. Id. at 956.

n101 Id. at 958-59 (noting disagreement with Justice Thomas). It should be noted that a majority of the Court accepted the "predominant motivation" standard in Miller v. Johnson. See id. at 959, 1000-02. In addition, even though the Court is splintered on the question now, as was evident in Vera, a plaintiff necessarily prevails by satisfying the "predominant motivation" standard, as it is the higher of the two standards. See id. at 959, 1000.

n102 See Forbath & Torres, supra note 8, at 188 ("With the 10 percent plan, there is no racial categorizing, and geographic diversity is a legitimate purpose on the face of the statute."); Holley & Spencer, supra note 8, at 259-60 ("From a legal perspective, the [Ten Percent] Plan's promise rests on its **race**-neutral method of promoting diversity . . . .").

n103 See Forbath & Torres, supra note 8, at 188 ("The Texas legislators knew that the 10 percent plan would change the post-**Hopwood** racial composition of entering classes and that was the purpose of the measure."); Orentlicher, supra note 8, at 194 ("There was clearly a racially discriminatory purpose behind the Texas law (i.e., to decrease the percentage of whites in Texas public colleges) . . . ."); Sullivan, supra note 8, at 1047 ("It might be relatively easy to demonstrate that [the Texas Ten Percent Plan] aims, at least in part, at increasing the racial diversity of student bodies.").

n104 One commentator considered only the racial effect of "disparate impact" and concluded that it would be impossible for whites to show such a racial effect because either the same percentage or a greater percentage of white students would finish in the top ten percent than other racial groups. See Orentlicher, supra note 8, at 194-95 & n.44. As is shown in infra text accompanying notes 107-27, this is not the only comparison relevant to disparate impact analysis. Another commentator, again focusing solely on the racial effect of disparate impact, argues that white students cannot show a disparate impact because there is no obvious alternative raceneutral baseline to the criteria adopted under the Ten Percent Plan. See Sullivan, supra note 8, at 1052. This claim fails to consider the disparate impact advanced in infra text accompanying notes 107-27, which compares the two prongs of admission under the Ten Percent Plan to each other.

n105 The analysis that follows should be prefaced with a few methodological points. First, the focus in this analysis is only on the top Texas universities, especially the University of Texas at Austin, because most other state undergraduate schools in Texas operate under open admissions policies for which the changes marked by the Ten Percent Plan are irrelevant. Forbath & Torres, supra note 8, at 185 n.3; see also Chris Newton, Damage Control, Black Issues in Higher Education, Apr. 29, 1999, at 18. Second, this analysis is limited to Texas residents seeking admission to state universities because the Ten Percent Plan only affects in-state residents. Finally, in the figures that follow it is important to keep in mind the following timeline in which the University of Texas at Austin's admissions procedures operated: 1996 was the last year in which state schools could consider **race** in admissions; in 1997, admissions were without regard to **race** and without the benefit of the Ten Percent Plan, and in 1998-2000, the Ten Percent Plan was in effect.

n106 An argument cannot be made that the Ten Percent Plan results in the racial effect of segregation because one racial group does not make up in excess of 70% of the student body at the University of Texas at Austin, the requisite composition of a segregated institution. Cf. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 452-54 (1979) (approving 80%-90%); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 529 & n.1 (1979) (approving 90%); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 196, 206 (1973) (approving 70%-90%); Brinkman v. Gilligan, 503 F.2d 684, 693-95 (6th Cir. 1974) (analyzing data regarding racial composition of schools). The 2000 freshman class at the University of Texas at Austin was only 63% white. Lavergne & Hargett, supra note 15 (providing raw data for this calculation).

n107 See Orentlicher, supra note 8, at 195 n.46.

n108 426 U.S. 229, 235, 246 (1976).

n109 Lavergne & Hargett, supra note 15 (providing raw data for this calculation).

n110 The acceptance rate for Asian applicants does exceed that for white applicants under the Ten Percent Plan. However, no one contends that the Plan was enacted to benefit Asians. Indeed, the composition of Asians in the admitted pool, unlike that of blacks and Hispanics, increased after **Hopwood.** Lavergne & Hargett, supra note 15.

n111 It is important to note, however, that the disparate impact need not be measured by comparing those admitted to all of those who applied. Rather, the disparate impact tests endorsed by the Supreme Court compare the racial composition of "similarly situated" applicants, cf. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 616-18 (1999) (Thomas, J., dissenting) (discussing disparate impact under Title VII), or of "otherwise qualified" applicants, cf. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-53 (1989) (discussing disparate impact under Title VII), with the racial composition of those admitted. That is, the disparate impact measurement should control for the different distribution of qualifications within racial groups among applicants. See Preston C. Green, III, Can Title VI Prevent Law Schools from Adopting Admissions Practices that Discriminate Against African-Americans?, 24 S.U. L. Rev. 237, 254-55 (1996) (arguing in favor of using an LSAT "cut-off score" to define a pool of "qualified" law school applicants). Put differently, if the distribution of qualifications among applicants differs from racial group to racial group, a prima facie case of disparate impact can be shown even if the overall acceptance rates do not show a disparate impact, as they do not under the Ten Percent Plan. The typical approach to controlling for the distribution of qualifications within racial groups among applicants is to define a pool of "qualified" applicants that meets some minimum scholastic requirements and compare the racial composition of this pool to the pool of admitted students. See id. at 253 (defining qualified pool as those with the "minimal ability for success at that school"); cf. Podberesky v. Kirwan, 38 F.3d 147, 156-57 (4th Cir. 1994) (defining qualified pool to determine whether there existed any present effects of racial discrimination against minorities); Groves v.

Alabama State Bd. of Educ., 776 F. Supp. 1518, 1524-26 (M.D. Ala. 1991) (defining qualified pool in Title VII context). To define the boundaries of the pool of minimally qualified applicants to undergraduate schools, courts often use minimum standardized test score and grade point average requirements for admission to the university, see, e.g., id., or, if the universities do no have formal minimum requirements, the lowest standardized test score and grade point average of those students admitted by the university. Podberesky, 38 F.3d at 157 n.5. Further study is necessary to determine whether white applicants could show a disparate impact under the Ten Percent Plan at the University of Texas at Austin with these comparisons.

n112 See Lavergne & Hargett, supra note 15.

n113 457 U.S. 440, 451 (1982).

n114 Id. at 445-51.

n115 See id. at 452-56.

n116 See, e.g., Grace W. Tsuang, Note, Assuring Equal Access of Asian Americans to Highly Selective Universities, 98 Yale L.J. 659, 673-76 (1989).

n117 406 U.S. 535, 549 (1972).

n118 Lavergne & Hargett, supra note 15 (providing raw data for this calculation).

n119 Tex. Educ. Code Ann. § 51.805(b) (Vernon Supp. 2001).

n120 See Lavergne & Hargett, supra note 15.

n121 457 U.S. at 443.

n122 406 U.S. 535, 549 (1972).

n123 Id. at 537-38.

n124 Id. at 548.

n125 Id. at 538.

n126 Id. at 548 & n.17.

n127 See Lavergne & Hargett, supra note 15. The numbers in this figure do not sum across to 100% because they exclude students of other **races.**

n128 Hernandez v. New York, 500 U.S. 352, 364 (1991) ("The ultimate question of discriminatory intent represents a finding of fact . . . ."); Rogers v. Lodge, 458 U.S. 613, 622-23 (1982); see Hunter v. Underwood, 471 U.S. 222, 229 (1985); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 (1979).

n129 Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

n130 Washington v. Davis, 426 U.S. 229, 242 (1976) ("An invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . .").

n131 Arlington Heights, 429 U.S. at 266-68.

n132 This article focuses on only two of the three factors, historical sequence of events and legislative history, because it is conceded that the third factor, extent of the discriminatory effect, does not advance the inference of discriminatory purpose. This is the case because the extent of the disparate impact does not rise to the level of a "stark," "extreme," and "clear pattern" of discrimination of the sort sufficient to advance this inference in prior cases. Id. at 266 & n.13; see also Rogers, 458 U.S. at 623-24 (judging as important, but not dispositive, the fact that no blacks have ever been elected in a county in which "it is sensible to expect that at least some blacks would have been elected").

n133 429 U.S. at 267.

n134 458 U.S. at 625.

n135 429 U.S. at 267.

n136 Miller v. Johnson, 515 U.S. 900, 917-18 (1995).

n137 Rogers, 458 U.S. at 625.

n138 See supra text accompanying notes 9-11.

n139 Rogers, 458 U.S. at 625.

n140 **Hopwood** v. Texas, 78 F.3d 932, 934 (5th Cir. 1996).

n141 Rogers, 458 U.S. at 625; Jodi Wilgoren, New Law in Texas Preserves Racial Mix in State's Colleges, N.Y. Times, Nov. 24, 1999, at A1.

n142 See Holley & Spencer, supra note 8, at 266.

n143 Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977); see also Pers. Adm'r. v. Feeney, 442 U.S. 256, 279-80 (1979).

n144 Hearings on H.B. 588 Before the House Higher Educ. Comm., 75th Leg., R.S. (Mar. 18, 1997) [hereinafter House Committee Hearings] (statement of Representative Rangel); see also Holley & Spencer, supra note 8, at 253 ("When introducing [H.B.] 588 to the Higher Education Committee, Representative Rangel said that the bill was authored in direct response to the Fifth Circuit's **Hopwood** decision and to the growing South Texas population, which has a large Mexican American population.").

n145 Hearings on H.B. 588 Before the Senate Educ. Comm., 75th Leg., R.S. (Apr. 20, 1997) [hereinafter Senate Committee Hearings] (statement of Senator Barrientos) (tapes available from Senate Staff Services Office).

n146 House Committee Hearings, supra note 144 (testimony of Gerald Torres, Associate Dean and Professor of Law, University of Texas at Austin).

n147 Id. (testimony of David Montejano, Professor of History, University of Texas at Austin).

n148 Debate, supra note 6 (statement of Representative Kamel).

n149 Most of the debate regarding the Ten Percent Plan took place in the Texas House of

Representatives because, after the House approved the Plan, state senators had informally agreed among themselves to support it. Holley & Spencer, supra note 8, at 259 n.113.

n150 Senate Debate on Tex. H.B. 588 on the Floor of the House of Representatives, 75th Leg., R.S. (May 8, 1997) (statement of Senator Barrientos) (tapes available from Senate Staff Services Offices).

n151 House Committee Hearings, supra note 144 (testimony of Albert Kaufman, regional counsel for the Mexican American Legal Defense and Educational Fund).

n152 See id. (testimony of Miguel Medolla, Jr.).

n153 See Debate, supra note 6 (statement of Representative Corte).

n154 See id. (statement of Representative Rangel).

n155 House Committee Hearings, supra note 144 (testimony of Albert Kaufman).

n156 Id.

n157 Id.

n158 Id. (testimony of Dr. William Cunningham, former Chancellor, University of Texas).

n159 Debate, supra note 6 (statement of Representative Giddings).

n160 Holley & Spencer, supra note 8, at 257.

n161 See Forbath & Torres, supra note 8, at 188 ("The Texas legislators knew that the 10 percent plan would change the post-**Hopwood** racial composition of entering classes and that was the purpose of the measure.").

n162 House Committee Hearings, supra note 144 (testimony of Michael Olivas).

n163 Id. (testimony of Leo Salavedra, Deputy Chancellor, Texas A & M University).

n164 Senate Committee Hearings, supra note 145 (statement of Senator West).

n165 Id. (testimony of Don **Brown,** Deputy Commissioner of Texas Higher Education Coordinating Board).

n166 Id. (testimony of Don **Brown,** Deputy Commissioner of Texas Higher Education Coordinating Board).

n167 House Committee Hearings, supra note 144 (testimony of David Montejano, Professor of History, University of Texas at Austin).

n168 Forbath & Torres, supra note 8, at 188; see also Holley & Spencer, supra note 8, at 253 ("The sponsoring legislators hoped that because it targeted high schools highly segregated by **race** and class, the Ten Percent Plan would broaden the student applicant pool.").

n169 See Debate, supra note 6 (statement of Representative Berlanga).

n170 Id. (statement of Representative Rangel).

n171 House Committee Hearings, supra note 144 (testimony of Michael Olivas, Professor of Law, University of Houston).

n172 Id. (testimony of Representative Rangel).

n173 Id. (testimony of Gerald Torres).

n174 Debate, supra note 6 (statement of Representative Giddings).

n175 Id. (statements of Representatives Davila and Rangel).

n176 See supra text accompanying notes 169-75.

n177 The Plan passed the Senate by the much larger margin of 26-5.

n178 Cf. Shaw v. Hunt, 517 U.S. 899, 910 (1996) (refusing to credit a proffered state interest as the actual interest behind the creation of a majority-black electoral district because "while some legislators invoked the State's history of discrimination as an argument for creating a second majority-black district, . . . these members did not have enough voting power to have caused the creation of the second district on that basis alone").

n179 Cf. Hunter v. Underwood, 471 U.S. 222, 232 (1985) ("An additional [arguably permissible] purpose to discriminate against poor whites would not render nugatory the impermissible purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a 'but-for' motivation for the enactment of [the challenged law].").

n180 See Hunt v. Cromartie, 526 U.S. 541, 553 n.9 (1999) (reversing summary judgment for the plaintiff on the factual question of whether the state acted with the "predominant" purpose to cause a racial effect when drawing electoral district because "summary judgment is rarely granted in a plaintiff's favor in cases where the issue is a defendant's racial motivation"). But cf. Edwards v. Aguillard, 482 U.S. 578, 594-96 (1987) (affirming summary judgment that the legislative purpose was to advance religion).

n181 450 U.S. 662 (1981).

n182 Id. at 680 (**Brennan,** J., concurring) (finding that the "actual purpose" behind the legislation under consideration was protectionist and therefore impermissible).

n183 Id. at 682 n.3 (citations omitted).

n184 Id. at 702-03 (Rehnquist, J., dissenting) (citations omitted).

n185 See Orentlicher, supra note 8, at 188-93, 197-210.

n186 Id.

n187 See, e.g., United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Flemming v. Nestor, 363 U.S. 603, 612 (1960); Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556-64 (1947); see also The Supreme Court, 1980 Term, 95 Harv. L. Rev. 93, 158-61 (1981).

n188 See, e.g., Hunter v. Underwood, 471 U.S. 222, 232 (1985) (refusing to hear the state's "legitimate interest in denying the franchise to those convicted of crimes involving moral turpitude" because "such a purpose simply was not a motivating factor of the 1901 convention," at which the law under consideration was passed); cf. United States v. Virginia,

518 U.S. 515, 535-36 (1996) ("In cases of this genre, our precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."); Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) (holding that a racially discriminatory law cannot "withstand strict scrutiny based upon what 'may have motivated' the legislature"; instead, "the State must show that the alleged objective was the legislature's 'actual purpose'"); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728-30 & n.16 (1982) ("Thus, we conclude that, although the state recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."); Califano v. Goldfarb, 430 U.S. 199, 212-13 (1977) (rejecting government-proffered purposes after "inquiry into the actual purposes" (internal quotation marks omitted)); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 & n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

n189 See supra text accompanying notes 76-101, 128-30.

n190 See Lavergne & Hargett, supra note 15.

n191 McGinnis v. Royster, 410 U.S. 263, 276-77 (1973) (internal citations omitted); see also Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.").

n192 See Miller v. Johnson, 515 U.S. 900, 916 (1995).

n193 Id.

n194 See Lavergne & Hargett, supra note 15 (providing raw data for this calculation).

n195 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("We wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

n196 Miller, 515 U.S. at 920.

n197 **Hopwood** v. Texas, 78 F.3d 932, 944-48 (5th Cir. 1996).

n198 Id. at 948-55.

n199 Id. at 944-48.

n200 See Metro. Broadcasting, Inc. v. FCC, 497 U.S. 547, 567-68 (1990).

n201 See Johnson v. Board of Regents of the University of Georgia, 2001 WL 967756, at *12 (11th Cir. Aug. 27, 2001) ("In the end, the fact is inescapable that no five Justices in **Bakke** expressly held that student body diversity is a compelling interest under the Equal Protection Clause . . . .").

n202 See Grutter v. Bollinger, 2001 WL 293196, at *24; (E.D.Mich. Mar. 27, 2001); Gratz v. Bollinger, 2000 WL 1827468, at *7 (E.D. Mich. Dec. 13, 2000).

n203 233 F.3d 1188 (9th Cir. 2000), cert. denied, 2001 WL 214037 (U.S. May 29, 2001) (No. 00-1341).

n204 Id. at 1196-1201.

n205 430 U.S. 188 (1977).

n206 Id. at 193 (internal quotation marks and ellipses omitted).

n207 Smith, 233 F.3d at 1200.

n208 In Johnson, the Eleventh Circuit rejected the Ninth Circuit's Marks analysis for a different reason than the one described below; namely, it concluded that a Marks analysis could not be applied to **Bakke** because there was no lowest common denominator among the Justices' various opinions. Johnson, 2001 WL 967756, at *11-12 & n. 12 ("The Supreme Court has recognized that there will be situations where no binding 'rule' may be taken from a fragmented decision and the Marks inquiry is ultimately 'not useful.' **Bakke** surely presents such a situation." (internal citation omitted)). This was the same conclusion reached by one of the district courts in Michigan. Grutter, 2001 WL 293196, at *22 ("The various Justices' reasons for concurring in the judgment are not merely different by degree . . ., but are so fundamentally different as to not be comparable in terms of 'narrowness.'"). . As shown below, however, a Marks analysis does yield a "narrowest grounds" for the judgment in **Bakke,** just not one based on the compelling interest of diversity.

n209 **Bakke,** 438 U.S. at 320 ("For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.")

n210 Id. at 421 (Stevens, J., concurring in the judgment in part and dissenting in part) ("The University's special admissions program violated Title VI . . . . I concur in the Court's judgment insofar as it affirms the judgment of the Supreme Court of California.").

n211 **Bakke,** 438 U.S. at 320.

n212 Id. at 410-11 (Stevens, J., concurring in the judgment in part and dissenting in part) ("It is therefore perfectly clear that the question whether **race** can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.")

n213 **Bakke,** 438 U.S. at 287-99.

n214 Id. at 311-15.

n215 Id. at 359 (**Brennan,** J., concurring in the judgment in part and dissenting in part).

n216 Id. at 368-69 ("We therefore conclude that Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify the use of **race**-conscious admissions criteria.").

n217 **Bakke,** 438 U.S. at 307.

n218 Id.

n219 Id. at 364-65 (**Brennan,** J., concurring in the judgment in part and dissenting in part).

n220 Id. at 369.

n221 See id. at 366 n.42 ("While we agree that reversal in this case would follow a fortiori had Davis been guilty of invidious racial discrimination . . . we do not think it of constitutional significance that Davis has not been so adjudged.").

n222 Id. at 324-25 (emphasis added).

n223 It should be noted that, although Justice Stevens took issue with the presumptuousness of Justice **Brennan's** announcement of the holding of the Court with regard to the second judgment in **Bakke,** he did not take issue with its accuracy. **Bakke,** 438 U.S. at 408 n.1 (Stevens, J., concurring in the judgment in part and dissenting in part).

n224 Smith, 233 F.3d at 1200 ("True it is that Justice **Brennan** did not specifically say that '**race**' could be used to achieve student body diversity in the absence of any **societal discrimination**

. . . .").

n225 **Bakke,** 438 U.S. at 326 n.1 (**Brennan,** J., concurring in the judgment in part and dissenting in part) ("We also agree with Mr. Justice Powell that a plan like the 'Harvard' plan . . . is constitutional under our approach, at least so long as the use of **race** to achieve an integrated student body is necessitated by the lingering effects of past discrimination." (emphasis added)).

n226 In Gratz, the federal district court concluded that, although the Supreme Court has never held that the educational benefits of diversity constituted a compelling interest, nor has the Court foreclosed that possibility. Gratz, 2000 WL 1827468, *7-*9. The court went on to hold that the University of Michigan had presented credible evidence that such educational benefits were real, and that achievement of those benefits constituted a compelling interest. Id. at *10-12. Missing from the court's analysis, however, was any discussion as to why achievement of these particular benefits rise to the level of a "compelling interest." A state does not have a "compelling interest" in achieving all possible benefits to society. (Otherwise, there would be no reason to have a multi-tiered equal protection analysis that tries to separate governmental pursuits into "important interests," "compelling interests," etc.) Rhetorical constraints are some of the most important checks on the exercise of judicial discretion. By shirking from its responsibility to explain why the purported educational benefits of racial diversity are so compelling that they should justify racial discrimination, the district judge in Gratz illegitimately evaded these constraints.

n227 **Hopwood,** 78 F.3d at 946.

n228 See id.

n229 Id. at 947.

n230 But see Forde-Mazrui, supra note 8 (arguing that diversity should constitute a compelling interest in the context of facially **race**-neutral state action, even though it does not in the context of explicit racial classifications).

n231 See, e.g., Grutter, 2001 WL 293196, at *24 ("The connection between **race** and viewpoint is tenuous at best.").

n232 See **Hopwood** at 949-52; see also City of Richmond v. Croson, 488 U.S. 469, 499 (1989) (holding that "like the claim that discrimination in primary and secondary school justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry" does not rise to the level of a compelling interest); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality

opinion) ("This Court never has held that **societal discrimination** alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." (emphasis added)). But see Croson, 488 U. S. at 491-92 (plurality opinion of O'Connor, J.).

n233 78 F.3d at 952-55.

n234 It is especially telling that the Law School's present effects of past discrimination theory in **Hopwood** rested almost exclusively on the past discrimination in primary and secondary schools. There was no claim that the Law School sought to remedy present effects of past discrimination in the Texas undergraduate schools. The **Hopwood** court speculated that this was due to the fact that past de jure discrimination against Hispanics in Texas, as opposed to blacks, occurred only in primary and secondary schools. See id. at 954 n.46.

n235 See United States v. Virginia, 518 U.S. 515, 535-36 (1996) ("In cases of this genre, our precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728-30 n.16 (1982) ("Thus, we conclude that, although the state recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."); Califano v. Goldfarb, 430 U.S. 199, 212-13 (1977) (rejecting government-proffered purposes after "inquiry into the actual purposes"); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

n236 See Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' . . . ."); Miller v. Johnson, 515 U.S. 900, 921 (1995) (considering only the "State's true interest" for purposes of "compelling interest" determination).

n237 This "actual reason" limitation parallels the "actual purpose" limitation that was discussed above. See supra text accompanying notes 181-89. When the two doctrines are combined, it means that in order for a state to prevail on an equal protection challenge to a facially **race**-neutral law, it must show either that the actual purpose behind the law was not to cause a racial effect or, even if it was, that the actual reason for seeking to cause such an effect was compelling.

n238 See Shaw, 517 U.S. at 910.

In this suit, the District Court found that an interest in ameliorating past discrimination did not actually precipitate the use of **race** in the redistricting plan. While some legislators invoked the State's history of discrimination as an argument for creating a second majority-black district, the court found that these members did not have enough voting power to have caused the creation of the second district on that basis alone.

Id.

n239 See Selingo & Brainard, supra note 1 ("A few [University of California] faculty members say they see the plan as yet another effort by university officials to broaden access

in the wake of Proposition 209, the ban on affirmative action that was approved by the state's voters in 1996 . . . ."); Jeffrey Selingo, What States Aren't Saying About the 'X-Percent Solution,' Chron. Higher Educ., June 2, 2000, at A31 ("Aides to Gov. Jeb Bush of Florida admit they settled on a 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students.").

n240 See Selingo & Brainard, supra note 1.

n241 See Bragg, supra note 2.

n242 See Mary Frances Berry, How Percentage Plans Keep Minority Students Out of College, Chron. Higher Educ., Aug. 4, 2000, at A48. ("The fundamental premise behind the plans --that automatic admission of highschool students in the tops of their classes will result in racially diverse colleges--is contingent upon the continued segregation of our publicschool system."); Roger I. Abrams, Affirmative, but less so, Nat'l L.J., May 8, 2000, at A18.

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Georgetown Law Journal

August, 2000

88 Geo. L.J. 2331

LENGTH: 32705 words

ARTICLE: The Constitutional Implications of **Race**-Neutral Affirmative Action

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* Associate Professor of Law, University of Virginia. I am grateful for the helpful comments I received on an earlier draft from Vince Blasi, John Jeffries, Mike Klarman and Daryl Levinson, as well as the participants in the annual Constitutional Law Workshop at the University of Virginia and in faculty workshops at Vanderbilt University and Washington & Lee University. A special thanks to Chris Gatewood, Erik Bodenhofer, Elizabeth Semancik and Tishisa Braziel for their diligent research assistance.

SUMMARY:
... In addition to the cases decided by the Fifth Circuit, ***Hopwood*** *v. Texas*, [1] and the Fourth Circuit, *Podberesky v. Kirwan*, [2] federal lawsuits are currently pending against the Universities of Michigan and Washington [3] challenging their **race**-based admission programs. ... An issue which remained unresolved after *Croson*, [27] and which *Adarand* did not address, [28] is exactly what strict scrutiny requires. ... [86] Strict scrutiny serves to guard against the risk that such illegitimate purposes or beliefs motivated a racial classification. ... [134] Accordingly, whether illegitimate or merely noncompelling, remedying **societal discrimination** simply cannot satisfy the interest prong of strict scrutiny, at least under the existing case law, which the present Court seems unlikely to expand in favor of affirmative action. ...

TEXT:
[*2332] INTRODUCTION

Efforts by public universities across the country to create racial diversity in their student populations have been placed in serious jeopardy by recent federal court decisions invalidating the use of **race** in admissions and financial aid. In addition to the cases decided by the Fifth Circuit, ***Hopwood*** *v. Texas*, [1] and the Fourth Circuit, *Podberesky v. Kirwan*, [2] federal lawsuits are currently pending against the Universities of Michigan and Washington [3] challenging their **race**-based admission programs. Nor is pressure to abandon affirmative action limited to the federal courts; popular initiatives to amend state law have succeeded in banning **race**-based affirmative action in California and Washington, and similar movements are underway in other states. [4] The question of whether to abolish affirmative action even reached a full vote in the United States House of Representatives, although the measure failed. [5]

Seeing the writing on the wall, but unwilling to return to student bodies lacking appreciable

minority membership, many schools of higher education are resorting to "alternative action," [6] that is, policies designed to create racial diversity without relying on racial preferences. Schools in California, for example, are experimenting with "class-based" affirmative action in which weight is given in the admission process to the socioeconomic or educational background of applicants and their families. In addition, some schools consider "diversity" or "hardship" essays in which applicants describe challenging life experiences such as poverty, English as a second language, or growing up with a parent in a gang or in prison. [7] In Texas, recent legislation enacted in response **[*2333]** to the ***Hopwood*** decision entitles the top ten percent of the graduating class of every high school in the state to admission to the University of Texas or other state university. [8] The University of California at Los Angeles has also taken advantage of residential location as a means of reaching minority students by targeting financial aid programs toward underprivileged neighborhoods. [9] In an attempt to address the root causes of minority underrepresentation in higher education, other reformers advocate earlier intervention in the educational process by improving the quality of elementary and secondary schools, where they believe many minority children receive an inadequate education. [10]

A serious problem facing these ostensibly **race**-neutral efforts to increase minority representation in higher education, a problem largely unnoticed even by opponents of existing affirmative action programs, is that such efforts are themselves **race**-conscious state action that may violate the Equal Protection Clause. [11] Briefly, the argument proceeds as follows: strict scrutiny under the Equal Protection Clause is triggered by a law motivated by a racially discriminatory purpose, regardless of whether the law employs an express racial classification or is **race**-neutral on its face. As the Supreme Court's affirmative action cases establish, the purpose to benefit racial minorities is a discriminatory purpose. Thus, when a state school intentionally seeks to admit minority students through the use of **race**-neutral criteria, such as economic disadvantage, **[*2334]** it has acted with a discriminatory purpose. Such efforts, therefore, should trigger the same strict, and usually fatal, scrutiny applicable to policies that directly rely on **race** as a criterion for admission.

The implications of the Court's affirmative action cases, moreover, go well beyond the particular context of higher education. Proposals to improve the quality of all elementary and secondary schools (and not just predominantly minority schools), if motivated in any part by a desire to improve the dismal educational achievement of minority schoolchildren, represent **race**-conscious state action that may be invalid. Indeed, taken to its logical end, the Equal Protection Clause presumptively forbids all governmental efforts to address the stark social and economic disparities that persist between racial groups, even through **race**-neutral means that would benefit disadvantaged whites as well. Accordingly, attempts to address the dearth of minority students in higher education, or any other disadvantages disproportionately suffered by racial minorities, however well-intentioned, may be unconstitutional. The Court's reaction to affirmative action as essentially reverse discrimination thus may require the abandonment of all efforts in whatever form to remedy the effects of historical discrimination.

Curiously, both sides of the affirmative action debate in the political arena have generally failed to recognize the constitutional difficulties inherent in **race**-neutral affirmative action and, moreover, so have the courts. Thus, the Supreme Court in *City of Richmond v. J.A. Croson Co.*, [12] the first case in which a majority of the Court held that strict scrutiny applies to all racial classifications by state or local governments regardless of the **race** burdened by the classification, suggested in dicta that states could increase minority participation in the construction industry through **race**-neutral remedies without meeting the requirements of strict scrutiny. [13] Even Justice Scalia, who concurred in the judgment in order to emphasize his stringent opposition to any racial classifications even for remedial purposes, suggested that states could remedy the underrepresentation of racial minorities by addressing the disadvantages, defined in a **race**-neutral fashion, that racial minorities disproportionately face. [14] Similarly, federal Courts of Appeals for the Fourth [15] and District of Columbia Circuits,

[16] in cases striking down **race**-based affirmative action, tacitly assumed or explicitly suggested that the underrepresentation of racial minorities could be addressed through **race**-neutral means. [17]

This Article explores the implications of the Court's decision to apply strict **[*2335]** scrutiny to "benign" racial classifications, those that benefit racial minorities, for any governmental efforts to ameliorate the conditions disproportionately experienced by racial minorities. More specifically, this Article will analyze to what extent the government may engage in ***race**-neutral affirmative action*, that is, the pursuit of affirmative action objectives, such as remedying past discrimination or promoting racial diversity, through policies that rely on **race**-neutral means, such as need-based preferences or services.

Part I explains the potential for the Court's affirmative action cases to render invalid any governmental attempts to redress disadvantages disproportionately suffered by racial minorities, regardless of the means used. Section I.A examines the demands of strict scrutiny as applied to benign *racial classifications* [18] or laws which are otherwise ***race**-operative*, concluding that the doctrine as developing would invalidate any use of such classifications in higher education and elsewhere. [19] Section I.B considers the emerging trend, especially among schools of higher education, toward the use of policies that employ ***race**-neutral classifications* [20] to benefit racial minorities. This section suggests that under the Court's decision to subject benign racial classifications to strict scrutiny, combined with the principle that legislative motivation is what counts for equal **[*2336]** protection purposes regardless of a law's explicit terms, **race**-neutral affirmative action may be just as constitutionally vulnerable as **race**-operative programs. As such, the Court's treatment of affirmative action may have far-reaching effects for government-sponsored efforts to remedy the condition of racial minorities. It may invalidate a wide range of governmental programs, including public school improvement, job training, health education, urban development, and other anti-poverty and equal opportunity programs to the extent they have been motivated in any part by a concern for racial minorities. This Part closes by noting the apparent ambivalence on the part of political conservatives and, more intriguingly, courts that have invalidated racial preferences, about the logical implications of their colorblind position. While purporting to believe that helping racial minorities is morally and legally equivalent to discriminating against them, these actors generally have accepted and even endorsed the trend toward **race**-neutral affirmative action. The challenge suggested by this ambivalence is how such programs could be upheld in a judicial environment increasingly hostile to affirmative action.

Parts II and III take up this challenge by offering doctrinal defenses of **race**-neutral affirmative action. Despite the surface plausibility of arguments against all **race**-conscious remedial action, including by **race**-neutral means, the doctrinal landscape is considerably more complicated. Existing doctrine does not in fact foreclose **race**-conscious governmental decisionmaking nor even subject all such policies to strict scrutiny. As Part II argues, **race**-neutral affirmative action can satisfy strict scrutiny even when the ultimate objective is to remedy **societal discrimination,** an objective the Court has held insufficient to justify racial classifications. The Court's reluctance to endorse remedying **societal discrimination** as a "compelling" interest is not due to a lack of importance of this interest, but rather its inadequacy to constrain the scope of a **race**-based remedy. If **race**-neutral means are used instead of **race**-operative classifications, the Court's concerns over remedying **societal discrimination** largely disappear. As such, given the functions of strict scrutiny as articulated by the Court, remedying **societal discrimination** should be sufficiently compelling to satisfy such review when the means used to accomplish this purpose are **race**-neutral in their operation.

Part III offers an alternative theory for upholding **race**-neutral affirmative action *without* triggering strict scrutiny. Strict scrutiny can be avoided if, and only if, such programs are adopted without a racially discriminatory purpose. Rather than trying to benefit racial minorities, this Part advocates the pursuit of **race**-neutral affirmative action to benefit

nonracial groups, such as victims of societal racial discrimination and members of ethnic cultures. As Section III.A demonstrates, such groups are not "racial" for equal protection purposes, and governmental policies designed to benefit them do not, therefore, trigger strict scrutiny. Section III.B focuses on some specific **race**-neutral affirmative action programs recently adopted or proposed by public universities. Despite this Article's defense of **race**-neutral affirmative action generally, this section acknowledges **[*2337]** serious doubts about the constitutionality of some of these programs given the circumstances in which they were developed. The section suggests, however, that universities that have adopted programs for impermissible reasons ought to be permitted to re-adopt such programs for the kinds of legitimate, nonsuspect purposes identified in this Part.

One final note. Rather than repudiating the Court's doctrine, as affirmative action proponents often do, the arguments developed herein are premised on existing doctrine or at least a good faith clarification thereof. This should not imply an endorsement of the Court's treatment of affirmative action. Nor is higher education necessarily the context in which **race**-neutral affirmative action is most urgently needed or would be most effective. An objective of this Article is to develop arguments for upholding **race**-neutral affirmative action that will have a realistic chance of success in the courts, and higher education is a context in which the legality of such efforts is likely to be litigated with precedential consequences for affirmative action in other contexts. The Court and our society are at a crossroads. Racial preferences are, for all practical purposes, no longer a permissible means for remedying historical discrimination or promoting multicultural diversity. The Court has not as yet foreclosed remedial measures that operate without regard to **race.** We must develop arguments that can persuade the Court [21] to uphold such efforts. Only arguments that take existing doctrine seriously can provide public universities and other state actors with a good-faith basis for adopting **race**-neutral affirmative action policies and the courts with a judicially principled basis upon which to uphold them.

I. THE (UNSEEN) WRITING ON THE WALL: THE UNCONSTITUTIONALITY OF AFFIRMATIVE ACTION BY ANY MEANS?

In 1989, in *City of Richmond v. J.A. Croson Co.*, [22] a consensus was finally reached by a majority of the Court that state-sponsored benign racial classifications **[*2338]** are presumptively invalid and are subject to *strict* scrutiny. [23] Although in the following year the Court held the federal government to a more lenient standard, [24] it held in 1995, in *Adarand Constructors, Inc. v. Pena*, [25] that federally enacted benign classifications are also subject to strict scrutiny. The principal significance of these decisions is the holding that benign racial classifications are as constitutionally troublesome or "suspect" as racial classifications that disadvantage racial minorities. By subjecting benign racial classifications to strict scrutiny, these decisions may have far-reaching implications for government-sponsored affirmative action. First, the nature of the strict scrutiny test articulated by the Court suggests that no affirmative action program employing a racial classification could withstand legal challenge. All such classifications thus may be doomed. Second, *Croson* and *Adarand* may spell the end to all government-sponsored efforts to remedy past discrimination or promote racial diversity, even when such efforts are pursued through **race**-neutral classifications. The Court's decisions in *Croson* and *Adarand* thus may forecast the abolition of affirmative action of any kind.

This Part highlights the potentially invalidating implications of *Croson* and *Adarand* for affirmative action in higher education and elsewhere, particularly with respect to the emerging trend toward using **race**-neutral means to accomplish affirmative action goals. Section A explores the requirements and implications of strict scrutiny for affirmative action programs that employ racial classifications. The section first examines the requirements of strict scrutiny as articulated by the Court in *Croson* [26] and then considers its implications for benign racial classifications, particularly in the context of higher education. This section suggests that, under the demands of strict scrutiny, such classifications could not survive

judicial review. Section B describes the trend among public universities toward using **race**-neutral means to pursue affirmative action goals and sets out the argument that such efforts may be subject to strict scrutiny and invalidated as a result. The section concludes by noting the puzzling endorsement of **race**-neutral affirmative action by the Court and other colorblind advocates.

[*2339] A. IMPLICATIONS OF STRICT SCRUTINY FOR BENIGN RACIAL CLASSIFICATIONS: THE CASE OF AFFIRMATIVE ACTION IN HIGHER EDUCATION

An issue which remained unresolved after *Croson*, [27] and which *Adarand* did not address, [28] is exactly what strict scrutiny requires. The Court [29] acknowledged as compelling the city's interest in remedying effects of private discrimination in the local construction industry and of the city's own discrimination, whether the city had direct or "passive" participation in private discrimination. [30] Such discrimination must, however, be "identified" with sufficient particularity, which the city had failed to do. [31]

The Court rejected as insufficiently compelling the city's interest in remedying the general effects of "**societal discrimination,**" that is, society-wide discrimination where specific instances or perpetrators cannot be identified, and in remedying similarly unidentified discrimination in the construction industry of the entire nation. [32] Such objectives were too ill-defined and speculative to justify **race**-based relief, providing "no logical stopping point" or other guidance to the legislature regarding the appropriate scope of a **race**-based remedy. [33] The Court did not squarely address whether racial diversity in the construction industry could be a compelling interest, but the opinion strongly intimated that only remedial objectives could justify a racial classification. [34]

[*2340] The Court also criticized the means as not narrowly tailored to remedying discrimination in the Richmond construction industry. First, the thirty percent set-aside represented an unrealistically rigid racial quota, a disfavored means that failed to account properly for differences in qualifications between contract applicants or between those minority-owned firms that did and did not truly suffer from discrimination. The inadequacies in the "fit" between the racial quota and its purported remedial purpose were particularly obvious by the inclusion of preferences for racial minorities other than blacks, such as Eskimos and Aleuts, for which there was no evidence of local discrimination. [35] The poor fit between purpose and means, the Court explained, undermined the credibility of the claimed remedial purpose. [36] That is, to the extent the program failed to benefit only likely victims of discrimination, the Court could not be sure that the program was not based on stereotypical assumptions or, apparently more troubling to the Court, "simple racial politics." [37]

The demands of strict scrutiny as suggested by *Croson* are strict indeed. *Croson* potentially limits the list of compelling interests a state actor may pursue through racial classifications to the remedying of identified discrimination attributable to the state actor or to particular private actors. In terms of tailoring, not only are racial quotas virtually invalid per se, [38] the Court also disfavors any reliance on **race where race**-neutral alternatives are available and particularly where individualized procedures enable the state actor to more effectively identify true victims of discrimination. In its most rigorous application, **[*2341]** strict scrutiny would permit **race**-conscious state action only when the state actor has identified specific instances of discrimination by specific perpetrators, when the action benefits only actual victims of such discrimination, and when it does so only to the extent necessary to remedy the harm caused by such discrimination.

Proponents of benign racial classifications may gain some solace from the observation that much of *Croson's* discussion about strict scrutiny was *obiter dicta*. The shortcomings of the city council's findings of local discrimination and the obvious lack of fit between such findings and the large percentage set-aside for such a variety of racial groups leave uncertain how well an affirmative action plan might fare if based upon more particularized findings and

more flexible and tailored means. Moreover, the Court in *Adarand* did subsequently reassure that "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" [39] Accordingly, whether any voluntary **race**-based affirmative action program could satisfy strict scrutiny remains unclear without further elaboration by the Court. In the meantime, the scope of strict scrutiny will depend on the application of *Croson* and *Adarand* by the lower courts.

Such developments have begun in the field of higher education, providing a useful context for observing the implications of strict scrutiny for racial preferences and, as explored in the next section, for **race**-neutral affirmative action. Public colleges and universities have been at the forefront of affirmative action efforts to increase and retain the participation of minority students in higher education since before, and in reliance on, *Regents of the University of California v. **Bakke***. [40] Schools have relied on **race** in defining admissions criteria, awarding scholarships and other financial aid, recruiting applicants, operating summer training programs for minority high school and college students, providing academic assistance to enrolled minority students, creating minority student centers, hiring minority faculty, and devising **race**-related curricular offerings. The result has been that many schools of higher education have succeeded in creating student bodies with substantial minority representation, sometimes approaching the percentage of minorities in the general population. The question raised by *Croson* and *Adarand* is whether such programs can survive judicial review. Thus far, two federal circuit courts have addressed the scope of strict scrutiny in the context of higher education. These cases, *Podberesky v. Kirwan* [41] and ***Hopwood** v. Texas*, [42] illustrate the potential for strict scrutiny to invalidate all racial classifications.

Perhaps the greatest difficulty for affirmative action, which *Podberesky* and **[*2342]** ***Hopwood*** demonstrate, is the Supreme Court's rejection of "**societal discrimination**" as a justification for racial classifications. In *Podberesky*, which involved a University of Maryland scholarship for black applicants, [43] the Fourth Circuit rejected as grounds for the program every condition the university claimed was an effect of its own past discrimination [44] because the university could not completely rule out **societal discrimination** as a contributing factor. [45] In ***Hopwood***, [46] the Fifth Circuit invalidated a **race**-based admission program by the University of Texas Law School. The court reasoned that the law school could not prove that the conditions it sought to ameliorate [47] were caused exclusively by its own past discrimination [48] and not by **societal discrimination,** discrimination by the state's public education system as a whole, or even discrimination by the greater University outside the law school's walls. [49] The court in ***Hopwood*** **[*2343]** also rejected as a justification for the admission program the law school's purported interest in a diverse student body. The court concluded that such an interest reflected an irrational and demeaning notion that **race** determines thought and behavior [50] and, notwithstanding Justice Powell's opinion in ***Bakke***, was unsupported by recent affirmative action decisions by the Supreme Court. [51]

Podberesky also suggests the difficulty of meeting the tailoring requirement of strict scrutiny even if nonsocietal discrimination can be sufficiently identified. [52] Assuming *arguendo* that minority underrepresentation in the student body resulted from the school's past discrimination, [53] the court concluded that the scholarship was insufficiently tailored. The court reasoned that a merit scholarship is unlikely to benefit the victims of the school's discrimination because these victims are unlikely to be high achievers, [54] the eligibility of out-of-state residents would likely benefit nonvictims, [55] and the university failed to consider **race**-neutral alternatives. [56]

Although ***Hopwood*** and *Podberesky* can be criticized as unduly strict in their application of strict scrutiny, their interpretations of *Croson* are not surprising. *Croson* does seem to require state actors to identify effects of their own discrimination, or that of particular private discriminators, and to address only those effects in the least **race**-conscious manner. As such, any public college seeking to pursue an affirmative action program would seem to have

to confess to its own past wrongs, demonstrate how those wrongs affect the enrollment of minority students today, and remedy only those effects. Given that most schools, especially those schools that have been operating affirmative action programs, are unlikely to have discriminated against minority applicants during the lifetime of most of those currently applying for college, [57] it is extremely unlikely that the beneficiaries of any existing affirmative action program in higher education were themselves victims of discrimination by the school now seeking **[*2344]** to recruit them. [58] Most of those directly discriminated against are at least fifty years old. Even if courts are willing to consider intergenerational causal links between current minority underrepresentation at a school and the school's discriminatory practices of the past, identifying which effects are attributable exclusively to the school's past discrimination, and not **societal discrimination,** would be virtually impossible. Perhaps a school could give a preference to the children of those minority applicants previously turned away by the school on account of their **race,** provided that the discrimination suffered by those parents did not prevent them from gaining the educational experience necessary to prepare their children for college.

Given the rigors of strict scrutiny, it is thus not surprising that the courts in ***Hopwood*** and *Podberesky* found the admissions and scholarship programs wanting, and it is difficult to imagine any **race**-operative affirmative action programs faring much better. As such, the continued use by public schools of higher education of racial preferences to increase or maintain minority student enrollment has been called into serious doubt. Schools failing to abandon such practices are vulnerable to court challenge--federal lawsuits are currently pending against the Universities of Washington and of Michigan, [59] and legal action has been taken or threatened against other schools as well. [60] Moreover, in addition to the federal Constitution, pressure to abandon racial preferences may increasingly come from state law. Popular initiatives to ban **race**-based affirmative action through state law have succeeded in California [61] and Washington, [62] and similar campaigns are underway in other states. [63]

[*2345] Affirmative action by private universities, moreover, may also be at risk. Virtually all private colleges and universities receive federal funds, and have been doing so on condition that they operate affirmative action procedures in their admissions programs. Courts applying *Adarand* will likely find such conditions unconstitutional. Some private schools may now choose to terminate affirmative action programs if such efforts are no longer required as a condition for receiving federal funds. Furthermore, even private schools that voluntarily engage in affirmative action may be vulnerable under civil rights statutes. Title VI of the Civil Rights Act of 1964, for example, prohibits racial discrimination by all schools, private or public, that receive federal funds. [64] If benign racial preferences by state schools represent racial discrimination in violation of the Equal Protection Clause, then such preferences should likewise violate Title VI when practiced by any schools receiving federal funds. [65] *Adarand* may not only prevent the federal government from requiring affirmative action by federally funded schools, it may also, through existing civil rights statutes, forbid the federal government from funding any schools that voluntarily engage in affirmative action. Given the vast number of private (and public) colleges and universities that depend on federal funding, *Adarand* may well signal the abolition of racial preferences by all schools of higher education. [66]

[*2346] The Court's decisions in *Croson* and *Adarand* may thus have far-reaching implications for affirmative action programs in higher education that employ racial preferences in their operation. Although the implications for private schools are largely speculative at this point, racial preferences by public universities are clearly vulnerable. Furthermore, the Court's decision to apply strict scrutiny to all laws employing racial classifications, benign or invidious, state or federal, may jeopardize a wide range of **race**-operative affirmative action programs beyond the field of higher education. To the extent that it is virtually impossible for a racial classification to satisfy strict scrutiny, the Court's approach amounts, in practice, to a rigid "classification rule"--a per se rule against government use of racial classifications regardless of which **race** is benefited or burdened by

the classification. [67] Moreover, although the affirmative action cases have thus far involved express racial classifications, *Croson* and *Adarand* may jeopardize laws employing **race**-neutral classifications if enacted for **race**-conscious motives. These implications are considered in the following section.

B. THE UNCERTAIN TREND TOWARD **RACE**-NEUTRAL AFFIRMATIVE ACTION

With the increasing threat of legal challenge to **race**-based affirmative action, a number of public universities have turned to disadvantage-based and other **race**-neutral approaches to increase the enrollment of minority students. [68] These attempts to avoid constitutional invalidation by using **race**-neutral classifications may, however, be as legally vulnerable as their racially classifying predecessors. In light of *Croson*, the benign purposes behind such efforts are arguably racially discriminatory and, per *Washington v. Davis* [69] and some earlier precedent, [70] **[*2347]** should trigger heightened review notwithstanding the absence of express racial classifications.

In *Washington v. Davis* the Court held that a **race**-neutral law with a disparate racial impact on racial minorities was subject to strict scrutiny if, and only if, the law was enacted with a discriminatory purpose. [71] The search for a discriminatory purpose was thus made the touchstone of judicial review under the Equal Protection Clause. Strict scrutiny is triggered by evidence of such intent, whether reflected in a racial classification or, where a classification is **race**-neutral, by other evidence revealing a discriminatory purpose.

What counts as a racially "discriminatory purpose" sufficient to trigger strict scrutiny was further clarified in *Personnel Administrator v. Feeney*. [72] In *Feeney*, the Court upheld a state law giving a preference to veterans for civil service employment, which had a significant discriminatory effect against female applicants. Notwithstanding the obvious impact of such a preference, the Court upheld it on the ground that "'discriminatory purpose,' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." [73]

Enter *Croson*, holding that all state-sponsored racial classifications--regardless of the **race** burdened or benefited by the classification--trigger strict scrutiny, and *Adarand*, extending this rule to federally enacted racial classifications. These cases established that discrimination against whites for the benefit **[*2348]** of racial minorities is still discrimination; a purpose to so discriminate is thus a discriminatory purpose. Read in conjunction with *Feeney, Croson* and *Adarand* establish that a "discriminatory purpose" exists whenever the government selects a course of action at least in part "because of" its adverse--or beneficial--effects upon a racial group. A "benign" racial purpose is nonetheless discriminatory, and a **race**-neutral law motivated by such a purpose is arguably just as "suspect" and subject to strict scrutiny as a similarly motivated express racial classification.

Accordingly, when a legislature or public university intentionally seeks to admit minority students through **race**-neutral means, such as disadvantage-based preferences, it has taken a course of action "because of" and not merely "in spite of" its effect on racial minorities. Such efforts, therefore, should trigger the same strict, and usually fatal, scrutiny applicable to admission policies that rely on racial classifications. [74] Moreover, even proposals to improve the quality of all elementary and secondary schools, not just those predominantly attended by minority children, if motivated in any part by a desire to improve the disappointing educational achievement of minority schoolchildren, arguably represent discriminatory state action and are presumptively invalid.

Taken to its logical end, the Equal Protection Clause requires government to ignore the stark racial disparities that persist in our society. The government cannot, in response to the poor academic achievement of minority schoolchildren, seek to address the conditions that

undermine their education, such as poor quality schools, poverty, or family breakdown, even if disadvantaged children of all **races,** including white, are benefited. The government cannot, in response to the high rates of unemployment and crime in minority communities, seek to enhance employment opportunities or strengthen law enforcement, even if such services are provided to communities of all **races** experiencing similar conditions. The government cannot, in response to the high rate of AIDS and other diseases among minorities, increase public health education even if high-risk communities of all **races** are targeted. If **race** must never occupy the thoughts of governmental decisionmakers, then the government cannot respond to racial problems in any fashion, not just without reliance on racial preferences. Consequently, by holding that helping racial minorities is discriminatory, the Court in *Croson* and *Adarand* may have effectively held that racial disparities that persist in America must simply be ignored.

A parallel can thus be observed between the evolution of equal protection doctrine in the era of segregation and its current development in response to affirmative action. During segregation, the Court increasingly invalidated invidious racial classifications. Discriminators then attempted to pursue similar purposes through **race**-neutral means, and the Court responded by looking to **[*2349]** legislative motivation. Now that the Court has decided to treat benign racial classifications as suspect, affirmative action proponents are turning to **race**-neutral means, and we may simply be awaiting the Court's pronouncement that reverse discrimination, by any means, is still discrimination.

Curiously, notwithstanding the seemingly settled principle that a racially discriminatory purpose can no more be pursued through **race**-neutral criteria than through racial classifications, the implications of *Croson* and *Adarand* for **race**-neutral affirmative action have gone largely unrecognized, even by strong opponents of existing affirmative action programs. [75] Perhaps more intriguing, even courts invalidating affirmative action programs have generally failed to acknowledge the constitutional difficulties inherent in **race**-neutral affirmative action, and indeed, many courts--including the United State Supreme Court--have explicitly endorsed such efforts for achieving the same purposes underlying the benign racial classifications they invalidated. In *Croson*, both the plurality and Justice Scalia suggested in dicta that a state may use **race**-neutral means to remedy disadvantages disproportionately suffered by racial minorities. "Even in the absence of evidence of discrimination," Justice O'Connor wrote for the plurality,

> the city has at its disposal a whole array of **race**-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all **races.** Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all **races** would open the public contracting market to all those who have suffered the effects of past **societal discrimination** or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than **[*2350]** actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of **race.** [76]

Even Justice Scalia, although critical of the plurality for suggesting that racial classifications could ever be justified, seemed prepared nonetheless to accept **race**-neutral remedial efforts:

> A State can, of course, act "to undo the effects of past discrimination" in many

> permissible ways that do not involve classification by **race.** In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses--which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on **race.** . . .
>
> . . . .
>
> . . . Since blacks have been disproportionately disadvantaged by racial discrimination, any **race**-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of **race,** is in accord with the letter and the spirit of our Constitution. [77]

Similarly, lower courts, both within and without the context of higher education, have appeared to endorse **race**-neutral efforts to remedy the underrepresentation of racial minorities. The Fourth Circuit in *Podberesky*, for example, suggested that the University of Maryland should have provided greater economic opportunities for all students as a way to retain more minority students. [78] In *Lutheran Church-Missouri Synod v. FCC*, [79] the Court of Appeals for the District of Columbia Circuit suggested **race**-neutral efforts to create racial diversity within radio and television broadcast companies. [80]

[*2351] That many political activists and courts opposed to racial preferences assume the validity of **race**-neutral alternatives does not, of course, mean that such alternatives are constitutional, or that the Court would so hold when squarely confronting them. And while any attempt to explain the motives of conservative activists or Supreme Court Justices is well outside the scope of this Article, their reluctance to condemn all forms of affirmative action suggests some reason for pause. When interpreting constitutional provisions, particularly the more "open textured" clauses, the Court is unlikely to stray too far from widely held views. An intriguing question, then, is this: if the Court would uphold **race**-neutral affirmative action, as its dicta seems to suggest, on what basis could it do so?

II. SATISFYING STRICT SCRUTINY THROUGH **RACE**-NEUTRAL MEANS

This Part defends a form of **race**-neutral affirmative action that should satisfy strict scrutiny. The proposed form is remedial in nature, encompassing governmental efforts to remedy racial discrimination, including **societal discrimination.** It attempts to address, in a **race**-neutral manner, the disadvantages that disproportionately impair the lives and opportunities of racial minorities. [81] For example, if racial minorities disproportionately fail to qualify for, or cannot afford, higher education because of economic hardship, then universities may provide need-based scholarships, not earmarked for racial minorities as were the scholarships invalidated in *Podberesky*. They also may give consideration in admissions to applicants based on socioeconomic background, provided equal consideration is given to white applicants from similarly disadvantaged circumstances. Legislatures may enhance the quality of public schools in response to the poor achievement levels of minority schoolchildren, provided that the improvements are administered on a **race**-neutral basis. And outside of the context of education, **race**-neutral affirmative action could entail governmental efforts to address the **race**-neutral factors that disproportionately cause racial minorities to be criminals and crime victims, to be poor, to be sick, and to die young. These programs represent "affirmative action" because of their remedial objectives: to remedy the effects of past discrimination, a principal justification for affirmative action. Such programs are "**race**-neutral" in the sense that they do not employ racial classifications or otherwise operate on the basis of **race.**

The greatest challenge for **race**-neutral affirmative action analyzed under strict scrutiny is establishing that remedying **societal discrimination** is a compelling interest, given that the

Court has rejected this claim in the context of racial classifications. This Part shall argue, however, that a deeper understanding of the dangers of express racial classifications, the functions of strict scrutiny, and **[*2352]** the Court's reasons for holding that remedying **societal discrimination** is insufficient to justify racial classifications suggests that remedying **societal discrimination** could satisfy strict scrutiny if **race**-neutral classifications are used instead. Section A lays the groundwork for this argument by examining the Court's concerns over racial classifications and the role of strict scrutiny in addressing these concerns. Racial classifications are not in fact intrinsically invalid but rather are deemed "suspect" because certain illegitimate racial purposes or beliefs are likely to have motivated their adoption. It is the illegitimate motivations, which include racial prejudice, stereotype, and "simple racial politics," that government may not act upon. Strict scrutiny serves to ensure that racial classifications were not in fact motivated by such illegitimate motives. If, and only if, a classification satisfies strict scrutiny is the Court sufficiently confident that the racial classification was adopted exclusively for legitimate reasons.

In addition to concerns over certain purposes, the Court has also identified certain effects of racial classifications that raise additional concerns under the Equal Protection Clause. These effects include the harm to white persons (or members of other nonbenefited minorities) [82] and the tendency of racial preferences to reinforce stereotypical thinking and to foster racial tensions. These potentially harmful effects of affirmative action policies further justify the application of strict scrutiny to such programs. In addition to guarding against the risk of illegitimate purposes, strict scrutiny serves to ensure that the harmful effects of discriminatory laws are outweighed by the interests they serve.

A close examination of strict scrutiny, moreover, suggests that its prongs are interdependent; the extent to which an interest is "compelling" depends on the nature of the means used to advance it. The more the means are racially restrictive or otherwise objectionable, the more compelling the government's interest must be to justify it. Conversely, the more **race**-neutral or otherwise unobjectionable the means, the less compelling the government's justificatory **[*2353]** interest must be. As the concluding discussion of Section A explains, the interdependence of interest and means follows logically from the functions served by strict scrutiny.

Section B argues that remedying **societal discrimination,** if tailored through **race**-neutral classifications, ought to withstand strict scrutiny analysis. The discussion assumes that such programs, if intended to benefit racial minorities, [83] would still have to satisfy strict scrutiny despite the absence of racial classifications. As discussed in the previous section, the purpose of benefiting racial minorities is arguably racially discriminatory under *Washington v. Davis* and *Croson*. However, when the justification for the discriminatory purpose is to remedy **societal discrimination, and race**-neutral means are used as operative criteria, **race**-neutral affirmative action should be upheld. The objective of remedying **societal discrimination** is sufficiently compelling, and the use of **race**-neutral means sufficiently unobjectionable, that the risks of illegitimate purposes and of harmful effects should be sufficiently minimized to satisfy judicial review.

These arguments, moreover, are not inconsistent with the Court's decided cases. Precedent rejecting **societal discrimination** as a basis for affirmative action has involved express racial classifications, and the Court's rejection of **societal discrimination** was based on its inadequacy as a justification for such **race**-operative remedies given the risks inherent in measures of that kind. The inadequacies of remedying **societal discrimination** as a justification for the use of racial classifications do not apply with equal force to the use of **race**-neutral means.

A. A CLOSER LOOK AT THE DANGERS OF RACIAL CLASSIFICATIONS AND THE FUNCTIONS OF STRICT SCRUTINY

Perhaps cognizant of the superficial implausibility of equating laws that purposely harm historically and politically disadvantaged groups with laws intended to undo such discrimination, [84] the Court in *Croson* and *Adarand* went to great lengths to explain the potential harms of benign racial classifications and how the application of strict scrutiny serves to minimize these harms while preserving, at least in theory, the availability of narrowly tailored remedial measures. This section first delineates the potential risks inherent in racial classifications that, according to the Court, justify subjecting all such classifications to strict scrutiny, and then considers how strict scrutiny functions to minimize these risks. Section B will argue that the risks posed by racial **[*2354]** classifications are sufficiently lacking in policies that use **race**-neutral means, and thus, strict scrutiny ought to tolerate such policies when designed to remedy **societal discrimination.**

1. Illegitimate Purposes, Discriminatory Means, and Expressive Harms

All racial classifications are inherently "suspect" and subject to strict scrutiny, the Court in *Croson* and *Adarand* explained, because the risk that such classifications have been motivated by illegitimate purposes or beliefs is too great to justify the judicial deference normally accorded legislative or executive policies. [85] Such illegitimate racial motivations, according to the Court, include "prejudice," "stereotypes," and "simple racial politics." [86] Strict scrutiny serves to guard against the risk that such illegitimate purposes or beliefs motivated a racial classification. Although the Court has not defined the exact nature of these illegitimate motivations, this section shall suggest some plausible accounts consistent with decided cases.

Beginning with "racial prejudice," such motivations surely include the kinds of invidious racist beliefs most clearly falling within the core proscription of the Equal Protection Clause, such as racial animosity or a belief in the inferiority of a particular **race.** [87] Racial classifications may reflect such prejudice, especially those that disadvantage racial minorities, because they quite plausibly advance the purpose of harming racial minorities out of animosity or white supremacy. Indeed, given the economically and politically disadvantaged position of racial minorities as a group, it is difficult to conceive of a legitimate reason to adopt a racial classification for the purpose of disadvantaging them further. Turning to benign racial classifications, those that grant preferential treatment to racial minorities, a risk of prejudice is less obvious. Many have argued against application of strict scrutiny to such classifications on the ground that the good intentions they reflect belie the risk of an impermissible purpose--that a "welcome mat" can be distinguished from a "'No Trespassing' sign" [88] -- without **[*2355]** resort to strict scrutiny. The Court in *Croson* and *Adarand* nonetheless expressed the concern that even benign classifications present an intolerably high risk of illegitimate purposes. [89] Given the historical abuse of **race,** ostensibly benign racial classifications may nonetheless reflect an illegitimate purpose designed to appear benign. Consider, for instance, how a legislature motivated to discredit racial minorities might adopt a "benign" classification in order to provide opportunities for minorities to fail. A benign racial classification may also reflect a form of reverse discrimination through which the concerns of whites burdened by a law are undervalued out of a belief that whites deserve to be punished for the discrimination they or their group have committed or tolerated.

Beyond such prejudice rooted in racial animosity or supremacy, the Court has also condemned the use of racial "stereotypes" to justify government action. By stereotypes, the Court seems to have in mind generalizations about a person or group of people based on their **race.** Such generalizations may include not only invidious assumptions about inferior intelligence or moral character, but even assumptions not necessarily irrational or condemned by most members of the group, for example, the assumption that **race** correlates to experience, perspective, or interests. The Court has therefore rejected the use of **race** as a proxy for juror perspective or voter interest as reflecting "the very stereotype the law condemns," and a majority of the Court appears to believe that positing a connection between race and diversity in the media broadcasting context is a demeaning stereotype. [90]

The reasons for the Court's resistance to the use of racial stereotypes or proxies are not entirely clear. One concern might be that such stereotypes are demeaning in the characteristics they correlate to **race** and that such generalizations are often or usually false. Moreover, even fairly accurate, empirically justified stereotypes will often be so only because of past discrimination and acting upon them in some sense perpetuates that discrimination. In any event, the Court increasingly takes the normative position that **race** is irrelevant and unrelated, even statistically, to *any* other characteristics, and that government policies ought not act upon any assumptions to the contrary. As Professor Michael Klarman observes, the Court seems to be moving toward a "relevance" theory of equal protection, which holds that "certain characteristics, of which **race** is the prototype, should be simply irrelevant to all, or almost all, governmental decisionmaking." [91]

[*2356] The Court's normative vision that **race** is irrelevant, or at least should be treated as such by government, seems to underlie a further concern of the Court over the use of racial classifications, namely, "racial politics." In addition to guarding against illegitimate racial prejudice and stereotypes, the Court in *Croson* justified the use of strict scrutiny to ensure that a law was not motivated by "simple racial politics." [92] Although the Court does not explain what it means by simple racial politics, the concern seems to be over the enactment of **race**-based laws simply to appease a racial group instead of laws designed to promote a "genuine public interest." [93] Permeating the Court's plurality opinion in *Croson* were suggestions that the **race**-based set-aside was enacted because blacks had gained sufficient political strength on the city council and were determined to do something for blacks simply because they could. [94] As Professor David Strauss suggests in explaining the Court's aversion to affirmative action plans, "What the Court is concerned about is the risk that affirmative action plans will be enacted simply because groups that favor them have gained sufficient power." [95]

Given the Court's concerns over what it views as illegitimate stereotypes and simple racial politics, its claim that benign racial classifications might reflect illegitimate purposes makes some sense. Such classifications may reflect the paternalistic assumption that racial minorities are inherently disabled and deserve special accommodation for their innate shortcomings. Stereotypical thinking or simple racial politics might, for example, motivate a legislature to adopt racial preferences in jury selection to ensure the presence of a "distinct" perspective, or to draw electoral district lines predominantly on the basis of **race** on the assumption that people, by the fact of shared **race** alone, "think alike, share the same political interests, and will prefer the same candidates at the polls." [96] In the context of higher education, benign racial classifications may reflect the potentially inaccurate and patronizing assumption that racial minorities, because of their **race,** cannot meet traditional admission standards or have a "minority" perspective to contribute to classroom discussion. Accordingly, as the breadth of the Court's concerns over racially motivated thinking suggests, all racial classifications might serve illegitimate purposes, and all such classifications are therefore suspect.

In addition to the risk that illegitimate purposes may underlie racial classifications, the Court in *Croson* and *Adarand* expressed concern over racial classifications--as means--because of the harmful effects such means have both in the **[*2357]** immediate impact of their operation and in their consequences for society at large. Such effects include that racial classifications, in their operation, involve discrimination against innocent individuals on the basis of their **race,** and they may have the further effect of reinforcing racial stereotypes and exacerbating racial tensions. These operative or consequential harms posed by even benign racial classifications seem to further justify, in the Court's judgment, the application of strict scrutiny to such classifications.

First, the Court in the affirmative action cases has repeatedly criticized the use of racial classifications because of the injury they cause by their operation. Racial classifications and other **race**-operative laws require those charged with their administration to identify people

by their **race** and to award or deny benefits based on these determinations. Regardless of the reason behind adoption of a racial classification, its implementation involves racial discrimination against individuals who bear little or no direct responsibility for the condition of racial minorities. Even when the purpose behind a racial classification is truly remedial, by discriminating against innocent third parties, such remedies inflict the same kinds of wounds they are intended to heal. As the Court explained in *Adarand*, "whenever the government treats any person unequally because of his or her **race,** that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." [97] As such, even presuming good faith on the part of those adopting racial classifications, equal protection concerns over racially discriminatory treatment counsel against such means.

In addition to the immediate harms of racial classifications, the Court has identified certain consequential "expressive harms" threatened by such classifications, which are independent of the motives for adopting them. These include the potential of racial classifications to perpetuate racial stereotypes and exacerbate racial hostility. Consider the perpetuation of stereotypes. [98] Benign racial classifications, by their terms and operation, award benefits to racial minorities on the basis of their **race** and, by implication, deny opportunities to whites on the basis of their **race.** The stereotypical assumption potentially expressed by the classification is that all or most racial minorities are inferior or otherwise disadvantaged on the basis of their **race** itself, not necessarily because of some underlying disadvantage that correlates to **race.** With respect to whites, such classifications potentially send the message that whites, no matter what tangible difficulties many face, are necessarily privileged. Blacks are presumed disadvantaged to the point of deserving preferential treatment regardless of how privileged **[*2358]** individual black beneficiaries may be, and whites are presumed advantaged regardless of the difficult circumstances many endure. Such over- and under-inclusive generalizations about blacks and whites that posit a direct relationship between **race** and advantage or disadvantage represent the kinds of "stereotypes" the Court condemns. By expressing this message, intentionally or not, racial classifications may cause or reinforce stereotypical thinking, which in turn leads people to treat others based on stereotypical beliefs, and furthers us from the day when **race** no longer matters.

In addition to the perpetuation of stereotypes, racial classifications have a tendency to exacerbate or inflame racial hostility. [99] Much of what causes resentment along racial lines is the way in which **race**-operative affirmative action appears to give preferential treatment to those who do not deserve it, relatively privileged racial minorities, and denies opportunities to materially disadvantaged persons, such as poor whites. [100] Again, these concerns are present even if the adoption of the classification was well-intentioned. Whites who are disadvantaged by a racial classification might well accept or even endorse the remedial purpose behind the classification, yet still resent that relatively privileged minorities not in need of a remedy can take advantage of the remedial program, while more disadvantaged whites are harmed by it. Such resentment will understandably focus on **race** when that is the basis upon which some racial minorities gain a windfall and some already struggling whites are disadvantaged further.

In sum, racial classifications do not themselves violate the Equal Protection **[*2359]** Clause (or the equal protection component of the Fifth Amendment), [101] but certain **race**-conscious purposes or beliefs do. Such illegitimate racial motivations include prejudice, stereotypes, and simple racial politics or, more generally, the premise that **race** is a meaningful distinction between people and groups. A law motivated by such purposes is invalid. Racial classifications, although potentially valid, are presumed invalid because they carry a great risk of having been supported by illegitimate purposes. Moreover, in addition to a concern over certain legislative purposes, the Equal Protection Clause is implicated by racial classifications as means because of the harmful effects such means threaten, both in their immediate impact and in their consequential harms to society. Racial classifications, even benign, cause largely innocent individuals to be discriminated against on the basis of their

race, reinforce racial stereotypes, and exacerbate racial tensions.

Given the breadth of the Court's concerns over racial classifications, one might have expected it simply to ban them entirely. However, rather than adopt an absolute rule against racial classifications, as some Justices advocate, the Court purports to permit the use of racial classifications if they satisfy strict scrutiny, which, we are assured, is not necessarily fatal. The Court therefore appears to believe that strict scrutiny is a sufficient obstacle to the pursuit of illegitimate purposes and check against the infliction of unduly injurious effects, but also preserves the availability of racial classifications for truly compelling reasons. The following subsection explores how strict scrutiny might perform these screening functions. The subsequent section will consider whether **race**-neutral affirmative action can survive similar scrutiny.

2. Functions of Strict Scrutiny: "Smoking Out" Illegitimate Purposes, and Cost-Benefit Balancing

Once the Court's concerns over certain illegitimate legislative motivations have been identified, one function of strict scrutiny can be understood. According to the Court, strict scrutiny serves to insure against the risk that a racial classification was motivated by an impermissible racial purpose. Thus, while conceding the possibility of a "benign" motivation for a racial classification, the Court in *Croson* explained that it is only through the application of strict scrutiny that a court can discern the actual purpose behind such a classification:

> Absent searching judicial inquiry into the justification for such **race**-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the **[*2360]** purpose of strict scrutiny is to "smoke out" illegitimate uses of **race** by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. [102]

This "smoke out" function of strict scrutiny has been explained by Professor John Hart Ely. [103] According to Ely, the different levels of judicial scrutiny, from strict to rational basis, can all be understood to guard against the use of illegitimate discriminatory purposes. This function assumes that the means or classifications adopted by a legislature reflect the purposes behind them--in other words, that legislatures generally employ means that advance their objectives. The less a classification advances permissible purposes, the greater is the risk that the classification was adopted to pursue an alternative illegitimate purpose. A comparison of ends and means thus provides a basis for inferring the actual purposes behind a law.

The level of scrutiny applied to particular kinds of classifications depends on the risk, in the Court's view, that such classifications were enacted for improper purposes. Out of institutional respect for legislative autonomy and competence, the Court applies a deferential "rational basis" level of scrutiny to all classifications other than those deemed "suspect" or "quasi-suspect," such as **race** or sex. Under this level of scrutiny, the Court presumes the legislature is pursuing legitimate purposes if the means used rationally advance some legitimate purposes, even if other means might achieve such purposes more effectively. The Court's presumption of legislative good faith is overcome only if the fit between classification and end is so attenuated, that is, where no conceivable legitimate purpose is advanced by the classification, that an inference of an alternative impermissible motivation is inescapable. This deferential posture usually results in judicial "rubber stamping" of nonsuspect

classifications.

With racial classifications, in contrast, the risk that illegitimate purposes motivated a law is significantly higher and the level of scrutiny is correspondingly greater. **Race** is a "suspect" classification because its historical abuse by legislatures as a tool to oppress racial minorities out of animus and a belief in their inferiority has been so pervasive that the risk of such illegitimate purposes is too great to justify judicial deference. Even benign racial classifications, given the Court's concerns over racial stereotypes and simple racial politics, require application of strict scrutiny since these illegitimate purposes are plausibly served even by benign classifications and application of a less rigorous **[*2361]** standard of review may leave such purposes undetected. The Court's insistence that **race** is generally irrelevant further undermines the likelihood that a governmental actor pursuing legitimate ends would use a racial classification. For racial classifications, therefore, the Court requires a close fit between classification and a weighty purpose before the risk of illegitimate purposes is deemed acceptably low.

Another role for strict scrutiny, in addition to that of "smoking out" illegitimate purposes, seems also to have emerged from the Court's concerns over the *effects* of racial classifications. Strict scrutiny serves to ensure that the potentially harmful effects of racial classifications are outweighed by the interests they serve. [104] Such a "cost-benefit justificatory test," as Professor Jed Rubenfeld characterizes it, "would serve to determine whether a law that causes acknowledged constitutional harms is justified by sufficiently important benefits that a less constitutionally costly ('better tailored' or 'less restrictive') law could not have achieved." [105] Although highly critical of this use of strict scrutiny, Rubenfeld argues that it provides a more plausible explanation for the Court's reaction to benign racial classifications than does the alternative claim that such classifications carry a serious risk of illegitimate motivation. "Recast this way, strict scrutiny for **race** classifications would appear to make sense after all. All **race** classifications would properly demand strict scrutiny, because all such classifications, regardless of their purpose, would be deemed a constitutional evil that could not stand in the absence of compelling justification." [106] Strict scrutiny thus appears to serve two functions: guarding against, or "smoking out" illegitimate racial purposes, and ensuring that potentially harmful effects of government-sponsored racial classifications are outweighed by the necessity of their use.

Regardless of which concerns--purposes or effects--influence the Court or individual Justices more in any given case, the factors that have informed the application of strict scrutiny across a range of cases are generally consistent with both theories of strict scrutiny's function. The kinds of interests the Court has and has not found compelling and the factors the Court has identified as part of proper tailoring are consistent with an effort to prevent illegitimate purposes and to minimize harmful effects. Consider what interests have been recognized as compelling: remedying identified discrimination by government or by private actors within the government's jurisdiction. Such interests are so important and so inconsistent with illegitimate racial attitudes that a law appearing to serve them is unlikely to be motivated instead by racial prejudice or stereotype. Similarly, the importance of such interests plausibly outweighs the potentially harmful effects that a racial classification might have on innocent victims and **[*2362]** society. These conclusions are strengthened further when the basis for the remedial action, the evidence of identified discrimination, is strong and particularized. Such a basis gives further credibility to the state actor's claim that remedying discrimination was its actual motivation and to the conclusion that the need to remedy discrimination is sufficient to justify the potentially harmful effects of a **race**-based remedy.

The requirement of tailoring the means to the justificatory interests further supports the functions of strict scrutiny. Minimizing the risk of illegitimate purposes by constraining the government to the pursuit of compelling interests would be undermined if the government could use means that hardly serve those interests, and which may in fact serve illegitimate

interests. Moreover, the costs of racial classifications are unlikely to be outweighed by the interests served if the means used do not serve the compelling interests well. Accordingly, the Court prefers remedial plans that benefit only those racial minorities who are likely victims of discrimination without benefiting those who are not and without unnecessarily burdening innocent whites or members of other nonpreferred racial groups.

Consider also the Court's preference for remedial plans that operate with minimal reliance on **race.** Rigid racial quotas are strongly disfavored; **race**-as-a-factor preferences that are temporary, flexible, and rebuttable receive greater tolerance, and the use of **race**-neutral means is most favored. With respect to the functions of strict scrutiny, the Court might plausibly conclude that the potentially stigmatizing and balkanizing effects of granting or denying benefits to individuals simply to fill predetermined racial slots is unlikely to be outweighed by the remedial interests served, at least not where those interests could be served by less racially restrictive means. A state actor who is sincerely interested in remedial goals, and who generally rejects the relevance of **race,** would likely be unwilling to endorse a policy that uses **race** in a blunt fashion whereas, in contrast, a state actor who holds stereotypical assumptions about **race** or is captured by "simple racial politics" would likely be less concerned by a policy that places heavy reliance on **race** at the expense of nonpreferred racial groups.

A further aspect of strict scrutiny that should be recognized is that the "prongs" of the analysis--what interests are "compelling" and what means are "narrowly tailored"--are interdependent concepts. That is, what constitutes a compelling interest varies depending on the nature of the means used to advance the interest. The more restrictive the means, including the more the means operate according to **race,** the more compelling the justifying interest must be and, conversely, the less compelling the justificatory interest, the less racially restrictive the means must be to count as sufficiently tailored. Consider, for example, the most restrictive **race**-based means possible--a racial quota. From ***Bakke*** to *Croson*, such remedies have generally been rejected as too restrictive even to advance a compelling interest. Yet, in *United States v. Paradise*, the Court upheld under strict scrutiny a court-ordered affirmative action plan involving a requirement that fifty percent of officers hired must be **[*2363]** black until a certain percentage in the department was reached. [107] In upholding such a stark racial quota, the Court emphasized the egregiousness of the department's discriminatory practices, which made the interest in remedying the discrimination particularly compelling. [108] Notice also that the hiring quota upheld benefited many blacks who were not necessarily the victims of the department's past discrimination. There was no requirement that only such victims be hired under the plan, and many innocent white victims, those white applicants who were not hired only because of the quota and who presumably had not been party to the department's discrimination, were probably harmed. Thus, what is generally considered an inadequately tailored means, a rigid racial quota that over- and under-includes true victims and perpetrators of the discrimination, is sufficiently tailored when the justification is particularly compelling.

In contrast, where acts of discrimination were less egregious, the Court has required less restrictive, less **race**-based means to satisfy strict scrutiny. In ***Bakke***, for example, which did not involve allegations of discrimination by the medical school itself, those Justices who found the quota at issue too restrictive seemed prepared to uphold "softer" **race**-based remedies. Justice Powell endorsed a **race**-as-a-factor approach while Justice Stevens, who wrote for the wing of Justices completely against any racial preferences in admissions, nonetheless seemed to approve of racially preferential recruitment policies. [109] Notice finally that the strict scrutiny test itself favors **race**-neutral remedies, the softest means possible, and will generally invalidate a plan that operates on the basis of **race if race**-neutral alternatives are available.

This interdependence between means and interests follows from the functions of strict scrutiny reviewed above. With respect to strict scrutiny's "smoke out" function, the more an

ostensibly remedial program discriminates against innocent whites directly on the basis of their **race** or benefits minorities who may not have suffered from discrimination, the more likely the racial preference reflects paternalistic stereotypes or simple racial politics. A sincerely remedially minded legislature, however, might resort to such a suspect remedy if the interest in remedying discrimination is acute and the evidence of the need particularly strong. Where the evidence of discrimination is weaker, in contrast, a legislature **[*2364]** properly averse to racial sorting should prefer policies that operate with less or no sensitivity to **race.** Similarly, with respect to strict scrutiny's concern over effects, the more egregious the discrimination sought to be remedied, the more likely a remedy that relies heavily on **race**-based means would outweigh the potential costs, whereas a remedy for less substantial or less identifiable instances of discrimination might not outweigh the costs unless it relies on minimally restrictive or **race**-neutral means.

B. REMEDYING **SOCIETAL DISCRIMINATION** AS SUFFICIENTLY COMPELLING WHEN TAILORED THROUGH **RACE**-NEUTRAL MEANS

This section argues that **race**-neutral affirmative action can satisfy strict scrutiny based on the justification of remedying societal racial discrimination. Contrary to widely held assumptions, the Court has not precluded the remedying of **societal discrimination** from ever qualifying as a compelling interest for strict scrutiny purposes. Rather, the Court has rejected this interest as insufficiently compelling to support racial classifications. In doing so, the Court has repeatedly emphasized the **race**-operative nature of the remedies at issue and the inability of **societal discrimination** to define and constrain the scope of such remedies. **Race**-neutral classifications, in contrast, are substantially less objectionable. The need to constrain their scope is, therefore, less imperative. Recall also the interdependence of the interest and means prongs of strict scrutiny. The preferable character of **race**-neutral policies from an equal protection standpoint suggests that remedying **societal discrimination** may be sufficiently compelling to justify such policies, even if insufficient to justify **race**-operative remedies. Accordingly, the Court could endorse as compelling, without violating existing doctrine, the remedying of **societal discrimination** when offered to justify policies that rely exclusively on **race**-neutral criteria.

Before exploring these arguments, it should first be explained why the goal of promoting racial diversity for nonremedial purposes would probably *fail* strict scrutiny. The Court today is unlikely to uphold policies designed to create racial diversity, whether through racial preferences or **race**-neutral means. First, to pursue racial diversity as an end in itself would represent racial discrimination "for its own sake," a rationale the Court would likely reject as illegitimate racial balancing. [110] Nor could racial diversity be pursued as a means or proxy **[*2365]** for other characteristics such as "experiences, outlooks, and ideas." [111] The problem here is not whether intellectual or experiential diversity in a general sense is compelling or not. Such diversity in an academic setting is plainly important and possibly compelling. The problem is in positing a connection between intellectual diversity and racial diversity. The Court's aversion to **race** essentialism and stereotypes reflected in recent affirmative action, jury selection, and electoral districting cases suggests it would reject as stereotypical and, therefore, illegitimate, the assumption that racial diversity correlates to intellectual diversity, whether or not that assumption is realistic. A governmental policy premised on illegitimate stereotypical racial beliefs would be invalid per se.

In contrast, the doctrine leaves room for the Court to uphold the objective of remedying **societal discrimination,** provided it is pursued through **race**-neutral means. This section shall first explain more fully what is meant by **societal discrimination** and what conditions reflect its effects. Then it will present the argument that remedying those effects through **race**-neutral means is a sufficiently compelling interest and is tailored to satisfy strict scrutiny.

"**Societal discrimination**" includes the widespread racial discrimination suffered by racial

minorities in this country, particularly blacks, from slavery, through segregation, until and including racial discrimination by private and public actors occurring today. The effects of such discrimination are evident in the stark disparities that persist between racial groups, particularly blacks and whites, with respect to significant indicators of social and economic well-being. For example, although only 12.6% of Americans, or one out of eight, are black, [112] more than half of the men in prison are black. [113] The average economic status of blacks is significantly worse than whites. [114] Although **[*2366]** whites outnumber blacks almost six to one overall, [115] there are more blacks than whites on welfare. [116] In the education context, from elementary to graduate school, the achievement of blacks and Hispanics consistently falls far below that of whites and Asian-Americans. [117] With respect to health, blacks live an average of seven years less than whites, [118] and of that life, blacks enjoy eight fewer years of "reasonably good health" than do whites. [119] Black infants die at two and a half times the rate of white infants, [120] and those that live are placed in foster care at a much higher rate than white children. [121] Blacks are more likely to suffer or die from serious diseases such as cancer, [122] **[*2367]** diabetes, [123] asthma, [124] and AIDS. [125] In sum, as Professor Alexander Aleinikoff observes:

> In almost every important category, blacks as a group are worse off than whites. Compared to whites, blacks have higher rates of unemployment, lower family incomes, lower life expectancy, higher rates of infant mortality, higher rates of crime victimization, and higher rates of teenage pregnancies and single-parent households. Blacks are less likely to go to college, and those who matriculate are less likely to graduate. Blacks are underrepresented in the professions, in the academy, and in the national government. [126]

The question presented by the Court's affirmative action jurisprudence is whether governmental efforts to remedy such conditions or other effects of **societal discrimination** can satisfy strict scrutiny if achieved through raceneutral means. Such efforts are at least legitimate. If our society is truly committed to racial equality, it is difficult to imagine a more genuine and important public interest than helping those members of our national community who were officially and pervasively denied their constitutional rights for so long or who have inherited impoverished conditions from such discrimination. To satisfy strict scrutiny, however, remedying **societal discrimination** must be more than legitimate and important. It must rise to the level of *compelling*. The Court has not thus far clearly delineated what interests are compelling and what interests are not, but it has specifically recognized the remedying of "identified" discrimination as such an interest. [127] The question then is whether remedying **societal discrimination** is an interest of comparable weight to that of remedying identified discrimination. A comparison of the two interests suggests that it is.

Consider the kinds of identified discrimination the Court has deemed compelling. The Court in *Croson* endorsed as compelling the city of Richmond's interest in remedying identified discrimination, past or present, by both the city itself, directly or as a "passive participant," and by private actors within the **[*2368]** city's jurisdiction. [128] The Court also made clear that the government retains the authority to remedy and punish private acts of discrimination that violate civil rights statutes. [129] The Court thus accepts as compelling the remedying of discrimination by governmental or private actors, past or present, provided the discrimination is identified with sufficient particularity. Notice, moreover, that the kind of discrimination that counts as compelling need not itself rise to the level of a constitutional violation. Distinguishing statements made by a plurality in *Wygant*, the Court in *Croson* clarified that a governmental actor may have a compelling interest in remedying more than just its own discrimination if it is acting within its legislatively authorized jurisdiction. [130] Remedying private discrimination, which by definition is not of constitutional status, can thus be compelling. Notice further that the Court did not require that specific victims or perpetrators necessarily be identified for "identified" discrimination to be established. The

Court only required that the city have a "strong basis in evidence" of a prima facie showing of discrimination in the local construction industry. [131] The evidence, that is, need not be sufficiently particularized to establish legal liability on the part of any discriminators.

Now consider the government's interest in remedying **societal discrimination,** the effects of the widespread discrimination that persisted in this society for much of our history, where the acts of discrimination and the particular perpetrators and victims thereof cannot be identified today with adequate specificity. The kinds of discrimination are essentially the same as those involved in identified discrimination--acts of racial discrimination by public and private actors. Indeed, **societal discrimination** is arguably worse as its effects represent the cumulative results of countless acts of discrimination so pervasive and enduring that its effects persist today. [132] The principal difference between societal and identified discrimination lies in our ability to pinpoint the time, place, and actors involved. It is difficult to see why this difference makes the acts of identified discrimination any worse or our interest any greater in **[*2369]** remedying its effects. The identification of discrimination with particularity may have emotional appeal, much like the display of war refugees on television increases public sympathy, but seeing it hardly makes the acts of discrimination any more egregious or the victims' harm any more deserving of our compassion. The desire or interest on the part of government to remedy or "undo" the effects of **societal discrimination** would thus seem to be comparable in importance to that of remedying identified discrimination by both public and private discriminators. Just as remedying identified discrimination is compelling, remedying **societal discrimination** should be as well.

A likely objection to the argument thus far is that it conflicts with existing doctrine. Despite the importance of remedying **societal discrimination,** the Court already seems to have rejected this interest as not compelling and, therefore, insufficient to satisfy strict scrutiny. [133] Indeed, some commentators apparently believe that the Court has rejected remedying **societal discrimination** as an entirely impermissible government interest. [134] Accordingly, whether illegitimate or merely noncompelling, remedying **societal discrimination** simply cannot satisfy the interest prong of strict scrutiny, at least under the existing case law, which the present Court seems unlikely to expand in favor of affirmative action. Any expectation of persuading the Court to uphold raceneutral affirmative action based on remedying **societal discrimination** would thus seem implausible for the foreseeable future.

Contrary to this objection, the Court has never suggested that remedying **societal discrimination** is an illegitimate purpose and, indeed, the Court seems to take care not to dismiss this interest as unjustified or unimportant. [135] Nor has the Court thus far held that this interest is insufficiently compelling to justify any remedial efforts. Rather, the Court has rejected this interest as an insufficient justification for remedial programs *that use racial classifications*. Beginning with ***Bakke***, Justice Powell rejected the remedying of **societal discrimination** as a justification for a **race**-based admission program, not on the ground that such a purpose was itself impermissible, but because it was too unfocused and "amorphous" to justify the use of a racial classification. [136] Similarly, a plurality **[*2370]** in *Wygant* subsequently explained that "**societal discrimination,** without more, is too amorphous a basis for imposing a racially classified remedy," [137] and that "this Court never has held that **societal discrimination** alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." [138] The plurality continued: "No one doubts that there has been serious racial discrimination in this country . . . but as the basis for imposing discriminatory legal remedies that work against innocent people, **societal discrimination** is insufficient and over expansive." [139]

And the majority in *Croson*, while expressing regret over the evident effects of **societal discrimination,** concluded that such a basis was insufficient to justify the extraordinary

nature of the **race**-based set-aside:

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify *a rigid racial quota* in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify *the use of an unyielding racial quota*.
>
> . . . .
>
> . . . To accept Richmond's claim that past **societal discrimination** alone can serve as the basis *for rigid racial preferences* would be to open the door to competing claims for "remedial relief" for every disadvantaged group. . . . Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to *preferential classifications*. [140]

The Court thus has not held that remedying **societal discrimination** is itself an illegitimate purpose or that it cannot support remedial relief of any form. The Court has instead emphasized the insufficiency of this remedial purpose based upon the nature of the means it is employed to justify--a racial classification or other **race**-operative remedy. Herein lies the real difference between remedying identified and **societal discrimination** for constitutional purposes: the insufficiency of the latter interest to define and thereby limit the scope of a **race**-operative remedy. Identified discrimination enables a governmental entity to **[*2371]** limit its reliance on **race** to the extent minimally necessary to remedy the effects so identified. **Societal discrimination,** in contrast, provides less guidance as to who suffers its effects, who is most responsible for them, and when, if ever, it has been remedied. It is, in the Court's view, too "amorphous" and, as such, "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." [141] Accordingly, remedying **societal discrimination** cannot justify racial classifications analyzed under strict scrutiny, not because such an interest is insufficiently important, but because it is too ill-defined to constrain the use of **race**-based remedies.

Remedying **societal discrimination** should, however, be accepted as sufficiently compelling to pursue through **race**-neutral means. The Court's concerns over racial classifications that underlie its rejection of **societal discrimination** as a sufficient justification largely disappear when **race**-neutral means are employed instead. A comparison of **race**-neutral and **race**-operative classifications reveals that **race**-neutral affirmative action is substantially less likely to reflect stereotypical, illegitimate motivations, or to have harmful effects. The discussion shall first compare the use of **race**-neutral means to racial classifications with respect to the risk of harmful effects, and then will compare the two types of means as they bear on the risk of illegitimate purposes.

Regarding effects, **race**-neutral affirmative action avoids inflicting the immediate injury caused by programs administered on the basis of racial classifications. It is also less likely to exacerbate those **race**-related social problems identified by the Court, such as the perpetuation of stereotypes, inflaming racial hostility and, in general, delaying the day that **race** no longer has significance in American life. First, in terms of their immediate effect, the means used by **race**-neutral affirmative action, such as disadvantage-based classifications, are unobjectionable in the way they are administered. While racial classifications require those charged with their administration to identify and treat individuals differently on the basis of their **race**, and in so doing inflict "an injury that falls squarely within the language

and spirit of the Constitution's guarantee of equal protection," [142] **race**-neutral classifications can be executed without racial discrimination.

Nor are **race**-neutral programs that classify on the basis of disadvantage likely to perpetuate the kind of stereotypical thinking with which the Court seems so concerned. Recall how racial classifications, by awarding benefits and burdens along racial lines, reinforce beliefs in the inferiority of racial minorities, who are treated as disadvantaged because of their **race,** and in the superiority of whites, who are treated as too privileged to deserve a compensatory preference. By contrast, **race**-neutral classifications based on disadvantage send a meaningfully different message. By their terms and operation, they award a preference to individuals who have been identified as suffering from a tangible disadvantage **[*2372]** and deny such a preference to those not suffering from that disadvantage, and they do so on a basis open to all regardless of **race.** Such programs send the realistic message that people who suffer from material or other tangible disadvantages are, indeed, disadvantaged.

To the extent that **race**-neutral classifications have a *racial* message, it is that blacks and whites who suffer from similar disadvantages share a common condition, while whites and blacks who do not suffer such disadvantages share a relative privilege. **Race** is not, by the terms of the classification, a common denominator. Rather, the classification finds commonalities between members of different (and the same) **races** and finds differences between persons of the same (and different) **races.** The classification, in other words, by its very silence on **race,** sends the message that "**race** does not matter," a normative proposition that the Court and opponents of racial preferences purport to embrace.

Race-neutral classifications are also less likely than **race**-operative classifications to cause racial divisiveness or resentment. As discussed earlier, much of the resentment over **race**-operative affirmative action stems from the way in which this kind of action both appears to give preferential treatment to some privileged racial minorities who do not deserve it and denies opportunities to disadvantaged white persons in need of help. **Race**-neutral affirmative action resolves both of these objections. Blacks who do not suffer from the identified disadvantage receive no benefit, and whites who do so suffer are benefited. The winners are disadvantaged blacks and whites, and the losers are advantaged blacks and whites. Such "losers" are unlikely to complain too loudly that those with less are being helped. Any resentment is at least unlikely to be as deeply held and racially defined as that fostered by racial preferences.

The salutary effects of **race**-neutral affirmative action can be seen in three other respects as well. First, a substantial number of white people would benefit from **race**-neutral, disadvantaged-based programs, likely reducing the risk of white resentment engendered by minority-exclusive preferences. Among the poor, although a disproportionate share are racial minorities as compared to the percentage of whites so disadvantaged, there are at least as many whites as minorities in actual numbers. A program designed to benefit the poor, therefore, would benefit as many whites as minorities. When one moves up the economic ladder to the lower middle class, a substantial majority of this class is white. That is why, especially in the context of higher education, the majority of those benefited by disadvantage-based programs are likely to be white. [143] While the ineffectiveness of such an approach in creating racial diversity has led some to criticize **race**-neutral affirmative action, [144] the fact that the beneficiaries of such **[*2373]** efforts will include so many whites should soften concerns that the interests of whites were unfairly ignored in designing the program. The ineffectiveness of **race**-neutral classifications at benefiting only or mainly racial minorities may thus be a virtue from a constitutional standpoint.

Indeed, if one considers only the beneficiaries outside the target group of actual victims of discrimination, **race**-neutral affirmative action probably does not benefit minorities even in proportional terms, and not just in actual numbers. Since affirmative action is problematic only to the extent it fails to benefit or "fit" only true victims of discrimination, it seems

legitimate to inquire how nonvictims of discrimination are actually affected. If we assume that, absent discrimination, the **races** would be represented in rough (not "lockstep") proportion among the disadvantaged, then disadvantage-based programs disproportionately benefit racial minorities because of discrimination. It follows that the disproportionate number of minorities compared to whites that benefit from disadvantage-based programs roughly represents the number of actual victims of discrimination. The remaining disadvantaged persons that benefit from disadvantage-based programs--those who are not disadvantaged because of discrimination--should include a roughly proportional percentage of different **races,** including whites. Accordingly, among the "undeserving" beneficiaries of a **race**-neutral disadvantage-based program, a proportional share is white. Thus, to the extent that **race**-neutral affirmative action "misses" discrimination victims, and instead benefits people who are not disadvantaged from discrimination, it does not favor racial minorities after all.

Second, as compared with racial preferences, there is little reason to be concerned about the length of time a **race**-neutral program remains in effect. Racial preferences that cause discrimination against whites are, at best, regrettable and few observers would want to see them continue indefinitely. Moreover, as racial preferences succeed in their purpose, they become more unfair in a racial sense. That is, as racial minorities become less disadvantaged compared to whites, fewer minorities who benefit from racial preferences will truly need or deserve it. Recall that these concerns seem to underlie the Court's rejection **[*2374]** of **societal discrimination** as a justification for racial preferences because it "provides no logical stopping point." [145] The need to make **race**-neutral affirmative action temporary, by contrast, is less obvious. Not only do such programs avoid racially discriminatory treatment in their administration, but also as they succeed in remedying the effects of **societal discrimination,** their racially disparate impact should decline. That is, if **race**-neutral affirmative action succeeds in reducing racial disparities, then the (arguably) disparate impact of such programs in favor of racial minorities will be reduced. While initially conceived as an effort to remedy racial discrimination, **race**-neutral affirmative action programs could be retained indefinitely as legitimate programs that help disadvantaged persons without regard to **race.**

Third, **race**-neutral classifications avoid the necessity of choosing which racial groups to include in a preferential program, which groups not to include, and how to define such groups. With racial classifications, a choice of which racial groups to prefer is required, a choice that may appear arbitrary or unjustified for some groups compared to others that may have experienced more severe discrimination. Indeed, even the process of defining racial groups and deciding which are more "deserving" than others has a certain unseemliness. Moreover, such potentially offensive racial sorting might have to be repeated on a regular basis as changes occur in the relative status of different racial groups. [146] **Race**-neutral classifications, by contrast, largely avoid these pitfalls. Because people receive benefits on the basis of disadvantage, anyone so disadvantaged is eligible, regardless of **race,** avoiding the need to choose, define, or categorize people by **race.** To the extent that different racial groups have suffered discrimination or are otherwise disadvantaged to different degrees, disadvantage-based preferences provide a sort of "rough justice" without racial sorting. Nor would *re*-sorting be required because, first, racial sorting is not involved at the outset and, second, any changes in the relative positions of racial groups would be automatically captured by the disadvantage-based preference. If some groups were to become more or less privileged compared to others, they would benefit proportionately less or more by need-based programs.

[*2375] The effects of **race**-neutral affirmative action, both immediately and consequentially, are thus substantially less objectionable than racial classifications with respect to the Court's concerns. **Race**-neutral classifications are significantly less likely than racial classifications to perpetuate racial stereotypes or racial hostility and, by their very terms, encourage the transformation of **race**-based thinking to an approach based on more

tangible **race**-neutral conditions shared or not shared by people regardless of **race.** Thus, to the extent the Court seems to have placed constitutional significance on the effects affirmative action may have in perpetuating and exacerbating **race**-conscious attitudes, **race**-neutral remedial programs are significantly less likely to foster--and may instead help to diminish--the relevance of **race.**

Next, consider the risk of illegitimate motivations with which strict scrutiny is also concerned. Here, too, **race**-neutral classifications are substantially less troublesome than **race**-based classifications. By classifying on the basis of tangible disadvantage and not **race, race**-neutral remedial policies are less likely than racial classifications to stem from illegitimate racial purposes or beliefs. Recall that one function of strict scrutiny is to "smoke out" illegitimate purposes by constraining the legislature to means that only serve compelling interests, thereby leaving little room for active pursuit of impermissible goals. [147] The risk is significant that illegitimate purposes, such as prejudice, stereotypes, and simple racial politics, motivated racial classifications because such classifications plausibly serve these purposes. That is, many of the immediate and consequential effects caused by racial classifications, effects that make such classifications objectionable in themselves, contribute to the inference that illegitimate purposes may have motivated them. A classification that embodies, and thereby perpetuates, the stereotype that racial minorities are inherently disadvantaged and deserving of **race**-based preferential treatment serves the purpose of a legislature that believes this to be true. A racial classification that benefits racial minorities, regardless of whether individuals within the benefited class are truly disadvantaged, and which ignores or burdens the opportunities of whites who suffer from disadvantage, serves the purpose of a legislature captured by simple racial politics in which political power is exercised for the sake of racial minorities alone. A law that racially classifies, and thereby treats people differently on the basis of **race,** serves the purpose of a legislature that believes **race** to be a relevant and important character trait, in violation of the normative position of the Court that **race** is rarely relevant.

In contrast, a **race**-neutral law that operates directly on the basis of disadvantage is by its own terms a close "fit" to the purpose of helping those truly disadvantaged, some of whom are disadvantaged because of **societal discrimination** and others for other reasons. A remedial program that helps blacks and **[*2376]** whites identically with respect to similarly shared **race**-neutral disadvantages, and which fails to help blacks and whites who share similar advantages, serves the purpose of a legislature dedicated to moving from a mode of categorizing persons on the basis of **race** to one that views any differences among people to be based on tangible conditions and experiences, not skin color.

Thus, by operating without regard to **race, race**-neutral affirmative action ameliorates many of the concerns that have led the Court to reject remedying **societal discrimination** as a justification for racial classifications. The risks that require racial classifications to be justified by identified discrimination stem from what such classifications do. Because they discriminate on racial grounds, these classifications plausibly reflect illegitimate racial beliefs and may cause harms that must be clearly justified. In contrast, **race**-neutral classifications, by what they do and do not do, are less likely than racial classifications to reinforce stigmatic racial stereotypes or exacerbate racial tensions, and, in their administration, they completely avoid the need to discriminate against innocent individuals on the basis of **race.** Such classifications are likewise less likely than racial classifications to have been motivated by racial prejudice, stereotypes, or simple racial politics. Instead, when a **race**-neutral program benefits disadvantaged persons of all **races** in similar circumstances and evidence discloses a legislative intention to remedy **societal discrimination,** the program is likely to reflect just such a remedial purpose. Therefore, the Court may conclude, without unduly retreating from prior decisions, that the risks warranting application of strict scrutiny are sufficiently minimized by **race**-neutral affirmative action, and thus, these programs ought to survive such review. Strict scrutiny should be satisfied, that is, by the compelling interest of remedying **societal discrimination** tailored through **race**-neutral means.

Indeed, even if the foregoing discussion has overestimated the importance of remedying **societal discrimination,** as compared with remedying identified discrimination, the preferability of **race**-neutral means supports the conclusion that strict scrutiny should still be satisfied. Recall that the prongs of strict scrutiny are interdependent: whether an interest counts as compelling turns in part on the means used to pursue that interest. The more racially restrictive the means, the stronger the interest must be to justify its use. Conversely, the weaker the interest, the less racially reliant the means must be to qualify as narrowly tailored. Even if **societal discrimination** is less important, not just less remedy-constraining, than identified discrimination, the Court could find it sufficiently compelling to support the use of **race**-neutral policies. While **race**-operative classifications might be too racially restrictive to be justified on the basis of remedying **societal discrimination,** a **race**-neutral policy might be sufficiently preferable that the importance of remedying **societal discrimination** would assure the Court that the policy reflects only legitimate purposes and poses a minimal risk of undesirable consequences.

As the foregoing discussion demonstrates, **race**-neutral affirmative action may be more constitutionally palatable to the Court than **race**-operative programs. **[*2377]** It should be recognized, however, that **race**-neutral affirmative action does not completely eliminate the risks raised by racial classifications. First, consider the risk of illegitimate motivations. While constraining a state professing to remedy **societal discrimination to race**-neutral means may well reduce the risk that illegitimate purposes actually motivated the legislature (or other state actor), it does not foreclose such a possibility. A legislature that targets disadvantages disproportionately affecting racial minorities may have selected the disadvantage to serve as a proxy for **race,** which, in turn, is stereotypically assumed to serve as a proxy for other characteristics such as student viewpoint, juror bias, or political affiliation. Consider also the minority-dominated legislature captured by racial politics that might endorse a **race**-neutral plan to benefit its more valued minority constituents. As the rigors of strict scrutiny would foreseeably apply to express racial classifications, a legislature with illegitimate stereotypical or raciopolitical objectives may well settle for a program that helps minorities through **race**-neutral means. Were efforts to remedy **societal discrimination** sufficient to justify **race**-neutral affirmative action, a legislature with illegitimate purposes could simply couch its intent in "remedial" terms to avoid invalidation.

A second concern, in addition to the risk of illegitimate motivations, is that **race**-neutral affirmative action may still have divisive racial effects. Even if the disproportionate benefit to racial minorities from **race**-neutral affirmative action is probably the result of **societal discrimination,** the overall disparate impact in favor of minorities may still stoke resentment among whites who perceive such programs as racial favoritism by proxy. Particularly those whites who do not qualify under a **race**-neutral program, and who may have fared better in its absence, may understandably claim injury by the government's pursuit of a discriminatory purpose to benefit racial minorities.

Finally, the discussion has thus far compared the risks of **race**-neutral and **race**-operative affirmative action. A fair critique of **race**-neutral affirmative action, however, should also compare its effects with those of absolute colorblindness. While **race**-neutral classifications designed to remedy the effects of past discrimination may be preferable to racial classifications, a remaining option for legislatures is to completely refrain from pursuing **race**-related objectives, or at least to refrain in the absence of the narrow class of remedial interests that the Court has already endorsed as compelling. Any law motivated by a racially discriminatory purpose poses a risk of illegitimate motivations, the perpetuation of racial stereotypes, and the aggravation of **race** relations. That is why strict scrutiny is triggered by such a purpose, whether pursued through **race**-neutral or racially classified means. Although a law that explicitly relies on **race** makes its racial purpose obvious, the racial objective of **race**-neutral affirmative action will eventually filter into the public's consciousness, reminding the public once again that its government is devoting time and limited public funds to the

interests of racial minorities. It may be true that limiting the benefits of such policies to the truly disadvantaged--including whites similarly situated--will **[*2378]** reduce the extent of harmful racial effects, but the purpose of remedying discrimination suffered almost exclusively by racial minorities by targeting disadvantages disproportionately suffered by them may still provoke negative racial attitudes. Only by completely excluding the consideration of **race** from governmental decisionmaking can the risk of such effects be wholly avoided.

These concerns are valid. A risk surely remains that illegitimate purposes motivated a **race**-neutral program purportedly intended to remedy **societal discrimination,** and the risk of divisive effects cannot be ruled out. While these risks remain, they are likely to be sufficiently minimized by the use of **race**-neutral means, so as to be outweighed by society's interest in remedying its past discrimination. What is called for is a judgment, an assessment of the risks of governmental attention to **race** against the risks of abandoning efforts to rectify racial injustice. Although identified discrimination may constrain the risks of discriminatory action more than **societal discrimination,** the difference is a matter of degree. Even the remedying of identified discrimination does not foreclose the risk of impermissible purposes or of negative expressive harms. A racial classification that satisfies strict scrutiny may well have been adopted by a **race**-conscious, stereotypical-thinking, racial-interest-group-captured legislature that wanted to help racial minorities because it favored them or believed they are inherently handicapped and tailored the program to satisfy strict scrutiny merely to withstand legal challenge. Nonetheless, the Court is prepared to take this risk instead of banning discriminatory programs per se because the compelling interests served justify the risk. Similarly, although antidiscrimination laws may be abused or may generate resentment, their validity is not in serious doubt. White employees may, for example, believe black employees receive a sort of "just cause" employment while they are employed at will, and in some cases the white employees may be right. Nonetheless, the interests served by civil rights laws legally outweigh the risks of abuse or ill effects.

Notice as well that the Court's application of rational basis review to apparently nonsuspect classifications runs the risk that illegitimate purposes and racially undesirable effects will go undetected. Any **race**-neutral law that disproportionately disadvantages racial minorities may have been motivated by racial prejudice and may reinforce stereotypes even where a discriminatory purpose cannot be proven. On balance, however, the Court tolerates this risk to avoid excessive intrusion into the legislative process that could impair the legislature's ability to pursue worthy objectives. [148] With **race**-neutral laws that disproportionately burden racial minorities, ostensibly unintentionally even if knowingly, the **[*2379]** Court has decided that the risk of undue interference with the legislative process outweighs the risk that, under rational basis review, the Court might fail to detect an impermissible purpose.

The question presented by **race**-neutral affirmative action is whether the risks that a **race**-neutral, disadvantage-based program was motivated by illegitimate purposes or will have unduly harmful effects are sufficiently great to invalidate such efforts, given the importance of remedying **societal discrimination** and the cost of disabling legislatures from attempting to do so. For the reasons discussed above, it seems plausible that remedying **societal discrimination** is sufficiently important that when pursued through **race**-neutral means, rather than racial classifications, the risks of illegitimate purposes and harmful effects worthy of concern [149] are sufficiently minimized so that strict scrutiny should be satisfied.

Finally, there remains to be addressed the concern that, however preferable **race**-neutral affirmative action is to **race**-operative preferences, the best approach for our society is for the government simply to stop thinking about **race.** Perhaps only the complete elimination of **race**-conscious state action can avoid the perpetuation of the kinds of racialist thinking and hostility that have plagued our country for too long. Contrary to this objection, a concern over racial tensions and stereotypical thinking counsels in favor of using **race**-neutral affirmative action rather than refraining completely from efforts to remedy **societal**

discrimination. The reason is that ignoring racial disparities carries its own risks. While affirmative action may well contribute in some way to racial tensions and stereotypes, it is hardly the only cause of these problems. The gross disparities between racial groups caused by historical discrimination exert significant influence upon the stereotypical assumptions people hold, consciously or unconsciously, about people of different **races.** People of good faith observe on a day-to-day basis that racial minorities occupy positions of inferior status in society. The only racial minorities many white people encounter are bagging their groceries, emptying their office trash, or shining their shoes. And for many people of color, the only doctors, lawyers, judges and business owners they observe are white. White children predictably develop caricatures of **[*2380]** minority people when, from simple observation at school, they conclude that minority children are disruptive and stupid. Minority children who, after spending all day every day of Winter break at their aunt's crowded apartment until mom gets off work, hear their white classmates tell stories of Disney World, predictably conclude that being white is a luxury they missed out on. While the government might be able to act without stereotypes, people do not. People form opinions and unconscious assumptions based on observed correlations between **race** and other attributes, and act according to these opinions and assumptions. If, for example, a group of young black males is assembled on a street corner, both white and black pedestrians will cross the street out of a sense of prudence. Preach colorblindness all you like, but people act on stereotypes to protect themselves. When conditions such as poverty, crime, educational failure, and family breakdown fall along racial lines, people will develop generalizations and act accordingly even though such generalizations may be characterized as stereotypes.

The point is that stereotypes are recurrently formed, reinforced, and exacerbated by the effects of **societal discrimination.** These effects cause their own "expressive harms" by teaching through the example of reality that racial minorities are inferior to whites. [150] "When certain groups always seem to fail," one commentator has observed, "it is tempting to believe that this is because these groups are inferior." [151] Moreover, the conditions that perpetuate inequality along racial lines predictably reproduce themselves from generation to generation. As such, the failure to act in response to the overwhelmingly disproportionate numbers of racial minorities in disadvantaged circumstances threatens to perpetuate conditions that foster prejudicial and stereotypical racial beliefs as much or more than would responding to such conditions with **race**-neutral remedial programs. [152] If a goal of the Equal Protection Clause is to **[*2381]** carry us to the day in which **race** no longer matters in America, it must tolerate, even encourage, affirmative efforts to remedy the effects of **societal discrimination** that perpetuate the kinds of assumptions that foster racial intolerance.

It is not, moreover, inconsistent with the Court's treatment of racial classifications to posit that, on balance, **race**-neutral affirmative action may be preferable to doing nothing. The Court may conclude that the risks inherent in racial classifications outweigh their potential benefits, and yet also conclude that the reduced risks posed by **race**-neutral affirmative action are outweighed by its potential benefits. **Race**-neutral efforts may need to be well-designed in order to minimize the burden on innocent whites or to avoid a windfall to those blacks not significantly disadvantaged by discrimination, but we cannot afford to do nothing. We cannot ignore the evidence of unremedied crimes of racial injustice or the people who have suffered therefrom. Nor can we fail to recognize the tendency of these conditions to perpetuate racial prejudice. We cannot afford to give up. The risk of doing nothing is too great.

III. AVOIDING STRICT SCRUTINY BY PURSUING NONSUSPECT PURPOSES THROUGH **RACE**-NEUTRAL MEANS

This Part advances a form of **race**-neutral affirmative action that should not be subject to strict scrutiny at all. The insight for lawfully avoiding strict scrutiny is in recognizing that helping racial minorities--as racial minorities--is not and has never been the ultimate

objective of affirmative action, including programs that rely on express racial preferences. Rather, racial minorities have been intentionally benefited as a means to achieving other objectives, such as remedying discrimination or promoting diversity. These other objectives are not themselves suspect and subject to strict scrutiny. Rather, it is the racially discriminatory purpose of benefiting racial minorities as a means of achieving these objectives that is suspect. If **race**-neutral means were adopted to pursue these objectives directly, instead of through racial minorities, then strict scrutiny should not apply.

It is important to clarify the difference between the **race**-neutral affirmative action programs proposed in this Part and those analyzed in the previous Part. The programs discussed previously were assumed to have been motivated by a desire to benefit racial minorities, either to remedy **societal discrimination** or to create racial diversity. This appears to be the case with many recently adopted **[*2382]** affirmative action programs that rely on **race**-neutral means. Such programs would have to satisfy strict scrutiny as they involve racially discriminatory purposes and are, therefore, suspect. The programs proposed in this Part would not be subject to strict scrutiny provided they are enacted without a racially discriminatory purpose, that is, without any intention to target racial minorities, whether to create diversity or to remedy past discrimination.

As Section A will argue, the purpose of remedying racial discrimination--including **societal discrimination**--is not racially discriminatory and, therefore, not suspect, and neither is the purpose of promoting diversity, including a diversity of ethnic cultures commonly associated with racial groups. A state actor who pursues such nonsuspect purposes through **race**-neutral classifications has not, absent more, acted with a suspect purpose, either in the objectives sought or in the choice of means. Such **race**-neutral affirmative action is, therefore, not subject to strict scrutiny.

Section B analyzes some of the specific **race**-neutral affirmative action programs that have recently been implemented or proposed in the context of higher education. Applying the theory developed herein, some of these programs should be upheld. At the same time, the circumstances surrounding some of the recent, ostensibly **race**-neutral schemes suggest a suspect purpose, albeit benign, to benefit racial minorities and, therefore, raise serious questions about the constitutionality of such schemes. The discussion suggests a potential basis for upholding such programs if they are re-adopted for nonsuspect purposes.

A. REMEDYING **SOCIETAL DISCRIMINATION,** PROMOTING DIVERSITY, AND OTHER NONSUSPECT PURPOSES

Objectives that have commonly been advanced by governmental actors in support of affirmative action programs include remedying racial discrimination and, particularly for educational institutions, promoting diversity--that is, assembling a group of people who have diverse interests, experiences, perspectives, and cultural backgrounds, including cultures associated with racial or ethnic groups. As explored previously, these purposes have generally failed to sustain racial classifications analyzed under strict scrutiny. Given the broad language with which the Court has condemned **race**-conscious decisionmaking, it is tempting to conclude that any attention to **race**-related issues in formulating or justifying governmental policies triggers strict scrutiny. Admittedly, a broad range of **race**-related legislative purposes would be viewed by the Court as racially discriminatory. Not all racial purposes, however, fall into this category, particularly those of a remedial nature. There are **race**-related objectives that are neither illegitimate nor suspect, whether compelling or not for the purposes of strict scrutiny. In particular, remedying discrimination, including **societal discrimination,** and promoting diversity, including of cultures commonly identified with racial groups, are not racially discriminatory purposes or otherwise suspect. Nor is the interest of reaching out to poor, underserved communities that happen to be predominantly minority. As none of these **race**-related interests--and there **[*2383]** may be others--is racially discriminatory or suspect, strict scrutiny is not triggered by their pursuit.

First, remedying societal racial discrimination is not suspect. Recall that a racial purpose is suspect if and only if it is racially discriminatory, whether reflected in a racial classification or in the motivation behind a law that is **race**-neutral on its face. Remedying **societal discrimination** is not, however, a racially discriminatory purpose. The point here is that the target group of this purpose--victims of **societal discrimination**--is not a *racial* group. An objective or classification is racially discriminatory only if it is intended to affect a group defined by **race.** The Court has explained that a classification defines a group by a particular suspect trait, such as **race** or sex, only when the classification is necessarily associated with the trait in all instances. [153] Where the classification is both over- and under-inclusive, that is, there are people covered by the classification who do not have the suspect trait and there are people with the trait who are not covered by the classification, then the classification does not classify by that trait. For example, in *Hernandez v. New York*, [154] the Court held that a prosecutor's peremptory challenges that intentionally targeted Spanish-speaking jurors did not target Latinos because not all Spanish speakers are Latino and not all Latinos are Spanish-speaking. Similarly, in the context of alleged sex classifications, the Court in *Personnel Administrator v. Feeney* [155] held that a law that classifies by veteran status does not classify by sex even though the overwhelming majority of veterans are male because some, albeit few, veterans are female and many nonveterans are male. [156] Accordingly, a **[*2384]** purpose to employ a classification not inherently tied to a suspect trait, even if highly correlative, is not by itself suspect. As strict scrutiny is only triggered when a suspect classification or purpose is used, such as **race,** a classification that is not suspect does not trigger strict scrutiny, provided it is not intended as a proxy for a suspect classification.

Returning to the purpose of remedying societal racial discrimination, the group targeted by such a purpose is victims of **societal discrimination.** One can define a victim of **societal discrimination** quite broadly. A victim of **societal discrimination** can include anyone who presently suffers substantially [157] from racial discrimination--in other words, those who are substantially worse off today as a result of racial discrimination than they would be absent such discrimination--and includes those who have experienced discrimination directly, or indirectly, such as those who have inherited disadvantages from prior generations who suffered direct discrimination. [158] This classification distinguishes between victims of **societal discrimination** and nonvictims of such discrimination, not between people of different **races.** While it is true that the nature of the discrimination suffered by these victims is based on **race,** the group is not a racial group because membership in the group does not turn on one's **race,** but rather on whether one has suffered mistreatment by others on account of one's **race.** The classification is not coextensive with **race;** people of any **race** can be covered by the classification, and people of any **race** can fall outside the classification. While it is true that, in our society, the vast majority of victims of **societal discrimination** are members of minority racial groups, the **[*2385]** fact remains that there are members of racial minorities who are and who are not members of this group. Indeed, opponents of affirmative action, including Supreme Court Justices, have recognized the distinction between racial minorities and victims of discrimination, repeatedly criticizing racial preferences on the ground that not all their beneficiaries are victims of discrimination. White people, moreover, may also fall both inside and outside the group "victims of **societal discrimination.**" Although relatively few white people have been discriminated against, some have been discriminated against, according to the Court, as a result of affirmative action. In addition, some white people residing in urban communities indirectly suffer from the effects of past **societal discrimination** manifest in their communities today in conditions of poverty, poor public schools and crime. Accordingly, the classification--victims of **societal discrimination**--does not denote a racial group; an intention to affect this group is not, therefore, a racially discriminatory purpose that triggers strict scrutiny.

The problem with remedying **societal discrimination** through racial classifications lies in *how* such classifications attempt to reach the victims of **societal discrimination.** Racial classifications use **race** as a proxy for victims of **societal discrimination** and, thereby,

racially discriminate in the means used. It is not the purpose of benefiting victims of discrimination that is suspect. It is the purpose reflected in the classification to benefit the group "racial minorities" that is suspect, a purpose employed in the hope that this racial group will include a substantial number of victims of **societal discrimination.** It can be illustrated thus:

Suspect racial classifications
racial minorities [as proxy for] victims of **societal discrimination**

The discriminatory purpose that triggers strict scrutiny is reflected in the choice to use a racial classification. Analyzed under strict scrutiny, such classifications cannot be used to remedy **societal discrimination.** Put another way, racial classifications may not be used as a proxy for victims of **societal discrimination.**

Race-neutral classifications are also arguably suspect and subject to strict scrutiny when they are intended to benefit racial minorities. **Race** is still being used as a proxy for other characteristics; a **race**-neutral proxy is simply being used as a proxy for **race,** which is in turn being used as a proxy for victims of **societal discrimination.** As illustrated below, the course of action still involves the discriminatory purpose to benefit racial minorities:

Suspect **race**-neutral classifications
race-neutral criteria [as proxy for] *racial minorities* [as proxy for] victims of **societal discrimination**

Race-neutral affirmative action of this form is subject to strict scrutiny although, as argued in the previous Part, the use of **race**-neutral classifications can enable such efforts to satisfy heightened review.

[*2386] In contrast, when racial minorities are not targeted at all as a means of benefiting victims of **societal discrimination, and race**-neutral means are used, there is no racially discriminatory purpose reflected in the choice of means or in the ultimate objective. That is, strict scrutiny is not triggered when **race**-neutral means are used directly to reach victims of **societal discrimination:**

Non-suspect **race**-neutral classifications
race-neutral criteria [as proxy for] victims of **societal discrimination**

To illustrate, recall the examples discussed in the preceding Part for remedying **societal discrimination.** It was suggested that public universities might address the underrepresentation of racial minorities in higher education by providing need-based scholarships or giving an admission preference for economic hardship. To avoid strict scrutiny analysis, such programs would instead have to be adopted sincerely for the purpose of remedying the underrepresentation of victims of **societal discrimination,** not racial minorities. To take another example, rather than improving the quality of public education to raise the achievement levels of minority schoolchildren, states could, without triggering strict scrutiny, seek to help schoolchildren whose educational opportunities have been impaired by **societal discrimination.**

Effectiveness could be enhanced, moreover, by targeting a combination of disadvantages

likely caused by **societal discrimination.** Therefore, a university might give weight in admissions to a wide variety of socioeconomic factors likely to correlate with victims of **societal discrimination,** such as a relative lack of intergenerational education and wealth broadly defined. [159] Additionally, universities might elect to "lower," or otherwise modify, their reliance on standardized measures of merit, such as grades and aptitude tests, based on the assumption that an inverse correlation likely exists between victims of **societal discrimination** and high achievement scores. [160] Alternatively, schools that would resist this suggestion to avoid compromising admission standards could abandon "legacy" programs, which are extremely unlikely to benefit victims of **societal discrimination** and, therefore, serve to reduce the number of such victims that could be admitted even without affirmative action. [161]

[*2387] In other contexts as well, the government may seek to remedy the effects of **societal discrimination** directly through **race**-neutral means. The government may, for example, address the causes of crime, poverty, substance abuse, and disease, not to help racial minorities, but to help those people who disproportionately endure these conditions because of **societal discrimination.** In these examples of **race**-neutral affirmative action, **race**-neutral means are used instead of, not as a proxy for, racial classifications as a means to helping victims of **societal discrimination.** By taking **race** out of the chain of purposes, **race**-neutral affirmative action so conceived completely avoids the use of a racially discriminatory purpose and, therefore, does not trigger heightened review.

In addition to remedying **societal discrimination,** a non-racially discriminatory purpose associated with affirmative action is the promotion of diversity, including a diversity of viewpoints, experiences, and even of cultures commonly associated with or identified by members of racial groups. As this is not a racially discriminatory purpose, the pursuit of this interest directly through **race**-neutral means does not trigger strict scrutiny. The most controversial aspect of the foregoing claim is that it is not suspect to promote a diversity of cultures predominantly identified with by members of particular racial groups. The reason such diversity is not racially suspect is that people who identify with particular cultures are, like victims of **societal discrimination,** not a racial group, because membership in the group is not inherently connected to any **race.** Consider, for example, the group defined as people who identify with "black," "African-American," or "Afrocentric" culture. While most members of the group--people who identify with this culture--may be racially black, there are many blacks who are not members of that group [162] and, as some **race** theorists have observed, people can identify with African-American culture without being racially black. [163] Accordingly, neither African-American nor Black culture is a racial category and the purpose of promoting the culture or affecting its members through **race**-neutral means is neither suspect nor subject to strict scrutiny. [164]

[*2388] The problem with racial classifications used to promote diversity, just as with racial classifications used for remedial purposes, is not in the ultimate purpose but in the choice of racially discriminatory means to achieve that purpose. Likewise, the use of **race**-neutral classifications as a proxy for racial minorities as a proxy for diversity would also involve a discriminatory purpose. If, however, **race** is taken out of the choice of means altogether, so that the legitimate nonsuspect purpose of promoting diversity is directly pursued through **race**-neutral classifications, then no racially discriminatory purpose exists and strict scrutiny is not triggered. The following formulations illustrate the various possibilities:

Suspect racial classifications
racial minorities [as proxy for] diversity

Suspect **race**-neutral classifications
race-neutral criteria [as proxy for] *racial minorities* [as proxy for] diversity

Non-suspect **race**-neutral classifications
race-neutral criteria [as proxy for] diversity

Thus, states and public universities may seek to promote diversity in higher education without triggering strict scrutiny, provided that **race**-neutral means are used. Such diversity of a broad nonracial type may include people from different social, political, or economic backgrounds, having had different life experiences, or holding various viewpoints or perspectives. Such diversity is clearly a legitimate interest, particularly in educational contexts. The use of **race**-neutral means to achieve this nonracial concept of diversity is plainly unobjectionable. Moreover, as argued here, nonracial diversity may include people who identify with different cultures, including cultures typically associated with racial groups, but which are available to people of any **race.** As such, a public university's admission or scholarship application may, without triggering strict scrutiny, consider **race**-neutral criteria, such as organizational membership, community service, or personal essays, to identify applicants who will likely enrich the cultural diversity of the student body. [165]

In sum, **race**-neutral affirmative action programs can avoid strict scrutiny analysis by not pursuing a racially discriminatory purpose. First, **race**-neutral **[*2389]** means must be used, although such means alone are not sufficient. The governmental actor must *directly* pursue nonsuspect purposes through **race**-neutral means and not use **race**-neutral means as a proxy for **race** as a proxy for nonsuspect interests. Remedying **societal discrimination** and promoting diversity are nonsuspect purposes. Provided that **race**-neutral classifications are used to pursue these goals directly, affirmative action remains viable without the risk of invalidation under strict scrutiny.

B. RE-ENACTING SUSPECT POLICIES FOR NONSUSPECT REASONS?: UNCERTAIN DEVELOPMENTS IN HIGHER EDUCATION

This final section considers the implications for **race**-neutral programs when evidence suggests that an illegitimate stereotype may have motivated their adoption. Such circumstances are illustrated by the recent **race**-neutral programs in California and Texas, which were described at the outset of this Article. Although these programs might be justified on remedial or nonracial diversity grounds pursuant to arguments presented in the previous section, [166] some of the circumstances surrounding their adoption suggest that they were adopted, not for remedial or nonracial diversity purposes, but as a proxy for racial diversity. That is, rather than relying on **race**-neutral means instead of **race** to pursue nonracial purposes, they instead appear to be targeting racial minorities, albeit through **race**-neutral means, to create a diversity of racial groups among the student body. Notably, many of these programs were adopted almost immediately after **race**-operative policies were invalidated. In California, for example, the move to class-based affirmative action came on the heels of Proposition 209's ban of racial preferences. [167] In Texas, the legislature adopted the high school admission scheme shortly after ***Hopwood***. [168] Moreover, explicit statements **[*2390]** by some school and state officials indicate a purpose to recreate racial diversity without the use of racial preferences. [169] Consider also the "disadvantage" criteria being considered by some schools. In addition to socioeconomic and educational background, schools are giving weight to applicants who speak English as a second language or who grew up while a parent was in a gang or in prison. [170] These traits are certainly disadvantageous and plausibly caused by **societal discrimination,** but when combined with other circumstances indicating a desire to avoid returning to a system of racially segregated schools, an inference might be drawn that such factors are being used as a proxy for **race** rather than instead of **race.** If such programs were in fact designed to create *racial* diversity, their constitutionality would be in question. As previously explained, the present Court is likely to conclude that promoting racial diversity to enhance the educational environment is stereotypical and, therefore, invalid, whether or not supported by empirical evidence. The Court would at least subject policies premised on such objectives to strict scrutiny.

While it remains to be seen how the Court would react to **race**-neutral programs in which potentially stereotypical thinking is indicated, the following points are offered in defense of their constitutionality. First, standing alone, the adoption of **race**-neutral policies in lieu of impermissible racial preferences to achieve the same objectives need not mean the program is a subterfuge for illegitimate purposes. If the objectionable nature of a racial preference-based program relates to its means and not its purpose, then the replacement of those means with **race**-neutral criteria cures the objection. Therefore, if a university has used **race** as a proxy for economic disadvantage or other nonracial experiential or cultural characteristics deemed valuable to the academic environment, then the use of **race**-neutral means to identify these nonracial factors represents compliance with, not evasion of, the Equal Protection Clause. Thus, if schools in California and Texas are substituting **race**-neutral criteria for racial criteria in order to re-create *nonracial* diversity, these alternative approaches should be accepted.

Second, even if circumstances in a particular case prove preponderantly that a state or public university acted upon an illegitimate purpose, the actor might counter that it would have adopted the same policy for nonsuspect reasons. If, for example, a university could demonstrate that it would have adopted a need-based scholarship for completely nonsuspect reasons, such as helping economically disadvantaged persons, victims of **societal discrimination,** or **[*2391]** members of cultural groups, then the purpose of creating racial diversity would not have been a but-for cause of the scholarship's adoption, and the program should be upheld. Such a defense might be plausible, given the legitimate nonracial purposes often served by **race**-neutral classifications that benefit racial minorities.

Finally, if evidence showed that an illegitimate stereotype motivated a **race**-neutral program that probably would not otherwise have been adopted, the question would arise whether the state actor should be permitted to reevaluate the need for the new policy and possibly re-adopt it for legitimate purposes. For example, if a need-based scholarship were invalidated because it was intended to benefit racial minorities on the stereotypical assumption that it would bring diverse perspectives to the institution, should the university be permitted to re-adopt the program for nonsuspect remedial, diversity, or economic purposes? The argument against this approach is that once an impermissible purpose has been found to have tainted the decisionmaking process, the same state actor cannot be allowed simply to profess a change of heart while re-enacting the very same policy. The incentive for a state actor found to have acted for illegitimate reasons to fabricate a legitimate purpose is obvious. Consistent with this reasoning, the Court in *Hunter v. Underwood* [171] invalidated a provision of the Alabama Constitution disenfranchising persons convicted of crimes of moral turpitude on the ground that the purpose for which it was originally enacted was to disenfranchise blacks. [172] In so doing, the Court rejected the argument that the state has since retained the disenfranchising provision for legitimate purposes, stating, "We simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of **race** and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*." [173] In *Keyes v. School District Number 1*, [174] the Court explained that a school board found to have intentionally segregated in the past cannot escape its duty to remove the vestiges of that segregation simply by observing that the discriminatory purpose has long since been abandoned. [175] In the present situation, a claim by state officials that an affirmative action program initially based on illegitimate stereotypes has been re-adopted for permissible purposes would be even less credible, given that no significant time has passed since the impermissible **[*2392]** objective was acted upon, and that the very same individuals who so acted would now be claiming a different purpose.

Other equal protection precedents involving sex discrimination, in contrast, support the possibility of upholding a law for reconsidered reasons. In *Michael M. v. Superior Court*, [176] for example, the Court rejected a defendant's claim that a statutory rape law that only targeted males was founded on stereotypical notions about the virtue and chastity of young

females. Instead, the Court accepted the California Supreme Court's determination that the law's purpose was the prevention of pregnancy, noting that, after the lower court's opinion, the state legislature had reconsidered the law and apparently retained the sex-based classification for the reasons suggested by the lower court. [177] Similarly, in *Rostker v. Goldberg* [178] when the male-only registration requirement of the Military Selective Service Act was challenged as an "accidental by-product of a traditional way of thinking about females," [179] the Court refused to limit its inquiry into legislative purpose to the time of the statute's original enactment and considered the legislative history surrounding the Act's subsequent reactivation. [180]

Finally, in *United States v. Virginia*, [181] the Virginia Military Institute defended its male-only admission policy, which it had maintained since the school's founding in 1839, based on its reexamination of the policy following the Court's 1982 decision in *Mississippi University for Women v. Hogan*. [182] Although the Court found the new justification inadequate, it nonetheless **[*2393]** considered the justification relevant in determining the purpose of the single-sex school rather than relying exclusively on the outmoded stereotypes that motivated the school's founding. [183]

Why has the Court in some cases relied exclusively on the original purpose behind a law while in others it has been willing to permit a state to reconsider and re-justify a law based on new reasons? The distinction may lie in the extent to which the Court views the state actor as having been particularly culpable at the time of the original enactment. Where the original purpose for a law was invidious racial prejudice, the Court may believe, in hindsight, that the purpose was wrong then and those acting upon it knew or should have known it. The people acting in the Alabama state convention, for example, who vowed to preserve white supremacy in the state by disenfranchising blacks, albeit through **race**-neutral means, were acting immorally and in an effort to thwart the Reconstruction Amendments to the United States Constitution. Similarly, the Court's aggressive efforts to undo school segregation "root and branch" [184] suggest a belief that segregation in the public schools was an evil that never should have happened. When invidious racial prejudice has been acted upon, especially recently, the credibility of a state actor who would act for such reasons may be so impeached that no recantation short of abandoning the law is acceptable. Even when a law's invidious purpose occurred a long time ago, the taint of that purpose may be so pernicious, so deep, and so enduring that it cannot be completely cleansed without invalidating the law.

The types of stereotypical assumptions that motivated sex-based classifications, in contrast, may be viewed by the Court as now outdated in light of changed cultural norms, but not as wrong, or at least not as invidious, at the earlier time. Thus, in *United States v. Virginia*, the Court may not have been prepared wholly to condemn the motivations of VMI's founders, who in 1839 desired to establish an institution to train men to serve what was then their role in society responsibly and honorably. [185] The distinction between the two approaches **[*2394]** to reconsidered legislative intent is not adequately explained, however, by whether such intent was unconstitutional or otherwise illegal at the time of the law's original enactment. Although the point can be debated, most legislators and school administrators reasonably believed school segregation was constitutional before ***Brown*** *v. Board of Education*, [186] at least under prevailing precedent, yet the Court, for a time at least, rigorously sought to undo all its vestiges.

The best explanation may lie in whether the Court views a law's original purpose, even if legally tolerated at the time, as nonetheless cruel or immoral. A purpose viewed by the Court as sufficiently blameworthy or unforgivable by contemporary constitutional standards, such as racial bigotry, may spell the invalidation of a law without chance of reconsideration. The Court may view sex discrimination instead as something right-minded people used to accept and who, when asked to reconsider, may well abandon those assumptions on learning that norms have changed.

The question then is whether states and public universities that have adopted **race**-neutral policies to benefit minorities for stereotypical purposes should be allowed to reconsider whether to retain these policies for legitimate purposes. The originating purposes involve **race** and are recent in time, both of which weigh against permitting reconsideration. In other respects, however, the culpability that characterizes diversity-based programs seems more analogous to sex discrimination than to old-style racism. Unlike the "odious" or "invidious" assumptions of white supremacy and the animosity that motivated many discriminatory policies that disadvantaged blacks, the purposes behind affirmative action that concern the Court are more in the nature of paternalistic stereotypes, much like the assumptions behind laws that have denied opportunities to women. Moreover, to the extent that legality is a factor, ***Bakke***, which has not been explicitly overruled, endorsed the limited use of racial preferences. [187] **[*2395]** Public universities have relied in good faith on this precedent and, in particular, on the diversity rationale endorsed by Justice Powell's opinion. [188] In addition, consider the suggestion in *Croson* that **race**-neutral means may be used to increase minority access to public construction contracts. [189] Looking at ***Bakke*** and *Croson* together, states and public universities may have reasonably believed that **race**-neutral programs designed to achieve racial diversity are constitutionally commendable. If courts now conclude that the racial diversity purpose is invalid even when pursued through **race**-neutral means, perhaps states should be permitted to learn from their mistakes and determine whether they want to retain the **race**-neutral programs for permissible remedial or nonracial diversity purposes. At least where state actors have abandoned racial preferences in their attempt to create racial diversity, a step toward **race**-neutral decisionmaking has been made.

CONCLUSION

Colorblind advocates from the right insist that affirmative action is morally equivalent to official segregation, and they are succeeding in persuading the courts and country of their position. Applying their reasoning to **race**-neutral policies, a governmental decision to improve the quality of all public schools, out of a concern for the continued underachievement of minority children, is no better than a decision to close all public schools to avoid integration. Exploring the constitutional implications of **race**-neutral affirmative action, however, clarifies the fundamental difference between these practices. Segregation designed to exclude blacks from equal citizenship was wrong because of its motivating ideology--white supremacy. Affirmative action to remedy past discrimination, in contrast, is arguably objectionable not because of its motivating purpose, but because of the means it commonly uses to achieve it--racial preferences. By removing **race** from the means in attempting to remedy past discrimination, **race**-neutral affirmative action largely cures the objectionable nature of affirmative action, whereas removing **race** from the means of a policy still designed to keep blacks in their place merely masks the illegitimate purpose behind a **race**-neutral facade. The former attempts to accommodate equal protection concerns; the latter attempts to evade them. This difference may explain the apparent political and judicial consensus that **race**-neutral affirmative action is a **[*2396]** legitimate alternative to racial preferences. Most Americans seem to understand, at least intuitively, that whatever flaws exist in affirmative action, the underlying purpose is hardly akin to that of the Ku Klux Klan.

The Equal Protection Clause, by any interpretation, should permit **race**-neutral efforts to undo the injurious effects of the racial discrimination it was intended to eliminate. This Article has presented arguments for upholding **race**-neutral affirmative action, arguments that take existing doctrine seriously. If strict scrutiny is not necessarily fatal, as the Court has assured, then **race**-neutral remedial programs ought to be upheld under such analysis, even if intended to remedy **societal discrimination.** Alternatively, if **race**-neutral policies are not intended to affect racial minorities, but are instead intended to benefit victims of **societal discrimination** or members of cultural groups, then such policies should be readily upheld under rational basis review. Whichever mode of analysis a case warrants, the importance of remedying **societal discrimination** and the unobjectionable nature of **race**-neutral means

counsel in favor of judicial tolerance.

Finally, I close with a comment on the broader affirmative action debate currently being waged across the country. It has been almost four decades since Martin Luther King, Jr. delivered his "I Have a Dream" speech at the March on Washington, and over three decades since his assassination. Apparently, at least in recent years, Dr. King has become the hero of the political right. His Dream, they lament, that his children would "one day live in a nation where they will not be judged by the color of their skin but by the content of their character," [190] is being dishonored by affirmative action. [191]

It is true that his Dream remains just that, a dream. It is true that we as a society continue to assume that racial minorities, particularly blacks, lack intelligence and moral character. And how can we not? After all, black children *are* more likely than white children to grow up to be thieves, drug dealers, rapists and murderers. Black schoolchildren *are* more likely to receive poor grades, to need remedial education, and to be disruptive or violent to other children. Black children are less likely to graduate from high school, to apply to college, and to qualify for admission to college based on high school grades and achievement test scores. Black children are more likely to end up, in adulthood, **[*2397]** performing low or unskilled jobs, or to be unemployed and on welfare. Black males are more likely than white males to father children only to abandon them and their mothers and never pay a cent in child support. Black females are more likely than white females to get pregnant before the age of fifteen, by a male with no interest or capacity to support her, to bear infants addicted to drugs, and to do it again. Black parents are more likely than white parents to abuse their children, to raise them in unclean, unsafe households, to give their children little emotional or psychological encouragement, to feed their children unhealthy diets, to give their children inadequate medical attention, to send their children to unsafe, unclean, high crime, poor quality schools. These children, then, grow up to . . .

We cannot eliminate **race** from the American psyche until we understand and eliminate the conditions that cause people to make assumptions about others because of their **race.** Assuming, optimistically, that racism no longer seriously impairs the life chances of racial minorities, we cannot ignore the social and economic deprivations that do. These conditions, by their example, do more than affirmative action to reinforce stereotypes, justify racism, and thereby exacerbate racial tensions. Worse, these conditions cause misery to those who must endure them. To ignore these conditions is to guarantee their perpetuation and that of the racialist thinking they fuel. The day when **race** no longer matters will not arrive until we take active measures, or *affirmative action*, to improve the conditions and remove the disadvantages that keep racial minorities down. And we have a legal and moral obligation to try. Unless we assume that **race** really does matter, that along with darker skin a child of color congenitally inherits a propensity to fail, to commit crime, and to die a violent death, we must acknowledge that centuries of slavery and decades of legalized racial oppression created an underclass identifiable by **race.**

Martin Luther King, Jr. was right to espouse the principle that people ought not be judged by the color of their skin. The Court was right in ***Brown*** *v. Board of Education* [192] and much of its progeny [193] to strive for a similar vision under the Equal Protection Clause. But the right not to be discriminated against on the basis of **race** includes the right to have the effects of such discrimination remedied. Perhaps the Court is right that racial preferences are not always **[*2398]** justified, may inflict upon innocent people the very injury they seek to remedy, and may perpetuate stereotypes and inflame racial hostility. But surely the principle of equality is not offended when states help disadvantaged persons on a **race**-neutral basis as a means to undo our history of discrimination against blacks. Such efforts do not treat blacks as the "special favorite of the laws." [194] Nor would King have dreamed otherwise:

In asking for something special, the Negro is not seeking charity. He does not

> want to languish on welfare rolls any more than the next man. He does not want to be given a job he cannot handle. Neither, however, does he want to be told that there is no place where he can be trained to handle it. So with equal opportunity must come the practical, realistic aid which will equip him to seize it. [195]

FOOTNOTES:

n1 78 F.3d 932 (5th Cir. 1996).

n2 38 F.3d 147 (4th Cir. 1994).

n3 *See* Douglas Lederman, *Suit Challenges Affirmative Action in Admissions at U. of Michigan; Legal Group That Won Case Against Texas Law School Now Shifts Attention to Undergraduates*, CHRON. OF HIGHER EDUC., Oct. 24, 1997, at A27.

n4 *See* Adam Cohen, *When the Field Is Level; In California, Minority Students Are "Cascading" Out of Top Schools and into the Second Tier. Is This Good for Them?*, TIME, July 5, 1999, at 30 (noting that "other states are considering Prop. 209-style initiatives, among them Florida, where a drive is on to put an anti-affirmative action referendum on the 2000 ballot"); *Initiative 200; Another Blow to Affirmative Action*, STAR TRIBUNE (Minneapolis, MN), Nov. 7, 1998, at A18 (stating that "proposals for additional 'Spawn of 209' legislation are under consideration in several states").

n5 The House of Representatives considered and defeated, by a 249-171 vote, a bill that would have prohibited federal aid to any public colleges or universities that use **race,** ethnicity or sex in the admissions process. *See* Editorial, *Why Colleges Need Affirmative Action*, GRAND RAPIDS PRESS, May 21, 1998, at A15. As originally drafted, the ban on affirmative action would have applied to private schools as well. *See id.*

n6 *See* Michele Norris & Peter Jennings, *Colleges Seek Alternative to Affirmative Action Keeping Minority Enrollment Numbers Up*, WORLD NEWS TONIGHT (ABC television broadcast, May 20, 1998) (describing how school administrators in California and Texas, "worried that higher education could slip back toward segregation, . . . are trying to find new ways to boost minority enrollment--not affirmative action, alternative action").

n7 *See* Michelle Locke, *In Post-Affirmative-Action Era, Essays Allow Students to Get 'A' for Adversity*, SEATTLE TIMES, May 24, 1998, at A6 (describing recent University of California "post-affirmative-action" admissions program by which applicants write "hardship essays" in which they explain difficult circumstances they have faced "such as poverty, having a parent in prison, speaking English as a second language or having a physical disability" and stating that "responses ranged from deaths in the family to being the child of a gang member"); *id.* (stating that "after losing a court battle to use **race** as a factor in admissions, the [University of Texas] added a two-page statement on disadvantage to its application this year"); *see also* Wade Goodwyn, *Morning Edition: Texas Affirmative Action Debate--NPR's Wade Goodwyn Reports From Austin, Texas on the Legal Battle Between the State's Attorney General and the University of Texas Law School* (National Public Radio broadcast, May 13, 1998) (explaining that after ***Hopwood***, the University of Texas "tried to compensate in other ways" including asking applicants to write "essays about overcoming adversity" in which admissions officers look for certain "kind[s] of qualities in a minority student").

n8 *See* TEX EDUC. CODE ANN. § 51.803 (West 1999); *see also Why Colleges Need Affirmative Action, supra* note 5, at A15 (stating that following ***Hopwood***, "the Texas legislature passed a bill requiring state universities to admit the top 10 percent of every high school graduating class").

n9 *See* Kenneth R. Weiss, *D-Day Comes as Minority Students Decide on College Education: Seniors Choosing Among Prestigious Universities Pay Little Attention to Affirmative Action Ban*, L.A. TIMES, May 3, 1998, at A1 (reporting that "UCLA officials decided to be more competitive this year in chasing top minority students by offering new Blue and Gold Scholarships to 200 of the best students from high schools in underprivileged neighborhoods").

n10 *See* Donna Foote & Patricia King, *The Provost Played On: In the Post-Affirmative-Action Era, Minorities are a Valuable Commodity on California Campuses*, NEWSWEEK, May 4, 1998, at 61 (explaining that, in response to Proposition 209, the University of California San Diego opened academic assistance programs for low-income and bilingual elementary school students, and quoting UC Santa Cruz Chancellor as vowing to "go all the way back to the first grade" if necessary); Michelle Locke, *Post-Affirmative Action Era Starts*, AP ONLINE, May 21, 1998, at A6 (quoting spokesperson for the American Civil Rights Institute, an organization against affirmative action, as saying it is time to "get past the debate on preferences and start working to reform (public schools) and make these kids qualified"); Norris & Jennings, *supra* note 6 (noting that "other schools use other experiments to achieve diversity. The University of California at Riverside helps minority teens sharpen their academic skills well before they get to college").

n11 U.S. CONST. amend. XIV, § 1.

n12 488 U.S. 469 (1989).

n13 *See id.* at 509-10.

n14 *See id.* at 528 (Scalia, J., concurring in the judgment).

n15 *See* Podberesky v. Kirwan, 38 F.3d 147, 158 (4th Cir. 1994).

n16 *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 351-52 (D.C. Cir. 1998) (invalidating FCC policy that exerted pressure on broadcasters to hire racial minorities and suggesting that the FCC could mandate "racially neutral" recruiting practices in order to enhance racial diversity).

n17 *See infra* notes 78-80 and accompanying text.

n18 For convenience, the shorthand term "racial classification" denotes a law or governmental policy that employs an express racial classification, as opposed to a law which is **race**-neutral on its face but may have been motivated by a racially discriminatory purpose. While this terminology is generally consistent with that of the Court's, *see, e.g.*, Washington v. Seattle Sch. Dist. Number 1, 458 U.S. 457, 484-85 (1982) (explaining that a challenge to "facially neutral legislation" requires an inquiry into intent whereas "[a] racial classification, regardless of purported motivation, is presumptively invalid" (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979))), the Court has on occasion referred to a **race**-neutral law motivated by a discriminatory purpose as an *implicit* racial classification, and has said that such laws trigger strict scrutiny just as express racial classifications trigger strict scrutiny. Since a principal objective of this project is to distinguish on doctrinal grounds between express racial classifications and laws that are **race**-neutral on their face, it is imperative that this Article does not misleadingly imply a distinction based on the choice of terms. The author has endeavored to avoid this risk and believes further that, on balance, the convenience and clarity of explication afforded by the shorthand justifies its use. See also *infra* note 19 for definitions of "**race**-operative" and "**race**-neutral" classifications.

n19 "**Race**-operative" laws mean laws or governmental policies whose administration

involves treating individuals on the basis of their **race.** These include express racial classifications and also laws which, though **race**-neutral on their face, are administered in a racially discriminatory manner. Examples of the latter include discretionary decisionmaking pursuant to **race**-neutral policies exercised in a racially discriminatory manner, such as racially motivated peremptory challenges, police arrests, and university admission decisions made without explicit authorization to consider **race. "Race**-based" laws or "racial preferences" are also **race**-operative. Unless the context clearly indicates otherwise, "**race**-neutral" classifications, laws, means, or policies refer to laws or policies that rely completely on **race**-neutral criteria in both their terms and operation but which may have been motivated by a discriminatory purpose in their formulation or adoption.

This Article assumes there is no meaningful distinction between **race**-operative laws that employ express racial classifications and those that are **race**-neutral in content but are administered on a racially discriminatory basis. It does distinguish, however, between racial classifications and other **race**-operative laws, on the one hand, and **race**-neutral classifications (operated on a **race**-neutral basis) potentially motivated in their formulation or adoption by a discriminatory purpose, on the other.

n20 See *supra* note 19 for a definition of "**race**-neutral classifications."

n21 This Article recognizes that, as the pivotal vote in prior affirmative action cases, Justice O'Connor is a logical target of arguments defending affirmative action. *See* Akhil Reed Amar & Neal Kumar Katyal, **Bakke***'s Fate*, 43 UCLA L. REV. 1745, 1754 (1996) (emphasizing affirmative action opinions of Justice O'Connor, who "may well hold the fate of ***Bakke*** in her hands"); *cf.* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 132 (1989) (discussing Justice O'Connor's determinative position on the constitutional status of abortion rights). This Article shall attempt, however, to resist such strategic scholarship. Decisions representing a majority of the Justices are those of the Court. Moreover, the arguments developed below are consistent with the reasoning of a substantial majority of Justices currently on the Court. This Article shall therefore generally refer to the Court, and not Justice O'Connor, as the source of existing doctrine and as the object of its arguments. Concededly, on some issues over which the Justices have not reached clarity or consensus, a focus on opinions of Justice O'Connor may provide the most useful guidance in predicting the future direction of the Court. As a general matter, however, the author is reluctant, perhaps naively, to discuss constitutional law as if it were the province of an individual Justice.

n22 488 U.S. 469 (1989).

n23 *See id.* at 493-99; *id.* at 520 (Scalia, J., concurring in the judgment). Under this most rigorous standard of judicial review, a racial classification will be upheld only if it was actually intended to further a "compelling" governmental interest and the use of the classification is "necessary" or "narrowly tailored" to the accomplishment of that interest.

n24 *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 566 (1990) (holding that intermediate scrutiny applied to federally enacted minority set-aside). The Court in *Croson* had applied strict, not intermediate, scrutiny to *state*-sponsored affirmative action. *See supra* note 23 and accompanying text.

n25 515 U.S. 200 (1995).

n26 The Court in *Adarand* did not apply strict scrutiny, instead remanding the case for such analysis in the first instance by the district court. *See id.* at 237. The opinion therefore did not clarify the scope of strict scrutiny beyond the articulation of the test in *Croson*. The significance of *Adarand* is in its holding that the federal government's authority to employ benign racial classifications is just as constrained as the states' authority. Whatever the

demands of strict scrutiny require of state and local actors, *Adarand* suggests that federally enacted racial classifications are subject to similar constraints.

n27 488 U.S. 469 (1989). At issue in *Croson* was a program by the City of Richmond, Virginia, that required prime contractors awarded city construction contracts to subcontract at least 30% of contract funds to minority-owned construction firms. *See id.* at 477.

n28 *See supra* note 26.

n29 The part of Justice O'Connor's opinion applying strict scrutiny represents a majority of the Justices. *See Croson*, 488 U.S. at 493-99; *id.* at 520 (Scalia, J., concurring in the judgment).

n30 *See id.* at 500-03. What the Court means by "passive participation" is not entirely clear. At a minimum, the Court seems to mean the city's support through public contracting funds of private companies that discriminate even if the city did not intend or was not aware of the discrimination. Thus, the city may be a passive participant in discrimination, which it has a compelling interest to remedy, even if the city itself did not violate the Equal Protection Clause by intentionally discriminating. Whether a state actor may be a passive participant in private discrimination without having financially supported the discriminator was not addressed. For an interesting discussion of possible interpretations of "passive participation," see Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1586-87 (1998).

n31 To establish a compelling need for a **race**-based remedy, the Court explained, the city council must rely on more particularized evidence than congressional findings as to nationwide discrimination or the mere assertions by city councilmembers of discrimination in the local industry. The Court also rejected the city's comparison of the percentage of residents in the Richmond area who are minority (50%) and the percentage of firms receiving city construction contracts that are minority-owned (0.67%) as a basis for inferring the existence of local discrimination, noting that the relevant comparison was between minority-owned firms receiving public contracts and those eligible to do so. It was unrealistic, the Court explained, to conclude that racial minorities would enter the construction industry in "lockstep" proportion to their percentage in the general population. *See Croson*, 488 U.S. at 507.

n32 *Id.* at 498-500.

n33 *Id.*

n34 *See id.* at 493 ("Classifications based on **race** carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *see also id.* at 511 (Stevens, J., concurring in part and concurring in the judgment) (disagreeing with "the premise that seems to underlie today's decision, as well as the decision in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong") (internal citations omitted).

n35 The program required prime contractors on city construction projects to subcontract 30% of each contract to "Minority Business Enterprises," defined as companies effectively owned or controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Croson*, 488 U.S. at 477-78. Noting the complete lack of evidence that the nonblack groups were victims of Richmond's discrimination, the Court remarked that "it may well be that Richmond has never had an Aleut or Eskimo citizen." *Id.* at 506.

n36 The Court noted: "The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination." *Id.* at 506.

n37 In a half-hearted response to political process theorists' defense of affirmative action, most notably that of Professor John Hart Ely, Justice O'Connor noted that a majority of the Richmond city council was black. *See id.* at 472. The comment seems half-hearted in that its passing nature following the lengthy defense of applying strict scrutiny to all racial classifications and the extent to which the comment reflects a highly superficial understanding of process theory suggests the Court was not relying on the racial composition of the city council in deciding to apply strict scrutiny. Nonetheless, the comment, along with other skeptical criticisms of the set-aside program, suggests that the plurality believed the affirmative action program was more a product of racial interest group politics rather than a meaningful effort to identify and remedy discrimination. For an account of what the Court may mean by "simple racial politics," see *infra* Part II.A.1., and see also David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 25 (exploring Court's apparent concern over racial interest group politics at the expense of the public interest).

n38 The Court has, however, upheld racial quotas as a court-ordered remedy to racial discrimination where the discrimination had been flagrant and persistent. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

n39 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

n40 438 U.S. 265 (1978) (invalidating admission program based on racial quota but holding that **race** may be used as one of many factors in the admission process).

n41 38 F.3d 147 (4th Cir. 1994).

n42 78 F.3d 932 (5th Cir. 1996).

n43 The scholarship program was voluntarily established by the University of Maryland at College Park. The district court granted summary judgment in the University's favor holding that the scholarship was narrowly tailored to remedy the University's own past discrimination. *See Podberesky*, 38 F.3d at 151-52.

n44 The University had identified four such effects: (1) the University's poor reputation within the black community; (2) the underrepresentation of blacks in the student population; (3) the low retention and graduation rates of blacks who do enroll; and (4) an atmosphere on campus perceived by blacks as racially hostile. *See id.* at 152.

n45 The court denied that the racially hostile environment on campus was "necessarily" an effect of the University's past discrimination because it could have resulted instead from present or past **societal discrimination.** *See id.* at 154. Similarly, with respect to the underrepresentation and attrition of minority students, the court held that the record failed to establish that any such effects were caused exclusively by the University's own discrimination and not **societal discrimination** or economic factors. *See id.* at 155-57.

n46 78 F.3d 932.

n47 The district court found the effects of the law school's past discrimination included the school's reputation in the minority community as a "white" school, a school environment perceived by minority students as racially hostile, and an underrepresentation of minority

students. *See id.* at 952.

n48 Relying on *Podberesky*, the court rejected the poor reputation and hostile environment effects because they were likely caused by **societal discrimination** rather than discrimination by the school. *See id.* at 952-53. The court further suggested that any racial tensions may have been caused by the affirmative action program itself. *See id.* at 953 (stating that "any racial tension at the law school is most certainly the result of present **societal discrimination** and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of **race** in admissions"); *see also id.* at 953 & n.45 (stating that "racial preferences, if anything, can compound the problem of a hostile environment" and citing trial testimony about disrespect toward minority students from students who "assumed that minorities attained admission because of the racial preference program"). The court also rejected minority underrepresentation in the student body as a basis for the program because, to the extent such underrepresentation was caused by the state's discrimination, it was due to discrimination by the state educational system as a whole, including elementary and secondary schools, and not discrimination by the law school. *See id.* at 953-54. The court also expressed skepticism that remedying past discrimination was a sincere goal of the program because it gave a preference to Mexican-Americans without any evidence that they had been discriminated against in the past, whether by the law school or by the state educational system. *See id.* at 953, 954 n.46, 955 n.50.

n49 Remedying discrimination is compelling, the court concluded, only if the discrimination is that of a specific governmental unit or agency, even if the highest state authority is pursuing the remedial goal. *See id.* at 949-52; *see also id.* at 951 n.43 (explaining that even if the State of Texas is responsible for the past wrongs of the law school, only the wrongs of specific governmental units can serve as the justifying interests of a racial classification); *id.* at 952 ("The fact that the law school ultimately may be subject to the directives of others, such as the board of regents, the university president, or the legislature, does not change the fact that the relevant putative discriminator in this case is still the law school. In order for any of these entities to direct a racial preference program at the law school, it must be because of past wrongs at that school."). Accordingly, only effects of past discrimination by the law school could justify the preferential admission program and, moreover, "the law school must show that it adopted the program specifically to remedy the identified present effects of [its own] past discrimination." *Id.* at 952.

n50 *See id.* at 945-47.

n51 The court observed that Justice Powell's opinion in ***Bakke*** stood alone in endorsing diversity as a compelling interest and, moreover, subsequent affirmative action cases by the Supreme Court have clearly limited the proper bases for racial classifications to remedying discrimination. *See id.* at 944-48.

n52 The court in ***Hopwood*** declined to consider whether the admissions program was narrowly tailored because it concluded that the evidence had failed to satisfy the compelling interest prong. *See id.* at 955.

n53 *See Podberesky*, 38 F.3d at 157-58.

n54 *See id.* at 158.

n55 *See id.* at 158-59.

n56 *See id.* at 160-61.

n57 Most students entering college this Fall were born after 1982. Not only had public universities ceased discriminating against minorities by this time but most were operating

under affirmative action policies. See *supra* note 58.

n58 Professor Issacharoff has made a similar observation. *See* Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 681 (1998) (observing that "it is highly unlikely in this day and age that the institutions of higher education that have heavily internalized a commitment to affirmative action are at the same time remedying their own discrimination").

n59 *See* Mark Hornbeck, *Engler Quiet on Racial Quotas: Governor Soft-Pedals Affirmative Action, Fears It's a No-Win Situation, Experts Say*, DETROIT NEWS, May 18, 1998, at D1, *available in* 1998 WL 3824655 (noting pending lawsuit against University of Michigan for considering **race** as a factor in admissions); *I-200 Flap Ends as Footnote in Voter Pamphlet*, SEATTLE TIMES, Sept. 17, 1998, at B4, *available in* 1998 WL 3172159 (describing "reverse discrimination" lawsuit against University of Washington School of Law).

n60 For example, lawsuits have been filed against both the National Institutes of Health and Texas A & M University alleging the illegal use of racial preferences, *see* Peter Schmidt, *NIH, Texas A&M Sued Over **Race**-Based Policy*, CHRON. OF HIGHER EDUC., Mar. 7, 1997, at A30, *available in* 1997 WL 24391283, and a complaint has been filed by the Washington Legal Foundation with the Office for Civil Rights alleging that Florida Atlantic University unlawfully sponsors **race**-based scholarships, *see* Yollander Hardaway, *Affirmative Action: Does the Fifth Circuit's* **Hopwood** *Ruling Place Affirmative Action on Shaky Ground?*, 122 EDUC. L. REP. 1089, 1098 (1998).

n61 Enacted as article 1, section 31 of the California Constitution, Proposition 209 provides in relevant part: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of **race,** sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. 1, § 31(a).

n62 *See Gore Says He Will Fight for Affirmative Action*, BOSTON GLOBE, July 10, 1999, at A18 (describing Initiative 200, which passed in Washington state and bans affirmative action programs in public education, employment, and contracting).

n63 *See, e.g.*, Hornbeck, *supra* note 59, at D1 (describing political efforts to abolish affirmative action in Michigan); *see also supra* note 4.

n64 42 U.S.C. § 2000d (1994).

n65 An aspect of ***Bakke*** not often emphasized is that a majority of the Justices held that Title VI of the Civil Rights Act of 1964 is violated by racial discrimination that would violate the Equal Protection Clause if committed by a state actor. *See* Regents of the Univ. of Cal. v. **Bakke,** 438 U.S. 265, 287 (1978) (Powell, J.) (concluding that Title VI prohibits "only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *id.* at 340 (**Brennan,** J., joined by White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part) (the "**Brennan** four") (concluding that Congress equated "Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, . . . [and] intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution"); *see also* Amar & Katyal, *supra* note 21, at 1747 n.12 (noting that "post-***Bakke***, Title VI is to be interpreted in line with the Equal Protection Clause"). After *Croson* and *Adarand*, therefore, benign racial classifications that would violate the Constitution if employed by government would violate Title VI if employed by a school receiving federal financial assistance.

Indeed, ***Bakke*** provides particularly strong support for the proposition that Title VI is at least implicated by affirmative action, whether or not violated. The Justices in ***Bakke*** were

unanimous in concluding that Title VI applied to the preferential admissions program at issue, although only a majority concluded that Title VI was actually violated. *See* ***Bakke***, 438 U.S. at 287, 320 (Powell, J.) (concluding that Title VI prohibits what the Equal Protection Clause forbids, and further concluding that program violated Equal Protection Clause); *id.* at 417-18 (Stevens, J., joined by Burger, C.J., Stewart, & Rehnquist, JJ., concurring in part and dissenting in part) (concluding that admission program violated Title VI); *id.* at 357-62 (**Brennan** four) (concluding that although strict scrutiny was inapplicable, some form of intermediate heightened review was appropriate, but concluding that such review was satisfied).

n66 *See* Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 191 n.48 (1999) (observing that "Title VI of the Civil Rights Act of 1964, which once provided an incentive to promote equal educational opportunities, is now used as a tool to force public and private universities to limit the reach of their affirmative action policies" and citing Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 ANN. SURV. AM. L. 515, 516-17 (1995)). This effect can already be seen in Texas where the former state attorney general, as well as administrators of private Texas colleges, have interpreted ***Hopwood*** as forbidding the use of racial preferences by private schools that receive federal funds. *See All Things Considered: Private Schools and* **Hopwood**--*NPR's John Burnett Reports on a Little-Reported Aspect of the* **Hopwood** *Decision* (NPR broadcast, May 15, 1998), *available in* 1998 WL 3644958 [hereinafter *All Things Considered*].

n67 Professor Klarman observes that the Court did not adopt a "racial classification rule," a presumptive ban against racial classifications that disadvantage racial minorities, until 1964 in McLaughlin v. Florida, 379 U.S. 184 (1964). *See* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991). Prior to that time, the Court applied a form of rationality review except where a racial classification denied racial minorities certain fundamental rights such as voting or jury service. *See id.* Because the context in which the racial classification rule was applied in the 1960s and '70s involved discrimination *against* racial minorities, it was unclear whether the racial classification rule would apply to benign racial classifications. The Court's affirmative action cases seem to have established a racial classification rule across the board. The rigors of strict scrutiny, moreover, mean that the racial classification rule is, in practice, a per se and not just a presumptive ban on all racial classifications.

n68 For a description of several such programs, see *supra* notes 6-10 and accompanying text.

n69 426 U.S. 229 (1976).

n70 Several cases before *Washington v. Davis* involved laws that, though **race**-neutral on their face, were motivated by a discriminatory purpose to disadvantage blacks. Particularly illustrative are cases involving the use of **race**-neutral means by segregationist states to disenfranchise blacks, such as poll taxes, literacy tests, "grandfather" clauses, gerrymandered electoral districts, and criminal records. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (invalidating city boundary drawn to exclude black voters); Guinn v. United States, 238 U.S. 347, 365 (1915) (invalidating grandfather clause designed to evade Fifteenth Amendment); *see also* Shaw v. Reno, 509 U.S. 630, 639-40 (1993) (describing ostensibly **race**-neutral devices employed by several states following adoption of the Fifteenth Amendment to disenfranchise blacks, including "grandfather" clauses, "good character" provisos, and gerrymandered electoral districts); Thornburg v. Gingles, 478 U.S. 30, 38 (1986) (describing North Carolina's disenfranchisement of blacks by poll tax and literacy test); Hunter v. Underwood, 471 U.S. 222, 31-33 (1985) (invalidating criminal record voting disability adopted to disenfranchise blacks); ***Bakke***, 438 U.S. at 390 (Marshall, J., concurring in part and dissenting in part) (describing post-Civil War disenfranchising

techniques employed by Southern states, "including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary"). Although many of these cases involved the Fifteenth Amendment rather than the Equal Protection Clause of the Fourteenth Amendment, the Court has subsequently relied on them as equal protection precedents. *See, e.g., Shaw*, 509 U.S. at 644-45.

It should be noted that, until *Davis*, the Court had not clearly resolved whether a discriminatory purpose was either necessary or sufficient to constitute unconstitutional discrimination. At the time of *Guinn*, for example, the Court insisted that it would not generally inquire into legislative motivation, but concluded that the grandfather clause was such a close surrogate for **race** that it was as if the classification explicitly relied on **race.** *See* Klarman, *supra* note 67, at 295-96.

n71 *See* 426 U.S. at 244-45.

n72 442 U.S. 256 (1979). Although *Feeney* involved a claim of sex-based discrimination, the test there announced for determining whether a purpose is "discriminatory" with respect to a particular trait has been applied to claims of racial discrimination as well. *See* Hernandez v. New York, 500 U.S. 352, 360 (1991) (citing *Feeney*, 442 U.S. at 279).

n73 442 U.S. at 279 (citation omitted). The Court established two years before *Feeney* that strict scrutiny is triggered when a governmental decision is shown to have been motivated in part by a discriminatory purpose, even if other motivations played an equal or greater role. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

n74 Moreover, as suggested in the previous section with respect to benign racial classifications, a *Croson*-like interpretation of civil rights statutes could restrain the ability of *private* schools to pursue **race**-neutral remedial policies. *See supra* notes 64-66 and accompanying text.

n75 *See, e.g.*, DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF **RACE** AND SEX ON CAMPUS 251-53 (1991) (condemning racial preferences but endorsing "nonracial affirmative action"); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 222 (1992) (advocating colorblind governmental decisionmaking while endorsing **race**-neutral approaches to remedying past discrimination); Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 907-08 (1998) (proposing large-scale investment in primary and secondary education in exchange for eliminating **race**-based affirmative action); Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 35-36 (1992) (opposing preferential affirmative action but supporting other means, such as Head Start, to remedy historical discrimination against minorities); *see also* Locke, *supra* note 10, at A6; *All Things Considered, supra* note 66 (while acknowledging concern over declining minority populations at Texas universities, then state Attorney General Dan Morales opposed a return to affirmative action advocating instead that "public universities can accomplish that [diversity] objective using **race**-neutral means and mechanisms"); Norris & Jennings, *supra* note 6 (noting that "even critics of affirmative action welcome these experiments" to achieve diversity in colleges by helping teenagers develop their academic skills). Only a few articles discuss at length the constitutional difficulties facing **race**-neutral affirmative action. *See* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1806-08 (1996) (arguing that **race**-neutral remedial programs are not only subject to strict scrutiny but are arguably less well-tailored than programs that use racial preferences); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039 (1999) (defending their constitutionality); Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After* Miller v. Johnson: *A **Race**-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289 (1997) (arguing against their constitutionality).

n76 City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 509-10 (1989).

n77 *Id.* at 526, 528 (Scalia, J., concurring in the judgment).

n78 Relying on a study concerning the causes of low retention and graduation rates of black students at the University of Maryland, the court in *Podberesky* stated:

> "[Minority students] are more likely to provide their own expenses and have little time for campus activities and friends due to off campus living and work." . . . That study suggests that the best remedy is "campus job opportunities and convenient, attractive, and economically reasonable campus housing . . . available to a greater proportion of students."
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> . . . .
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> . . . The University has not made any attempt to show that it has tried, without success, any **race**-neutral solutions to the retention problem. Thus, the University's choice of a **race**-exclusive merit scholarship program as a remedy cannot be sustained.

Podberesky v. Kirwan, 38 F.3d 147, 161 (4th Cir. 1994).

n79 141 F.3d 344 (D.C. Cir. 1998).

n80 In the process of invalidating, under strict scrutiny, an FCC policy that pressured broadcast licensees to use racial preferences in hiring to achieve racial diversity among the staff, the court opined that the FCC could have sought to increase such diversity within licensees by mandating "racially neutral" recruitment and hiring policies. *See id.* at 351.

n81 As explained more fully below, this Article does not defend efforts to promote racial diversity for nonremedial purposes against constitutional challenge. *See infra* notes 110-11 and accompanying text.

n82 In this Article, I generally refer to white people when discussing those not benefited by commonly used racial preferences. I also refer to black people as the most common beneficiaries of affirmative action as well as the most common victims of historical discrimination. I recognize that such generalizations oversimplify the myriad circumstances in which discrimination and affirmative action operate. There are minority groups, most notably Native Americans, that have suffered serious discrimination, and there are minority groups who are not always included in the groups preferred by affirmative action programs. I do not mean to suggest otherwise. I refer to blacks and whites loosely as the principal minority and majority groups in part for convenience and in part because these groups have centered most prominently in the legal history of discrimination and affirmative action in the United States.

Several scholars have in fact argued that the history of discrimination experienced by black people makes them uniquely entitled to affirmative action. *See, e.g.*, Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 900 (1995) ("No other group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs."); Roy L. Brooks, ***Race*** *as an Under-Inclusive and Over-Inclusive Concept*, 1 AFR.-AM. L. & POL'Y REP. 9, 15 (1994) ("African Americans . . . are the only social group . . . that did not come to this country of their own free will."); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the*

Nineties, 1992 U. ILL. L. REV. 1043, 1071-73 (arguing that the unique experience of blacks justifies the use of racial quotas for their benefit).

n83 Part III shall argue that such programs could be adopted not to benefit racial minorities but to benefit the nonsuspect groups of victims of **societal discrimination** and members of cultural groups. Such programs would then not trigger strict scrutiny. This Part analyzes **race**-neutral affirmative action programs that have been adopted for the purpose of benefiting racial minorities and which, therefore, must satisfy strict scrutiny.

n84 *Cf.* Strauss, *supra* note 37, at 14 (remarking that "whatever the supposed vices of affirmative action, maintaining a system of racial supremacy is not among them").

n85 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (noting that the role of strict scrutiny is to "smoke out" illegitimate purposes); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (same).

n86 *Croson*, 488 U.S. at 493.

n87 In *Loving v. Virginia*, 388 U.S. 1, 11 (1967), for example, the Court rejected as impermissible the objective of preventing racial mixture through miscegenation, concluding that such a purpose was based on a belief in white supremacy.

n88 Justice Stevens used this metaphor in chiding the majority in *Adarand* for equating affirmative action with historical discrimination against blacks:

> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's **race** as a positive factor. . . . An attempt by the majority to exclude members of a minority **race** from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market.

Adarand, 515 U.S. at 245 (Stevens, J., dissenting).

n89 *See supra* text accompanying note 85.

n90 Four Justices currently on the Court dissented in *Metro Broadcasting*, criticizing Congress for relying on the "demeaning" assumption that a broadcaster's **race** was correlated with the broadcaster's choice of programming content. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 617 (1990) (O'Connor, J., dissenting) (criticizing the assumption that **race** predicts viewpoint); *id.* at 636 (criticizing FCC policy as seemingly based on "demeaning notion that members of the defined racial groups ascribe to certain 'minority views'"). The replacement of Thurgood Marshall with Clarence Thomas makes five Justices that would likely vote with the *Metro Broadcasting* dissenters.

n91 Klarman, *supra* note 67, at 311; *see also* George A. Rutherglen, *After Affirmative Action: Conditions and Consequences of Ending Preferences in Employment*, 1992 U. ILL. L. REV. 339, 340 (arguing that "an increasingly conservative Court is likely to limit affirmative action to progressively narrower circumstances, and perhaps, to prohibit it entirely").

n92 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

n93 Strauss, *supra* note 37, at 25.

n94 *See Croson*, 488 U.S. at 495-96 (explaining that because blacks were majority of city council members the case was not one in which a majority was disadvantaging itself).

n95 Strauss, *supra* note 37, at 25.

n96 Miller v. Johnson, 515 U.S. 900, 920 (1995) (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).

n97 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229-30 (1995).

n98 The concern with perpetuating stereotypes is independent of, though related to, the concern with stereotypical motivations behind a law. A racial classification could express a stereotypical message, thereby perpetuating such thinking among the public without the enacting legislature having held the stereotype. The message could be inadvertent. The two concerns are related, however, in that the more a classification expresses a stereotype the more likely it is that the enacting body was motivated by similar assumptions.

n99 Professor Kathleen Sullivan notes the emergence in *Croson* of concerns among several Justices over the risk that racial classifications may cause resentment and hostility. *See* Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.: *The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1622-23 (1990) (quoting Justices O'Connor, Kennedy, and Scalia). The most "ominous" warning came from Justice Scalia, who wrote that "when we depart from this American principle [against racial quotas] we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns." *Id.* (quoting *Croson*, 488 U.S. at 527 (Scalia, J., concurring)).

n100 *See* RICHARD D. KAHLENBERG, THE REMEDY: CLASS, **RACE,** AND AFFIRMATIVE ACTION 44 (1996) (arguing that racial preferences unfairly burden disadvantaged whites). The media routinely report anecdotal evidence of resentment toward affirmative action by disadvantaged whites. One article, for example, describes a conversation with a group of law students about affirmative action in which a white woman breaks in:

> Excuse me, I dated a black guy all throughout high school. My grades were better than his. He kept getting special assistance, counseling, scholarship offers. They were going out of their way to get him into college. His dad was a doctor. My mom was on food stamps. Tell me that's fair.

Wendy Kaufman & Bob Edwards, *Morning Edition: Initiative 200, available in* 1998 WL 3308596 (NPR broadcast, Sept. 4, 1998).

Even Justice **Brennan,** who would have upheld the affirmative action program in ***Bakke***, acknowledged the potentially unfair burden to disadvantaged whites. *See* Regents of the Univ. of Cal. v. **Bakke,** 438 U.S. 265, 361 (1978) (**Brennan,** J., concurring in part and dissenting in part) (observing that "the 'natural consequence of our governing process [may well be] that the most "discrete and insular" of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination'") (quoting United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 174 (1977) (**Brennan,** J., concurring in part)).

n101 I assume in this Article that, in light of *Adarand*, the analysis of racial discrimination and affirmative action by the federal government under the Due Process Clause of the Fifth

Amendment is essentially identical to the analysis of similar programs by state entities. Accordingly, any references I make to the Equal Protection Clause or to "state" action are intended to apply equally to programs enacted by the federal government.

n102 *Croson*, 488 U.S. at 493.

n103 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 145-48 (1980); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1699-1700 (1984) (arguing that function of heightened judicial review is to ensure that laws are enacted for public values rather than private preferences).

n104 After stating that governmental discrimination causes injury to its victims, the Court in *Adarand* explained that "the application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury." 515 U.S. 200, 230 (1995).

n105 Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 438 (1997).

n106 *Id.*

n107 480 U.S. 149, 185 (1987) (upholding court-ordered racial hiring quota enacted in response to persistent and egregious discrimination by state police force).

n108 *See id.* at 167.

n109 *See* Regents of the Univ. of Cal. v. **Bakke,** 438 U.S. 265, 418 n.22 (1978) (Stevens, J., concurring in part and dissenting in part) (distinguishing medical school's preferential admission program from nondiscriminatory "special recruitment policies" of the Department of Health, Education and Welfare). Indeed, regarding recruitment, in *Washington v. Davis*, in which the Court found insufficient proof of discriminatory intent by the police department, the Court cited with approval the department's **race**-conscious efforts to recruit minority officers. 426 U.S. 229, 246 (1976) (approving district court's inference that the police department had not discriminated against blacks, which was based in part on the department's "affirmative efforts . . . to recruit black officers"). The Court's reasoning might be that the police department is unlikely to have discriminated against blacks because it discriminates against whites instead. More plausibly, the Court simply did not consider affirmative efforts to recruit black officers as unfair discrimination against potential white officers.

n110 Even Justice Powell's opinion in ***Bakke***, the only opinion endorsing diversity in some form, rejected the goal of racial diversity as an end it itself:

> If [the medical school's] purpose is to assure within its student body some specified percentage of a particular group merely because of its **race** or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than **race** or ethnic origin is discrimination for its own sake. This the Constitution forbids.

Bakke, 438 U.S. at 307 (citing Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964); **Brown** v. Board of Educ. of Topeka, 347 U.S. 483, 493-96 (1954)).

n111 A diversity of "experiences, outlooks, and ideas" was the kind of interest Justice

Powell endorsed in ***Bakke***, although he found the racial quota an inappropriate means for achieving it. *See* ***Bakke***, 438 U.S. at 314.

n112 *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, U.S.A. STATISTICS IN BRIEF (1997) [hereinafter CENSUS] (reporting that, in 1995, 12.6% of Americans were black, 73% white and 10.4% Hispanic).

n113 *See* Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 868 n.97 (1997) ("In 1994, for the first time in American history, there were more African American men in prison than white men."). Blacks are incarcerated at a rate eight times that of whites. *See* Pierre Thomas, *Study Suggests Black Male Prison Rate Impinges on Political Process*, WASH. POST, Jan. 30, 1997, at A3 (citing 1995 Sentencing Project report that the incarceration rate of blacks is 7.66 times that of whites). On any given day, one in three black men in their twenties is under the control of the criminal justice system, *see id.*, more than the number of black men of all ages in college. *See* DERRICK A. BELL, JR., **RACE,** RACISM & AMERICAN LAW 340 n.33 (1992). In contrast, only 1 in 16 white males in the same age group is involved with the criminal justice system. *See id.* at 340. The Sentencing Project also reported that one of every seven black men (1.46 million of a voting population of 10.4 million) is barred from voting because of a felony conviction. *See* Thomas, *supra*, at A3.

n114 The average income of blacks is 60 % that of whites, and the median wealth of blacks is a mere 8% of that of whites. *See* CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, **RACE,** AND AMERICAN VALUES 45 (1996). A recent study found that the average income of black high school graduates ($ 18,700) is roughly the same as that for white high school drop-outs. *See* Joan Wallace-Benjamin & Ted Murphy, Editorial, *Raising the Income of Poor Men*, BOSTON GLOBE, Jan. 25, 1998, at E7. Blacks are less likely to be employed, to own their home or to own stock, and are dramatically overrepresented among the poor. *See* EDLEY, *supra*, at 43-44, 49.

n115 *See* CENSUS, *supra* note 112.

n116 *See* Jason Deparle, *More Whites Than Minorities Abandoning Welfare*, MILWAUKEE J. SENTINEL, July 27, 1998 ("By early 1997, blacks accounted for 37% of the nation's welfare caseload, although they are just 13% of the general population. Hispanics accounted for 22% of the welfare rolls, though they represent 11% of the general population. Whites, by contrast, accounted for just 35% of the welfare rolls, although they make up 73% of the general population.").

n117 For example, in Montgomery County, Maryland, 41% of black seventh-graders passed a reading achievement test (the Criterion Reference Tests). This compares to passing grades by 81% of white seventh-graders, 46% of Hispanics, and 75% of Asian-Americans. *See* Fern Shen, *Scores Rise in Reading in Montgomery; Disparity Persists for Racial Groups*, WASH. POST, Dec. 10, 1997, at B1.

By 1996, *with the help of affirmative action*, only 7.8% of students, or 1 in 13, graduating from college were black. *See* THOMAS SNYDER ET AL., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 1998, 302-11 (1999). Blacks are particularly underrepresented among those graduating from professional or graduate schools, comprising less than 7% of those receiving professional and Master's degrees, and only 3.7%, or 1 in 27, of successful doctoral candidates. *See id.* And these fractions are undoubtedly smaller at the most prestigious schools that graduate the most influential members of our society.

n118 *See* Egypt Freeman, *The State of Black Health*, HEALTH QUEST: THE PUBLICATION OF BLACK WELLNESS, Feb. 28, 1998, at 18 (reporting life expectancy for blacks is 69.6 years as compared to 76.5 years for whites).

n119 A "National Institute for Aging [study] shows that blacks enjoy 56 years of reasonably good health, eight years fewer than whites and Hispanic[s] . . . ." Peter T. Kilborn, *Racial Health Disparities Continue, Studies Say*, PITTSBURGH POST GAZETTE, Jan. 26, 1998, at A6. Christopher Jennings, Chief White House advisor on health issues, said that "huge" disparities remain even when economic status and education are factored out. *See id.*

n120 *See Clinton Plan to Target Disparities in the Health of Whites, Minorities*, BUFFALO NEWS, Feb. 22, 1998, at A4.

n121 Black and other children of color are placed in foster care three times more frequently than white children. *See* Judith K. McKenzie, *Adoption of Children with Special Needs*, 3 FUTURE OF CHILDREN 62, 68-69 (1993). According to the U.S. Department of Health and Human Services' Administration for Children and Families, 43% of children in foster care on March 31, 1999 were black, 36% were white, and 15% were Hispanic. *See* U.S. DEP'T OF HEALTH & HUM. SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, **RACE/**ETHNICITY OF CHILDREN IN FOSTER CARE (Jan. 2000).

n122 The American Cancer Society (ACS) estimates that 234 of every 100,000 black men will get prostate cancer in 1998, compared to estimates of 135 white men this year. The ACS reports that black men are two to three times more likely to die of the disease. *See Health Watch: Prostate Cancer*, ATLANTA J. & ATLANTA CONST., Jan. 14, 1998, at D6. Once diagnosed with prostate cancer, 66% of black men and 81% of white men survive for five years. *See* Kilborn, *supra* note 119, at A6. Since the early 1960s, black men's death rates from cancer have risen 61%, while the rate for white men has increased by only 19%, according to the American Cancer Society. *See id.* The Center for Disease Control and Prevention reports that while the overall death rate from breast cancer fell 10% between 1990 and 1995, from 23.1 per 100,000 to 21, the death rate for black women remained at 27.5 per 100,000. *See id.*

n123 The Center for Disease Control and Prevention (CDCP) reports that the number of blacks with diabetes rose by 33% from 1980 to 1994, three times the rate of increase for all other Americans. *See* Editorial, *Let's Work to Bridge the Gap in Black Health*, BALTIMORE SUN, Feb. 4, 1998, at A15.

n124 According to a CDCP study, blacks die of asthma at more than twice the rate of whites. *See Health Watch: Asthma on the Rise*, ATLANTA J. / ATLANTA CONST., Apr. 24, 1998, at F3 (reporting that blacks die of asthma at a rate of 38.5 per million, while the rate for whites is 15.1 per million).

n125 *See* Sheryl Gay Stolberg, *Epidemic of Silence: A Special Report; Eyes Shut, Black America Is Being Ravaged by AIDS*, N.Y. TIMES, June 29, 1998, at A1 (reporting that African-Americans, only 13% of the U.S. population, account for 57% of this country's new HIV infections).

n126 T. Alexander Aleinikoff, *A Case for **Race**-Consciousness*, 91 COLUM. L. REV. 1060, 1065-66 (1991) (citations omitted).

n127 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) (explaining that "nothing we say today precludes a state . . . from taking action to rectify the effects of identified discrimination").

n128 *See id.* at 492.

n129 *See id.* at 494 (explaining that "states and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to

remove arbitrary barriers to minority advancement"); *id.* at 500 (suggesting that Richmond could remedy "a prima facie case of a constitutional or *statutory* violation by anyone in the Richmond construction industry" but concluding that Richmond had failed to establish such a showing) (emphasis added).

n130 *See id.* at 492 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)).

n131 *See Croson*, 488 U.S. at 500.

n132 *See* Strauss, *supra* note 37, at 15 (observing that "if the premise is that racial classifications are generally harmful, one would want them employed only to remedy the greatest evils, and offhand **societal discrimination** seems like a greater evil than discrimination in a specific area"); *see also* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 405 (1998) (arguing that "given our nation's woeful history of racial discrimination and the Fourteenth Amendment's promise of equal opportunity, it is reasonable to believe that a general interest in remedying **societal discrimination** is weighty enough to be constitutionally 'compelling'"); Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. **RACE** & L. 51, 84 (1996) (observing that "'**societal discrimination**' is, of course, the sum total of local discriminatory practices").

n133 *See Croson*, 488 U.S. at 505.

n134 *See* Jennifer R. Byrne, *Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action*, 42 ST. LOUIS U. L.J. 619, 626 (1998) (describing ***Bakke*** as holding that correcting **societal discrimination** is an impermissible goal); Lino A. Graglia, *The 'Remedy' Rationale For Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK U. L. REV. 569, 615 (1988) (describing remedying **societal discrimination** as an impermissible goal); Kent D. Lollis, *Strict or Benign Scrutiny Under the Equal Protection Clause: Troublesome Areas Remain*, 35 ST. LOUIS U. L.J. 93, 100 (1990) (describing goal of remedying **societal discrimination** as "strictly forbidden by the Constitution").

n135 Professor Strauss makes a similar observation, stating that "the Court does not disparage the importance of **societal discrimination** as a concern; on the contrary, it repeatedly acknowledges the 'sorry history of racial discrimination' and its effects." Strauss, *supra* note 37, at 29 (quoting *Croson*, 488 U.S. at 499, and citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (plurality opinion) and *Wygant*, 476 U.S. at 276 (plurality opinion)).

n136 *See* Regents of the Univ. of Cal. v. **Bakke,** 438 U.S. 265, 307-10 (1978) (Powell, J.). Justice Powell's reasoning has been cited with approval in subsequent decisions. *See Croson*, 488 U.S. at 496-97, 505-06; *Wygant*, 476 U.S. at 276.

n137 *Wygant*, 476 U.S. at 276.

n138 *Id.* at 274; *see also id.* at 276.

n139 *Id.* at 276.

n140 *Croson*, 488 U.S. at 505-06 (emphases added) (quoting ***Bakke***, 438 U.S. at 296-97 (Powell, J.)); *see also Croson*, 488 U.S. at 499 (expressing concern that permitting **societal discrimination** to justify **race**-based remedies "would give local governments license to create a patchwork of *racial preferences* based on statistical generalizations about any particular field of endeavor") (emphasis added).

n141 *Croson*, 488 U.S. at 498.

n142 Adarand Constructors, Inc. v. Pena. 515 U.S. 200, 230 (1995).

n143 *See* Lincoln Caplan et al., *The* **Hopwood** *Effect Kicks in on Campus*, U.S. NEWS & WORLD REP., Dec. 23, 1996, at 28 (stating that University of California at Berkeley determined that Hispanic and black student population would drop under class-based affirmative action); Chris Klein, *Law School Diversity Hinges on* ***Race*** *Policy*, NAT'L L.J., Jan. 27, 1997, at A1 (discussing a study by Linda Wightman finding that minority enrollment would drop significantly under class-based affirmative action).

n144 *See, e.g.*, Brest & Oshige, *supra* note 82, at 897-98; Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1947 (1996); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1894 (1996); Tung Yin, *A* Carbolic Smoke Ball *for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 230-45 (1997); Nathan Glazer, ***Race,*** *Not Class*, WALL ST. J., Apr. 5, 1995, at A12. An oft-quoted criticism of **race**-neutral affirmative action as ineffective is that of Justice Blackmun in ***Bakke***:

> I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of **race.** There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot--we dare not--let the Equal Protection Clause perpetuate racial supremacy.

Bakke, 438 U.S. at 407 (Blackmun, J., concurring in part and dissenting in part). Notice that Justice Blackmun's assumption that **race**-neutral means would be permissible, even if ineffective, suggests that the principal concern of the Justices who voted to invalidate the affirmative action program in ***Bakke*** **was its race**-operative character rather than its motivating objectives.

n145 *See Croson*, 488 U.S. at 498 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986) (plurality opinion)).

n146 Justice Powell expressed this concern in concluding that all racial preferences must be subject to strict scrutiny. Otherwise, he surmised:

> Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence--even if they otherwise were politically feasible and socially desirable.

Bakke, 438 U.S. at 296-97 (Powell, J.).

n147 *See supra* notes 102-03 and accompanying text (discussion of strict scrutiny's "smoke out" function); *see also supra* note 85 (citing Court's explanation in *Croson* and *Adarand* of this function of strict scrutiny).

n148 As the Court explained in *Washington v. Davis*, subjecting **race**-neutral classifications to heightened review where no discriminatory purpose is demonstrated, simply because

> in practice it benefits or burdens one **race** more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

426 U.S. 229, 248 (1976).

n149 To the extent the Court is concerned with harmful social effects of affirmative action, such as resentment by nonpreferred racial groups, it should limit its concern to resentment that is arguably legitimate. This means resentment by those who truly regret our discriminatory history and desire to remedy it but who may believe that affirmative action is sometimes unfair. *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 276 (1995) (Ginsburg, J., dissenting) ("Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with *legitimate* expectations of persons in once-preferred groups.") (emphasis added). Resentment of any kind, in contrast, should not necessarily concern us, or the Court, because there is always a risk that anything that helps racial minorities will offend some people who believe minorities do not deserve equal rights. Resentment of this sort cannot be deemed a legitimate obstacle to remedial efforts. If any resentment over efforts to pursue racial equality were a basis to avoid such efforts, then the abolitionist and civil rights movements should never have been attempted. *See* Randall Kennedy, *Persuasion and Distrust, A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1330 (1986) (describing bitter resistance to civil rights movements).

n150 *See* DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 245-87 (1995) (arguing that many people hold stereotypes about blacks as criminals based on personal experience or on an awareness that blacks commit a disproportionately high rate of crime); Carol R. Goforth, *'What is She?' How **Race** Matters and Why it Shouldn't*, 46 DePAUL L. REV. 1, 63 (1996) (suggesting that negative media reports about blacks, such as high rates of crime, drug use, unemployment, and teen pregnancy reinforce stereotypical beliefs). A psychiatrist in the Boston area recounted his observations of people forming racial stereotypes from reports about blacks:

> When they [his suburban neighbors] hear of all these murders, all these men in prison, all these women pregnant with no husbands, they don't buy the explanation that it's poverty, or public schools, or racial segregation. They say, "We didn't have much money when we started out, but we led clean and decent lives. We did it. Why can't they?" I try to get inside that statement. So I ask them what they mean. What I hear is something that sounds very much like a genetic answer: "They don't have it." What they mean is lack of brains, or lack of drive, or lack of willingness to work. Something like that.

David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q.

921, 996-97 (1996) (quoting JONATHAN KOZOL, SAVAGE INEQUALITIES 192 (1992)).

n151 Dinesh D'Souza, *Improving Culture to End Racism*, 19 HARV. J.L. & PUB. POL'Y 785, 794 (1996).

n152 Professor Rubenfeld has also noted that abandoning affirmative action may have worse effects on stereotypes and racial tensions than those created by affirmative action:

> Does affirmative action "in fact promote notions of racial inferiority and lead to a politics of racial hostility"? Without doubt. Of course, affirmative action's critics tend to forget that the relevant question on this point is whether affirmative action fosters more racial hostility and stereotyping than would exist without it. (To have extremely few black students at some of our most prestigious academic institutions would also promote notions of racial inferiority. . . .).

Rubenfeld, *supra* note 105, at 446; *see also* Kennedy, *supra* note 149, at 1330-31 (arguing that it is unrealistic to think affirmative action is the primary cause of white disparagement of blacks).

n153 *See* Hernandez v. New York, 500 U.S. 352, 361 (1991) (explaining that "Spanish speaking" is not equivalent to "Latino" for equal protection purposes because not all Latinos are Spanish-speaking and not all Spanish speakers are Latino).

n154 500 U.S. 352 (1991).

n155 442 U.S. 256 (1979).

n156 Indeed, a couple of cases of dubious status suggest that a classification does not classify by **race** if it is only under-inclusive of a racial group, even if not over-inclusive. That is, provided there are members of the racial group who do not fall within the classification, then the classification is not based on **race,** even if everyone *within* the classification is a member of the racial group. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court held that a federal hiring preference for individuals who were "one-fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe" was not a "racial" preference because it "operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id.* at 554. The preference was thus under-inclusive of the racial group--Indians--notwithstanding that everyone within the hiring classification was racially Indian. *Accord* United States v. Antelope, 430 U.S. 641, 647 & n.7 (1977) (holding that jurisdictional law that subjected Indians to felony-murder rule was not based on "impermissible racial classifications" because it only applied to members of federally recognized tribes and therefore did "not apply to many individuals who are racially to be classified as 'Indians.'") (quoting *Mancari*, 417 U.S. at 554). These holdings are aberrational and inconsistent with prevailing equal protection doctrine. A governmental policy that explicitly disfavors (or favors) members of particular racial groups plainly employs a racial classification even if it limits the burden to only some members of the disfavored groups. A state employment policy against hiring "any blacks without a college education" would trigger strict scrutiny notwithstanding that some blacks, those with a college education, would not be covered by the policy. Consider also *Croson's* invalidation of the **race**-based set-aside, even though it benefited only minority persons who also owned construction firms and otherwise qualified to perform the contracted work. The Indian classification cases might be explained in part because they involved the special relationship between the federal government and Native American tribes, a relationship which finds explicit support in the Indian Commerce Clause of the Constitution. *See* U.S. CONST. art. I, §

8, cl. 3. Those cases might be reconciled with equal protection doctrine to the extent that Congress's principal intent was to address Native American tribes as political entities rather than as racial groups. If membership in a tribe does not necessarily require being a member of a particular racial group, so that there may be non-Indian members as well as nonmember Indians, then tribal membership would not be a racial classification under *Hernandez*.

n157 The classification is here limited to those who suffer "substantially" from **societal discrimination** because otherwise the classification may well include virtually everyone, since most people might be said to suffer in some way from historical **societal discrimination** simply by experiencing the negative effects of racial tensions in our society. A state has a legitimate interest in focusing its limited resources on those most acutely harmed by **societal discrimination,** whose socioeconomic circumstances are significantly below what they would be had historical discrimination not occurred. A state may, of course, wish to target a broader class of victims of **societal discrimination.** The point is simply that victims of **societal discrimination** are not a racial group and, therefore, a **race**-neutral affirmative action plan may target all or any portion of them, whether or not "identified" with particularity, without triggering strict scrutiny.

n158 As Professor Strauss observes:

> A person might be subject to the effects of past discrimination even if he himself has never been the victim of a specific act of discrimination, or has not been discriminated against for decades. Discrimination at an earlier time (or even discrimination against earlier generations) can leave people without the resources, particularly human capital resources, needed to compete--education, experience, reputation, contacts.

Strauss, *supra* note 37, at 21.

n159 *See* Richard D. Kahlenberg, *Equal Opportunity Critics*, NEW REPUBLIC, July 17, 1995, at 20, 21 (suggesting a sophisticated definition of disadvantage).

n160 *See* Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 229 (1999) (suggesting as an alternative to racial preferences that universities reconsider weight given to standardized test scores and grade point averages). If a university modified reliance on standardized criteria in order to recruit racial minorities, then such action would be subject to strict scrutiny. If, however, replacing racial preferences with modified admission standards were intended to reach victims of discrimination directly through modified standards *instead of* relying on racial preferences as a proxy for discrimination victims, then strict scrutiny would not be triggered.

n161 "Legacies" refer to the children of university alumni who are often given a preference in the admission process over applicants with stronger paper credentials. *See* Elaine Woo, *Belief in Meritocracy an Equal-Opportunity Myth*, L.A. TIMES, Apr. 30, 1995, at A1. "In 1988, for example, Harvard University's legacy preference led to the admission of almost 200 students who arguably would have been rejected otherwise." Yin, *supra* note 144, at 217 n.22 (citing Woo, *supra*, at A1). Abandoning the legacy preference could, of course, have its own real cost in lost alumni donations. *See id.* (explaining that defenders of legacy programs cite the increased donations from alumni such programs tend to encourage which in turn enables schools to fund more need-based scholarships) (citing Woo, *supra*, at A1).

n162 *See* Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 948 (1994) (arguing that "not all Black

families identify with Black culture"); Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 948 (1996) (advocating distinction between "black" as a **race** and "African-American" as a culture, and arguing that not all racially black persons are culturally African-American); Tommy E. Whittler et al., *Strength of Ethnic Affiliation: Examining Black Identification with Black Culture*, 131 J. SOC. PSYCH. 461, 461 (1991) (explaining that some blacks may identify strongly with Black culture while others may assimilate more with the majority culture).

n163 *See* Johnson, *supra* note 162, at 950 n.222 ("Of course, nested within the ethnic categorization of African American are a plethora of people of all **races,** blacks, mestizos, mulattos, and surprisingly, whites.").

n164 The nonsuspect nature of *cultural* classifications applies equally to cultures commonly associated with particular national origins. Thus, for example, government sponsored events or programs that celebrate Irish, German, Chinese, or Mexican cultures are not suspect or subject to strict scrutiny. The reason is that, although national origin, like **race,** is a suspect classification, having a particular national origin is neither necessary nor sufficient to identifying with a culture associated with a particular national origin.

n165 *See, e.g.*, Brest & Oshige, *supra* note 82, at 876 & n.80 (suggesting that schools might identify students whose presence will most serve affirmative action goals by asking applicants to discuss their cultural backgrounds, "community" ties, or social or political viewpoints) (citing Ian Haney Lopez, *Community Ties, **Race,** and Faculty Hiring: The Case for Professors Who Don't Think White*, RECONSTRUCTION, Winter 1991, at 46, 49).

n166 For example, class-based affirmative action programs with which some California schools are experimenting should be upheld if they are intended either to compensate for disadvantages caused by **societal discrimination** or as a means to obtaining students with diverse experiences defined nonracially, such as economic, educational, or cultural backgrounds. The consideration by school admissions officers of "diversity" or "hardship" essays in which applicants describe challenging life experiences could likewise be justified on remedial grounds or as a means for identifying students from a variety of backgrounds who could bring distinct outlooks, ideas, and cultural perspectives to the academic environment. Colleges in Texas might be justified in admitting the top 10% of every high school on the grounds that past **societal discrimination,** particularly residential and educational segregation, resulted in highly segregated, low-income, ethnic communities that still exist today and which would benefit from the 10% program. Alternatively, Texas colleges might seek students from a cross-section of high schools as a strategy to enrich diversity given that different communities are often defined by a unique mix of demographic characteristics including socioeconomic status, occupation, education, and political, religious, or cultural affiliation. *Cf.* Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 366-67 (1999) (arguing that diversity of jury compositions could be enhanced by selecting jurors from a cross-section of communities).

n167 *See, e.g.*, Foote & King, *supra* note 10, at 61 (explaining that, in response to Proposition 209, the University of California at San Diego opened academic assistance programs for low-income and bilingual elementary school students, and quoting University of California at Santa Cruz Chancellor as vowing to "go all the way back to the first grade" if necessary).

n168 *See Why Colleges Need Affirmative Action, supra* note 5 (stating that "when the 5th U.S. Circuit Court of Appeals, in its radical ***Hopwood*** decision, outlawed any consideration of **race** in admission to public universities, the Texas legislature passed a bill requiring state universities to admit the top 10 percent of every high school graduating class").

n169 For example, University of Texas vice president Patricia Olendorf purportedly said that the new law guaranteeing admission to the top 10% of each graduating high school class in the state was "designed to offset ***Hopwood***." *This Morning: Newscast--University of Texas Heads Back to Court to Get an Affirmative Action Ban Overruled* (CBS television broadcast, May 18, 1998).

n170 *See supra* note 7.

n171 471 U.S. 222 (1985).

n172 *See id.* at 233.

n173 *Id.* at 233.

n174 413 U.S. 189 (1973).

n175 The Court stated:

> We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

Id. at 210-11.

n176 450 U.S. 464 (1981).

n177 In rejecting petitioner's claim of illegitimate legislative motivation, the Court reasoned:

> Subsequent to the decision below, the California Legislature considered and rejected proposals to render § 261.5 gender neutral, thereby ratifying the judgment of the California Supreme Court. That is enough to answer petitioner's contention that the statute was the "accidental by-product of a traditional way of thinking about females." Certainly this decision of the California Legislature is as good a source as is this Court in deciding what is "current" and what is "outmoded" in the perception of women.

Id. at 471 n.6 (citations omitted).

n178 453 U.S. 57 (1981).

n179 *Id.* at 58.

n180 The Court stated:

> We reject appellees' argument that we must consider the constitutionality of the MSSA solely on the basis of the views expressed by Congress in 1948, when the MSSA was first enacted in its modern form. Contrary to the suggestions of

> appellees and various amici, reliance on the legislative history of Joint Resolution 521 and the activity of the various Committees of the 96th Congress considering the registration of women does not violate sound principles that appropriations legislation should not be considered as modifying substantive legislation. Congress did not change the MSSA in 1980, but it did thoroughly reconsider the question of exempting women from its provisions, and its basis for doing so. The 1980 legislative history is, therefore, highly relevant in assessing the constitutional validity of the exemption.

Id. at 74-75.

n181 518 U.S. 515 (1996).

n182 *See id.* at 539 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)).

n183 *See Virginia*, 518 U.S. at 535 ("Virginia has not shown that VMI was established, *or has been maintained*, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.") (emphasis added); *id.* at 536 ("Neither *recent* nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options.") (emphasis added); *id.* at 539 (considering VMI's report on the re-examination of the single-sex policy and concluding that it did not demonstrate sufficiently important purpose to uphold the policy).

n184 Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968) (declaring that segregated school systems have an affirmative obligation to dismantle their dual school systems "root and branch").

n185 Chief Justice Rehnquist's concurrence most clearly reflects this position:

> VMI was founded in 1839, and, as the Court notes, admission was limited to men because under the then-prevailing view men, not women, were destined for higher education. However misguided this point of view may be by present-day standards, it surely was not unconstitutional in 1839. The adoption of the Fourteenth Amendment, with its Equal Protection Clause, was nearly 30 years in the future. The interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was yet another century away.
>
> . . . .
>
> Even at the time of our decision in *Reed v. Reed*, therefore, Virginia and VMI were scarcely on notice that its holding would be extended across the constitutional board. They were entitled to believe that "one swallow doesn't make a summer" and await further developments. Those developments were 11 years in coming.
>
> . . . .
>
> . . . Unlike the majority, I would consider *only* evidence that postdates our decision in *Hogan*, and would draw no negative inferences from the Commonwealth's actions before that time. I think that after *Hogan*, the Commonwealth was entitled to reconsider its policy with respect to VMI, and not to have earlier justifications, or lack thereof, held against it.

Id. at 560-62 (Rehnquist, C.J., concurring) (emphasis in original).

n186 347 U.S. 483 (1954).

n187 A majority of the Court in ***Bakke*** held that some use of **race** in university admissions was constitutional, reversing so much of the lower court's opinion that prohibited any consideration of **race.** *See* Regents of the Univ. of Cal. v. **Bakke,** 438 U.S. 265, 320 (1978) (Powell, J.) (Part V-C of opinion); *id.* at 328 (**Brennan,** White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part) (joining Part V-C of Justice Powell's opinion); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (noting that racial diversity in higher education has been found to be a compelling state interest) (citing ***Bakke***, 438 U.S. at 311-15 (Powell, J.)).

n188 *See* Jonathan Alger, *When Color-blind Is Color-bland: Ensuring Faculty Diversity in Higher Education*, 10 STAN. L. & POL'Y REV. 191, 192 (1999) ("Because the Court has not provided further guidance on the issue, colleges and universities continue to rely upon Justice Powell's opinion in ***Bakke*** to justify faculty and student diversity programs.") (footnote omitted); Philip T.K. Daniel & Kyle Edward Timken, *The Rumors of My Death Have Been Exaggerated:* **Hopwood's** *Error in "Discarding"* **Bakke,** 28 J.L. & EDUC. 391, 400 (1999) (observing that "Justice Powell's diversity rationale in ***Bakke*** has been embraced by college administrators as the blueprint of permissible admissions").

n189 *See supra* notes 76-77 and accompanying text (quoting suggestion by Justices O'Connor and Scalia that **race**-neutral means could be used to remedy disadvantages suffered by minority-owned firms).

n190 Martin Luther King, Jr., *I Have a Dream, in* THE WORDS OF MARTIN LUTHER KING, JR. (selected by Coretta Scott King, Newmarket Press: NY 1983) (address on August 28, 1963).

n191 *See* Kathleen A. Graves, *Affirmative Action in Law School Admissions: An Analysis of Why Affirmative Action Is No Longer the Answer . . . Or Is It?*, 23 S. ILL. U. L.J. 149, 171 (1998) (quoting King's "I Have a Dream" speech as exemplifying that "even Martin Luther King, Jr. recognized the detriment of affirmative action and the need to do away with it"); Cass R. Sunstein, *What the Civil Rights Movement Was and Wasn't (with Notes on Martin Luther King, Jr. and Malcolm X)*, 1995 U. ILL. L. REV. 191, 203 (1995) ("As we have seen, King's 'I have a dream' speech has been used to give moral weight to the constitutional attack on affirmative action."); Sylvia R. Lazos Vargas, *Deconstructing Homogeneous Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1517-18 (1998) (arguing that current attack on affirmative action is premised on the argument that individuals should be judged, according to Martin Luther King, Jr.'s aphorism, on the "content of character and not the color of skin").

n192 347 U.S. 483 (1954) (invalidating segregation in public schools).

n193 The Court applied ***Brown*** in a series of per curiam orders to invalidate a variety of invidious segregationist practices. *See* Schiro v. Bynum, 375 U.S. 395 (1964) (municipal auditorium); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (municipal golf course and parks); Gayle v. Browder, 352 U.S. 903 (1956) (city buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (municipal golf course); Mayor & City Council v. Dawson, 350 U.S. 877 (1955) (public bathhouses and beaches). Other laudable cases following ***Brown*** in which the Court invalidated discriminatory practices include *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating state antimiscegenation law), *McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down law that criminalized interracial cohabitation between unmarried persons), *Anderson v. Martin*, 375 U.S. 399 (1964) (invalidating law that required

election ballots to indicate candidates' **races)**, and *NAACP v. Alabama*, 357 U.S. 449 (1958) (invalidating state law that required NAACP to disclose membership).

n194 The Court so characterized congressional legislation passed during Reconstruction, which it invalidated, that would have prohibited racial discrimination in places of public accommodation. *See Civil Rights Cases*, 109 U.S. 3, 25 (1883).

n195 MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 136 (1964). Indeed, while Dr. King's principal concern was the condition of blacks, he offered solutions that would help all disadvantaged persons on a **race**-neutral basis. Thus, in proposing a "Bill of Rights for the Disadvantaged" to "transform the conditions of Negro life," King explained the need to help disadvantaged whites as well:

> While Negroes form the vast majority of America's disadvantaged, there are millions of white poor who would also benefit from such a bill. . . .
>
> It is a simple matter of justice that America, in dealing creatively with the task of raising the Negro from backwardness, should also be rescuing a large stratum of the forgotten white poor.

Id. If opponents of affirmative action seek guidance from Martin Luther King, Jr., as we all should, they--and the Court--should also remember all of his Dream. Whatever his position would have been today on racial preferences, he clearly would have supported **race**-neutral affirmative action.

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Record Type: Record

To: Noel J. Francisco/WHO/EOP

cc: david g. leitch/who/eop@eop, alberto r. gonzales/who/eop@eop
Subject: Re: Michigan Case

My initial general comments. I am also going over the specifics.

First, the draft seems to give too little a sense of the country's history -- namely, the history of racial discrimination against African-Americans, American Indians, Asian-Americans, and Hispanics, among many others. For example, Judge Friedman stated in district court before striking down the program: "First, there is no question about the long and tragic history of race discrimination in this country. At different times in history, Native Americans have been deprived of land and forced onto reservations; African Americans have been held in slavery; and Asian Americans have been detained in internment camps. Many ethnic and racial groups -- including, but not limited to, the underrepresented minority groups identified by the law school's admissions policy -- have been victims of discrimination in housing, employment, education, public accommodations, and elsewhere. While American public policy has sought to eradicate race discrimination, its lingering effects are apparent." It seems to me that the brief should not ignore this history, but rather should acknowledge it and explain that the Court has considered that history together with its commitment to racial equality and race-neutrality -- and has held that this history of race discrimination is appropriately remedied, where possible, by aggressive race-neutral programs (compare the President's program for increasing minority home ownership).

Second and relatedly, the brief gives no sense of the Court's jurisprudential history. General racial preferences (that is, racial preferences unmoored from the need to remedy specific, identified discrimination by a particular state entity) have been justified in the past on two different grounds -- remedying the effects of past societal discrimination and achieving diversity. It seems to me that both interests are actually related and should be mentioned -- and the Court's past holdings on those asserted interests should be outlined.

Third, that is particularly important here because in this very case, the intervenors advanced in district court and Sixth Circuit the compelling interest of remedying the effects of past societal discrimination. (Keep in mind that this was the interest accepted by the Brennan 4-Justice opinion in Bakke, which then proceeded also to uphold the program after concluding that race-neutral alternatives were insufficient to remedy those effects.) The district court here considered that alternative interest and rejected it per controlling Supreme Court case law. The Sixth Circuit did not need to address this asserted interest because it found diversity to be a compelling interest (see fn4 of Sixth Circuit opinion). It seems to me the brief would do well to mention the jurisprudential context in which the case arises.

Fourth, I do not like the optics of excessively citing dissenting opinions throughout from O'Connor and Douglas. I understand the point, and there are a few places where a string cite to past O'Connor dissents makes sense, but the current cites create a misimpression that the argument here is not entirely

consistent with the Court's case law as outlined in majority opinions. (I also do not think cites to Bob Jones case create the right impression.)

Fifth, the brief is actually quite thin on the strongest and easiest argument in the case -- namely, that race-neutral alternatives must be considered and attempted and race-based admissions used (if at all) only as a last resort. I think this section should be beefed up with citations and explanations and good comparisons to Texas, California, and Florida.

Sixth, I think this brief should be understandable to any member of the public as well as experienced constitutional lawyers. I do not think the draft accomplishes that goal.

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Citation: **137 F. Supp. 2d 821**

*137 F. Supp. 2d 821, *; 2001 U.S. Dist. LEXIS 3256, **

BARBARA GRUTTER, Plaintiff, vs. LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, REGENTS OF THE UNIVERSITY OF MICHIGAN, and THE UNIVERSITY OF MICHIGAN LAW SCHOOL, Defendants.

Civil Action No. 97-CV-75928-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

137 F. Supp. 2d 821; 2001 U.S. Dist. LEXIS 3256

March 27, 2001, Decided

DISPOSITION: [1]** Plaintiffs' request for declaratory relief granted. Plaintiffs' request for injunctive relief granted. Parties' various motions for summary judgment denied, except that motion of individual defendants for summary judgment on grounds of qualified immunity granted.

CASE SUMMARY

PROCEDURAL POSTURE: The matter came on for trial on plaintiff's complaint alleging defendants' law school admissions policy discriminated against her on the basis of race in violation of equal protection under U.S. Const. amend. XIV, and that defendants violated 42 U.S.C.S. § 2000d. The individual defendants moved for summary judgment based on qualified immunity and defendant board of regents moved for summary judgment on the basis of U.S. Const. amend. XI immunity.

OVERVIEW: Plaintiff, a Caucasian, applied for admission to defendant law school, a state educational institution receiving federal funds. Plaintiff sued alleging her application was rejected because defendants, the law school, its dean and director of admissions, the university president and the university regents, used race as a predominant factor in determining law school admissions, giving minority applicants a significantly greater chance of admission than students with similar credentials from disfavored racial groups. Following a bench trial the court found that: defendants placed a heavy emphasis on race in deciding whether to accept or reject an applicant; under the Bakke analysis a state educational institution's desire to assemble a racially diverse student body was not a compelling state interest; achievement of racial diversity in defendant law school's admissions was not a compelling state interest because it was not a remedy for past discrimination; and, even if it was, it had not been narrowly tailored to serve that interest. With respect to intervenors' case the court held that remedying past or present societal discrimination was not a compelling state interest.

OUTCOME: The court granted plaintiff declaratory and injunctive relief, holding that defendant law school's race conscious admissions policy violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The court enjoined further use of race as an admissions factor, denied defendant regents Eleventh Amendment immunity, but granted individual defendants summary judgement on the basis of qualified immunity.

CORE TERMS: law school, score, underrepresented, diversity, undergraduate, odds, dean,

critical mass, gap, ethnic, median, intervenors, grid, diverse, educational, grades, affirmative action, non-minority, racially, classification, student body, faculty, cell, admit, University of Michigan Law School, enrollment, classroom, viewpoint, candidate, dropped

LexisNexis(TM) HEADNOTES - Core Concepts - Hide Concepts

Constitutional Law > Equal Protection > Scope of Protection

HN1 See U.S. Const. amend. XIV, § 1.

Constitutional Law > Civil Rights Enforcement > Discrimination in Education

HN2 See 42 U.S.C.S. § 2000d.

Constitutional Law > Equal Protection > Level of Review

Constitutional Law > Equal Protection > Race

HN3 All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Constitutional Law > Equal Protection > Race

HN4 The legal analysis of a claim of discrimination on the basis of race under both the Fourteenth Amendment, U.S. Const. amend. XIV, and 42 U.S.C.S. § 2000d, is the same under both claims.

Governments > Courts > Judicial Precedents

HN5 The Marks framework cannot be applied to a case where the various Justices' reasons for concurring in the judgment are not merely different by degree, but are so fundamentally different as to not be comparable in terms of "narrowness."

Constitutional Law > Equal Protection > Level of Review

HN6 Strict scrutiny applies to all racial classifications, regardless of the level of government using the classification.

Constitutional Law > Equal Protection > Race

HN7 Racial classifications are unconstitutional unless they are intended to remedy carefully documented effects of past discrimination.

Constitutional Law > Equal Protection > Race

HN8 Racial classifications which are not strictly limited in duration are highly suspect.

Constitutional Law > Equal Protection > Race

Constitutional Law > Equal Protection > Scope of Protection

HN9 A straight quota system is not narrowly tailored under any interpretation of the Equal Protection Clause, U.S. Const. amend. XIV, § 1.

Constitutional Law > Equal Protection > Level of Review

HN10 A "close fit" is required between the means and the ends that the U.S. Constitution demands in order for a racial classification to pass muster under strict scrutiny analysis.

Constitutional Law > Equal Protection > Level of Review

HN11 The term "narrowly tailored" maybe used to require consideration of whether lawful alternative and less restrictive means could have been used. The

classification at issue must 'fit' with greater precision than any alternative means.

Constitutional Law > Civil Rights Enforcement > Immunity > Public Officials

HN12 Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Constitutional Law > State Autonomy

HN13 Congress has abrogated Eleventh Amendment, U.S. Const. amend. XI, immunity by conditioning the receipt of federal funds upon the duty to comply with various anti-discrimination laws.

Constitutional Law > State Autonomy

HN14 See 42 U.S.C.S. § 2000d-7(a).

Constitutional Law > Civil Rights Enforcement > Civil Rights Generally

HN15 Under 42 U.S.C.S. § 2000d, liability for damages attaches upon a showing of intentional discrimination. The right at issue need not have been "clearly established"; it suffices for a state to have violated a plaintiff's rights by intentional action. A violation of § 2000d requires proof of discriminatory intent, and, when intentional discrimination is proven, damages are among the remedies which may be awarded.

Constitutional Law > Civil Rights Enforcement > Civil Rights Generally

HN16 In the context of the duty to comply with anti-discrimination laws conditioned upon the receipt of federal funds, "intentional discrimination," as used in 42 U.S.C.S. § 2000d means that a plaintiff must prove that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on the basis of race.

Constitutional Law > Equal Protection > Race

HN17 The effects of general, societal discrimination cannot constitutionally be remedied by race-conscious decision-making.

Constitutional Law > Equal Protection > Race

HN18 Societal discrimination alone is insufficient to justify a racial classification. Rather, there must be some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

Constitutional Law > Equal Protection > Level of Review

Constitutional Law > Equal Protection > Race

HN19 A governmental agency's interest in remedying "societal" discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.

Constitutional Law > Equal Protection > Race

HN20 The Fourteenth Amendment, U.S. Const. amend. XIV, does not permit

government to make racial classifications in order to remedy societal discrimination.

Constitutional Law > Equal Protection > Race

HN21 A constitutional challenge to a voluntarily adopted racial classification may not be defeated by the argument that elimination of the classification will or may have undesirable consequences, be they political, social, economic or otherwise.

Constitutional Law > Equal Protection > Level of Review

Constitutional Law > Equal Protection > Race

HN22 All racial distinctions are inherently suspect and presumptively invalid. This presumption may be overcome only upon a showing that the distinction in question serves a compelling state interest, and that the use of race is narrowly tailored to the achievement of that interest. It does not suffice for the interest in question merely to be important, beneficial, or laudable; the interest must be compelling.

Constitutional Law > Equal Protection > Race

HN23 The remedying of societal discrimination, either past or present, has is not recognized as a compelling state interest.

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JUDGES: BERNARD A. FRIEDMAN, UNITED STATES DISTRICT JUDGE.

OPINIONBY: BERNARD A. FRIEDMAN

OPINION: [*823] FINDINGS OF FACT AND CONCLUSIONS OF LAW

On December 22, 2000, the court heard oral argument in this case on the parties' cross motions for summary judgment. The court took the motions under advisement and identified the issues for trial. Over a period of 15 days in January and February 2001, the court conducted a bench trial. In this opinion, the court shall rule on the motions and make findings of fact and conclusions of law.

I. Introduction

Plaintiff Barbara Grutter commenced this action in December 1997. Ms. Grutter alleges that in 1996 she applied for admission to the University of Michigan Law School (hereinafter "the law school"). At first plaintiff was placed on a waiting list, but in June 1997 her application was rejected. **[*824]** Plaintiff, who is Caucasian, alleges that her application was **[**3]** rejected because the law school uses race as a "predominant" factor, giving minority n1 applicants "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." Complaint PP 20, 23. In their answer to the complaint, defendants "state that they do have a current intention to continue using race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Answer PP 9, 23.

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n1 Unless indicated otherwise, the court uses the terms "minorities," "minority groups," and "underrepresented minorities" interchangeably in this opinion to refer to African American, Native American, Mexican American and mainland Puerto Rican students, as these are identified in University of Michigan Law School documents as the groups which receive special attention in the admissions process.

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Plaintiff asserts two claims. First, she claims that defendants discriminated against her on **[**4]** the basis of her race, thereby violating her rights to equal protection under the Fourteenth Amendment. n2 This claim is brought under 42 U.S.C. §§ 1981 and 1983. Second, plaintiff claims that defendants violated Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, which prohibits recipients of federal funds from discriminating on the basis of race. n3 For relief, plaintiff seeks a declaratory judgment to the effect that her rights were violated; an injunction prohibiting racial discrimination in admissions; compensatory and punitive damages; an order requiring defendants to admit her to the law school; and attorney fees and costs. The defendants are Lee Bollinger, the dean of the law school from 1987 to 1994 and president of the University of Michigan from 1997 to the present; Jeffrey Lehman, the dean of the law school from 1994 to the present; Dennis Shields, the director of admissions at the law school from 1991 to 1998; the regents of the University of Michigan; and the University of Michigan Law School.

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n2 HN1 Section 1 of the Fourteenth Amendment to the Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> **[**5]**

n3 HN2 42 U.S.C. § 2000d states: "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."

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In an opinion and order dated January 7, 1999, the court granted plaintiff's motion for class certification and for bifurcation of the trial into liability and damages phases. The class was defined as consisting of "all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School."

In March 1998, 41 individuals and three pro-affirmative action student groups n4 **[*825]** sought to intervene in the case as defendants. The individual intervenors include 21 undergraduate students of various **[**6]** races who currently attend the University of Michigan, Wayne State University, the University of California at Berkeley, or Diablo Valley Community College in Pleasant Hill, California, all of whom plan to apply to the law school for admission; five black students who currently attend Cass Technical High School or Northwestern High School in Detroit and who plan to apply to the law school for admission; twelve students of various races who currently attend the law school; a paralegal and a Latino graduate student at the University of Texas at Austin who intend to apply to the law school for admission; and a black graduate student at the University of Michigan who is a member of the Defend Affirmative Action Party. Motion to Intevene PP 1-41. The court initially denied the motion to intervene, but in August 1999 the court of appeals reversed and directed that the intervention be permitted.

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n4 These groups are United For Equality and Affirmative Action (UEAA), the Coalition to Defend Affirmative Action By Any Means Necessary (BAMN), and Law Students for Affirmative Action (LSAA).

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On December 22, 2000, the court heard oral argument on the parties' cross motions for summary judgment. The court took those motions under advisement. The court indicated that the trial would focus on the following three issues: (1) the extent to which race is a factor in the law school's admissions decisions; (2) whether the law school's consideration of race in making admissions decisions constitutes a double standard in which minority and non-minority students are treated differently; and (3) whether the law school may take race into account to "level the playing field" between minority and non-minority applicants.

II. Diversity as a Rationale for Using Race as a Factor in University Admissions

A. Evidence

1.

The starting point in this case is the written admissions policy of the University of Michigan Law School, which was admitted at trial as Exhibit 4. This policy, which was adopted by the law school faculty in April 1992, was the subject of many hours of testimony during trial as

well as extensive discovery. Due to the central role the policy has played in this case, the court shall summarize the policy and highlight certain provisions.

The policy expresses **[**8]** the law school's desire "to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year. . . . Collectively, we seek a mix of students with varying backgrounds and experiences who will respect and learn from each other." Exhibit 4, Admissions Policy, p. 1. The policy notes that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems." Id. at 2. In identifying applicants who can be expected to succeed academically, the law school's "most general measure . . . is a composite of an applicant's [Law School Admission Test] score and undergraduate gradepoint average (UGPA) (which we shall call the 'index')." Id. at 3.

Under this admissions policy, the law school pays close attention to LSAT scores and UGPA's in reviewing applications. The significance of these numbers is visually apparent from the "grid" of law school applicants, an example of which is attached to the law school's admissions policy. n5 **[*826]** LSAT scores are shown along the horizontal axis in three- or four-point increments; UGPA's are shown along the vertical axis **[**9]** in quarter-point increments. Every combination of LSAT and UGPA is shown in a "cell" on this grid. In each cell, the law school reports the number of applicants with that particular combination of numerical qualifications, as well as the number of offers of admission made to the applicants in that cell. n6 Constructed in this manner, the highest combinations of LSAT scores and UPGA's are found in the upper right-hand corner of the grid. Even a cursory review of the numbers contained in this grid reveals that one's chances of being admitted increase dramatically as one moves into the upper right corner. Of the 966 offers of admission made in 1991, 843 (87%) were made to applicants who fell within the nine cells closest to this corner. In short, the numbers reflect the law school's stated policy: "Bluntly, the higher one's index score, the greater should be one's chances of being admitted. The lower the score, the greater the risk the candidate poses. . . . So we expect the vast majority of those students we admit to have high index scores." Id. at 4. See also id. at 6-7 ("The further applicants are from the upper right corner the less likely they are to be offered admission. **[**10]** Thus we may think of the upper right portion of the grid as indicating the combinations of LSAT and UGPA that characterize the overwhelming bulk of students admitted.")

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n5 For easy reference a copy of this grid, which shows admissions information for 1991, is attached to this opinion as Exhibit A.

n6 For example, in 1991 there were 499 applicants with an LSAT score between 38 and 41 and a UGPA between 3.50 and 3.74; and of these, 36 were offered admission. In later years, the LSAT was scored on a scale between 120 and 180 points. The grids for the years at issue in this case (1995 to the present) still show UGPA in quarter-point increments on the vertical axis, as was done in earlier years. But the LSAT scores, which are still shown along the horizontal axis, are presented in the following increments: no LSAT, 120-145, 146-147, 148-150, 151-153, 154-155, 156-158, 159-160, 161-163, 164-166, 167-169, and 170-above.

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The policy also notes, however, that admissions decisions should not be made strictly based **[**11]** on the index scores. A high index score may not necessarily identify an applicant who is likely to succeed in law school, and a low index score may not necessarily identify one who is likely to fail. See id. at 4-5. The policy states:

> When the differences in index scores are small, we believe it is important to weigh as best we can not just the index but also such file characteristics as the

> enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection. These "soft" variables not only bear on the applicant's likely graded performance but also have the additional benefit that they may tell us something about the applicant's likely contributions to the intellectual and social life of the institution. Thus an applicant who has performed well in advanced courses in a demanding subject may have more to offer both faculty and students than an applicant with a similarly high average achieved without ever pursuing in depth any area of learning. Other information in an applicant's file may add nothing about the applicant's likely LGPA [law school grade-point average] beyond **[**12]** what may be discerned from the index, but it may suggest that that applicant has a perspective or experiences that will contribute to the diverse student body that we hope to assemble. The applicant may for example be a member of a minority group whose experiences are likely to be different from those of most students, may be likely to make a unique contribution to the bar, or may have had a successful **[*827]** career as a concert pianist or may speak five languages.

Id. at 5-6.

Thus, while the policy indicates that most offers for admission should be made to applicants with high "index" scores, the policy also states that "considerable discretion is exercised in the admissions process . . ., for many qualities not captured in grades and test scores figure in the evaluation of an application." Id. at 7. The reasons behind the exercise of this discretion are an important part of the admissions policy, and they also lie at the heart of the dispute between the parties in this case. The policy articulates two reasons why an offer of admission may be made to applicants with grades and test scores "that place them relatively far from the upper right corner of the grid." Id. at **[**13]** 8. The first reason is that "there are students for whom we have good reason to be skeptical of an index score based prediction." Id. As an example, the policy describes an applicant who received a poor SAT score but nonetheless went on to perform well academically in college. This applicant received an unimpressive LSAT score, which pulled down his index, but he was admitted on the strength of his undergraduate record "with the expectation that this record would be a better predictor of [his] performance at Michigan than his LSAT score." Id. at 9.

The second reason for admitting applicants with comparatively lower index scores is that they "may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts. In particular we seek to admit students with distinctive perspectives and experiences as well as students who are particularly likely to assume the kinds of leadership roles in the bar and make the kinds of contributions to society discussed in the introduction to this report." Id. at 9-10. The policy identifies these as "diversity admissions," id. at 10, and provides three **[**14]** examples of applicants who were admitted in 1991 under this rubric. One was born in Bangladesh, graduated from Harvard, received "outstanding references" from his professors, and had a "truly exceptional record of extracurricular activity." Id. Another was a single mother from Argentina who worked successfully in business for several years, graduated from college summa cum laude, received "glowing references," and was fluent in four languages. Id. at 10-11. The third had excellent grades and a good LSAT score; "diversity considerations" further strengthened her application because her parents were Greek immigrants, she was "immersed in a significantly ethnic home life," she had studied and traveled in Europe and was fluent in three languages. Id. at 11.

In addition to the type of diversity that may come, for example, from an applicant's interesting or unusual employment experiences, extracurricular activities, travel experiences, athletic accomplishments, volunteer work, or foreign language fluency, the admissions policy

also describes the importance of an applicant's race as a qualification which may make him a more attractive candidate for admission:

> There is, however, **[**15]** a commitment to one particular type of diversity that the school has long had and which should continue. This is a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers. These students are particularly likely to have experiences **[*828]** and perspectives of special importance to our mission.
>
> Over the past two decades, the law school has made special efforts to increase the numbers of such students in the school. We believe that the racial and ethnic diversity that has resulted has made the University of Michigan Law School a better law school than it could possibly have been otherwise. By enrolling a "critical mass" of minority students, we have ensured their ability to make unique contributions to the character of the Law School; the policies embodied in this document should ensure that those contributions continue in the future.

Id. at 12.

The law school's admissions policy is further described in an October 13, 1992, memorandum **[**16]** from defendant Dennis Shields, who was the Director of Admissions at the law school from 1991 to 1998. This memorandum (Trial Exhibit 5), entitled "The Gospel According to Dennis," was addressed to "File Readers 1992-93," and was intended to provide guidance to his staff who assisted him in reviewing application files. Mr. Shields explained his philosophy as follows:

> As one of my colleagues so elegantly stated recently "our mission is to pick winners". . . . To make those selections requires more than a mere review of the numbers (LSAT and GPA), credentials. This is because many of the numbers will be so close to the same as to make the candidates indistinguishable from one another on that basis. Rather we must begin with the numbers and go forward from there to scrutinize the essays and letters of recommendation (as well as considering extracurricular and work experience) to look for candidates that show intellectual talent, leadership ability, and academic acumen which augers for a lively intellectual community and important contributions to the profession.
>
> * * *
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> Of the 5,000 or more applications we will receive this year, we will offer admission to about 1,000 of the candidates. **[**17]** Of that thousand offers, fully 500 of the decisions are pretty easy, another 300 or are [sic] a bit tougher, and the last 200 very difficult because the numbers will be so close that in these cases we will clearly be making the most subjective of judgements.

Mr. Shields went on to explain that in reviewing an application file he looked first at an applicant's grades and LSAT score. "My view is we will ultimately be swayed in any case by the strength of the numbers so it makes sense to know what they are before one proceeds to judge the rest of the file." "The numbers" referred to the LSAT score, the cumulative GPA, the undergraduate institution, the trend in grades, and the rank at the undergraduate institution. In addition, Mr. Shields indicated that in reviewing transcripts he looked to see if

applicants chose a rigorous major, whether they pursued a liberal education, and whether they took difficult courses. After reviewing "the numbers," Mr. Shields proceeded to the essays and the letters of recommendation. The essays reveal an applicant's writing and intellectual abilities and interests, and "what the candidate might offer the academic enterprise which is legal education **[**18]** at Michigan." The letters of recommendation are useful because they provide information about the applicant's academic abilities, particularly "growth and improvement or other trends" and "the general rigor of the curriculum pursued by the student." Finally, Mr. Shields noted that "there is a preference for those who have demonstrated academic and/or intellectual strength. Hard work and discipline evidenced in file [sic] are also important. **[*829]** I also like to see people who have been challenged in one way or the other and have faced up to that challenge in a positive way."

The law school's admissions policy is also succinctly described in the University of Michigan Law School Bulletin. The bulletin for the 1996-1997 academic year, which was admitted as Trial Exhibit 6, states at page 81: n7

> All applications are read in their entirety, and all of the information elicited by the application is factored into the admission decision. All admissions are made with the goal of forming a class with an exciting and productive mix of students who will enhance the educational experience for each other and for the School. Law School Admission Test (LSAT) scores and undergraduate course work **[**19]** and performance are relied on heavily, as are comparative studies of the past performance of similar students at the Law School. Serious regard is also given to an applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic -- e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background. The guiding purpose for selection among applicants is to make the School a better a livelier place in which to learn and to improve its service to the profession and the public.
>
> In addition to its own interest in forming a class which is strengthened by the talents and diversity of its members, Michigan recognizes the public interest in increasing the number of lawyers from groups which the faculty identifies as significantly underrepresented in the legal profession. In particular, we strongly encourage prospective students who are African American, Mexican American, Native American, or Puerto Rican and raised on the U.S. mainland to apply. Such applicants are invited to contact the Admissions Office for further information about the School's affirmative efforts to increase enrollment **[**20]** from among these groups. Similarly, the Law School welcomes applications from all persons without regard to their sex, religious affiliation, national origin or ancestry, age, marital status, sexual orientation, or handicap. Every Law School matriculant must be a graduate of an accredited college or university.

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n7 The identical statement appears at page 81 of the law school bulletin for 1995-1997. See Trial Exhibit 7.

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In the 1997-1999 law school bulletin (Exhibit 8, p. 85), the first paragraph of this passage is repeated, but the second paragraph was rewritten as follows:

> Based on its years of teaching experience, the Michigan faculty has determined that the quality of classroom analysis and discussion is enhanced by the multiplicity of perspectives and experiences that students bring with them. Each year, the Law School enrolls a talented and diverse class of students, and the admissions office considers the ways in which a potential student will contribute to the diversity of the Law School as **[**21]** one of the factors in its admissions decisions. The Law School welcomes applications from all persons without regard to their sex, religious affiliation, national origin or ancestry, age, marital status, sexual orientation, or handicap. Every Law School matriculant must be a graduate of an accredited college or university.

2.

At trial, a number of witnesses testified as to the admissions procedures prior to **[*830]** the adoption of the 1992 policy; the reasons why, and the process by which, the 1992 policy was adopted; and the manner in which the 1992 policy has been administered. This testimony assisted the court in understanding the genesis of the 1992 policy and how it works in practice.

Allan Stillwagon was the law school's Director of Admissions from 1979 to 1990. He testified that during his tenure admissions decisions were made in accordance with the policy described at pp. 85-86 of the 1988-89 Law School Announcement (Exhibit 55), which states:

> One half of the entering class is selected primarily on the basis of a prediction of their academic success in law study. The prediction is calculated on the basis of Law School Admission Test scores, undergraduate records, and studies **[**22]** of the past performance of previous students at the Law School. . . .
>
> The other half of the class will be chosen from a group of several hundred applicants whose grades and test scores qualify them for further consideration. The grades and scores necessary to gain admission to this pool vary from year to year, but the academic credentials of all who are included are invariably strong.
>
> Selections among applicants in the pool are made for the purpose of making the School a livelier place to learn and for improving its service to the profession and the public. Specifically, the School seeks those students who are more likely to contribute affirmatively to the learning of others by reason of their unusual intellectual attainments, significant employment experience or outstanding non-academic achievements, demonstration of emotional maturity and self-discipline, unusual social background, or exceptional capacity to benefit from a particular phase of the School's program. . . .
>
> In administering its admissions policy, the Law School recognizes the racial imbalance now existing in the legal profession and the public interest in increasing the number of lawyers from the ethnic and cultural **[**23]** minorities significantly underrepresented in the profession. Minorities are strongly encouraged to apply and to call upon Assistant Dean Stillwagon for information and assistance. Black, Chicano, Native American, and many Puerto Rican applicants are automatically considered for a special admissions program designed to encourage and increase the enrollment of minorities.

Mr. Stillwagon testified that under this system, which was in effect throughout his tenure, applicants were selected from one of three groups. The first group consisted of applicants who were chosen based on "the numbers," that is, their LSAT scores and UGPA. The second

consisted of a "pool" of candidates who had lower numbers but other interesting qualities. The third, known as "special admissions," was for minority candidates who did not fall within the other two groups. According to Mr. Stillwagon, approximately one-half of the minority applicants who were admitted came from the first two groups, and the other half came from the third. The "special admissions" program was adopted in order to increase minority enrollment at the law school. n8 Mr. Stillwagon indicated **[*831]** that the law school had a "goal" or "target" **[**24]** whereby 10-12% of the students of each entering class should be Black, Chicano, Native American, and mainland Puerto Rican. The law school faculty increased this percentage in the 1970s from 10% to 10-12% because they believed it necessary to increase the representation of minorities in the legal profession. Mr. Stillwagon testified that he had no discretion to disregard this policy, and that the policy was considered flexible only to the extent that the number of minority admittees could deviate by three or four students on either side of the target range. Mr. Stillwagon also testified that the 10-12% target could be achieved only through the special admissions program due to the "considerable differences" in academic credentials between the minority and non-minority applicants.

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n8 Trial Exhibit 53 is a document entitled "The History of Special Admissions at the University of Michigan Law School, 1966-1981." This document traces the history of the law school's efforts to enroll a certain percentage of students from particular, identified minority groups during this time period. Beginning in 1966, the law school faculty became concerned about the low numbers of black students. For the first time, "those who are Negroes or from disadvantaged backgrounds" who were on the waiting list for admission were given preference. Id. at 5. In 1970, the dean of admissions indicated he would seek to admit black and Mexican-American students "who fall below the admission standards regularly applied" in sufficient numbers to constitute 10% of the entering class. Id. at 16. Exhibit 53 shows that from the late 1960s to the early 1980s the law school faculty frequently debated the issue of special admissions -- the reasons for the policy, how it should be administered, the minority groups to which it was directed, and the "target" percentage the law school should aim to achieve. Over the years, the law school faculty apparently reached a consensus that black and Hispanic students should constitute between 10% and 12.5% of the entering class. See id. at 16, 19, 22, 27, 31, 34, 45, 48-50, 57. In 1975 the law school faculty formally adopted a special admissions policy that identified "Blacks, Chicanos, American Indians, and Puerto Rican Americans" as the groups which "have been substantially underrepresented in the student body and the legal profession" and directed that members from these groups constitute 10-12% of the entering class. See id. at 48-49. The dean of the law school, Terrance Sandalow, reaffirmed the 10-12% goal in a memorandum to the faulty in 1978. See id. at 53-55.

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Mr. Stillwagon testified that Exhibits 112 and 113 show admissions statistics for 1988-1989 and 1989-1990, respectively. These reports to the law school Committee of Visitors show significant differences in the numerical qualifications between "regular" admissions (i.e., students admitted based on LSAT and UGPA and those admitted from the "pool") and "special" admissions. In 1988, the regular admissions had a median LSAT score of 43 and a median UGPA of 3.58, whereas the special admissions had a median LSAT score of 34 and a median UGPA of 3.05. This gap in the numbers was essentially the same in 1989 and 1990. n9 On cross-examination, Mr. Stillwagon testified that explicit consideration of race was necessary since otherwise very few minority students would have been admitted.

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n9 In 1989, regular admissions had a median LSAT score of 43 and a median UGPA of 3.60,

while special admissions had a median LSAT score of 35 and a median UGPA of 3.06. In 1990, regular admissions had a median LSAT score of 45 and a median UGPA of 3.60, while special admissions had a median LSAT score of 38 and a median UGPA of 3.16.

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Dennis Shields succeeded Allan Stillwagon as the director of the law school's admissions office in 1991 and he held this position until 1998. Mr. Shields testified that his memo entitled "The Gospel According to Dennis" was intended to give newcomers to his staff some guidance in reading application files. Mr. Shields did not mention race in this memo because this is not a "primary consideration" in making admissions decisions. Mr. Shields indicated that he did not tell his staff to strive to admit a particular percentage of minority students, but that an applicant's race was considered along with all other factors. Mr. Shields said that he never spoke with the law school dean about the number or percentage of minority students who should be admitted, although the dean **[*832]** did tell him that approximately one-third of the class should consist of Michigan residents because the law school is a state institution. Mr. Shields also testified that the minority and non-minority admittees were all well qualified for admission.

On cross-examination, Mr. Shields was asked about the manner in which he would use the so-called "daily reports," an example of which was admitted as Exhibit 10. These **[**27]** reports provide an overview, as of the day the report is generated, of the number of applications and their current status. That is, one can see at a glance the number of applications received to date, the number offered admission, the number rejected, the number on the waiting list, and so on. While the first page of the report provides an overview for the total applicant pool, each of the next seven pages breaks down the information by the following racial categories: Native American, Black/African American, Caucasian/White, Mexican American, Other Hispanic, Asian American, and Puerto Rican American. Page 9 is devoted to "Other/Non-Citizen" and page 10 is "unknown." The last four pages break down the applicants by gender and by their status as either Michigan or Non-Michigan residents. Mr. Shields testified that as an admissions season progressed, he would consult the daily reports more and more frequently in order to keep track of the racial and ethnic composition of the class. This was done in order to ensure that a "critical mass" of minority students were enrolled so as to realize the educational benefits of a diverse student body. Mr. Shields could not say what percentage was **[**28]** needed in order to achieve this goal. He doubted if five percent would be enough but thought that 10% might suffice. While Mr. Shields testified that he did not seek to admit a particular number or percentage of underrepresented minority students, he acknowledged that during his tenure at least 11% of each entering class consisted of African American, Hispanic and Native American students.

Mr. Shields' attention was drawn to Exhibit 15, which is the law school's admissions grids for the class entering in 1995. Like the law school's daily reports, the admissions grids are broken down by racial groups. In each cell of each grid, one can see the number of applicants who applied, the number who were accepted, and the number who enrolled for any given combination of LSAT score and undergraduate GPA. When asked why most white applicants are rejected and most black applicants are accepted in the mid-ranges of LSAT scores and UGPA, Mr. Shields acknowledged that race does account for some of the difference. n10

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n10 Mr. Shields also acknowledged that, at his deposition, he testified that race "generally" explains the difference in admissions rates between minority and non-minority groups. The comparison during Mr. Shields' cross-examination was the difference in admission rates between white and black applicants with LSAT scores between 154 and 169 and with UGPA's between 3.25 and 4.00. In these cells nearly all of the African American applicants (48 of 52) were accepted, whereas a much smaller percentage of the Caucasian applicants (379 of

1437) were accepted. In the same cluster of cells, 30 of 40 Mexican American applicants were accepted; 7 of 14 Native American applicants were accepted; and 3 of 5 Puerto Rican applicants were accepted.

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Erica Munzel replaced Dennis Shields as the director of the law school's admissions office in 1998. She testified that she feels bound by the law school's 1992 admissions policy, including the provision that calls for the enrollment of a "critical mass of minority students." See Exhibit 4, p. 12. Ms. Munzel testified that a "critical mass" means "meaningful numbers" or "meaningful representation," which she understands to mean a number that is **[*833]** sufficient so that the minority students can contribute to classroom dialog and not feel isolated. When pressed to express this concept in numerical terms, Ms. Munzel stated that there is no number or percentage, or range of numbers or percentages, which constitute critical mass. However, she stated that there must be more than a "token" number of minority students, since small numbers of students cannot contribute in the manner foreseen by the law school's diversity policy.

Ms. Munzel also indicated that she must consider the race of the applicants because a critical mass of minority students could not be enrolled if admissions decisions were based primarily on LSAT scores and UGPA's. This is apparent from Exhibit 14, which Ms. Munzel **[**30]** acknowledged shows the median LSAT scores and UGPA's for the students enrolled in 1994 and 1995. These figures show the same gap in the numbers between minority and non-minority admittees as is shown in similar exhibits for previous years. n11 Ms. Munzel testified that only ten minority students per entering class would be admitted if admissions decisions were driven by the numbers.

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n11 See, e.g., Exhibit 112 (1988-1989), Exhibit 113 (1989-1990), Exhibit 114 (1990-1991), Exhibit 115 (1992), Exhibit 116 (1993). Exhibit 14 shows that in the 1994 entering class, white students had a median LSAT score of 168 and a median UGPA of 3.57, while the corresponding figures were 157 and 2.97 for African American students, and 162 and 3.26 for Mexican American students. In the 1995 entering class, white students had a median LSAT score of 167 and a median UGPA of 3.59, while the corresponding figures were 155 and 3.18 for African American students, and 159 and 3.35 for Mexican American students.

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In deciding whether to **[**31]** admit an applicant, Ms. Munzel stated that she reviews the entire file. In addition to grades and test scores, she also considers the strength of the undergraduate curriculum, the college attended, the personal statements, letters of recommendation, and the applicant's background and experiences. The student's race is considered because it is relevant to achieving diversity in the entering class. Ms. Munzel stated that she was never told by the dean or by the faculty to admit a particular number or percentage of minority students, but she does consult the daily reports (such as Exhibits 11 and 12) to make sure that admissions goals, including those regarding the admission of a critical mass of minority students, are being achieved.

The court also heard testimony from Lee Bollinger and Jeffrey Lehman as to the reasons why race is considered in the admissions process. Mr. Bollinger was the dean of the law school from 1987 to 1994, and he has been the president of the University of Michigan since 1997. Mr. Lehman succeeded Mr. Bollinger as the dean of the law school in 1994, and he continues to hold this position. President Bollinger testified that in the fall of 1991 he convened a faculty **[**32]** committee to review the law school's admissions policy. n12 President Bollinger sought to ensure that the policy complied with the Supreme Court's ruling in

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). He believes that it is appropriate for an applicant's race to be considered because the law school seeks a student body with diverse backgrounds and perspectives.

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n12 It was this committee's report and recommendation that became the law school's official admissions policy when it was adopted, unanimously, by the law faculty in April 1992. See Exhibit 4 (cover sheet).

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Dean Lehman testified that racial diversity in the student body is an important part of one's education at the law school because exposure to students of various **[*834]** races and perspectives helps students to understand and be sympathetic to differing points of view. He described racial diversity as "part of the general commitment to diversity." Dean Lehman agreed with the testimony offered by other witnesses to the effect **[**33]** that the law school seeks to admit a critical mass of underrepresented minority students, particularly those from groups which have been discriminated against historically. He was unable to quantify "critical mass" in terms of numbers or percentages, or ranges of numbers or percentages, but indicated that critical mass means "meaningful numbers," that is, numbers such that the minority students do not feel isolated or like spokespersons for their race, and feel comfortable discussing issues freely based on their personal experiences. He doubted whether critical mass would be present if only five percent of a class consisted of minority students, and he acknowledged that minority students have constituted at least 11% of every entering class since 1992.

When asked about the extent to which race is considered in admissions, Dean Lehman testified that this varies from one application file to another. In some files the applicant's race may play no role, while in others it may be a "determinative" factor. n13 Dean Lehman indicated that race is taken into consideration to the extent necessary to achieve a critical mass, although he could not quantify this in terms of numbers or percentages. **[**34]** While Dean Lehman reviews the daily admissions reports with the admissions director, he said he has not given any direction as to a number or percentage of minority students who should be admitted. Dean Lehman also stated that a critical mass of minority candidates cannot be admitted unless race is explicitly considered, due to the gap in LSAT scores and UGPA's between minority and non-minority students. He fears that minority enrollment would drop to "token levels" if race could not be considered, and in this context he pointed to the experience of the University of California at Berkeley, where minority enrollment dropped sharply after passage of Proposition 209.

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n13 Dean Lehman conceded that the different admission rates for different racial groups is "partly indicative" of the extent to which race is considered. Referring to Ex. 15 (the law school's 1995 grids), Dean Lehman acknowledged that all African American applicants with an LSAT score of 159-160 and a UGPA of 3.00 and above were admitted, whereas only one of 54 Asian applicants and four of 190 Caucasian applicants with these qualifications were admitted.

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The court also heard extensive testimony from Professor Richard Lempert, the law school professor who chaired the faculty admissions committee that drafted the 1992 admissions policy. n14 Professor Lempert testified that the admissions committee was charged with examining the law school's admissions policy and ensuring that it complied with the Supreme

Court's ruling in Bakke. The 1992 written policy, which was conceived in a "very deliberative process," was debated and then adopted unanimously by the full faculty. It remains in effect today.

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n14 The other members of the committee were Don Herzog, Jeffrey Lehman, Don Regan, Ted Shaw and Dennis Shields. See Exhibit 4, p. 14.

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Professor Lempert emphasized that the law school seeks to admit an interesting and dynamic class, which has a certain "synergy" that is greater than the sum of its parts. That is, the law school seeks students with a diversity of interests and backgrounds in order to enhance classroom discussion and the educational experience of students **[**36]** and faculty, both in and outside the classroom. In Professor Lempert's view, racial diversity is an important **[*835]** part of "perspective" or "experiential" diversity. A critical mass is needed so that minority students do not feel that they must be spokespersons for their race.

When asked about the policy's "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against," see Exhibit 4, p. 12, Professor Lempert stated that this was not intended as a remedy for past discrimination, but as a means of including students who may bring to the law school a perspective different from that of members of groups which have not been the victims of such discrimination. n15 Professor Lempert indicated that race is one element in the admissions decision-making process, but that some minority applicants would be admitted even if their race were not considered. He believes that race is considered only to the extent necessary to achieve critical mass.

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n15 Professor Lempert indicated that other groups, such as Asians and Jews, have also been discriminated against, but they were not mentioned in the law school's admissions policy because members of these groups are already being admitted to the law school in significant numbers.

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Exhibit 34 is a draft of the admissions policy, which contains several provisions omitted from the final version. One such provision, on page 13 of the draft, states:

> Our goal is to have substantial and meaningful racial and ethnic diversity, but we do not wish to exhaust the positions that are open to non-grid diversity admittees in promoting racial and ethnic diversity. Nor are we insensitive to the competition among all students for admissions to this law school. Thus while we set no floors or ceilings on the numbers or proportion of students who are to be admitted as minority diversity candidates, in making judgments about admitting such candidates the Admissions Officer and Admissions Committee should be sensitive to such factors as the proportion of minority students who would be attending Michigan without a diversity admissions program and the strength of the credentials that various minority candidates bring. Also it is important to note that in the past we seem to have achieved the kinds of benefits that we associate with racial and ethnic diversity from classes in which the proportion of African American, Hispanic and Native American members has been between about 11% **[**38]** and 17% of total enrollees.

Professor Lempert testified that the "11% to 17%" figure, which is the range he believes constitutes critical mass, was omitted from the final version of the admissions policy because percentages were too rigid and could be misconstrued as a quota. Another provision omitted for the same reason stated on page 12 of the draft that "non-grid admittees admitted for diversity purposes shall not exceed 20% of the expected matriculants in a class." One faculty member, Don Regan, argued for retaining the "numbers on the 'target range' . . . for a variety of reasons, including candor." See Exhibit 32, p. 1.

The final witness who testified about the law school's policy, and the reasons for the inclusion of race as a factor in admissions decisions, was Kent Syverud. He was a professor at the law school when the 1992 admissions policy was adopted, and he is now the dean of Vanderbilt Law School. He has also submitted expert reports on the educational benefits of diversity. See Exhibits 153, 154, 155. Like the other witnesses who testified on this subject, Dean Syverud believes that racial diversity is part of the diversity of perspectives needed to **[**39]** enhance the "classroom dynamic." Also like the other witnesses, he indicated **[*836]** that critical mass cannot be quantified, but that a professor knows when it is present because minority students feel free to express their views, rather than to state "expected views" or "politically correct views." Dean Syverud also indicated that when a critical mass of minority students are present, racial stereotypes are dismantled because non-minority students see that there is no "minority viewpoint"; they see, in other words, that there is a diversity of viewpoints among minority students.

3.

While defendants concede that race is a factor in the admissions process, they have consistently argued that race is simply one of many factors and not a "trump card." Plaintiffs, on the other hand, have argued that race is a "super factor" in the admissions process. In an attempt to quantify the extent to which race actually has been considered during the years in question, the parties presented expert testimony, and expert reports, from two statisticians. Plaintiffs presented Dr. Kinley Larntz, a professor emeritus in the Department of Applied Statistics at the University of Minnesota. n16 Defendants presented **[**40]** Dr. Stephen Raudenbush, a professor of education at the University of Michigan. n17 Both were qualified as experts in statistics and both testified at great length.

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n16 Dr. Larntz' expert reports were admitted as Exhibits 137-142. Exhibit 143 consists of the tables and charts of Dr. Larntz' "powerpoint presentation."

n17 Dr. Raudenbush's expert reports were admitted as Exhibits 145-150.

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Dr. Larntz analyzed admissions data provided by the law school. This data consists of the "admissions grids" for each of the years in question (1995-2000). As noted previously, these grids show the number of applicants and the number of admittees for all combinations of undergraduate GPA and LSAT score. n18 The UGPA is presented along the vertical axis in quarter-point increments (as well as "below 2.00" and "No GPA"); the LSAT score is presented along the vertical axis in two- or three-point increments (as well as "170-Above," "120-145" and "No LSAT"). The ten UGPA rows and twelve LSAT columns in these grids produce 120 **[**41]** "cells" with admissions data. For each of the years in question, the law school compiled one admissions grid for all applicants, as well as separate grids for various racial groups. n19

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n18 The law school grids also indicate the "yield," that is, the number of admittees who enrolled.

n19 For example, separate grids are compiled for Native Americans, African Americans, Caucasian Americans, Mexican Americans, Hispanic Americans, Asian/Pacific Island Americans, Puerto Rican Applicants, and for other groups as well.

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Dr. Larntz used this extensive numerical data, compiled by the law school, to make "cell-by-cell" comparisons between applicants of different races to determine by logistic regression analysis whether a statistically significant relationship exists between race and admission rates. Because the grids show the number of applicants and the number of admittees in each cell, and because different grids have been prepared for various racial groups, it is possible to make cross-racial comparisons of applicants **[**42]** with closely similar "academic credentials" or "numbers." To make this comparison, Dr. Larntz calculated the odds of admission for Caucasian applicants and compared them with the odds of admission for applicants of other races in order to calculate the "relative odds of acceptance" for each racial group. Caucasians were **[*837]** the "comparison group" -- that is, each group's odds of acceptance were calculated relative to those of Caucasians. Relative odds, or an "odds ratio," greater than 1.0 would indicate that a member of the racial group in question has a greater chance of admission than does a Caucasian applicant. Relative odds less than 1.0 would indicate the opposite. "For perspective, attaining a relative odds of 2 or 3 for cure of a disease is often the goal of a medical study. That is, a drug that doubled or tripled the odds of cure would be of great value. Double and triple digit relative odds are simply enormous!" Exhibit 137, p. 8.

Dr. Larntz calculated the relative odds of acceptance for various racial groups for each of the years in question. The results of these calculations, and the grids themselves, are presented in his expert reports. See Exhibits 137 and 138 (1995-98), **[**43]** 139 (1999), 141 (2000). For each of the years in question, the relative odds of acceptance for Native American, African American, Mexican American and Puerto Rican applicants were many times greater than for Caucasian applicants. n20 Dr. Larntz characterized these relative odds as "extremely large." He concluded that in 1995-2000,

> membership in certain ethnic groups is an extremely strong factor in the decision for acceptance. Native American, African American, Mexican American, and Puerto Rican applicants in the same LSAT x GPA grid cell as a Caucasian American applicant have odds of acceptance that is many, many (tens to hundreds) times that of a similarly situated Caucasian American applicant.

Exhibit 137, p. 9; Exhibit 139, p. 7; Exhibit 141, p. 7. This conclusion remained the same even when Dr. Larntz controlled for other factors, such as Michigan residency status, gender, and whether the applicant received an application fee waiver. See Exhibit 137, p. 11; Exhibit 139, p. 8; Exhibit 141, p. 10. At trial Dr. Larntz characterized his relative odds figures as "enormous" and as showing that a "tremendous advantage" was given to applicants from these minority groups **[**44]** in each of the years in question.

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n20 In 1995, the relative odds of acceptance were 61.37 for Native Americans, 257.93 for African Americans, 81.90 for Mexican Americans, and 37.86 for Puerto Ricans. In 1996, the

relative odds were 29.81 for Native Americans, 313.59 for African Americans, 81.46 for Mexican Americans, and 45.40 for Puerto Ricans. In 1997, the relative odds were 37.37 for Native Americans, 53.49 for African Americans, 17.55 for Mexican Americans, and 32.78 for Puerto Ricans. In 1998, the relative odds were 23.98 for Native Americans, 132.16 for African Americans, 23.53 for Mexican Americans, and 17.84 for Puerto Ricans. See Exhibit 137, pp. 23-26. In 1999, the relative odds were 32.05 for Native Americans, 206.45 for African Americans, 43.77 for Mexican Americans, and 41.71 for Puerto Ricans. See Exhibit 139, p. 21. And in 2000, the relative odds were 24.61 for Native Americans, 443.26 for African Americans, 16.99 for Mexican Americans, and 28.63 for Puerto Ricans.

Dr. Larntz cautioned that the relative odds do not express the "number of times greater" a minority applicant's chances of admission are as compared to those of a Caucasian applicant. For the 1995 relative odds, for example, if a Caucasian applicant has a 6-7% chance of being admitted, an African American with a similar index score would have a 93% chance of being admitted. If a Caucasian applicant has a 10% chance of being admitted, a Mexican American applicant with a similar index score would have a 90% chance of being admitted.

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In addition to calculating relative odds of acceptance, Dr. Larntz also prepared graphs which plotted the probability of acceptance against the selection index. The selection index, or simply "index," is a combination of an applicant's undergraduate GPA and LSAT score. As noted above, the law school's admissions policy states that "bluntly, the higher one's index score, the greater should be one's chances of being admitted. The lower the **[*838]** score, the greater the risk the candidate poses." Exhibit 4, p. 4. Each of Dr. Larntz' graphs plots the relationship between the selection index and the probability of acceptance for Caucasian applicants and for applicants from one minority group for comparison. As one would expect, these graphs show that for all races the higher one's index score, the greater one's chances of being admitted. However, each graph shows a significant gap between the lines plotted for the Caucasian and certain minority applicants. n21 Dr. Larntz concluded that "all the graphs comparing Native American, African American, Mexican American, and Puerto Rican applicants to Caucasian American applicants show wide separation indicating a much higher probability of acceptance **[**46]** for the particular ethnic group at a given selection index value." Exhibit 137, p. 14; Exhibit 139, pp. 9-10; Exhibit 141. pp. 9-10. Based on all of his analysis, Dr. Larntz concluded that membership in these racial groups "is an extremely strong factor in the decision for acceptance." Exhibit 137, p. 14, and that applicants from these minority groups "are given an extremely large allowance for admission" as compared to Caucasian applicants. Exhibit 139, p. 13; Exhibit 141, p. 13. Dr. Larntz found this to be the case for each of the years in question (1995-2000).

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n21 See Exhibit 137, Figures 9, 10, 11, 14, 17, 18, 19, 22, 25, 26, 27, 30, 33, 34, 35, 38; Exhibit 139, Figures 3, 4, 5, 8; Exhibit 141, Figures 3, 4, 5, 8.

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At trial Dr. Larntz made certain cell-by-cell comparisons to highlight the difference in acceptance rates for Caucasian and minority applicants. For example, in 1995 African American and Caucasian applicants with LSAT scores of 161-163 were accepted in clearly disparate proportions at every **[**47]** UGPA level. Two of the three African American applicants with a UGPA of 2.5-2.74 were accepted, whereas none of the seven Caucasian applicants were accepted. All of the four African American applicants with a UGPA of 2.75-2.99 were accepted, whereas none of the 14 Caucasian applicants were accepted. Seven of the eight African American applicants with a UGPA of 3.00-3.24 were accepted, whereas two of the 42 Caucasian applicants were accepted. All of the four African American applicants

with a UGPA of 3.25-3.49 were accepted, whereas five of the 126 Caucasian applicants were accepted. Five of the six African American applicants with a UGPA of 3.50-3.74 were accepted, whereas 14 of the 161 Caucasian applicants were accepted. All of the three African American applicants with a UGPA of 3.75 and above were accepted, whereas eight of the 93 Caucasian applicants were accepted. See Exhibit 143, slide 27.

Dr. Larntz highlighted similarly disparate rates of admission between African American and Caucasian applicants by holding the UGPA constant and showing the admissions figures for applicants with various LSAT scores. Dr. Larntz' Exhibit 143, slide 28, compares applicants in 1995 from these **[**48]** two racial groups with UGPA's of 3.25-3.49. In this UGPA range, of six African American applicants with an LSAT score of 148-150, two were admitted; of 16 Caucasian applicants, none was admitted. Of seven African American applicants with an LSAT score of 151-153, three were admitted; of 24 Caucasian applicants, none was admitted. Of five African American applicants with an LSAT score of 154-155, four were admitted; of 51 Caucasian applicants, one was admitted. Of ten African American applicants with an LSAT score of 156-158, all were admitted; of 51 Caucasian applicants, one was admitted. Of three African American applicants with an LSAT score of 159-160, all were admitted; of 61 Caucasian applicants, one was admitted. Of four African American applicants with an LSAT score of 161-163, all were **[*839]** admitted; of 126 Caucasian applicants, five were admitted.

Dr. Larntz showed similar discrepancies in the admissions rates between Caucasians and members of other minority groups in each of the years in question. See, e.g., Exhibit 143, slides 47-51. He concluded that the law school gives an "incredibly large allowance" to Native American, African American, Mexican American and Puerto Rican **[**49]** applicants, as compared to Caucasian applicants with similar undergraduate GPA's, LSAT scores, and residency status.

Dr. Raudenbush testified as defendants' statistician. He suggested that Dr. Larntz' analysis of the admissions data is flawed because it did not consider the effect of "unquantifiable" factors such as applicants' letters of recommendation and essays, or the reputation of the applicants' undergraduate institutions. In addition, Dr. Raudenbush criticized Dr. Larntz' odds ratio analysis because it disregarded cells in which all applicants were accepted, or all were rejected, and this resulted in the loss of information. n22 He also suggested that because the odds ratios vary from one cell to another, an overall or "composite" odds ratio is not informative. In addition, Dr. Raudenbush was suspicious of the odds ratios because they vary widely from one year to another, whereas the actual percentage of applicants admitted (at least for African Americans and Caucasians) has remained relatively stable. See Exhibit 194.

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n22 Dr. Larntz testified that he disregarded these cells because they do not contain "comparative information." That is, if all applicants in a particular cell are accepted, or if all are rejected, then there is no basis for calculating the odds ratio.

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Aside from criticizing Dr. Larntz' analysis, the primary focus of Dr. Raudenbush's own analysis and testimony was on the predicted effect of eliminating race as a factor in the law school's admissions process. In Dr. Raudenbush's view, a "race-blind" admissions system would have a "very dramatic," negative effect on minority admissions but only a slight effect on non-minority admissions, due to the vastly greater number of non-minority applicants. In the year 2000, 35% of underrepresented minority applicants and 40% of non-minority applicants were admitted. See Exhibit 187. Dr. Raudenbush predicted that if race were not considered, then only 10% of underrepresented minority applicants and 44% of non-minority applicants would be admitted. If correct, this would mean that in the year 2000 only 46

underrepresented minority applicants would have been admitted (instead of 170 who actually were admitted), of whom only 16 would enroll (instead of 58 who actually enrolled). Under this scenario, underrepresented minority students would have constituted 4% of the entering class in 2000, instead of 14.5% as actually occurred. See Exhibit 189.

B. Findings of Fact and Conclusions of **[**51]** Law

From this testimony and documentary evidence, the court makes the following findings and conclusions.

1.

The law school clearly considers an applicant's race in making admissions decisions. While the reasons for doing so have changed somewhat over time, the law school has given some degree of preference to members of particular racial groups for more than 30 years. n23 In the early years of affirmative action, the law school extended this preference only to African American applicants. In the **[*840]** years since then, the preference has been broadened to include Native Americans, Mexican Americans and mainland Puerto Ricans. It does not appear that any preference is given to members of any other racial groups.

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n23 Professor Lempert has written that the law school has considered applicants' race since 1966. See Exhibit 166, p. 2.

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The current stated reason for granting a preference to members of these groups is that certain educational benefits flow from a racially diverse student body, and members of underrepresented **[**52]** minorities would not be admitted in significant numbers unless race is explicitly considered. n24 This is due to the fact that members of these groups, on average, have lower LSAT scores and lower undergraduate GPA's as compared to other applicants (i.e., Caucasians and Asians), so that comparatively few would be admitted in a system where admissions decisions were based on "the numbers."

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n24 This is the reason stated in the policy itself, and it is the reason given by defendants' witnesses and counsel. However, the court notes that as recently as 1996-1997 the law school's bulletin indicated that one reason for the affirmative action policy has been to further "the public interest in increasing the number of lawyers from groups which the faculty identifies as significantly underrepresented in the legal profession." Exhibit 6, p. 81.

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A major bone of contention in this case has been the extent to which race is considered in the admissions process. The evidence shows that race is not, as defendants have argued, **[**53]** merely one factor which is considered among many others in the admissions process. Rather, the evidence indisputably demonstrates that the law school places a very heavy emphasis on an applicant's race in deciding whether to accept or reject.

This emphasis on race is apparent from the admissions policy itself, which explicitly states the law school's "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, . . ." Exhibit 4, Admissions Policy, p. 12. The admissions policy is equally explicit about the extent of this commitment: race is

considered at least to the extent necessary to enroll a "critical mass" of students from these groups. While "critical mass" has proved to be a concept that has eluded precise quantification, over the years it has meant in practice that the law school attempts to enroll an entering class 10% to 17% of which consists of underrepresented minority students. The 10% figure, as a target, has historical roots going back to the late 1960s. Beginning in the 1970s, law school documents begin referring to **[**54]** 10-12% as the desired percentage. Professor Lempert testified that critical mass lies in the range of 11-17%. Indeed, this percentage range appeared in a draft of the 1992 admissions policy, and it was omitted from the final version despite Professor Regan's suggestion that it remain for the sake of "candor."

The actual admissions and graduation statistics confirm the law school's commitment to enroll African American, Native American and Hispanic students in the 10-17% range. For example, Exhibit 97 shows the number of students graduating (total as well as by various racial groups) for each year from 1950 to 1999. From 1973 to 1985, underrepresented minority students constituted approximately 9-10% of the graduating class, n25 and from 1986 to 1999 students from these groups constituted approximately 12-13% of the graduating class. n26 These percentages conclusively **[*841]** demonstrate that the law school considers race in the admissions process because applicants from the underrepresented minority groups have, on average, considerably lower undergraduate GPA's and LSAT scores as compared to Caucasian applicants and yet, nonetheless, the percentage of applicants from these minority groups **[**55]** who are admitted is roughly equal to the percentage they constitute of the total applicant pool.

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n25 The percentages range from a low of 5.8% in 1974 to a high of 12.5% in 1977, but the mean percentage of underrepresented minority students from 1973 to 1985 was 9.7%.

n26 The percentages range from a low of 5.4% in 1998 to a high of 19.2% in 1994, but the mean percentage of underrepresented minority students from 1986 to 1999 was 12.6%.

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In 1995, for example, Native Americans constituted 1.1% of the total applicant pool and 1.2% of the admitted students; African Americans constituted 9.3% of the total applicant pool and 9.2% of the admitted students; Mexican Americans constituted 2.3% of the total applicant pool and 3.5% of the admitted students; Puerto Ricans constituted 0.5% of the total applicant pool and 0.4% of the admitted students; and Caucasians constituted 56.3% of the total applicant pool and 59.7% of the admitted students. See Exhibit 146, Table 1. That is, the representation of each group in **[**56]** the applicant pool roughly approximates its representation among the total admitted. Yet the median undergraduate GPA and LSAT score are generally lower -- even considerably lower -- for underrepresented minority applicants than for Caucasian applicants. See Exhibit 137, pp. 18-19 (Tables 2 and 3). The same pattern can be seen in 1996 and 1997. See Exhibit 146 (Tables 2 and 3) and Exhibit 137, pp. 18-19 (Tables 2 and 3). If race were not considered in the admissions process, one would expect to see underrepresented minority applicants admitted in much lower proportions than has been the case.

Plaintiffs' and defendants' statisticians analyzed the admissions data and both provided testimony and expert reports which assisted the court in understanding the extent to which race is considered in the law school's admissions process. Dr. Larntz' cell-by-cell analysis provided mathematically irrefutable proof that race is indeed an enormously important factor. In each year at issue in this case, Native American, African American, Mexican American and Puerto Rican applicants have been admitted in significantly greater proportions than Caucasian applicants with the same or similar undergraduate **[**57]** GPA's and LSAT

scores. As Dr. Larntz noted, this fact is apparent on the face of the law school's admissions grids. One does not need to undergo sophisticated statistical analysis in order to see it; the statistical analysis simply confirms empirically what the grids suggest intuitively. The court specifically adopts Dr. Larntz' analysis and his conclusion that "membership in certain ethnic groups is an extremely strong factor in the decision for acceptance."

The court rejects Dr. Raudenbush's criticism of Dr. Larntz' cell-by-cell analysis. While it is true that Dr. Larntz' analysis did not include cells in which all applicants were either accepted or rejected, the court was persuaded by Dr. Larntz' explanation that these cells do not contain any comparative data. The issue in this case is whether similarly situated applicants are treated differently because of their race, and this question can be answered by examining cells in which some applicants are accepted and others rejected so that the differences in the admissions rates can be calculated. Moreover, Dr. Larntz testified that the cells he included in his analysis are the ones containing more than 95% of all admittees. Thus, **[**58]** the court believes that Dr. Larntz omitted very little data from his analysis and none that is relevant.

The court also rejects Dr. Raudenbush's other criticisms of Dr. Larntz' methodology. For example, Dr. Raudenbush argued that the admissions process is complex and cannot be reduced to a comparison of acceptance **[*842]** odds based on "the numbers" and membership in various racial groups. The court agrees, and specifically finds, that the law school examines each application file individually and considers not only grades and test scores but also letters of recommendation, the applicant's personal statements, extracurricular activities, work experience, residency status, relationship to university alumni, rigor of undergraduate curriculum, trend in undergraduate grades, and reputation of undergraduate institution. Nonetheless, the court does not believe that the complexity of the admissions process undermines the validity of Dr. Larntz' analysis. When cell by cell, and year by year, underrepresented minority applicants are admitted in significantly greater proportions than their non-minority competitors with similar UGPA and LSAT scores, it is clear that the law school accords the race of **[**59]** the applicants a great deal of weight.

Even the testimony and reports of the law school's statistician, Dr. Raudenbush, support this conclusion. As noted above, Dr. Raudenbush testified that the number of underrepresented minority admittees would drop "sharply and dramatically" if race were not considered in the admissions process. By his calculations, the percentage of underrepresented minority applicants who are admitted would have dropped from 26% to 4% in 1995, and from 31% to 8% in 1996, under a race-blind admissions system. See Exhibit 146, Table 8. In 1997 the percentage admitted would have dropped from 33% to 8%; in 1998 the percentage admitted would have dropped from 34% to 9%; in 1999 the percentage admitted would have dropped from 37% to 8%; and in 2000 the percentage admitted would have dropped from 35% to 10%. See Exhibit 149, Table 1; and Exhibit 149, Tables 1-3. These figures, which the court has no reason to doubt, may explain even more plainly than Dr. Larntz' odds ratios and graphs the extent to which race is considered in the law school's admissions process.

Finally, the testimony of the witnesses who are familiar with the inner workings of the law school's **[**60]** admissions office confirmed that race is considered and that it makes a difference in admissions decisions. The current and former dean, as well as the current and former admissions directors, all testified that race is considered to the extent necessary to enroll a critical mass of underrepresented minority students. While none of these witnesses acknowledged that they have a particular number or percentage in mind as the admissions season progresses, the written and unwritten policy at the law school charges the admissions office with assembling entering classes which consist of between 10% and 17% African American, Native American, and Hispanic students. Over the years this target has been achieved, and even exceeded, n27 despite the underrepresented minority students' generally lower LSAT scores and undergraduate GPA's. The court also finds it significant that the dean and the admissions director monitor the law school's "daily admissions reports," which

classify applicants by race. These reports inform the reader how many students from various racial groups have applied, how many have been accepted, how many have been placed on the waiting list, and how many have paid a deposit. **[**61]** There would be no need for this information to be categorized by race unless it were being used to ensure that the target percentage is achieved.

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n27 From the graduation years 1986 to 1999, underrepresented minorities constituted at least 9.8% (1999) and as much as 19.2% (1994) of the class, except in 1998 when the percentage dipped to 5.4%. See Exhibit 97.

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[*843] In conclusion, the court finds that the law school explicitly considers the race of applicants in order to enroll a critical mass of underrepresented minority students -- that is, the law school wants 10% to 17% of each entering class to consist of African American, Native American, and Hispanic students.

2.

The court must now turn to the central issue in this case: whether the Constitution permits the consideration of race in order to achieve racial diversity. In current constitutional parlance, the question is Whether the achievement of racial diversity is a compelling state interest and, if so, whether the law school's admissions policy is narrowly **[**62]** tailored to serve that interest. n28 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) ("HN3 all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests").

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n28 HN4 While plaintiffs claim that the law school's policy violates both the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, the legal analysis under the two claims is the same. See Bakke, 438 U.S. at 287; Johnson v. Board of Regents, 106 F. Supp. 2d 1362, 1366 (S.D. Ga. 2000).

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In answering this question, the starting point is the Supreme Court's landmark decision in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), the only case in which the high court has ever addressed the "diversity **[**63]** rationale" as a justification for considering race in reviewing an application for admission to a university.

In Bakke, the plaintiff was a white male who applied in 1973 and 1974 to the University of California at Davis Medical School ("U.C. Davis"), a state institution. In both years, U.C. Davis rejected Bakke's application. After the second rejection Bakke sued the Regents of the University of California, claiming that U.C. Davis' special admissions program, which reserved 16 places in the class of 100 for members of certain minority groups, violated the California state constitution, Title VI, and the Fourteenth Amendment's Equal Protection Clause. The trial court held that U.C. Davis could not consider race in making admissions decisions. The California Supreme Court affirmed and enjoined any consideration of race in the admissions process.

On appeal, a sharply divided Supreme Court affirmed in part and reversed in part. Justice Stevens wrote an opinion in which Chief Justice Burger and Justices Stewart and Rehnquist joined. The Stevens group concluded that Title VI prohibited U.C. Davis, as a state educational institution receiving federal funding, from considering an applicant's **[**64]** race in making admissions decisions. Bakke, 438 U.S. at 412. Justices Brennan, White, Marshall, and Blackmun authored a joint opinion in which they concluded that both Title VI and the Constitution permit a state educational institution to "take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." Id. at 325.

In a separate, tie-breaking opinion, Justice Powell expressed the view that a state educational institution has a compelling interest in admitting a diverse student body, and that "ethnic diversity . . . is only one element in a range of factors a university **[*844]** properly may consider in attaining the goal of a heterogeneous student body." Id. at 311, 314. Because the Brennan group joined in the short portion of Justice Powell's opinion (Part V-C) which reversed the California Supreme Court's holding that an applicant's race may never be considered, a total of five Justices agreed that "the State has a substantial interest that **[**65]** legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." Bakke, 438 U.S. at 320. However, Justice Powell also found that U.C. Davis' special admissions program, which implemented a strict quota system along race lines, was not narrowly tailored to serve the interest of admitting a diverse class of students. Thus, Justice Powell joined the Stevens group, albeit on different grounds, to make a five-Justice majority holding that U.C. Davis' special admissions program was unlawful. n29

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n29 Justice Powell found U.C. Davis' special admissions program invalid under the Fourteenth Amendment, see Bakke, 438 U.S. at 320; while the Stevens group avoided the constitutional issue and found that the program violated Title VI, see id. at 421.

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This court is faced with the task of piecing together the above opinions to determine Bakke's holding. n30 Specifically, the court must determine whether Bakke held **[**66]** that a state institution's desire to assemble a racially diverse student body is a compelling government interest. The parties sharply disagree on this issue. In short, plaintiffs argue that although Justice Powell's opinion announced the Court's judgment, his opinion contained statements and conclusions in which no other Justice or group of Justices joined and are therefore not part of the Court's holding. Plaintiffs argue that Justice Powell's discussion of the "diversity rationale" in Part IV-D of his opinion is one such matter. Defendants argue that the Brennan group concurred with Justice Powell's conclusions regarding diversity by joining in Part V-C of his opinion, and that under Marks n31 Justice Powell's conclusions regarding diversity are part of the Court's holding. For the reasons stated below, the court is persuaded that Bakke did not hold that a state educational institution's desire to assemble a racially diverse student body is a compelling government interest.

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n30 The difficulty of this task was perhaps best summarized by the Fifth Circuit in United States v. City of Miami, 614 F.2d 1322, 1337 (5th Cir. 1980), which stated: "We frankly admit that we are not entirely sure what to make of the various Bakke opinions. In over one hundred and fifty pages of United States Reports, the Justices have told us mainly that they have agreed to disagree." **[**67]**

n31 See Marks v. United States, 430 U.S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977).

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Of the six separate opinions issued by the Supreme Court in Bakke, Justice Powell's was the only one that considered whether a state educational institution may have a compelling interest in admitting a racially diverse class of students. While rejecting the other justifications offered for the special admissions program, n32 Justice Powell found in Part IV-D of his opinion that "the attainment of a diverse student body . . . clearly is a constitutionally **[*845]** permissible goal for an institution of higher education." 438 U.S. at 311-12. He cited Justice Frankfurter's statement in Sweezy v. New Hampshire, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957), that universities must have the freedom to decide which students to admit, as this is relevant to providing an "atmosphere which is most conducive to speculation, experiment and creation." Justice Powell also indicated his belief that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of **[**68]** many peoples." 438 U.S. at 313. He quoted approvingly from an article by the president of Princeton University, who wrote:

> [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.

Id. at 313, quoting Bowen, "Admissions and the Relevance of Race," Princeton Alumni Weekly 7, 9 (September 26, 1977). Justice Powell emphasized that "ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." Id. at 314.

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n32 U.C. Davis argued that its special admissions program served four purposes: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body." Bakke, 438 U.S. at 306.

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Having recognized the compelling nature of a university's interest in diversity, including ethnic diversity, Justice Powell went on in Parts V-A and V-B of his opinion to find that U.C. Davis' quota system was not narrowly tailored to serve this interest. He stated:

> It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the

> nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation, of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important **[**70]** element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

438 U.S. at 315. While rejecting a quota system, Justice Powell endorsed an admissions program such as the one adopted by Harvard College, which states that

> race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, **[*846]** for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough **[**71]** to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.

438 U.S. at 317-18.

In Part V-C of his opinion, Justice Powell concluded that

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

438 U.S. at 320.

The clearest indication that the Brennan group did not concur with Justice Powell's conclusions regarding the diversity rationale is that, although they joined in other portions of Justice Powell's opinion, they did not join in Part IV-D, the only portion of any of the Bakke opinions that specifically addressed the diversity issue. n33 Moreover, the Brennan group apparently **[**72]** did not believe that the diversity rationale was before the Court, as those Justices stated that the "issue presented" in the case was "whether government may use race-conscious programs to redress the continuing effects of past discrimination." Id. at 324. The Brennan group also stated that in their view the "central meaning of today's opinions [is that] Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial

prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." Id. at 325. The Brennan group did not so much as mention the diversity rationale in their opinion, and they specifically declined to join in the portion of Justice Powell's opinion that addressed this issue. At the same time, Justice Powell specifically and vigorously disagreed with the Brennan group's conclusion that the special admissions program at U.C. Davis could be justified on the grounds that it sought to remedy general, societal discrimination. See 438 U.S. at 294-97 & nn. 34, 36. **[**73]** In short, while the Brennan group and Justice Powell agreed that race may be considered in admissions (hence the joinder of the Brennan group in Part V-C of Justice Powell's opinion), they disagreed entirely as to the reasons why (hence their failure to join in Part IV-D). Thus, there is no force at all to defendants' contention that the Brennan group's joinder in Part V-C of Justice Powell's opinion may be taken as an endorsement of Justice Powell's discussion of the diversity rationale.

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n33 The Brennan group stated that it "joined Parts I and V-C of our Brother POWELL's opinion and three of us agree with his conclusion in Part II that this case does not require us to resolve the question whether there is a private right of action under Title VI." 438 U.S. at 328.

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[*847] The defendants next argue that under Marks, Justice Powell's opinion is controlling because it is the narrowest grounds which support the judgment. The court must reject this argument because a Marks analysis does not assist in **[**74]** interpreting Bakke.

In Marks v. United States, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977), the Court held that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In Marks this rule was applied to determine the holding of Memoirs v. Massachusetts, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966), a pornography case in which the Supreme Court reversed a state court judgment finding a book obscene. In Memoirs, three Justices reversed on the grounds that the book had not been shown to be "utterly without redeeming social value"; two others reversed on the grounds that the First Amendment prohibits any action by government to suppress obscenity; and one Justice reversed on the grounds that the book was not "hard core pornography." In Marks the Court stated that the "governing standards" of Memoirs were those announced by the three-Justice plurality because the other Justices who concurred in the judgment did so "on broader grounds." 430 U.S. at 193.

The Court **[**75]** in Marks did not clearly explain what it meant by "narrow" and "broad" grounds. But in that particular case, the plurality's opinion was the "narrowest" in the sense that it was the most conservative reason for reversing the finding of obscenity *and* it was a reason that was subsumed within the grounds articulated by the other justices who concurred in the judgment.

HN5 The Marks framework cannot be applied to a case like Bakke, where the various Justices' reasons for concurring in the judgment are not merely different by *degree*, as they were in Memoirs, but are so fundamentally different as to not be comparable in terms of "narrowness." In Memoirs, the six Justices concurring in the judgment expressed three viewpoints which could be placed on a continuum from narrow to broad. The narrowest would permit a finding of obscenity if the book in question is "utterly without redeeming social value." A somewhat broader view would permit a finding of obscenity if the book is "hard cord pornography." An even broader view would not permit any book to be found obscene.

On this continuum, the first view is clearly the narrowest and, therefore, articulates the binding legal **[**76]** standard constituting the Court's holding.

In Bakke, however, it is nonsensical to ask which opinion -- Justice Powell's or the Brennan group's -- offers the "narrowest grounds" in support of the judgment reversing the finding that race may never be considered in university admissions. The diversity rationale articulated by Justice Powell is neither narrower nor broader than the remedial rationale articulated by the Brennan group. They are completely different rationales, neither one of which is subsumed within the other. There is simply no overlap between the two rationales; in fact, as noted above, the two opinions are very much at odds with one another. Thus, the Marks framework is inapplicable because the varying positions cannot be compared for "narrowness."

For these reasons, the court concludes that Justice Powell's discussion of the diversity rationale is not among the governing standards to be gleaned from Bakke. No other member of the Court joined in **[*848]** his view that the attainment of a diverse student class is a compelling state interest which can justify the consideration of race in university admissions. Nor can Justice Powell's discussion of this issue be understood **[**77]** as part of the Court's holding on the grounds that, under Marks, it is the narrowest grounds for the judgment in which he and the Brennan group joined. Therefore, this court concludes that Bakke does not stand for the proposition that a university's desire to assemble a racially diverse student body is a compelling state interest. n34

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n34 The court acknowledges that the status of Justice Powell's opinion has been the subject of much debate and disagreement. Some courts have concluded that the diversity rationale is part of Bakke's holding. See, e.g., Smith v. University of Wash. Law Sch., 233 F.3d 1188, 1200-1201 (9th Cir. 2000); Gratz v. Bollinger, 122 F. Supp. 2d 811, 819-21 (E.D. Mich. 2000). Others have reached the opposite conclusion. See, e.g., Hopwood v. State of Texas, 78 F.3d 932, 944-45 (5th Cir. 1996); Johnson v. Board of Regents of the Univ. Sys. of Georgia, 106 F. Supp. 2d 1362, 1368-69 (S.D. Ga. 2000). Other courts have avoided deciding the issue. See, e.g., Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130 (4th Cir. 1999) ("whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved"); Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) ("we need not definitively resolve this conundrum today").

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Further, in post-Bakke decisions the Supreme Court has indicated quite clearly that it looks upon racial classifications with even more suspicion than was the case at the time Bakke was decided. In Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990), the Court upheld FCC regulations which gave a preference to various racial minority groups in the awarding of broadcast licenses. Applying intermediate scrutiny, the Court upheld the regulations because "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective . . . ." Id. at 567. Five years later, however, in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995), the Court stated "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled." Adarand clarified that HN6 strict scrutiny applies to all racial classifications, regardless of the level of government using the classification. Here it should be noted that **[**79]** the Brennan group in Bakke used the less demanding standard of intermediate scrutiny in their review of U.C. Davis' admissions program. See Bakke, 438 U.S. at 359 ("racial classifications designed to further remedial purposes "'must

serve important governmental objectives and must be substantially related to achievement of those objectives'"). Moreover, the Court in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989), made the following significant statement: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." n35 When read together, **[*849]** Adarand and Croson clearly indicate that HN7 racial classifications are unconstitutional unless they are intended to remedy carefully documented effects of past discrimination. n36 The Supreme Court has rejected various "benign" justifications for racial classifications. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (finding race-conscious layoff policy unconstitutional, and rejecting "minority role model" **[**80]** and "societal discrimination" justifications).

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n35 This statement appears in Part III-A of Justice O'Connor's opinion, in which Justices Rehnquist, White and Kennedy joined. Justice Scalia, in a concurring opinion, wrote that "at least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that 'our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'" 488 U.S. at 521 (citations omitted). Thus, four members of the Court expressed the view that racial classifications are permissible only to remedy past discrimination, and a fifth expressed the view that they are permissible only in cases of social emergency.

n36 For example, race-based hiring or promotion programs have been upheld where necessary to correct a racial imbalance caused by documented race discrimination by a particular agency or employer. See, e.g., United States v. Paradise, 480 U.S. 149, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987); Franks v. Bowman Transp. Co., 424 U.S. 747, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1976). Race-based student assignments have been upheld where necessary to correct a racial imbalance, or a misallocation of school resources, caused by de jure racial segregation. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971).

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The court concludes that the Supreme Court in Bakke did not recognize the achievement of racial diversity in university admissions as a compelling state interest. The court further concludes that under the Supreme Court's post-Bakke decisions, the achievement of such diversity is not a compelling state interest because it is not a remedy for past discrimination.

3.

This is not to say that diversity does not have important educational benefits. The evidence defendants submitted on this issue, both at trial and in their summary judgment briefs, demonstrated that the educational atmosphere at the law school is improved by the presence of students who represent the greatest possible variety of backgrounds and viewpoints. Several law professors testified that classroom discussion is livelier, more spirited, and simply more enlightening and interesting when students from varying walks of life, and representing varying world views, participate. As Professor Syverud has written, "in the best classrooms, every voice is heard, and the quality of the education received is largely a function of the diversity of viewpoints and experiences among the students in the class." Report of Kent **[**82]** Syverud, p. 3. n37

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n37 Professor Syverud's report is among those contained in volume 3 of the appendix filed by defendants in support of their renewed motion for summary judgment on grounds of qualified immunity.

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However, a distinction should be drawn between viewpoint diversity and racial diversity. While the educational benefits of the former are clear, those of the latter are less so. The defendants' witnesses emphasized repeatedly that it is a diversity of viewpoints, experiences, interests, perspectives, and backgrounds which creates an atmosphere most conducive to learning. As Dean Lehman testified, it is primarily a "diversity of views" that the law school seeks.

The connection between race and viewpoint is tenuous, at best. The defendants walk a fine line in simultaneously arguing that one's viewpoints are not determined by one's race but that certain viewpoints might not be voiced if students of particular races are not admitted in significant numbers. Some of defendants' witnesses testified that classroom **[**83]** discussion is improved when the class is racially diverse, and some gave examples of viewpoints expressed in class by underrepresented minority students. However, these witnesses generally conceded that these **[*850]** viewpoints might equally have been expressed by non-minority students. n38

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n38 Professor Terrance Sandalow, former dean of the law school and long-time law professor, has written in this connection:

> Students learn from one another in different ways. In the course of discussion, whether in the classroom or in dormitory 'bull sessions,' participants are likely to be exposed to unfamiliar ideas. My own experience and that of colleagues with whom I have discussed the question, experience that concededly is limited to the classroom setting, is that racial diversity is not responsible for generating ideas unfamiliar to some members of the class. Students do, of course, quite frequently express and develop ideas that others in the class have not previously encountered, but even though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial implications of issues that are not facially concerned with race, but white and Asian-American students are in my experience no less likely to do so.

Terrance Sandalow, "Identity and Equality, Minority Preferences Reconsidered," 97 Mich. L. Rev. 1874, 1906-1907 (1999).

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Another asserted benefit of racial diversity is, essentially, that it promotes socialization. That is, cross-racial understanding is advanced, and racial stereotypes break down, in a multi-racial setting. This, it is argued, enhances all students' legal education because it enables them to better understand persons of different races and better equips them to serve as lawyers in an increasingly diverse society and an increasingly competitive world economy. See, e.g., Report of Derek Bok, pp. 3, 11, 13, 17; Report of Robert Webster, pp. 2-5; Amicus Curiae Brief of General Motors Corp., pp. 8-25. Defendants have also submitted a lengthy report by Patricia Gurin, a professor of psychology and women's studies at the University of

Michigan, whose research suggests that "students learn better in a [racially and ethnically] diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting." Report of Patricia Gurin, p. 3.

The court does not doubt that racial diversity in the law school population may provide these educational and societal benefits. Nor are these benefits disputed by the **[**85]** plaintiffs in this case. Clearly the benefits are important and laudable. Nonetheless, the fact remains that the attainment of a racially diverse class is not a compelling state interest because it was not recognized as such by Bakke and it is not a remedy for past discrimination.

4.

Even if racial diversity were a compelling state interest, defendants' use of race as an admissions factor would be constitutional only if "narrowly tailored" to serve that interest. See Adarand, 515 U.S. at 227. For the following reasons, the court finds that defendants' use of race has not been so narrowly tailored at any time under consideration in this case.

First, defendants have indicated that they use race in admissions to the extent necessary to achieve a "critical mass" of underrepresented minority students. None of the witnesses was able to clearly define critical mass in terms of numbers or percentages. While Professor Lempert indicated that critical mass lies somewhere between 11% and 17% of the entire class, Professor Syverud stated that even one to three minority students in a particular classroom might suffice. The current director of admissions, Erica Munzel, testified **[**86]** that she does not know what number or percentage of the entering class would constitute critical mass, and that she relies on faculty members to keep her informed as to whether she is achieving it. "Critical **[*851]** mass" has proved to be an amorphous concept. Apparently defendants know it when they see it, but it cannot be quantified. Narrow tailoring is difficult, if not impossible, to achieve when the contours of the interest being served are so ill-defined.

Second, there is no time limit on defendants' use of race in the admissions process. HN8 The Supreme Court has been highly critical of racial classifications which are not strictly limited in duration. See, e.g., Croson, 488 U.S. at 510 ("Proper findings . . . defining both the scope of the injury and the extent of the remedy . . . serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself"); Wygant, 476 U.S. at 275 ("The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial **[**87]** purpose"). The defendants have indicated that they will continue to use race as a factor in admissions for as long as necessary to admit a critical mass of underrepresented minority students, and no one can predict how long that might be. Such indefiniteness weighs heavily against a finding of narrow tailoring.

Third, by using race to ensure the enrollment of a certain minimum percentage of underrepresented minority students, the law school has made the current admissions policy practically indistinguishable from a quota system. As noted above, the law school has an unwritten policy of constituting each entering class so that at least 10-12% are students from underrepresented minority groups. This percentage has fluctuated somewhat from one year to another, but 10-12% is the approximate percentage that has been established as the minimum level needed to achieve a "critical mass" of students from these groups. While the law school has not set aside a fixed number of seats for underrepresented minority students, as did the medical school in Bakke, there is no principled difference between a fixed number of seats and an essentially fixed minimum percentage figure. Under either system, **[**88]** students of all races are not competing against one another for each seat, with race being simply one factor among many which may "tip the balance" in particular cases. The

reservation of some seats for applicants of particular races, and the attendant lack of competition for those seats, was the principle reason Justice Powell found U.C. Davis' quota system unconstitutional. See Bakke, 438 U.S. at 315-19. While defendants contend that the law school's admissions policy differs from U.C. Davis' in that all applicants compete against one another, the fact of the matter is that approximately 10% of each entering class is effectively reserved for members of particular races, and those seats are insulated from competition. The practical effect of the law school's policy is indistinguishable from HN9 a straight quota system, and such a system is not narrowly tailored under any interpretation of the Equal Protection Clause. See, e.g., Bakke, 438 U.S. at 307 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake"). It appears that the law school is engaging in simple racial balancing by focusing **[**89]** so carefully on admitting and enrolling a particular percentage of students from particular racial groups.

Fourth, there is no logical basis for the law school to have chosen the particular racial groups which receive special attention under the current admissions policy. The 1992 admissions policy, at page 12, identifies "African Americans, Hispanics and Native Americans" as "groups which have been historically discriminated **[*852]** against n39 [and] who without this commitment might not be represented in our student body in meaningful numbers." During some of the years at issue in this lawsuit, the law school bulletin indicated that special attention has been given to "students who are African American, Mexican American, Native American, or Puerto Rican and raised on the U.S. mainland." n40 The law school has failed to offer a principled explanation as to why it has singled out these particular groups for special attention. Certainly, other groups have also been subjected to discrimination, such as Arabs and southern and eastern Europeans to name but a few, yet the court heard nothing to suggest that the law school has concerned itself as to whether members of these groups are represented **[**90]** "in meaningful numbers." No satisfactory explanation was offered for distinguishing between Puerto Ricans who were raised on the U.S. mainland from Puerto Ricans who were raised in Puerto Rico or elsewhere. No satisfactory explanation was offered for singling out Mexican Americans but, by implication, excluding from special consideration Hispanics who originate from countries other than Mexico. A special "commitment" is made to African Americans, but apparently none is made to blacks from other parts of the world. This haphazard selection of certain races is a far cry from HN10 the "close fit" between the means and the ends that the Constitution demands in order for a racial classification to pass muster under strict scrutiny analysis. n41 If the law school may single out these racial groups for a special commitment today, there is nothing to prevent it from enlarging, reducing, or shifting its list of preferred groups tomorrow without any reasoned basis or logical stopping point.

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n39 In this connection it is worth noting that the law school, like U.C. Davis, "does not purport to have made, and is in no position to make such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." Bakke, 438 U.S. at 309. **[**91]**

n40 See the University of Michigan Law School Bulletin, 1996-1997 (Exhibit 6), p. 81; the University of Michigan Law School Bulletin, 1995-1997 (Exhibit 7), p. 81. No such statement appears in the University of Michigan Law School Bulletin, 1997-1999 (Exhibit 8), p. 85.

n41 A close fit is lacking for another reason -- namely, that there is no basis for believing that a particular member of any underrepresented minority group is "particularly likely to have experiences and perspectives of special importance to our mission." Exhibit 4, 1992 Admissions Policy, p. 12. One cannot assume, for example, that a particular African American applicant has been the victim of race discrimination or that a particular Mexican American applicant has grown up in an economically depressed neighborhood.

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A fifth and final factor the court must note in this connection is the law school's apparent failure to investigate alternative means for increasing minority enrollment. See Croson, 488 U.S. at 507 (finding that narrow tailoring was absent because, among other reasons, the city failed to **[**92]** consider "the use of race-neutral means to increase minority business participation in city contracting"); Wygant, 476 U.S. at 280 n.6 ("HN11 The term 'narrowly tailored' . . . maybe used to require consideration of whether lawful alternative and less restrictive means could have been used. . . . The classification at issue must 'fit' with greater precision than any alternative means"). The court did hear some testimony from witnesses who indicated that underrepresented minority students cannot be enrolled in significant numbers unless their race is explicitly considered in the admissions process. However, the court heard very little **[*853]** testimony from the authors of the 1992 admissions policy, or from those who have been involved in administering it, as to whether the deans or the faculty at the law school itself have ever given serious consideration to race-neutral alternatives. Such efforts might have included increasing recruiting efforts, decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores, using a lottery system for all qualified applicants, or a system whereby a certain number or percentage of the top graduates from various colleges and universities **[**93]** are admitted. Even if these alternatives would not be as effective in enrolling significant numbers of underrepresented minority students, the law school's failure to consider them, and perhaps experiment with them, prior to implementing an explicitly race-conscious system militates against a finding of narrow tailoring.

For all of these reasons, the court believes that the attainment of a racially diverse student body is not a compelling state interest. Even if it were, the law school's admissions policy is not narrowly tailored to serve that interest. Accordingly, the court concludes that the law school's 1992 admissions policy violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act.

5.

Nonetheless, having listened to extensive testimony and having reviewed all of the relevant documents, the court also concludes that the individual defendants are qualifiedly immune from damages. Under Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), "HN12 government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory **[**94]** or constitutional rights of which a reasonable person would have known." In Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987), the Supreme Court indicated that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

While the court is convinced that the law school's admissions policy is unconstitutional, the court is equally convinced that the individual defendants (Lee Bollinger, Jeffrey Lehman, and Dennis Shields) did not participate in the adoption or administration of a policy they either knew or had reason to believe was unconstitutional. The state of the law in this area is murky, to say the least. No Supreme Court decision since Bakke has addressed the constitutionality of affirmative action in university admissions, and Bakke itself, to borrow a phrase, "is a riddle wrapped in a mystery inside an enigma." n42 Lower courts have struggled **[**95]** for years, with little success, to divine the legal principles to be gleaned from Bakke, and to understand how, if at all, the teachings of other affirmative action cases may apply to the higher education context. Under these circumstances, university officials understandably had difficulty formulating admissions policies that conformed with Bakke.

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n42 Winston Churchill, in a radio broadcast in October 1939. J. Bartlett, Familiar Quotations 620 (1968).

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Moreover, it is clear from the defendants' testimony that they were concerned **[*854]** about the constitutionality of the law school's admissions policy and that they attempted to comply with Bakke, as they interpreted the decision, while still striving to fulfill their admissions goals. President Bollinger testified that he formed the faculty Admissions Committee in the fall of 1991 because he wanted to ensure that the law school was in compliance with the law. He deliberately selected committee members who were knowledgeable about Bakke and constitutional **[**96]** law. Dean Lehman, who served on that committee, testified that the committee members wanted the law school's admissions policy to be lawful, especially in light of Bakke. Dennis Shields, the director of admissions from 1991 to 1998, also served on that committee. Nothing in his testimony, or in any other evidence admitted in this case, suggests that he knew or should have known that it was unconstitutional for the law school to consider race as part of its admissions policy.

In short, the "contours" of the legal standards governing affirmative action in university admissions have not been so clearly defined as to permit reasonable law school officials to know whether it was constitutional to use race in the admissions process in order to assemble a racially diverse student body. The court finds that the individual defendants in this case acted reasonably and in good faith in adopting and administering the policy in question. Accordingly, the court shall grant the motion of these defendants for summary judgment on grounds of qualified immunity.

6.

Plaintiffs also seek, as part of their Title VI claim, money damages from the board of regents. The board argues that this damages **[**97]** claim is barred by the Eleventh Amendment, which generally prevents individuals from obtaining damages from a state or a state institution in federal court. See, e.g., Alabama v. Pugh, 438 U.S. 781, 782, 57 L. Ed. 2d 1114, 98 S. Ct. 3057 (1978); Edelman v. Jordan, 415 U.S. 651, 662-63, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974).

However, the board acknowledges that in this context HN13 Congress has abrogated Eleventh Amendment immunity by conditioning the receipt of federal funds upon the duty to comply with various anti-discrimination laws. Title 42 U.S.C. § 2000d-7(a) states:

> HN14 (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the **[**98]** same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

Nonetheless, the board argues that it may be held liable in damages only if it is found to have violated "clearly established legal principles." Defendants' Memorandum of Law in Support of Renewed Motion for Summary Judgment, p. 45. Plaintiffs argue that it is inappropriate to graft a qualified immunity standard onto Title VI, and that the board is liable so long as intentional discrimination has been proven. See Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 33.

[*855] The court has reviewed the cases cited by both sides and is convinced that, HN15 under Title VI, liability for damages attaches upon a showing of intentional discrimination. The right at issue need not have been "clearly established"; it suffices for a state to have violated a plaintiff's rights by intentional action. In Guardians Ass'n v. Civil Serv. Comm'n of the City of New York, 463 U.S. 582, 608 n.1, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), a majority of the Court agreed "that a violation of [Title VI] requires proof of discriminatory intent." When intentional **[**99]** discrimination is proven, damages are among the remedies which may be awarded. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75-76, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992). In Franklin, the Court held that damages could be awarded under Title IX to a student who allegedly had been sexually harassed by a teacher, even though the law in this area was not clearly established. See id. at 75 (citing a Title VII sexual harassment case as sufficient authority for the proposition that sexual harassment of a student by a teacher is an "intentional action[]" proscribed by Title IX). The court agrees with the Fifth Circuit's view on this issue:

> HN16
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> "Intentional discrimination," as used in this context means that a plaintiff must prove "that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on the basis of race." While we agree with the district court's conclusion that the various defendants acted in good faith, there is no question that they intended to treat the plaintiffs differently on account of their race.

Hopwood, 78 F.3d at 957 **[**100]** (citations omitted). Accord, Gratz, 122 F. Supp. 2d at 834-36; Smith v. University of Wash. Law Sch., 2 F. Supp. 2d 1324, 1331 (W.D. Wash. 1998). See also Pederson v. Louisiana State Univ., 201 F.3d 388, 410-12 (5th Cir. 2000) (defendants liable for damages under Title IX for "intentional discrimination" where university sports program treated women differently because of their sex, although defendants were ignorant of their legal obligations. Court noted the defendants "need not have intended to violate Title IX, but need only have intended to treat women differently").

In the present case, there is no doubt that the law school's official admissions policy intentionally treats applicants differently because of their race. While the constitutionality of this policy may be debatable, the board of regents is nonetheless subject to liability in damages under Title VI insofar as it intentionally endorsed, or acquiesced in, an admissions policy that treats applicants differently because of their race. The unlawfulness of the policy need not have been clearly established for liability to attach. n43 Accordingly, the court must deny the board's **[**101]** motion for summary judgment.

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n43 Of course, whether plaintiffs actually should be awarded any damages is a question to be resolved in the next phase of the trial. Now that defendants' liability has been established, defendants may still defeat plaintiffs' claim for compensatory damages by showing that plaintiffs would not have been admitted under a race-blind admissions policy. See Hopwood, 78 F.3d at 955-57 (discussing burden of proof under Mt. Healthy).

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III. Remedying Societal Discrimination as a Rationale for Using Race as a Factor in University Admissions: The Intervenors' Case

A. Evidence

The intervenors presented many witnesses who testified about the history and current status of racial discrimination in this country; the causes of the "achievement gap" between underrepresented minority **[*856]** and non-minority students; the alleged cultural bias in standardized tests such as the SAT and the LSAT; and the recent experiences of some African American and Mexican American students **[**102]** at high schools, colleges and universities. Some of these witnesses are preeminent experts in their respective fields of history, sociology, psychology and education. Others testified about their personal experiences of the deplorable conditions at a Detroit high school, and of isolation and discrimination at predominantly white universities. The court listened intently to nearly 30 hours of testimony from the intervenors' witnesses. The court shall summarize briefly the highlights of each witness's testimony.

Four students testified. Erica Dowdell is an African American student in her junior year at the University of Michigan. She was elected to the university's student assembly on the Defendant Affirmative Action Party ticket. Ms. Dowdell grew up in Detroit and attended public schools, where all or nearly all of the students were African American. She testified to the generally shoddy conditions at her elementary, middle and high schools. Her high school, Lewis Cass Technical High School, is one of the best in Detroit, yet the building is poorly maintained and books and other resources are often lacking. Ms. Dowdell testified that in her senior year she attended a band festival **[**103]** at Livonia Churchill High School in the suburbs, where most of the students are white, and she was hurt and shocked at the differences in such things as the sports facilities and the quality of the students' musical instruments. As an undergraduate student at the University of Michigan, Ms. Dowdell testified that she feels isolated because African Americans are in the minority. She also testified that she experiences racism on a daily basis, and she gave examples of insensitive remarks by other students and instructors. While Ms. Dowdell is doing well academically, she feels that racism negatively affects her performance because it is discouraging and distracting.

Concepcion Escobar is a Mexican American and Native American student at the University of Michigan Law School. She testified primarily about her experiences at a predominantly black public high school in Chicago and then at Amherst College, where most of the students are white and from privileged backgrounds. In her high school there were very few college counselors, and Ms. Escobar was not given any information about scholarships for which she may have been eligible. At Amherst, she abandoned her plans to pursue a pre-med **[**104]** curriculum because her high school had not adequately prepared her for college-level math and science classes. Ms. Escobar indicated that she did not often speak in class at Amherst because the student population was predominantly white and she did not want to play the role of representing her race. She also testified about some of the difficulties she and her classmates had in understanding one another, as they came from such completely different backgrounds.

Crystal James is an African American student in her second year of law school at the University of California at Los Angeles. Ms. James entered UCLA in 1999, three years after the passage of Proposition 209, which banned state-sponsored affirmative action and racial preferences in California. She testified that she was shocked to discover that she was one of only two African American law students in her entering class of 300. Ms. James feels isolated and believes that students and teachers expect her to represent the "black viewpoint" when racial issues are discussed. She also has experienced a loss of self-confidence and optimism,

and a decline **[*857]** in her academic performance, which she attributes to her racial isolation and to **[**105]** subtle forms of racism on campus. The latter phenomenon has taken the form of students making anti-affirmative action comments, teachers failing to direct classroom discussion of racial issues in a positive manner, and teachers neglecting to call on her in class because, she believes, they assume she would not be able to respond. In sum, Ms. James testified that the loss of affirmative action in California has resulted in far fewer underrepresented minority students being admitted to prestigious state universities such as UCLA and Berkeley, and that those who are admitted feel isolated and defeated.

The last student to testify was Tania Kappner, an African American graduate of the master's of education program at the University of California at Berkeley. Like Ms. James, Ms. Kappner testified about her feelings of isolation, since the number of black students in her program dropped significantly following the passage of Proposition 209. Ms. Kappner teaches English at a high school near Berkeley, and she testified that the abolishment of affirmative action has had a demoralizing effect on her minority students.

The court also heard testimony from several university professors who, **[**106]** as noted above, are highly respected scholars in their various fields of endeavor. Gary Orfield is a professor of education and social policy at Harvard University. He testified extensively about racial segregation and affirmative action. His expert report, which is a collection of articles he has published on these issues, was admitted as Exhibit 167.

Professor Orfield testified that racial segregation in American public schools is particularly pronounced in the northeast and midwest sections of the country, and that Michigan is among the four most highly segregated states. n44 Of all the states, Michigan has the highest percentage (64%) of black students who attend schools whose student populations are 90-100% minority. See Exhibit 196. Detroit has the most highly segregated schools of any major metropolitan area in the country. Over 90% of the children enrolled in Detroit public schools are African American. Professor Orfield testified that racial segregation in the schools is related to segregation in housing, and he characterized housing in Detroit as "hyper-segregated." Further, Professor Orfield indicated that segregation in schools is associated with high levels of poverty **[**107]** which, in turn, are associated with poor resources and decreased educational opportunities. And as a rule, the poorest schools are the ones with the highest minority population. See Exhibit 197. Two-thirds of African American and 70% of Hispanic schoolchildren attend segregated schools. Professor Orfield testified that, as a result, most minority students do not receive a public education that prepares them for college. He noted, for example, that the University of Chicago has routinely rejected applicants who are Chicago valedictorians, even those from magnet schools, because city schools do not compare with schools in the suburbs. Professor Orfield has written that "college admissions officers have long known that class rank is hardly comparable from one high school to the next. The top students in many high-poverty schools are woefully unprepared for college." Exhibit 167 D, G. Orfield and E. Miller, Chilling Admissions 10 (1998).

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n44 In this connection Professor Orfield meant racial separation, not de jure segregation.

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Professor Orfield was also asked several questions about the effects of Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996), **[*858]** which banned the consideration of applicants' race in university admissions in the Fifth Circuit; and of Proposition 209, which in 1996 eliminated all racial preferences, including in university admissions, in California. Professor Orfield noted that following Hopwood and Proposition 209, enrollment of underrepresented minority students dropped sharply in Texas and California. For example, at the University of

Texas School of Law at Austin, whose admissions system was challenged in Hopwood, the percentage of the entering class that is African American dropped from 5.8% (29 students) in 1996 to 0.9% (4 students) in 1997. n45 Native American enrollment at that law school dropped from 1.2% (six students) in 1996 to 0.2% (one student) in 1997. n46 Hispanic enrollment dropped from 9.2% (46 students) in 1996 to 6.7% (31 students) in 1997. n47 See Exhibit 131.

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n45 The percentage of African American students increased to 1.8% (nine students) in 1998 but fell slightly to 1.7% (nine students) in 1999. **[**109]**

n46 The percentage of Native American students increased to 1.0% (five students) in 1998 but fell to 0.4% (two students) in 1999.

n47 The percentage of Hispanic students increased to 7.6% (37 students) in 1998 and to 8.1% (42 students) in 1999.

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Professor Orfield also cited statistics showing that similar declines in law school enrollments occurred in California following the passage of Proposition 209. In 1996, for example, 89 Hispanics, 43 African Americans and 10 Native Americans were enrolled as first year students at the top three public California law schools. n48 In 1997, these numbers fell to 59, 16, and 4, respectively. At Berkeley, only one African American enrolled in the freshman law class in 1997, whereas 20 had been enrolled in the freshman class the year before. See Exhibit 132.

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n48 By this Professor Orfield was referring to the University of California at Berkeley, the University of California at Davis, and the University of California at Los Angeles.

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Part of the reason for the drop in the number of underrepresented minorities in law schools, following the elimination of affirmative action, can be seen in Exhibits 199 and 200. These exhibits are graphs showing the distribution of LSAT scores by race in 1997-1998. Exhibit 199 shows that the test scores of each racial group formed a similar bell-shaped curve, but that the curve for whites is located to the right of those of all underrepresented minority groups. This confirms the data from other exhibits, which reveal that the median LSAT score of white test-takers is significantly higher than the median underrepresented minority score. See Exhibit 137, p. 19; Exhibit 139, p. 20; Exhibit 141, p. 17. Exhibit 200 shows the distribution of LSAT scores by race, but indicates the absolute numbers of tests taken. The curve of the white test-takers absolutely dwarfs the curves of the minority test-takers; this graph dramatically illustrates the fact that the vast majority of test-takers are white and that the vast majority of high LSAT scores are obtained by white test-takers. In Professor Orfield's words, "hardly any" minority test-takers receive scores in the 169-180 range from which **[**111]** the best law schools expect their applicants to come.

Professor Orfield concluded that affirmative action is needed in order to achieve racial diversity at law schools because the academic averages between underrepresented minority and non-minority groups is such that a "very segregated outcome" would result if race were not considered in the admissions process. He believes there is no double standard in doing so, since most minority children are so disadvantaged in their public school education.

[*859] Professor Orfield also testified that the elimination of affirmative action in university

admissions leads to a phenomenon known as "cascading," whereby minority students no longer gain admittance to the most prestigious institutions and are instead relegated to less selective ones. In his view, this is undesirable because the more prestigious universities are "leadership training institutions." n49

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n49 Professor Orfield has written:

> The reversal of affirmative admissions in higher education can drastically reduce black, Latino, and American Indian enrollment on highly selective campuses. The increased use of tests and grades as entrance standards will tend to exacerbate the existing inequities in U.S. society. If affirmative action is outlawed nationally, as it has been in Texas, the impact on access to leading public and private universities would be enormous. Many of our most able students would find themselves on campuses overwhelmingly dominated by white and Asian students. The severe isolation characteristic of our more affluent suburbs would become the rule in the institutions that train the leaders of our society and our professions. This threatens critical educational functions of universities and their ability to fully serve their communities.

Exhibit 167D, G. Orfield and E. Miller, Chilling Admissions 14 (1998).

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The court also heard extensive testimony from another distinguished sociologist, Dr. Walter Allen, a professor of sociology at the University of California at Los Angeles. His expert reports were admitted as Exhibits 156-158.

Professor Allen testified that affirmative action in the law school admissions process is needed in order to counterbalance the negative effects of racism on the academic performance of underrepresented minority students in college. Professor Allen believes that underrepresented minorities suffer systematic deprivations in both housing and educational opportunities, which account for much of the "GPA gap" that exists between minority and non-minority college students. Professor Allen indicated that underrepresented minority students at predominantly white undergraduate institutions often experience a racially hostile environment, which depresses their confidence and desire to succeed academically. He stated that African American students perform better at historically black colleges and universities (HBCU's) than at predominantly white institutions because they feel validated and encouraged to succeed in the friendlier and more supportive atmosphere at HBCU's. **[**113]** In contrast, at predominantly white institutions, African Americans and other underrepresented minority students often feel isolated, disliked and marginalized.

Professor Allen studied the racial climate at four of the undergraduate institutions which supply a portion of the students who apply to the University of Michigan Law School. The "feeder schools" selected for this research were the University of Michigan, Michigan State University, the University of California at Berkeley, and Harvard University. Professor Allen also studied the racial climate at the law school itself. His research was conducted at these campuses principally by studying the responses of minority and non-minority students in focus groups and surveys.

Professor Allen concluded that the students at the four feeder campuses "described the overall racial climate of their campuses as a place where they feel their presence is

questioned and belittled." Exhibit 157, p. 11. The underrepresented minority focus group participants described various items which contributed to this climate, including insensitive or racist remarks by faculty and students, a feeling of isolation due to the low number of fellow students **[**114]** of the same race, avoidance of racial issues in classroom discussions, the **[*860]** lack of minority role models such as faculty members, exclusion from white study groups, and unequal treatment by campus police. Some of the focus group participants also indicated that the negative racial climate caused them to feel alienated and discouraged and that this harmed their academic performance.

Professor Allen also surveyed 200 students at the feeder institutions. Thirty-five percent felt discriminated against at their campus because of their race, and 47% felt they had been unfairly graded. See Exhibit 157, p. 51. However, 75% felt they had made the right choice in attending their undergraduate institution, and 84% "would definitely recommend their university to other students who want to attend college." Id. pp. 51, 55.

The court also heard testimony from Professor John Hope Franklin, a renowned historian with special expertise in the history of race relations in the United States. n50 His expert report was admitted as Exhibit 163. Professor Franklin described his personal experiences as the victim of racial discrimination as an undergraduate student in Nashville, as a graduate student **[**115]** doing research in North Carolina, and as a young history professor seeking housing in Brooklyn. Professor Franklin testified that even now, as a distinguished educator and historian, he experiences racism. For example, in recent years he has been approached more than once by a white person in a hotel lobby or private club who asked him to fetch her coat or car. Professor Franklin believes that great strides have been made in improving race relations, but that much more remains to be done. Professor Franklin believes that active effort is needed to eliminate the race problem, and that the abolishment of affirmative action at universities is a step toward resegregation. However, he also expressed the belief that academic standards should not be lowered for minority students, and that all people should be judged on their individual merits.

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n50 Additional testimony about this history of racial discrimination in the United States was provided by Dr. Eric Foner, a professor of American history at Columbia University.

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Three witnesses testified on the subject of bias in standardized testing. This was important testimony, given the significance of such tests in undergraduate and graduate admissions. The first such witness was Jay Rosner, the executive director of the San Francisco office of the Princeton Review Foundation (PRF). The PRF is affiliated with the Princeton Review, an organization that provides LSAT preparation courses to approximately 10,000 students each year. The PRF focuses on providing such courses to underrepresented minority students.

Mr. Rosner's expert reports were admitted as Exhibits 168 and 169. He testified that the LSAT is developed and administered by the Law School Admission Council (LSAC), which claims that the LSAT score helps predict students' first year grades in law school. However, according to Mr. Rosner, the actual correlation is only 16-20%, which is to say that 80-84% of first year law school grades are not predicted by the LSAT. Mr. Rosner stated that test preparation courses like those offered by the Princeton Review, or by its competitor Kaplan, Inc., generally improve one's LSAT score by approximately seven points.

Mr. Rosner testified that the PRF engages **[**117]** in "targeted outreach" to offer its test preparation services to African American and other minority students. In his experience, white students are aware of the benefits of taking such a course, but minority students do not share this awareness. For example, at Howard University, **[*861]** a predominantly

African American institution, Mr. Rosner once had difficulty filling the 15 seats in an LSAT preparation course, despite the fact that the customary $ 1,000 fee was reduced to $ 200. He also testified that despite PRF's outreach efforts, the vast majority of the students who take an LSAT preparation course are white, and that this fact accounts for some of the test-score gap between minority and non-minority test-takers.

Martin Shapiro, a professor of psychology at Emory University, testified on the issue of bias in standardized testing. He also submitted an expert report, which was admitted as Exhibit 170. Professor Shapiro testified that standardized admission tests, by the manner in which new test questions are "pretested," tend to perpetuate bias against groups which have performed poorly on the tests in the past. He also noted the large difference between the average LSAT score for whites **[**118]** and blacks, and the weak correlation, of about 27%, between performance on the LSAT and first year law school grades.

On the issue of bias in standardized testing, the court also heard testimony from David White, director of Testing for the Public, a group which offers test preparation courses for women and minority students. His expert report was accepted as Exhibit 173. White provided information similar to that provided by Dr. Larntz regarding the gaps in LSAT scores and UGPA's between whites and underrepresented minorities. Exhibit 219 shows that while 46% of white law school applicants in 1996-1997 scored at or above 155 on the LSAT, only 8% of black applicants did so. While 46% of white applicants had a UGPA of 3.25 or above, only 17% of black applicants had a UGPA in this range. And while 27% of white applicants had both qualifications, only 3% of black applicants had both. Whites on average score higher on the LSAT than any other racial group at all socioeconomic levels. See Exhibits 220, 221. Even among applicants who attend the same undergraduate institution and have the same undergraduate GPA, the LSAT gap as compared to white applicants is 4.0 points for Native Americans, **[**119]** 6.8 points for Hispanics, and 9.2 points for African Americans. See Exhibit 223.

The court also heard testimony from Dr. Eugene Garcia, the Dean of the School of Education at the University of California at Berkeley. His expert report was admitted as Exhibit 164. Dr. Garcia testified about the effects of Proposition 209 on student admissions at the eight campuses of the University of California system. n51 From 1995 to 2000, underrepresented minority admissions dropped by 1% overall. See Exhibit 213. Underrepresented minority admissions at the most selective campuses, Los Angeles and Berkeley, have dropped by 45% and 42%, respectively, whereas the admission rates at Santa Cruz and Riverside, which are less selective, have increased by 27% and 87%, respectively. n52 Dr. Garcia attributed these **[*862]** changes to the fact that underrepresented minority applicants generally have lower GPA's and test scores. Their lower average GPA is due in large part to the generally poorer quality of the schools attended by underresented minority students. And their lower average test scores are to some extent due to the fact that standardized tests, like the SAT and LSAT, are "heavily loaded with **[**120]** academic English." This disadvantages many Hispanics because English is their second language. African Americans are also disadvantaged because many -- 60% by his estimate -- speak "Black English." Dr. Garcia indicated that test preparation courses do improve test scores, but that these courses are expensive, which adds to the disadvantage against poorer groups. Dr. Garcia characterized the loss of underrepresented minority students at Los Angeles and Berkeley, and the corresponding gain of underrepresented minority students at Santa Cruz and Riverside, as a "redistribution" within the University of California system. This is the phenomenon which Professor Orfield called "cascading."

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n51 The University of California has campuses at Los Angeles, Berkeley, San Diego, Irvine, Davis, Santa Barbara, Santa Cruz, and Riverside.

n52 Exhibit 214 shows applications, admissions, admissions rates, and enrollment figures for the years 1995 to 2000 at all of the University of California campuses by the race of the applicants. It appears that the most significant declines in admission rates occurred among African Americans, Native Americans, Chicanos and Latinos at Berkeley, Los Angeles and San Diego. The court notes that admission rates of whites and Asian Americans also dropped at most of the campuses over the same time period, albeit less dramatically. At San Diego, for example, the admission rate for Asian Americans fell from 62.8% in 1995 to 46.1% in 2000. At Santa Barbara, the admission rate for whites fell from 85.3% in 1995 to 48.9% in 2000.

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Dr. Garcia testified that the University of California has been unable to admit underrepresented minority students in significant numbers by any means other than by explicitly considering race in admissions. He favors race-conscious admissions policies because they enable universities to consider historical discrimination against particular racial groups. Dr. Garcia testified that a decrease in racial diversity at universities decreases the quality of the educational experience for all students. He also expressed the belief that institutions of higher education prepare students to take leadership roles later in life, and that part of this preparation should include exposure to people of other races, particularly in light of the fact that American society is itself becoming increasingly diverse.

On cross-examination, Dr. Garcia acknowledged that at the school of education of which he is the dean, 28% of this year's class consists of underrepresented minority students. Dr. Garcia indicated that the school of education was able to achieve this level of diversity by decreasing reliance on the Graduate Record Examination (GRE), and by expending greater effort in recruiting new students. **[**122]**

The court also heard testimony from Faith Smith, the president of Native American Educational Services (NAES) College; and Frank Wu, an associate professor of law at Howard University. Ms. Smith testified about the educational difficulties which face Native Americans, and the importance of increasing the number of Native American lawyers. Her expert report was admitted as Exhibit 171. Professor Wu testified about the historical and present societal discrimination against Asian Americans, particularly in the areas of employment and housing. His expert report was admitted as Exhibit 175.

Finally, the intervenors called Professor Richard Lempert. As noted above, Professor Lempert has served for many years on the faculty of the law school as well as in the sociology department at the University of Michigan. While the defendants called him to testify about the genesis of the law school's admissions policy, the intervenors called him to testify about a survey study he and others performed which examined the career success of underrepresented minority graduates of the law school. Professor Lempert's study, and a condensed version thereof, were admitted as Exhibits 165 and 166.

While Professor **[**123]** Lempert's report is quite lengthy, he summarized the main conclusions as follows:

> The results reveal that almost all of Michigan Law School's minority graduates pass a bar exam and go on to have **[*863]** careers that appear successful by conventional measures. In particular, the survey indicates that minority graduates (defined so as to include graduates with African American, Latino, and Native American backgrounds) are no less successful than white graduates, whether success is measured by the log of current income, self-reported satisfaction, or an index of service contributions. Also, although an admissions index that combines LSAT scores and undergraduate grade-point average is a significant predictor of law school grades, it does not predict career success on

any of our three outcome measures. n53

Exhibit 166, p. 1. Professor Lempert also wrote:

> What we find is a strong, statistically significant relationship between LSAT and UGPA, on the one hand, and grades at the end of three years of law school on the other. But we find no significant relationship between the LSAT or UGPA and what matters more -- the achievement of students after graduation. Drawing on work **[**124]** done in connection with the affirmative action lawsuit against the University of Michigan Law School, we can also say that had the LSAT and the UGPA been the only criteria for admissions at Michigan, few of Michigan's minority graduates would have been admitted to the school, even though their career success since law school is similar to the career success of Michigan's white graduates and consistent with the aspirations Michigan has for all students it admits.

Id. at 33-34. In his testimony, Professor Lempert also indicated that the law school's race-conscious admissions policy has helped to integrate the legal profession. He testified that if affirmative action in admissions did not exist, the number of underrepresented minorities admitted to any law school in the country would be reduced by 75%. Not only would underrepresented minority applicants "cascade down" to less selective law schools, but they probably would, if admitted, simply displace other minority applicants. Professor Lempert believes that the LSAT is a valid predictor of academic success in law school (though not of later success in the profession), and he does not believe there are any "hard data" showing **[**125]** any racial bias against minorities in terms of the LSAT's predictive capacity. See also Exhibit 166, p. 34 ("LSAT scores and an index based on LSAT scores and UGPAs are significantly correlated with both first-year and final law school grade-point averages").

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n53 Professor Lempert found that the law school's "admissions index" (combination of LSAT score and UGPA) was an equally poor predictor of career success for both minority and white alumni. See Exhibit 166, pp. 94-99 (Tables 29A, 29B, 29C, 30A, 30B, 30C).

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B. Findings of Fact and Conclusions of Law

From this extensive body of evidence, the court makes the following findings and conclusions.

1.

First, there is no question about the long and tragic history of race discrimination in this country. At different times in history, Native Americans have been deprived of land and forced onto reservations; African Americans have been held in slavery; and Asian Americans have been detained in internment camps. Many ethnic and racial groups -- including, **[**126]** but not limited to, the underrepresented minority groups identified by the law school's admissions policy -- have been victims of discrimination in housing, employment, education, public accommodations, and elsewhere.

[*864] While American public policy has sought to eradicate race discrimination, its

lingering effects are apparent. As Professor Wu has written, "For many people of color, racism has decreased the amount and value of economic, social, and cultural capital inherited from our ancestors. Not only did we receive less material wealth, we also received less 'insider knowledge' and fewer social contacts so instrumental to one's educational and professional advancement in America." Exhibit 175, p. 131. The lingering effects can be seen, for example, in lower education rates and higher poverty rates among some minority groups as compared to whites. n54

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n54 While not introduced at trial, defendants did submit a report from Dr. Thomas Sugrue, a professor of history and sociology at the University of Pennsylvania, in support of their motion for summary judgment on grounds of qualified immunity. Professor Sugrue cites census data showing the significant disparities along racial lines in educational attainment, unemployment rates, income levels, poverty rates, and household net worth. See Sugrue Report, pp. 50, 53-57.

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2.

The evidence presented at trial also made clear that underrepresented minority groups have, on average, lower undergraduate grade-point averages than whites. Among applicants accepted by the University of Michigan law school from 1995 through 2000, the median UGPA of every underrepresented minority group has been lower than the median UGPA of Caucasians by approximately one-tenth to three-tenths of a point. n55 A greater gap exists in LSAT scores. From 1995 to 2000, the median LSAT score of the underrepresented minority groups has been lower than the median LSAT score of Caucasians by approximately seven to nine points. n56

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n55 The median undergraduate GPA for accepted applicants, by race, is shown in Exhibit 137, p. 21; Exhibit 139, p. 19; and Exhibit 141, p. 16. The smallest difference between the Caucasian UGPA and an underrepresented minority group UGPA was .05 (Caucasian vs. Puerto Rican in 1996, and Caucasian vs. Native American in 1998). The largest difference was .41 (Caucasian vs. African American in 2000). Averaging the figures over the six years, one sees that the gap between the Caucasian UGPA was .21 for Native Americans, .32 for African Americans, .14 for Mexican Americans, and .22 for Puerto Ricans. **[**128]**

n56 The median LSAT scores for accepted applicants, by race, is shown in Exhibit 137, p.22; Exhibit 139, p. 20; and Exhibit 141, p. 17. The smallest difference between the Caucasian LSAT score and an underrepresented minority group LSAT score was three points (Caucasian vs. Native American in 2000). The largest different was 12 points (Caucasian vs. African American in 2000). Averaging the figures over the six years, one sees that the point gap between the Caucasian LSAT score was 6.8 for Native Americans, 9.6 for African Americans, 7 for Mexican Americans, and 7.6 for Puerto Ricans.

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The reasons for the "GPA gap" and the "LSAT gap" are complex. While one must be cautious in making generalizations, the evidence at trial clearly indicates that much of the GPA gap is due to the fact that disproportionate numbers of Native Americans, African Americans, and Hispanics live and go to school in impoverished areas of the country. It should not surprise anyone that students who attend schools where books are lacking, where classrooms are overcrowded, and where Advanced Placement or other higher level courses **[**129]** are

not offered are at a competitive disadvantage as compared with students whose schools do not suffer from such shortcomings. An educational deficit in the K-12 years will, for most students, have a negative ripple effect on academic performance in college. Ms. Escobar, for example, had to drop out of the pre-med program in college because her high school, a large public school in Chicago, failed to provide her with the necessary **[*865]** mathematics and science background. Of course, students of any race will have difficulty "catching up" in college if they have had a poor K-12 education.

The intervenors have also argued that the GPA gap is due in part to the racially hostile environment at college and university campuses. The court does not doubt that many underrepresented minority students find the racial climate hostile at the law school's "feeder" institutions. Nor does the court doubt that such a climate can have a negative effect on these students' academic performance. Nonetheless, the court is unable to give any weight to Professor Allen's study of this issue, due to the small number of students who participated in the focus groups and surveys and due to the manner in which the **[**130]** students were selected.

Regarding the small numbers, the court notes that a total of 65 students participated in Professor Allen's focus groups. Of these, 18 were white and Asian students; only 47 were members of the underrepresented minority groups at issue in this case. n57 Of these 47 students, 20 participated in four focus groups at the University of Michigan; 15 participated in three focus groups at Berkeley; eleven participated in two focus groups at Harvard; and one participated in one focus group at Michigan State University. See Exhibit 157, Figure 2. n58 Similarly small numbers of underrepresented minority students participated in the surveys. Of the 200 total respondents, 140 were African Americans, Hispanics or Native Americans, 47 of whom were participants in the focus groups. See Exhibit 157(2), Tables 3, 6, 9 and 12. At trial, Professor Allen acknowledged that it is difficult to make generalizations based on results from such small sample sizes. The court seriously doubts whether any reliable generalizations can be made about the racial climate at the feeder institutions, whose total student population well exceeds 125,000, based on the information gathered **[**131]** from 47 focus group participants and 140 survey respondents.

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n57 All 47 of these students were African American or Hispanic. No Native Americans participated in the focus groups. See Exhibit 157, Figure 2.

n58 At trial Professor Allen indicated that focus groups 1, 2, 5, 8, 9 and 11 were conducted at The University of Michigan; focus groups 4, 6 and 10 were conducted at Berkeley; focus groups 3 and 7 were conducted at Harvard; and focus group 12 was conducted at Michigan State University.

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The reliability of Professor Allen's conclusions is further undermined by the manner in which students were solicited for inclusion in the research project. While Professor Allen supervised the focus groups and the composition of the survey, he relied on student volunteers to recruit the study's participants. Several of these solicitations, in the form of electronic mail and facsimile transmissions, were co-authored by United for Equality and Affirmative Action, which is one of the intervenors in this case. These solicitations **[**132]** called upon students "to contribute to a legal case that will impact the educational opportunities of minority students for generations to come. It is our 'Brown v. Board of Education' and we must do everything we can to ensure a victory." Exhibit 176. Other solicitations began with the heading, "URGENT - PLEASE PARTICIPATE IN A STUDY FOR THE U OF M AFFIRMATIVE ACTION CASES." Exhibit 177. These solicitations also indicated that "the student intervenors in the watershed University of Michigan affirmative action cases are seeking students . . . ."

Id. Professor Allen acknowledged that the wording of these solicitations "possibly" could have biased **[*866]** the selection process. The court believes not only that such bias may have occurred, but that it surely did occur, because the solicitations clearly communicated a desire to attract research participants who shared a particular viewpoint.

The court has three other difficulties with Professor Allen's research results. The first is that they fail to quantify the degree to which the academic performance of underrepresented minority students is reduced by the racially hostile environment at the feeder institutions. Nor did the evidence show **[**133]** that the academic performance of all underrepresented minority students is reduced to the same extent, or whether the effect varies from one individual to another. Thus, even if it were constitutionally permissible for the law school to consider the race of underrepresented minority applicants in order to compensate for the reduction in their grades and test scores attributable to a racially hostile environment in college, the court has no means of knowing the permissible extent of such compensation, either for particular individuals or for all underrepresented minority law school applicants.

Second, even if the effect of a racially hostile environment on academic performance could be quantified, no testimony was offered as to the percentage or numbers of underrepresented minority students at the University of Michigan Law School who come from the four "feeder" institutions. n59 Nor was any testimony or other evidence offered to show whether the racial climate at other undergraduate institutions from which underrepresented minority law students have graduated is hostile to the same degree as at the four feeder schools. Thus, it is impossible to know whether Professor Allen's findings **[**134]** apply to most or only some of the underrepresented minority law school applicants.

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n59 The magnitude of this flaw is suggested by Exhibit 18, which identifies all of the undergraduate schools which graduated students who entered the law school's 1995 class. Of the 337 students in that class, only 85 (25%) came from the four "feeder" institutions studied by Professor Allen. The remaining 252 students (75%) came from 106 other colleges and universities which were not included in the study.

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Third, Professor Allen's research failed to inquire into the effects of racial hostility on the academic performance of minority groups other than African Americans, Latinos, Asian Americans and Native Americans. It seems quite likely that Arab students, or those from eastern or southern Europe, or adherents of a religious minority, may also to one degree or another be subjected to a hostile undergraduate environment. Given the narrow focus of Professor Allen's research project, the court and the law school admissions office **[**135]** can only guess as to precisely which applicants are entitled to a "boost."

3.

The gap in LSAT scores between underrepresented minorities and Caucasians is even more difficult to explain than the gap in undergraduate GPA's. The intervenors contend that this gap is due to various factors, including cultural bias in the LSAT and a psychological phenomenon experienced by underrepresented minority test-takers known as "stereotype threat." The court is unable to find that anything in the content or design of the LSAT biases the test for or against any racial group. If such a bias exists, it was not proved at trial. Jay Rosner gave some testimony about "white preference" and "black preference" questions on the SAT (not the LSAT). Three of these questions appeared in newspaper articles in 1997 and 1999, while Mr. Rosner found others in unspecified "'88-'89 ETS data." See Exhibits 202-210. The court is unable to give **[*867]** any weight to this testimony, as Mr. Rosner is not an expert in test design. Nor did he claim to have studied, or to have the expertise to study, the

issue of bias in standardized tests. Professor Shapiro testified generally as to how pre-testing procedures can be used to **[**136]** perpetuate a test-score gap, but he did not testify that such procedures are used in connection with the LSAT. Professor Shapiro and David White testified about the existence of the LSAT gap, but they did not demonstrate to the court's satisfaction that the gap is due to the selection of the test questions or the design of the test.

The intervenors have also suggested that underrepresented minority students do less well than Caucasians on the LSAT, and on other standardized tests, because of a psychological phenomenon known as "stereotype threat." No witnesses testified directly on this subject. However, defendants did file a report by Dr. Claude Steele, a psychology professor at Stanford University who has done some research in this area. See Appendix in support of defendants' motion for summary judgment on grounds of qualified immunity, volume 3. Professor Steele writes that stereotype threat

> refers to the experience of being in a situation where one recognizes that a negative stereotype about one's group is applicable to oneself. When this happens, one knows that one could be judged or treated in terms of that stereotype, or that one could inadvertently do something **[**137]** that would confirm it. In situations where one cares very much about one's performance or related outcomes -- as in the case of serious students taking the SAT -- this threat of being negatively stereotyped can be upsetting and distracting. Our research confirms that when this threat occurs in the midst of taking a high stakes standardized test, it directly interferes with performance.

Steele Report, p. 7. Professor Steele indicates that he once conducted an experiment where black and white Stanford University sophomores were given a difficult verbal test, using questions from the advanced Graduate Record Examination in literature. When the students were told that their ability was being tested, the black students performed "dramatically worse" than did the white students. But when the students were told that the test was a "problem-solving task," not a measure of ability, black and white performance was the same. Id. at 8. Professor Steele indicates that he has performed other research which "shows stereotype threat to be a very general effect, one that is undoubtedly capable of undermining the standardized test performance of any group negatively stereotyped in the area **[**138]** of achievement tested by the test." Id. at 9.

Due to the sparseness of the evidence on this issue, the court is unable to determine whether stereotype threat explains any part of the gap between Caucasian and underrepresented minority LSAT scores. Professor Steele's report describes his research only in the most general terms. He reports the results of only one experiment he performed using the GRE, and he does not indicate when the experiment was done, how many students participated, whether the results were tested for statistical significance, or whether the results were published and subjected to peer review. Nor has Professor Steele provided any evidence, by way of survey data for example, to show that the members of any particular racial group perceive themselves as being the object of a stereotype that expects underachievement. Professor Steele does not quantify the effect of stereotype threat; nor, at least according to this report, has he performed any research on the LSAT. If there is evidence showing that stereotype threat accounts for some of **[*868]** the LSAT gap, it was not produced in this case.

The intervenors' witnesses offered two explanations for the LSAT gap which the **[**139]** court does find plausible. The first is that the LSAT, and other standardized tests, are written in what Dr. Garcia characterized as "academic English." Evidence at trial indicated that this

causes a problem for underrepresented minority students, many of whom do not speak English, or do not speak standard English, as their first language. The second is that underrepresented minority students are less likely to take an LSAT preparation course, which could increase one's score. Mr. Rosner testified that underrepresented minority students enroll in such courses only in "token numbers." This may well be due to the cost of taking a test preparation course, although Mr. Rosner testified that in his experience underrepresented minority students are simply less aware than are Caucasian students about the benefits such a course can provide.

4.

The intervenors have argued strenuously that the law school's race-conscious admissions policy does not apply lower academic standards to underrepresented minority applicants than are applied to non-minority applicants. In this view, there is no "double standard" in the admissions process because the UGPA gap and the LSAT gap are attributable to past **[**140]** and present discrimination against underrepresented minorities in the form of segregation in housing and schools, a racially hostile environment at undergraduate institutions, cultural bias in standardized tests, and stereotype threat. That is to say, underrepresented minority applicants are actually performing at a higher academic level than is suggested by their undergraduate grade-point averages and LSAT scores because of the more difficult conditions under which they were obtained. Therefore, the intervenors argue, the law school's race-conscious admissions policy simply "levels the playing field," or compensates for the differing levels of adversity, by giving some degree of preference to underrepresented minority applicants.

The court has made its findings on the factual issues relevant to this inquiry and, as noted above, the court concludes that the comparatively lower grades and test scores of underrepresented minorities is attributable, at least in part, to general, societal racial discrimination against these groups. While the court may agree with some of the factual underpinnings of the intervenors' argument, the legal conclusion they draw therefrom is flawed both as a **[**141]** matter of logic and as a matter of constitutional law.

The logical flaw in the argument is that it assumes all members of the underrepresented minority groups have suffered adversity entitling them to some degree of upward adjustment in their UGPA and LSAT scores. Conversely, the intervenors' argument assumes that no members of non-minority groups have suffered any such adversity which would entitle them to a similar adjustment in their grades and scores. Of course, neither assumption is correct. Every law school applicant is an individual whose personal history is unique. Some applicants, regardless of their race, may have been the victims of racial discrimination or have attended a substandard school or have grown up in poverty, while others will have been more fortunate. There is no basis in logic or in the evidence for assuming that all members of some racial groups are victims of adverse circumstances or, conversely, that all members of other racial groups are beneficiaries of privilege.

The legal flaw in the intervenors' conclusion is even more daunting, and it is this: **[*869]** the Supreme Court has held that HN17 the effects of general, societal discrimination cannot constitutionally be **[**142]** remedied by race-conscious decision-making. For example, in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986), the Supreme Court stated that it "never has held that HN18 societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." n60 See also id. at 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.") n61 In the present case there has been no evidence, or even an allegation, that the law school or the University of Michigan has engaged in racial discrimination. All of the evidence submitted by the intervenors relates to discrimination on

the part of society at large or by entities other than the law school or the University of Michigan. As a matter of federal constitutional law, the law school is not permitted to "level the playing field" in the manner urged by the intervenors. That is, the law school may not consider the race of applicants in order to compensate for **[**143]** the effects of discrimination by others or by society generally.

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n60 This statement is from Part I of Justice Powell's opinion, which was joined by Justices Burger and Rehnquist. Justice O'Connor filed a concurring opinion in which she specifically joined Part I of Justice Powell's opinion, see 476 U.S. at 294, and "agreed with the plurality that HN19 a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny." 476 U.S. at 288. Justice White also concurred in the judgment and wrote that "none of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal Protection Clause." 476 U.S. at 295. Thus, five members of the court indicated that HN20 the Fourteenth Amendment does not permit government to make racial classifications in order to remedy societal discrimination.

n61 This statement is from Part III-A of Justice Powell's opinion, in which Justices Burger, Rehnquist and O'Connor joined. Justice White, in a concurring opinion, tacitly agreed with the statement by indicating that "none of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the structures of the Equal Protection Clause." 476 U.S. at 295.

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5.

The intervenors' other argument in support of the law school's race-conscious admissions policy is that it is necessary in order to prevent "resegregation." The intervenors fear that if the law school is prohibited from considering race in admissions, then the number of underrepresented minority students will fall dramatically, perhaps to mere "token" levels. They point to the law schools at Austin and Berkeley, where underrepresented minority enrollment fell sharply following the elimination of affirmative action, as examples of what may occur here.

The court agrees that it would be unfortunate if the number of students from any racial group would decline at the University of Michigan Law School. It is the court's sincere hope that such consequences can be avoided, and some evidence adduced at trial suggested that they can be. Dr. Garcia testified that Berkeley's school of education has succeeded in constituting a class that is 28% minority by increasing its recruiting efforts and decreasing its reliance on standardized test scores. At the most selective law schools in the University of California system, the underrepresented minority population increased **[*870]** from 9.3% of the entering **[**145]** class in 1999 to 10.5% in 2000. See Exhibit 132. Throughout the University of California system, underrepresented minority admissions decreased just one percent from 1995 to 2000, although one must recognize the significant shift of the underrepresented minority student population from the more to the less selective campuses during this time period. See Exhibit 213.

Regardless of one's analysis of the admissions data in California and Texas, the constitutionality of the current admissions system at the University of Michigan Law School does not turn on the predicted consequences of instituting a race-blind admissions system. The current system is either constitutional or it is not. The court is unaware of any precedent

for the proposition that HN21 a constitutional challenge to a voluntarily adopted racial classification may be defeated by the argument that elimination of the classification will or may have undesirable consequences, be they political, social, economic or otherwise. n62 If undesirable consequences are likely or even certain to occur, the answer is not to retain the unconstitutional racial classification but to search for lawful solutions, ones that treat all people **[**146]** equally and do not use race as a factor.

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n62 This is not a case where a challenge to a desegregation order is opposed on the grounds that the order must be kept in place lest the school district revert to a racially segregated state. See, e.g., Belk v. Charlotte-Mecklenburg Bd. of Educ., 233 F.3d 232 (4th Cir. 2000) (opinion vacated). Nor, with all due respect to the intervenors' counsel, can the present admissions policy be defended on the grounds that its elimination would result in the creation of an all-white campus. In this connection the intervenors have raised the specter of Sweatt v. Painter, 339 U.S. 629, 94 L. Ed. 1114, 70 S. Ct. 848 (1950), in which the Supreme Court struck down the de jure exclusion of blacks from the University of Texas Law School and the creation of a separate law school for black students. There is simply no comparison between the de jure segregation at issue in Sweatt and a race-blind admissions policy which may admit fewer underrepresented minority students than are admitted by a race-conscious policy.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**147]**

One such solution may be to relax, or even eliminate, reliance on the LSAT. The evidence presented at trial indicated that the LSAT predicts law school grades rather poorly (with a correlation of only 10-20%) and that it does not predict success in the legal profession at all. If, as its admissions policy states, the law school seeks students who "have substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law," one must wonder why the law school concerns itself at all with an applicant's LSAT score. Defense counsel, and counsel for the intervenors, asserted at trial that the American Bar Association (ABA) and the Association of American Law Schools (AALS) will not accredit law schools which do not require applicants to submit an LSAT score. This is not entirely accurate. Standard 503 of the ABA's Standards for the Approval of Law Schools states:

> A law school shall require all applicants to take an acceptable test for the purpose of assessing the applicants' capability of satisfactorily completing its education program. A law school that is not using the Law School Admission Test sponsored by the Law School Admission Council **[**148]** shall establish that it is using an acceptable test.

Section 6-2 of the AALS bylaws, which covers law school admissions, states:

> a. A member school shall admit only those applicants who appear to have the capacity to meet its academic standards.
>
> b. In order that appropriate intellectual rigor may be maintained, a member school shall admit to its first professional degree program only those applicants **[*871]** who have the level of intellectual maturity and accomplishment normally demonstrated by the award of an undergraduate degree.
>
> c. A member school shall deal fairly with applicants for admission.

Exhibit 31. Thus, neither accrediting organization requires law schools to require applicants to take the LSAT. While the ABA does require law schools to "require all applicants to take an acceptable test," such as the LSAT, it does not require that law schools give the test results any particular weight. n63

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n63 The court did not hear any testimony as to whether the University of Michigan Law School has considered reducing its reliance on the LSAT or whether it has considered challenging the ABA's requirement that applicants take "an acceptable test."

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**149]**

Another solution may be for the law school to relax its reliance on undergraduate GPA. The law school's admissions policy acknowledges that, even in combination, the LSAT score and undergraduate GPA are "far from perfect" predictors of success in law school. In fact, the policy asserts that the correlation between the index score and first-year law school grades is merely 27%. See Exhibit 4, Admissions Policy, p. 3. The policy also notes the obvious fact that high undergraduate grades may overstate an applicant's academic achievements or promise, and that low grades may understate them. To determine the significance of an applicant's undergraduate GPA, the law school's admissions officers say they consider such factors as the difficulty of the course work and the reputation of the undergraduate institution. The law school may be able to counterbalance some of the negative effect of the UGPA gap by also determining whether *individual applicants* have had to overcome any particularly challenging or difficult obstacles. So long as the law school acknowledges that such obstacles may confront an applicant of any race, consideration might be given to such things as growing up in **[**150]** difficult family circumstances, attending underfunded public schools, or learning English as a second language.

Another solution may be for the law school to reduce or eliminate the preference now given to the sons and daughters of University of Michigan alumni. The current admissions director testified that applicants with a family connection to alumni are given "careful consideration," although this factor adds nothing in terms of diversity. Common sense would suggest that a preference of this nature perpetuates past imbalances and has no connection to any measure of "merit."

In this regard, the court would make the obvious observation that, ultimately, the law school student population naturally will become racially diverse under a race-blind admissions system when the gaps in LSAT scores, undergraduate GPA's, and other measures of academic performance are eliminated by investing greater educational resources in currently under-performing primary and secondary school systems. Dr. Garcia testified to some of the efforts being made in this regard in California. This is a social and political matter, which calls for social and political solutions. The solution is not for the law **[**151]** school, or any other state institution, to prefer some applicants over others because of race.

Whatever solution the law school elects to pursue, it must be race neutral. The focus must be upon the merit of *individual applicants*, not upon assumed characteristics of racial groups. An admissions policy that treats any applicants differently from others on account of their race is unfair and unconstitutional. As a matter of constitutional law, such a system cannot be justified on the grounds that certain races are at a greater competitive disadvantage **[*872]** than others because of discrimination or other societal conditions which may have created an "uneven playing field." Nor can a race-conscious system be upheld based on the predicted consequences of moving to a race-blind system. In sum, the court must reject the arguments raised by the intervenors in defense of the law school's current admissions policy.

IV. Conclusion

The Supreme Court has often stated that "distinctions between citizens solely because of their ancestry [are] odious to a free people whose institutions are founded upon the doctrine of equality." Wygant, 476 U.S. at 273, quoting Hirabayashi v. United States, 320 U.S. 81, 100, 87 L. Ed. 1774, 63 S. Ct. 1375 (1943). **[**152]** In our history, such distinctions generally have been used for improper purposes. Even when used for "benign" purposes, they always have the potential for causing great divisiveness. For these reasons, HN22 all racial distinctions are inherently suspect and presumptively invalid. This presumption may be overcome only upon a showing that the distinction in question serves a compelling state interest, and that the use of race is narrowly tailored to the achievement of that interest. It does not suffice for the interest in question merely to be important, beneficial, or laudable; the interest must be *compelling*.

For the reasons stated in this opinion, the court concludes that the University of Michigan Law School's use of race as a factor in its admissions decisions is unconstitutional and a violation of Title VI of the 1964 Civil Rights Act. The law school's justification for using race -- to assemble a racially diverse student population -- is not a compelling state interest. Even if it were, the law school has not narrowly tailored its use of race to achieve that interest. Nor may the law school's use of race be justified on the alternative grounds urged by the intervenors -- to "level **[**153]** the playing field" between applicants of minority and non-minority races -- because HN23 the remedying of societal discrimination, either past or present, has not been recognized as a compelling state interest. n64 Accordingly,

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n64 The court notes again that no party in this case has alleged, or offered any evidence to suggest, that the law school or the University of Michigan has committed any acts of discrimination against any minority group which might warrant a race-based remedy.

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IT IS ORDERED that plaintiffs' request for declaratory relief is granted. The court finds and declares that the University of Michigan Law School's use of race in its admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

IT IS FURTHER ORDERED that plaintiffs' request for injunctive relief is granted. The University of Michigan Law School is hereby enjoined from using applicants' race as a factor in its admissions decisions.

IT IS FURTHER ORDERED that the parties' **[**154]** various motions for summary judgment are denied, except that the motion of the individual defendants for summary judgment on grounds of qualified immunity is granted.

IT IS FURTHER ORDERED that the clerk schedule the damages phase of the trial.

Dated: March 27, 2001

Detroit, Michigan

/s/

BERNARD A. FRIEDMAN

UNITED STATES DISTRICT JUDGE

[SEE ILLUSTRATION IN ORIGINAL]

Service: **Get by LEXSEE®**
Citation: **137 F. Supp. 2d 821**
View: Full
Date/Time: Sunday, January 12, 2003 - 1:03 PM EST

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