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The President's Initiative on Race

*The New Executive Office Building
Washington, DC 20503
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MEMORANDUM

TO: Tanya Martin

FROM: Scott Palmer

SUBJECT: Diversity Papers

DATE: March 10, 1998

Per our discussion yesterday, attached are two papers I wrote on topics related to the value of diversity in higher education. I realize that these papers get way too much mileage, and they are not the tone we are looking for in the Department of Education papers. But I wanted you to glance through the paper entitled *Reconceptualizing the Legal Debate Concerning Non-Remedial Affirmative Action in Higher Education*, if you are interested, to know where I am coming from on this. Thanks.

Attachments

**Reconceptualizing the Legal Debate Concerning
Non-Remedial Affirmative Action in Higher Education**

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May 1997

Preliminary Draft
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This paper is an abridged version of a chapter from a larger paper entitled *Making the Case for Non-Remedial Affirmative Action in Higher Education: A Conceptual Framework for Assessing the Value of Diversity*. I want to thank the following people who have provided me with invaluable assistance in the preparation of this paper and who I hope will continue to help me explore the ideas expressed within it: Derek Bok, Ron David, Christopher Edley, Laura Heymann, Tom Kane, Adina Kole, Gary Orfield, Stephanie Naso, Anne Piehl, and Julie Wilson. They deserve credit for all that is good in the paper and are blameless for all that is not. Finally, special thanks to Tom Loveless, Robert Post, and Judith Winston (and the U.S. Department of Education Office of General Counsel) without each of whom this paper would not have been possible.

Reconceptualizing the Legal Debate Concerning Non-Remedial Affirmative Action in Higher Education

I. Introduction

In *Regents of the University of California v. Bakke*,¹ Justice Powell, in an opinion that came to be known as the opinion of the Court, held that securing the educational benefits that flow from diversity in higher education is a compelling interest that can constitutionally support race-based actions.² As a result, public and private universities across the country have for the last two decades adopted this diversity rationale as their primary justification for affirmative action programs in student admissions.³ However, in *Hopwood v. Texas*,⁴ the Fifth Circuit Court of Appeals rejected the notion that promoting educational diversity is a compelling interest, striking down the affirmative action admissions program at the University of Texas School of Law. *Hopwood* sets a precedent that, if extended nationally, threatens the viability of nearly all affirmative action programs in higher education. This paper is meant to serve as an important first step in rebutting *Hopwood* and making the case for affirmative action in higher education by providing a policy framework for reconceptualizing the legal debate concerning the role of diversity in higher education and applying that framework to the issue of affirmative action in student admissions. I conclude that there is likely a strong case to be made for affirmative action in higher education based on the diversity rationale, but much more needs to be done and done quickly both to use educational diversity more effectively and to evaluate it more rigorously.

II. A Policy Framework for Analyzing the Diversity Rationale: The Case of Affirmative Action in University Admissions

This paper argues that in order to effectively make the case for affirmative action in higher education based on the diversity rationale, it is first necessary to reconceptualize the legal debate into a policy-oriented framework. The model I have chosen is relatively simple: Policy engineering can be

¹ 438 U.S. 265 (1978).

² See *id.* at 312-15 (opinion of Powell, J.).

³ See, e.g., Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 Ann. Surv. Am. L. 515, ____ (1995) ("Although affirmative action in higher education was created specifically for remedial purposes, today the primary, and perhaps only, justification for the retention of affirmative action programs is educational diversity.").

⁴ 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

divided into four interrelated parts: (1) goals, (2) objectives, (3) strategy, and (4) design.⁵ Each part is linked to the next by evidence and analytical presumptions (i.e., goals dictate objectives, objectives dictate strategy, etc.). Understood in these terms, promoting racial diversity at universities is not an end in itself; rather, it is an *objective* designed to further various *goals* of higher education. In order to achieve that *objective*, a university may institute a given *strategy*, such as race-based affirmative action in admissions, which in turn has a certain *design*, such as *Bakke's* "plus" factor design in which race is "but a single though important element."

Using this framework to reconceptualize the legal debate concerning non-remedial affirmative action in higher education clearly identifies the possible arguments in support of racial diversity and highlights what needs to be done to make those arguments most effectively. The remainder of this paper applies the policy framework described above to the issue of affirmative action in university admissions. The following chart summarizes the analysis that follows. Each column indicates a different line of argument in support of non-remedial affirmative action in higher education. The darker cells indicate the weakest link in each column.

⁵ See Philip Zelikow, *Foreign Policy Engineering: From Theory to Practice and Back Again*, 18 Int'l Security 143 (Spring 1994) (dividing policy engineering into seven interrelated parts including the four discussed here).

Policy Analysis of Non-Remedial Affirmative Action in University Admissions

The Model	I	II	III	IV
Goals/Interests of Higher Education	Promote teaching and learning	Enhance civic values	Remedy the lack of essential-service providers in under-served communities	Remedy racial stratification in society • <i>Not compelling in most cases</i>
Evidence Linking Objective to Goals (possible evidentiary links)	Direct evidence: Racial diversity increases substantive learning and/or cognitive development Indirect evidence: Diversity of perspectives promotes problem solving, all relevant perspective are valuable; racial perspectives are often relevant • <i>Lack of substantial evidence</i>	Direct evidence: Racial diversity promotes tolerance, understanding, open-mindedness, etc. Indirect evidence: Interaction among different peoples promotes tolerance (contact hypothesis) • <i>Lack of substantial evidence</i>	Minority graduates are more likely to practice in under-served communities (e.g., medical school graduates)	Minority graduates of prestigious institutions are more likely to serve at advanced levels in society Minority graduates are of instrumental value in some positions in society (e.g., medical school graduates)
Objective	Promote racial diversity in the student body (ensure a "critical mass" of minority students)	Promote racial diversity in the student body (ensure a "critical mass" of minority students)	Promote racial diversity in the student body (increase minority representation)	Promote racial diversity in the student body (increase minority representation)
Strategy	Race-based affirmative action in admissions	Race-based affirmative action in admissions	Race-based affirmative action in admissions • <i>Race-neutral means available</i>	Race-based affirmative action in admissions
Design	Race used as a single "plus" factor	Race used as a single "plus" factor	Race used as a single "plus" factor	Race used as a single "plus" factor

A. Goals of Higher Education

Goals are defined here as the non-operational *interests* that drive policy choices.⁶ In *Hopwood v. Texas*, the Fifth Circuit rejected the diversity rationale for affirmative action in higher education without fully considering the relevance of racial diversity to the various goals of higher education it may promote.

⁶ *Id.* at 160. Throughout the remainder of this paper, I use the terms "goals" and "interests" interchangeably.

The *Hopwood* court often seemed to consider all non-remedial uses of affirmative action to be akin to the use of race for race's sake. Thus the court said, "[W]e see the case law as sufficiently established that the use of ethnic diversity *simply to achieve racial heterogeneity*, even as part of a number of factors, is unconstitutional."⁷ Obviously a university's use of affirmative action to foster racial diversity has to serve some goal beyond the achievement of diversity itself. That much was clear from *Regents of the University of California v. Bakke*.⁸ Racial diversity in the student body is not an end in itself; it is an objective that is sought only because it serves some larger goals of higher education. It is those goals (or interests) that a court must judge to determine if they are sufficiently compelling to justify affirmative action.

Much has been written about the goals of higher education, yet they are still a topic of debate. At least four potentially compelling goals of higher education may be enhanced by pursuing the objective of promoting racial diversity in the student body, by which I mean increasing minority representation at predominantly white universities: (1) *promoting teaching and learning* (stimulating thought by providing diverse perspectives relevant to various fields of study); (2) *enhancing civic values* (instilling students with the tolerance, understanding, and open-mindedness necessary for them to function as good citizens and/or effective leaders in our multicultural, democratic society); (3) *remedying the lack of essential-service providers in society* (producing well-educated professionals to practice in under-served communities); and (4) *remedying racial stratification in society* (producing well-educated minorities to serve at advanced levels of society).⁹

The remainder of this section will describe in greater detail each of these goals and its link to the objective of promoting racial diversity. Furthermore, this section will consider which, if any, of these goals (or interests) are most likely to be considered "compelling" by the current Supreme Court. The Court has offered little guidance concerning precisely what the term "compelling interest" means.¹⁰ Nonetheless, it is

⁷ *Hopwood*, 78 F.3d at 945-46 (emphasis added).

⁸ See *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

⁹ Notice that the first two goals identified here constitute the "educational diversity" at issue in *Bakke*. They are believed to be furthered by interactions among students of different races (i.e., it is the diversity that is important) and are intended to benefit all students. The last two goals flow from the definition of diversity as the inclusion of minorities at predominantly white universities. They are intended to benefit primarily the minority students and some segments of society. All of these goals are interrelated and can be divided in several different ways. Finally, other goals may also be relevant, such as the interest in developing new knowledge (providing diverse perspectives to stimulate new research and writing), which is closely related to the goal of promoting teaching and learning.

¹⁰ See, e.g., Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. Rev. 917, 937 (1988) ("[W]ith few exceptions, the Court has failed to explain the basis for finding and deferring to compelling governmental interests."). Some legal commentators have suggested that the Court has adopted a "know it when I see it approach" to identifying compelling interests, *id.* (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)), and that "compelling, even more than beauty, [may be] in the eyes of the beholder," David Schimmel, *Is Bakke Still Good Law? The Fifth*

possible to glean some general principles from the Court's jurisprudence and to reach some tentative conclusions with regard to the four goals identified above.

1. Promoting Teaching and Learning

One interest that may be served by promoting racial diversity in student admissions is *teaching and learning*. Teaching and learning is obviously a central part of the mission of higher education. It is also of great importance to society. Significantly, teaching and learning at universities occurs not only between faculty and students but among students themselves.¹¹ In *Bakke*, Justice Powell recognized that "[p]eople do not learn very much when they are surrounded only by the likes of themselves."¹² Thus, a diversity of student perspectives, including racial perspectives, promotes substantive teaching and learning, both in and out of the classroom, by exposing students to a variety of views on whatever subject is at issue and by challenging students' individual perspectives. Racial diversity, therefore, benefits *all* students by providing them with a more complete educational experience.¹³

This interest in teaching and learning can perhaps be more fully explained by responding to the criticisms often lodged against it. The most common criticism levied against this interest is that it equates race with viewpoint. As the Fifth Circuit asserted in *Hopwood*, "To believe that a person's race controls his point of view is to stereotype him."¹⁴ But this criticism misses the point. The belief is not that a person's race controls his viewpoint, but rather that a person's race may affect his/her life experience and, in turn, his/her perspective on certain issues. This does not stereotype a person any more than the belief that where a person was born and raised may have a similar effect. In a sense, what is at issue is not racial diversity at all, but experiential diversity: "The variety of viewpoints that the university seeks to foster

Circuit Says No and Outlaws Affirmative Action, 113 Ed. L. Rep. 1052, ____ (1996) (quoting Lino Graglia, Texas Lawyer, Sept. 25, 1995 at 25).

¹¹ See, e.g., Ernest T. Pascarella & Patrick T. Terenzini, *How College Affects Students* 620 (1991) ("Consistent with evidence on the impact of student-faculty interaction, students' interactions with their peers also have a strong influence on many aspects of change during college. Included are such areas as intellectual development and orientation; political, social, and religious values; academic and social self-concept; intellectual orientation; interpersonal skills; moral development; general maturity and personal development; and educational aspirations and educational attainment.").

¹² *Bakke*, 438 U.S. at 313 (quoting William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)).

¹³ See, e.g., Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1749 (1996) ("Integrated education . . . does not just benefit minorities -- it advantages all students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as democratic equals.").

¹⁴ *Hopwood*, 78 F.3d at 946.

does not come from any innate difference between the races themselves, but rather from the varying life experiences of the individuals, due in large part to their racial backgrounds.”¹⁵ Furthermore, the point is not that every black person, for example, will feel the same about every issue, or that every black person will feel differently than every white person about every issue. Rather, the simple reality is that black and white persons are often perceived differently in the world and, in turn, often perceive the world differently.¹⁶

The Fifth Circuit in *Hopwood* seems to deny the role of race in society by stating that race is no more relevant than blood type.¹⁷ This comparison is insulting. It is safe to assume that blood type is in no way correlated with educational opportunity, socio-economic status, or the nature of interpersonal relations in our country. Substantial evidence indicates that this is clearly not true for race.¹⁸ The Fifth Circuit, like all of us, may wish that there were not racial differences in society, but it cannot deny reality. “One must be careful to distinguish between issues of is and ought.”¹⁹ And if the court’s goal is to delegitimize racial differences in society,²⁰ the question from the perspective of university admissions is what is more likely to facilitate that goal -- allowing black and white students to interact in the university marketplace of ideas or effectively censoring all differences between black and white students from discussion in that marketplace by disallowing affirmative action in student admissions?

A second criticism that may be lodged against promoting racial diversity in the student body to further the interest in teaching and learning is that it relies on a faulty pedagogical premise: The university is a place where faculty teach students, not where students teach students. This criticism is both wrong and

¹⁵ Murphy, *supra* note 3, at ____.

¹⁶ “Students ‘come to “understand” primarily on the basis of their own reflecting experience, into which they seek to incorporate the new ideas they encounter in their courses.’ Because their experiences determine their frame of reference, minority students bring the influence of these experiences to assignments and discussions.” Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 Harv. L. Rev. 1357, 1370 (1996) (quoting John D. Wilson, *Student Learning in Higher Education* 29 (1981)). Racially diverse perspectives may be more relevant to some issues than others. See, e.g., Amar and Katyal, *supra* note 13, at 1778 (“Of course, diversity cannot function in the same way, or be as important, in every academic context. There may be settings where diversity may not have much educational importance at all (graduate school in math, perhaps) and other settings where it will matter a great deal (college, for example).”). But at any comprehensive university, racially diverse perspectives are likely to be more often relevant than not.

¹⁷ See *Hopwood*, 78 F.3d at 945.

¹⁸ E.g., Affirmative Action Review: Report to the President 20-25 (July 1995) (presenting evidence of continued racial stratification and discrimination in American society).

¹⁹ Adolphus Levi Williams, Jr., *A Critical Analysis of the Bakke Case*, 16 S.U. L. Rev. 129, 225 (1989).

“However unpleasant it may be, the issue of race is still very much an unresolved issue in the United States. As desirable as it might be to set this issue to one side, pretend it does not exist, or acknowledge its existence and accord it only minimal importance, the historical evidence and realities (for example the small percentage of Afro-American[s] in the professions) lead us in the opposite direction and to another conclusion; specifically, that race must be considered now and in the foreseeable future.” *Id.* at 229.

²⁰ See *Hopwood*, 78 F.3d at 940 (suggesting that the goal of equal protection is to make race irrelevant).

misses the point. It is wrong because it assumes that faculty have all the answers and have internalized all relevant perspectives concerning their subjects. On the contrary, the role of faculty is to constantly discover as well as to share knowledge, and "[these] functions of discovering and sharing knowledge are intimately related."²¹ Furthermore, the criticism is wrong because it assumes that all teaching and learning occurs in the classroom. "A great deal of learning occurs informally."²² Finally, this criticism misses the point because even if it were true that only faculty teach students, it is widely believed that student-centered teaching, whether it be discussion sections in college, the Socratic method in law school, the case method in business school, etc., improves the overall educational experience (i.e., promotes teaching and learning). "In the classroom, professors can use the backgrounds and experiences of other students as a learning tool."²³

Finally, the question of whether this interest in promoting teaching and learning, which is part of the educational diversity endorsed in *Bakke*, is likely to be found compelling by the Supreme Court today is a separate issue that can perhaps best be determined by examining the likely view of each Justice. On the negative side of the ledger, Justices Scalia and Thomas and Chief Justice Rehnquist are unlikely to find this interest to be compelling. Justices Scalia and Thomas have recently indicated that they favor full race-neutrality,²⁴ and Chief Justice Rehnquist shows no signs of favoring diversity.²⁵ On the positive side, Justice Stevens has taken a pragmatic view of what constitutes a compelling interest and now clearly supports educational diversity as sufficiently compelling.²⁶ Furthermore, while the views of Justices

²¹ Nannerl O. Keohane, *The Mission of the Research University*, in *The Research University in a Time of Discontent* 157 (Jonathan R. Cole, Elinor G. Barber & Stephen R. Graubard eds., 1994). In this way, promoting racial diversity can also further universities' goal of developing new knowledge, because students not only help educate other students; they also educate and stimulate faculty. *See id.* at 157-64.

²² *Bakke*, 438 U.S. at 313 n.48 (quoting Bowen, *supra* note 12, at 9).

²³ Note, *supra* note 16, at 1370.

²⁴ *See Adarand*, 115 S. Ct. at 2119 (Scalia, J., concurring in part) ("To pursue the concept of racial entitlement -- even for the most admirable and benign purpose -- is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American."); *id.* (Thomas, J., concurring in the judgment) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.")

²⁵ *See, e.g., Amar & Katyal*, *supra* note 13, at 1768 ("William Rehnquist voted for Allan Bakke once, and his writings and opinions reveal no faith in Lewis Powell's diversity theory.")

²⁶ *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 601-02 (Stevens, J., concurring) ("The public interest in broadcast diversity -- like the interest in an integrated police force, diversity in the composition of a public school faculty, or diversity in the student body of a professional school -- is in my view unquestionably legitimate.")

Souter, Breyer, and Ginsburg are somewhat less known, their dissents in *Adarand v. Peña* clearly evidence a rejection of strict race neutrality and potential support for educational diversity as a compelling interest.²⁷

The apparent swing votes, therefore, are likely Justices Kennedy and O'Connor, whose views are somewhat difficult to discern. Justice Kennedy seems generally to be opposed to affirmative action because he has often been a strong proponent of race neutrality.²⁸ Justice O'Connor has not been as strong a proponent of race neutrality, but she authored the main dissent in *Metro Broadcasting, Inc. v. FCC*, joined by Justice Kennedy, among others, which rejected broadcast diversity as a compelling interest and suggested that only the remedial interest in overcoming the present effects of past discrimination could ever constitute a compelling interest.²⁹ Nonetheless, there are clear differences between the broadcast diversity at issue in *Metro* and the interest in promoting teaching and learning in the higher education context.³⁰ Furthermore, Justice O'Connor's prior opinions indicate some level of support for educational diversity.³¹ Finally, in *Adarand*, Justice O'Connor avoided repudiating *Bakke*, indicated that strict scrutiny is not "fatal in fact," and, joined only by Justice Kennedy, reaffirmed her belief in the importance of precedent.³² This last point concerning the importance of precedent may be especially important:

Adarand teaches us a valuable lesson about Justices O'Connor and Kennedy. . . . Joined . . . only by Justice Kennedy, [Justice O'Connor] carefully crafted one section of *Adarand* in light of her 1992 [*Planned Parenthood v. Casey*] opinion (coauthored with Justices Kennedy and Souter), which cautioned against overruling hugely important cases around which major social expectations have crystallized. . . . Thus a big "plus" for *Bakke* [and its interest in promoting teaching and learning] is its social importance. An entire generation of Americans has been schooled under

²⁷ See *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting, joined by Ginsburg, J.); *id.* at 2131 (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.); *id.* at 2134 (Ginsburg, J., dissenting, joined by Breyer, J.). Justice Ginsburg's explanation, joined by Justice Souter, concerning the Court's denial of *certiorari* in *Hopwood* is perhaps also evidence of their support for affirmative action in the higher education context. See *Texas v. Hopwood*, 116 S. Ct. 2581 (1996) (indicating that the issue of whether universities can use race as one factor in admissions is "an issue of great national importance" that will be decided another day).

²⁸ See Amar & Katyal, *supra* note 13, at 1757-58, 1769.

²⁹ *Metro*, 497 U.S. at 3028 (O'Connor, J., dissenting).

³⁰ These differences include the unique role of education in society, the special First Amendment protections of academic freedom operating in the higher education context, the emphasis placed on individualistic diversity in *Bakke* versus the largely pluralistic diversity at issue in *Metro*, the direct interactions among students in a university environment versus the attenuated interactions between owners of broadcast stations and the public, and the fact that Justice Powell upheld educational diversity under strict scrutiny in *Bakke*. See, e.g., Amar & Katyal, *supra* note 13, at 1747 (1996) (offering several potentially salient distinctions between *Bakke* and *Metro*).

³¹ See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial classifications in furthering that interest."); *id.* at 288 n.* ("The goal of providing 'role models' discussed by the courts below [and rejected by the Supreme Court here] should not be confused with the very different goal of promoting racial diversity among the faculty.").

³² *Adarand*, 115 S. Ct. at 2114-17.

Bakke-style affirmative action. . . . Only a handful of modern Supreme Court cases are now household words in America. But *Bakke* -- like *Brown* and *Roe* -- is surely one of them.³³

Given this analysis, there is likely a case to be made for affirmative action in higher education based on the interest in promoting teaching and learning. But it is likely to be a tough case.

2. Enhancing Civic Values

A related interest that may be furthered by promoting racial diversity in the student body is *enhancing civic values*. Education has long been viewed in our democratic society as "the very foundation of good citizenship."³⁴ "[M]uch of the point of education is to teach students how others think and to help them understand different points of view -- to teach students how to be sovereign, responsible, and informed citizens in a heterogeneous democracy."³⁵ By bringing together and promoting interaction among an array of students from diverse racial and ethnic groups, universities help cultivate the values of understanding, tolerance, and respect for others that make all students better citizens. This goal is central to universities and is arguably the cornerstone of arguments for racial diversity.

Institutions of higher education are today a primary source of . . . cultural capital. They aspire to cultivate the remarkable and difficult capacity to regard oneself from the perspective of the other, which is the foundation of the critical interaction necessary for active and effective citizenship. . . . In the United States, . . . racial and ethnic identities mark lines of intense political division. If the racial and ethnic rifts that divide us are to be transcended by a democratic state that is legitimate to all sides, there must be articulate participation in public culture that concomitantly spans the lines of these controversies.³⁶

This civic interest is at the heart of *Bakke*'s diversity rationale and is often analyzed as part of the interest in promoting teaching and learning described above. Therefore, the prior analysis of the likely views of each justice concerning whether the interest in teaching and learning is "compelling" likely applies here. However, I have disaggregated the two interests to point out an important difference: Unlike the teaching and learning interest, the civic interest does not *necessarily* depend on judgments about

³³ Amar & Katyal, *supra* note 13, at 1769-70.

³⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

³⁵ Amar & Katyal, *supra* note 13, at 1774.

³⁶ Robert Post, *Introduction: After Bakke*, Representations, Summer 1996, at 1,1. See also Amar & Katyal, *supra* note 13, at 1749 ("If a far-flung democratic republic as diverse -- and at times divided -- as late twentieth-century America is to survive and flourish, it must cultivate some common spaces where citizens from every corner of society can come together to learn how others live, how others think, how others feel. If not in . . . universities, where? If not in young adulthood, when?").

individuals' viewpoints. Even if the lesson that black and white students, for example, learn from interacting with each other in a university setting is that there is no viewpoint correlated with race (i.e., that black and white students do not in fact see any issues differently in any consistent way), that would likely be an extremely valuable lesson toward instilling students of all races with the tolerance and understanding necessary for them to function as good citizens in our multicultural, democratic society. As Justice Stevens explained in *Wygant v. Jackson Board. of Education*, referring to the value of racial diversity in the faculty:

In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. *For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land.* It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.³⁷

This distinction could make a difference to Justice O'Connor, who in her *Metro* dissent indicated her opposition to any affirmative action program that is based on the assumption that a person's race determines how he/she thinks.³⁸ As explained above, I believe that this criticism concerning race and viewpoint misunderstands the relevance of racial diversity in the higher education context. Nonetheless, to the extent that the criticism can be avoided, the case for enhancing civic values as a compelling interest may be slightly stronger than that for promoting teaching and learning.

3. Remedying the Lack of Essential-Service Providers

On a different level than the two educational interests just described, promoting the inclusion of racial minorities at predominantly white universities may serve the interest in *producing well-educated professionals to practice in under-served areas in society*. This interest is different than the interests in

³⁷ *Wygant*, 476 U.S. at 315 (Stevens, J., dissenting) (emphasis added). Some seek to distinguish this *sameness* argument from the *difference* argument for promoting racial diversity. But I see the two as inherently linked. Persons of different races likely have some differences that are real, based on their different cultures and experiences, and others that are based on misperceptions from which our sameness can emerge. But the point is that it does not matter to which theory one subscribes because racial diversity likely promotes civic values among all students in either case. Therefore, this goal for affirmative action cannot be said to turn on the relationship between race and viewpoint.

³⁸ See *Metro*, 497 U.S. at 602 (O'Connor, J., dissenting).

teaching and learning and civic values because it is not based on the interaction among students of different races. In fact, this interest is not really concerned with the race of the students at all. Rather, it seeks to promote minority student attendance only because under-served communities tend to be largely minority communities, and because it is believed that minority graduates are more likely to practice in those communities.

This interest may be compelling in some circumstances where the need for certain service providers is itself compelling. For example, in *Bakke*, Justice Powell suggested that the state's interest in "facilitating the health care of its citizens" by expanding health services in under-served communities was arguably compelling enough to justify the use of race-based affirmative action at Davis Medical School, but he rejected the interest in large part because there was no evidence that minority graduates were more likely to practice in such under-served communities.³⁹ As will be shown below, such evidence now exists. However, as will also be shown below, affirmative action programs designed to promote this interest are unlikely to withstand strict scrutiny under any circumstances because they suffer from a different fatal flaw -- there are clearly race-neutral means available to further this interest (i.e., the program would not be necessary or narrowly tailored).⁴⁰ For example, a university could offer scholarships to students who pledge to practice in under-served communities after graduation. At the extreme, universities could even reserve admissions slots for students who agree to practice in under-served communities. Therefore, the potentially compelling nature of this goal is likely moot.

4. Remedying Racial Stratification in Society

Finally, promoting the inclusion of racial minorities through affirmative action in university admissions may serve the interest in *remedying racial stratification by producing well-educated minorities to serve at advanced levels in society*. This interest rests in part on the notion that universities are prime forces of social mobility. However, this interest does not only have a social promotion component to it; it may also have an instrumental component. It may be necessary in some circumstances to admit minority students to study in certain fields because there is an instrumental value to having minorities in certain positions in society. For example, in *Wittmer v. Peters*,⁴¹ the Seventh Circuit upheld an affirmative action program for correctional officers at a prison "boot camp" because the court found it was necessary to promote black officers to serve the state's compelling interest in "pacification and reformation" of youth

³⁹ *Bakke*, 438 U.S. at 310-11 (opinion of Powell, J.).

⁴⁰ Justice Powell mentioned this criticism in *Bakke* as well. See *id.* at 311.

⁴¹ 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 65 USLW 3416 (1997).

offenders. Imagine that instead of the boot camp seeking to promote a black officer directly, the local university sought to enroll a black applicant in its correctional officer training program. In that case, there would perhaps be an argument that, given the compelling interest in having some black correctional officers in supervisory positions, the university program would pass strict scrutiny.

It is clear that universities may not use affirmative action simply to promote the social mobility of minorities; that interest is largely akin to the interest in overcoming "societal discrimination," which the Supreme Court has clearly indicated is not sufficiently compelling to justify affirmative action by any entity except perhaps the federal government.⁴² Furthermore, even where there is an instrumental value to the promotion of minorities in a given field, affirmative action is likely to raise substantial concerns for the Court. Nonetheless, this interest may be worth pursuing in defense of a university's affirmative action program where there is an extremely close connection between the education the university provides and the availability of minorities in potentially compelling positions in society. One possible example that will be explored below is the medical profession.⁴³

B. Evidence Linking the Objective of Promoting Racial Diversity to the Goals of Higher Education

In order to make the case for affirmative action in higher education, the objective of promoting racial diversity must be linked to the above goals of higher education by more than mere analytical presumptions. The Supreme Court will uphold affirmative action only where there is "*a strong basis in evidence*" to support the belief that the given program serves a compelling interest and is narrowly tailored to achieve that interest.⁴⁴ Given the paucity of evidence concerning the value of racial diversity in higher education, this heightened evidentiary requirement would seem to pose the greatest challenge to efforts to promote affirmative action based on the diversity rationale. "The hope for preserving pluralism in American higher education now rests on our ability to marshal specific evidence that the institutions' core

⁴² See, e.g., *Bakke*, 438 U.S. at 307-10 (opinion of Powell, J.) (holding that the interest in overcoming societal discrimination is insufficient to justify affirmative action by a university).

⁴³ See *infra* text accompanying notes 73-78.

⁴⁴ See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant*, 476 U.S. at 277). This subsection of the paper focuses on showing that racial diversity serves a compelling interest. The related issue of whether affirmative action is necessary to promote that interest is an issue of *strategy* and is discussed below. See *infra* text accompanying notes 92-99.

needs and values require special efforts for racial and ethnic minorities.”⁴⁵ In other words, universities must present clear evidence that promoting racial diversity serves one or more of the potentially compelling interests identified above.

It is unclear how much and what kind of evidence is necessary to meet this evidentiary requirement. A recent article argues that the Court should be satisfied with “the testimony of educators.”⁴⁶ Many academics have touted the value of diversity,⁴⁷ but I am not confident that such evidence will independently be sufficient to sustain affirmative action. (It certainly was not in *Hopwood*.) Nonetheless, several factors arguably favor universities in their efforts to present sufficient evidence of the value of racial diversity: (1) The First Amendment concept of academic freedom holds that it is chiefly the university’s place “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁴⁸ (2) The Supreme Court has arguably indicated that some deference to higher education experts may be appropriate with regard to affirmative action.⁴⁹ (3) While universities must present substantial evidence of the value of diversity, the ultimate burden of proof remains with the plaintiff(s) challenging a university’s affirmative action program to prove that it violates his/her equal protection rights.⁵⁰ (4) In *Wittmer v. Peters*, Chief Judge Posner held that how much and what kind of evidence is required under the strict scrutiny standard depends, in part, on what evidence is available.⁵¹

This section of the paper describes possible evidentiary chains linking the objective of promoting racial diversity within the student body to each of the four potentially compelling interests identified above (in other words, assessing the value of diversity). Direct evidence linking racial diversity to most of the interests identified above is extremely limited; some have even suggested that such evidence cannot be produced.⁵² Furthermore, what evidence does exist sometimes shows mixed results concerning the value of

⁴⁵ Martin Michaelson, *Building a Comprehensive Defense of Affirmative Action Programs*, Chron. of Higher Ed., July 28, 1995, at A56.

⁴⁶ Note, *supra* note 16, at 1361.

⁴⁷ See, e.g., Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 Wm. & Mary Bill Rts. J. 881, 888-89 (1996).

⁴⁸ *Bakke* 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)).

⁴⁹ See Southern Education Foundation, *Redeeming the American Promise*, 14-18 (1995) (suggesting that the Supreme Court’s statement in *United States v. Fordice*, 505 U.S. 717 (1992), that policies traceable to the de jure segregated era must be eliminated “to the extent practicable and consistent with sound educational practices,” indicates a willingness to defer, to some extent, to education leaders).

⁵⁰ See, e.g., *Wygant*, 476 U.S. at 277-78 (plurality opinion); *id.* at 292 (O’Connor, J., concurring).

⁵¹ See *Wittmer*, 87 F.3d at 920-21.

⁵² See, e.g., Note, *supra* note 16, at 1361-62 (“Although the educational community has heralded diversity’s benefits, current social science methods do not provide definitive measurements. Therefore, if courts did require universities to prove that diversity furthers learning, courts would be making a substantive choice that higher

racial diversity in higher education. However, this is likely because the resource of racial diversity has, until recently, been largely underutilized by universities in any formal way and has in turn been underevaluated as well. Still, some positive direct evidence exists concerning the value of diversity, and other indirect evidence shows great promise. Therefore, I conclude that there is likely a case to be made for the importance of racial diversity in achieving the goals of higher education, but universities must promote efforts to use the resource of diversity more effectively and to evaluate it more rigorously.

1. **Evidence Linking Racial Diversity to the Goal of Promoting Teaching and Learning**

Direct evidence linking racial diversity in the university student body to the goal of promoting teaching and learning would include studies that demonstrate more effective teaching and learning in racially diverse environments, including enhanced learning on substantive issues, improved cognitive skills, etc. Such studies are rare, but some recent and encouraging attempts have been made. For example, several recent longitudinal studies based on nationwide student survey data report positive correlations between increasing cross-racial student interactions and such educational outcomes as retention, satisfaction with college, intellectual self-concept and social self-concept (at least where coupled with efforts to promote constructive interactions among students of different racial groups).⁵³ Other studies have tried to measure the effects of diversity at a more micro-level. One example is a recent study by Maurianne Adams and Yu-hui Zhou-McGovern that attempted to measure the effects of an undergraduate social diversity course (with a racially diverse student enrollment) on students' cognitive development.⁵⁴ Adams and Zhou-McGovern hypothesized that "[c]ollege curricula that deal with social justice and social diversity call for many of the qualities described in the [cognitive] developmental literature with regard to critical thinking, openness to conflicting perspectives from readings or classroom discussions, and, most especially, the ability to reflect upon one's experience, prior beliefs and feelings from another's

educational institutions cannot pursue diversity. . . . The benefits of diversity are the result of interpersonal interactions that cannot be quantified or verified by scientific proof.").

⁵³ See Alexander Astin, *How Are Students Affected?* 25 Change 44 (1993); Octavio Villalpando, Comparing the Effects of Multiculturalism and Diversity on Minority and White Students' Satisfaction with College, ASHE Annual Meeting Paper 16 (Nov. 9, 1994); Mitchell Chang, Racial Diversity in Higher Education: Does a Racially Mixed Student Population Affect Educational Outcomes? 11-12 (1996) (forthcoming article based on unpublished Ph.D. dissertation, University of California, Los Angeles).

⁵⁴ Maurianne Adams and Yu-hui Zhou-McGovern, The Sociomoral Development of Undergraduates in a "Social Diversity" Course, Paper presented at the Annual Meeting of the American Educational Research Assoc. (Apr. 1994).

perspective.”⁵⁵ Based on tests administered to students before and after participation in the social diversity course, Adams and Zhou-McGovern found statistically significant, positive effects on students’ cognitive development.⁵⁶

The above studies indicate that it is possible to develop evidence linking racial diversity in the student body to the goal of promoting teaching and learning, but much more research is clearly needed. Studies showing a direct link between racial diversity and improved teaching and learning are likely hard to produce. Assessing teaching and learning is inherently difficult, and assessing that part of teaching and learning attributable to diversity is likely even more so. However, qualitative data may be more readily available than quantitative data and should not be undervalued.⁵⁷

Finally, in the short term, the premise that racial diversity in the student body improves teaching and learning can perhaps be proven indirectly. First, there is evidence that having a variety of perspectives examine a problem, in general, promotes problem solving. “Studies have shown that work team heterogeneity promotes critical strategic analysis, creativity, innovation, and high-quality decisions.”⁵⁸ Second, those perspectives that should be actively included in a diverse problem-solving group are likely those perspectives that are relevant to the given problem or subject at issue and are not otherwise adequately represented. Third, there is substantial evidence indicating that race is often relevant in the sense that black and white persons, for example, often have different experiences in the world as a result of race and, in turn, often see the world differently.⁵⁹ Therefore, there is likely a strong argument to be made

⁵⁵ *Id.* at 1-2.

⁵⁶ *Id.* at 31.

⁵⁷ See Villalpando, *supra* note 53, at 25; Telephone Interview with Mitchell Chang, Professor, Loyola Marymount Univ. (Apr. 1, 1997).

⁵⁸ Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 1024 (1996) (citing L. Richard Hoffman & Norman R.F. Maier, *Quality and Acceptance of Problem Solutions by Members of Heterogeneous Groups*, 62 J. Abnormal and Social Psychology 401 (1961)). Of course, not all of the effects of diversity, especially cultural diversity, on problem solving are positive. “Although culturally diverse groups have the potential to generate a greater variety of ideas and other resources than culturally homogeneous groups, they need to overcome some of the group interaction problems that make group functioning more difficult.” Warren E. Watson & Kamalesh Kumar, *Differences in Decision Making Regarding Risk Taking: A Comparison of Culturally Diverse and Culturally Homogeneous Task Groups*, 16 Int’l J. of Intercultural Relations 53, 61 (1992).

⁵⁹ This often unfortunate truth can be shown in many ways including audit studies and surveys that demonstrate the continuing vestiges of discrimination that African Americans and other minorities face in their daily lives. See, e.g., Michael Fix, George C. Galster & Raymond J. Struyk, *An Overview of Auditing for Discrimination, in Clear and Convincing Evidence: Measurement of Discrimination in America 1* (Michael Fix & Raymond J. Struyk eds., 1993) (discussing evidence of discrimination facing minorities in employment and housing); Jennifer L. Hochschild, *Facing Up to the American Dream* 114 (1995) (reporting that white persons rank black persons as more violent and less likely to work hard). Such vestiges undoubtedly influence minority life experiences and likely contribute to differences in black and white viewpoints on countless issues, from welfare reform to the O.J. Simpson verdicts. See, e.g., *The Four Americas: Government and Social Policy Through the Eyes of America’s*

for the notion that including black students' perspectives in university discussions is likely to enhance problem solving, and thereby teaching and learning, on many issues, at least in student-centered learning environments.

2. Evidence Linking Racial Diversity to the Goal of Enhancing Civic Values

Direct evidence linking racial diversity in the student body to the goal of enhancing civic values would include research studies that demonstrate that students' values, beliefs, and/or actions are positively affected by a more diverse campus environment. Once again, such direct evidence is extremely limited. "National studies dealing with changes during the college years in attitudes and values related to civil rights, civil liberties, racism, anti-Semitism, or general tolerance for nonconformity uniformly report shifts toward social, racial, ethnic, and political tolerance and greater support for the rights of individuals in a wide variety of areas."⁶⁰ But there is little evidence that racially diverse educational environments themselves have such effects. One exception is a recent longitudinal study by Alexander Astin, mentioned above, in which he found that increased faculty and institutional commitment to diversity and increased student diversity experiences (such as participation in a cultural awareness workshop) were positively associated with increased cultural awareness among students and/or increased student commitment to promoting racial understanding.⁶¹ Thus Astin lends some direct support to the notion that efforts to promote racial diversity in turn promote civic values, and other studies have corroborated Astin's findings that participation in cultural awareness workshops has positive effects on students' attitudes about racial diversity.⁶² But much more research is clearly needed.

Once again, the link between racial diversity in the student body and the goal of inculcating civic values can perhaps be established indirectly by studies demonstrating that interactions among different types of people, in general, promote tolerance and understanding. This theory is widely known as the "contact hypothesis," which states that "contact with members of a negatively stereotyped group might ameliorate attitudes both toward the specific group member or members with whom contact occurred, and

Multi-Racial and Multi-Ethnic Society, Harvard Survey Project 25-37 (Dec. 1995) (illustrating differences in viewpoints by race with regard to numerous issues).

⁶⁰ Pascarella & Terenzini, *supra* note 11, at 279.

⁶¹ See Astin, *supra* note 53, at 46-49.

⁶² See, e.g., Leonard Springer et al., *Attitudes Toward Campus Diversity: Participation in a Racial or Cultural Awareness Workshop*, 20 Rev. of Higher Ed. 53, 60-66 (1996) (showing that participation in a cultural awareness workshop is positively associated with more favorable attitudes toward racial diversity among white students including men, women, and students in both liberal and conservative majors).

toward the group as a whole."⁶³ Numerous studies have provided support for the contact hypothesis *provided that certain conditions are met*. These conditions include (1) that the interaction occur between persons of equal status, (2) that the interaction afford persons the chance to get to know each other, and (3) that the interaction be cooperative and in pursuit of mutual goals.⁶⁴ Even where these conditions are met, most studies concerning the contact hypothesis show a positive shift in attitudes only toward the specific stereotyped group member and not necessarily toward the group as a whole. But recent studies have shown support for the generalization component of the contact hypothesis as well.⁶⁵ Therefore, the contact hypothesis could lend indirect support for the importance of racial diversity in promoting such civic values as racial tolerance and understanding, provided that universities are willing to make the commitment to foster cross-racial cooperative learning opportunities.

3. Evidence Linking Racial Diversity to the Goal of Remediating the Lack of Service Providers in Under-Served Communities

There is substantial evidence of a lack of certain types of professionals practicing in certain segments of society. These under-served communities tend to be largely minority. Furthermore, there is some evidence that minority professionals are more likely to practice in these areas. Therefore, increasing minority enrollment in certain professional programs may remedy this lack of service providers. The most apparent example is the medical profession: There is substantial evidence of a shortage of physicians in certain segments of society.⁶⁶ While there is some evidence of shortages in poor communities, a recent study in California indicates that "[t]he supply of physicians was much more strongly associated with the proportion of black and Hispanic residents in the community areas than with the areas' income level."⁶⁷

⁶³ James L. Werth & Charles G. Lord, *Previous Conceptions of the Typical Group Member and the Contact Hypothesis*, 13 *Basic and Applied Social Psychology* 351 (1992). See also Gordon Allport, *The Nature of Prejudice* (1954) (proposing the contact hypothesis).

⁶⁴ See Werth & Lord, *supra* note 63, at 352; Donna M. Desforges et al., *Effects of Structured Cooperative Contact on Changing Negative Attitudes Toward Stigmatized Social Groups*, 60 *J. of Personality and Social Psychology* 531 (1991); Janet Ward Schofield, *Improving Intergroup Relations Among Students*, in *Handbook on Research on Multicultural Education* 635, 638-41 (James A. Banks ed., 1995).

⁶⁵ See Desforges, *supra* note 64, at 535-40 (showing that cooperative learning interactions between college students and other students who they believed were former mental patients had a positive effect on the college students' attitudes toward the supposed mental patients with whom they interacted and toward mental patients overall); Werth & Lord, *supra* note 63, at 358-63 (indicating, with some lack of experimental controls, that classroom interactions between college students and a guest speaker with AIDS had a positive effect on the students' attitudes toward the speaker and toward people with AIDS more generally, but finding that the change in attitudes was only significant for students who had not previously had contact with a person with AIDS).

⁶⁶ See, e.g., Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 *N.E. J. of Medicine* 1305 (May 16, 1996).

⁶⁷ *Id.* at 1307.

Finally, studies show that black and Hispanic medical school graduates are significantly more likely to practice in these under-served areas.⁶⁸ Therefore, affirmative action in medical school admissions may be necessary to further the compelling interest in facilitating health care to all citizens.⁶⁹ However, as mentioned above and discussed below, it is unlikely that affirmative action programs designed to achieve this interest will pass strict scrutiny, despite the above evidence, because there are likely race-neutral means available to achieve this goal.

4. Evidence Linking Racial Diversity to the Goal of Remedying Racial Stratification in Society

There is ample and impressive evidence that higher education is a major force of social mobility for minorities. Consider the effects of college on minorities' future earnings: First, for all students, the effect of obtaining an undergraduate degree on future earnings has never been greater.⁷⁰ Second, a college degree results in an even greater increase in earnings for black students than for white students.⁷¹ Third, and most important in the context of affirmative action, a recent study shows that minority students who attend selective universities, often as a result of affirmative action, have higher future earnings than equally qualified minority students who attend less prestigious universities.⁷² This shows that affirmative action in higher education is itself an agent of social mobility.

Despite all of this, it is not likely that the Supreme Court would find that universities are the appropriate actors to decide to use affirmative action to pursue this goal of remedying racial stratification, which is akin to remedying societal discrimination. However, as stated above, there may be rare cases where increasing the number of minorities serving in select positions in society has an instrumental value that is itself compelling, and where universities are so closely connected to producing minorities to serve in those positions that affirmative action would be justifiable.

⁶⁸ *Id.*; S.N. Keith et al., *Effects of Affirmative Action in Medical Schools: A Study of the Class of 1975*, 313 N.E. J. of Medicine 1519-25 (1985).

⁶⁹ See *Bakke*, 438 U.S. at 310-11 (indicating that the state's interest in "facilitating the health care of its citizens" was potentially compelling).

⁷⁰ See William G. Bowen, *No Limits*, Transcript of speech delivered at Cornell Univ. 2-3 (May 21, 1995) (quoting Sarah E. Turner, *Changes in Returns to College Quality*, U. of Mich, Dep't of Econ., mimeo (April 1995)).

⁷¹ See *One Statistical Measure of How a College Education Tends to Repair Damage From the Past*, J. of Blacks in Higher Ed. 5 (Autumn 1996) (reporting that the median annual income of black high school graduates is approximately 57 percent of white high school graduates, but the income of black college graduates is 87 percent of white college graduates). "Whatever the reasons for the continuing economic disparities between the races, it is certain that a college education, more than any other factor, serves to break down racial stereotypes, increase opportunities for African Americans, and decrease the economic gap between blacks and whites." *Id.*

⁷² Thomas Kane, *Racial and Ethnic Preference in College Admissions* 13-14 (1997) (Paper presented at recent conference on affirmative action and university admissions).

Consider, once again, the medical profession. It is clear that there is an underrepresentation of black physicians in society.⁷³ Furthermore, there may be an instrumental value to having a sufficient number of black physicians in society (not to be confused with the interest discussed above in providing under-served segments of society with physicians of any race). Simply put, while physicians of all races are capable of providing quality care, black physicians may, in some cases, provide better care for black patients.⁷⁴ This could be true for several reasons: First, there is evidence that black patients are more likely to visit black physicians. This is true even after controlling for the proportion of black residents living in the given community.⁷⁵ This may indicate that black patients feel more comfortable visiting black physicians. Thus, increasing the number of black physicians could lead to an increase in preventive care and early detection of illness as more black patients would more readily seek medical attention. Second, black physicians may be more likely to understand "the cultural and social context of illness and disability among blacks."⁷⁶ For example, the unique social pressures facing African Americans, such as issues of status and discrimination, can cause great stress, which can promote disease and illness. A black physician is likely to better understand these pressures and to more easily factor them into his/her diagnosis.⁷⁷ Third, black physicians may be able to communicate with black patients more easily, which is crucial because medical evaluation is itself a social interaction.⁷⁸ For all these reasons and more, it is possible, though perhaps not probable, that the Supreme Court could find that affirmative action in medical school admissions is necessary to further the compelling interest in providing health care to all citizens.⁷⁹ However, the question remains whether some actor besides a university, such as the federal government, is the more appropriate actor to make that determination.

⁷³ E.g., Sterling M. Lloyd & Russell L. Miller, *Black Student Enrollment in U.S. Medical Schools*, 261 J. of Am. Medical Assoc. 272 (1989) ("Blacks continue to be underrepresented in the medical schools of this country and in the profession of medicine. Blacks represent about 12% of the nation's population, but only 6% of total medical school enrollment, 5% of medical school graduates, 5% of postgraduate trainees, 3% of physicians in practice, and 2% of medical school faculties.")

⁷⁴ *Id.* at ____.

⁷⁵ Komaromy, et al., *supra* note 66, at 1301-08.

⁷⁶ Lloyd & Miller, *supra* note 73, at ____.

⁷⁷ See Clovis E. Semmes, *Racism, Health, and Post-Industrialism: A Theory of African-American Health* 131-34 (1996).

⁷⁸ Lloyd and Miller, *supra* note 73, at ____.

⁷⁹ See *Bakke*, 438 U.S. at 310-11 (opinion of Powell, J.) (indicating that the state's interest in "facilitating the health care of its citizens" is potentially compelling).

C. Objective of Promoting Racial Diversity

Objectives are concrete, operational aims that are linked to the non-operational goals/interests by evidence and analytical presumptions,⁸⁰ as illustrated above. In the case of affirmative action in university admissions, the objective is *promoting racial diversity in the student body*, by which I mean *increasing minority representation at predominantly white universities*. However, vague objectives, such as “promoting racial diversity,” are sometimes dangerous because they lead to confused, imperfect policy choices.⁸¹ What makes an objective “operational” is that it is defined precisely enough so that it is easy to understand what is expected and to determine whether the objective has been achieved. In the case of affirmative action in university admissions, this need to clearly articulate a policy’s objective raises additional questions: Exactly what level of racial diversity is appropriate? And for how long should it be pursued?⁸²

The proper level of diversity a university should pursue and how long a university should pursue it naturally depends on what goal(s) of higher education it is trying to promote. For example, if the goal or interest is remedying racial stratification in society, then the appropriate level of diversity is likely tied to the lack of minorities at certain levels in society. This conclusion illustrates why it is unlikely that the goal of remedying racial stratification will be found to be compelling in most cases. Promoting this interest would permit a discrete university to use affirmative action to admit any number of minority applicants it believed appropriate until societal discrimination was remedied, a situation the Supreme Court has clearly rejected.⁸³

However, if the interests a university is seeking to serve are promoting teaching and learning or enhancing civic values among its students, then the appropriate levels of diversity are tied to the levels

⁸⁰ See Zelikow, *supra* note 5, at 162.

⁸¹ *Id.* at 162-64.

⁸² When talking about numbers, it is obviously important to distinguish between targets and quotas. The use of quotas in affirmative action is clearly unconstitutional, *see, e.g., Bakke*, 438 U.S. at 314-20, in part because using a quota encourages the recruitment of enough minorities to fill the quota regardless of qualifications, *see Amar & Katyal, supra* note 13, at 1751. Numerical targets are intended to be more flexible and aspirational. Numerical targets in affirmative action establish the ideal while recognizing that meeting the targets depends on the availability of qualified minority applicants.

⁸³ *See, e.g., Bakke*, 438 U.S. at 307-10 (opinion of Powell, J.) (“[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.”).

necessary to achieve those goals by promoting discussions and interactions among students of different races. In other words, some specific level of minority representation on campus is obviously required to create sufficient opportunities for communication and interactions across racial lines.

Given the lack of direct evidence concerning the value of diversity to promoting teaching and learning and instilling civic values, we obviously do not know what level of minority enrollment is optimal. One point of agreement between proponents and opponents of diversity-based affirmative action seems to be that proportionality in racial representation is not necessarily required to further those educational goals.⁸⁴ Furthermore, many education leaders believe that minority participation and interaction across racial lines are dependent upon the level of comfort minorities feel on campus. This raises the notion of "critical mass."⁸⁵ Even on this point, however, the available pedagogical literature is limited and difficult to interpret. There is substantial evidence that black students attending predominantly white universities experience greater levels of alienation and isolation than their white counterparts at predominantly white universities or their black counterparts at historically black universities.⁸⁶ Furthermore, there is evidence that the social and academic adjustment of black students at predominantly white universities is enhanced by communalism, meaning the tendency for a black student to see him/herself as part of a black community.⁸⁷ "The communal student may be more likely to draw from the support of Blacks on campus or in the surrounding community, thereby uniting with community members in the face of adversity rather than withdrawing in isolation."⁸⁸ Thus a critical mass of black students may increase the level of comfort of black students on campus by providing such a black community.

This, however, highlights the concern that a "critical mass" might make minority students feel more comfortable only because they are able to self-segregate within their own racial or ethnic communities, thereby actually decreasing cross-racial interactions. There is some evidence of such

⁸⁴ Compare Amar & Katyal, *supra* note 13, at 1777 (supporting non-remedial affirmative action) ("A critical mass of students of a particular group may be needed so that other students become aware of the group (and of the diversity within the group), but this by no means requires exact proportionality -- or anything like it.") and Chin, *supra*, note 47, at 894 (opposing non-remedial affirmative action) ("The theory of Bakkean diversity is that it may be beneficial for persons who are not members of a particular group to have contact with others who are. Accordingly, the number of minority students admitted is driven not by the percentage of minorities in the population, but by the number needed to achieve that goal of educational diversity.").

⁸⁵ See, e.g., Chin, *supra* note 47, at 921 ("Diversity proponents often argue that a 'critical mass' of minority students is necessary to ensure that the students are socially comfortable.").

⁸⁶ See, e.g., Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 Harv. Ed. Rev. 26 (Spring 1992); Pascarella & Terenzini, *supra* note 11, at 380.

⁸⁷ Chalmer E. Thompson & Bruce R. Fretz, *Predicting the Adjustment of Black Students at Predominantly White Institutions*, 62 J. of Higher Ed. 437, 437-38 (July/Aug. 1991).

⁸⁸ *Id.*

“Balkanization,” but recent studies indicate that a “critical mass” of minority students will not necessarily result in self-segregation.⁸⁹ Cross-racial interaction will occur *as long as universities seek to promote such cross-racial interaction*. In other words, in addition to numbers, “the results of efforts to increase diversity on our campuses may depend very much on what kinds of learning environments are created.”⁹⁰

Finally, the issue of whether affirmative action in higher education intended to promote teaching and learning and enhance civic values has a clear stopping point in terms of how long it should be used is more difficult. Given the nature of these goals, it seems logical that a university should use affirmative action, if necessary, to promote racial diversity until race no longer has substantial educational value, which is likely tied to the role of race in society and, thereby, to the existence of societal discrimination.⁹¹ But perhaps the distinction here is that universities are not trying to directly overcome past societal discrimination by acting as the self-proclaimed leaders of social readjustment for discrete racial groups. Rather, universities are simply recognizing the reality of societal discrimination and its relevance to the fulfillment of their core goal: providing a complete education (intellectual, vocational, civic, moral, etc.) *for all of their students*. Whether this is a distinction with a difference likely depends on how compelling the Court finds the goals of promoting teaching and learning and instilling civic values to be.

D. Strategy of Affirmative Action

A strategy is a general plan of action designed to achieve the desired objective(s) and thereby promote the larger goals.⁹² The strategy at issue here is *race-based affirmative action in student admissions*. It is the use of this *race-based* strategy that implicates strict scrutiny and requires universities to show that the strategy is narrowly tailored to serve a compelling interest.

However, recent comments and actions by members of the higher education community and others indicate a lack of understanding or appreciation for what it means for a strategy to be “race-based” and thereby trigger strict scrutiny. Some education leaders and researchers are encouraging the development of

⁸⁹ See, e.g., Troy Duster, *The Diversity of California at Berkeley: An Emerging Reformulation of “Competence” in an Increasingly Multicultural World*, in *Beyond a Dream Deferred* 231, 237 (1993) (“Our research revealed that while the student body is segmented along racial and ethnic lines, there are some important, good social relations and collective problem solving across racial and ethnic lines.”); Sylvia Hurtado, Eric L. Dey & Jesus G. Trevino, *Exclusion or Self-Segregation? Interaction Across Racial/Ethnic Groups on College Campuses*, Paper presented at the Annual Meeting of the American Educational Research Association (1994) (finding that, in terms of informal interactions, “African Americans are more likely to interact across groups than are whites.”).

⁹⁰ Bowen, *supra* note 70, at 21.

⁹¹ See Note, *supra* note 16, at 1363-63.

⁹² See Zelikow, *supra* note 5, at 164-65.

admissions schemes intended to promote racial diversity by using facially race-neutral criteria, such as social class.⁹³ But what implicates so-called strict scrutiny in constitutional analysis is not merely facially race-based action but also intent to discriminate based on race.⁹⁴ In other words, if the intent of a university in adopting a facially race-neutral admissions policy is to achieve *racial* diversity, it is subject to the same legal standard as if its admissions program were facially race-based. The law scrutinizes covert race-based actions as stringently as overt race-based actions. Therefore, there may be little value in developing such facially race-neutral admissions programs.⁹⁵ In any case, the data overwhelmingly indicate that the use of facially race-neutral factors, such as social class, is not likely to yield a racially diverse student body.⁹⁶

Whether it is facially or just intentionally race-based, the Supreme Court will uphold affirmative action in higher education only where it serves a compelling interest and is narrowly tailored to achieve that interest. The compelling interest prong was addressed above. The narrowly tailored prong requires

⁹³ See, e.g., Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 48 (forthcoming, 1997).

⁹⁴ See, e.g., *Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 264-71 (1977) (indicating that strict scrutiny is implicated where a racially discriminatory purpose is shown to have been a "motivating factor" in the adoption of a facially race-neutral policy or program). The existence of a discriminatory purpose is determined by examining a number of factors including the events leading up to the program's adoption and statements made by members of the given decisionmaking body. *Id.* at 267-68.

⁹⁵ Two caveats to this point are perhaps warranted: (1) Once a facially race-neutral program is shown by the plaintiff to have been motivated by a racially discriminatory purpose (i.e., to promote racial diversity), then the burden technically shifts back to the defendant to show that the program would have been adopted even without that factor. *Id.* at 271 n.21. Therefore, to the extent that universities can justify the adoption of race-neutral admissions criteria that promote racial diversity on grounds independent of their intent to promote racial diversity (i.e., for other legitimate educational reasons), such criteria likely have a better chance of being upheld. See Michael Williams, *Racial Diversity Without Racial Preferences*, *Chron. of Higher Ed.*, Nov. 15, 1996, at A64. (2) An argument can be made that facially race-neutral efforts such as widening the scope of student recruitment may be immune from equal protection challenge even if the intent is to recruit minority students, perhaps because such programs cause no injury to non-minority students (i.e., recruitment has no discriminatory effects). See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (indicating that the "irreducible constitutional minimum of standing" requires "injury in fact"). *But cf.* *Miller v. Johnson*, 115 S. Ct. 2475, 2485 (1995); *Shaw v. Reno*, 509 U.S. 630, 641-42 (1993) (holding that a voter residing in a racially gerrymandered district has standing to challenge the redistricting plan because he/she has been injured by having been treated not as an individual but as a member of a racial group.).

⁹⁶ E.g., Robert Bruce Slater, *Why Socioeconomic Affirmative Action in College Admissions Works Against African Americans*, *J. of Blacks in Higher Ed.* 57-59 (Summer 1995) (showing that using socio-economic status in admissions at selective universities would result in little more racial diversity than a race-blind system that did not include socio-economic status); Wightman, *supra* note 93, at 48-59 (finding that neither socioeconomic status, selectivity of undergraduate school, or undergraduate major if used as factors in law school admissions would result in racial diversity similar to that presently achieved under affirmative action); Kane, *supra* note 72, at 18-19 (finding that because the majority of low-income families are white, a college presently administering a race-based affirmative action admissions plan would have to "grant preferences to six times as many low-income students to 'yield' the same number of black and Hispanic freshmen"). "No race-blind substitute is likely to cushion the effect of an end to racial preferences. The problem is one of numbers." *Id.* at 17.

primarily that the race-based strategy of affirmative action be necessary in the sense that there are no truly race-neutral (i.e., neither facially or intentionally race-based) means available to achieve the compelling interest(s). If race-neutral means are available, race-based means cannot be utilized. For example, as explained above, it is possible to implement race-neutral means to promote the goal of remedying the lack of essential-service providers in society. A university could, for example, reserve admissions slots for students who pledge to practice in under-served communities after graduation.⁹⁷ Because such race-neutral means are available, race-based affirmative action programs designed to achieve that goal are unlikely to pass strict scrutiny even if the goal is found to be compelling.

However, it is more difficult to see how race-neutral means could effectively achieve the remaining goals of higher education presented above (assuming they are found to be compelling). For example, with regard to the goals of promoting teaching and learning and enhancing civic values among all students, the very point is to expose students to different racial perspectives and to promote racial understanding. It is unlikely that these goals could be fully achieved without promoting at least some level of racial diversity.⁹⁸ Furthermore, the evidence indicates that absent intentional efforts to promote the admission of certain minorities to selective universities, racial diversity at those institutions would be decimated.⁹⁹ Therefore, assuming that either of the goals of promoting teaching and learning or instilling civic values is found to be compelling, affirmative action in student admissions, properly designed, would likely be a narrowly tailored means of achieving that goal.

⁹⁷ Even if the effect of such a program was to increase racial diversity, it would not be subject to strict scrutiny because it was not facially or intentionally race-based. *See, e.g.,* *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) (upholding a Massachusetts veterans' preference policy even though the legislature was fully aware that the policy would have a discriminatory effect on women).

⁹⁸ Possible race-neutral means likely include incorporating multicultural ideas into the university curriculum and/or formalizing efforts to promote racial ethics. Therefore, universities may have to present evidence that such race-neutral efforts are not likely to be effective in racially homogeneous (i.e., all white) environments. Furthermore, to the extent that such race-neutral means are likely to be even partially successful, the Court may look more favorably on the use of affirmative action if those race-neutral means are used in tandem with affirmative action. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 589-90, 590 n.3 (citing with approval the FCC's prior and continued use of race-neutral means).

⁹⁹ *See, e.g., Slater, supra note*, at 57 ("[I]f admissions at [the nation's most prestigious universities] were made on the basis of grade point average and SAT scores, and without regard to race, perhaps 1 percent or 2 percent of all students accepted for admission to these schools would be black."); *Wightman, supra note* 93, at 19-27 (showing that minority admissions to ABA accredited law schools would decrease significantly if only race-neutral criteria were used); *Bowen, supra note* 70, at 19 (finding that the use of exclusively race-blind criteria at selective universities would reduce black enrollment from approximately 8 percent to 2 percent).

E. Design of Race as "Plus" Factor

Simply put, policy design is a detailed statement of the strategy.¹⁰⁰ In the case of affirmative action in university admissions, the legally required design is dictated by Justice Powell's decision in *Bakke*. In order for a university's affirmative action program to pass constitutional muster, it must avoid racial quotas and seek to promote a broad-based, individualistic notion of diversity in which race is "but a single though important element."¹⁰¹ In other words, race may only be deemed a *single "plus" factor* in a particular candidate's file. Admissions programs that do not follow this design will not pass strict scrutiny.

It is perhaps appropriate to inquire whether this design of affirmative action, where race is just one element of diversity among many, can truly result in a racially diverse student body, or whether this individualistic notion of diversity is a sham because race is really the predominant factor in student admissions. The evidence indicates that while race is only a factor in admissions at the most selective universities, it is a substantial factor at those institutions. According to a recent study, at those selective universities with average SAT scores in the top 20 percent of all four-year institutions, black and Hispanic applicants were found to be 8-10 percent more likely to be admitted than white students with similar qualifications.¹⁰² "This differential was as large as that associated with having an A- average in high school rather than a B or having an SAT score of 1400 rather than 1000."¹⁰³

However, for several reasons, this does not necessarily mean that *Bakke*'s "plus factor" design is a sham: First, the *primary* factor in admissions is always prior academic achievement (i.e., all students admitted, through affirmative action or otherwise, come from the pool of qualified candidates).¹⁰⁴ Second, it is clear that universities seek to promote diversity in student admissions based on multiple factors in addition to race (e.g., geographic diversity).¹⁰⁵ But many of these factors are likely well represented at all levels of highly qualified students. Therefore, a university may not have to take as substantial affirmative action to achieve diversity with regard to most of these characteristics. Third, universities do give substantial weight to other particularistic factors beyond race in student admissions. The most obvious example is alumni preferences, which the evidence indicates are more substantial than race-based

¹⁰⁰ See Zelikow, *supra* note 5, at 166.

¹⁰¹ *Bakke*, 438 U.S. at 315 (opinion of Powell, J.).

¹⁰² Kane, *supra* note 72, at 8-9.

¹⁰³ *Id.*

¹⁰⁴ See, e.g., Bowen, *supra* note 70, at 10.

¹⁰⁵ See, e.g., *Citizens Commission on Civil Rights, The Resource: An Affirmative Action Guide 9A* (1996) (indicating that the University of California at Los Angeles (UCLA) considers not fewer than 17 factors in its admissions process).

preferences at selective universities.¹⁰⁶ Fourth, race is likely given substantial weight in admissions at selective universities when choosing among qualified applicants because, as I hope I have explained throughout this paper, racial diversity is an important resource for achieving the goals of higher education - certainly much more important than diversity in children of alumni.

III. Conclusion

The above policy analysis indicates that there is likely a strong case to be made for affirmative action in university admissions designed to promote the objective of increasing racial diversity in the student body and to further the various goals of higher education that flow from it. However, making the case for affirmative action in higher education will require an immediate, substantial commitment from the higher education community. For nearly 20 years, the higher education community has relied on Justice Powell's decision in *Regents of the University of California v. Bakke* as its sole justification for affirmative action in higher education. This reliance has bred complacency. The Fifth Circuit's decision in *Hopwood v. Texas* can be either a clarion call or a death knell.

This paper has sought to serve as a first step in making the case for affirmative action in higher education by reconceptualizing the legal debate into a policy-oriented framework that clearly identifies the possible arguments in support of non-remedial affirmative action in higher education and highlights what needs to be done to make those arguments most effectively. Based on that analysis, I conclude that affirmative action programs designed to further the goals of enhancing civic values and promoting teaching and learning are most likely to pass strict scrutiny and that the weakest link in the chains of argument supporting those goals is likely the lack of substantial evidence indicating that promoting racial diversity furthers those goals. The limited evidence that exists indicates that achieving racial diversity can promote teaching and learning and enhance civic values when coupled with efforts to promote constructive interactions among students of different racial groups. Therefore, in order to make the case for affirmative action in higher education, universities must increase their efforts to use the resource of racial diversity more effectively and to evaluate it more rigorously.

¹⁰⁶ See, e.g., John Larew, *Who's the Real Affirmative Action Profiteer?*, in *Debating Affirmative Action* 247, 250 (Nicolaus Mills ed., 1994) ("At most elite universities during the eighties, the legacy was by far the biggest piece of the preferential pie.").

**An Overview of the Law Governing
Non-Remedial Affirmative Action in Higher Education**

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Preliminary Draft

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An Overview of the Law Governing Non-Remedial Affirmative Action in Higher Education

I. Introduction

The law governing affirmative action in higher education is at a crucial point in its development. Several recent decisions by the Supreme Court, most notably *Adarand Constructors, Inc. v. Peña*,¹ evidence a clear trend toward the universal, rigid application of so-called strict scrutiny in evaluating all race-based policies and programs. Some legal commentators have argued that this trend may “sound the death knell” for affirmative action in higher education and especially for the non-remedial interest in promoting educational diversity.² *Hopwood v. Texas*,³ in which the Fifth Circuit rejected educational diversity as a compelling interest and held unconstitutional the affirmative action admissions program at the University of Texas School of Law, is obviously a manifestation of that view. However, there is also a competing conception of the present state of affirmative action based on the notion, recently endorsed by a majority of the Court, that strict scrutiny is not “fatal in fact.”⁴ That view is embodied in the recent, countervailing case of *Wittmer v. Peters*,⁵ in which the Seventh Circuit upheld an affirmative action employment program for correctional officers at a “boot camp” in order to further the state’s compelling interest in the “pacification and reformation” of youth offenders. *Wittmer*, though occurring outside the higher education context, provides a potentially powerful rebuttal to *Hopwood* and illustrates that the law governing affirmative action can best be understood as being unsettled. This brief paper provides an overview of the present legal standards relevant to affirmative action in higher education, focusing specifically on the diversity rationale, and contrasts the cases of *Hopwood* and *Wittmer*.

II. Legal Background: Developing the Present Legal Standards

In its broadest terms, the legal standard governing race-based affirmative action, both in the context of higher education and more generally, is likely settled, though its meaning remains unclear.

¹ 115 S. Ct. 2097 (1995).

² E.g., Leland Ware, *Tales From the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education*, 23 J.C. & U.L. 43, 44 (1996); Donald L. Beschle, “You’ve Got to Be Carefully Taught”: Justifying Affirmative Action After *Croson* and *Adarand*, 74 N.C. L. Rev. 1141, 1180 (1996).

³ 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996).

⁴ E.g., *Adarand*, 115 S. Ct. at 2117 (“[W]e 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 in the judgment))); *id.* at 2136 (Ginsburg, J., dissenting, joined by Breyer, J.).

⁵ 87 F.3d 916 (7th Cir. 1996), cert. denied, 65 USLW 3416 (1997).

Under the constitutional requirement of equal protection, race-based classifications are “inherently suspect.”⁶ “Th[e] Court has ‘consistently repudiated “[d]istinctions between citizens solely because of their ancestry” as being “odious to a free people whose institutions are founded upon the doctrine of equality.”’⁷ Race-based policies or programs will be upheld only where they pass so-called strict scrutiny. Strict scrutiny requires that a given affirmative action program (1) serve a compelling interest and (2) be narrowly tailored to achieve that interest.⁸

The strict scrutiny standard now applies regardless of whether the given affirmative action program constitutes federal action challenged under the Fifth Amendment,⁹ state action challenged under the Fourteenth Amendment,¹⁰ or private action challenged under Title VI, which prohibits discrimination by any actor receiving federal financial assistance, including most if not all private universities.¹¹ The standard governing private action challenged under Title VII, which prohibits discrimination in employment, is less clear, but analogous.¹² Furthermore, strict scrutiny applies regardless of whether the affirmative action program at issue seeks to achieve so-called invidious or benign goals (i.e., whether the program seeks to benefit the white majority or historically disadvantaged minorities).¹³

⁶ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) (citing *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978)).

⁷ *Id.* (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943))).

⁸ *E.g.*, *Adarand*, 115 S. Ct. at 2113.

⁹ *See id.* (“[W]e 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.” (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), on this point)). The Fifth Amendment states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” The Due Process Clause has been held to embrace notions of equal protection. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁰ *E.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (O’Connor, J., plurality opinion joined by Rehnquist, C.J., White, and Kennedy, JJ.); *id.* at 520 (Scalia, J., concurring). The Fourteenth Amendment mandates that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

¹¹ Title VI of the Civil Rights Act of 1964 reads, “No person in the United States shall, on the grounds 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.” 42 U.S.C. § 2000d. The Supreme Court has held that Title VI is coextensive with the Fourteenth Amendment. *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (citing *Bakke*, 438 U.S. at 287, 328; *Guardians Assn. v. Civil Service Comm’n of New York*, 463 U.S. 582, 610-11, 612-13, 639-43 (1983)).

¹² Title VII of the Civil Rights Act of 1964 reads, “It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2. The Supreme Court has held that affirmative action is justified under Title VII where the given program is designed to “eliminate a manifest racial imbalance” in the work force (at least in “traditionally segregated job categories”) and does not “unnecessarily trammel” the interests of non-minorities. *See, e.g.*, *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979).

¹³ *See, e.g.*, *Adarand*, 115 S. Ct. at 2111-14 (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal

"[T]he 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."¹⁴ Thus, the strict scrutiny standard is meant to examine both the ends and the means: "In short, the compelling interest inquiry centers on 'ends' and asks *why* the government is classifying individuals on the basis of race or ethnicity; the narrow tailoring focuses on 'means' and asks *how* the government is seeking to meet the objective of the racial or ethnic classification."¹⁵

The Supreme Court's efforts to clearly define what interests are sufficiently compelling to justify race-based actions have been hampered by several conflicting principles. First, where race-based actions are necessary and appropriate (e.g., to remedy past discrimination), the Court likely wants to encourage institutions to take such actions on a voluntary basis.¹⁶ However, the Court is also clearly concerned about endorsing race-based remedies that are insufficiently tied to specific acts or discrete goals, thereby promoting race-based actions that are "ageless in their reach into the past and timeless in their ability to

treatment under the strictest judicial scrutiny."). The Court's decision to apply strict scrutiny to all racial classifications is grounded in the notion that the Fourteenth Amendment protects individual rights, not group rights. In other words, it protects each individual's right not to be judged according to his/her race except in exceptional circumstances. *Id.* at 2111 (*quoting* *Bakke*, 438 U.S. at 299 (opinion of Powell, J.) (*citing* *Shelley v. Kraemer*, 334 U.S. 1 (1948))). Furthermore, according to the Court, the very purpose of strict scrutiny is to distinguish the benign from the invidious justifications for race-based actions. "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." *Id.* at 2112.

Nonetheless, powerful counter-arguments can be made to the Court's decision to extend strict scrutiny to so-called benign race-based programs. As Justice Stevens argued in dissent in *Adarand*:

The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that is designed to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. . . . The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat.

Id. at 2120-21 (Stevens, J., dissenting).

¹⁴ *Id.* at 2112 (*quoting* *Croson*, 488 U.S. at 493).

¹⁵ Memorandum to General Counsels from Walter Dellinger, Assistant Attorney General, U.S. Dep't of Justice 10 (June 28, 1995).

¹⁶ See, e.g., *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (noting the Court's and Congress's "consistent emphasis on 'the value of voluntary efforts to further objectives of the law'" (*quoting* *Bakke*, 438 U.S. at 364 (opinion of Brennan, J.))).

affect the future.”¹⁷ Second, in order to decrease the role of race in society, the Court likely wants to promote an individualistic notion of society rather than a pluralistic one.¹⁸ However, the reality is that individuals define themselves, and are in turn defined, in part by their group affiliations. Man is, after all, a social animal. The Court has reacted to these competing pressures, in part, by requiring a “strong basis in evidence” for the belief that a voluntary affirmative action program is warranted.¹⁹

In the context of higher education, and more generally, the Supreme Court has to date found only two interests sufficiently compelling to justify voluntary, race-based affirmative actions: (1) remedying the present effects of past discrimination²⁰ and (2) realizing the educational benefits that flow from a racially diverse student body.²¹ Each of these interests are discussed in greater detail below. Furthermore, the Court has expressly rejected several interests as not sufficiently compelling to justify race-based actions: First, the Court has repeatedly held that the interest in remedying so-called societal discrimination is insufficient to justify affirmative action by any entity except perhaps the federal government: “[A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and overexpansive.”²² Second, the Court, or at least Justice Powell, has held that the interest in increasing the number of minorities in a given profession is insufficient to justify affirmative action by a university.²³ Justice Powell’s analysis of this interest, however, was cursory. He seemed to view this goal as equivalent to valuing race for race’s sake. Third, the Court, or at least Justice Powell, has held that the interest in increasing the number of professionals practicing in under-served communities is insufficient to justify affirmative action by a university.²⁴ However, Justice Powell based his holding primarily on the absence of any evidence indicating that the program at issue was either necessary or designed to promote that goal. Fourth, the Court has held that the interest in providing “role models” for minority students is insufficient to justify affirmative action in faculty hiring.²⁵ The Court seemed to equate this goal with the

¹⁷ *Croson*, 488 U.S. at 498.

¹⁸ See, e.g., *Adarand*, 115 S. Ct. at 2111 (indicating that the Fourteenth Amendment protects each individual regardless of, not because of, his/her membership in a particular group).

¹⁹ See, e.g., *Wygant*, 476 U.S. at 277-78; *Croson*, 488 U.S. at 500.

²⁰ See, e.g., *Wygant*, 476 U.S. at 286 (O’Connor, J., concurring).

²¹ See *Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.) But see *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996) (rejecting the idea that Justice Powell’s statement concerning educational diversity constituted a holding of the Court).

²² *Wygant*, 476 U.S. at 276. The Court in *Adarand* remanded the question of whether the interest in remedying general societal discrimination is a sufficiently compelling interest to justify affirmative action by the federal government when acting under section 5 of the Fourteenth Amendment. *Adarand*, 115 S. Ct. at 2118.

²³ *Bakke*, 438 U.S. at 306-07 (opinion of Powell, J.).

²⁴ *Id.* at 310-11.

²⁵ *Wygant*, 476 U.S. at 274-76 (plurality opinion).

goal of alleviating general societal discrimination, and the interest in promoting educational diversity was expressly distinguished.²⁶

Finally, assuming that a given affirmative action program is found to serve a compelling interest, the Court has identified several factors to be considered in determining whether the program is narrowly tailored to achieve that interest:

As it has been applied by the courts, the factors that typically make up the "narrow tailoring" test are as follows: [1] whether the government considered race-neutral alternatives before resorting to race-conscious action; [2] the scope of the affirmative action program and whether there is a waiver mechanism that facilitates the narrowing of the program's scope; [3] the manner in which [it] is used, that is, whether race is a factor in determining eligibility for a program or whether race is just one factor in the decisionmaking process; [4] the comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; [5] the duration of the program and whether it is subject to periodic review; and [6] the degree and type of burden caused by the program.

[T]hree general points about the narrow tailoring test deserve mention. First, it is probably not the case that an affirmative action measure has to satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others. Second, all of the factors are not relevant in every case. . . . The factors may play out differently where a program is non-remedial. Third, the narrow tailoring test should not necessarily be viewed in isolation from the compelling interest test. To be sure, the inquiries are distinct: as indicated above, the compelling interest inquiry focuses on the ends of an affirmative action measure, whereas the narrow tailoring inquiry focuses on the means. However, as a practical matter, there may be interplay between the two.²⁷

A. Remedial Interest in Overcoming the Present Effects of Past Discrimination

A solid majority of the Supreme Court agrees that the remedial interest in overcoming the present effects of past discrimination is a sufficiently compelling interest to support race-based affirmative action.²⁸ The real debate here is over the scope of this interest. What "past discrimination" is sufficient to justify affirmative action? What "present effects" are sufficient? What evidentiary link must be

²⁶ *Id.* at 289 n.* (O'Connor, J., concurring).

²⁷ Memorandum to General Counsels from Walter Dellinger, *supra* note 15, at 19-20. *See also* *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *id.* at 187 (Powell, J., concurring).

²⁸ *See, e.g., Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant the remedial use of a carefully constructed affirmative action program."). All of the justices would undoubtedly agree that where present, intentional discrimination has been established, some form of prospective remedy is appropriate. But they differ in the extent to which they approve of group-based remedies to correct for past injustices against other members of the group. Nonetheless, only Justice Scalia and perhaps Justice Thomas have "adopted anything that approaches a blanket prohibition on race-conscious remedies." Memorandum to General Counsels from Walter Dellinger, *supra* note 15, at 6.

established between the “past discrimination” and the “present effects”? In examining these questions in the context of higher education, it is useful to distinguish between when a university *must* take affirmative action to overcome the present effects of past discrimination and when it *may* take such action.

1. **When Universities Must Take Affirmative Action to Remedy Prior Discrimination**

The Supreme Court in *United States v. Fordice*²⁹ defined what remedial actions states are required to take to dismantle their prior *de jure* segregated systems of higher education. *Fordice* involved a challenge to Mississippi’s university system under the Fourteenth Amendment and Title VI alleging that the state had failed to take the required steps to dismantle its prior *de jure* segregated system. Mississippi adopted facially race-neutral university admissions policies in the 1960s, but by the mid-1980s, Mississippi’s university system remained racially segregated.³⁰ The Court in *Fordice* held:

[A] State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation. . . . If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices.”³¹

Fordice thus requires states to do more to desegregate their universities than simply adopt facially race-neutral admissions policies. Rather, states must at a minimum seek to establish effective neutrality.³²

²⁹ 505 U.S. 717 (1992).

³⁰ *Id.* at 724-25.

³¹ *Id.* at 728-29 (holding several policies of Mississippi’s university system “constitutionally suspect” under this standard).

³² Prior to *Fordice*, the Court held, with regard to primary and secondary schools, that “separate educational facilities are *inherently* unequal.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (emphasis added). States that had been operating *de jure* segregated systems of primary and secondary education at the time of *Brown* had an affirmative obligation to cure the effects of that prior segregation. See, e.g., *Green v. New Kent County School Bd.*, 391 U.S. 430, 437-38 (1968) (“School boards . . . operating state-compelled dual systems [at the time of *Brown*] were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch”). However, in *Bazemore v. Friday*, 478 U.S. 385 (1986), the Court held, with regard to state-funded and -operated clubs that had been *de jure* segregated, that states had an obligation only to adopt facially race-neutral membership policies. Thus, the question in *Fordice* was, in effect, whether college and universities were more like primary and secondary schools or like voluntary clubs. One way to understand the decision in *Fordice* is that the Court adopted a middle-ground. *Fordice* in effect creates a presumption that any university practice emanating from the *de jure* segregated era and continuing to have discriminatory effects is viewed as intentional discrimination and thus subject to strict scrutiny. This reading of *Fordice* is perhaps modest because it is not that different from other cases that have held that the intent to discriminate is judged from the time at which the law or policy at issue was originally adopted. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding unconstitutional a provision of the Alabama Constitution of 1901, which disenfranchised persons convicted of crimes of moral turpitude, based on general evidence that the provision was originally enacted for a discriminatory purpose).

But the precise meaning of the Court's holding in *Fordice* is somewhat unclear, and key questions remain unanswered: First, what remedies are appropriate under *Fordice*? Clearly a state must eliminate offending policies and practices traceable to the *de jure* era, but may a state opt to counter the effects of such policies and practices where their elimination is not feasible by adopting affirmative action programs? Justice O'Connor suggested in her concurrence in *Fordice* that states can and may be required to take such affirmative actions: "Only by eliminating a remnant that unnecessarily continues to foster segregation or by negating as possible its segregative effects can the State satisfy its constitutional obligation to dismantle the discriminatory system that should, by now, be only a distant memory."³³ Second, *Fordice* defines what actions are *required* by states, but what actions, if any, are states and/or universities permitted to take voluntarily? Can they go farther than *Fordice* mandates? What do they have to demonstrate to be allowed to do so?

2. When Universities May Take Affirmative Action to Remedy Prior Discrimination

The legal standard governing what affirmative actions a university *may* take voluntarily to remedy the present effects of past discrimination and when it may do so is somewhat unclear. However, three general principles can perhaps be gleaned from the Supreme Court cases of *Wygant v. Jackson Board of Education*,³⁴ which concerned the use of affirmative action in faculty employment, and *Richmond v. J.A. Croson Co.*,³⁵ which concerned the use of affirmative action in government contracting: First, a university cannot (nor can any other actor except perhaps the federal government) take affirmative action to remedy the effects of general societal discrimination. Second, a university can take affirmative action to remedy the present effects of its own past discrimination if it has a "strong basis in evidence" for the belief that such action is warranted. Third, there is some limited support in the Court's holdings for the proposition that a university can take affirmative action to remedy prior discrimination by some other actor(s) to avoid serving as a "passive participant" in a pattern of discrimination.

In *Wygant*, the Court held unconstitutional under the Fourteenth Amendment a collective bargaining agreement between the Jackson Board of Education and the Jackson Education Association (a teachers' union) that gave special protection to minority teachers against layoffs in order to "remedy

³³ *Fordice*, 505 U.S. at 744-45 (O'Connor, J., concurring) (emphasis added). See also Southern Education Foundation, *Redeeming the American Promise*, 15-16 (1995).

³⁴ 476 U.S. 267 (1986)

³⁵ 488 U.S. 469 (1989)

societal discrimination by providing 'role models' for minority schoolchildren."³⁶ In a plurality opinion, the Court soundly rejected the idea that the interest in overcoming societal discrimination was sufficiently compelling to support affirmative action, and strongly suggested that only an actor's interest in overcoming its own prior discrimination could constitutionally support such race-based action.³⁷ Furthermore, the Court held that an actor implementing affirmative action to overcome the present effects of its own past discrimination must have "a strong basis in evidence for its conclusion that remedial action was necessary. . . . That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination."³⁸ The Jackson Board did not have sufficient evidence of such prior discrimination.³⁹ Finally, a plurality held that the affirmative action plan at issue was not narrowly tailored, in any case, because layoffs were too great a price for non-minorities to bear.⁴⁰

In her concurring opinion, Justice O'Connor clarified the Court's holding by expressly stating that an actor's remedial purpose "need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required."⁴¹ For example, a firm evidentiary basis to support affirmative action in employment could be established by a racial imbalance in the appropriate labor pools sufficient to support a prima facie case under Title VII.⁴²

Three years later, in *Croson*, Justice O'Connor authored the part-majority, part-plurality opinion holding unconstitutional under the Fourteenth Amendment the Richmond City Council's Minority Business Utilization Plan, which required a 30 percent minority set-aside for all city-awarded construction contracts in order to remedy past discrimination in the construction industry.⁴³ Speaking for a majority of the Court, Justice O'Connor again rejected the idea that responding to a general claim of societal discrimination

³⁶ *Wygant*, 476 U.S. at 269-84 (plurality opinion).

³⁷ *Id.* at 274 ("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.").

³⁸ *Id.* at 277.

³⁹ *Id.* at 272.

⁴⁰ *Id.* at 283 ("While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.").

⁴¹ *Id.* at 286 (O'Connor, J., concurring).

⁴² *Id.* at 292. This requires showing a statistical imbalance between the percentage of minorities employed at a given institution or on a given project and the percentage of qualified minorities in the labor pool. It is yet unclear how this form of evidence would operate in the case of affirmative action in university admissions. It is perhaps possible that a university could define minimum requirements for qualified applicants and then argue that the use of race-blind criteria to distinguish among students within that qualified pool would result in a statistical imbalance in minority representation in the class admitted. Therefore, affirmative action would be justified. This possibility should be explored, but it is beyond the scope of this brief paper.

⁴³ *Croson*, 488 U.S. at 476-511.

(meaning in this case discrimination within the construction industry) was a sufficiently compelling interest to justify affirmative action. Rather, the Court held that the city of Richmond must have had "a substantial basis in evidence for its conclusion that remedial action was necessary," which again could include evidence of a statistical disparity between the appropriate labor pools sufficient to establish a *prima facie* case under Title VII.⁴⁴ The City Council did not have such evidence in this case.⁴⁵ Furthermore, the Court held that the city's plan was not narrowly tailored because there had been no consideration of available race-neutral means and because the 30 percent set-aside was not tied to any goal "except perhaps outright racial balancing."⁴⁶ Finally, speaking for a plurality, Justice O'Connor clarified that the Richmond City Council was not restricted to remedying its own prior discrimination but could, given the proper basis in evidence indicating that such action was necessary, also act to eliminate private discrimination within its jurisdiction.⁴⁷

Wygant and *Crosón* arguably left some important room for the adoption of voluntary affirmative action programs designed to remedy the present effects of past discrimination, at least by institutions that had previously been *de jure* segregated. However, two lower federal courts applying these holdings in the context of higher education have applied them rigidly and expansively, and have thus greatly restricted remedial affirmative action programs at universities in those circuits.

First, in *Podberesky v. Kirwan*,⁴⁸ the Fourth Circuit held unconstitutional the University of Maryland at College Park's Banneker scholarship program, a merit scholarship program open only to African-American students. The University of Maryland defended the Banneker program as necessary to remedy the present effects of its own past discrimination. Because the University of Maryland had previously been *de jure* segregated and was still under a U.S. Department of Education, Office of Civil Rights mandate to desegregate, establishing prior discrimination was not an issue.⁴⁹ Furthermore, the University offered proof that "four present effects of past discrimination exist at the University: (1) The University has a poor reputation within the African-American community; (2) African-Americans are underrepresented in the student population; (3) African-American students who enroll at the University

⁴⁴ *Id.* at 500-02.

⁴⁵ *Id.* at 498-506.

⁴⁶ *Id.* at 507-08.

⁴⁷ *Id.* at 491-92 (plurality opinion) ("[A] state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. . . . Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.").

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

⁴⁹ *See id.* at 152.

have low retention and graduation rates; and (4) the atmosphere on campus is perceived as being hostile to African-American students.”⁵⁰ However, the Fourth Circuit held that the evidence presented by the University of Maryland was not sufficient under *Wygant* and *Croson*. According to the court, in order to sustain a remedial affirmative action program, the university was required to show not only proof of prior discrimination and present effects, but also proof that the present effects were caused by the prior discrimination and that the present effects were sufficient to justify the affirmative action program at issue.⁵¹ The Fourth Circuit held that the University of Maryland was unable to establish these evidentiary links and thus rejected the University of Maryland’s race-based scholarship program.

Second, in *Hopwood v. Texas*,⁵² the Fifth Circuit Court of Appeals held unconstitutional the affirmative action admissions program at the University of Texas School of Law. The law school defended its affirmative action admissions program based in part on the need to remedy the present effects of past discrimination. Like the University of Maryland, the University of Texas School of Law had previously been *de jure* segregated, and the Texas university system was arguably still under a U.S. Department of Education, Office of Civil Rights mandate to desegregate.⁵³ However, the law school sought to justify its affirmative action admissions program based not only on its own discrimination but also on the prior discrimination perpetrated by Texas’s primary and secondary school systems and by the University of Texas System as a whole.⁵⁴ The law school’s reasoning was likely that it is merely a part of the overall system of education administered by the state of Texas, and by permitting affirmative action at the law school, the state was merely acting to remedy discrimination in one part of its education system that had discriminatory effects in another.⁵⁵ Alternatively, the law school’s reasoning could perhaps be viewed as analogous to Justice O’Connor’s statement in *Croson* that a state actor (in this case, the law school) should not be required to serve as a “passive participant” perpetuating a system of racial exclusion.⁵⁶ Regardless, the Fifth Circuit rejected these arguments, reading *Wygant* and *Croson* as requiring the University of Texas School of Law to justify its affirmative action admissions program based solely on its own prior

⁵⁰ *See id.*

⁵¹ *Id.* at 153-54 (“To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program.”)

⁵² 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

⁵³ *See* Letter from Dan Morales, Attorney General, State of Texas, to William P. Hobby, Chancellor, University of Houston System 25 (Feb. 5 1997) (describing the complex history of the Office of Civil Rights’s relations with Texas’s university system).

⁵⁴ *Hopwood*, 78 F.3d at 948.

⁵⁵ *Id.* at 953-54.

⁵⁶ *See Croson*, 488 U.S. at 491-492 (O’Connor, J., concurring).

discrimination.⁵⁷ Applying the standard established by the Fourth Circuit in *Podberesky*, the Fifth Circuit held that the law school had failed to do so: The court held that the present effects the law school identified, which were nearly identical to those identified by the University of Maryland in *Podberesky*, were not sufficiently linked to its own past discrimination and could not serve to justify the affirmative action admissions program at issue.⁵⁸

The standard established in *Podberesky* and applied again in *Hopwood* expands on *Wygant* and *Croson* and has not yet been endorsed by the Supreme Court. If *Podberesky* and *Hopwood* become the law of the land, it is unclear how any university can provide sufficient evidence to support affirmative action to overcome the present effects of past discrimination.⁵⁹ Perhaps the only clearly established method to prove a link between past discrimination and present effects in the context of higher education admissions is by showing a policy or practice emanating from the *de jure* era that continues to have discriminatory effects, in which case the university is *required* to take remedial action under *United States v. Fordice*.⁶⁰ In this sense, *Podberesky* and *Hopwood* may mean that there are now only two classes of remedial affirmative action programs at universities in the Fourth and Fifth Circuits -- those that are required under *Fordice* and those that are not allowed under *Podberesky* or *Hopwood*.⁶¹ This possibility puts great pressure on the diversity rationale for affirmative action in higher education.

⁵⁷ *Id.* at 948-52. According to the court, "Even if, arguendo, the state is the proper government unit to scrutinize, the law school's admissions program would not withstand our review. For the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the 'plus' given to applicants to remedy that harm." *Id.* at 951.

⁵⁸ *Id.* at 952-55. The "present effects" identified by the University of Texas School of Law included "[1] the law school's lingering reputation in the minority community, particularly with prospective students, as a 'white' school; [2] an underrepresentation of minorities in the student body; and [3] some perception that the law school is a hostile environment for minorities." *Id.* at 952 (quoting *Hopwood v. Texas*, 881 F. Supp. 551, 572 (W.D. Tex. 1994)).

⁵⁹ See, e.g., Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 Ann. Surv. Am. L. 515, ___ (1995) ("This strict standard of review and the seemingly impossible factual basis necessary to satisfy this heightened scrutiny imply that remedial action in higher education is no longer a valid justification for affirmative action.").

⁶⁰ See *supra* text at notes 29-32. Ironically, the Fifth Circuit in *Hopwood* may have inadvertently identified one such link when it suggested that the University of Texas School of Law could continue to grant a preference in admissions to candidates who are relatives of alumni. See *Hopwood*, 78 F.3d at 946. The law school has likely had an alumni preference policy since the time it was *de jure* segregated. Furthermore, because the law school was *de jure* segregated in the past, it obviously has a greater percentage of white alumni than minority alumni. Therefore, the alumni preference policy likely has a discriminatory effect. "Thus, if the law school adopted an admissions policy that employed only those factors that the court approved [in *Hopwood*], past racial discrimination by the law school itself would create a present disadvantage on the basis of alumni relations. By focusing on the use of racial classifications, the court overlooked this effect." Recent Case, *Hopwood v. Texas*, 110 Harv. L. Rev. 775, 780 (1997).

⁶¹ This possibility does not necessarily sound the death knell for remedial affirmative action in higher education, at least not at prior *de jure* segregated institutions, because it can be argued that the Fifth Circuit in *Hopwood* did not

B. Non-remedial Interest in Realizing the Educational Benefits that Flow From Diversity

Unlike the remedial interest in overcoming the present effects of past discrimination, the non-remedial interest in promoting educational diversity seeks to justify affirmative action not as a remedy to make up for past discrimination against a certain group, but as a necessary tool to promote the educational development of all students for the future benefit of society as a whole. Leaders in higher education have long believed that diversity within a university's student body, including, more recently, racial diversity, is a vital tool for providing students with a complete educational experience.⁶² The Supreme Court, too, has long recognized the value of educational diversity.⁶³

In *Regents of the University of California v. Bakke*,⁶⁴ Justice Powell, in an opinion that came to be known as the opinion of the Court, held that securing the educational benefits that flow from diversity in higher education is a compelling interest that can constitutionally support race-based actions.⁶⁵ *Bakke* involved a challenge under the Fourteenth Amendment and Title VI to the affirmative action admissions program at the University of California at Davis Medical School. The Davis admissions program reserved each year sixteen places in its 100-student entering class for minority students. These sixteen places in the entering class were filled through a special admissions process operated in coordination with the regular admissions process. The Davis admissions program was challenged by Allan Bakke, a white male who

apply the *Fordice* standard correctly or completely. For example, the court in *Hopwood* presumed that there was no way that the present underrepresentation of minorities at the University of Texas School of Law could be attributed to prior discrimination by the law school itself, as opposed to being attributed to prior discrimination by the state of Texas in its primary and secondary schools or its university system, which the court held the law school was not permitted to remedy through affirmative action. However, if the law school uses such variables as LSAT scores in its admissions decisions, which undoubtedly have a discriminatory effect on minority students, and if that practice dates back to the *de jure* segregated era, then that practice may be sufficient under *Fordice* to link the law school's prior discrimination to the present underrepresentation of minority students. Therefore, the law school would perhaps be required, or in this case, permitted, to eliminate that practice if consistent with "sound educational practices" or to "negat[e] as possible its segregative effects" through affirmative action. An analogous holding was made recently by the Fifth Circuit in *Ayers v. Fordice*, 95-60431 (5th Cir. Apr. 23, 1997), in which the court found that Mississippi's predominantly white universities could not continue to award scholarships based on minimum ACT cutoff scores because that practice dated back to the *de jure* segregated era and continued to have discriminatory effects. The court recognized that the use of ACT scores to award scholarships may be perfectly appropriate outside of Mississippi, but it cannot, given the Supreme Court's holding in *Fordice*, continue in Mississippi nonetheless.

⁶² See, e.g., Neil Rudenstine, President, Harvard University, Report to the Harvard University Board of Overseers, 1993-1995, 1 (Jan. 1996) ("[S]tudent diversity has, for more than a century, been valued for its capacity to contribute powerfully to the process of learning and to the creation of an effective educational environment. It has also been seen as vital to the education of citizens -- and the development of leaders -- in heterogeneous democratic societies such as our own.")

⁶³ See *Sweatt v. Painter*, 339 U.S. 629 (1950) (recognizing, ironically, the value of student diversity at the University of Texas Law School).

⁶⁴ 438 U.S. 265 (1978).

⁶⁵ See *id.* at 312-15 (opinion of Powell, J.).

was rejected from Davis Medical School two consecutive years under the regular admissions process despite having grades and test scores substantially above the average of those students admitted under the special admissions program.⁶⁶

In a fractured opinion, four justices in *Bakke* held that Title VI was coextensive with the Fourteenth Amendment and that the Davis admissions program was constitutional in all respects;⁶⁷ four different justices held that the case was governed exclusively by Title VI, that Title VI prohibited all considerations of race in the administration of programs receiving federal funds, and that the Davis admissions program was therefore unlawful.⁶⁸ Announcing the judgment of the Court, Justice Powell as the swing vote, joined the former four justices in holding that the Fourteenth Amendment and Title VI were coextensive and that the medical school was not fully prohibited from considering race in its admissions process. However, Justice Powell joined the latter four justices in declaring the Davis admissions program unconstitutional because it was not narrowly tailored to promote its sole compelling interest, as Justice Powell saw it, of promoting educational diversity.⁶⁹

According to Justice Powell, the Davis Medical School's interest in promoting educational diversity was sufficiently compelling to support affirmative action in student admissions.⁷⁰ "The atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher education -- is," he wrote, "widely believed to be promoted by a diverse student body."⁷¹ Justice Powell found the medical school's interest in educational diversity to be supported not just by leaders in higher education, but by the First Amendment interest in academic freedom, which protects the authority of universities to make their own educational judgments concerning "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁷²

However, according to Justice Powell, the type of educational diversity that constituted a compelling interest was not pluralistic diversity of certain racial groups, but more individualistic diversity in which race is "but a single though important element."⁷³ "Ethnic diversity. . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student

⁶⁶ See *id.* at 272-78.

⁶⁷ See *id.* at 324-79 (Brennan, J., concurring in part and dissenting in part, joined by White, Marshall, & Blackmun, JJ.).

⁶⁸ See *id.* at 408-21 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., and Rehnquist & Stewart, JJ.).

⁶⁹ See *id.* at 271-72 (opinion of Powell, J.).

⁷⁰ *Id.* at 311-12.

⁷¹ *Id.* at 312.

⁷² *Id.* at 312-13 (*quoting* *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)).

⁷³ *Id.* at 315.

body.”⁷⁴ Therefore, a narrowly tailored affirmative action program designed to promote educational diversity would not rely on rigid racial quotas or separate admissions processes, but would treat race as only a single “plus” factor in its regular admissions process.⁷⁵

As a result of Justice Powell’s opinion in *Bakke*, public and private universities across the country have for the last two decades adopted this diversity rationale as their primary justification for affirmative action programs in student admissions.⁷⁶ However, given the fractured holding of the Court in *Bakke* and the absence of additional guidance from the Court, the status of Bakkean diversity has remained in some doubt.⁷⁷

Twelve years after *Bakke*, in *Metro Broadcasting, Inc. v. FCC*,⁷⁸ the Court dramatically expanded the scope of the diversity rationale by applying it outside the formal education context. In *Metro*, the Court upheld under a Fifth Amendment challenge two minority preference policies adopted by the Federal Communications Commission (FCC), as authorized by Congress, which sought to increase minority ownership of radio and television stations in order to increase broadcast diversity. Central to the Court’s holding was its conclusion that because these were federal affirmative action programs authorized by Congress, which was owed special deference by the Court as a co-equal branch with special powers under Section 5 of the Fourteenth Amendment, they were subject only to intermediate scrutiny.⁷⁹ The Court held that “the interest in enhancing broadcast diversity is, at very least, an important governmental objective and is therefore a sufficient basis for the Commission’s minority ownership policies.”⁸⁰ In reaching this

⁷⁴ *Id.* at 314.

⁷⁵ *See id.* at 316-18.

⁷⁶ *See, e.g.,* Murphy, *supra* note 59, at ____.

⁷⁷ Prior to *Hopwood v. Texas*, discussed *infra* at text accompanying notes 87-100, the only federal case to address *Bakke*’s diversity rationale in the higher education context was *Davis v. Halpern*, 768 F. Supp. 968 (E.D.N.Y. 1991). *Davis* involved a challenge by a white male plaintiff to the affirmative action admissions program at the City University of New York Law School at Queens College. *Id.* at 970. Ruling on defendant’s motion for summary judgment, the federal district court held, based on *Bakke*, that educational diversity was a compelling interest that could constitutionally support race-based affirmative action. *Id.* at 975. However, the court nonetheless refused to grant summary judgment to the university because evidence indicated that its affirmative action admissions program was intended not only to promote diversity, but to achieve other “impermissible” ends that fell under the rubric of overcoming the effects of general societal discrimination. *Id.* at 980-83. Thus, *Davis* stands for the important proposition that a university that seeks through student admissions to promote both educational diversity and remedial interests will be forced to justify its program under both standards. *See* Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 Wm. & Mary Bill Rts. J. 881, 905-06 (1996).

⁷⁸ 497 U.S. 547 (1990), *overruled, in part, by* Adarand v. Peña, 115 S. Ct. 2097 (1995).

⁷⁹ *See Metro*, 497 U.S. at 563-65 (“We hold that benign race-conscious measures mandated by Congress -- even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”).

⁸⁰ *Id.* at 567-68.

holding, the Court gave great weight to the host of evidence, including empirical evidence, linking the promotion of minority owners in the broadcast industry to an increase in broadcast diversity.⁸¹

However, in a vigorous dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, strongly objected to the application of intermediate rather than strict scrutiny to the FCC's affirmative action programs.⁸² Furthermore, Justice O'Connor argued that the interest in promoting broadcast diversity was not sufficiently compelling to justify race-based affirmative action, and, although *Bakke*'s educational diversity was never expressly mentioned in the dissent, Justice O'Connor suggested repeatedly that only the remedial interest in overcoming the present effects of past discrimination could ever be considered so compelling.⁸³

Finally, just five years later in *Adarand Constructors, Inc. v. Peña*,⁸⁴ Justice O'Connor, this time writing for the Court, held that *all* race-based affirmative action programs, whether adopted by a federal, state, or local government actor, were subject to strict scrutiny, and overruled *Metro* on this point. *Adarand* involved a challenge to "the Federal Government's practice of giving general contractors on government projects a financial incentive to hire 'socially and economically disadvantaged individuals,' and in particular the Government's use of race-based presumptions in identifying such individuals."⁸⁵ The Court did not reach the merits, but remanded for reconsideration under the strict scrutiny standard.

This constitutes the present state of the Supreme Court's jurisprudence concerning race-based affirmative action programs. The implications of *Adarand* for the diversity rationale are troubling, but uncertain at best. *Adarand* overruled *Metro*, but only on the standard to be applied in evaluating federal affirmative action programs, and not on the merits. Furthermore, *Adarand* made no reference to *Bakke* as far as educational diversity is concerned. Most importantly, perhaps, there are several key distinctions between the broadcast diversity at issue in *Metro* and the educational diversity endorsed in *Bakke*, including the unique role of education in society, the special First Amendment protections of academic freedom operating in the higher education context, the emphasis placed on individualistic diversity in *Bakke* versus the largely pluralistic diversity at issue in *Metro*, the direct interactions among students in a university

⁸¹ *Id.* at 580-83. *But see id.* at 602 (O'Connor, J., dissenting) ("Social scientists may debate how peoples' thoughts and behaviors reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.")

⁸² *Id.* at 603-10 (O'Connor, J., dissenting).

⁸³ *E.g., id.* at 612 ("Modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination.")

⁸⁴ 115 S. Ct. 2097 (1995).

⁸⁵ *Id.* at 2101.

environment versus the attenuated interactions between owners of broadcast stations and the public, and the fact that Justice Powell upheld educational diversity under strict scrutiny in *Bakke*.⁸⁶

Nonetheless, the Fifth Circuit in *Hopwood v. Texas*⁸⁷ implicitly recognized that the dissenters in *Metro* had become the majority in *Adarand*. In a burst of judicial activism, “tenuously stringing together pieces and shards of recent Supreme Court opinions,”⁸⁸ a divided court in *Hopwood* rejected educational diversity as a compelling interest that can constitutionally justify affirmative action in higher education.

III. *Hopwood v. Texas* and Its Rejection of the Diversity Rationale

In *Hopwood v. Texas*, as discussed above, the Fifth Circuit held unconstitutional the affirmative action admissions program at the University of Texas School of Law. The law school’s admissions system was largely a bifurcated system in which African- and Mexican-American applicants were evaluated separately from other applicants based on reduced admissions standards.⁸⁹ The law school defended its affirmative action admissions program based in part on *Bakke*’s diversity rationale. It was clear that the law school’s admissions program did not meet the narrowly tailored requirements laid out in *Bakke*; rather than promoting individualistic diversity in which race was “a single though important element,” the law school was basically administering a separate admissions process for minority students. Nonetheless, a majority of the court eschewed this more narrow ground for holding the law school’s admissions program unconstitutional and set out, in effect, to “overrule” *Bakke* by rejecting educational diversity as a compelling interest.⁹⁰

The Fifth Circuit’s rejection of the diversity rationale in *Hopwood* proceeded in three stages: First, the court held that Justice Powell’s decision in *Bakke* had never been the law and, therefore, was not binding precedent. According to the Fifth Circuit, “Justice Powell’s argument in *Bakke* garnered only his vote and has never represented the view of the majority of the Court in *Bakke* or any other case.”⁹¹ Second, the court held that recent Supreme Court precedent indicated that the only potentially compelling interest was overcoming the present effects of past discrimination and that educational diversity was,

⁸⁶ See, e.g., Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. Rev. 1745, 1747 (1996) (offering several potentially salient distinctions between *Bakke* and *Metro*).

⁸⁷ 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996).

⁸⁸ *Hopwood v. Texas* (“*Hopwood II*”), 84 F.3d 720, 722 (5th Cir. 1996) (Politz, J., dissenting from denial of rehearing en banc).

⁸⁹ See *Hopwood*, 78 F.3d at 934-38 (explaining the University of Texas School of Law’s admissions process).

⁹⁰ *Hopwood II*, 84 F.3d at 722 (Politz, J., dissenting from denial of rehearing en banc) (“The majority of the panel [in *Hopwood*] overruled *Bakke*, wrote far too broadly, and spoke a plethora of unfortunate dicta.”).

⁹¹ *Id.* at 944.

therefore, not compelling.⁹² The Fifth Circuit even suggested that this conclusion constituted binding precedent on the court, saying, "[W]e see the case law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge."⁹³ Third, the court held that race is as irrelevant to university admissions as blood type, that the use of race in university admissions improperly stereotypes minority applicants, and that the use of race fuels racial hostility.⁹⁴

The Fifth Circuit concluded, "In sum, the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny."⁹⁵ While *Hopwood* applies only in the Fifth Circuit, which includes Texas, Mississippi, and Louisiana, *Hopwood* sets a dangerous precedent with potentially broad scope and effects. According to Dan Morales, Texas's Attorney General, "*Hopwood*'s restrictions would generally apply to all internal institutional policies [at both public and private universities], including admissions, financial aid, scholarships, fellowships, recruitment, and retention, among others."⁹⁶ Furthermore, since *Hopwood*, several cases have been filed challenging affirmative action in higher education.⁹⁷

The Fifth Circuit's rejection in *Hopwood* of educational diversity as a compelling interest in the higher education context can be criticized on numerous grounds that are beyond the scope of this paper.

⁹² *Id.* at 944-45 ("[R]ecent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny. Foremost, the Court appears to have decided that there is essentially only one compelling interest to justify racial classifications: remedying past wrongs.").

⁹³ *Id.* at 945-46.

⁹⁴ *Id.*

⁹⁵ *Id.* at 948.

⁹⁶ Letter from Dan Morales, *supra* note 53, at 22. Morales has been "bitterly criticized" for his narrow reading of what is permitted under *Hopwood*. Peter Applebome, *Universities Report Less Minority Interest After Action to Ban Preferences*, N.Y. Times, Mar. 19, 1997, at A24.

⁹⁷ A federal district court in Texas recently rejected the claim of an unsuccessful white applicant alleging race-based discrimination in admissions at the University of Texas College of Education. The court found no evidence that race was a motivating factor in the admissions process at the point at which the plaintiff was rejected. See *Lesage v. Texas*, No. A-96-CA-286 JN (W.D. Tex. March 7, 1997) (refusing to reach the issue of whether the University's use of race at a later stage in the admissions process would be constitutional). Furthermore, two recent suits have been filed in Georgia and Washington challenging affirmative action programs in higher education on grounds similar to those invoked in *Hopwood*. See Patrick Healy, *A Lawsuit Against Georgia University System Attacks a Range of Race-Based Policies*, Chron. of Higher Ed., March 14, 1990, at A25; Douglas Lederman, *Suit Challenges Affirmative Action at U. of Wash.*, Chron. of Higher Ed., March 14, 1997, at A27. The Washington case is being pursued by the same group that instigated the action against the University of Texas School of Law in *Hopwood*. Finally, the Supreme Court is presently considering whether to grant *certiorari* on a Title VII case challenging a school board's decision to lay off a white high school teacher rather than an equally qualified black teacher in order to maintain educational diversity in the faculty. See *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (holding that such non-remedial affirmative action is prohibited under Title VII).

However, the most important point to note here is that *Hopwood* is not the end of the story. In *Wittmer v. Peters*,⁹⁸ Chief Judge Posner offers a vastly different and ultimately persuasive view of the present state of non-remedial affirmative action programs under the Supreme Court's jurisprudence.

IV. The Countervailing Case of *Wittmer v. Peters*

In *Wittmer v. Peters*, the Seventh Circuit upheld an affirmative action employment program for correctional officers at a "boot camp" for youth offenders. The affirmative action program was intended to promote qualified black correctional officers to vacant lieutenant positions in order to facilitate the penological goals of the boot camp.⁹⁹ The boot camp's security staff was less than 6 percent black with no black supervisors; the inmate population was approximately 70 percent black. The defendant state official, warden of the youth detention center, presented expert evidence that the boot camp program was not likely to be as successful without some black officers in supervisory positions. The plaintiffs, three white correctional officers who had applied unsuccessfully for a lieutenant position, challenged the affirmative action program under the Fourteenth Amendment.

Chief Judge Posner, writing for a unanimous court, upheld the affirmative action employment program, finding it narrowly tailored to serve a compelling interest.¹⁰⁰ First, the court rejected the plaintiffs' contention, embraced by the Fifth Circuit in *Hopwood*, that recent Supreme Court precedent indicated that only the remedial interest in overcoming the present effects of past discrimination could ever justify race-based affirmative action:

The plaintiffs argue that the only form of racial discrimination that can survive strict scrutiny is discrimination designed to cure the ill effects of past discrimination by the public institution that is asking to be allowed to try this dangerous cure. There is dicta to this effect. And certainly it is the most frequently mentioned example of a case in which discrimination is permissible. But there is a reason that dicta are dicta and not holdings, that is, are not authoritative. A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him. The dicta on which the plaintiffs rely were uttered in cases that did not involve, by judges who had never had cases that involved, the racial composition of a prison staff. Such cases were not, at least insofar as one can glean from the opinions, present to the minds of the judges when they considered and rejected other grounds for discrimination and expressed that rejection in

⁹⁸ 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 65 USLW 3416 (1997).

⁹⁹ *See id.* at 917. "The idea [of the boot camp] is to give inmates an experience similar to that of old-fashioned military basic training, in which harsh regimentation, including drill-sergeant abuse by correctional officers, is used to break down and remold the character of the trainee." *Id.*

¹⁰⁰ *See id.* at 918-19.

sweeping dicta that we have mentioned. The weight of judicial language depends on context, by these plaintiffs ignored. . . . [T]he rectification of past discrimination is not the only setting in which government officials can lawfully take race into account.¹⁰¹

Second, the court implicitly held that the state's interest in "pacification and reformation" of youth offenders was sufficiently compelling to justify affirmative action.¹⁰² The court's reasoning here was somewhat unclear. However, two factors were clearly central to the court's holding on this point: (1) The court noted that a majority of the Supreme Court had recently endorsed the idea that strict scrutiny is not inevitably "fatal in fact."¹⁰³ (2) The court placed great weight on the fact that the defense presented sufficient expert evidence of the penological necessity of the affirmative action program. On this second point, the court said:

It is not enough to say that of course there should be some correspondence between the racial composition of a prison's population and the racial composition of the staff; common sense is not enough; common sense undergirded the pernicious discrimination against blacks now universally regretted. . . . In any event that is not the justification advanced. The black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. This is not just speculation, but is backed up by expert evidence that the plaintiffs did not rebut. The defendants' experts -- recognized experts in the field of prison administration -- did not rely on generalities about racial balance or diversity; did not for that matter, defend a global racial balance. They opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white at staff as it would have had if a black male had not been appointed to one of the lieutenant slots.¹⁰⁴

What does *Wittmer* tell us about *Hopwood*? *Wittmer* and *Hopwood* obviously evaluate different non-remedial interests and different programs designed to achieve those interests. Nonetheless, *Wittmer* establishes, at least in the Seventh Circuit, that non-remedial interests in general can be sufficiently compelling to justify affirmative action. Furthermore, while *Wittmer* says nothing about whether

¹⁰¹ *Id.* at 919 (criticizing *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996)) (other citations omitted).

¹⁰² *See id.* at 920.

¹⁰³ *Id.* at 918. *See also Adarand*, 115 S. Ct. at 2117; *id.* at 2136 (Ginsburg, J., dissenting, joined by Breyer, J.).

¹⁰⁴ *Id.* at 919-20. Of potentially great relevance to making the case for educational diversity as a compelling interest, the court, in deciding how much and what type of evidence was necessary to justify the affirmative action program at issue, expressly recognized that the amount and type of evidence required was dependent upon the amount and type of evidence available. *Id.* at 920. The court did suggest that "after correctional boot camps have been around long enough to enable thorough academic (or academic-quality) study of the racial problems involved in their administration, prison officials can[not] continue to coast on expert evidence that extrapolates to boot camps from the experts' research on conventional prisons." *Id.* at 920-21. However, the court also recognized that boot camps have been in existence since 1983, and it still upheld the affirmative action program at issue based on limited direct evidence. *Id.* at 921

educational diversity constitutes such a compelling interest, it would be somewhat ironic if the interest in rehabilitating youth offenders was sufficiently compelling to justify affirmative action, but the interest in promoting the educational and socio-moral development of university students was not so compelling. Correctional facilities may be unique institutions, but so are universities.

V. Conclusion

This brief legal overview indicates that the Supreme Court will uphold affirmative action only where there is a strong basis in evidence to support the belief that the given program serves a compelling interest and is necessary to achieve that interest.¹⁰⁵ In *Hopwood v. Texas*,¹⁰⁶ the Fifth Circuit held that a university's interest in promoting educational diversity (as well as any non-remedial interest) is not sufficiently compelling to justify affirmative action. *Wittmer v. Peters*¹⁰⁷ lays the foundation for a potentially powerful rebuttal to that conclusion. Ultimately, the Supreme Court will decide which conception is correct. The higher education community must, therefore, use this time to develop its case for diversity.

¹⁰⁵ See, e.g., *Adarand v. Peña*, 115 S. Ct. 2097, 2113 (1995).

¹⁰⁶ 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

¹⁰⁷ 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 65 USLW 3416 (1997).