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# TWENTY-FIVE YEARS OF A DIVIDED COURT AND NATION: “CONFLICTING” VIEWS OF AFFIRMATIVE ACTION AND REVERSE DISCRIMINATION

Shaakirrah R. Sanders\*

## I. INTRODUCTION

*Race has been the political issue in this nation since it was founded. And we may regret that that is a political reality, but it is a reality.*<sup>1</sup>

The Equal Employment Opportunity Commission (EEOC) defines affirmative action as “actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity.”<sup>2</sup> Programs enacted under the rubric of “affirmative action” are designed to aid and encourage the hiring of minorities and women in order to overcome the social and economical disadvantages of these classes because of past discrimination. Despite this noble mission, American law and society have been reluctant to accept affirmative action programs as a proper remedy for race and gender discrimination. In fact, affirmative action programs have led to complex mountains of litigation focusing on whether these anti-discrimination programs are themselves in violation of Titles VI or VII of the Civil Rights Act or the Fifth or Fourteenth Amendments. The typical reverse discrimination claim is brought by members of the majority, historically white males and more recently, white females, who argue that the enacted anti-discrimination program or plan is in fact discriminatory. These reverse discrimination claims have developed into their own constitutional jurisprudence.

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1. Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1268 (1992) (quoting Oral Argument of Solicitor General Robert Bork, *United States Jewish Orgs. v. Carey*, 430 U.S. 144 (1977), in 92 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 845–46 (Phillip B. Kurland & Gerhard Casper eds., 1978)).

2. 29 C.F.R. § 1608.1(c) (2002).

An affirmative action program that has been enacted by a private employer, university, etc. is challenged under Titles VI or VII of the Civil Rights Act.<sup>3</sup> On the other hand, affirmative action programs enacted by a state or one acting with state authority are challenged under the Fourteenth Amendment Equal Protection Clause or Fifth Amendment Due Process Clause (which embodies the Fourteenth Amendment Equal Protection Clause).<sup>4</sup> This essay explores seminal United States Supreme Court reverse discrimination cases. The author then examines the theoretical debates surrounding affirmative action and reverse discrimination claims. Next, the author discusses the disparity between affirmative action programs based on gender and those based on race. The author then discusses the treatment of race in reverse discrimination claims versus racial profiling claims. Finally, the author examines current issues and case law emerging in this area.

## II. SEMINAL UNITED STATES SUPREME COURT REVERSE DISCRIMINATION CASES THROUGH 1995

*This absence of a common ground, this failure to reason together, causes uncertainty about the future development of the law.*<sup>5</sup>

By necessity, this section is rather lengthy. However, it is only by mulling through these cases that the reader gains a greater knowledge of the conflict within the Court as a whole, but also the conflicting views of the individual members of the Court. It will also become apparent that the scope and meaning of the Fourteenth Amendment is just as highly debated today as it was during its adoption in 1868.

### A. *Califano v. Webster*<sup>6</sup>—Decided 1977 (Unanimous Decision)

Prior to an amendment in 1972, the Social Security Act computed old age insurance benefits such that women obtained larger benefits than men of the same age who had the same earnings record.<sup>7</sup> After the amendment, the

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3. See generally John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 *FORDHAM L. REV.* 423, 428–29 (2002) (“[a]s a federal statute, the Civil Rights Act places restrictions on the behavior of individual members of society and private, non-governmental entities”).

4. See *id.* (“[a]s a constitutional provision, the Equal protection Clause places restrictions on state action”).

5. Landsberg, *supra* note 1, at 1271.

6. 430 U.S. 313 (1977).

7. *Id.* at 314–16.

previous distinction between men and women was eliminated for men reaching the age of sixty-two before 1975 or later.<sup>8</sup> An action was brought to challenge the constitutionality of the amendment.<sup>9</sup> The United States District Court for the Eastern District of New York held that the statutory scheme violated the equal protection component of the Fifth Amendment Due Process Clause.<sup>10</sup>

A direct appeal was taken to the United States Supreme Court<sup>11</sup> and the decision was reversed in a per curiam opinion which expressed the views of Justices Brennan, White, Powell, Stevens, and Marshall.<sup>12</sup> Those Justices reasoned that the Fifth Amendment Due Process Clause, which embodies the Fourteenth Amendment equal protection guarantee, was not violated because favorable treatment of women served the permissible purpose of redressing society's longstanding disparate treatment of women and operated directly to compensate women for past economic discrimination.<sup>13</sup> Chief Justice Burger, joined by Justices Stewart, Blackmun, and Rehnquist concurred on the ground that the gender classification was rationally justifiable on the basis of administrative convenience.<sup>14</sup>

B. *Regents of University of California v. Bakke*<sup>15</sup>—Decided 1978 (Plurality Decision)

In *Bakke*, the application of a white male to a California medical school was rejected.<sup>16</sup> That applicant brought this action challenging the

8. *Id.*

9. *Id.* at 316.

10. *Id.*

11. *Id.*

12. *Califano*, 430 U.S. at 314, 316. Justice Brennan, appointed by President Eisenhower, took the Judicial Oath of Office on October 16, 1956. Justice White, appointed by President Kennedy, took the Judicial Oath of Office on April 16, 1962. Justice Marshall, appointed by President Johnson, took the Judicial Oath of Office on October 2, 1967. Justice Powell, appointed by President Nixon, took the Judicial Oath of Office on January 7, 1972. Justice Stevens, appointed by President Ford, took the Judicial Oath of Office on December 19, 1975.

13. *Id.* at 317–18. The Justices reasoned that "[t]he statutory scheme involved here . . . was not a result of 'archaic and overbroad generalizations' about women . . . [r]ather, 'the only discernible purpose of . . . more favorable treatment is the permissible one of redressing our society's longstanding disparate treatment of women.'" *Id.*

14. *Id.* at 321 (Burger, J., concurring). As a result, every Justice agreed that the affirmative action plan did not violate equal protection. This would be the last time every Justice agreed whether or not a preference based on race or gender violated equal protection.

Justice Stewart, appointed by President Eisenhower, took Judicial Oath of Office on October 14, 1958. Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, were appointed by President Nixon and took Judicial Oath of Office on June 23, 1969, June 9, 1970, and January 7, 1972, respectively.

15. 438 U.S. 265 (1978).

legality of the school's special admissions program, which reserved sixteen of the 100 positions for "disadvantaged" minority students.<sup>17</sup> The school cross-claimed for a declaratory judgment that its program was legal.<sup>18</sup> The California trial court ruled that the program was illegal, but did not order the school to admit the applicant.<sup>19</sup> The Supreme Court of California also ruled that the program was illegal and also declined to order the applicant be admitted.<sup>20</sup> On certiorari, a divided United States Supreme Court affirmed in part and reversed in part.<sup>21</sup>

Justice Powell, writing the plurality decision, held that while the affirmative action program was illegal,<sup>22</sup> race may be among one of the many factors considered by a university or college in passing on applications.<sup>23</sup> The Court, however, ordered the school to admit the applicant, because the school failed to show that the applicant would not have been admitted in the absence of the special admissions program.<sup>24</sup> Justices Brennan, White, Blackmun, and Marshall, dissenting in part and concurring in part, argued that Title VI proscribes only those racial classifications employed by a state or its agencies that violate the Equal Protection Clause.<sup>25</sup> They also argued that while racial classifications are given strict scrutiny, overcoming substantial minority underrepresentation in the medical profession is sufficiently important to justify the states' remedial use of race.<sup>26</sup> Although Jus-

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16. *Id.* at 276.

17. *Id.* at 277-79.

18. *Id.* at 278.

19. *Id.* at 279.

20. *Id.* at 280-81. The California Supreme Court transferred the case directly from the California trial court "because of the importance of the issues involved." *Id.* at 279 (quoting *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1156 (Cal. 1976) (affirmed in part; reversed in part by *Bakke*, 438 U.S. 265)).

21. *Bakke*, 438 U.S. at 269-72.

22. *Id.* at 271, 305-19. By analogy, Justice Powell compared the University of California admissions process with Harvard University's where "all applicants competed for all available openings in an upcoming class, but race was used as a positive factor when considering individual applications." Lindsay C. Patterson, *Individual Rights and Group Wrongs: An Alternative Approach to Affirmative Action*, 56 MISS. L.J. 781, 789 (1986). See also *Bakke*, 438 U.S. at 316-17, 321-24.

23. *Bakke*, 438 U.S. at 319-20. In all, five Justices (Powell, Marshall, Blackmun, Brennan, and White) agreed that "state educational institutions can take race into account in a properly devised admissions program." Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 326 (1990). See also *Bakke*, 438 U.S. at 272, 319-20.

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

25. *Id.* at 328-55 (Brennan, J., White, J., Blackmun, J., Marshall, J., concurring in part and dissenting in part).

26. *Id.* at 357-62. Justices Brennan, White, Blackmun, and Marshall would also reverse the Supreme Court of California's holding that "the Medical School's special admissions program [was] unconstitutional . . . as well as that portion of the judgment enjoining the Medical School from according any consideration to race in the admissions process." *Id.* at

tice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, dissented, those Justices agreed that the applicant was entitled to admission.<sup>27</sup>

C. *United Steelworkers of America v. Weber*<sup>28</sup>—Decided 1979 (5-2 Decision)

In *Weber*, a master collective bargaining agreement was reached covering terms and conditions of employment at several plants.<sup>29</sup> The implemented affirmative action plan was designed to "eliminate conspicuous racial imbalances."<sup>30</sup> A white male worker at one of the plants instituted a class action lawsuit after he was denied a promotion.<sup>31</sup> The United States District Court for the Eastern District of Louisiana ruled that the affirmative action plan violated Title VII of the Civil Rights Act of 1964.<sup>32</sup> The United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling and held that any employment preferences based upon race, even if incidental to an affirmative action plan, violated Title VII's prohibition against racial discrimination in employment.<sup>33</sup> The United States Supreme Court reversed.<sup>34</sup>

In a decision by Justice Brennan, and joined by Justices Stewart, Marshall, White, and Blackmun, the Court ruled that Title VII does not condemn all private, voluntary, race-conscious affirmative action plans.<sup>35</sup> The majority Justices reasoned that the plan was permissible under Title VII because it did not require the discharge of white workers (and their replacement with new black hires), did not create an absolute bar to the advancement of white employees, and was a temporary measure not intended to maintain racial balance, but to remedy a preexisting racial imbalance.<sup>36</sup> Justice Blackmun, concurring separately, was of the opinion that the plan was an affirmative action plan to remedy past violations of Title VII.<sup>37</sup>

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379.

27. *Id.* at 421 (Stephens, J., dissenting). "[O]pponents of affirmative action were [thus] dealt a set-back because the Court recognized that race could operate as a positive factor in the admissions process." Patterson, *supra* note 22, at 789.

28. 443 U.S. 193 (1979).

29. *Id.* at 198.

30. *Id.*

31. *Id.* at 199. A black co-worker was promoted to the position. *Id.*

32. *Id.* at 200.

33. *Id.*

34. *Weber*, 443 U.S. at 200. Justices Powell and Stevens did not participate in the judgment. *Id.* at 209.

35. *Id.* at 208.

36. *Id.* at 208-09.

37. *Id.* at 216 (Blackmun, J., concurring).

Chief Justice Burger and Justice Rehnquist dissented and argued that the racial quota embodied in the collective bargaining agreement was an "unlawful employment practice" under the plain language of the Civil Rights Act, 42 U.S.C. § 2000e-2(d).<sup>38</sup> The dissenters reasoned that neither Title VII's legislative history nor its spirit sanctioned the use of quotas.<sup>39</sup>

D. *Fullilove v. Klutznick*<sup>40</sup>—Decided 1980 (6-3 Decision)

In *Fullilove*, associations of construction contractors and subcontractors brought claims against the Secretary of the United States Department of Commerce as the administrator of federal programs for local public works projects and the State and City of New York as actual and potential grantees of federally funded local public work projects.<sup>41</sup> Plaintiffs' Fifth Amendment and Title VI challenges were against a provision of the Public Works Employment Act, which required at least ten percent of federal funds granted for local public works projects to be used by state and local grantees for the procurement of services or supplies from businesses owned and controlled by minorities.<sup>42</sup> The United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit upheld the validity of the program.<sup>43</sup> The United States Supreme Court affirmed. Six members of the Court agreed that the provision of the Public Works Employment Act containing the set-aside requirement violated neither the equal protection guarantee of the Fifth Amendment nor Title VI.<sup>44</sup> Beyond this holding, however, none of the Justices could agree.<sup>45</sup>

Chief Justice Burger, announcing the opinion of the Court and joined by Justices White and Powell, reasoned that Congress chose a valid means of achieving its objectives, curbing the effects of prior discrimination, which impaired or foreclosed access by minority businesses to public contraction opportunities, without either violating equal protection or creating inconsistencies with Title VI.<sup>46</sup> Justice Powell also concurred separately and

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38. *Id.* at 226 (Burger, C.J., Rehnquist, J., dissenting).

39. *Id.* at 255.

40. 448 U.S. 448 (1980), *overruled by* *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

41. *Id.* at 455. A firm engaged in heating, ventilation, and air conditioning work was also made a party. *Id.*

42. *Id.*

43. *Id.* at 455-56.

44. *Id.* at 517, 521.

45. *Id.* at 456-522. Majority opinion by Chief Justice Burger, who was joined by Justices White and Powell, separate concurring opinion by Justice Powell, and concurring opinion by Justice Marshall, who was joined by Justices Brennan and Blackman; Justices Stewart, Stevens, and Rehnquist dissented. *Id.* at 456.

46. *Fullilove*, 448 U.S. at 456-92.

reasoned that the racial classification reflected in the set-aside was not violative of equal protection because it was a remedy serving the compelling governmental interest of eradicating the continuing effects of past discrimination.<sup>47</sup> Justices Marshall, Brennan, and Blackmun, who concurred in the judgment, argued that the appropriate standard of review was intermediate scrutiny: whether the classification serves an important governmental function and is substantially related to the achievement of those objectives.<sup>48</sup> In dissent, Justices Stewart and Rehnquist argued that on its face, the set aside violated equal protection.<sup>49</sup> Justice Stevens also dissented, but argued separately that Congress failed to discharge its Fifth Amendment duty to govern impartially when they failed to establish that the unique statutory preference established in the ten percent set-aside was justified by a relevant characteristic shared by members of the preferred class.<sup>50</sup>

E. *Firefighters Local Union No. 1784 v. Stotts*<sup>51</sup>—Decided 1984 (5-4 Decision)

In *Stotts*, the United States District Court for the Western District of Tennessee enjoined the City of Memphis from applying its "last hired, first fired" seniority policy, insofar as it would decrease the percentage of black employees in any of seven job classifications.<sup>52</sup> The result was that in certain instances, non-minority employees with more seniority were laid off or demoted in rank.<sup>53</sup> The United States Court of Appeals for the Sixth Circuit affirmed.<sup>54</sup> The United States Supreme Court reversed.<sup>55</sup>

Justice White, who was joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, reasoned that it was not within the district court's inherent authority to modify a previously issued consent decree because a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination.<sup>56</sup> Justices Blackmun, Brennan, and Marshall dissented and argued that because the Court could only review the preliminary injunction for abuse of discretion,<sup>57</sup>

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47. *Id.* at 515-16.

48. *Id.* at 519. Thus, a majority of the Court agreed that "a sharing of the burden of affirmative action by innocent parties was permissible when the remedy was narrowly drawn to cure the effects of prior discrimination." Patterson, *supra* note 22, at 790.

49. *Fullilove*, 448 U.S. at 527.

50. *Id.* at 554.

51. 467 U.S. 561 (1984).

52. *Id.* at 567.

53. *Id.* at 566-67.

54. *Id.* at 568.

55. *Id.* at 574.

56. *Id.* at 572-83.

57. *Stotts*, 467 U.S. at 601-21.



the case was moot and the Court lacked jurisdiction.<sup>58</sup> Justice Stevens also dissented, but reasoned that this case did not involve Title VII.<sup>59</sup>

F. *Wygant v. Jackson Board of Education*<sup>60</sup>—Decided 1986 (5-4 Decision)

In *Wygant*, a provision was added to the collective bargaining agreement between the Jackson Board of Education and its teachers union stating that if it were to become necessary to lay off teachers, those with the most seniority would be retained.<sup>61</sup> However, at no time would there be a greater percentage of minority teachers laid off than the percentage of minority teachers employed at the time of the layoff.<sup>62</sup> This provision was designed to preserve the effects of a hiring policy implemented to increase the percentage of minority teachers in the school system.<sup>63</sup> When the Board of Education adhered to the provision during a lay off, the displaced non-minority teachers brought this suit and alleged violations of the Equal Protection Clause of the Fourteenth Amendment.<sup>64</sup>

The United States District Court for the Eastern District of Michigan dismissed the teachers' claims, reasoning that the racial preferences were permissible as an attempt to remedy societal discrimination by providing role models for minority school children.<sup>65</sup> The United States Court of Appeals for the Sixth Circuit affirmed.<sup>66</sup> On certiorari to the United States Supreme Court, both lower court decisions were reversed.<sup>67</sup>

While five members of the Court agreed that the layoffs were in violation of the Equal Protection Clause,<sup>68</sup> a majority was again unable to agree

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58. *Id.* at 593–601 (Blackmun, J., Brennan, J., Marshall, J., dissenting).

59. *Id.* at 590–92 (Stevens, J., dissenting). As a result, many lower courts refuse to read *Stotts* as an affirmative action case and regard Justice White's Title VII language as "merely dicta." See Patterson, *supra* note 22, at 791. Nevertheless, *Stotts* illustrates a division between members of the Court when the result is the loss of benefits to whites as a class. *Id.* Moreover,

*Stotts* . . . demonstrates the Court's confusion over how to apply group remedies in a legal culture receptive only to individuals stripped of any historical or group identity. In this light, the split on the Court, as to the appropriateness of the affirmative action remedy, mirrors the ideological split in American society as to whether justice is a group concept, an individual concept, or both.

*Id.* See also *infra* notes 214–42 (discussing group and individual approach to civil rights).

60. 476 U.S. 267 (1986).

61. *Id.* at 270.

62. *Id.* at 270–71.

63. *Id.*

64. *Id.* at 271.

65. *Id.* at 271–73.

66. *Wygant*, 476 U.S. at 274.

67. *Id.* at 284.

68. *Id.* at 269–95.

upon a reasoning.<sup>69</sup> Justice Powell announced the opinion of the Court and was joined by Chief Justice Burger and Justice Rehnquist. These Justices held that strict scrutiny applied to any governmental classification or preference based on racial or ethnic criteria<sup>70</sup> and that the need to provide minority students with role models was not a compelling governmental interest justifying the use of a racial classification.<sup>71</sup> In concurrence, Justice O'Connor reasoned that the layoff provision was not narrowly tailored to achieve its asserted purpose.<sup>72</sup> Justice White also concurred, but held that the layoff policy had the same permissible effect as one that would integrate a work force by discharging whites and hiring blacks until the latter comprised a suitable percentage.<sup>73</sup>

In dissent, Justices Marshall, Brennan, and Blackmun argued that the Constitution was not violated by the school board's attempt to achieve diversity, as it was for the benefit of all students.<sup>74</sup> Moreover, the dissenting Justices reasoned that the layoff provision was a permissible means of achieving this goal because it was a result of the process of collective bargaining.<sup>75</sup> Dissenting separately, Justice Stevens argued that the decision to include more minority teachers in the school system served the valid public purpose of seeking multiethnic representation among the faculty, regardless of whether the board of education was guilty of past racial discrimination.<sup>76</sup>

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69. *Id.*

70. *Id.* at 273-74.

71. *Id.* at 274-76.

72. *Wygant*, 476 U.S. at 293-94. Some believe that Justice O'Connor "hoped to avoid the issue that so bitterly divided the plurality and the dissenters" by offering the alternative reasoning:

[T]he hiring goal was linked to achieving a parity between the percentage of minority teachers and the percentage of minority students. But since a disparity in that regard is no [sic] evidence of discrimination, the hiring goal itself had no relation to the remedying of employment discrimination, and the layoff provision which was intended to safeguard that hiring goal was likewise unrelated to the state interest being asserted—thus constituting an impermissible means.

Thomas R. Haggard, *Mugwump, Mediator, Machiavellian, or Majority? The Role of Justice O'Connor in the Affirmative Action Cases*, 24 AKRON L. REV. 47, 60 (1990). Justice O'Connor was appointed by President Reagan and took the Judicial Oath of Office on September 25, 1981.

73. *Wygant*, 476 U.S. at 294-95 (White, J., concurring).

74. *Id.* at 295-312 (Marshall, J., Brennan, J., Blackmun, J., dissenting).

75. *Id.* at 307-09.

76. *Id.* at 313-20.

G. *Local Number 93, International Association of Firefighters v. City of Cleveland*<sup>77</sup>—Decided 1986 (6-3 Decision)

The Vanguard of Cleveland, an organization of African-American and Hispanic-American firefighters, filed a complaint charging the City of Cleveland with discrimination on the basis of race and national origin in the hiring, assignment, and promotion of firefighters within the fire department in violation of Title VII.<sup>78</sup> The United States District Court for the Northern District of Ohio held that there was a historical pattern of racial discrimination in promotions within the fire department and approved a four year consent decree aimed at remedying the effects of the discrimination.<sup>79</sup> The United States Court of Appeals for the Sixth Circuit affirmed and reasoned that the race conscious relief provided in the consent decree was not only justified by the statistical evidence presented to the district court,<sup>80</sup> but that it was also fair and reasonable to non-minority firefighters.<sup>81</sup>

The United States Supreme Court affirmed on certiorari.<sup>82</sup> Justice Brennan announced the opinion of the Court and was joined by Justices Marshall, Blackmun, Powell, Stevens, and O'Connor.<sup>83</sup> This majority held that it was unnecessary for plaintiffs to show that they were victims of racial discrimination because of the voluntary nature of a consent decree.<sup>84</sup> In dissent, Chief Justice Burger and Justice Rehnquist argued that because the district court failed to make a finding that plaintiffs were victims of racial discrimination, they must conclude that the city's failure to promote plaintiffs was not on account of race, color, religion, sex or national origin as required by Title VII.<sup>85</sup> Therefore, according to dissenters, the district court could not order their promotion.<sup>86</sup> Justice White also dissented, but argued that the consent decree was beyond the limits of a permissible remedy because none of the non-minority employees who were denied a promotion were shown to have been responsible for the discriminatory practices recited in the decree.<sup>87</sup>

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77. 478 U.S. 501 (1986).

78. *Id.* at 504-05. The lawsuit was filed on behalf of a class of African-Americans and Hispanic-Americans, and consisting of firefighters already employed by the city, applicants for employment, and all African- and Hispanic-Americans who will in the future apply for employment or will be employed as firemen. *Id.* at 504.

79. *Id.* at 511-13.

80. *Id.* at 513. The city also admitted that it engaged in discriminatory practices. *See id.*

81. *Id.* at 512.

82. *Id.* at 515.

83. *Local No. 93*, 478 U.S. at 502.

84. *Id.* at 515-24.

85. *Id.* at 535-45 (Burger, C.J., Rehnquist, J., dissenting).

86. *Id.*

87. *Id.* at 531-35 (White, J., dissenting).

H. *Local 28 of the Sheet Metal Workers' International Association v. EEOC*<sup>88</sup>—Decided 1986 (6-3 Decision)

In *Sheet Metal Workers'*, an action was brought under Title VII to enjoin a union and its apprenticeship committee from engaging in a pattern and practice of discrimination against black and Hispanic individuals.<sup>89</sup> The United States District Court for the Southern District of New York held that nonwhite workers had been discriminated against and set a twenty-nine percent nonwhite membership goal to be achieved by a specified date.<sup>90</sup> The District Court's determination of liability and the membership goal was affirmed by the United States Court of Appeals for the Second Circuit.<sup>91</sup> The United States Supreme Court also affirmed on certiorari.<sup>92</sup>

Justice Brennan, announcing the opinion of the Court and joined by Justices Powell, Marshall, Blackmun, and Stevens, held that Title VII does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination where a history of discrimination has been shown or where race-conscious relief is necessary to dissipate the lingering effects of pervasive discrimination.<sup>93</sup> These Justices were also convinced that the membership goal did not deny benefits to white persons based on race.<sup>94</sup> Justice O'Connor, concurring in part and dissenting in part, and Justice White, dissenting, argued that the membership goal was a rigid racial quota violating Title VII.<sup>95</sup> Chief Justice Burger and Justice Rehnquist dissented and argued that racial preferences that dis-

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88. 478 U.S. 421 (1986).

89. *Id.* at 426. The union had already been found guilty of engaging in discriminatory practices in 1975. *Id.* The district court ordered the union to end such practices and admit a certain percentage of minorities to union membership by 1981. *Id.* However, in both 1982 and 1983, the union was found guilty of civil contempt for disobeying those orders. *Id.*

90. *Id.* at 432. This membership goal had been set in the original decree in 1975 and survived the revision and amendments to the district court's orders. *Id.*

91. *Id.* at 433. However, the court of appeals "modified the District Court's order to permit the use of a white-nonwhite ratio for the apprenticeship program only pending implementation of valid, job related entrances tests." *Id.* On remand, the district court adopted a revised plan, which gave the union a year to meet the membership goal. *Id.* In 1983 an amendment was made to the revised plan. This amendment was challenged on certiorari. *Id.* at 437-40.

92. *Id.* at 440.

93. *Id.* at 475-79.

94. *Sheet Metal Workers'*, 478 U.S. at 475-79.

95. *Id.* at 489, 499-500 (O'Connor, J., concurring in part and dissenting in part). Some have opined that Justice O'Connor's dissent is based on such narrow grounds because a majority of the Court allowed court-ordered affirmative relief to non-victims. Haggard, *supra* note 72, at 62.

place non-minorities are forbidden except where the minority individuals were actual victims of the employer's racial discrimination.<sup>96</sup>

I. *California Federal Savings and Loan Association v. Guerra*<sup>97</sup>—  
Decided 1987 (6-3 Decision)

After pregnancy disability leave, a receptionist at a California savings and loan was told by her employer that she had been replaced and similar positions were unavailable.<sup>98</sup> The receptionist filed an action with California's Department of Fair Employment and Housing claiming that the employer violated a California statute regarding pregnancy leave.<sup>99</sup> The employer filed an action seeking a declaration that the California statute violated Title VII because it discriminated against men.<sup>100</sup> The United States District Court for the Central District of California granted the employer's motion of summary judgment, holding that the California statute discriminated against men.<sup>101</sup> The United States Court of Appeals for the Ninth Circuit reversed.<sup>102</sup>

On certiorari, the United States Supreme Court affirmed the decision of the Ninth Circuit.<sup>103</sup> Justice Marshall, announcing the opinion of the Court and joined by Justices Brennan, Blackmun, and O'Connor, held that Title VII, as amended by the Pregnancy Discrimination Act, does not preempt the California statute<sup>104</sup> because both share the goal of promoting equal employment opportunities for women<sup>105</sup> and neither statute compels employers to treat pregnant workers better than other disabled employees.<sup>106</sup> Moreover, the Pregnancy Discrimination Act does not indicate that employers are forbidden to extend any benefits to pregnant women that they do not already provide to other disabled employees.<sup>107</sup>

Justice Stevens, concurring in part and in the judgment, argued that the Pregnancy Discrimination Act does allow some preferential treatment of pregnancy as long as it is consistent with the goal of achieving equality of employment opportunities.<sup>108</sup> Justice Scalia,<sup>109</sup> concurring in the judgment,

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96. *Sheet Metal Workers'*, 478 U.S. at 500.

97. 479 U.S. 272 (1987).

98. *Id.* at 278.

99. *Id.*

100. *Id.* at 278-79.

101. *Id.*

102. *Id.* at 280.

103. *Guerra*, 479 U.S. at 280.

104. *Id.* at 292.

105. *Id.* at 288-89.

106. *Id.* at 286.

107. *Id.*

108. *Id.* at 292-93 (Stevens, J., concurring in part).

reasoned that because the California statute did not require or permit any refusal to accord equal treatment of workers other than pregnant women, Title VII was inapplicable.<sup>110</sup> In dissent, Chief Justice Rehnquist, along with Justices White and Powell, expressed the view that Title VII prohibits preferential treatment of pregnant workers; therefore, according to those Justices, the California statute is pre-empted because it extends preferential benefits for pregnancy.<sup>111</sup>

J. *United States v. Paradise*<sup>112</sup>—Decided 1987 (5-4 Decision)

In 1972, a class of black plaintiffs filed an action challenging the long-standing practice of the Alabama Department of Public Safety of excluding blacks from employment.<sup>113</sup> The United States District Court for the Middle District of Alabama held that the department engaged in a pattern of discrimination and thus ordered the department to hire one black employee per white employee until blacks constituted approximately twenty-five percent of the state trooper force.<sup>114</sup> The department was also enjoined from engaging in any discrimination in its employment practices, including promotions.<sup>115</sup>

Twelve years later the District Court found that those same discriminatory policies and practices remained pervasive and conspicuous.<sup>116</sup> Thus, the court held that for a period of time "at least fifty percent of promotions to corporal should be awarded to black troopers, if qualified black candidates were available";<sup>117</sup> that a fifty percent promotional quota in the upper ranks shall go to blacks if there are qualified black candidates;<sup>118</sup> and that the department must submit within thirty days a schedule for the development of promotion procedures for all ranks above the entry level.<sup>119</sup> The United States Court of Appeals for the Eleventh Circuit affirmed, reasoning that "the relief at issue was designed to remedy the present effects of past discrimination" and was deemed to "extend no further than necessary to ac-

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109. Justice Scalia, appointed by President Reagan, took the Judicial Oath of Office on September 26, 1986.

110. *Guerra*, 479 U.S. at 295-96 (Scalia, J., concurring).

111. *Id.* at 304 (Rehnquist, C.J., White, J., Powell, J., dissenting). Justice Rehnquist was elevated to the position of Chief Justice by President Reagan and took the Judicial Oath of Office for this position on September 26, 1986.

112. 480 U.S. 149 (1987).

113. *Id.* at 154.

114. *Id.* at 154-55.

115. *Id.*

116. *Id.* at 162-63.

117. *Id.* at 163.

118. *Paradise*, 480 U.S. at 163.

119. *Id.* at 164.

comply with the objective of remedying the egregious and long-standing racial imbalances in the upper ranks of the department."<sup>120</sup>

The United States Supreme Court affirmed<sup>121</sup> in an opinion by Justice Brennan, who was joined by Justices Marshall, Blackmun, and Powell.<sup>122</sup> These Justices held that the Equal Protection Clause was not violated because such relief was narrowly tailored and justified by a compelling governmental interest in remedying the discrimination that permeated entry-level hiring practices and the promotional process alike.<sup>123</sup> Moreover, the Justices reasoned that the order did not impose an unacceptable burden on innocent third parties.<sup>124</sup> The Justices also reasoned that because the district court had first hand experience with the parties and the particular situation, its judgment should be respected.<sup>125</sup> Justice Powell concurred, expressing the same views.<sup>126</sup> Justice Stevens concurred in the result, but argued that the guidelines set forth in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>127</sup> should have guided both the district court and the United States Supreme Court's deliberations.<sup>128</sup>

In dissent, Justice White argued that the district court "exceeded its equitable powers in devising a remedy[.]"<sup>129</sup> Chief Justice Rehnquist and Justices O'Connor and Scalia also dissented, but reasoned that the district court's remedy was not narrowly tailored to accomplish its purposes because the quotas far exceeded the percentage of blacks in the trooper force and because there was no evidence in the record that such an extreme quota was necessary to eradicate the effects of such delay.<sup>130</sup> These dissenters also agreed that the rights of non-minority troopers were impermissibly trampled upon.<sup>131</sup>

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120. *Id.* at 165-66.

121. *Id.* at 166.

122. *Id.* at 153.

123. *Id.* at 166-86.

124. *Paradise*, 480 U.S. at 179-83.

125. *Id.* at 183-85.

126. *Id.* at 186-95 (Powell, J., concurring).

127. 402 U.S. 1, 20-31 (1971).

128. *Paradise*, 480 U.S. at 190-95 (Stevens, J., concurring). In *Swann*, the Court held that district courts had broad discretion to fashion remedies that will assure unitary school systems. *Swann*, 402 U.S. at 12-13. In exercising that authority, the Court warned that in devising remedies to eliminate legally imposed segregation, local authorities and district courts must see to it that future school construction and abandonment are neither used nor serve to perpetuate or re-establish a dual system. *Id.* at 20-21. Thus, "[i]n ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight." *Id.* at 21.

129. *Paradise*, 480 U.S. at 196 (White, J., dissenting).

130. *Id.* at 196-201 (Rehnquist, C.J., O'Connor, J., dissenting).

131. *Id.* Thus, *Paradise*

K. *Johnson v. Transportation Agency, Santa Clara County, California*<sup>132</sup>—Decided 1987 (6-3 Decision)

The Transportation Agency of Santa Clara County devised an affirmative action plan which, among other things, provided that when making promotions to positions within a traditionally segregated job classification where women have been significantly underrepresented, the agency was authorized to consider, as one of many other factors, the sex of the qualified applicant.<sup>133</sup> After a female applicant, who ranked third behind two other male applicants, was selected for a position, one of the higher ranked male applicants filed suit alleging violations of Title VII.<sup>134</sup> The United States District Court for the Northern District of California held that the plaintiff was more qualified for the position,<sup>135</sup> that the female's sex was the determining factor in her selection,<sup>136</sup> and that the County's plan did not satisfy the test enumerated in *United Steelworkers of America v. Weber*<sup>137</sup> because it was not temporary.<sup>138</sup> The United States Court of Appeals for the Ninth Circuit reversed.<sup>139</sup>

The United States Supreme Court affirmed the Ninth Circuit in an opinion by Justice Brennan, who was joined by Justices Marshall, Blackmun, Powell, and Stevens. This majority held that the County did not illegally consider the sex of the applicant in making its employment decision,<sup>140</sup> as the plan did not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement.<sup>141</sup> Moreover, it was unnecessary for the agency to show past discriminatory practices because the plan sought to satisfy imbalances in traditionally segregated job categories and because the plan satisfies the requirements of *United Steelworkers of America*.<sup>142</sup> Justice O'Connor concurred.<sup>143</sup> Chief Justice Rehnquist and

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foreshadows the continuing debates as to the standard of review to be applied to affirmative action plans challenged under the Equal Protection Clause and as to the significance of statistical disparities in employment. However, *Paradise* also reflects general agreement among all of the Justices that, in some circumstances, federal courts may order race-conscious affirmative action where it is necessary to remedy the effects of past discrimination.

Landsberg, *supra* note 1, at 1283–84.

132. 480 U.S. 616 (1987).

133. *Id.* at 620–22.

134. *Id.* at 623–25.

135. *Id.* at 625.

136. *Id.*

137. 443 U.S. 193 (1979).

138. *Johnson*, 480 U.S. at 625.

139. *Id.* at 625–26.

140. *Id.* at 626–40.

141. *Id.* at 637–40.

142. *Id.* at 627–37.



Justices White and Scalia, however, dissented.<sup>144</sup> They argued that *United Steelworkers of America* should be overruled because Title VII makes impermissible intentional race and sex based discrimination, even for purposes of overcoming effects of societal attitudes that may or may not be reflected by the employer's employment practices.<sup>145</sup>

L. *City of Richmond v. J.A. Croson Company*<sup>146</sup>—Decided 1989 (6-3 Decision)

In *Croson*, the city council of Richmond, Virginia adopted an ordinance which required contractors who were awarded city contracts to set aside at least thirty percent of the dollar amount of contracts to one or more minority business enterprises that were located anywhere in the United States, with each such enterprise being at least fifty-one percent owned and controlled by any United States citizen who was a minority.<sup>147</sup> Suit was filed under 42 U.S.C. § 1983 claiming that the set aside violated the Equal Protection Clause of the Fourteenth Amendment.<sup>148</sup> The United States District Court for the Eastern District of Virginia held that the plan did not violate Equal Protection.<sup>149</sup> The United States Court of Appeals for the Fourth Circuit initially affirmed the district court, but later reversed and remanded on grounds that the set-aside requirement was invalid.<sup>150</sup> The United States Supreme Court affirmed.<sup>151</sup>

In a decision written by Justice O'Connor, who was joined by Chief Justice Rehnquist and Justices White, Kennedy, and Stevens, the Court held that the set-aside requirement violated the Equal Protection Clause because the city failed to demonstrate a compelling governmental interest in requiring thirty percent of subcontractors to be businesses owned by minorities; moreover, the city also failed to show that the set aside was not narrowly tailored, as there was no evidence of past discrimination against the minori-

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143. *Id.* at 642-57 (O'Connor, J., concurring).

144. *Johnson*, 480 U.S. at 657-77 (Rehnquist, C.J., White, J., Scalia, J., dissenting).

145. *Id.* Thus, "*Johnson* . . . harkens back to *Bakke* for the idea that race or sex may be a plus factor." Patterson, *supra* note 22, at 792 n.62. Nevertheless, with the exception of this holding, i.e. "that an employer need not have a history of intentional discrimination to rationalize its self-imposed affirmative action plan, the Court has for the most part limited the application of affirmative action to those areas already covered by pre-*Stotts* case law." *Id.* at 792.

146. 488 U.S. 469 (1989).

147. *Id.* at 477-81.

148. *Id.* at 483.

149. *Id.*

150. *Id.* at 483-86.

151. *Id.* at 476-77.

ties benefiting from the set-aside requirement.<sup>152</sup> Justice Scalia, concurring in the judgment, argued that the only instance where a state might act to undo effects of past discrimination is where it is shown that the bias is necessary to remedy the effects of past discrimination by the state.<sup>153</sup> These six Justices agreed that the proper standard to evaluate racial classifications, even those serving a remedial purpose, is strict scrutiny: whether the classification serves a compelling governmental function and is necessary and narrowly tailored to achieve those objectives.<sup>154</sup> Justices Blackmun, Marshall, and Brennan dissented and argued that the proper standard to evaluate racial classifications under the Fourteenth Amendment is intermediate scrutiny, i.e., whether the remedial goals must "serve an important governmental objection and be substantially related to achievement of those objectives."<sup>155</sup>

M. *Wards Cove Packing Company v. Atonio*<sup>156</sup>—Decided 1989 (5-4 Decision)

A class of non-white cannery workers brought a Title VII action against certain cannery companies in Alaska.<sup>157</sup> The workers claimed racial stratification of the workforce was caused by hiring and promotion practices, including a rehire preference for minorities, a lack of objective hiring criteria, a practice of not promoting from within, and separate hiring channels.<sup>158</sup> The United States District Court for the Western District of Washington ruled in favor of the cannery companies.<sup>159</sup> The original three-judge

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152. *J.A. Croson*, 488 U.S. at 498–508. Justice Kennedy, appointed by President Reagan, took the Judicial Oath of Office on February 18, 1988.

153. *Id.* at 520–28 (Scalia, J., dissenting). It has been opined that Justice Scalia believed "that affirmative discrimination could never be regarded as truly remedial unless it was in favor of the original victim[.]" Haggard, *supra* note 72, at 75–76. The majority, however, "was apparently not yet willing to accept that proposition, and chose instead to resolve the case on the narrower grounds of the lack of a factual predicate showing specific discrimination[.]" *Id.* at 76.

154. *J.A. Croson*, 488 U.S. at 493–528. Thus, "for the first time [a majority of the Court] . . . settled on a single standard—the strict scrutiny test—to determine the constitutionality of affirmative action [programs] based on race." Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1731 (1989).

155. *J.A. Croson*, 480 U.S. at 535 (Blackmun, J., Marshall, J., Brennan, J., dissenting).

156. 490 U.S. 642 (1989).

157. *Id.* at 646–48.

158. *Id.*

159. *Id.* at 648. The district court rejected plaintiff's disparate treatment claims and disparate impact challenges. *Id.*

panel of the United States Court of Appeals for the Ninth Circuit Court affirmed; however, the decision was later reversed after an en banc hearing.<sup>160</sup>

On certiorari, the United States Supreme Court reversed and remanded in an opinion by Justice White, and joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy.<sup>161</sup> The majority held that the plaintiff bears the burden of isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities, and once the plaintiff establishes this prima facie disparate impact case, the employer bears the burden of producing evidence of a business justification for its employment practices.<sup>162</sup> Nevertheless, warned the majority, the burden of persuasion remains with the plaintiff.<sup>163</sup> Moreover, the majority held that racial imbalance in one segment of an employer's work force is not sufficient to establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions.<sup>164</sup>

In dissent, Justices Stevens, Blackmun, Brennan, and Marshall argued that the intent to discriminate plays no role in a disparate-impact inquiry.<sup>165</sup> The dissenters also argued that once there is sufficient proof of disparate impact, the employer bears the burden of demonstrating as an affirmative defense that the challenged practices are necessary to the operation of its business.<sup>166</sup> Therefore, according to the dissenters, in making out a prima facie case, employees are not required to "isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities."<sup>167</sup>

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160. *Id.* at 648-49. The en banc court held that "'once the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer' . . . to 'prov[e] the] business necessity' of the challenged practice." *Id.* at 648 (quoting *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1482 (9th Cir. 1987)). Nevertheless, the District Court's rejection of the disparate treatment claims was not disturbed by the en banc decision. *Id.* at 649.

161. *Id.* at 644-45.

162. *Wards Cove Packing*, 490 U.S. at 656-61.

163. *Id.* Thus, the Court "visceralized much precedent with no discussion except to predict that imposing on the employer burdens attending the traditional strong version 'would result in a host of evils we have identified above.'" Landsberg, *supra* note 1, at 1293. The problem with shifting this burden is that on the one hand "affirmative action is treated the same as discrimination against blacks . . . [but o]n the other hand, . . . proof of discrimination and proof of justifications for affirmative action proceed on a very specific level, thus placing a heavier burden on black plaintiffs and on defendants seeking to support affirmative action." *Id.* at 1304.

164. *Wards Cove Packing*, 490 U.S. at 656-58.

165. *Id.* at 661-79 (Stevens, J., Blackmun, J., Brennan, J., Marshall, J., dissenting).

166. *Id.* at 667-68 (Stevens, J., dissenting).

167. *Id.* at 672 (Stevens, J., dissenting).

N. *Metro Broadcasting, Inc. v. Federal Communications Commission*<sup>168</sup>—Decided 1990 (5-4 Decision)

In *Metro Broadcasting*, the constitutionality of several of the Federal Communications Commission's (FCC) practices were challenged under the Fifth Amendment.<sup>169</sup> These practices included awarding enhancement credit for ownership and participation by members of minority groups when competing for new radio or television broadcast station licenses,<sup>170</sup> as well as promoting minority ownership of broadcast stations through a distress sale policy.<sup>171</sup> The United States Supreme Court, in a decision by Justice Brennan and joined by Justices White, Marshall, Blackmun, and Stevens, held that neither the minority enhancement credit policy nor the distress sale policy violated the equal protection guarantee of the Fifth Amendment.<sup>172</sup> The Court reasoned that the policies, which were mandated by Congress<sup>173</sup> and served the purpose of promoting racial diversity in the broadcast industry, were important governmental objectives within the power of Congress. Moreover, the policies were substantially related to the achievement of those objectives.<sup>174</sup>

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, dissented and argued that the proper standard of review was whether the racial classification was necessary and narrowly tailored to achieve a compelling governmental interest.<sup>175</sup> The dissenters were of the view that the policies in question would not survive strict scrutiny.<sup>176</sup>

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168. 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

169. *Id.* at 552. The disputes in No. 89-453 and No. 89-700 were consolidated. *Id.* at 552, 558-63.

170. *Id.* at 556-58.

171. *Id.* at 557-58. Under this distress sale policy, a licensee whose qualifications to hold a broadcast license have come into question, may assign its license to an FCC-approved minority enterprise without the hearing that is ordinarily required before a license may be assigned. *Id.* at 557.

172. *Id.* at 562-69.

173. *Id.* at 563.

174. *Metro Broadcasting, Inc.*, 497 U.S. at 569. Instead of attempting to rationalize policy reasons for adopting this intermediate level of scrutiny, the Court justified the application of this choice by reference to *Fullilove*. Landsberg, *supra* note 1, at 1287.

175. *Metro Broadcasting, Inc.*, 497 U.S. at 602-03 (O'Connor, J., dissenting).

176. *Id.* at 631 (O'Connor, J., dissenting). "In sum, *Metro Broadcasting* reveals a fundamental difference in how the members of the Court think." Haggard, *supra* note 72, at 82. One side "thinks in terms of racial and ethnic groupings, and of insuring that a proportionately equal share of society's goods go to each of these groups." *Id.* The other side "thinks in terms of individuals whose identifying characteristics relate to each individual's unique merit and worth, and of insuring that government does not allocate its benefits on any other basis, particularly on the basis of race." *Id.* These "two views sharply divide the court [a]nd the disagreement will not be resolved through arguments over the proper level of scrutiny, the

O. *Shaw v. Reno*<sup>177</sup>—Decided 1993 (5-4 Decision)

In *Shaw*, the North Carolina legislature, in an attempt to comply with the Voting Rights Act of 1965, submitted to the Attorney General a revised reapportionment plan, which included two majority black districts.<sup>178</sup> Five North Carolina residents filed an action seeking a declaratory judgment that the State created an unconstitutional racial gerrymander in violation of the Fourteenth Amendment Equal Protection Clause.<sup>179</sup> The United States District Court for the Eastern District of North Carolina held that the district court lacked subject matter jurisdiction over the federal defendants,<sup>180</sup> that the defendants failed to state an equal protection claim because favoring minority voters was not discriminatory in the constitutional sense,<sup>181</sup> and that the reapportionment plan did not lead to proportional underrepresentation of white voters statewide.<sup>182</sup>

The United States Supreme Court, in an opinion written by Justice O'Connor, who was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, reversed the judgment of the district court.<sup>183</sup> The majority held that plaintiffs stated a claim under the Equal Protection Clause by alleging that the reapportionment plan was so irrational on its face, that it could only be understood as an effort to segregate voters into separate voting districts because of their race and because the separation lacked sufficient justification.<sup>184</sup> Moreover, classifying citizens by race warranted a different equal protection analysis from cases considering whether multi-member districts and at-large voting systems violated the Equal Protection Clause by diluting a minority group's voting strength, because racial classification threatened special harms that were not present in the vote-dilution cases.<sup>185</sup> Finally, if the voters' allegation of racial gerrymandering remained uncontradicted on remand, the district court would be required to determine

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distinction between state and federal action, the significance of obscure precedents, or the existence of necessary factual predicates." *Id.* at 82–83.

177. 509 U.S. 630 (1993).

178. *Id.* at 633. North Carolina's original reapportionment plan, which contained one black district, was rejected by then Attorney General Janet Reno because the legislature could have created a second district with a majority of minority-group voters with lines no more irregular than those of other districts in the plan, but the state had declined to do so for pretextual reasons. *Id.* at 635 (quoting App. To Brief for Federal Appellees 10a–11a).

179. *Id.* at 636–37.

180. *Id.* at 637.

181. *Id.* at 638–39.

182. *Id.*

183. *Shaw*, 509 U.S. at 632, 636. Justice Thomas, appointed by President Bush, took the Judicial Oath of Office on October 23, 1991.

184. *Id.* at 641–42.

185. *Id.* at 649–50.

whether the plan was narrowly tailored to further a compelling governmental interest.<sup>186</sup>

Justice White, joined by Justices Blackmun and Stevens, dissented and argued that in order for plaintiffs' complaint, which claimed the reapportionment plan carved out districts on the basis of race, to state a claim under the Fourteenth Amendment there had to be an allegation of discriminatory purpose and effect.<sup>187</sup> Even assuming that the state's admitted intent to improve minority group prospects of electing candidates of their choice constituted a discriminatory purpose, plaintiffs have not alleged the requisite discriminatory effect, given that under the state's reapportionment plan, whites still constituted a voting majority in eighty-three percent of the twelve congressional districts.<sup>188</sup> Thus, according to the dissenters, there was no need for a remand, even under the Court's approach, because the state's plan was precisely tailored to meet the Attorney General's objection to the prior plan.<sup>189</sup>

Justice Blackmun also argued that because the intent of the redistricting plan was not to deny a particular group access to the political process or to minimize the group's voting strength unduly, the conscious use of race in redistricting failed to violate the Equal Protection Clause.<sup>190</sup> Justice Stevens argued that the Constitution does not impose a requirement of contiguity or compactness on how states could draw their electoral districts.<sup>191</sup> Furthermore, the Equal Protection Clause does not prevent a state from drawing district boundaries for the purpose of facilitating the election of a member of an identifiable group of voters, even when the favored group is defined by race, and remains underrepresented in the state legislature, therefore lacking power over the electoral process.<sup>192</sup>

Dissenting separately, Justice Souter argued that there was a general requirement under Supreme Court cases that in order to obtain relief under the Fourteenth Amendment with respect to electoral districting, the purpose and effect of the "districting must be to devalue the effectiveness of a voter compared to what, as a group member, [the voter] would otherwise be able to enjoy."<sup>193</sup> Moreover, Justice Souter argued that there was no "need for further searching scrutiny once it had been shown that a given districting

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186. *Id.* at 653.

187. *Id.* at 658–60 (White, J., dissenting).

188. *Id.* at 666–67 (White, J., dissenting).

189. *Shaw*, 509 U.S. at 674–75 (White, J., dissenting).

190. *Id.* at 676 (Blackmun, J., dissenting).

191. *Id.* at 676–77 (Stevens, J., dissenting).

192. *Id.* at 678 (Stevens, J., dissenting).

193. *Id.* at 684 (Souter, J., dissenting). Justice Souter was appointed by President Bush and took the Judicial Oath of Office on October 9, 1990.

decision" fell within one of the common categories of dilutive practices.<sup>194</sup> According to Justice Souter, "[t]he Court offer[ed] no adequate justification for treating the narrow category of bizarrely-shaped-district claims differently from other districting claims."<sup>195</sup>

P. *Adarand Constructors, Inc. v. Pena*<sup>196</sup>—Decided 1995 (5-4 Decision)

*Adarand* involved the federal government's subcontractor compensation clause, which gave prime contractors financial incentives to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals and required the contractor to presume that such individuals include minorities or any other individuals found to be disadvantaged by the Small Business Administration.<sup>197</sup> Plaintiff, *Adarand Constructors, Inc.*, who submitted the lowest bid on the subcontract but was not certified as a small business, filed suit claiming that the race-based presumptions used in the subcontractor compensation clause violated the equal protection component of the Fifth Amendment Due Process Clause.<sup>198</sup> The United States District Court for the District of Colorado granted summary judgment in favor of defendants on the grounds that the case was controlled by *Fullilove* and *Metro Broadcasting*, mandating intermediate scrutiny, rather than *J. A. Croson Co.*, mandating strict scrutiny.<sup>199</sup> The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court, agreeing that the appropriate standard of review was intermediate scrutiny.<sup>200</sup>

On certiorari, the United States Supreme Court vacated the judgment of the Tenth Circuit.<sup>201</sup> Justice O'Connor, who was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia, held that for purposes of determining the validity of all classifications based explicitly on race imposed by federal, state, or local governments under the equal protection component of the Fifth Amendment Due Process Clause and under the Fourteenth Amendment Equal Protection Clause, the appropriate standard of review is strict scrutiny.<sup>202</sup> Thus, according to the majority, *Metro Broad-*

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194. *Id.* (Souter, J., dissenting).

195. *Shaw*, 509 U.S. at 684 (Souter, J., dissenting).

196. 515 U.S. 200 (1995).

197. *Id.* at 204. While the record did not reveal how the company obtained its certification, it could have been by one of three ways: under one of two Small Business Association programs known as the 8(a) and 8(d) programs or by a state agency under relevant Department of Transportation regulations. *See id.* at 204-08.

198. *Id.* at 210.

199. *Id.*

200. *Id.*

201. *Id.* at 204-05.

202. *Adarand Constructors, Inc.*, 515 U.S. at 202-03, 227, 235.

*casting* was overruled to the extent that it disagreed with the strict scrutiny standard of review.<sup>203</sup> Nevertheless, according to Justice O'Connor, who was joined by Chief Justice Rehnquist and Justices Thomas and Kennedy, the government is not disqualified from acting in response to the persistence of both the practice and the lingering effects of racial discrimination against minority groups when race-based action is necessary to further a compelling interest and is within constitutional constraints, which requires “narrow tailoring” of any such action.<sup>204</sup>

Justice Scalia, concurring in part and in the judgment, argued that to allow the government to discriminate on the basis of race is improper under the Constitution, as there can never be a creditor or debtor race; thus, according to Justice Scalia, it is also improper “[t]o pursue the concept of racial entitlement—even for the most admirable and benign of purposes.”<sup>205</sup> Justice Thomas, also concurring in part and in the judgment, argued that “there is a moral [and] constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality,” even though such benefit programs may have been motivated by good intentions.<sup>206</sup>

Justices Stevens, Ginsburg, Souter, and Breyer dissented.<sup>207</sup> Justice Stevens, joined by Justice Ginsburg, argued that while a court should be suspicious of governmental decisions that rely upon racial classifications, there are significant differences “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.”<sup>208</sup> Moreover, there is a difference between a decision by Congress to adopt an affirmative action program and such a decision by state or local government to do the same.<sup>209</sup> Justice Souter, joined by Justices Ginsburg and Breyer argued that there are certain circumstances where the government, consistent with the Constitution, may adopt programs aimed at remedying the effects of past invidious discrimination.<sup>210</sup> Therefore, the Supreme Court should not have entertained the question whether any standard below strict scrutiny should be applied.<sup>211</sup> Justice Ginsburg, joined by Justice Breyer, argued that Congress has the authority to act affirmatively to not only end

203. *Id.* at 227.

204. *Id.* at 237.

205. *Id.* at 239 (Scalia, J., concurring in part and in the judgment).

206. *Id.* at 240 (Thomas, J., concurring in part and in the judgment) (citation omitted).

207. *Id.* at 242, 264, 271 (Stevens, J., Souter, J., Ginsburg, J., dissenting). Justices Ginsburg and Breyer were appointed by President Clinton and took the Judicial Oath of Office on August 10, 1993 and August 3, 1994, respectively.

208. *Adarand Constructors, Inc.*, 515 U.S. at 242–43 (Stevens, J., dissenting).

209. *Id.* at 244–64 (Stevens, J., dissenting).

210. *Id.* at 270 (Souter, J., dissenting).

211. *Id.* (Souter, J., dissenting).



racial discrimination, but also to counteract discrimination's lingering effect.<sup>212</sup> Moreover, all dissenting Justices agreed that the majority misapplied the doctrine of stare decisis and thus, *Fullilove* controlled.<sup>213</sup>

As demonstrated by the cases, the issue of whether affirmative action programs are appropriate remedies under Titles VI or VII or the Fifth or Fourteenth Amendments is an issue that divides the Court today as much as it did over twenty-five years ago. Some argue whether the programs should be enacted at all, other argue to what extent the programs should be allowed. Amidst all of this arguing, there seems to be no room to agree to disagree.

### III. THE DEBATE: REMEDYING PAST DISCRIMINATION OR PUNISHING THE INNOCENT? ADOPTION OF A GROUP OR INDIVIDUAL APPROACH

*Americans rally around the Constitution, while disputing its meaning, so too with the anti-discrimination principle. . . . The stated fear of . . . [one] wing is that the failure to follow such measures will revive the effects of Plessey. The stated fear of . . . [another] wing is that race-conscious, group based measures will revive the effects of Plessey.*<sup>214</sup> *[M]aybe all arguments can be understood only with reference to what they are reacting against[?]*<sup>215</sup> *The search for a common definition of the antidiscrimination principle must address both these fears.*<sup>216</sup>

The legal and sociological debate surrounding affirmative action centers around two concepts: affirmative action as a remedy for past discrimination<sup>217</sup> and affirmative action as a form of discrimination.<sup>218</sup>

[D]ecision makers who adopt a [sex blind or] 'colorblind' interpretation of the Equal Protection Clause are likely to do so based on the view that [sexism and] racism is on the decline in the United States; adjudicators who adopt constitutional norms more favorable to [gender-conscious or]

212. *Id.* at 271-76 (Ginsburg, J., dissenting).

213. *See id.* at 242-76 (Stevens, J., Souter, J., Ginsburg, J., dissenting).

214. Landsberg, *supra* note 1, at 1335.

215. Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 317 (1988).

216. Landsberg, *supra* note 1, at 1335.

217. *See* T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 329 (1992); Paul Brest, *Affirmative Action and the Constitution: Three Theories*, 72 IOWA L. REV. 281 (1987); Brooks, *supra* note 23; Freeman, *supra* note 215; Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Patterson, *supra* note 22.

218. *See* Ken Feagins, *Affirmative Action or the Same Sin?*, 67 DENV. U. L. REV. 421, 422 (1990); Haggard, *supra* note 72.

color-conscious remedies probably see a far greater degree of [gender and] racial inequality in American society.<sup>219</sup>

This section shall examine both views.

The question of whether a court should adopt an individual or group approach to rights when examining affirmative action programs and other remedies to combat racism or sexism, is very much at the heart of the debate surrounding affirmative action.<sup>220</sup> An individual approach to rights is derived mainly from western "notions of liberty" that describe the relationship between individuals and the state during the secularization of natural law jurisprudence in Europe.<sup>221</sup>

In the natural law tradition, all organized society, including the state, represents a compact among the people by which the people delegate some of their sovereign prerogatives and autonomy to the state in exchange for the peace, security, and personal well being established by the organized society. Thus, conceptually, western thought imagines that the individual antedates the state.<sup>222</sup>

As a result, western thinkers recognize only the right of the individual and sever any group identity of the individual.<sup>223</sup>

219. Aleinikoff, *supra* note 217, at 329.

220. In any debate surrounding the adoption of an individual or group approach to rights, there must be a discussion of whether the rights are to be characterized as negative or positive. Negative rights are described as reflecting the "natural and inherent traits in human beings [such that] the state need only recognize . . . [its] existence and refrain from interfering with . . . [it]." Martha Jackman, *Constitutional Rhetoric and Social Justice: Reflections on the Justiciability Debate*, in *SOCIAL JUSTICE AND THE CONSTITUTION: PERSPECTIVES ON A SOCIAL UNION FOR CANADA* 17 (Joel Bakan et al. eds., 1992). Negative rights are favored for judiciary review because the rights do not require any action on the part of the government to act affirmatively; the government need only refrain from intruding on the free exercise of the right. *See id.*

Positive rights, on the other hand, do "not come into existence automatically upon . . . recognition. Rather[,] the state must act affirmatively to create . . . [the right] or to ensure the conditions necessary for . . . [its] enjoyment." *Id.* Because of this, "positive" rights are "considered highly subjective and imprecise in character" and thus are not justiciable for fear that the "courts will effectively engage in social policy making, a role that is . . . reserved for the legislative branches of government." *Id.*

221. Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 *ARIZ. L. REV.* 739, 740 (1990). This theory, which has been the "dominant fountainhead of [western] thinking about rights and the relationship of the individual to the state[.]" was espoused by Locke, Hobbes, Rousseau, and Rawls. *Id.* at 740-41.

222. *Id.* at 740. According to Clinton, this compact explains why "American and western thought on individual rights . . . [is troubled by] concepts of group, collective, or societal rights within the context of a larger nation-state." *Id.* at 742.

223. "American constitutional jurisprudence has largely abstracted the individual from his or her collective setting." Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Mi-*

Nonwestern thinkers have a contrary perspective of the nature of rights and legal relationships. To nonwestern thinkers, people, as social beings, "never exist isolated from others in some mythic, disorganized state of nature."<sup>224</sup> The individual is "born into a closely linked and integrated network of family, kinship, social, and political relations. . . [which becomes] part of one's personal identity [and these] rights and responsibilities exist only *within* the framework of such familial . . . [and] social networks."<sup>225</sup> Thus, nonwestern thinkers "naturally think of their rights as part of a group."<sup>226</sup> "The justice of any system . . . allocat[ing] rights and resources can be measured by a variety of yardsticks[;] . . . in [predominant western] legal thought, this yardstick has been the individual."<sup>227</sup> However, the rights of minorities, women, and other classes of people dealing with the after effects of discrimination "can be conceived either as individual rights or as collective [group] rights pertaining to the group as a whole."<sup>228</sup> Nevertheless,

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norities, 30 COLUM. HUM. RTS. L. REV. 249, 254, 259 (1999). For example, consider organized religious groups and an individual's freedom of religious expression:

While organized religious groups constitute groups that might presumably seek *group* protection for the religious autonomy, American law recognizes only the right of the *individual* adherent to the free exercise of his or her religion. While organized churches might sue to vindicate religious autonomy from state regulation, American domestic law only permits an organized church to proceed through litigation on the theory that it represents religious adherents' individual rights to the free exercise of religion . . . [Thus,] first amendment law in the United States would require the members of . . . [a] church to sue for infringement of their individual rights of religious observance, or, maybe, first amendment law would permit the Church, to sue as an organized religious association, to enforce its members' *individual* rights to religious autonomy. In most western conceptions those rights are held by the individual, not by the religious group seeking autonomy *as a group* . . . .

Clinton, *supra* note 221, at 741 (emphasis in original).

224. Clinton, *supra* note 221, at 742.

225. *Id.*

Such notions of group and communal relationship rights derive from basic principles of mutual respect and respectful behavior within and between kinship and tribal groups. Thus, an individual's right to autonomy is not a right against organized society, . . . but a right one has because of one's membership in the family, kinship[,] and associational webs of the society.

*Id.*

226. *Id.* "Certain rights exist within each social group and other rights and responsibilities are attendant to their relations with members of other groups within the web of associations that form . . . the state. For them, the . . . state is merely composed of interlinked group associations and affiliations." *Id.*

227. Patterson, *supra* note 22, at 783.

228. Rosenfeld, *supra* note 223, at 254 (suggesting a pluralist approach as the remedy for examining the rights of minorities).

American law has chosen to recognize only the individual's rights<sup>229</sup> and as might be expected, a tension is created.<sup>230</sup>

Most proponents of affirmative action favor a group approach to rights.<sup>231</sup> This means that individuals benefiting from an affirmative action program do not have to show that they were the actual victims of discrimination by the entity adopting the affirmative action program.<sup>232</sup> It is suffi-

229. *Id.* at 259. "A survey of the constitutional landscape in the United States reveals an overwhelmingly, if not exclusively liberal, individualistic approach to . . . rights [demonstrating that] American constitutional jurisprudence has largely abstracted the individual from his or her collective setting." *Id.* For example, consider the following:

A public declaration falsely accusing an individual of being dishonest is more injurious, according to . . . [American constitutional law], than labeling an entire ethnic or religious group as dishonest. Moreover, the principal reasons for this discrepancy are that individual slander is usually much more believable than group slander and that even if it happens to be widely believed, group defamation has a much more diffuse effect on individual members of the defamed group than individual defamation has on its lone victim.

*Id.* at 261. Nevertheless, points out Rosenfeld,

[S]ustained group defamation may convince the general population that members of the targeted group are likely—and certainly more likely than fellow citizens who do not belong to the group—to be dishonest. This can result in pervasive employment, social, and political discrimination against members of the targeted group, thus producing individual injuries on account of group affiliation. . . . [B]y abstracting the individual from his or her group in the context of defamation, American free speech jurisprudence denies individual protection to certain victims of group defamation who are, for all relevant purposes, equally situated with others who are accorded such individual protection.

*Id.* at 261–62.

230. *Id.* at 254, 260. Rosenfeld demonstrates this tension:

[A] constitutional regime based on individual rights looms as inadequate for purposes of protecting group autonomy, self-government, and survival; conversely, a constitutional regime that relies on group rights appears incapable of affording sufficient protection to minorities within a minority or to non-conforming or dissident individuals within the protected group. . . . [Moreover] it severely limits individual rights by ignoring individual interests deriving from group affiliation.

*Id.*

231. See Patterson, *supra* note 22. The individualistic approach to group rights isolates the individual and makes him stand alone by placing "the burden on the victim to realize that he has a legally compensable grievance, hire and pay an attorney and then proceed the lengthy and expensive process of a lawsuit." *Id.* at 785. Patterson finds the

fact that the litigant stands alone flies in the face of any realistic understanding of the nature of discrimination. . . . [for] [i]nsidious discrimination is founded upon erroneous stereotypes which are used to deny a person a wide range of social benefits and resources for no other reason than membership in a certain group.

*Id.* Patterson also believes that a "highly individualized approach to justice also gives short shrift to an essential aspect of human beings as social creatures who live in an interdependent society." *Id.* at 786.

232. See *id.*

cient to be a member of the discriminated class.<sup>233</sup> This approach assumes that members of the discriminated class, simply by virtue of their membership in that particular class, either already have or will in the future experience discrimination; thus actual proof of individual discrimination is unnecessary.<sup>234</sup> According to those proponents, affirmative action programs are fair and necessary tools for the equality of all individual Americans.<sup>235</sup>

Proponents of affirmative action rationalize their claims in a variety of ways, the most common of which is that non-minorities have benefited from injustices done to minorities, thus negating any claim of innocence.<sup>236</sup> Moreover, these proponents argue that any discrimination suffered by non-minorities is not intentional, but it is society rationing its limited resources.<sup>237</sup>

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233. See *id.* at 796 (commenting that “[i]t is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, have managed to escape the impact”) (footnote omitted).

234. See Brooks, *supra* note 23, at 354–57 (noting that “[t]he affirmative action candidate is more qualified if he or she has had to overcome psychological and social obstacles (societal disadvantages) because of race or sex to get to a point of being able to compete with white male candidates on roughly equal grounds”); Patterson, *supra* note 22, at 789 (arguing that “racial discrimination as it exists today is so pervasive that individualistic approaches to justice are insufficient to correctly respond to the problem”).

235. See Brest, *supra* note 217, at 285 (commenting that “the overall aim of affirmative action is to address the problem of a perpetual racial [and gender] underclass [and] it is too early in our history . . . to forbid racial [and gender]-based remedies as a matter of constitutional law”); Brooks, *supra* note 23, at 357 (arguing that “affirmative action reverses institutional and individual discrimination in the selection process . . . by mandating a degree of race- or sex- consciousness that has the effect of canceling out institutional . . . and individual discrimination by placing minorities and females in . . . positions . . . to cancel out or counteract such discrimination”).

236. See Brooks, *supra* note 23, at 365 (noting that “white male candidates may not bear any responsibility for past societal discrimination, but they certainly have benefited from the effects of such discrimination,” for there can be no doubt that “the elimination of minorities and females as competitors in the past has resulted in a higher proportion of desirable jobs that are more readily available to white males today [and thus] white males of today enjoy greater seniority, pension benefits, and experience than minorities or females”); Patterson, *supra* note 22, at 798 (commenting that “though white males may not have individually wronged women and blacks, they have profited by wrongs done to those groups by the community”). See also Brest, *supra* note 217, at 283 (suggesting that under one view there is no cause of action for claims of reverse discrimination by white males because “reverse discrimination was not within the cognizance of the [E]qual [P]rotection [C]lause and therefore does not state a constitutional claim”); Hasnas, *supra* note 3, at 434–36 (explaining that under the Anti-Oppression Principle interpretation of the Equal Protection Clause, it is inaccurate to describe affirmative action as reverse discrimination because it does not treat individuals unequally with the intent to oppress).

237. See Kennedy, *supra* note 217, at 1336 (arguing that the “injury suffered by white victims of affirmative action does not properly give rise to a constitutional claim, because the damage does not derive from a scheme animated by racial prejudice;” rather “this diminished

Opponents of affirmative action favor an individual approach to rights.<sup>238</sup> Thus, the only persons who may benefit from affirmative action programs are those who are actual victims of that particular defendant's discriminatory acts.<sup>239</sup> Affirmative action programs benefiting anyone else are discriminatory against innocent members of society.<sup>240</sup> The stance of affirmative action opponents is that all racial classifications are unconstitutional violations of the Equal Protection Clause<sup>241</sup> and may even perpetuate existing stereotypes about women and minorities.<sup>242</sup> These arguments, while

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opportunity is simply an incidental consequence of addressing a compelling societal need: undoing the subjugation of the Negro . . . [thus] whites are excluded because of a rational calculation about the socially most beneficial use of limited resources"): *see also* Brest, *supra* note 217, at 283 (noting that "[w]hen a legislature or government agency acts to advantage a discriminated-against minority at the expense of everyone else, it is not singling out some other minority group to be dispreferred;" but merely "discriminating against everybody else in society except for a few particular minority groups"); Brooks, *supra* note 23, at 362 (suggesting that "affirmative action is not unfair to a rejected white male because, in reality, it merely places him on roughly equal footing with competing minorities and females").

238. *See* Haggard, *supra* note 72, at 84–85 (advocating "victim-specific relief" and arguing that "an affirmative action actor is privileged to 'remedy' only the prior discrimination of that actor, or someone for whom the actor is responsible, but not the prior discrimination for society as a whole;" the "notion of non-victim specific 'remedial' affirmative action makes sense only if you assume that the original wrong was against 'the group' and that the later remedy is for 'the group's' benefit"); *but see* Landsberg, *supra* note 1, at 1305 (stating that "discrimination is group based, yet it falls on individuals").

239. *See* Feagins, *supra* note 218, at 451 (referring to a group approach as a "misguided polic[y] of group entitlements"); Haggard, *supra* note 72, at 85 (arguing that "[t]he beneficiaries of affirmative action, or the defendant employer on their behalf, should be required to make some showing that they were likely or probable victims of the prior discrimination, as evidenced by the statistics"). This view is quite opposite from proponents of affirmative action, who favor a presumption that racial minorities and females have already been discriminated against by virtue of the fact that they are members of a class or group that has been historically discriminated against. *See supra* notes 231–37 and accompanying text.

240. *See* Feagins, *supra* note 218, at 441, 448 (referring to affirmative action policies as sanctioning "the race- and sex-based policy of robbing Peter to pay Paul (and Paula)" and embodying "the notion of preferential treatment of minorities and women as groups, rather than equal opportunity for all individuals").

241. *See id.* at 422 ("discrimination on the basis of race or sex is *unconstitutional* because it violates the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment . . . [and] 'affirmative action' is the 'samesin'—the continuation an propagation of 'separate but equal' race- and sex-consciousness").

242. *See id.* at 449 (rejecting the "presumption that every minority or woman is disadvantaged due to 'societal discrimination'" and arguing that "[i]n our society . . . minorities, like white males, occupy a wide-range of socio-economic levels"); Haggard, *supra* note 72, at 52 (arguing that "preferential treatment continues rather than cures the problems of discrimination, in that it reinforces the false but stereotypical notion that women, Blacks, and other minorities, being innately inferior, cannot obtain positions of importance in any other way"). One proponent directly rejects this view. *See generally* Kennedy, *supra* note 217, at 1330–34.

persuasive, fail to recognize the disparate treatment of racial classifications in criminal law or the disparate treatment of racial classifications as opposed to gender classifications, as discussed below.

#### IV. DISPARITY OF TREATMENT OF GENDER AND RACE IN REVERSE DISCRIMINATION CLAIMS

*It is interesting to note that the debate over gender preferences appears to have dissipated over time, while the intensity of the discussion regarding racial preferences has escalated.*<sup>243</sup>

The state of constitutional law in all discrimination claims reveals a disparity in the treatment of race and gender.<sup>244</sup> Racial classifications are considered "suspect" and thus, subjected to a higher level of scrutiny—namely strict scrutiny.<sup>245</sup> Gender classifications, while "suspect," are not subjected to "strict scrutiny," but rather, an intermediate scrutiny level of review.<sup>246</sup> Thus, courts will subject classifications based on race to a higher level of scrutiny than classifications based on gender, and this difference results in greater protection for affirmative action programs making classifications based on gender than for affirmative action programs making classifications based on race.<sup>247</sup>

Gender classifications aimed at remedying the effects of past discrimination against women, and arguably those that also create greater gender diversity, can withstand constitutional challenges under the Fifth and Four-

243. Constance Hawke, *Reframing the Rationale for Affirmative Action in Higher Education Admissions*, 135 EDUC. L. REP. 1, 2 (1999).

244. This article only analyzes three cases challenging an affirmative action program for women; the first was challenged on constitutional grounds, the other two were challenged on Title VII grounds. *See generally* Califano v. Webster, 430 U.S. 313 (1977) (social security scheme passes constitutional muster); Cal. Sav. & Loans Ass'n v. Guerra, 479 U.S. 272 (1987) (no violation of Title VII); Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616 (1987) (no Title VII violation).

245. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (affirmative action programs benefiting minorities subject to strict scrutiny). *See also* Brooks, *supra* note 23, at 342–45 (discussing standard of scrutiny for classifications based on race in reverse discrimination claims).

246. *See* Califano, 430 U.S. at 316–17 (affirmative action programs benefiting women subject to intermediate scrutiny). *See also* Brooks, *supra* note 23, at 345–48 (discussing standard of scrutiny for classifications based on gender in reverse discrimination claims).

247. This appears to make sense for under current constitutional jurisprudence, classifications based on gender must serve an important governmental interest and the means used must be substantially related to the achievement of those objectives; on the other hand classifications based on race must serve a compelling governmental interest and the means used must be necessary to the achievement of those objectives. *See* Brooks, *supra* note 23, at 342–48 (comparing standards of proof needed for affirmative action programs benefiting women and those benefiting minorities).

teenth Amendments.<sup>248</sup> Yet the same programs creating a racial classification may not.<sup>249</sup> Such an inequitable result surely was not the framers intent, especially as the original purpose of the Fourteenth Amendment was to prohibit race discrimination.<sup>250</sup> To solve this disparity, if it should even be solved, the same standard of scrutiny should apply to discrimination challenges based on race and sex.<sup>251</sup>

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248. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727–31 (1982) (discussing possibility that the state's scheme may have passed constitutional muster if the state showed past discrimination against women in that particular field); *Califano*, 430 U.S. at 317 (social security scheme not violation of equal protection because it seeks to remedy past effects of discrimination against women). See also Brooks, *supra* note 23, at 348 (comparing disparity in reverse discrimination claims based on sex and race and noting that "a gender-based classification designed to redress societal discrimination would pass muster under the important governmental ends test").

249. See *J.A. Croson Co.*, 488 U.S. at 511 (affirmative action program seeking to remedy effects of past discrimination against minorities insufficient to past constitutional muster). See also Brooks, *supra* note 23, at 344 (discussing *Croson* and noting that "the desire to redress the present effects of past societal discrimination can never be a compelling governmental reason for racial discrimination").

250. See *Strauder v. West Virginia*, 100 U.S. 303, 305–08 (1879), *abrogated by Taylor v. Louisiana*, 492 U.S. 522 (1975) (the Fourteenth Amendment Equal Protection Clause was designed to prohibit legal burdens based on race).

Future affirmative action cases will . . . have to grapple with a . . . serious problem of constitutional interpretation created by . . . Supreme Court affirmative action opinions . . . [t]o the extent that gender-based affirmative action programs are easier to defend than race-based affirmative action programs under the equal protection clause . . . [which is] a bizarre state of affairs . . . [because] [f]emales and minorities will receive *unequal* treatment under the equal protection clause, with females enjoying *better* treatment than . . . [minorities], the intended primary beneficiary group of the equal protection clause).

Brooks, *supra* note 23, at 350. Compare *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (classifications discriminating against minorities based on race receive strict scrutiny), with *Craig v. Boren*, 429 U.S. 190, 197 (1976) (classifications discriminating against women based on gender receive intermediate scrutiny).

251. This would mean examining racial classifications under intermediate scrutiny or examining gender classifications under strict scrutiny. See Brooks, *supra* note 23, at 350 (arguing that "[m]erging constitutional . . . standards into a single standard of permissibility that would govern all . . . affirmative action programs is one sure way to resolve the parity problem[,] however, noting that "the Supreme Court . . . has firmly rejected the concept of merger").



# V. DISPARITY OF TREATMENT OF RACE IN REVERSE DISCRIMINATING CLAIMS AND RACIAL PROFILING

*Although the public, . . . and the Court have embraced nondiscrimination as an abstract principle, Plessey showed it was possible to pay lip service to nondiscrimination while sanctioning oppression of people.*<sup>252</sup>

Many Supreme Court Justices opposing affirmative action programs argue that “[i]f laws are of general applicability, [then] no one can be singled out because of race”,<sup>253</sup> however, those same Justices approve of a law enforcement tactic called “racial profiling,” which does just that by singling out people on the basis of race because of the belief that those persons are more likely to commit a criminal offense. “The problems with racial profiling, known all too well by many, are finally being discussed openly in the media and other forums.”<sup>254</sup> Racial profiling is the controversial practice used by many law enforcement divisions of establishing specific physical and cultural or ethnic characteristics to target and apprehend suspects of criminal activity.<sup>255</sup> Race is one such “characteristic” used, and with the approval of the United States Supreme Court.<sup>256</sup>

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252. Landsberg, *supra* note 1, at 1335. Much of the discussion can be attributed to the fact that “[g]roups of citizens are now bringing civil suits against police departments for alleged . . . singling out [of] blacks or Hispanic[s] . . . for discriminatory enforcement of . . . the traffic laws or for random stops without reasonable suspicion to investigate drug-trafficking.” Stephen C. Thaman, *Is America a Systematic Violator of Human Rights in the Administration of Criminal Justice?*, 44 ST. LOUIS U. L.J. 999, 1008 (2000).

253. Wesley M. Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1435 (2000).

254. Camille Knight, *The Realities of Racial Profiling: Broad Interpretations of High Court Decisions Lead to Fourth Amendment Abuses*, 15 CRIM. JUST. 22, 23 (2000). See also Gail Russell Chaddock, *Debate Over Racial Profiling Intensifies on the Hill*, Oct. 2, 2001, at [www.csmonitor.com/2001/1004.p2s2-uspo.html](http://www.csmonitor.com/2001/1004.p2s2-uspo.html) (last visited Jan. 22, 2003) (detailing senate debates on racial profiling); Bill Dedman, *Traffic Citations Reveal Disparity in Police Searches*, BOSTON GLOBE, Jan. 6, 2003, at [www.boston.com/dailyglobe2/008/metro/Task\\_force\\_to\\_review\\_state\\_data\\_on\\_traffic\\_stops](http://www.boston.com/dailyglobe2/008/metro/Task_force_to_review_state_data_on_traffic_stops) (last visited Jan. 22, 2003) (detailing results of metro Boston data collection effort to discover extent of alleged racial profiling); Bill Dedman, *Task Force To Review State Data on Traffic Stops*, Jan. 8, 2003, BOSTON GLOBE, at [www.boston.com/dailyglobe2/008/metro/Task\\_force\\_to\\_review\\_state\\_data\\_on\\_traffic\\_stops](http://www.boston.com/dailyglobe2/008/metro/Task_force_to_review_state_data_on_traffic_stops) (last visited Jan. 22, 2003) (reporting on task force created in metro Boston area aimed at exploring “the causes of racial disparities in traffic tickets and vehicle searches”).

255. Racial profiling is also described as “any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been engaged in criminal activity.” DEBORAH RAMIREZ ET AL., A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEM 3 (U.S. Dept. Justice 2000); see also Peter Siggins, *Racial Profiling in an Age of Terrorism*, at [www.scu.edu/ethics/publicatons/ethicalperspec-](http://www.scu.edu/ethics/publicatons/ethicalperspec-)

"Driving while black" is a term coined by civil rights advocates to indicate racial profiling of African Americans. But in recent years, "flying while Arab" has entered the vocabulary.<sup>257</sup> Described as "the dark side of America's war on terrorism,"<sup>258</sup> one news source has reported approximately 200 incidents of profiling at airports since the attacks in New York City and Washington D.C. on September 11, 2001.<sup>259</sup> Moreover, the Department of Justice has proposed new legislation that seeks to increase the scope and breadth of investigations aimed at targeting America's Arab communities.<sup>260</sup> The most surprising aspect of this new practice is that it has apparently found much support among many Americans, even those in the African-American community.<sup>261</sup>

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tives/profiling.html (last visited Jan. 22, 2003) (describing racial profiling as "government activity directed at a suspect or group of suspects because of their race, whether intentional or because of the disproportionate numbers of contacts based upon other pre-textual reasons"). This "profile is based on a compilation of characteristics derived from research and experience that serve[s] as a reasonable indication that an individual is involved in criminal activity." Adero S. Jernigan, *Driving While Black: Racial Profiling in America*, 24 LAW. & PSYCHOL. REV. 127, 129 n.20 (2000) (quoting John Gibeaut, *Marked for Humiliation*, A.B.A. J. 46 (1999)).

256. See *United States v. Sokolow*, 490 U.S. 1, 8–9 (1989) ("[i]n evaluating the validity of a stop . . . we must consider 'the totality of the circumstances—the whole picture'" thus, while race cannot be the only factor in detaining an individual, it can be one of them).

257. Niraj Warikoo, *Racial Profiling: Muslims and Arab Americans See Their Civil Rights Eroded*, DET. FREE PRESS, Oct. 24, 2001, at [http://www.freep.com/news/nw/terror2001/arab24\\_20011024.htm](http://www.freep.com/news/nw/terror2001/arab24_20011024.htm) (last visited Jan. 22, 2003) ("[t]he U.S. government has locked up hundreds of Arab Muslim men in connection with the terrorism investigation; some who have been held don't know the charges against them").

258. Thomas Ginsberg, *Profiling Charged on Nightmare Flight*, PHIL. ENQUIRER, Sept. 19, 2002, at <http://www.philly.com/mld/inquirer.4102992.htm>. (last visited Jan. 22, 2003) (stating "[i]n our haste to protect ourselves, we are literally turning on each other"). See also Andrew Gumbel, *Fears of Witch-hunt as Police Question Arab Men*, Nov. 28, 2001, at <http://news.independent.co.uk/world/americans/story.jsp?story=107156>. (last visited Jan. 22, 2003) (noting that "young Middle Eastern men in the Detroit area were sent letters . . . asking them to set up 'interviews' with the police to relay any information they may have about terrorism or the terrorist sympathies of friends").

259. Donna Leinwand, *Lawsuits Accuse Airlines of Profiling Men Who Appear To Be Arabs Barred from Flights—ACLU Says*, USA TODAY, Jun. 4, 2002, at 10A (describing lawsuits involving "men who appear to be of Arab descent and who had been cleared through security but were removed from flights or denied boarding").

260. See Warikoo, *supra* note 257 (noting that antiterrorism bill "would make it easier for the government to wiretap and search homes without the owner knowing about it, allow the CIA to spy on citizens, and broaden the definition of a terrorist").

261. Leela Jacinto, *Flying While Arab*, Aug. 14, 2002, at <http://www.abcnews.go.com/sections/world/DailyNews/visa020814.html> (last visited Jan. 22, 2003) (noting recent Zogby International poll that found "60 percent of blacks favored a policy that singles out Arab-Americans for special scrutiny at airport check-in counters"); Stuart Taylor, Jr., *The Case for Using Racial Profiling at Airports*, Sep. 25, 2001, at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm> (last visited Jan. 22, 2003) ("If you were boarding an airplane, wouldn't you want authorities to scrutinize Arab passengers?"); but see Niraj

Challenges to racial profiling brought under the Equal Protection Clause of the Fourteenth Amendment "are hampered by the burden of proof established by the Court."<sup>262</sup> As the law stands, "[t]o prove such a claim, the plaintiffs must show both disparate impact and discriminatory intent."<sup>263</sup> Statistics proving disparate impact are readily available and clear.<sup>264</sup> Despite this, the relevancy of an officer's discriminatory intent is questionable due to the Court's decision in *Whren v. United States*.<sup>265</sup> Nevertheless, even a plaintiff who proves both elements of the claim may lose due to "the government's 'compelling' interest in drug interdiction [which] justifies subverting civil rights."<sup>266</sup> According to the Court, under Fourteenth Amendment jurisprudence, curtailing drug activity is a compelling governmental interest justifying the use of race as a factor in profiling. Moreover, it appears that a majority of the Justices agree that racial profiling is narrowly

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Warikoo, *Black, Arab-American Leaders Assail Racial Profiling*, DET. FREE PRESS, Jan. 11, 2002, at [http://www.freep.com/news/locway/deport11\\_20020111.htm](http://www.freep.com/news/locway/deport11_20020111.htm) (last visited Jan. 22, 2003) (reporting that "Arab-American and African-American leaders met . . . in Detroit to denounce what they see as racial profiling against Middle Eastern men by the U.S. government"). See also Niraj Warikoo, *Race Bias Checked at Metro Airport*, DET. FREE PRESS, Jun. 5, 2001, at [http://www.freep.com/money/business/narab5\\_20010605.htm](http://www.freep.com/money/business/narab5_20010605.htm) (last visited Jan. 22, 2003) (reporting that the "U.S. Department of Transportation began surveying passengers at Detroit Metro Airport on Monday in an effort to determine whether racial profiling is a problem at . . . airports").

262. Knight, *supra* note 254, at 24.

263. *Id.*

264. *Id.*

265. 517 U.S. 806, 813 (1996) (making racial bias irrelevant when there is probable cause to stop driver, thus the constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved). See also *Id.* at 24. Therefore, an officer may only stop minorities for the exact same offense the officer witnesses white drivers commit. To its credit, the Court did note in *Whren* that the plaintiff should bring his claim of racial bias under the Fourteenth Amendment, not the Fourth Amendment. See *Whren v. United States*, 517 U.S. 806, 813 (1996). However, the Court failed to recognize the procedural bars and heavy burdens of proof those plaintiffs face. Moreover, the Court failed to realize that many discretionary stops by officers with racial biases are merely pretext and that barring evidence gathered as a result of such pretextual stops will act as a greater deterrence to the officer.

Pretext . . . must be at least one reason minorities are disproportionately stopped . . . [for] a pretextual stop flows from an officer's belief that criminal activity is afoot despite the absence of articulable suspicion . . . [and] [a] pretextual stop based on a racial profile stems . . . from a belief that stopping minorities will yield evidence of crime more often than stopping other motorists . . . [thus] [l]imiting an officer's power to benefit from evidence he discovers during a pretextual stop discourages the use of pretextual stops.

Oliver, *supra* note 253, at 1414.

266. Knight, *supra* note 254, at 24. Title VII's standing problems have also hindered plaintiffs who bring claims under Title VII. See *Chavez v. Illinois State Police*, No. 94-C5307, 1999 U.S. Dist. LEXIS 11976 (N.D. Ill. Aug. 2, 1999) (requiring plaintiff to show he will imminently be stopped again in the future to have standing in racial profiling challenge).

tailored to achieve the objective of drug interdiction. On the other hand, remedying the present effects of past racism is not a compelling governmental interest justifying the use of race as a factor in an affirmative action program. Furthermore, it is perceived that any affirmative action program using racial classifications is not narrowly tailored to achieve the objectives of curing past racial discrimination.

The Supreme Court has yet to address the disparity of the use of race in affirmative action programs and racial profiling. Research has never shown that minorities are more likely to be involved in criminal activity.<sup>267</sup> On the other hand, studies certainly have shown that minorities are more likely to be victims of racial discrimination, especially in the area of criminal law enforcement.<sup>268</sup> Yet, the use of race in affirmative action schemes is given

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267. Nevertheless,

our country has historically associated crime with race, and still does today. African-Americans are often viewed as being out of control and as possibly dangerous. There is a commonly held belief that they tend to commit more crime and thus police are justified in targeting African-Americans as opposed to other groups. Many feel that the focus of the police should be aimed at preventing black crime against white victims because of the dangerous nature of African-Americans.

Jennifer A. Larrabee, "*DWB (Driving While Black)*" and *Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291, 326 (1997).

268. For example, "a . . . study by the Associated Press revealed that African American drivers are four times as likely to be stopped by police along sections of Interstate 95 in Maryland than other drivers." Larrabee, *supra* note 267, at 292-93.

In New Jersey, 75% of drivers stopped for investigation on portions of the New Jersey Turnpike are African-Americans and Latinos, yet this group only makes up 13.5% of the annual drivers on the Turnpike. Minority drivers traveling through the suburbs of Texas' major cities are twice as likely to receive tickets for traffic violations than are white drivers . . . In one Florida county, 62% of the drivers stopped were minorities, and on an interstate in Colorado, 190 out of 200 stops "targeted minorities."

*Id.* at 296-97. In response, "[a] group of citizens are now bringing civil suits against police departments for alleged 'racial profiling,' that is, singling out blacks or Hispanic Americans for discriminatory enforcement of" violations of criminal statutes. Thaman, *supra* note 252, at 1008. Moreover, "[t]he federal government recently sued the State of New Jersey and the New Jersey State Police for engaging in a well-documented practice of targeting racial minorities in the enforcement of traffic laws on the New Jersey Turnpike." Oliver, *supra* note 253, at 1476. Such claims of racial profiling have also resulted in the granting of at least 17 motions to suppress in New Jersey alone. 66 CRIM. L. REP. 251 (2000). See also Larrabee, *supra* note 267, at 298 nn. 38-39 (detailing other statistics indicating discrimination against minorities by state law enforcement agencies, including: a report comparing the stops of motorists on Interstates 85 and 95 by the State Police Special Emphasis Team, which targeted drug offenses, to stops made by the regular highway patrol showing forty-five percent of charges rendered by the Special Emphasis Team were against African Americans, whereas other troopers working the same highways issued only twenty-four percent of their charges against African-Americans; a report revealing that police use race as a factor in deciding whom to stop on the highway; and a report "revealing that Sheriff Vogel of Volusia County,

the highest level of scrutiny allowable, making it almost impossible to use race as a factor in admissions and employment decisions; conversely, courts often defer to law enforcement agencies by using the totality-of-the-circumstances approach when examining allegations of racial profiling.<sup>269</sup> The Court failed to engage in a least intrusive means inquiry to determine if law enforcement agencies have proof to verify their suspicions,<sup>270</sup> while adopters of affirmative action programs are more likely than not to see their programs perish because of this.<sup>271</sup> Most disturbing is that the intent of an employer or university to consider race as an admissions criterion is, for all intents and purposes, unlawful. Nevertheless, the use of race by a police officer in determining which vehicles to stop for traffic violations is considered to be irrelevant. This applies even if the officer had probable cause to stop several drivers, but intentionally only stopped those drivers against whom the officer had a racial bias.

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Florida instructed his Selective Enforcement team to look for cars in which 'African American and Hispanic motorists were traveling' in the Team's quest for drug busts").

269. By ruling the officer's racial bias irrelevant, the Court in *Whren* refused to recognize the abuses of power that law enforcement officers regularly commit, especially when dealing with minor traffic offenses such as that in *Whren*. See also Jernigan, *supra* note 255, at 132 (arguing *Whren* "leaves too much discretion in the hand of police officers" and noting that "the Court never addressed the petitioners' concern that relying on probable cause in the context of pretextual traffic stops leaves motorists without protection against arbitrary law enforcement").

Given that nearly all motorists commit some traffic offense, even on short trips, the base-line expectation of an ordinary traffic offender is that his liberty and privacy will go undisturbed[; this permits] an officer standardless discretion to determine which of the many traffic offenders to single out, stop, and subject to the indignity of a request to search [which] runs afoul of an Amendment designed to prevent placing 'the liberty of every man in the hands of every petty officer' [and] [a]s the guardians of the people from themselves, the courts must restrain officers' discretion to determine who shall be seized and searched.

Oliver, *supra* note 253, at 1412.

270. See *United States v. Sokolow*, 490 U.S. 1, 10-11 (1989).

271. Should not a university be given the same deference when making admissions decisions? If not, then should the police be allowed to use race as a factor in determining who to arrest? Is it important to imprison blacks and other minorities than to educate them?

# VI. HOPWOOD & THE UNIVERSITY OF MICHIGAN: AWAITING THE SUPREME COURT'S DECISION

*The reconstruction of society is the promise of the Thirteenth, Fourteenth, and Fifteenth Amendments.*<sup>272</sup>

The first Supreme Court case determining the validity of a college or university's affirmative action program was *Regents of University of California v. Bakke*.<sup>273</sup> Since *Bakke*, however, a number of circuit courts have determined the validity of affirmative action programs in institutions of higher education. Until recently, the most controversial of these cases was *Hopwood v. Texas*.<sup>274</sup>

In *Hopwood*, four non-minority applicants who were rejected by the University of Texas Law School brought a lawsuit challenging the university's affirmative action program under the Fourteenth Amendment Equal Protection Clause.<sup>275</sup> The United States District Court for the Western District of Texas entered judgment for the plaintiffs, holding that the University of Texas violated plaintiffs' equal protection guarantees.<sup>276</sup> The district court also held that the university's affirmative action program passed strict scrutiny analysis because there was a compelling governmental interest in creating diversity at the university's law school and Texas's plan was narrowly tailored to meet these objectives.<sup>277</sup>

The United States Court of Appeals for the Fifth Circuit reversed and remanded in part.<sup>278</sup> While the Fifth Circuit agreed that plaintiffs' equal protection rights were violated and strict scrutiny was the appropriate standard of review, the circuit court disagreed with the district court's conclusion that the university's affirmative action plan passed muster under the strict scrutiny analysis.<sup>279</sup> A majority of the Fifth Circuit's panel held that *Bakke's* diversity rationale was not controlling, reasoning that "the Court has accepted the diversity rationale only once in its cases dealing with race[,] and that case, *Metro Broadcasting, Inc.*, was overruled by *Ada-*

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272. Barbara Phillips Sullivan, *The Gift of Hopwood: Diversity and the Fife and Drum March Back to the Nineteenth Century*, 34 GA. L. REV. 291, 346 (1999).

273. 438 U.S. 265, 320 (holding that while the University of California's affirmative action program was invalid and plaintiff was entitled to admission to defendant's medical school, defendant may use race as one of many factors to determine admission to its medical school).

274. 78 F.3d 932 (5th Cir. 1996).

275. *Id.* at 938.

276. *Id.* at 938-39.

277. *Id.* at 941.

278. *Id.* at 962.

279. *Id.* at 944.

*rand*.”<sup>280</sup> Thus, according to the Fifth Circuit, the diversity rational was not a compelling governmental interest, as “[m]odern equal protection has recognized one compelling state interest: remedying the effects of racial discrimination.”<sup>281</sup> Judge Wiener specially concurred and disagreed with the panel’s holding that diversity can never be a compelling governmental interest in an institution of higher learning.<sup>282</sup>

As expected, the Fifth Circuit’s decision in *Hopwood* came under attack by legal scholars because of the three judge panel’s disregard of *Bakke*.<sup>283</sup> Others applauded *Hopwood*’s clear determination that diversity was not a compelling governmental interest.<sup>284</sup> Because the Fifth Circuit denied en banc review of *Hopwood*<sup>285</sup> and the United States Supreme Court denied certiorari,<sup>286</sup> it was unclear whether the three judge panel was incorrect in disregarding *Bakke* and concluding that the diversity was not a compelling governmental interest justifying a racial classification by institutions of higher education.

Since *Hopwood*, other federal courts of appeal have faced determining the validity of the diversity rational in reversed discrimination claims.<sup>287</sup>

280. *Hopwood*, 78 F.3d at 944–45 (stating “[i]n short, there has long been no indication from the Supreme Court, other than Justice Powell’s lonely opinion in *Bakke*, that the state’s interest in diversity constitutes a compelling justification for governmental race-based discrimination . . . [and s]ubsequent Supreme Court case law strongly suggests, in fact, that it is not”).

281. *Id.* at 944–46 (quoting *Metro Broad., Inc. v. Fed. Communications Comm’n*, 497 U.S. 547, 612 (1990) (O’Connor, J., dissenting) (citations omitted) (stating “we see the case law 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”)).

282. *Id.* at 962 (Weiner, J., concurring).

I respectfully disagree with the panel opinion’s conclusion that diversity can never be a compelling governmental interest in a public graduate school[.] . . . [r]ather . . . I would assume arguendo that diversity can be a compelling interest but conclude that the admissions process here under scrutiny was not narrowly tailored to achieve diversity.

*Id.*

283. Carla D. Pratt, *In the Wake of Hopwood: An Update on Affirmative Action in the Education Area*, 42 How. L.J. 451, 467 (1999) (arguing that *Hopwood* and its progeny have had a chilling effect and have weakened affirmative action programs).

284. See Sullivan, *supra* note 272, at 292–93, 296 (describing the diversity rationale as “the amorphous concept presented in *Regents of University of California v. Bakke*, [which] provides weak, inappropriate, and ultimately mutable doctrinal support for race-conscious remedies” and arguing that the “‘substanceless definition of diversity undermines what ought to be affirmative action’s true purpose[.] . . . the remedying of society’s racism”) (quoting Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 765–69 (1997)).

285. *Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996).

286. *Texas v. Hopwood*, 518 U.S. 1033 (1996).

287. See *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2nd Cir. 2000); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999); *Hunter v. Re-*

One case seems to have accepted the reasoning of *Hopwood* by concluding that the diversity rationale was invalid.<sup>288</sup> Other cases declined to determine the issue and instead examined whether there was a compelling governmental interest or whether the program was narrowly tailored to meet the stated governmental interest.<sup>289</sup> This left the Sixth Circuit with conflicting federal case law<sup>290</sup> and virtually no precedent to follow in deciding challenges to

gents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); and *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir. 1998).

288. See *Lutheran Church-Missouri Synod*, 141 F.3d at 354–55 (rejecting EEOC commission rationale to “foster ‘diverse’ programming content” and reasoning that “the sort of diversity at stake in this case has even less force than the ‘important’ interest at stake in *Metro Broadcasting*”).

289. See *Brewer*, 212 F.3d at 749 (stating “this Circuit has not previously taken the position that diversity, or other non-remedial state interests, can never be compelling in the educational setting . . . [i]n fact, binding precedent in this Circuit . . . explicitly establishes that reducing *de facto* segregation . . . serves a compelling government interest”); *Eisenberg*, 197 F.3d at 133–34 (“[w]e have not decided that diversity, as the term is used here, either is or is not a compelling governmental interest” yet, racial balancing previously held by the circuit court to be insufficient as a compelling governmental interest and the school’s rationale for denying the student’s request to transfer on the basis that it would affect the school’s diversity profile because the narrowly tailored prong of the court’s analysis was not satisfied); *Hunter*, 190 F.3d at 1066–67 (not expressly discussing or rejecting *Hopwood*, but accepting that “California has a compelling interest in providing effective education to its diverse, multi-ethnic, public school population” as a rationale for use of race in admissions process in order “to obtain the desired student population”).

It may be that the *Hopwood* panel is correct and that, were the Court to address the question today, it would hold that diversity is not a sufficiently compelling interest to justify a race-based classification . . . [i]t has not done so yet, however, and we are not prepared to make such a declaration in the absence of a clear signal that we should . . . [for] as matters turn out, we need not definitively resolve this conundrum today . . . [and] we assume *arguendo*—but we do not decide—that *Bakke* remains good law and that some iterations of ‘diversity’ might be sufficiently compelling . . . to justify race-conscious actions . . . , [therefore] we turn to . . . [the school’s] alternative justification.

*Wessman*, 160 F.3d at 796. See also *McNamara*, 138 F.3d at 1222 (stating “whether other justifications [besides remedying past discrimination] are possible is unsettled,” yet because no other rationale was offered, the court concluded “the only available justification is the remedial one”).

290. In addition to federal courts, a Nevada state court, as well as state legislatures in Washington and California, have banned the use of race as a factor in making admissions or employment decisions. See, e.g., *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1254 (11th Cir. 2001) (invalidating the University of Georgia’s undergraduate admissions policy on ground that it was not narrowly tailored); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that educational diversity is a compelling governmental interest meeting the demands of strict scrutiny); *Univ. & Cmty. Coll. Sys. v. Farmer*, 930 P.2d 730 (Nev. 1997) (upholding university’s “‘minority bonus policy,’ which allowed a department to hire an additional faculty member following the initial placement of a minority candidate[,]” implemented in response to low number of minority faculty). See also CAL. CONST. art. I, § 31 ([also know as Proposition 209] prohibiting use of race and gender in



the admissions practice of the University of Michigan's undergraduate and law schools.<sup>291</sup>

In December of 1997, Barbara Grutter, an unsuccessful applicant to the University of Michigan Law School (the "Law School"), and Jennifer Gratz, an unsuccessful applicant to the University of Michigan's College of Literature, Science & the Arts (the "University"), brought separate actions challenging the admissions processes, which, among other factors, considered the race and/or ethnicity of the applicant.<sup>292</sup> The United States District Court for the Eastern District of Michigan in both cases ruled that the admissions processes for certain years was unlawful.<sup>293</sup> The unsuccessful par-

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admissions and employment decisions made by the "state or local governments in the areas of public employment, contracting, and education that gives 'preferential treatment' on the basis of sex, race, color, ethnicity, or national origin"); WASH. REV. CODE ANN. § 49:60 (West 1999) (prohibiting the state, which includes the state itself, any city, county, public or community college or university, school district, special district or other political subdivision or governmental instrumentality of or within the state, "from discriminating against or granting preferential treatment to individuals or groups based on race, sex, color, ethnicity or national origin"); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (vacating preliminary injunction against enforcement of Proposition 209).

291. See *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998), *rev'd*, 123 S. Ct. 2411 (2003); *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1998), *aff'd*, 123 S. Ct. 2325 (2003). In both cases, non-minority students brought actions under the Fourteenth Amendment and Title VI seeking monetary damages under 42 U.S.C. § 1983 and claiming violations of their constitutional rights by the University of Michigan's undergraduate and law school admissions policy. *Id.* The University of Michigan defended its program on the basis of diversity, among other things. See Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 L. & SOC. INQUIRY 507, 510, 514 (discussing study done by University of Michigan researchers showing that "law students value diversity as an aspect of their educational experience"). See also *Smith*, 2 F. Supp. 2d at 1330 (W.D. Wash. 1998) (discussing claim against University of Washington Law School claiming university uses race as a dispositive factor, not a plus, in making admissions decisions).

292. Brief for Petitioner at 10, *Grutter v. Bollinger*, 2002 U.S. LEXIS 8677 (Dec. 2, 2002) & Brief for Petitioner at 9, *Gratz v. Bollinger* (Dec. 2, 2002). Both cases were later certified by the district court as class actions. *Id.*

293. In *Grutter*, the district court, following cross motions for summary judgment and a trial on the merits, ruled as a matter of law that "the [L]aw School's stated interest in achieving diversity in the student body was not a compelling interest that could justify racial preferences in admissions." Brief for Petitioner at 14, *Grutter v. Bollinger*, 2002 U.S. LEXIS 8677 (Dec. 2, 2002). Moreover, the district court held that "even if diversity was compelling, the Law School's racial preferences were not narrowly tailored to achieve that interest." *Id.* The district court in *Gratz* "granted Plaintiffs' motion for summary judgment with respect to declaring the University's admissions system for years 1995-1998 unlawful." Brief for Petitioner at 9, *Gratz v. Bollinger* (Dec. 2, 2002). With respect to the constitutionality of the University's admissions program for years 1999-2000, the district court granted summary judgment in the University's favor. *Id.*

ties in both cases appealed to the United States Court of Appeals for the Sixth Circuit.<sup>294</sup>

The en banc panel of the Sixth Circuit reversed in part and vacated in part the trial court's ruling with regards to the Law School admissions program.<sup>295</sup> Writing for the majority, Chief Circuit Judge Martin reasoned that under *Marks v. United States*,<sup>296</sup> Justice Powell's opinion in *Bakke*<sup>297</sup> was binding on the court<sup>298</sup> and thus, the Law School had a compelling interest in achieving a diverse student body.<sup>299</sup> Moreover, the court held that the "Law School's competitive consideration of the race and ethnicity of African-Americans, Hispanics[,] and Native Americans closely tracks the Harvard plan."<sup>300</sup> Circuit Judge Clay, concurring, agreed that Justice Powell's opinion in *Bakke* remained the "law of the land," that the evidence supported "diversity as a compelling governmental interest," and that the law school's policy was "narrowly tailored to achieve the compelling interest of diversity."<sup>301</sup>

Circuit Judge Boggs dissented and argued that the Law School's admissions policy was a "straightforward instance of racial discrimination by a state institution."<sup>302</sup> Arguing that the majority's application of *Marks* to *Bakke* was in error, Circuit Judge Boggs reasoned that "the separate opinions in *Bakke* do not constitute a coherent set and subset of each other and cannot be placed in a logical continuum."<sup>303</sup> Even if *Marks* could be applied to *Bakke*, however, "the rationales for the use of race put forth by the *Bakke* concurrences [are] not a continuum, but . . . several distinct and unrelated

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294. Brief for Petitioner at 13–14, *Gutter v. Bollinger*, 2002 U.S. LEXIS 8677 (Dec. 2, 2002) & Brief for Petitioner at 10–11, *Gratz v. Bollinger* (Dec. 2, 2002).

295. *Gutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002) *aff'd*, 123 S. Ct. 2325 (2003). The Court of Appeals heard argument in *Gratz* and stated that a decision would be rendered. *Id.* at 735 n.2. However, no opinion was issued. Brief for Petitioner at 11, *Gratz v. Bollinger* (Dec. 2, 2002).

296. 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

297. *Bakke v. Regents of the Univ. of Cal.*, 438 U.S. 265, 269–320 (1978).

298. *Gutter*, 288 F.3d at 738–744. In so ruling, the majority reasoned that because Justice Powell's plurality opinion in *Bakke* applied strict scrutiny to the use of a racial factor, rather than intermediate scrutiny applied by the four concurring Justices, *Adarand* did not implicitly overrule *Bakke*. *Id.* at 741–45. Therefore, Powell's opinion provided the narrowest rationale for *Bakke*'s holding under *Marks*. *Id.* As a result, "*Bakke* remains the law until the Supreme Court instructs otherwise." *Id.* at 739.

299. *Id.* at 742.

300. *Id.* at 746.

301. *Id.* at 758–73 (Clay, J., concurring).

302. *Id.* at 773 (Boggs, J., dissenting).

303. *Id.* at 781 (Boggs, J., dissenting).

justifications.”<sup>304</sup> In any event, argued Circuit Judge Boggs, the Law School’s admissions policy, which purportedly sought a diverse student body, lacked substance and was not narrowly tailored to achieve that interest.<sup>305</sup> Circuit Judge Gilman also dissented and argued that assuming educational diversity is a compelling interest, the Law School’s use of a critical mass of minority students was indistinguishable from a quota.<sup>306</sup> The Supreme Court granted certiorari in both cases.<sup>307</sup>

## VII. THE COURT’S DECISION(S)

Justice O’Connor, writing for the majority in *Grutter* and joined by Justices Stevens, Souter, Ginsburg, and Breyer, held that the educational benefits attained from a diverse student body is a compelling governmental interest justifying the use of race in university admissions.<sup>308</sup> To reach this conclusion, the *Grutter* Court relied not only upon the University’s judgment that diversity is essential to its educational mission, but also

the [numerous] expert studies and reports . . . show[ing] that . . . diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce’. . . . [A]s major American businesses have made clear[,] . . . the skills needed in today’s increasingly global marketplace can only be developed through exposure to . . . diverse people, cultures, ideas, and viewpoints.”<sup>309</sup>

The *Grutter* majority also agreed that the law school’s use of race was narrowly tailored to meet those goals.<sup>310</sup> These Justices reasoned that, unlike a quota, the law school’s attainment of a critical mass of underrepresented

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304. *Grutter*, 288 F.3d at 783 (Boggs, J., dissenting).

305. *Id.* at 795–96 (Boggs, J., dissenting).

306. *Id.* at 816–17 (Gilman, J., dissenting).

307. *Grutter v. Bollinger*, 537 U.S. 1043 (2002); *Gratz v. Bollinger*, 537 U.S. 1044 (2002).

308. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (5–4 decision). In so holding, the Court found it unnecessary to determine whether Justice Powell’s *Bakke* opinion is binding precedent under *Marks*, as that inquiry has “baffled and divided the lower courts that have considered it.” *Id.* at 2337. Instead, the Court itself endorsed Justice Powell’s diversity rationale. *Id.*

309. *Id.* at 2340 (citations omitted). The Court was most persuaded by amici of highly ranked U.S. military retirees and civilian leaders who argued that

a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.” . . . At present, “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.”

*Id.* (citations omitted).

310. *Id.* at 2341–42. The Court reasoned that the Law School’s admissions program uses race in a “flexible, nonmechanical way.” *Id.* at 2342.

minority students is not a fixed number or proportion of opportunities reserved exclusively for certain minority groups.<sup>311</sup> Moreover, "the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. . . [and] all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."<sup>312</sup> The Court warned, however, "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>313</sup>

In dissent, Justice Scalia, joined by Justice Thomas, argued that the Court's "*Grutter-Gratz* split double header" will, without a doubt, cause a flood of controversy and litigation.<sup>314</sup> Justice Scalia contends that "a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK," most likely could have prevented such a result.<sup>315</sup> Justice Thomas, joined by Justice Scalia, also dissented separately, but agreed that "racial discrimination in higher education admissions will be illegal in 25 years."<sup>316</sup> However, according to Justice Thomas, "the Law School's use of race violates that Equal Protection Clause and . . . the Constitution means the same thing today as it will in 300 months."<sup>317</sup>

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311. *Id.* at 2342. The Court distinguishes a quota as a "program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups[,] . . . which must be attained, or which cannot be exceeded,' . . . and 'insulate[s] the individual from comparison with all other candidates for the available seats.'" *Id.* (citations omitted). A permissible goal, on the other hand, "requires only a good-faith effort . . . to come within a range demarcated by the goal itself" . . . and permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'competes with all other qualified applicants.'" *Id.* (citations omitted).

312. *Id.* at 2343-44.

313. *Id.* at 2347. Concurring separately, Justice Ginsburg, joined by Justice Breyer, noted that "[f]rom today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Id.* at 2348 (Ginsburg, J., concurring).

314. *Grutter*, 123 S. Ct. at 2349-50 (Scalia, J., dissenting). Justice Scalia contended that future lawsuits will likely focus on whether affirmative action programs sufficiently focus on the individual or whether the university has put forth a good faith effort to avoid a quota. *Id.* (Scalia, J., dissenting). Other lawsuits will focus on whether there are educational benefits of the diversity scheme or whether the university's "racial preferences have gone below or above the mystical *Grutter*-approved 'critical mass.'" *Id.* (Scalia, J., dissenting).

315. *Id.* at 2349 (Scalia, J., dissenting).

316. *Id.* at 2350 (Thomas, J., dissenting).

317. *Id.* at 2351 (Thomas, J., dissenting). Justice Thomas argued that while "blacks [and other minorities] can achieve in every avenue of American life without the meddling of university administrators, . . . [t]he Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially dispro-

Chief Justice Rehnquist also dissented and was joined by Justices Scalia, Kennedy, and Thomas.<sup>318</sup> These dissenters argued that the law school's "means . . . [were not] narrowly tailored to the interest it asserts[:] 'critical mass.'"<sup>319</sup> According to Chief Justice Rehnquist, this is evidenced by the fact that significantly more individuals from one underrepresented minority group than the others are needed in order to achieve "critical mass" or further student body diversity.<sup>320</sup> Finally, Justice Kennedy argued in a separate dissent that the majority too willingly relied upon the law school's representations that its admissions process meets with constitutional requirements.<sup>321</sup>

In contrast, the Court held in *Gratz* that the University's admissions program was not narrowly tailored to achieve the compelling interest of diversity.<sup>322</sup> Chief Justice Rehnquist, delivering the opinion of the Court and joined by Justices O'Connor, Scalia, Kennedy, Thomas, and Breyer, found issue with the University's automatic award of twenty points to "underrepresented minorities," as this virtually guaranteed their admission into the University.<sup>323</sup> According to the *Gratz* majority, this practice did not provide the individualized consideration Justice Powell contemplated in *Bakke*, as

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portionate results." *Id.* at 2350 (Thomas, J., dissenting). Justice Thomas also maintained that "Michigan has no compelling interest in having a law school at all, much less an *elite* one." *Id.* at 2354. Noting that only twenty-seven percent of the Law School's student body are from Michigan and that only six percent of Michigan graduates apply for that state's bar examination, Justice Thomas contended that the decision to maintain an elite institution "does little to advance the welfare of the people of Michigan or any other cognizable interest of the State of Michigan." *Id.* at 2355 (Thomas, J., dissenting).

318. *Id.* at 2365 (Rehnquist, C.J., dissenting).

319. *Id.* (Rehnquist, C.J., dissenting). According to the dissenting Justices, the Law School's admissions program, "[s]tripped of its 'critical mass' veil," can be described as "a naked effort to achieve racial balancing." *Id.* (Rehnquist, C.J., dissenting).

320. *Grutter*, 123 S. Ct. at 2366–68 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist points to the fact that from 1995–2000, the law school admitted between thirteen and nineteen Native Americans, between ninety-one and 108 African-Americans, and forty-seven and fifty-six Hispanics. *Id.* at 2366 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist reasoned that if the law school needed to admit a certain number of African-American students to achieve that critical mass, then why aren't the same number of Hispanic and Native American students also needed to achieve "critical mass" for those underrepresented groups. *Id.* at 2366–67 (Rehnquist, C.J., dissenting). "[O]ne would think that a number of the same order of magnitude [of Hispanic and Native American students as there are of African-American students] would be necessary to accomplish the same purpose for Hispanics and Native Americans." *Id.* at 2366 (Rehnquist, C.J., dissenting).

321. *Id.* at 2371 (Kennedy, J., dissenting). In doing so, argues Justice Kennedy, "[t]he majority fails to confront the reality of how the Law School's admissions policy is implemented." *Id.*

322. *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (6-3 decision). As a preliminary matter, the Court first ruled that the *Gratz* petitioners had standing to bring forth their claims. *Id.* at 2422–2425.

323. *Id.* at 2427–29.

"the factor of race . . . [became] decisive' for virtually every minimally qualified underrepresented minority applicant."<sup>324</sup> The fact that the University provided some level of individualized review was inconsequential, as such individualized review only occurred after a candidate for admissions was automatically awarded the twenty points.<sup>325</sup> As a result, the University's undergraduate program was found to be unconstitutional.<sup>326</sup>

In a separate concurrence, Justice O'Connor, who was joined by Justice Breyer, agreed that this twenty-point bonus was not the type of individualized consideration endorsed by Justice Powell.<sup>327</sup> Justice Thomas also concurred separately and argued that the University's policy fails "because it does not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants."<sup>328</sup> Justice Breyer concurred separately in the Court's judgment of liability on the University, but emphasized that he did not join in the Court's opinion.<sup>329</sup> Instead, Justice Breyer argued that "in implementing the Constitution's equality instruction, government decision makers [sic] may properly distinguish between policies of inclusion and exclusion, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally."<sup>330</sup>

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324. *Id.* at 2428 (citation omitted). Chief Justice Rehnquist reasoned that "[t]he only consideration that accompanies . . . [the University's] distribution of [the 20] points is a factual review of an application to determine whether an individual is a member of one of these minority groups." *Id.* As a result, each particular candidate was not considered individually by an assessment and evaluation of their abilities to contribute to the unique setting of higher education. *Id.* at 2429.

325. *Id.* at 2430.

326. *Id.* Because this practice violated the Equal Protection Clause of the Fourteenth Amendment, it also violated Title VI and 42 U.S.C. § 1981. *Id.* As a result, the district court's grant of summary judgment in favor of the University on the issue of liability was reversed and the case remanded. *Id.* at 2430-31.

327. *Id.* at 2431 (O'Connor, J., concurring). "Unlike the [L]aw [S]chool that considers the various diversity qualifications of each applicant, including race, on a case-by-case basis," argued Justice O'Connor, the University's undergraduate admissions program "relies on the selection index to assign every underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant." *Id.* (O'Connor, J., concurring). This "nonindividualized, mechanical" approach "automatically determines the admissions decisions for each [nonminority] applicant." *Id.* (O'Connor, J., concurring). In short, Justice O'Connor believed that 20 points was simply too much. *See id.* at 2432 (O'Connor, J., concurring) (stating "[e]ven the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race").

328. *Gratz*, 123 S. Ct. at 2433 (Thomas, J., concurring).

329. *Id.* at 2434 (Breyer, J., concurring).

330. *Id.* (Breyer, J., concurring) (citations omitted).

In dissent, Justice Stevens, who was joined by Justice Souter, argued that the Court lacks jurisdiction to hear this case, as "[n]either petitioner has a personal stake in the outcome of the case, and neither has standing to seek prospective relief on behalf of unidentified class members who may or may not have standing to litigate on behalf of themselves."<sup>331</sup> Justice Souter also dissented separately and argued that the University's admissions program "is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record."<sup>332</sup> Justice Ginsburg, joined by Justice Souter, agreed that the University's practice was within constitutional limitations.<sup>333</sup>

### VIII. CONCLUSION

*It is . . . undeniable that the search for truth often causes pain.*<sup>334</sup>

Even after *Grutter-Gratz's* "split double header," reverse discrimination jurisprudence remains a complex area. However, some conclusions can be made.

First, plaintiffs bringing claims under Title VI or VII of the Civil Rights Act will have the burden of isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.<sup>335</sup> Once the plaintiff establishes this prima facie disparate impact case, the employer bears the burden of producing evidence of a business justification for its employment practices.<sup>336</sup> Nevertheless, the burden of persuasion remains with the plaintiff.<sup>337</sup>

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331. *Id.* at 2434-38 (Stevens, J., dissenting).

332. *Id.* at 2440 (Souter, J., dissenting). Justice Breyer reasoned that because the University's admissions practice "lets all applicants compete for all places, . . . a nonminority applicant who scores highly on these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20-point bonus." *Id.* (Souter, J., dissenting). Thus, "[i]n the Court's own words, 'each characteristic of a particular applicant [is] considered in assessing the applicant's entire application.'" *Id.* (Souter, J., dissenting). Therefore, it is impossible "to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in *Bakke*." *Id.* at 2441 (Souter, J., dissenting).

333. *Id.* at 2445 (Ginsburg, J., dissenting). Justice Ginsburg was further convinced by the fact that even though the "stain of generations of racial oppression is still visible in our society," it was undisputed that "[e]very applicant admitted under the current plan . . . [wa]s qualified to attend the College." *Id.* at 2446 (Ginsburg, J., dissenting) (citations omitted).

334. Kennedy, *supra* note 217, at 1340.

335. *Antonio v. Wards Cove Packing Co.*, 490 U.S. 642, 656-61 (1989).

336. *Id.* Moreover, racial imbalance in one segment of an employer's work force is not sufficient to establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions. *Id.* at 656-58.

337. *Id.* at 656-61.

Second, whether the claim is brought under the Fifth or Fourteenth Amendment, strict scrutiny will apply to any program making classifications based on race.<sup>338</sup> While the Court warns that strict scrutiny is not "fatal in fact," few programs have survived since the adoption of this standard.<sup>339</sup> Before *Grutter*, the only compelling governmental interest justifying the use of racial classifications was remedying the effects of past discrimination upon individuals who have experienced discrimination by the particular entity adopting the affirmative action program.<sup>340</sup> However, *Grutter* makes it abundantly clear that the educational benefits of a diverse student body also serve a compelling governmental interest justifying the use of a racial classification in admissions programs of a college or university.<sup>341</sup> Nevertheless, the question of the meaning of *Bakke* and more importantly, what distinguishes a quota from "critical mass" remains a mystery.

This was demonstrated during the oral argument of Maureen Mahoney, on behalf of the Law School, when she discussed 44 F.R. 58510, which was issued by the Department of Education after *Bakke*.<sup>342</sup> This policy interpretation specifically authorized the use of race in admissions decisions as long as they did not set aside a fixed number of places or make race the sole criterion for eligibility.<sup>343</sup> According to Ms. Mahoney's interpretation of *Bakke*, there must be more than a token number of minorities in order to achieve the educational benefits of diversity.<sup>344</sup> However, when answering the question of what constitutes a quota, Ms. Mahoney replied, "what a quota is under this Court's cases is a fixed number."<sup>345</sup> If a quota is a fixed number, how does one determine what constitutes more than a token num-

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338. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212–31, 235–39 (1995) (declaring strict scrutiny applies to federal affirmative action programs based on race); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–528 (1989) (declaring strict scrutiny the appropriate standard for state affirmative action program based on race).

339. See *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (striking down University of Michigan's undergraduate admissions program on grounds that it was not narrowly tailored to serve compelling governmental interest of racial diversity); *Adarand*, 515 U.S. at 200 (striking down affirmative action program under strict scrutiny); *Shaw v. Reno*, 509 U.S. 630 (1993) (striking down voting district plan based on race); *J. A. Croson*, 488 U.S. at 469 (declaring strict scrutiny appropriate standard for affirmative action program based on race and striking down program).

340. See *J.A. Croson*, 488 U.S. at 520–28. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 269–95 (1986), made clear that the role model rationale is insufficient. So is remedying the present effects of past discrimination. See *J.A. Croson*, 488 U.S. at 498–528.

341. See *supra* notes 308–21 and accompanying text (discussing *Grutter*). See also *supra* notes 273–307 and accompanying text (discussing split in federal and state courts regarding force of *Bakke* and whether diversity is a compelling governmental interest).

342. Transcript of Oral Argument, *Grutter v. Bollinger*, at 37.

343. 44 Fed. Reg. 58510 (1979).

344. Transcript of Oral Argument, *Grutter v. Bollinger*, at 38.

345. *Id.* at 40



ber sufficient to meet the demands of diversity? The Court utterly failed to resolve or offer any guidance on this issue.

Perhaps a state may find it easier to adopt admissions programs that are race neutral, as did Texas and California. The benefit of such programs is that they not only encompass those targeted by traditional affirmative action programs, they also target those negatively affected by those same programs.<sup>346</sup> For example, Texas' "ten percent plan," which was adopted in the wake of *Hopwood*,

requires the University of Texas to admit the top ten percent of every high school's graduating class in the State of Texas. While the criterion for admission under this plan is race neutral, many agree that more African- and Mexican-American students have been admitted to the University than the affirmative action program that was outlawed in *Hopwood*.<sup>347</sup>

However, not all agree that these programs have resulted in a sufficient number of minority students to adequately promote diversity.<sup>348</sup> This can be attributed to the fact that most minority students gaining admission under these programs are not as well prepared as their Caucasian counterparts. This is most likely a result of unequal standards of education between inner city public schools, which are predominately attended by poor Americans of African and Hispanic descent, and private schools or suburban public schools, which are almost exclusively attended by the nation's upper to middle class, who most likely are Caucasian.<sup>349</sup>

"[T]he legacy of legally-enforced slavery, Jim Crow legislation, and privately-held racial prejudice has produced a society in which African-Americans [as well as other minorities] as a group have a lower socioeconomic status and less political and economic power than Caucasians."<sup>350</sup>

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346. But see Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002) (explaining that the "perceived unfairness" of affirmative action programs "is more exaggerated than real" and that while "minority applicants stand a much better chance of gaining admission to selective institutions with the existence of affirmative action . . . [there is] no logical basis to infer that white applicants would stand a much better chance of admission in the absence of affirmative action").

347. See Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 969 (2001).

348. Transcript of Oral Argument, *Grutter v. Bollinger*, at 38.

349. See Hasnas, *supra* note 3.

350. *Id.* at 438. See also Freeman, *supra* note 215, at 359-60. Professor Freeman notes that:

there was always some more important issue which turned national attention elsewhere. It was more important, for example, to have a ratified Constitution even if it accepted the legitimacy of slavery, than to have had the sectional strife that might have meant no Constitution. It was more important to respect property

Furthermore, "[n]otwithstanding *Brown*,<sup>351</sup> racial segregation in the schools has been increasing in almost every state, even during the 1990s."<sup>352</sup> As funding for public education has become based on the property value of the particular community rather than the needs of the students,<sup>353</sup> more and more public schools located in poor areas have fewer resources than public schools located in more affluent areas.

This uneven spread of economic and social wealth has resulted in African-Americans and other minorities remaining disproportionately disadvantaged. Without a doubt, "[m]ost of what are regarded as the decisive characteristics for higher education or employment have a great deal to do with things over which the individual has neither control nor responsibility[,]” most particularly, the socioeconomic class of their parents.<sup>354</sup> It cannot be disputed that for the most part, education remains the key to success in America. Despite this truth, the Supreme Court has refused to make education a fundamental right.<sup>355</sup>

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rights than to distribute land and power on an equitable basis to those freed from slavery by the Civil War. And it was more important to ignore altogether the plight of the newly freed in order to get on with the “business” of industrializing America. In the twentieth century, fighting the Great Depression meant ignoring, and then barely noticing, the plight of black Americans, lest powerful Southern members of Congress be offended. Waging World War II was so important we could not risk the moral problems that might result from desegregating the army. We had to move slowly also in the late 1950’s, lest we upset the established “Southern way of life.” In the 1970’s when school desegregation finally threatened the enclaves of white suburbia, the paramount value became the ‘local autonomy’ of the suburbs.

*Id.*

351. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (denouncing “separate but equal” and declaring intentional segregation in public school unlawful).

352. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1199 (2002).

353. See generally Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (describing the phenomena of white flight which made it possible for such schemes to be implemented); Martha S. West, *Equitable Funding of Public Schools Under State Constitutional Law*, 2 J. GENDER RACE & JUST. 279 (1999) (discussing public school financing in state constitutional law).

354. See Hasnas, *supra* note 3, at 497 (arguing that “individuals [do not] morally deserve their qualifications and abilities since these arise largely as a matter of chance or as a result of past societal inequities”). See also Anderson, *supra* note 352, at 1203 (noting that “among all privately owned U.S. businesses, half were started by their owners; the other half were inherited or purchased[, b]y contrast, ninety-four percent of black-owned businesses are self-started”); Kristen Booth Glen, *When and Where We Enter, Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1700 (2002) (noting recent study finding that the SAT is a “socially constructed rather than scientifically objective measure of aptitude”); Lawrence, *supra* note 347, at 945 (arguing that “the SAT does a better job predicting the socio-economic status of the test taker’s parents than predicting college performance”).

355. See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–39 (1973) (holding education is not a fundamental right).

Not surprisingly, these results reflect our collective inability to resolve the inadequacies of both the group and individual approaches to rights, "which represents a clash over views about the nature of ordered society."<sup>356</sup> As demonstrated by arguments on both sides of the debate, adopting an individual approach to rights "ignores the individual[s] interest deriving from group affiliation."<sup>357</sup> This is especially true when discrimination against the individual is based on that individual's affiliation with a certain group. Adopting a group approach to rights, however, may lead to an overly broad extension of benefits, which may result in the granting of benefits to those who may not need it and, in turn, denying benefits to those in need. It must be recognized that the rights of each individual are based on both the group of which he is a member and his status as an individual in society. It is only then that a discussion on race in America can lead to results that will adequately answer the questions of affirmative action, reverse discrimination, and Equal Protection.

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356. Clinton, *supra* note 221, at 743. See also Landsberg, *supra* note 1, at 1305 ("[d]iscrimination is group based, yet it falls on individuals"); Douglas D. Scherer, *Affirmative Action Doctrine and the Conflicting Messages of Croson*, 38 U. KAN. L. REV. 281, 330-31 (1990) (citation omitted) (stating "[t]he abstract principle of individual rights under the equal protection clause is appealing, but will deprive individuals of equality if applied to a society in which group considerations determine allocation of opportunity"); Wendy B. Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER RACE & JUST. 315, 359 (1999) (quoting ANTHONY E. COOK, *THE LEAST OF THESE: RACE, LAW, AND RELIGION IN AMERICAN CULTURE* (1997)) (stating "one cannot affirm the individual without affirming the group with which the group strongly identifies").

357. Rosenfeld, *supra* note 223, at 260.