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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol91/iss1/8

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The Diversity and Remedial Interests in University Admissions Programs

BY KATHRYNE RAINES*

INTRODUCTION

This nation was founded on the principle that all men are created equal. Unfortunately, throughout American history this ideal has not always been promoted. In fact, the drafters of the Constitution initially undercut this basic tenet with its antithesis: slavery. The effects and results of slavery are notorious. American leaders today are still faced with its issues and the hope of equal opportunity for all, regardless of race.

The Equal Protection Clause of the Fourteenth Amendment sets forth that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” This clause was generally ignored in its early existence and was even turned against those whom it was designed to aid, per the claim that “separate but equal” fulfilled its purpose. In 1954, the United States Supreme Court ruled in Brown v. Board of Education that separate schools and public facilities are inherently unequal and thus unconstitutional. Since then, courts have endeavored to appropriately and consistently interpret the Equal Protection Clause, particularly in reference to racial classifications.

Affirmative action programs have attempted to alleviate the repercussions of unfortunate early oppression and the additional benefits of these programs have become apparent. However, the methods used in implementing these programs have often been criticized as violating the Equal Protection Clause. Recent cases involving university admissions programs

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* J.D. expected 2003, University of Kentucky.
2 Id.
3 U.S. CONST. amend. XIV, § 1.
4 See Plessy v. Ferguson, 163 U.S. 537 (1896). See also Bakke, 438 U.S. at 326.
6 Id.
have once again brought this affirmative action debate to the forefront. The Supreme Court has not ruled on a university’s affirmative action policy since the 1978 case Regents of the University of California v. Bakke. This decision has since been subject to a variety of interpretations, leaving the issue of the constitutionality of race-based university admissions programs unclear. Thus, many states that have been handed decisions from federal courts striking down race-based policies have been forced to look for alternate means of achieving the same benefits of race-based affirmative action.

This Note focuses on the recent judicial decisions involving the constitutionality of university race-based admissions policies and their ramifications. Part I discusses Bakke, the Supreme Court’s most recent ruling on university affirmative action programs. Part II examines how various courts have interpreted Bakke and what the courts have held to constitute a “compelling governmental interest.” Part III investigates new programs implemented in some states aimed toward emulating the benefits of affirmative action. Part IV considers the future of affirmative action, addressing the Supreme Court’s inevitable return to the question of affirmative action programs in educational settings. This Note explores the plethora of benefits to educational environments provided by race-based admissions programs and concludes that such programs should be found constitutional.

I. U.S. Supreme Court Decisions in Affirmative Action Cases

A. The Bakke Case

The Supreme Court last addressed affirmative action in university admissions programs in the 1997 Bakke case. In Bakke, the admissions policy of the Medical School of the University of California at Davis was at issue. The university reviewed candidates for admission under either the regular admissions program or the special admissions program.

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8 Bakke, 438 U.S. at 267.
9 See infra notes 13-64 and accompanying text.
10 See infra notes 65-178 and accompanying text.
11 See infra notes 179-222 and accompanying text.
12 See infra notes 223-41 and accompanying text.
13 Bakke, 438 U.S. at 269-70.
14 Id. at 273-75.
Through the regular admissions program, applicants with overall undergraduate grade point averages below 2.5 on a scale of 4.0 were promptly rejected. The special admissions program reviewed candidates to fill the sixteen places in the entering class of one hundred reserved for "disadvantaged" minorities in the classes of 1973 and 1974. In order to determine which candidates were eligible for special review, the application forms asked whether they "wished to be considered as 'economically and/or educationally disadvantaged' applicants and members of a 'minority group.'" Those ultimately found to fit both requirements were then reviewed under the special admissions program, in which they did not have to meet the 2.5 grade point average standard.

Allan Bakke, a white male, applied to the medical school two consecutive years and was rejected each time after a review of his application under the regular admissions policy. After his second rejection, Bakke sued the University of California arguing that the "special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment." A highly divided Supreme Court ultimately found Davis Medical School's particular policy unconstitutional.

Bakke established a strict scrutiny standard of review for race-based programs. A strict scrutiny standard requires that a two-prong test be met: (1) the race-based classification must meet a compelling governmental interest, and (2) the classification must be precisely tailored to serve that interest. Justice Powell stated that "[t]he guarantee of equal protection

15 Id. at 273.
16 Id. at 275.
17 Id. at 274. Minority groups, for the medical school's application purposes, consisted of "blacks," "Chicanos," "Asians," and "American Indians." Id.
18 Id. at 275.
19 Id. at 276. Allan Bakke had an overall grade point average of 3.46 from his undergraduate institution. The average overall grade point averages for those admitted through the special program was 2.88 in 1973 and 2.62 in 1974. Id.
20 Id. at 277-78. Bakke also alleged that the special program violated Art. I, § 21, of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides that "[n]o person... shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id. at 278 n.11.
22 Bakke, 438 U.S. at 299.
cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”

Thus, under Bakke, strict scrutiny should be applied to all cases when race is at issue; it cannot be applied only in certain situations depending upon whether a minority or majority group is involved. All “[r]acial and ethnic classifications . . . are subject to stringent examination without regard to these additional characteristics.” Following earlier case precedent, the court asserted that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” This strict scrutiny standard must be applied with respect to every person regardless of race.

Bakke has been subject to various interpretations by lower courts because the Supreme Court was so divided in its ruling. Four justices, known as the Brennan Group, found the Davis Medical School’s policy to be constitutional. The Stevens Group voted to strike down the program, claiming that any consideration of race violated Bakke’s rights under Title VI of the Civil Rights Act. Justice Powell provided the decisive vote, finding the Davis Medical School’s admissions program to be unconstitutional. However, Powell stated that race, in some instances, can be constitutionally used in admissions programs. Thus Powell and the Stevens Group comprised a majority, effectively striking down the admissions policy. On the other hand, Powell and the Brennan Group constituted a majority for the proposition that race can be constitutionally used as a factor in admissions policies. Justice Powell wrote what is generally viewed as the majority opinion, however, some federal courts refuse to follow his decision, alleging that it is not binding law.

23 Id. at 289-90.
24 Id.
25 Id.
26 Id. at 291. See also Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
27 Bakke, 438 U.S. at 294.
28 The Brennan Group included Justices Brennan, White, Marshall, and Blackmun.
30 Justice Stevens wrote the concurring opinion in which Chief Justice Burger, Justice Stewart, and Justice Rehnquist joined forming what is called the Stevens Group.
31 Anderson, supra note 29, at 192-93.
32 See Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996); Johnson v. Board of Regents of Univ. of Georgia, 263 F.3d 1234, 1245 (11th Cir. 2001).
1. *The Compelling Governmental Interest of Diversity*

The two prongs of strict scrutiny require that the race-based classifications meet a compelling governmental interest and that the classification be narrowly tailored to fulfill that interest. Justice Powell stated that in "'order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" The Davis Medical School claimed its special admissions program served a number of purposes. Although the majority opinion easily discards most of these purposes, the opinion spends considerable time discussing the diversity purpose. Justice Powell writes that diversity "clearly is a constitutionally permissible goal for an institution of higher education." Indeed, diversity in academic environments provides a plethora of benefits to students. An essential part of higher education is an environment of

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33 See supra note 22 and accompanying text.
34 *Bakke*, 438 U.S. at 305 (quoting *In re Griffiths*, 413 U.S. 717, 721-22 (1973)).
35 The university claimed that the special admissions programs served the following interests: "(i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,'...; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body." *Id.* at 306 (footnote omitted).
36 *Id.* at 311-12.
37 See *id.* at 313 n.48 (quoting the former Princeton University president from Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY. 7, 9 (Sept. 26, 1977)). The [former] president of Princeton stated:

[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; ... and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, "People do not learn very much when they are surrounded only by the likes of themselves."

... For many ... the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of
"'speculation, experiment and creation’ . . . [which] is widely believed to be promoted by a diverse student body." Justice Powell also advanced the idea that academic freedom within university education invokes the Constitution.

Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Although diversity was found to be a compelling governmental interest, the facts of the Bakke case did not meet the second prong of strict scrutiny because the racial classifications used by the Davis Medical School were not necessary to promote this interest. The Court found that reserving a specified number of seats for particular ethnic minorities does not, in effect, further the goal of diversity.

Diversity in academic settings encompasses, according to Justice Powell, more than a variety of races. Rather, diversity's benefits are attained through a broad array of backgrounds, beliefs, and characteristics.

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improved understanding and personal growth.

*Id.*

38 *Bakke*, 438 U.S. at 312.


41 *Id.* at 314-16.

42 Justice Powell stated that the fatal flaw in the school's admissions program was that: It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats.

*Id.* at 319.

43 *Id.* at 315.
Of course, different ethnicities and races comprise a part of diversity; however, it cannot be the only factor considered. A "special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." Thus, while diversity is a compelling governmental interest, a rigid quota system admitting students based on their race alone is not the appropriate means to accomplish that interest.

2. Righting Wrongs: Remedial Purposes of Affirmative Action

Remedial purposes, like diversity, may serve as a justification for preferential treatment of certain races. Bakke held that there is a "legitimate and substantial [governmental] interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." Earlier desegregation cases, such as Brown v. Board of Education, set out the importance of such a goal. However, Justice Powell asserts that the Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." If such findings of constitutional or statutory violations are uncovered, then this preferential treatment is substantiated as a vindication of victims' legal rights. In the absence of such findings, there is no governmental interest in helping one person while harming another.

In Bakke, the Davis Medical School's policy focused on education, not on remedying earlier illegality. The administration did not establish that the special admissions program used the race factor as a reaction to discrimination. For instance, the University of California at Davis did not even explain how they chose the four preferential racial groups. The medical school's selection of disadvantaged races did not, under Bakke, justify discriminating against others not responsible for the alleged harm

44 Id.
45 Id. at 315-18.
46 Id. at 307.
48 Bakke, 438 U.S. at 307.
49 Id.
50 Id. at 308-09.
51 Id. at 309.
52 Id. at 310 n.45.
done. Thus, the remedial interest of using race-based admissions was not met.

B. The Supreme Court's Ruling in Affirmative Action Since Bakke

The Supreme Court has not ventured to rule on the use of affirmative action in university admissions programs since Bakke. However, the Court has addressed affirmative action in reference to employment situations. These cases generally address and elaborate on the use of race-based programs for remedial purposes. They also provide valuable insight into how the Supreme Court applies the strict scrutiny standard.

For example, in Wygant v. Jackson Board of Education, a collective-bargaining agreement that extended preferential protection against layoffs to certain minority teachers was at issue. The Court of Appeals found that the policy of providing more security to minority teachers was “an attempt to alleviate the effects of societal discrimination” and that this “was sufficiently important to justify the racial classification embodied in the layoff provision.” The Supreme Court reversed, holding that societal discrimination alone has never been able to justify such a racial classification. According to the Court, the discrimination needs to be more specific than general societal discrimination.

A few years later, the Supreme Court elaborated on the Wygant conclusion in an affirmative action case involving a construction contract in City of Richmond v. J.A. Croson Co. The program at issue required that

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53 Id. at 310.
55 Id. at 270-71. The collective bargaining agreement (“CBA”) between the Jackson Board of Education and the Jackson Education Association (a teachers’ union) provided:

“In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.”

... When layoffs became necessary... it was evident that adherence to the CBA would result in the layoff of tenured nonminority teachers while minority teachers on probationary status were retained.

Id.
56 Id. at 274 (citing Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1156-57 (6th Cir. 1984)).
57 Id.
contractors, who had construction contracts with the City of Richmond, subcontract at least thirty percent of the value of those contracts to minority businesses. The city argued that this plan was implemented to remedy past discrimination of minorities in the construction industry. However, the Court found that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." Thus, the past discrimination must be specific enough for a legislative body to tailor a proper remedy. However, "the Supreme Court has yet to establish specific rules for determining precisely how 'localized' past discrimination must be before a particular governmental entity . . . can, consistent with the Constitution, use racial preferences to remedy the effects of prior discrimination." Nevertheless, the Supreme Court has made it clear that societal or generalized discrimination will not meet the strict scrutiny standard.

It is apparent from the Supreme Court cases on race-based policies that strict scrutiny always applies. A compelling governmental interest is needed and the program must be narrowly tailored to address that interest. It appears that the strongest "interests" available to universities in complying with the strict scrutiny test are the diversity interest and the goal of remedying past discrimination in their university. Diversity is an important interest that is unique to university settings and may provide a powerful distinction between affirmative action cases in employment and university backgrounds. The remedial purposes of affirmative action have been acknowledged by the Supreme Court as valid governmental interests so long as the remedy can be narrowly tailored to ameliorate specific past discrimination, as seen in the post-\textit{Bakke} cases.4

\section*{II. Post-\textit{Bakke}: A Variety of Interpretations}

Since \textit{Bakke}, various lower courts have addressed the issue of race-based admissions programs. The result has been different interpretations of the \textit{Bakke} decision and a split over what constitutes a compelling governmental interest. The Fifth Circuit Court of Appeals, for example, determined that diversity is not a compelling governmental interest capable of

\begin{itemize}
\item[59] Id. at 477-78.
\item[60] Id. at 479-81.
\item[61] Id. at 498.
\item[64] See infra Part II.
\end{itemize}
withstanding the strict scrutiny standard. On the other hand, the Ninth Circuit Court of Appeals, and more recently the Sixth Circuit, held just the opposite—that diversity is sufficient to fulfill the first prong of the strict scrutiny standard. This section will explore the differing interpretations effecting the circuit split.

A. The Fifth Circuit: Hopwood v. State of Texas

In Hopwood v. State of Texas the Fifth Circuit Court of Appeals first rejected Justice Powell's diversity rationale. In the Hopwood case, Cheryl Hopwood and three other Caucasians applied for admission to the 1992 entering class at the University of Texas Law School. All four applications were rejected by the school. They filed suit claiming, among other things, that the admissions policy of the law school violated the Equal Protection Clause of the Fourteenth Amendment.

In the early 1990s, when Hopwood and the three other plaintiffs applied, the law school largely based its initial admissions decisions upon an applicant's "Texas Index" ("TI") number, a composition of an applicant's undergraduate grade point average and the applicant's LSAT score. Based on the calculated TI scores, applicants were placed into one of three groups: "presumptive admit," "presumptive deny," or a middle "discretionary zone." Most of the applicants in the presumptive admit...
category were offered admission while most in the presumptive deny category received little consideration.\(^{75}\) Those in the discretionary zone were subjected to the most scrutiny.\(^{76}\) In 1992, when Hopwood’s application was considered, the presumptive admit TI score for “resident whites and non-preferred minorities” was 199 and above.\(^{77}\) The presumptive admit score for Mexican-Americans and African-Americans was only 189.\(^{78}\) The presumptive deny TI score for non-minorities was 192 and lower, while the score for the favored minorities was 179 and below.\(^{79}\) Hopwood had a TI of 199 but was dropped into the discretionary zone while the other plaintiffs had TIs of 197 and were reviewed in the discretionary category as well.\(^{80}\) Ultimately, none of the plaintiffs were granted admission and they claimed that they would have been granted admission if minorities were not granted preferential treatment.\(^{81}\)

The Fifth Circuit applied the proper standard of strict scrutiny, under which the question of race-based admissions is to be examined. This analysis involved the two-prong test, which examines whether the policy served a compelling governmental interest and whether it was narrowly tailored to achieve that goal.\(^{82}\) The district court’s first review of the case found that two interests promoted by the school met the first prong of the test, those being “(1) ‘obtaining the educational benefits that flow from a racially and ethnically diverse student body’ and (2) ‘the objective of overcoming past effects of discrimination.’”\(^{83}\) The Fifth Circuit reversed this finding.

The court of appeals actually ruled on the Hopwood case on three separate occasions. The first appeal, known as Hopwood I, was interlocutory and simply affirmed a denial of intervention.\(^{84}\) The second appeal, known as Hopwood II,\(^{85}\) occurred in 1996 and reviewed the district court’s

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\(^{75}\) Id. at 935-36.
\(^{76}\) Id. at 936.
\(^{77}\) Id.
\(^{78}\) Id. African-Americans and Mexican-Americans were the only two minority groups given preferential treatment in the law school’s admissions policies. Id. at 936 n.4.
\(^{79}\) Id. at 936.
\(^{80}\) Id. at 938.
\(^{81}\) Id.
\(^{82}\) Id.
\(^{83}\) Id. (quoting Hopwood A, 861 F. Supp. 551, 571 (W.D. Tex. 1994)).
\(^{84}\) Hopwood v. State of Texas (Hopwood II), 236 F.3d 256, 260 (5th Cir. 2000).
\(^{85}\) Hopwood v. State of Texas (Hopwood II), 78 F.3d 932 (5th Cir. 1996).
judgment on the merits (Hopwood A\textsuperscript{86}). The Hopwood II decision held that the University of Texas Law School could not use race as a factor in admissions in order to achieve a diverse student body nor to eliminate any present effects of past discrimination by actors other than the law school.\textsuperscript{87} The case was remanded back to district court for damages (Hopwood B\textsuperscript{88}). The district court, in Hopwood B, ruled that the plaintiffs were not entitled to damages and also entered a permanent injunction proscribing consideration of race in the law school's admissions process.\textsuperscript{89} The court of appeals' review of this decision in 2000 is known as Hopwood III.\textsuperscript{90} Hopwood III reversed the injunction against any consideration of race in the admissions program and also analyzed the diversity and remedial interests discussed in Hopwood II.\textsuperscript{91} Both Hopwood II and Hopwood III held that diversity is not a compelling governmental interest and that in order for remedial purposes to be a compelling interest the past discrimination must be specific to the law school.\textsuperscript{92}

1. The Diversity Rationale

Hopwood II\textsuperscript{93} first struck down the diversity rationale of Bakke that the district court supported. The court stated that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."\textsuperscript{94} The Hopwood III decision in 2000 affirmed this proposition, re-stating the holding in Hopwood II that "the government cannot constitutionally use racial preferences for the purpose of fostering student body diversity."\textsuperscript{95} Hopwood II ignores Justice Powell's diversity rationale set forth in Bakke. The Hopwood II court argues instead that, although Justice Powell "announced the judgment, no other Justice joined in that part of the opinion

\textsuperscript{87} Hopwood II, 78 F.3d at 932.
\textsuperscript{88} Hopwood B, 999 F. Supp. 872 (W.D. Tex. 1998).
\textsuperscript{89} Id.
\textsuperscript{90} Hopwood v. State of Texas (Hopwood III), 236 F.3d 256 (5th Cir. 2000).
\textsuperscript{91} Id.
\textsuperscript{92} See also Leslie Yalof Garfield, Hopwood v. Texas: Strict in Theory or Fatal in Fact, 34 SAN DIEGO L. REV. 497 (May-June 1997) (providing a detailed look at the Hopwood decisions).
\textsuperscript{93} See Hopwood v. State of Texas (Hopwood II), 78 F.3d 932, 944 (5th Cir. 2000).
\textsuperscript{94} Id. at 944.
\textsuperscript{95} Hopwood III, 236 F.3d at 275.
discussing the diversity rationale." Thus, according to the Fifth Circuit, the diversity rationale is not binding.

The *Hopwood II* court also asserts that the Supreme Court only accepted the diversity rationale on one occasion after *Bakke*. In *Metro Broadcasting, Inc. v. FCC*, the Supreme Court used an intermediate scrutiny standard to review a federal program that promoted diversity in broadcasting. However, a few years later, it overruled this intermediate scrutiny standard in *Adarand v. Pena* and called for strict scrutiny in race-based programs. Since *Metro Broadcasting*, diversity has not been used by the Supreme Court as a compelling governmental interest in race-based policies.

*Hopwood II* claims that, contrary to Justice Powell's argument in *Bakke*, race alone does not promote diversity, which encompasses far more than skin color. In addition, the *Hopwood II* court asserts that racial classifications can serve to stigmatize groups the programs are supposed to help. Thus, the court held that diversity is not a compelling interest.

2. The Remedial Governmental Interest

The district court in *Hopwood A* determined that "the remedial purpose of the law school's affirmative action program is a compelling government objective." The Fifth Circuit distinguished this argument from the diversity one, noting that a majority of the Supreme Court has justified the use of race for remedial purposes. As determined in *Wygant* and *Croson*, past discrimination must be specific to the governmental unit involved. The Fifth Circuit found in *Hopwood II* "that the district court erred in expanding the remedial justification to reach all public education within the State of Texas," and that racial remedies need to be limited in order to

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96 *Hopwood II*, 78 F.3d at 944.
97 Id.
100 *Hopwood II*, 78 F.3d at 946.
101 Id.
102 Id.
104 *Hopwood II*, 78 F.3d at 948.
106 *Hopwood II*, 78 F.3d at 950.
retain a "logical stopping point." In Hopwood, the discrimination relied on to support the claimed remedial interest was not specific to the law school. Accordingly, the Fifth Circuit held that the University of Texas law school was not the appropriate actor to remedy discrimination in the education system as a whole. The Court held that the University of Texas law school needed to be able to show present effects of past discrimination that plagued the school. The present effects the law school proffered and the Fifth Circuit struck down were the perception of being a "white" school, a present hostile environment, and underrepresentation of minorities due to past discrimination. These arguments, however, failed because there was no evidence of overt discrimination at the University of Texas. Additionally, the Fifth Circuit held that the race-based law school admissions program could not be motivated by a desire to remedy the effects of general discrimination in the Texas education system.

The Fifth Circuit affirmed the Hopwood II decision in its Hopwood III ruling in 2000. The court reiterated that a government entity may use race for a remedial purpose provided its focus is on discrimination specific to that entity. However, the University of Texas School of Law failed to prove this requirement.

B. The Ninth Circuit: Smith v. University of Washington

While the Fifth Circuit disagreed with the Justice Powell's diversity argument in Bakke, other courts have upheld the diversity rationale. The Ninth Circuit Court of Appeals, in Smith v. University of Washington, followed Justice Powell's opinion in Bakke by declaring that diversity is a permissible goal, sufficient to fulfill the first prong in the strict scrutiny review. In Smith, Katuria Smith was denied admission to the University of

107 Id. (quoting Wygant, 476 U.S. at 275).
108 Id. at 951.
109 Id.
110 Id. at 952.
111 Id.
112 Id.
113 Id. at 954.
114 Hopwood v. State of Texas (Hopwood III), 236 F.3d 256, 273-74 (5th Cir. 2000).
115 Id. at 273.
Washington School of Law in 1994.\textsuperscript{117} She and other rejected candidates filed a lawsuit a few years later claiming that the law school “illegal[ly] discriminat[ed] against Caucasians and others on the basis of their race.”\textsuperscript{118} The district court refused to grant “Smith a partial summary judgment on [her] claim that . . . race cannot be used as a factor in achieving educational diversity, although it may be used for certain limited remedial purposes.”\textsuperscript{119} The Ninth Circuit Court of Appeals affirmed the district court’s decision.

1. The Diversity Rationale

In \textit{Smith}, the Ninth Circuit Court of Appeals declared that there was “no doubt that the district court’s decision faithfully followed Justice Powell’s opinion in . . . \textit{Bakke}.”\textsuperscript{120} In \textit{Bakke}, the Court determined that “the attainment of a diverse student body ‘is a constitutionally permissible goal for an institution of higher education.’”\textsuperscript{121} The \textit{Smith} court reemphasized this assertion.

The Ninth Circuit addressed the same issue that the \textit{Hopwood} court faced regarding whether Justice Powell’s diversity rationale is binding Supreme Court authority since “none of the other Justices fully agreed with Justice Powell’s opinion.”\textsuperscript{122} The court stated that “[w]hen 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.’”\textsuperscript{123} In \textit{Bakke}, it was the opinion of the Stevens Group that joined Powell in striking down the admissions policy. However, Justice Stevens’ opinion broadly proclaimed that Title VI precluded all race-conscious admission policies.\textsuperscript{124} This left Justice Powell’s decision to be the narrower of concurring opinions. However, the Brennan Group thought that the admissions program was constitutional and, with Powell, constituted a majority of Justices who agreed that an admissions policy could consider race.\textsuperscript{125} Thus, the \textit{Smith} court concluded that “a race-based

\begin{itemize}
  \item \textsuperscript{117} \textit{Id}. at 1191.
  \item \textsuperscript{118} \textit{Id}.
  \item \textsuperscript{119} \textit{Id}.
  \item \textsuperscript{120} \textit{Id}. at 1196.
  \item \textsuperscript{121} \textit{Id}. at 1197 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978)).
  \item \textsuperscript{122} \textit{Id}. at 1198.
  \item \textsuperscript{123} \textit{Id}. at 1199 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).
  \item \textsuperscript{124} \textit{Id}. at 1198.
  \item \textsuperscript{125} \textit{Id}. at 1198-99.
\end{itemize}
possibility must be taken to be the actual rationale adopted by the Court."\textsuperscript{126} In either case, Justice Powell’s decision is the narrowest, and thus may be considered the Court’s holding.\textsuperscript{127}

The Ninth Circuit noted that Supreme Court cases since \textit{Bakke} have not looked favorably upon race-based policies. However, \textit{Smith} asserted the distinction that the Supreme Court “has not returned to the area of university admissions, and has not indicated that Justice Powell’s approach has lost its vitality in that unique niche of our society.”\textsuperscript{128} The Ninth Circuit declared that it is the Supreme Court’s authority to overrule the \textit{Bakke} case if and when those race-based rationales become obsolete.\textsuperscript{129} Thus, the court held that the opinion of Justice Powell and the diversity rationale in the \textit{Bakke} case are good law.

2. \textit{The Remedial Governmental Interest}

In \textit{Smith}, the law school does not claim that its policy has a remedial effect. Thus, the remedial justification of race-based admissions policies is not an issue. However, the court does briefly discuss the remedial interest in its interpretation of \textit{Bakke}. The \textit{Smith} court asserted that “‘the State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.’”\textsuperscript{130} While the remedial interest issue is not essential to the Ninth Circuit’s decision in \textit{Smith}, the court, in dicta, upheld the validity of the remedial interest by arguing that Justice Powell’s decision is the correct \textit{Bakke} holding.

C. \textit{The Epitome of the Bakke Split: The Michigan Cases}

Two very recent decisions in Michigan illustrate most vividly the uncertainty associated with university race-based admission policies. These cases, \textit{Gratz v. Bollinger}\textsuperscript{131} and \textit{Grutter v. Bollinger},\textsuperscript{132} attempt to determine the validity of racial classifications in admissions programs at the same

\begin{footnotesize}
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  \item \textsuperscript{126} Id. at 1199.
  \item \textsuperscript{127} \textit{Marks} v. United States, 430 U.S. 188, 193 (1977).
  \item \textsuperscript{128} \textit{Smith}, 233 F.3d at 1200.
  \item \textsuperscript{129} Id.
  \item \textsuperscript{130} Id. at 1197 (quoting \textit{Regents of the Univ. of Cal. v. Bakke}, 438 U.S. 265, 307 (1978)).
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university. However, the holdings of these two cases are very different: the Eastern District Court of Michigan found one policy constitutional while finding the other, similar program, unconstitutional.

1. Gratz v. Bollinger

In Gratz, the plaintiffs filed suit claiming that the University of Michigan’s College of Literature, Science, and the Arts violated the Equal Protection Clause of the Fourteenth Amendment by considering race as a factor in its admission policy. The court applied the strict scrutiny test due to the inherently suspect racial distinctions in the policy. The university claimed that a diverse student body is a compelling government interest, which the court addresses in the 2000 Gratz decision. The university did not claim that its policies served a remedial purpose; however, Defendant-Intervenors, comprised of a group of minority students who had applied for or intended to apply for admission to the university, asserted the claim that the admissions policy served a remedial purpose. This rationale is addressed in the 2001 Gratz decision.

In the first Gratz decision, the court interpreted Bakke to determine whether or not the diversity rationale is a compelling government interest. The court initially noted that “the separate opinions in Bakke . . . clearly illustrate[ ] that there were no clear grounds upon which a majority of the Court agreed in reaching their respective decisions.” The court ultimately adopted Justice Powell’s diversity interest; however, it arrived at its conclusion in a slightly different manner than did the Smith court. The Gratz court declares that while there are not five Justices concluding that diversity is a compelling interest in Bakke, there are five Justices who believe that race may be considered, if properly done, in admissions policies. The court proposes that Justice Brennan’s silence as to the diversity issue is not necessarily a rejection of the idea; in the later Metro

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133 Gratz, 122 F. Supp. 2d at 813-14 (Plaintiffs also claimed that the policy violated Title VI of the Civil Rights Act.).
134 Id. at 816.
135 Id.
136 Id.
139 Id. at 820.
140 Id. at 819.
141 Id. at 820.
Broadcasting case, Justice Brennan explicitly recognizes Justice Powell's diversity argument from Bakke. The Gratz court specifically disagreed with Hopwood's outcome that a diverse student body is not a compelling interest, instead holding that diversity is in fact a compelling interest.

The court then examined whether the university admissions program was narrowly tailored to accomplish the diversity interest. In Bakke, Justice Powell made it clear that rigid quotas are not permissible. By simply setting aside a predetermined number of minority seats, non-preferred minorities and Caucasians "are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats," regardless of the strength of their qualifications. The Gratz court agreed, stating that in order "to achieve the educational benefits associated with a racially and ethnically diverse student body, more than a token number of underrepresented minority students is required." However, the court also noted that "it is often a thin line that divides the permissible from the impermissible." The present admissions program at the University of Michigan, in effect since 1999, was found to be a permissible use of race that is narrowly tailored. The program employs a combination of methods to promote diversity: minority applicants are given twenty points in calculating their selection score and applicants that possess certain desirable qualities are "flagged." Thus, minority applicants are not isolated from the rest of the candidate pool. The Gratz court found that this admissions policy satisfies the Bakke requirements and is therefore constitutional.

It was not until the 2001 Gratz ruling that the court addressed the remedial interest issue posed by the Defendant-Intervenors. Applying strict scrutiny, the court looked for a specific occurrence of discrimination performed by the university. The court also examined the program to determine whether it appropriately addressed the effects of the discrimination. However, the Defendant-Intervenors "failed to present any evidence

143 Gratz, 122 F. Supp. 2d at 820.
144 Hopwood v. State of Texas (Hopwood III), 236 F.3d 256 (5th Cir. 2000).
146 Gratz, 122 F. Supp. 2d at 830.
147 Id. at 827.
148 Id.
149 See Bakke, 438 U.S. at 316 ("[T]he race of an applicant may tip the balance in [his] favor just a geographic origin or a life spent on a farm may tip the balance in other candidates' cases.") (Powell, J., concurring).
150 Gratz, 122 F. Supp. 2d at 831.
that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the . . . race-conscious admissions programs.” Additionally, the Defendant-Intervenors failed to establish the existence of the identified discrimination or the necessity of the admissions policies to remedy such discrimination. Thus, the court rejected the Defendant-Intervenors’ argument since they “failed to cite any evidence that the . . . race-conscious admissions criteria were actually motivated by a desire to remedy any past or present discrimination by the University.”

*Gratz*, like the Ninth Circuit, follows Justice Powell’s decision in *Bakke*. The *Gratz* court asserts that both the diversity interest and remedial interest are sufficient to fulfill the first prong of strict scrutiny.

2. *Grutter v. Bollinger*

In *Grutter v. Bollinger*, Grutter’s 1996 application for admission to the University of Michigan Law School was rejected. She claimed that the law school discriminated against her on the basis of race, which is a violation of the Equal Protection Clause of the Constitution.

The court examined the diversity issue by stating that *Bakke* is “the only case in which the high court has ever addressed the ‘diversity rationale’ as a justification for considering race in reviewing an application for admission to a university.” As in *Hopwood*, the *Grutter* court believed that, due to the fragmented *Bakke* court, the *Bakke* opinion “did not hold that a state educational institution’s desire to assemble a racially diverse student body is a compelling government interest.” The *Grutter* court further declared that even if diversity was a compelling state interest, the law school’s admissions policy was not sufficiently narrowly tailored to fulfill the second prong of the strict scrutiny test.

The court also examined the remedial interest of the questioned race-based admissions policies. The law school attempted to argue that the program was a remedy for past discrimination against minorities. As
elaborated in earlier cases, societal discrimination alone can never be a justification for racial classifications.\(^{159}\) In *Grutter*, the court found “there has been no evidence, or even an allegation, that the law school or the University of Michigan has engaged in racial discrimination.”\(^{160}\) Therefore, the university’s admissions policy was not justified by any remedial interests.

*Grutter* is consistent with the Hopwood Court’s interpretation of the *Bakke* case. Unlike *Gratz*, the court in *Grutter* held that a diverse student body is not a compelling governmental interest.\(^{161}\) Thus, the race-based admissions policy at the University of Michigan’s School of Law violated the Equal Protection Clause of the Constitution.

**D. The Sixth Circuit: A Decision on Grutter v. Bollinger**

The Sixth Circuit Court of Appeals delivered its highly emotional decision on *Grutter v. Bollinger* in May, 2002.\(^{162}\) The district court had determined that diversity should not be a compelling governmental interest in university admissions policies. In a five to four *en banc* decision, the court of appeals reversed the district court’s ruling, finding the law school’s admissions program constitutional and announcing that achieving a diverse student body is a compelling interest.

1. **The Diversity Rationale**

The Sixth Circuit, in its argument in support of diversity as a governmental interest, focused on the *Bakke* case. Since a law school is “the proving ground for legal learning and practice, [it] cannot be effective in isolation from the individuals and institutions with which the law interacts.”\(^{163}\) Justice Powell’s decision in *Bakke*, according to the majority opinion, is binding law under *Marks v. United States*.\(^{164}\) Like the Ninth

\(^{159}\) *Id.* at 869.

\(^{160}\) *Id.*


\(^{162}\) *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

\(^{163}\) *Id.* at 739 (quoting Justice Powell’s *Bakke* decision (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950))).

\(^{164}\) *Marks v. United States*, 430 U.S. 188, 193 (1977) (“the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))). *See also supra* note 123 and accompanying text.
Circuit, the Sixth Circuit found that, under *Marks*, Justice Powell's decision is the narrowest rationale, and is the rationale that should be followed.165

The Sixth Circuit asserted that Justice Brennan's concurrence in *Bakke* provided some support of Justice Powell's diversity argument.166 Justice Brennan declared the "Harvard plan" to be constitutional under his concurrence "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."167 This statement, according to the Sixth Circuit, implicitly supported Justice Powell's belief that diversity is a compelling interest.168 The *Hopwood* court used the same statement to support its contention that Brennan implicitly rejected diversity as a compelling interest.169 However, the Sixth Circuit examined the language, claiming "at least so long as" does not mean "only if."170 Furthermore, the court claimed that the Brennan quote provided that a constitutional goal is "achieving an integrated student body," which is distinguished from the assertion that it is permissible to use race to achieve an integrated student body "so long as necessitated by the lingering effects of past discrimination."171 Additionally, to support Justice Brennan's approval of diversity as a compelling interest, the court cited to the post-*Bakke* case, *Metro Broadcasting*. In that opinion, Justice Brennan quoted Justice Powell's *Bakke* decision claiming that "a diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which race-conscious university admissions programs may be predicated."172

The Sixth Circuit rejected the notion that cases such as *Adarand* and *City of Richmond v. Croson, Co.* preclude the possibility of diversity as a

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165 According to Brennan's concurrence in *Bakke*, an "intermediate scrutiny standard would apply to 'benign' racial classifications." Justice Powell, on the other hand, applied strict scrutiny to all racial classifications. Therefore, the Sixth Circuit reasoned that "[b]ecause the set of constitutionally permissible racial classifications under intermediate scrutiny by definition includes those classifications constitutionally permissible under strict scrutiny, Justice Powell's rationale would permit the most limited consideration of race." *Grutter*, 288 F.3d at 741.

166 *Id.* at 742-43.

167 *Id.* at 742 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 326 n.1 (1978)).

168 *Id.* at 742-43.


170 *Grutter*, 288 F.3d at 742.

171 *Id.* at 743.

172 *Id.* (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (quoting *Bakke*, 438 U.S. at 311-13)).
compelling governmental interest. Those cases dealt with employment situations and held that racial classifications were unconstitutional unless they serve a remedial purpose. The Sixth Circuit noted that because the Supreme Court previously stated that "if a precedent of [the] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." Therefore, the Bakke case should be followed.

The Court of Appeals found the law school’s admissions program to be narrowly tailored. The policy at issue was carefully drafted, with no utilization of a quota system. A ‘plus’ factor was employed instead, allowing the school to consider more than just race. This admissions policy was similar to the Supreme Court approved “Harvard plan” in Bakke. The rejected applicants to the law school claimed that the policy’s pursuit of a “critical mass” is the same as a quota system. However, the “critical mass” was not a set quota but rather an approximate range that varied over the years. Since the Michigan law school’s admissions program promoted the compelling governmental interest of a diverse student body and was narrowly tailored to serve that interest, it fulfilled the requirements of strict scrutiny and was therefore deemed constitutional.

2. The Remedial Governmental Interest

Although the district court asserted that the admissions policy at the law school was not justified by remedial concerns, the Sixth Circuit does not address the remedial interest in its Grutter decision. However, by accepting Bakke as binding law, the general idea of a remedial use of racial classifications is supported.

174 Grutter, 288 F.3d at 743. See also Leonardi, supra note 161, at 178-95.
175 Grutter, 288 F.3d at 743-44 (alteration in original) (quoting Agostini v. Felton, 521 U.S. 203, 237 (1997)).
176 Id. at 746.
177 Id. at 747-48.
178 Id. at 748. While the dissent argues that the “critical mass” is equivalent to forty-four to forty-seven minority members per class (about 13.5%), the majority points out that, from 1987 to 1998, minority enrollment has ranged from 12.3% to 20.1%. Id.
III. REACTIONS TO THE ELIMINATION OF AFFIRMATIVE ACTION IN UNIVERSITIES

Due to the Supreme Court’s hesitation to provide a definite answer as to the constitutionality of certain race-based programs, many states whose courts have struck down race-based admissions policies have been forced to search for alternate means of attaining the benefits of affirmative action. Such examples are Texas and California, which have taken new initiatives in adopting socioeconomic admissions policies. However, these policies could be prone to problems similar to those faced by race-based programs. This section will address those new schemes.

A. Various State Reactions

1. California’s Proposition 209

In 1996, California let voters decide how to handle the race debate. They introduced a proposal which would eliminate state and local government affirmative action programs in the areas of public education, public employment, and public contracting. Basically, the effect of this program on state universities was that they would no longer be able to use race or ethnicity as factors in their admissions decisions.

This proposition, known as the California Civil Rights Initiative (“CCRI”), became law after it passed by a vote of fifty-four percent to forty-six percent in November of 1996. It was ultimately codified in Article I of California’s Constitution: “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Opponents attempted to dispose of Proposition 209 by filing suit, claiming that the new provision prohibiting public race and gender preferences denied equal protection and conflicted with federal civil rights statutes. However, the

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179 Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities, Analysis by Legislative Analyst, at http://www.ss.ca.gov/Vote96/html/BP/209.htm (last visited Sept. 8, 2002).
181 CAL. CONST. art. I, § 31(a).
182 Coalition for Econ. Equity v. Wilson, 122 F.3d 718 (9th Cir. 1997).
Ninth Circuit held that this new initiative did not violate the United States Constitution or "conflict[ ] with any decision of the Supreme Court." Since then, California state universities have not been permitted to consider race in admissions decisions. Other states have followed California's lead by enacting statutes similar to Proposition 209. For instance, voters in Washington state passed Initiative 200 ("I-200") in 1998, which was then codified with language identical to that of Proposition 209.

Since Proposition 209, California schools have turned to other means of attaining diversity and providing "affirmative action" programs. Some schools, for instance, are experimenting with types of class-based affirmative action policies. In these admissions programs, instead of using race as a factor, a potential student's socioeconomic background is considered. The University of California at Los Angeles has used residential location as a means to enroll minority students. With this policy, the backgrounds of students from high schools in underprivileged minority areas are given some weight in admissions procedures. The University of California implemented a "Top Four Percent" policy effective in 2001. This program allows the top four percent of students from all California high schools to be admitted into a UC campus.

2. Texas

Texas considered an idea similar to Proposition 209 shortly thereafter, known as "Houston Proposition A." Unlike the California initiative,

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183 Vinik et al., supra note 180, at 412 (quoting Coalition for Econ. Equity, 122 F.3d at 719).
184 Id. at 407.
185 WASH. REV. CODE ANN. § 49.60.400 (1) (West 2001).
186 See Martin D. Carcieri, Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-Based Reforms, 9 SETON HALL CONST. L.J. 459, 466 (Spring 1999) (arguing that Proposition 209 needs to provide a temporary exception for university admissions).
188 Id.
189 Id. at 2333.
191 Id.
192 Vinik et al., supra note 180, at 412-13.
Texas voters did not pass this proposition. However, the Fifth Circuit's decision in *Hopwood* precluded the use of race to achieve student diversity. Therefore, public universities have been searching for new admissions programs for minorities.

After looking at various possibilities for their universities, Texas selected a program dubbed "Affirmative Access," also known as the "Top Ten Percent" policy, which was enacted into law in 1997. This program "automatically admits students who graduate in the top ten percent of the high school class into the University of Texas system." It is codified in Texas' Education Code stating:

> Each general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated with a grade point average in the top 10 percent of the student's high school graduating class in one of the two school years preceding the academic year for which the applicant is applying for admission and the applicant graduated from a public or private high school in this state...

Other states have implemented similar top percentage programs. The state of Florida has implemented one such program, automatically admitting the top twenty percent of the graduates from each Florida public high school to one of the state's public colleges.

### B. The Effects of the New Admissions Policies on Universities' Enrollment

The new socioeconomic and top percentage plans have arisen to take the place of race-based affirmative action policies. However, these pro-

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193 *Id.* at 412.


197 TEX. EDUC. § 51.803 (Vernon 2001).


199 Vinik et al., *supra* note 180, at 416.
grams may not be as effective as the race-based admissions policies in increasing minority groups’ enrollment in universities.

Many argue that the top percentage plans do not aid in increasing minority enrollment. Rather, these programs increase the diversity of statewide economic representation by automatically admitting students in the top of the class of all high schools throughout the state. They do help some minorities that are in the top of their classes, particularly those in predominately minority schools. However, many schools are not predominately minority schools, so the top percentage plan serves to automatically admit a large number of Caucasians.

Socioeconomic programs will help to provide “affirmative action” to all those who are underprivileged, regardless of race. By focusing solely on prospective students’ economic and social standing, affirmative action would be extended to reach all disadvantaged students, not just those racial groups termed “disadvantaged minorities.” Supporters of socioeconomic affirmative action claim this type of program presents several advantages:

1) it would be legally defensible, 2) it would enjoy broader public support because it includes more people, and 3) it would eliminate difficult questions under a race-based program such as why an African-American student from an affluent background should obtain preference in admissions over a Caucasian student from a poor background.

Also, racial diversity on college campuses may increase since socioeconomic programs benefit large numbers of racial minorities.

200 Montejano, supra note 195. Since every single school, urban and rural, across the state is included, nonminority students who come from poor communities are helped by the percentage policy.

201 See id. The author discusses the “new sender” high schools in Texas in reference to UT-Austin. These new feeder schools consist of “distinct clusters of inner-city minority high schools in Dallas-Ft. Worth, Houston and San Antonio, and rural white high schools in East and Northeast Texas.” Id.

202 Vinik et al., supra note 180, at 423. See also Derrick Bell, Guarding Diversity Programs from Political and Judicial Attack, CHRON. HIGHER EDUC., Apr. 4, 1997, at B4.

203 Vinik et al., supra note 180, at 423. But see Thomas Glenn Martin, Jr., UCLA School of Law Admissions in the Aftermath of the U.C. Regents’ Resolution to Eliminate Affirmative Action: An Admissions Policy Survey and Proposal, 18 CHICANO-LATINO L. REV. 150, 174 (1996) (“Because socioeconomic disadvantage has a somewhat ambiguous relationship to race, the preference of the socioeconomically disadvantaged applicant would not necessarily benefit minority applicant [sic].”).
C. The Constitutional Implications of the New Admissions Programs

The new race-neutral university admissions programs may be unconstitutional, implicating the same problems that plague race-based policies.204 A racially discriminatory purpose triggers the Equal Protection Clause, even if no racial classifications are used.205 If a university admissions program’s purpose is to benefit minorities, even absent racial classifications, then it is discriminatory and the strict scrutiny standard applies.206

In Washington v. Davis,207 black applicants who were not hired as police officers for the District of Columbia claimed that a written test required for all applicants was racially discriminatory. The plaintiffs claimed that the test excluded a disproportionate number of African-Americans.208 The Supreme Court stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."209 However, the Court went on to say:

[We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.210

In other words, a law will not trigger the strict scrutiny standard simply because it has a disproportionate racial impact. Rather, in order to violate the Equal Protection Clause, the disproportionate impact must be traced to a purpose to discriminate.

In Personnel Administrator of Massachusetts v. Feeney,211 the plaintiffs were females who claimed that a state statute, which favored veterans who qualified for state civil service positions over other applicants, discrimi-

204 Forde-Mazrui, supra note 187, at 2333.
205 Id.
206 Id.
208 Id. at 233.
209 Id. at 242.
210 Id.
nated against women. This statute had the effect of limiting employment opportunities for women. Although *Feeney* addresses gender discrimination, the Court notes that racial classifications are presumptively invalid and are subject to strict scrutiny.\(^{212}\) This “applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.”\(^{213}\)

The Supreme Court applied a two fold inquiry to this facially gender-neutral statute that had adverse effects on women.\(^{214}\) The first inquiry is whether the statutory classification is actually neutral.\(^{215}\) If the classification itself is neutral, then “the second question is whether the adverse effect reflects invidious gender-based discrimination.”\(^{216}\) The impact of a particular statute “provides an ‘important starting point’ but purposeful discrimination is ‘the condition that offends the Constitution.’”\(^{217}\) The court must then determine the legislative purpose of the statute. In order for the purpose to be discriminatory, and thus in violation of the Constitution, the legislature must have “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”\(^{218}\) In applying this inquiry to *Feeney*, the Supreme Court held that the veterans’ statute was constitutional. The legislative history showed that the statute was created to ensure a preference for veterans of either sex over non-veterans, not to create a preference for men over women.\(^{219}\)

Applying these Supreme Court holdings to affirmative action programs may cause the new admissions programs to be invalidated as having a racially discriminatory purpose.\(^{220}\) When “a legislature or public university intentionally seeks to admit minority students through race-neutral means, such as disadvantage-based preferences, it has taken a course of action ‘because of’ and not merely ‘in spite of’ its effect on racial

\(^{212}\) *Id.* at 272.

\(^{213}\) *Id.* See also *Guinn v. United States*, 238 U.S. 347 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

\(^{214}\) *Feeney*, 442 U.S. at 274.

\(^{215}\) *Id.*

\(^{216}\) *Id.*


\(^{218}\) *Id.* at 279.

\(^{219}\) *Id.*

\(^{220}\) *But see Carceri*, *supra* note 186 (suggesting that class-based preferences do not involve a suspect classification).
Thus, these policies will be subject to the same strict scrutiny analysis as the original race-based affirmative action programs.

If these race-neutral programs are found to have the purpose of benefiting minorities then programs such as Texas' "Top Ten Percent" and California's socioeconomic affirmative action would be subject to the same strict scrutiny test as the race-based classifications. These new programs would then have to meet the two prongs of strict scrutiny: (1) serving a compelling governmental interest, and (2) being narrowly tailored to fulfill that interest. Given the outcome of many cases, such as *Hopwood*, this standard may be difficult to meet. The new policies would have to serve a remedial interest or be found to ensure diversity. Even then, some jurisdictions, like the Fifth Circuit, do not consider diversity to be a compelling interest. In order to meet the remedial interest, the race-neutral program would have to alleviate discrimination specific to the school at hand, which is often hard to prove. Thus, these race-neutral programs may suffer just as the race-based programs have.

IV. THE FUTURE OF AFFIRMATIVE ACTION

The future of affirmative action is uncertain. The Supreme Court has refused, thus far, to reconsider a case such as *Bakke*, leaving the Circuit Courts of Appeals on their own to interpret the issue. Unless the Supreme Court makes a final decision on this matter, the appellate courts will continue to create inconsistency in their treatment of affirmative action programs, perhaps injuring minorities, as well as universities, in their jurisdictions. The two key interests in maintaining affirmative action programs in university settings are the diversity and remedial interests.

A. The Diversity Interest

Diversity in universities is an important, if not necessary, part of a well-rounded educational system. The United States is progressively becoming

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222 Socioeconomic programs may also be suspect if race is involved when defining the class. See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 Tex. L. Rev. 1847, 1860 (1996) ("[A]ny attempt by a legislature or other public body to adopt a class metric that recognizes interactions among race, ethnicity, gender, and class might well be struck down by the Court as a subterfuge, a reintroduction of race- and gender-based affirmative action through the back door.").
more multicultural; therefore it is essential that Americans learn about and experience various cultures.\textsuperscript{223} A diverse student body will allow students to experience different cultures through firsthand interactions with other students. Institutions of higher education “must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas.’”\textsuperscript{224} In addition, various races and ethnicities in a class may prompt professors to approach their class subject matter in a different manner, encompassing a broad array of perspectives from different cultures. University students should be granted the opportunity to gain “‘wide exposure’ to the ideas and mores of students as diverse as this Nation of many people.”\textsuperscript{225}

Diversity in higher education is not only important because of its benefits to the educational environment, but is also imperative in preparing students to interact and succeed in the world post-graduation.\textsuperscript{226} Physicians, lawyers, business people, and other professionals, serve a “heterogeneous population” and thus the “interplay of ideas and the exchange of views” is vital to graduates’ ability to provide “service to humanity.”\textsuperscript{227} The United States is becoming increasingly diverse.\textsuperscript{228} In 2000, African Americans, Native Americans, Asian Americans, and Hispanics made up twenty-nine percent of the population of the United States.\textsuperscript{229} According to one estimate, these groups will constitute forty-seven percent, almost half, of the United States’ population by the year 2050.\textsuperscript{230} Therefore, it is imperative that university students experience a broad variety of perspectives and ideas in order to be able to succeed in this increasingly diverse nation.\textsuperscript{231}

\textsuperscript{223} Wilbert Jenkins, \textit{Why We Must Retain Affirmative Action}, USA TODAY Magazine (Sept. 1999), \textsl{available at} http://www.findarticles.com/cf_nativew/m1272/2652_128/56459125/p7/article.jhtml?term=%2BAffirmative+%2Bregulations+%2Betc.

\textsuperscript{224} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978).

\textsuperscript{225} Id.

\textsuperscript{226} \textit{See} Brief of Amici Curiae 3M, Abbott Laboratories et al., Gratz v. Bollinger (6th Cir. 2001) (Nos. 01-1333, 01-1416, 01-1418).

\textsuperscript{227} Id.

\textsuperscript{228} \textit{See} id.

\textsuperscript{229} \textit{See} U.S. Census Bureau, \textit{Race and Hispanic or Latino: 2000}, \textsl{at} http://factfinder.census.gov/bf/_lang=en\_vt\_name=DEC\_2000\_SF1\_U\_QTP3\_geo\_id =01000US.html.

\textsuperscript{230} Jon Meacham, \textit{The New Face of Race}, NEWSWEEK, Sept. 18, 2000, at 40.

\textsuperscript{231} Brief of Amici Curiae 3M et al., at 9-11. The \textit{amici} offer a number of ways a diverse educational setting promotes future success:

First, a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-
It is clear that diversity should be considered a compelling government interest. Some circuits, such as the Ninth Circuit and the Sixth Circuit, already hold that diversity is a compelling interest substantial enough to justify racial classifications in admissions programs.\textsuperscript{232} Of course, the admissions policy must be tailored to adequately serve the goal of a diverse student body. However, some courts have decided that diversity should not be considered a compelling interest; thus, universities in those jurisdictions have been deprived of their ability to pursue excellence by adequately determining which students have the most to contribute to the environment and which students possess the most promise of success.\textsuperscript{233}

If courts strike down diversity as a compelling interest in race-based admissions policies, they may also doom the alternative race-neutral programs if they are found to have the purpose of benefiting certain races.\textsuperscript{234} This result would leave universities powerless to ensure that their students receive the training necessary to succeed after graduation. Students would be subject to "to study in an academic vacuum, removed from the interplay of ideas and the exchange of views" that will help mold them into well-rounded, adept professionals.\textsuperscript{235}

The only way to ensure the best education for the future leaders of America is to provide universities the power to create a diverse atmosphere. By holding that diversity is a compelling government interest, the Supreme Court would effectively guarantee that students at public universities will be able to experience the benefits associated with the "robust exchange of ideas."\textsuperscript{236}

solving arising from the integration of different perspectives. Second, such individuals are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to these consumers. Third, a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world. Fourth, individuals that have been educated in a diverse setting are likely to contribute to a positive work environment by decreasing incidents of discrimination and stereotyping. Finally, an educational environment created by consideration of the potential promise of each applicant in light of his or her experiences and background is likely to produce the most talented workforce.

\textit{Id.}
\textsuperscript{232} See supra Part II.
\textsuperscript{233} See Amici Curiae 3M et al., at 11.
\textsuperscript{234} See supra Part III.
\textsuperscript{236} Id. at 313.
B. The Remedial Governmental Interest

*Bakke* and other Supreme Court decisions make it clear that there is a "legitimate and substantial [governmental] interest in ameliorating or eliminating where feasible, the disabling effects of identified discrimination."237 A remedial interest, therefore, will justify the use of racial classifications in university admissions policies. However, this interest often fails universities because they are unable to prove the existence of present effects of past discrimination specific to their school.238

In order to justify the use of racial classifications by claiming they serve to remedy past discrimination, a university must be clear that the discriminatory harms stem from the particular school's past.239 A university cannot attempt to alleviate the effects of discrimination in society in general or even in the educational system as a whole.240 Rather, they must show that the actual school is responsible for the present effects of past discrimination. This can be a daunting task. In addition, those universities without a discriminatory past cannot use this justification for race-based admissions policies. Since this remedial interest is so difficult to prove, most universities are not able to use this justification for race-based admissions policies. Thus, universities must look for other interests, such as diversity, to validate their policies.

**CONCLUSION**

The use of race-based admissions policies in a university setting provides a plethora of benefits to the university and to the students it educates. In order to retain these advantages, the Supreme Court must readdress this issue and make clear that Justice Powell's decision in *Bakke* is the law of the land. The Supreme Court, in its post-*Bakke* decisions, has already unambiguously acknowledged that racial classifications can be used to remedy past discrimination.241 However, this interest is not applicable to all universities; those universities without discriminatory pasts will be deprived of the opportunity to adequately choose the students who have the

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237 *Id.* at 307.
238 See supra Part II and the discussion of the *Hopwood* case in Part II.A.
239 See *Hopwood v. Univ. of Tex.*, 861 F. Supp. 551 (W.D. Tex.), *rev'd*, 78 F.3d 932 (5th Cir. 1994). See also supra Part II.
240 *Hopwood v. State of Texas (Hopwood II)*, 78 F.3d 932 (5th Cir. 1996).
most to contribute to the educational environment and those who have the most potential. A diverse student body is then the best option to justify the use of race in university admissions policies. In order to provide the leaders of tomorrow with the skills they need to succeed in a multicultural nation, diversity should be considered a compelling governmental interest for justifying racial classifications in university settings.