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AFFIRMATIVE ACTION IN COLLEGE AND GRADUATE SCHOOL ADMISSIONS—THE EFFECTS OF *HOPWOOD* AND THE ACTIONS OF THE U.C. BOARD OF REGENTS ON ITS CONTINUED EXISTENCE

Jeffrey B. Wolff

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I. INTRODUCTION

THE affirmative action debate which began in 1978 with the Supreme Court's decision in *Regents of the University of California v. Bakke*¹ has continued over the years. The litigation and controversy has generally been associated with the awarding of government contracts² and with business hiring and firing practices.³ Since *Bakke*, the Supreme Court has not squarely addressed the issue of affirmative action policies in graduate school admissions. A recent Texas case⁴ and the actions by the University of California ("U.C.") Board of Regents during the summer of 1996 have brought the affirmative action issue back into the limelight. This Comment will discuss the development of affirmative action policies generally and in the graduate school context. The Comment will then provide an extensive discussion of *Hopwood v. Texas*, U.C.'s actions, and the effects that these occurrences could have on affirmative action policies throughout the United States. The resulting conclusion will be that preferential admissions of minorities to graduate schools are no longer needed and should be abandoned in favor of programs that assist socially and economically disadvantaged people, without consideration of skin color. To ensure that minorities have an equal chance at achieving the grades and the test scores necessary to gain admittance to graduate schools, lower level education must be improved. This can be accomplished by improving the quality of instruction at the middle school and high school levels or through initiating tutorial programs that help minorities achieve admission to graduate schools under color-blind admissions policies.

II. THE HISTORY OF AFFIRMATIVE ACTION

Affirmative action policies have not been in effect for many years. But judicial decisions preceding the programs laid the groundwork for the policies. The decision in *Plessy v. Ferguson*⁵ may have signified the birth of the "separate but equal" doctrine in 1896, but Justice Harlan's dissent

1. 438 U.S. 265 (1978) (involving a state medical school's policy of reserving a specific number of spaces in its entering class for minority students).

2. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding statute that required contractors to use qualified minority business enterprises).

3. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (invalidating a scheme that granted black teachers greater protection from layoffs than white teachers).

4. *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994).

5. 163 U.S. 537 (1896). *Plessy* involved a Louisiana statute that said a railroad had to provide separate but equal facilities for whites and people of color. *Id.* at 540. The statute

foreshadowed things to come. He was the first Justice to recognize the potential effects of restricting both races, even on an equal basis. He observed that the separation of the races would only instill hatred between them⁶ and that the doctrine was really not an equal restriction of both races.⁷

After *Plessy* announced the separate but equal doctrine, numerous cases followed which analyzed the issue of whether or not separate facilities were in fact equal.⁸ These cases demonstrated the problem with the doctrine, and it was only a matter of time before the doctrine was overruled in the landmark decision *Brown v. Board of Education*.⁹ The Court had tired of analyzing each claim on a case by case basis to determine whether or not the equality issue had been satisfied. The majority finally realized that separate but equal was inherently *unequal*. It was obvious that the black students' schools were significantly inferior and that black and white children did not have the same educational opportunities.¹⁰ The demise of the separate but equal doctrine illustrated the Court's growing sensitivity towards the plight of minorities in the educational arena. The *Brown* decision laid the groundwork for the development of affirmative action policies in graduate school admissions.

III. AFFIRMATIVE ACTION POLICIES IN GRADUATE SCHOOL ADMISSIONS

A. THE EARLY YEARS

After *Brown* rejected the separate but equal doctrine, law schools employed another method of keeping blacks out of "their" law schools: they included questions regarding race on the admissions forms.¹¹ Thus, most people attempting to increase minority enrollment were opposed to the presence of these questions on admissions forms.¹²

An admissions policy that does not consider race sounds like an ideal goal. But some unbelievable statistics resulted from "color blind" admissions. In 1965, only 1.3% of the law students in the United States were black, while 5.5% of the undergraduate population was black.¹³ Even more troublesome, in 1970, 12% of the U.S. population was black, while

was upheld on the basis that the Equal Protection Clause of the Constitution should not be used to try to attain social equality. *Id.* at 551-52.

6. *Id.* at 560.

7. *Id.* at 557.

8. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that equal protection was denied when a black man was denied admission to a Missouri law school, but his education in another state was funded by Missouri); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that "parallel" black law school in Texas was so unequal that the State was forced to admit the minority to the University of Texas ("U.T.") Law School).

9. 347 U.S. 483 (1954).

10. *Id.* at 495.

11. Anthony J. Scanlon, *The History and Culture of Affirmative Action*, 1988 B.Y.U. L. REV. 343, 348.

12. *Id.*

13. *Id.* at 349.

only 1% of U.S. lawyers were black.¹⁴ Such a discrepancy in enrollment figures and minority representation in the legal profession indicated a glaring problem that needed to be solved.

The discrepancy resulted in the development of some early programs that focused on admitting numerous minorities who would otherwise not have been admitted under the then-existing admissions policies.¹⁵ In 1966, Harvard began the first such program, known as CLEO (Council on Legal Education Opportunities). The Harvard program and others invited certain minority students to participate in summer programs that helped prepare them for the possibility of admission to law school. Exceptional performance during this program allowed them to be admitted to law school in the following term.¹⁶ Such programs became popular because they were inexpensive and allowed the preservation of the first-year curriculum because they took place in the summer.¹⁷ But the programs also had numerous problems, and new programs needed to be developed to achieve a more representative mix of students in first-year law classes.¹⁸ What developed is known today as preferential admissions policies.

Most preferential admissions policies are based on Law School Admissions Test (LSAT) scores and undergraduate grade point averages—objective criteria upon which law schools determine admission. Many years ago, it was not really necessary to use these numerical standards. But due to the increase in the number of people applying to professional schools, the schools had to devise a way to efficiently select qualified students.¹⁹ The LSAT was created to assist in the process and has become one of the most important factors.²⁰ The development of these objective criteria opened the door for preferential admissions to be actively utilized.

B. THE *BAKKE* DECISION

In *Regents of the University of California v. Bakke*,²¹ a white male who had applied to the medical school at U.C.-Davis brought an action chal-

14. *Id.* The problem was not limited to blacks. In 1970 there were only 24 Native American lawyers in the U.S. and less than 100 Puerto Rican lawyers in the continental U.S. *Id.*

15. The Association of American Law Schools (AALS) was instrumental in helping to establish a remedial English program at Texas Southern University for its minority students. The program was implemented because minorities had been disadvantaged through the use of the earlier program of separate but equal. *Id.*

16. *Id.* at 350-51.

17. *Id.* at 351. Many foundations help fund these programs, and often the faculty would volunteer their time to teach the minorities. By not affecting the first-year law school curriculum, these programs avoided integrating minorities into the overall student population. *Id.*

18. *Id.* at 351-52. The goal of increased enrollment was not achieved with these programs because many of the minority students who were invited to these programs were already accepted at other law schools. *Id.*

19. Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359, 370-86 (1987).

20. *Id.* at 374.

21. 438 U.S. 265 (1978).

lenging the school's special admissions program after his application was rejected. The school had *specifically* reserved sixteen of the one hundred spots in its entering classes for minorities.²² The school used separate admissions programs to help fulfill its quota.²³

Bakke applied to the medical school in 1973 and 1974 and was rejected both times, even though many of the applicants under the special admissions program were admitted with lower scores.²⁴ Bakke claimed a violation of the Equal Protection Clause of the Fourteenth Amendment²⁵ as well as violation of Title VII of the Civil Rights Act of 1964.²⁶

In his majority opinion, Justice Powell addressed the argument that whites did not need extra protection because they were not a "discrete and insular minority."²⁷ Powell felt that although whites had not been a historically disadvantaged group, they were entitled to invoke the protection of the Fourteenth Amendment.²⁸ He stated that all types of racial classifications would be subject to a strict scrutiny analysis²⁹ and that the admissions policies of the medical school had to be necessary to accomplish a compelling state objective.³⁰

The medical school claimed that the purposes of its admissions policy were to decrease the deficit of minorities in the medical field, remedy discrimination in society, increase the representation of physicians in certain communities, and "obtain[] the educational benefits that flow from

22. *Id.* at 275.

23. *Id.* at 275-76. U.C.-Davis admitted some applicants under the regular admissions procedure while admitting others under a special admissions procedure. The regular admissions program admitted students based upon consideration of the following criteria: undergraduate GPA, MCAT scores, letters of recommendation, and interview ratings. The special admissions program used similar factors but did not require a minimum GPA, as required by the regular admissions policy. Applicants were considered for admission under the special admissions program if they indicated that they were either "economically and/or educationally disadvantaged" or a member of a "minority group." *Id.*

24. *See id.* at 277. Bakke's GPA was 3.46. In 1973 and 1974, the overall GPA for applicants admitted under the special admissions program was 2.88 and 2.62, respectively. Also, in both years the MCAT scores of special admittees were much lower than Bakke's score.

25. The Equal Protection Clause of the Fourteenth Amendment mandates that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws." U.S. CONST. amend. XIV, § 1.

26. 42 U.S.C. § 2000d (1994) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

27. *Bakke*, 438 U.S. at 290 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

28. *Id.* at 293-94. *See Adam Winkler, Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 934 (1995). Although whites are not really a "discrete and insular minority," if judges had to continue to make decisions like whether or not a certain group fit this description, they would be "relying on nothing more than the 'ebb and flow of political forces'" in their determination. *Id.* (citing *Bakke*, 438 U.S. at 298).

29. *Bakke*, 438 U.S. at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

30. Strict scrutiny involves this analysis. *Id.* at 267.

an ethnically diverse student body."³¹ Powell summarily rejected the first goal because its purpose was to admit a certain class of people simply because of their skin color—a purpose he believed completely impermissible.³² While remedying discrimination in society is obviously a satisfactory goal, it was not a valid goal in this case. For a remedial goal to be valid, past discrimination by that specific entity must be identified.³³ In this case, the university was attempting to remedy the discrimination present in society as a whole. Thus, people who had little or nothing to do with the past discrimination would be punished for the behavior of others.³⁴

Powell then considered the idea that the policies help increase the number of physicians in certain communities.³⁵ In his opinion, the goal of increasing the number of physicians in certain communities was the weakest. The theory was that by admitting people who were disadvantaged minorities, there would be more medical graduates in the coming years who would be more inclined to practice in locations where there was a significant lack of doctors.³⁶ Powell rejected this argument because of the problems of prediction and lack of proof.³⁷

Powell did, however, see merit in the goal of having a diverse student body. This goal satisfied the compelling state objective prong.³⁸ Because the diversity goal was compelling, Powell applied the second prong of strict scrutiny to determine whether the methods used were necessary for its accomplishment.³⁹ Powell quickly concluded that the use of a strict quota system, by which a specific number of minorities were admitted,⁴⁰ was not necessary to achieve a diverse student body; there clearly was a better way to achieve this goal.⁴¹ Powell would allow race to be used as a "plus" factor in admissions, but only to that extent.⁴² Powell was particu-

31. *Id.* at 306.

32. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id.* at 307.

33. *Id.* at 309.

34. *Id.* at 310. Here, Powell advances one of the classic arguments for the elimination of affirmative action: many people now applying to graduate schools were not even born when the discrimination of the 1960s and previous decades took place. This argument will be revisited throughout this Comment.

35. *Id.*

36. *Id.* at 310-11.

37. *Id.* at 311.

38. *Id.* at 311-12 ("The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.").

39. *Id.* at 314-15.

40. Although the special admissions program technically was available to "economically and/or educationally disadvantaged" applicants as well as members of minority groups, in a four-year period, not one disadvantaged white applicant was admitted under the special program. *Id.* at 265-66.

41. *Id.* at 316-17. Harlan looked at Harvard's procedures as a model. These procedures considered race just like any other factor. Harvard would basically treat the minority characteristic just like membership on an athletic team in college would be considered. No greater weight would be given.

42. *Id.*

larly upset that nonminority applicants had been denied the opportunity to compete for all of the seats in the entering class, while minorities were given a fair shot at every seat in the class.⁴³ As a result of this opinion, Bakke was admitted to the medical school.⁴⁴ Thus began the controversy over affirmative action programs that seemed to involve "reverse discrimination."

C. VIEWS ON THE *BAKKE* DECISION

The *Bakke* decision understandably elicited many commentaries and law review articles on the merits of affirmative action policies. Some commentators believe that the quota systems that were disallowed in *Bakke* are permissible under the Fourteenth Amendment. They argue that a quota system is the only effective way of increasing the representation of minorities in the professional disciplines.⁴⁵ But one must not forget that the proper goal of affirmative action policies in graduate schools simply should not be to increase the representation of minorities in the profession. This argument was rejected in the *Bakke* decision.⁴⁶ The commentators in this area have failed to realize that there are other methods of achieving this goal.

One possibility is to improve many of the inner-city schools and better prepare minority students. This would give students a better chance at succeeding in college and achieving the grades and test scores necessary to be admitted to professional schools, without the need for affirmative action programs. Also, parents of minorities can provide the encouragement necessary for their children to aggressively pursue a professional career. Further, more scholarship programs can be designed to help defray the cost of an expensive professional education. Students would then be assured that finances would not separate them from their desired career if they continue to achieve high marks in school. These and other possibilities, which will be discussed later in this Comment, defeat the alleged necessity of a quota.

At first glance, the "plus-factor" approach developed in *Bakke* seems to be a valid method of solving the problem. But the suggestion has been raised that without the quota, hidden discrimination may result.⁴⁷ The belief is that without a quota system, universities will be able to say that they have a program, but can reject minority applicants, claiming that

43. *Id.* at 319-20.

44. *Id.* at 320.

45. See, e.g., Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1054-55 (advocating the use of quotas in the admissions process because minorities are "still woefully underrepresented" in the legal profession (of the 23,195 partners in the 250 largest law firms of the United States, less than 1% are black)); Simien, *supra* note 19, at 360 ("Blacks are so underrepresented in law school student bodies that there is no realistic possibility that their numbers in the bar will significantly increase in the foreseeable future.").

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

47. See Johnson, *supra* note 45, at 1056 (urging that unless specific numbers are used, the majority can continue to cause underrepresentation of minorities in the legal field).

factors other than race accounted for the low enrollment figures for minorities. The classic example is the so-called "pool problem." Under this theory, universities are able to implement threshold admission requirements and then claim that the underrepresentation of minorities is due to the fact that there were not enough minorities in the admissions pool who met the stringent requirements.⁴⁸ This is a valid concern, but one would hope that in today's society we are past many of the racist attitudes that were prevalent in past decades. Even if we are not, the best way to change society is not through court-ordered standards, but through education and continued understanding of the plight of minorities. The *Bakke* decision was a landmark case in the affirmative action arena, but there is room for improvement on its rationale.

IV. POST-BAKKE DECISIONS

Although the Supreme Court has not addressed the issue of affirmative action in graduate school admissions since the *Bakke* decision, it has addressed several related issues. *Wygant v. Jackson Board of Education* involved minority school teachers who were given some protection from layoffs.⁴⁹ Once again, the Equal Protection Clause of the Fourteenth Amendment was invoked.⁵⁰ The problem in *Wygant* was that race was the main factor in deciding who would lose their job.⁵¹ This sounds very similar to the approach used in the *Bakke* case. In holding the school board's practice unconstitutional, the Court stressed that the loss of an existing job was much more damaging than the denial of future employment.⁵² Even though the Court again stated that remedying past discrimination was a proper goal of the school board, the means for achieving the goal were not narrowly tailored.⁵³

This case is helpful in the analysis of affirmative action policies because it identifies a line that may not be crossed when applying these policies. A plausible argument can be made that causing people to lose their job in an effort to encourage minority employment might be a better policy than implementing hiring goals. Considering the age of the people who might be laid off under this system, one could argue that they were in fact working when the discrimination was taking place. Therefore, any goal of

48. *See id.* at 1067-68.

49. 476 U.S. 267, 267 (1986).

50. *Id.*

51. *Id.* at 271-72. An earlier suit was brought by minority teachers who had been laid off even though technically they should have been retained under the union agreement. After this case was filed, the school board followed the agreement with the union and laid off the teachers prescribed by the agreement. Those laid off turned out to be nonminority teachers with greater seniority.

52. *Id.* at 282-83.

53. *Id.* at 283-84. The Court believed that hiring goals could be used that would achieve the same goal of remedying past discrimination. The problem with the layoff policies was that they could cause a serious disruption in the lives of certain people who possibly could have invested their entire lives in the school and expected to work there until they retired. *Id.*

remedying past discrimination would be better attained by making these people pay for it. At first this argument might seem absurd, but it is certainly less absurd than making people suffer who had nothing to do with the discrimination of the 1950s and 1960s, as they were not even born at that time.

Another major case after the *Bakke* decision involved public contracts. In *City of Richmond v. J.A. Croson*,⁵⁴ the City of Richmond implemented a plan by which contractors who had been awarded city contracts were forced to subcontract at least thirty percent of the dollar amount of the project to minority business enterprises.⁵⁵ Because there was neither evidence of racial discrimination in Richmond nor evidence that the city's contractors had ever discriminated against any of the minority subcontractors, the program was found to be unconstitutional.⁵⁶ Even more convincing to Justice O'Connor in this case was the fact that the Richmond program defined "minority" as including not only African-Americans but also Orientals, Eskimos, and Aleut people—even though there was no evidence that these other minorities had ever been the victims of discrimination in Richmond.⁵⁷ To the Court, the inclusion of these people within the definition of "minority" further demonstrated that this program was arbitrary and not implemented to remedy past discrimination.⁵⁸ Therefore, O'Connor concluded that this program in no way met the requirement in the strict scrutiny analysis that the means be narrowly tailored.

In another major Supreme Court case, the legislature implemented an affirmative action policy that drew voting-district boundary lines in an extremely irregular manner.⁵⁹ One of the black voting districts had the appearance of a snake: it was 160 miles long and extremely narrow.⁶⁰ The complaint alleged that the effect of the method for determining voting districts was that two districts were created with a majority of black voters. Therefore, the election of two African-Americans to Congress was virtually guaranteed.⁶¹ Again, the majority applied strict scrutiny to the redistricting plan because it classified citizens on the basis of race and found it unconstitutional.⁶² The Court recognized that proving "racial gerrymandering" is difficult, but they refused to apply lesser scrutiny to a plan that allowed district lines to be drawn in such a manner.⁶³

54. 488 U.S. 469 (1989).

55. *Id.* at 469. Without even considering the opinion in the case, this plan is scary. Basically, the plan told contractors whom they had to hire before they could receive a job. This definitely sounds a lot like government overreaching into areas where it does not belong.

56. *Id.* at 499. Basically, the Court found the imposition of a 30% quota completely arbitrary and not "tied to any injury suffered by anyone." *Id.*

57. *Id.* at 506.

58. *Id.*

59. *Shaw v. Reno*, 509 U.S. 630 (1993).

60. *Id.* at 635-36.

61. *Id.* at 637.

62. *Id.* at 643, 649.

63. *Id.* at 650.

An important conclusion drawn from the discussion of these cases is that the courts are going to always apply strict scrutiny to racial discrimination situations.⁶⁴ With this strict scrutiny analysis in place, it seems that programs with racial tinges will rarely be considered constitutional: the application of strict scrutiny usually means the death of the program or practice.⁶⁵ Our discussion now turns to some of the post-*Bakke* affirmative action programs that have been implemented at graduate schools.

V. EXAMPLES OF AFFIRMATIVE ACTION POLICIES IN GRADUATE SCHOOLS

Until researching the different programs in place at graduate schools around the nation, one might not realize the real hurdles that have been placed in front of nonminority applicants to certain professional schools. A quick glance at some statistics should make even the most outspoken advocate of affirmative action programs realize that there are significant inequities.

A recent look at UCLA Law School revealed some astounding figures.⁶⁶ In 1993, more than 5200 candidates applied to UCLA for a mere 350 spaces in the class.⁶⁷ There were thirty applicants who were rejected with an undergraduate grade point average (GPA) of 3.5 or better and LSAT scores above the ninety-second percentile.⁶⁸ Such standards do not seem so unusual at a respected institution like UCLA. But of these thirty people, twenty-seven were either white or failed to state their race on the application form.⁶⁹ Even more astonishing, the school offered admission to twenty-two candidates, each having a GPA of less than 3.0 and an LSAT score below the eightieth percentile. These admittees consisted of thirteen African-Americans, six Latinos, and three Native Americans.⁷⁰ These statistics indicate that a minority with average academic qualifications could be admitted, but nonminority applicants with the same qualifications would not be admitted. The numbers would

64. The Supreme Court recently held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under *strict scrutiny*." *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (emphasis added). Before *Adarand*, the Court only subjected local and state race-based legislation to strict scrutiny. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980). After *Adarand*, strict scrutiny is the proper standard to apply when dealing with race-based legislation at any level of government. A previous case, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), applied intermediate scrutiny to "benign" federal racial classifications, but it was overruled. *Adarand*, 115 S. Ct. at 2113.

65. The application of the strict scrutiny analysis resulted in "scrutiny that was 'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court—1971 Term*, 86 HARV. L. REV. 1, 8 (1972).

66. Allan J. Favish, *Preferential Admissions at UCLA Law*, L.A. DAILY NEWS, Dec. 11, 1994, at V5 (discussing the faculty resistance the author encountered in obtaining statistics concerning admissions and speculating that the resistance was an attempt to hide damaging information).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

not be so problematic if there was not such a large discrepancy. In today's world, with such an intense competition to receive admission to professional schools, it seems astonishing that anyone would be able to attain admission with a GPA of less than 3.0, while at the same time an applicant with a GPA above 3.5 and an LSAT score in the ninetieth percentile would be denied admission on the basis of the applicant's skin color.

UCLA Law School is not the only school that engages in these practices. At Georgetown Law School, a law student discovered that whites were severely discriminated against in the admissions process.⁷¹ The median LSAT score for white applicants was forty-three, while the median for black applicants was thirty-six.⁷² According to this law student, this discrepancy resulted in a bifurcated student body at the law school.⁷³ This bifurcated student body damages everyone because one of the benefits of the law school learning process is the commingling of people from all sorts of different social backgrounds. These discrepancies bring about a loss of this principle of a legal education and further resentment among the races.⁷⁴

Not only is there resentment among the races, but there is also harm to the minorities who are admitted to the law school. There is a certain stigma attached to affirmative action, with people questioning the credentials of the minorities who are allowed admission.⁷⁵ In the competitive atmosphere of a law school, there could be a small group of people who feel that affirmative action has created an unfair advantage for the minorities in law school. They will undoubtedly voice their opinions, and this may cause the minority students to feel defensive. This could affect a minority student's academic performance and, therefore, his or her success at the law school.

VI. FEDERAL CASES ADDRESSING ADMISSIONS POLICIES

As previously mentioned, the Supreme Court has not squarely addressed the issue of preferential admissions since the *Bakke* decision. But the Court was concerned with the issue in a pre-*Bakke* case dealing

71. Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEGAL EDUC. 97, 97 (1992).

72. *Id.* at 100. The median LSAT scores for blacks and whites at U.T. Law School showed similar discrepancies; the median LSAT score for whites was about 42, while the median LSAT score for blacks was 33. *Id.*

73. *Id.* ("The result of race norming in law school admissions is to produce an entering class with two separate student bodies, identifiable by race, essentially in different academic ballparks.")

74. See Albert Yates, *Beyond the Numbers Game: Diversity Is Vital to True Education*, DENV. POST, Jan. 2, 1996, at B5. Although affirmative action has allowed many people a chance to acquire positions in parts of society, "affirmative action has contributed to polarization and growing hostility among disparate groups." *Id.*

75. Donna St. George, *Blacks Find Families at Odds in Affirmative Action Debate*, HOUS. CHRON., Dec. 5, 1995, at A11. The article discusses a minority who had been smart throughout her life, but who was not respected in college because it was assumed that she was there because she was black.

with the University of Washington Law School.⁷⁶ The petitioner, DeFunis, applied to the law school and was denied admission; he brought suit claiming racial discrimination.⁷⁷ The problem with this case is that the per curiam opinion does not address the issue of reverse discrimination. The Court considered the case moot because injunctive relief had been granted to the petitioner; he was already in his third year of law school and was set to graduate.⁷⁸ The Court felt that its Article III powers did not provide jurisdiction for this matter.⁷⁹ But even though the majority opinion failed to discuss reverse discrimination, the dissent understood the importance of the matter and provided an insightful analysis.⁸⁰

Justice Douglas discussed the admissions procedure and noted that, as in most of these controversial cases, minority applications were evaluated in a completely different manner than nonminority applicants.⁸¹ Under the separate procedure, thirty-seven minorities were admitted, with all but one having a lower index score⁸² than DeFunis.⁸³ Douglas concluded that the number of places for which DeFunis could possibly compete was reduced simply because he was not a minority.⁸⁴ Because of the importance of the issue, the dissent felt that a new trial was necessary to determine whether the Equal Protection Clause had been violated.⁸⁵ The majority's per curiam opinion, on the other hand, represented the Supreme Court's earlier "stay away" attitude regarding programs like the one in place at the University of Washington.⁸⁶

In some of the post-*Bakke* federal cases, the candidates were unable to prove that they would have been admitted absent the discriminatory programs.⁸⁷ This problem may explain why more of these cases have not

76. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

77. *Id.* at 314.

78. *Id.* at 317 (DeFunis was already registered for his final term and was set to receive his degree no matter what the Court decided; everyone agreed that he was going to be allowed to complete his legal education at Washington).

79. *Id.* at 316 ("[T]he exercise of judicial power depends upon the existence of a case or controversy.").

80. *Id.* at 320 (Douglas, J., dissenting).

81. *Id.* at 323. The minority applications were compared with each other, but "were never directly compared to the remaining applications." *Id.* Also, no matter what their averages, the minority applications were never considered for summary rejection. *Id.*

82. The index was called the Predicted First Year Average and was calculated using the LSAT and the applicant's grades in his final two years in college. *Id.* at 321.

83. *Id.* at 324.

84. *Id.* at 333.

85. *Id.* at 344.

86. Another case representing this "hands off" approach was *Henson v. University of Ark.*, 519 F.2d 576 (8th Cir. 1975). In this case, minority students were allowed an extra chance at being admitted. If they were not admitted under the normal standards, then they could be admitted if the admissions committee felt that the candidate had a "reasonable likelihood" of success in law school. *Id.* at 577. The case was dismissed because the court apparently thought that there was no evidence that the minority admissions policies kept the plaintiff out of the law school. *Id.* at 578.

87. See *McAdams v. Regents of the Univ. of Minn.*, 508 F. Supp. 354, 360 (D. Minn. 1981) (little evidence that plaintiff would have been admitted without the questionable admissions procedure which involved giving educationally and culturally disadvantaged

been brought. With so many different factors being considered in the admissions process, it is no wonder that many potential plaintiffs fail to bring lawsuits. Schools can always mask reverse discrimination by using a large number of admissions factors, making it virtually impossible for a plaintiff to prove a claim. Although few cases have been successful at challenging the admissions policies in graduate schools, some recent cases have begun to show the courts' growing reluctance to approve preferential policies for minorities.

Last year, the Supreme Court refused to strike down a Fourth Circuit decision which held that a scholarship program reserved only for black students at the University of Maryland was unconstitutional.⁸⁸ In this case, Daniel Podberesky sued the University of Maryland over the Banneker scholarship program, a merit-based scholarship program reserved only for blacks.⁸⁹ The university claimed that the program was necessary to counter the present effects of past discrimination.⁹⁰ In its view, there were present effects of past discrimination because the school had a bad reputation among the black community, blacks were underrepresented in the student body, blacks who were admitted to the school had low graduation rates, and the atmosphere at Maryland was considered to be hostile to blacks.⁹¹

The court did not allow the program to be sustained based on the school's poor reputation among the black community, which stemmed from memories of the past discrimination.⁹² The court stated that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy."⁹³ The court likewise could not justify the program with the hostile-climate idea.⁹⁴ The argument that racial attitudes were carried along by black and white students for twenty-five years failed because its success would have permitted a race-conscious remedy to deal with *societal* discrimination.⁹⁵ The court also could not justify the program because of low graduation rates or underrepresentation of minorities. There was not enough evidence supporting the idea that black students leave, do not graduate, or are underrepresented at Maryland *because of* past discrimination.⁹⁶

candidates who did not meet the normal requirements another chance at admission); *Baker v. Board of Regents of Kan.*, 721 F. Supp. 270, 277 (D. Kan. 1989) (rejected medical school candidate could not prove that the rejection of his application was due to race when it was apparent that it was due to his interviews, which were not found to be discriminatory against whites).

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

89. *Id.* at 152.

90. *Id.* at 153.

91. *Id.* at 152.

92. *Id.* at 154.

93. *Id.*

94. *Id.* at 154-55.

95. *Id.* at 155 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)).

96. *Id.* at 156-57.

The court then hedged its reasoning by holding that the Banneker program was not narrowly tailored enough to remedy the possible graduation rate and underrepresentation problems.⁹⁷ The Fourth Circuit frowned on the district court's findings that the purpose of the scholarship program was to recruit high-achieving blacks because high-achievers were not the group that had been discriminated against in the past.⁹⁸ Also, the scholarship program was open to nonresidents of Maryland, which would not address the school's concern that there were not enough "qualified African-American Maryland residents" at the state university.⁹⁹

The court also found that the conditions for the program's continued existence were based on arbitrary statistics.¹⁰⁰ The university was unable to provide a method to accurately determine how many African-American students must be at Maryland before the need for the affirmative action scholarship program had passed.¹⁰¹ Like in *Croson*,¹⁰² the Fourth Circuit frowned on the use of calculations that had no real scientific basis. Because of the court's decision in this case, scholarship programs around the country, like the Banneker program, are likely to be changed.¹⁰³ Even more recently, a case emerged from Texas that laid the groundwork for another bitter debate on the propriety of preferential admissions policies.¹⁰⁴ Our discussion now turns to this important case.

VII. HOPWOOD V. TEXAS¹⁰⁵

A. INTRODUCTION

The *Hopwood* case brought the issue of preferential admissions in graduate school out into the forefront yet again. The facts of the case are familiar. One white female and three white males brought an action challenging the admissions policies at the University of Texas (U.T.) Law School. They claimed that the law school was engaged in what was effectively a quota system,¹⁰⁶ which *Bakke* disallowed.¹⁰⁷ The plaintiffs al-

97. *Id.* at 157-58.

98. *Id.* at 158.

99. *Id.* at 159.

100. *Id.* at 160. Apparently, the lower court was going to allow the Banneker program to continue to exist until the amount of black students at the University of Maryland was an accurate reflection of the amount of Maryland high school graduates who could possibly attend the school. *Id.*

101. *Id.*

102. *See supra* text accompanying notes 54-58.

103. Colorado has already reconsidered its race-based scholarship programs and has decided to allow preferences based upon class or need, not race. The Attorney General of Colorado claimed that by assisting the needy, the minorities will probably be benefited anyway. James Brooke, *Colorado Tries College Aid Based on Need, Not on Race*, N.Y. TIMES, Jan. 16, 1996, at A10.

104. The Supreme Court, however, has declined to hear this case. *Texas v. Hopwood*, 116 S. Ct. 2581 (1996).

105. 861 F. Supp. 551 (W.D. Tex. 1994).

106. *Id.* at 553.

107. *See generally* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

leged violations of the Fourteenth Amendment and requested injunctive and declaratory relief, in addition to compensatory and punitive damages.¹⁰⁸

The challenged admissions procedure involved the use of a procedure by which each class would consist of approximately five percent black students and ten percent Mexican-American students.¹⁰⁹ These numbers were not arbitrary, but corresponded to the percentages of minority college graduates in Texas.¹¹⁰ Like most states, Texas had a history of discrimination against minorities in the educational arena.¹¹¹ Discrimination at the university had continued into the 1950s and 1960s with such policies as the requirement of separate minority living facilities and the prohibition of black visitors to the white student dormitories.¹¹² Beginning in the 1970s, the university felt pressure from the Department of Health, Education and Welfare Office for Civil Rights (OCR) to conform to the provisions of Title VI of the Civil Rights Act of 1964.¹¹³ To this date, the OCR is continuing to monitor U.T. to make sure that any remnants of segregation are eliminated.¹¹⁴ In order to comply with the federal mandates, U.T. implemented the disputed admissions policy.¹¹⁵

B. THE PREFERENTIAL ADMISSIONS POLICY AT U.T. LAW SCHOOL

In the 1970s, because there were few minorities in the law school, a separate admissions committee was formed that examined the applications of minorities and other disadvantaged students. This committee had no concrete requirements for admission, but was only concerned with the prospective applicant's chances of passing the first year of law school.¹¹⁶ The problem with this system was that minority and nonminority students were being evaluated separately.¹¹⁷ The committee technically was organized to evaluate the applications of all *disadvantaged* students. But an examination of the admissions that resulted from the committee's recommendations reveals that the main concern was admitting *minority* students.¹¹⁸ Because of the decision in *Bakke*, the law school felt that it needed to reevaluate its admissions procedures, and it tried to abolish its

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

109. *Id.* at 560.

110. *Id.* at 560 n.19.

111. Texas had involved itself in a vigorous fight to attempt to stop integration of the public education system. *Id.* at 554-55; see *Sweatt v. Painter*, 339 U.S. 629 (1950) (separate law school for blacks was unsatisfactory and a black man was forcibly admitted to U.T. Law School).

112. *Hopwood*, 861 F. Supp. at 555.

113. 42 U.S.C. § 2000d (1994) (prohibiting discrimination on the basis of race in programs receiving federal financial assistance).

114. *Hopwood*, 861 F. Supp. at 557.

115. *Id.* at 556.

116. *Id.* at 558.

117. *Id.*

118. For example, in 1977, 500 applications were considered by this separate committee, 100 of which were nonminorities. Sixty-eight minority students were admitted from this pool, while only three nonminority students were admitted. Clearly, the primary purpose of the committee was to increase minority enrollment. *Hopwood*, 861 F. Supp. at 558.

two separate evaluation committees.¹¹⁹

Over the next few years, various admissions policies were implemented—all of which possessed affirmative action characteristics.¹²⁰ By 1992, because of problems that resulted from a huge amount of applications, the application process involved a regular committee and a minority subcommittee.¹²¹

The problems of this admissions procedure were obvious to the district court. As soon as an application was received, it was color-coded partially on the basis of race or ethnicity.¹²² There were three zones that applicants fell into: the presumptive admission zone; the discretionary zone; and the presumptive denial zone.¹²³

The presumptive admission and denial applications were preliminarily analyzed, and some applications were put into the discretionary category depending on a number of factors.¹²⁴ To help the efficiency of the admission process, those in the presumptive admission or denial zones were allowed admission or rejected simply on the basis of their grades and LSAT scores.¹²⁵ Observing the figures required for an applicant to be placed in the different zones, one begins to notice the major problems with the procedure.

The school set separate presumptive admission scores for nonminorities, African-Americans, and Mexican-Americans.¹²⁶ But the striking thing is that nonminorities had a higher presumptive denial score than the presumptive admission score for minorities.¹²⁷ Basically, this meant that white applicants who might possess numbers that would allow them to be admitted automatically if they were black or Hispanic were thrown into the discretionary zone on no other basis than their race.

The admissions procedure then separated minority and nonminority applications in the discretionary zone. Three people on the admissions committee evaluated nonminority students in groups of thirty. Each

119. *Id.* at 558-59.

120. For example, in the late 1970s, the law school used a banded admissions procedure. Each of the bands (there were either five or six) were composed of students with similar credentials. A percentage of individuals were admitted from each band; the higher bands (the ones with the students with the best credentials) were allocated a much higher percentage. Minority and nonminority candidates within each band were divided into separate groups, which were then reviewed by individual members of the admissions committee. Each member was able to decide the amount of affirmative action that was to occur within his or her small group. Therefore, nonminorities could be severely affected by affirmative action, depending on whether they were lucky enough to be included in one group or another. *Id.* at 559.

121. *Id.* at 560.

122. *Id.*

123. *Id.* at 561.

124. Sometimes applicants had really achieved high grades, but they did so at a less reputable university or in a less challenging major. Also, some applicants with lower grades may have attended school at a quality university, or there were other characteristics of their application that showed that they really had a better chance of succeeding in law school. *Id.*

125. *Id.* at 560-61.

126. *Id.* at 561-62.

127. *Id.* at 562.

committee member was given a "fixed number of votes determined by the yield desired from a particular [group]."128 An applicant receiving no votes or only one vote was denied admission or placed on the waiting list. Applicants with two or three votes were admitted unless the chair of the admissions committee, Professor Johanson, disagreed.129 Minority applicants were evaluated by a separate minority subcommittee, which had a group discussion about each minority candidate.130 Also, not everyone on the minority subcommittee participated in a review of nonminority files.131 The evidence further showed that all decisions of the minority subcommittee were final.132 The result of these separate admissions policies for minorities is not astonishing. The average undergraduate GPA and LSAT score for minorities was significantly lower than that of nonminorities.133

C. THE DECISION

The district court that decided *Hopwood* began its opinion by stressing that these cases are subject to strict scrutiny.134 This point is important because the defendants relied on a somewhat recent court opinion to try to persuade the court to adopt an intermediate standard of review.135 The court distinguished this situation because the programs at U.T. were not adopted as a response to a federal mandate. The programs were implemented voluntarily after suggestions had been made by a federal agency.136 The court further justified its use of the strict scrutiny standard of review by stressing the importance of the protection of individual rights: "individual rights are afforded the full protection they merit under the Constitution."137 The court noted that in some instances affirmative action programs are valid when they are in place to remedy specific past instances of discrimination; but when the programs do not and their implementation affects innocent nonminorities, their continued existence cannot be justified.138

Although much emphasis was placed on the importance of the continued application of the strict scrutiny test in this context, the district court

128. *Id.* at 559.

129. *Id.* at 562.

130. *Id.*

131. *Id.*

132. *Id.* at 563.

133. Nonminorities had an average undergraduate GPA of 3.56 and average LSAT score of 164; African-Americans had corresponding numbers of 3.30 and 158; and Hispanics had an average undergraduate GPA of 3.24 and LSAT of 157. *Id.* at 563 n.32.

134. *Id.* at 568 (reaffirming the long-standing concept that racial classifications are subject to strict scrutiny).

135. See *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (adopting an intermediate level of scrutiny in the case of affirmative action programs implemented in response to a federal mandate). *But see Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (holding that all racial classifications must be analyzed under strict scrutiny).

136. *Hopwood*, 861 F. Supp. at 568-69.

137. *Id.* at 569.

138. *Id.*

still held that the test was satisfied. The court held that "obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications."¹³⁹ Although this intangible goal may be difficult to measure, the evidence is rather substantial that a successful law school must be one where students with diverse backgrounds are present. Diversity will better facilitate the exchange of a broad range of ideas.¹⁴⁰ In the university's view, there would have been very few Mexican-Americans or African-Americans in the entering class of 1992 without the preferential admissions program at U.T.¹⁴¹

The district court continued its analysis regarding the goals of the law school's preferential admissions policies. The court held that U.T.'s programs survived strict scrutiny analysis because they satisfied the compelling goal of remedying the effects of past discrimination.¹⁴² Apparently, "the legacy of the past has left residual effects that persist into the present."¹⁴³

District Judge Sparks makes a valid point that the minorities affected by the programs today are likely the children of parents who were denied many educational opportunities in the past. This denial of educational opportunities, according to Sparks, makes it much more difficult for their children to succeed in school.¹⁴⁴ Furthermore, Sparks contends that the candidates in law school in 1992 were likely to have been victims of the racial segregation of the public school system in the 1970s and 1980s. This segregation stunted their academic potential and probably caused fewer minorities to achieve the necessary GPA and LSAT scores to be admitted under normal admissions guidelines.¹⁴⁵ All of these arguments put together show that the preferential admissions policy at U.T. Law School was in pursuit of a compelling state objective.

But, under the strict scrutiny analysis, the means must be narrowly tailored in pursuit of the objectives. In order to determine whether the means employed are sufficiently tailored, the court considered four factors: (1) the possible presence of alternative remedies; (2) the flexibility

139. *Id.* at 570-71.

140. *Id.*

141. Only 9 blacks and 18 Mexican-Americans would have been admitted if applications had been evaluated on the numbers alone. *Id.*

142. *Id.* at 572. The continuing analysis suggests that the court may not have felt too strongly about its conclusion that having a diverse student body is a sufficiently compelling goal. If having a diverse student body was so compelling, the analysis should have stopped here.

143. *Id.* Judge Sparks looked to the fact that the State of Texas and U.T. have had a continuing history of discrimination in education. Texas resisted the integration of its schools, and numerous racially motivated incidents have occurred on campus. Also, Texas has had difficulty attracting minorities to its university because of the school's antiminority reputation among their communities.

144. *Id.* at 572-73.

145. *Id.* at 573. This analysis by Sparks does a good job of countering the idea that effects of past discrimination no longer exist today. This argument is one of the main thrusts of the anti-affirmative action groups.

and duration of the relief; (3) whether the goals related to the percentage of minorities in the population; and (4) the effect of the goals on third parties.¹⁴⁶ The preferential admissions policy was attacked by the plaintiffs as the type of quota system that was disallowed in *Bakke*.¹⁴⁷ Even though it was discovered that U.T. had certain enrollment percentage goals, the goals were not stringently pursued. The U.T. policy was far from the blatant, concrete numerical goals that were present in *Bakke*.¹⁴⁸

Sparks brushed aside the next two factors and found them satisfied by the admissions policies. He was more troubled, however, by the possibility that innocent parties were adversely affected by the U.T. program.¹⁴⁹ The school was basically penalizing people in their early to mid-twenties for horrible acts that occurred either before they were born or before they were old enough to affect a discriminatory society.¹⁵⁰

One adverse effect on the nonminorities was that many were rejected earlier in the admissions process, without being compared with the minority students' files.¹⁵¹ The district court frowned upon the fact that minorities had a separate admissions procedure from nonminorities. But the court was even more critical of the different presumptive denial criteria established for the different groups.¹⁵² Even worse, according to Sparks, is that no minority student who was below the presumptive denial line was summarily denied admission. In 1992, all minority applicants who were not presumptively admitted were placed in the discretionary zone, and none were summarily denied admission.¹⁵³ This observation further illustrates the lack of fairness in U.T.'s admissions scheme. In 1992, the U.T. Law School admissions office established certain rules governing admissions. But minority applicants were exempt from these rules. The university attempted to defend its policies by pointing to other

146. *Id.*

147. *Id.* at 570-71; see generally *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

148. *Hopwood*, 861 F. Supp. at 574. The admission percentages for minorities from 1983 to 1993 varied significantly. Sometimes an entering class was more than 10% Mexican-American, sometimes the percentage was less. The same is true for the enrollment figures for African-Americans. The district court seemed to stress the fact that specific numbers were not used, like in *Bakke*. This suggests that if the percentage goals were followed more strictly, they would have been considered quotas. *Id.*

149. *Id.* at 575. Sparks was impressed that the percentage goals related to percentages of Hispanic and black college graduates in the state. Things might be different in other cases if percentages were arrived at in an arbitrary manner. *Id.*

150. The statement is based on the presumption that a large number of applicants to law schools are either coming directly from college or have graduated from college in the last few years. Assuming that they arrived at college at age 18 and graduated at age 22 or 23, they would be applying to law school between the ages of 22 and 25. This statement does not discount the fact that a large number of applicants are much older than 22 or 25.

151. A perfect example of the early rejections of nonminority applicants is that by the end of February 1992, 201 resident candidates for admission had been denied, not one of which was Mexican or African-American. *Id.*

152. Because of the inconsistent application of the presumptive denial policy, certain nonminority students were rejected early on in the process even though minority students with similar scores were not presumptively denied admission. *Id.* at 576.

153. *Id.*

schools around the country and demonstrating the use of similar admissions practices.¹⁵⁴ But the district court was unimpressed and did not allow other schools' policies to influence the decision.¹⁵⁵

Sparks felt that U.T. was required to allow the most qualified candidates in the state a chance at a high quality legal education.¹⁵⁶ By using separate admissions procedures for minorities and nonminorities, this requirement was not attainable.¹⁵⁷ In its decision, the district court affirmed the idea that race could be lawfully used as a "plus" factor in the admissions process.¹⁵⁸ But the main problem with U.T.'s admissions procedures was that there was no comparison between the two groups. The best minority candidates were admitted, consistent with the percentage goals of U.T., without regard to how these students stacked up against the nonminority students. Thus, it was possible that a student's skin color, rather than qualifications, decided whether or not that student gained admission to one of the best law schools in the country.¹⁵⁹ The fact that the rights of third parties were adversely affected caused the district court to find that this admissions procedure was not narrowly tailored and, thus, violated the Equal Protection Clause.¹⁶⁰

As a result, one might think that all of the plaintiffs walked away ecstatic with the verdict and that the district court had forced U.T. Law School to admit all four plaintiffs, as occurred in *Bakke*.¹⁶¹ But that is not the case.

The court, after finding the constitutional violation, next looked to whether "legitimate, nondiscriminatory reasons" existed for refusing to admit the four plaintiffs.¹⁶² The court examined the statistics of each plaintiff and decided that it was possible that they would not have been admitted, even if a constitutional admissions process had been in place.¹⁶³ Although Sparks noted that the plaintiffs' indices were higher than most of the minorities who were offered admission, he did not say that these

154. *Id.*; see also Terrence Stutz, *UT Minority Enrollment Tested by Suit*, DALLAS MORNING NEWS, Oct. 14, 1995, at A1 (asserting that trial testimony indicated that schools like Stanford and Michigan had similar programs).

155. *Hopwood*, 861 F. Supp. at 577 ("The fact that other schools may use processes with similar components does not resolve the issue of whether the defendants deprived the four plaintiffs . . . of equal protection under the law.").

156. *Id.* at 578.

157. *Id.*

158. See *Bakke*, 438 U.S. at 316.

159. *Hopwood*, 861 F. Supp. at 578 ("[a]dmission of the best qualified was not assured in 1992").

160. *Id.* at 579.

161. See *Bakke*, 438 U.S. at 265.

162. *Hopwood*, 861 F. Supp. at 579-80.

163. The court did note a fairly large difference in the index scores of minority and nonminority candidates. The highest nonminority index was 220, while the highest African-American index was 199 and the highest Mexican-American index was 208. Ten nonminorities who had indices higher than Hopwood were not offered admission. Three of the plaintiffs had indices of 197, but there were 16 other nonminority applicants who were denied admission with this same index. Also, although minorities possessed the lowest indices of admittees, the lowest nonminority index was only slightly higher. *Id.* at 580-81.

candidates should have been offered admission.¹⁶⁴ The district court felt that, after analyzing the files of the four plaintiffs, their application materials were not glaringly superior to the minority candidates that were admitted.¹⁶⁵ These findings led to a rather unsatisfying result for the plaintiffs: declaratory relief.

D. THE RESULT

The end result of the *Hopwood* case, in the district court, was that the plaintiffs received declaratory relief. The court acknowledged that the method by which the law school admitted students was unconstitutional.¹⁶⁶ But the court refused to grant injunctive relief or mandate a change in the admissions procedures because the university had already made, or was in the process of making, the necessary changes in the admissions procedures.¹⁶⁷ Basically, the plaintiffs each received a chance to reapply to U.T. in 1995 without charge and nominal damages of one dollar.¹⁶⁸

VIII. THE AFTERMATH OF THE DISTRICT COURT'S DECISION

An extensive analysis of the case reveals that the opponents of affirmative action admissions policies should be happy with it. The decision forced one of the best law schools in the country to give every applicant a greater opportunity for admission. But reaction to the case suggests otherwise. A group of lawyers from the Center for Individual Rights, which represented the plaintiffs, were displeased with the result. They felt that such a small award would have little, if any, effect on most law school admissions policies across the country. They were concerned that the low award would send a message to law schools that they need not worry about their preferential admissions policies. Most people affected by the policies are not likely to spend the time and money to challenge a university if they will not win more than one dollar.¹⁶⁹ This verdict seems

164. *Id.* at 581-82.

165. *Id.* at 581 (court refused to put itself in the shoes of the admissions committee who had much better knowledge of the admissions process).

166. *Id.* at 582.

167. The law school has made numerous changes since the suit was filed against them. These changes went into effect on September 1, 1994. Now, applications of minorities are not sent to a special subcommittee for evaluation. Applicants are no longer placed into the presumptive admit, discretionary, or presumptive denial zones. Candidates with the top GPAs and LSAT scores will be admitted quickly just like always, but among students with lower scores, there is a much greater emphasis on undergraduate institution, work experience, and the like. Race is still considered, but hopefully it is just being considered as a "plus" factor. Janet Elliott, *UT Responds to Suit with Policy Changes*, TEX. LAW., May 23, 1994, at 10. *But see* Henry J. Reske, *\$1 Damages for Reverse Bias Plaintiffs*, 80 A.B.A. J. 24 (1994) (plaintiff's lawyer in *Hopwood* claims that the new policy is simply "window dressing" and is not satisfactory even if it sets goals for minority admissions).

168. *Hopwood*, 861 F. Supp. at 583.

169. *See Verbatim: Hopwood: "A Perfect Mess of an Opinion,"* TEX. LAW., Nov. 7, 1994, at 34 (excerpt from a Center for Individual Rights publication).

even more ridiculous when one considers other civil rights cases where high damages were awarded or settlements were made for relatively minor incidents.¹⁷⁰ Michael McDonald, one of the plaintiffs' lawyers, did express some happiness because since *Bakke*, no court had struck down university admissions procedures as unconstitutional on the basis of reverse discrimination. But he felt wronged because his clients were not awarded meaningful damages and did not receive injunctive relief.¹⁷¹

Another concern that came out of this decision was that the court required the plaintiffs to prove that they would have been admitted without the unconstitutional admissions policies. This burden, in many eyes, is virtually impossible. With so many factors being taken into account by an admissions committee (grades, test scores, letters of recommendation, work experience, educational background, and the like), it is hard to believe that any plaintiff could ever prove that he or she would have been admitted absent the unconstitutional procedures. "[T]o assign this burden of proof is to deny the relief, for no plaintiff can possibly prove that he would have emerged victorious from the lottery among the discretionary admit(tee)s."¹⁷²

This ruling was embraced by affirmative action supporters. Some viewed the district court decision as a "straightforward endorsement of the use of race in admissions to law schools."¹⁷³ The opinion reaffirmed the basic rule in *Bakke* that race may still be used as a factor in student admissions.¹⁷⁴ The importance of the decision lay in the federal courts' willingness, after fifteen years, to allow race to be a valid consideration, even though affirmative action programs have been under attack in recent years.

IX. THE FIFTH CIRCUIT'S DECISION

In March of 1996, the Fifth Circuit addressed the case on appeal. The circuit court decided that affirmative action programs have no place in school admissions.¹⁷⁵ The decision "outlawed consideration of race as any factor at all" in admissions decisions.¹⁷⁶ Circuit Judge Smith, delivering the court's opinion, affirmed the basic principle that courts must em-

170. These seemingly minor incidents include the settlement of a class action against Denny's Restaurants for \$17.7 million for allegedly serving people ten minutes late. Also, there was the case of a newspaper advertisement which only had white models. Just because an African-American man was upset by this ad, the jury awarded the man \$800,000. *Id.* These awards are probably better applied to a law review article on the absurdity of certain tort awards, but in this context they do make one wonder why these awards and settlements were garnered by minority plaintiffs and why white plaintiffs, in a seemingly more sensitive situation, were awarded only a dollar each.

171. *Id.*

172. *Id.*

173. Reske, *supra* note 167, at 24.

174. Hopwood, 861 F. Supp. at 578.

175. See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

176. Anthony Lewis, *Should Race Be a Consideration in College Admissions?*, DALLAS MORNING NEWS, Mar. 31, 1996, at J5.

ploy strict scrutiny when evaluating any racial classification.¹⁷⁷

The opinion begins with a detailed analysis of Justice Powell's opinion in *Bakke*.¹⁷⁸ Circuit Judge Smith concentrates on Powell's analysis of the possible justifications for using racial preferences in admissions policies. Justice Powell thought that "remedying societal discrimination and providing role models" were never proper justifications for racial preferences in admission policies.¹⁷⁹ But Powell did believe that diversity was a "constitutionally permissible goal for an institution of higher education."¹⁸⁰

The Fifth Circuit looked at the situation differently, finding that considering race is never appropriate when it is done for the purpose of having a diverse student body.¹⁸¹ In so doing, the court stated that Powell's belief was only supported by one vote and "has never represented the view of a majority of the Court in *Bakke* or any other case."¹⁸² The court avoided interpreting its decision as being contrary to *Bakke* by observing that the diversity rationale was never supported by a *Bakke* majority and that the word diversity only appeared in Powell's opinion.¹⁸³ Also, Circuit Judge Smith noted that not one case since the *Bakke* decision has held that diversity was a "compelling state interest under a strict scrutiny analysis."¹⁸⁴ After analyzing later Supreme Court cases, the court was of the opinion that remedying past discrimination was the only goal that justified a use of racial preferences.¹⁸⁵

The court noted other problems that occur when race is taken into account in ways like those occurring at U.T.¹⁸⁶ Racial hostility often occurs, as well as bigotry. By using diversity as a goal, minorities are lumped together into a group, under the assumption that they think the same.¹⁸⁷ Thus, the court overruled the district court's acceptance of the diversity rationale.¹⁸⁸

After denouncing the diversity rationale, Smith examined the district court's acceptance of the remedial purpose to justify racial preferences. Once again, the court explained that remedying *societal* discrimination was not a proper justification for affirmative action¹⁸⁹ and chastised the district court for allowing "the remedial justification to reach all public

177. *Hopwood*, 78 F.3d at 940.

178. *Id.* at 941-44.

179. *Id.* at 942 (citing *Bakke*, 438 U.S. at 307).

180. *Bakke*, 438 U.S. at 311-12.

181. *Hopwood*, 78 F.3d at 944.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 945-64.

187. *Id.* at 946 ("To believe that a person's race controls his point of view is to stereotype him.").

188. *Id.* at 948.

189. *Id.* at 950.

education within the State of Texas.”¹⁹⁰ If the remedial purpose was expanded and applied to the entire state, it could also be used to justify preferences in any state operation that considers an applicant’s educational achievements.¹⁹¹ Thus, preferences could be justified in an unlimited number of areas. To avoid this, the court restricted its evaluation to the U.T. Law School to determine if the school’s racial preferences were justified by past discrimination.¹⁹² Just because past discrimination existed in the U.T. system as a whole did not mean that U.T. Law School itself discriminated. Such past discrimination, therefore, could not justify an affirmative action admissions policy.¹⁹³

When it considered only the past policies of the law school, the court determined that no compelling interest in correcting the present consequences of past discrimination had been shown to justify affirmative action admissions policies.¹⁹⁴ The defendants argued that the hostile environment at U.T. Law School, the school’s reputation in the minority community, and the underrepresentation of minorities at the school were present effects of past discrimination.¹⁹⁵ But the court, citing *Podberesky v. Kirwan*,¹⁹⁶ rejected the idea that the school’s reputation and the alleged hostile environment could justify the admissions procedures.¹⁹⁷ The court also could not find evidence that the underrepresentation was due to any discriminatory policies at the law school.¹⁹⁸ Since there was no evidence that effects of discrimination by the law school in the past are still felt today, the underrepresentation justification did not help the defendants. As a result, because the law school did not show a compelling interest to remedy the “present effects of past discrimination,” the court never considered whether the program was narrowly tailored. The circuit court, like the district court, found the admissions program unconstitutional.¹⁹⁹

Aside from the significant determination that race cannot be used at all in admissions decisions, the court also made an important finding on the burden of proof in these situations. As discussed earlier, a huge problem for reverse discrimination plaintiffs has been that the burden of proof as to damages has been on the plaintiffs instead of the defendants.²⁰⁰ Smith relied on a previous case, *Mt. Healthy City School District Board of Edu-*

190. *Id.* “The Supreme Court repeatedly has warned that the use of racial remedies must be carefully limited, and a remedy reaching all education within a state addresses a putative injury that is vague and amorphous.” *Id.*

191. *Id.*

192. *Id.* at 951-52.

193. *Id.* at 951. The Fifth Circuit reasoned that the “specific [state] agency involved is best able to measure the harm of its past discrimination” and, thus, “the law school[] is the appropriate governmental unit for measuring a constitutional remedy.” *Id.*

194. *Id.* at 955.

195. *Id.* at 952.

196. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

197. *Hopwood*, 78 F.3d at 952-53.

198. *Id.* at 954.

199. *Id.* at 955.

200. *See supra* text accompanying note 172.

ation v. Doyle,²⁰¹ to shift the burden to the law school.

In *Mt. Healthy*, the Court gave the school the burden of proving that an improperly discharged teacher would have been terminated anyway.²⁰² By shifting the burden, plaintiffs in these cases are not handcuffed by the almost impossible task of proving that they would have been admitted without the policy. Now the schools must show by a preponderance of the evidence that the plaintiffs would not have been admitted under proper admissions policies.²⁰³

As a result of this determination in *Mt. Healthy*, the Fifth Circuit directed the district court to reconsider *Hopwood* to see if the school could show that these plaintiffs would not have been admitted anyway.²⁰⁴ If the school could not prove this, the district court was directed to award any relief it believed was proper.²⁰⁵

Interestingly enough, the court refused to grant any prospective injunctive relief.²⁰⁶ The district court gave the plaintiffs the right to reapply to U.T.²⁰⁷ But the court felt that it was not necessary to enter an injunction because it was "confident that the conscientious administration at the school . . . will heed the directives contained in this opinion."²⁰⁸

Finally, the court addressed punitive damages. The court felt that the law school had acted in good faith; thus, the refusal by the district court to award punitives was proper.²⁰⁹ But the Fifth Circuit warned that the continued use of racial classifications could justify an award of punitive damages in the future.²¹⁰

A. REACTION TO THE FIFTH CIRCUIT'S DECISION

The decision understandably elicited quick reaction. Some see this decision as possibly ending affirmative action as it exists today.²¹¹ Others worry that the decision could resegregate higher education. Apparently, if race would not have been considered in admissions decisions in 1992, only nine blacks and eighteen Hispanics would have been admitted.²¹² But we cannot continue to allow students, regardless of their race, to achieve admission into a law school like U.T. without having the requisite qualifications. Through its system, U.T. has given an unfair advantage to

201. 429 U.S. 274 (1977), cited in *Hopwood*, 78 F.3d at 956-57.

202. *Id.* at 287.

203. *Hopwood*, 78 F.3d at 956-57. The Fifth Circuit even implied that schools should not be unhappy with this burden shifting because it "simply gives the defendant law school a second chance of prevailing by showing that the violation was largely harmless." *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 958.

207. *Id.*

208. *Id.*

209. *Id.* at 959.

210. *Id.*

211. Linda P. Campbell, *UT Law School Case Fuels Affirmative Action Opposition*, FORT WORTH STAR-TELEGRAM, Mar. 24, 1996, at 5.

212. Terrence Stutz, *Court Says UT Can't Show Bias*, DALLAS MORNING NEWS, Mar. 20, 1996, at A1, A17.

many "children of wealthy and highly educated black or Hispanic families" who had lower grades and test scores than "children of poor white or native American families."²¹³

Resegregation will not happen if schools make early efforts to prepare students to make high grades and test scores or if the schools make better efforts to recruit minority students who can meet race-neutral admissions standards. Yale has been able to recruit qualified minority students since the early 1970s, so there is no doubt that other schools should be able to do this in the 1990s.²¹⁴

Even Texas Attorney General Dan Morales, whose office appealed the decision, agrees that the objectives of diversity and inclusiveness should not be put ahead of the Constitution or fairness concerns.²¹⁵ Although Morales believes that race should be one consideration in the admissions process, he recognizes that "[w]e will never overcome past discrimination by practicing discrimination today."²¹⁶ Morales appears to be taking an objective approach, which other leaders reject. For example, Texas NAACP president Gary Bledsoe has stated that "[i]t could take several years for many of these folks to find another way of getting an education."²¹⁷ This may not be true. If one does not have the numbers or other qualifications, one can apply to other schools. Not everyone can receive admission to U.T., Harvard, or Yale. Not everyone gets into law school, especially the law school of their choice. We cannot give certain people an unfair advantage because of their race.

B. THE SUPREME COURT'S DECISION

On July 1, 1996, the Supreme Court declined to hear the *Hopwood* case.²¹⁸ In refusing to hear the case, Justices Ginsburg and Souter stated that Texas was "challeng[ing] the rationale relied on by the Court of Appeals" and that the Court "reviews judgments, not opinions."²¹⁹ The admissions policy at U.T. in 1992 was no longer in controversy, and the Court wanted to "await a final judgment on a program genuinely in controversy before addressing" the affirmative action issue.²²⁰ The case now proceeds back to U.S. District Judge Sam Sparks to determine the amount of damages for the plaintiffs and the attorneys' fees. The trial

213. John Doggett, *UT Can Find Qualified Minorities*, DALLAS MORNING NEWS, Apr. 8, 1996, at A11.

214. *Id.*

215. Dan Morales, *Use One Standard for Admission*, AUSTIN AM.-STATESMAN, May 4, 1996, at A13.

216. *Id.*

217. Terrence Stutz, *UT Case May Have Big Impact*, DALLAS MORNING NEWS, June 4, 1996, at A1.

218. *Texas v. Hopwood*, 116 S. Ct. 2581 (1996).

219. *Id.* (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)).

220. *Id.*

date has been set for November 25, 1996.²²¹

C. AFTERMATH

As a result of the Supreme Court's refusal to hear the case, thus allowing the Fifth Circuit's decision to stand, U.T. and Texas A&M University ("A&M") announced massive changes in their admissions policies. The U.T. system will cease the long-standing policy of admitting many students automatically because of outstanding grades and test scores.²²² The new policy will take into account indications of leadership, the applicants' parents' educational background, and three essays,²²³ beginning in the summer of 1997.²²⁴ U.T.'s new application form will not have anything questioning the applicant about race.²²⁵ A&M's new policies are similar: leadership, personal characteristics, work experience, and overcoming adversity will be more important in the admission decision.²²⁶

Many are concerned that the *Hopwood* decision will hurt U.T.'s chances to compete with other major universities in minority student recruitment.²²⁷ Attorney General Morales has interpreted the ruling to mean that racial preferences cannot be used in the awarding of financial aid, which may deter many minorities from enrolling.²²⁸ Because the ruling only applies to the Fifth Circuit, it may put U.T. at a competitive disadvantage.

It remains to be seen what effect the removal of affirmative action will have in the Fifth Circuit states. Speculation has been that the U.T. Law School student body could end up being all-white.²²⁹ But perhaps the new admissions factors are such that a significant amount of minorities will qualify for admission without the need for affirmative action programs. It will be interesting to observe this situation in the next few years.

221. Jim Phillips, *Damages, Lawyers' Fees Are Issues in UT Reverse-Discrimination Case*, AUSTIN AM.-STATESMAN, Aug. 7, 1996, at B2.

222. *UT Regents Revise Admissions Policy*, HOUS. CHRON., Aug. 9, 1996, at A33.

223. *Id.*

224. *New UT Policy's Wise*, AUSTIN AM.-STATESMAN, Aug. 13, 1996, at A8.

225. Jim Phillips, *Revamped Admissions Likely for UT; Regents Expected Today to Shift Focus Away from Grades and Toward Essays, Activities, Background*, AUSTIN AM.-STATESMAN, Aug. 8, 1996, at B1. But there will be a separate form that will ask an applicant about his ethnicity or gender. It will include a disclaimer that the information will only be used for statistical purposes. *Id.*

226. *UT Regents Revise Admissions Policy*, *supra* note 222, at A43.

227. Lesley Hensell, *UT Faces Uncertain Future Without Affirmative Action*, HOUS. CHRON., July 7, 1996, at D1.

228. Mary Ann Roser, *Texas Hit Hard By Hopwood Decision*, AUSTIN AM.-STATESMAN, July 11, 1996, at B1. Officials in the other two states in the Fifth Circuit, Louisiana and Mississippi, have not come to a definitive conclusion about whether the ruling also covers financial aid. *Id.*

229. Hensell, *supra* note 227, at D1.

X. ACTIONS BY THE U.C. BOARD OF REGENTS

A. OVERVIEW

Some other events have happened in California which could stop the use of racial preferences in many areas, including higher education. "July 20 will live a long time in California history," said Jesse Jackson.²³⁰ This quote was in response to the cancellation by the U.C. Board of Regents of all racially based preferences in hiring, contracting, and student admissions.²³¹ The new policy will no longer allow "race, religion, gender, color, ethnicity, or national origin" to be used as factors in admissions decisions starting on January 1, 1997.²³² This action has shocked many because in the past California was one of the leaders in the implementation of affirmative action policies.

The whole movement to end preferential policies in California was started by Ward Connerly, an African-American businessman. Connerly wants to achieve diversity on college campuses without using these preferential policies.²³³ Connerly was appointed by Governor Pete Wilson. Governor Wilson, a former candidate in the 1996 presidential race, has expressed his disdain for these policies and has advocated the rights of the individual over group rights.²³⁴ He claimed that he wanted the California taxpayers, who pay for the operations of the universities in the California university system, to have an equal chance at having their children admitted to the state universities. He also wanted these policies abolished because of the further racial division that they cause.²³⁵ We now turn to the effects on the California university system.

From a statistical analysis, the number of minority students will probably decrease significantly when race is not taken into account as a factor in the admissions decisions.²³⁶ Even more troubling for the university may be the fact that, with the larger emphasis on economic criteria in the admissions process, there may be significant funding problems because lower income students generally receive a larger amount of financial aid.²³⁷ Also, students may be admitted with lower grades and lower LSAT scores, a problem which not only affects a university's reputation

230. Amy Wallace & Dave Leshner, *UC Regents, In Historic Vote, Wipe Out Affirmative Action*, L.A. TIMES, July 21, 1995, at A1.

231. *Id.* The policies were cancelled at a 12-hour meeting of the regents at U.C.-San Francisco. The vote was 15-10 in favor of elimination. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* The figures show that by the addition of economic merit in the admissions criteria and the subtraction of race, the amount of black students could fall as much as 50%. Blacks would then represent less than 3% of the student body. Also, Hispanic enrollment could fall from 13% to 11%. There would be a 15-25% rise in Asian-American students and white enrollment would increase approximately 5%. *Id.*

237. Because of funding cuts, the university is already struggling as it is. Financial aid programs, as they now stand, are not going to be enough. *Id.*

around the country, but also led to the present controversy today.²³⁸ One day many years from now, we may be debating the preferential admissions policies for the economically disadvantaged, although it is doubtful that any such admissions policies could elicit such a huge debate as the affirmative action policies have.

Another interesting feature of the California regents' decision is that many in the California university system support continuing affirmative action policies.²³⁹ This continued widespread support caused the only student regent at U.C., Edward Gomez, to initiate a challenge and a proposal to reverse the decision.²⁴⁰ Gomez claimed that his action was in response to the urging of over 1800 faculty members. The plea was expected to be denied, but there were plans for professors in the system to come together and eventually request a cancellation of the regents' decision.²⁴¹ It remains to be seen whether these efforts by the student and the faculty will be successful.

Another important aspect of the Board's actions is that this may be only the first step in abolishing affirmative action programs in university admissions policies²⁴² or in any field across the country. The magnitude of the regents' decision cannot be ignored.

B. REACTION

As a result of the U.C. Board of Regents' decision, supporters of affirmative action have unveiled a different method of assuring that minorities are adequately represented at U.C.-Berkeley. The Berkeley Pledge, as it is called, focuses on minority and low income public school students.²⁴³ The Pledge involves efforts to identify elementary and high school age students who could possibly attend Berkeley with some assistance. The assistance includes summer programs, mentoring by professors,²⁴⁴ and heavy recruiting.²⁴⁵ A program like this will obviously cost a

238. *Id.*

239. U.C.'s president, vice presidents, student leaders, and faculty all want to keep the programs because they believe the programs enhance the diversity on the college campuses. *Id.*

240. Pamela Burdman, *Challenge to Regents' Vote at UC*, S.F. CHRON., Jan. 5, 1996, at A20. Gomez is a graduate student at U.C.-Riverside. *Id.*

241. *Id.* The faculty based their argument on the idea that hiring and admissions policies should be determined by them, not by the regents. *Id.* The faculty is claiming that, at a minimum, the regents have "ignored a 70-year tradition of shared governance among regents, administration, and faculty." Pamela Burdman, *UC Officials Roll Out Plans on Preferences*, S.F. CHRON., Dec. 14, 1995, at A1, A19.

242. Many public university systems are closely monitoring the situation in California. The regents at the University of Maryland have continued to endorse affirmative action policies, and the U.C. regents' actions might cause them to change their minds. Also, officials at the University of Arizona have decided to reassess their affirmative action policies and could possibly decide to eliminate them. David Folkenflik, *Affirmative Action Efforts Questioned*, BALT. SUN, Dec. 10, 1995, at 5.

243. See *Tien's Alternative to Affirmative Action*, S.F. CHRON., Jan. 2, 1996, at A14.

244. *Id.* Already, in San Francisco, 17 Nobel Laureates have been obtained to academically assist students in the San Francisco public schools. *Id.*

245. *Id.*

great deal of money; U.C.-Berkeley Chancellor Chaing-Lin Tien has committed \$1 million a year for three years to the program, as well as \$10,000 of his own salary.²⁴⁶ The hope is that by implementing these programs, the students will become eligible for admission to the U.C. system.²⁴⁷

In addition to the Berkeley Pledge, U.C. officials have come up with new guidelines and factors to consider when evaluating a student's application. The goal of the new guidelines is for the university to have a diverse student body without using racial or gender preferences. There will be no mention of race or gender, but the admissions committee will be able to look at "a candidate's completion of special projects, outstanding performance in a particular subject, as well as 'unusual persistence and determination' in overcoming adverse circumstances" in the decision-making process.²⁴⁸

Southern Methodist University ("SMU") has had a program similar to the Berkeley Pledge underway since 1991. The focal point of the Inner Community Experience ("ICE") Program is a house in one of the lower income neighborhoods of Dallas. SMU students who live at the house, along with other students, are enrolled in a class that conducts a tutoring program for the children in the neighborhood.²⁴⁹ Programs similar to the Berkeley Pledge and the ICE Program could be initiated around the country to help improve the education of these disadvantaged students. The theory is that by more effectively preparing elementary and middle school students, the diversity issue will take care of itself; students will be able to achieve the needed grades in high school and college so that they will be admitted without the need for affirmative action programs.

The University of Pennsylvania ("Penn") is involved in heavy recruiting of minority students.²⁵⁰ The school's activities could be a model for any university to follow. Penn sends sixteen admissions officers across the country to meet promising students at many inner-city high schools and try to convince them that attendance at Penn is a possibility for them. These efforts result in some students, who never thought that they could attend a university like Penn, realizing the possibility of going to such an elite school.²⁵¹ Other schools could follow Penn's lead and aggressively recruit minority students. The extensive effort to recruit these students does not involve any political or social problems.

246. Nanette Asimov, *UC Berkeley Is Taking the 'Pledge'*, S.F. CHRON., Dec. 25, 1995, at A1.

247. *Id.*

248. Burdman, *supra* note 241, at A19. These new factors will likely result in a less diverse group of students. A recently released report has indicated that the new admission factors will only work to minimize the adverse consequences on diversity that the end of affirmative action programs has caused. Wallace & Leshner, *supra* note 230, at A1.

249. Wes Magruder, *Ordination Will Be Next Step in Woman's Lifetime of Service*, DALLAS MORNING NEWS, Feb. 11, 1995, at G3.

250. Howard Goodman, *Penn Displays Firm Belief in Affirmative Action*, HARRISBURG PATRIOT & EVENING NEWS, Nov. 8, 1995, at B11.

251. *Id.*

These alternatives to affirmative action should be implemented in other areas of the country. They give disadvantaged minority students a chance at going to a school like Berkeley or Penn without taking advantage of a program like affirmative action.

XI. THE CALIFORNIA CIVIL RIGHTS INITIATIVE²⁵²

A. OVERVIEW

Following the U.C. regents' actions, a campaign began to stop all government-funded affirmative action programs in California with the so-called California Civil Rights Initiative. This document, along with an identical bill up for consideration by the California legislature would, for all intents and purposes, end all government-funded affirmative action programs for minorities and women.²⁵³ One of the arguments of the initiative's proponents is that affirmative action programs tend to create more racial hatred, something that we can certainly do without in today's society. The author of the proposal, Bernie Richter, stated what preferential policies do to the attitudes of people: "When you deny someone who has earned it and give it to someone else who has not earned it . . . you create anger and resentment. . . . You stir the flames of racial hatred."²⁵⁴ This is a valid point, but even placing proposals like this before the legislature or the public for a vote may cause racial hatred and division.

California voters passed the initiative, commonly known as Proposition 209, by a margin of fifty-four percent to forty-six percent.²⁵⁵ About 8.7 million votes were cast, and the measure won by about 750,000 votes.²⁵⁶ This hardly ends the matter in California, however, because a lawsuit has been filed in federal court by organizations led by the American Civil Liberties Union, seeking to have the measure declared unconstitutional.²⁵⁷ The first programs that are likely to be attacked under Proposition 209 include a California community college rule that requires race to be used as a consideration in staff hiring and certain contract decisions by

252. The California Civil Rights Initiative states:

Neither the state of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment, public education or public contracting.

Cathleen Decker, *Affirmative Action: Fairness or Favoritism?*, L.A. TIMES, Feb. 19, 1995, at A1.

253. *Id.* (The initiative would amend the state constitution and would be mainly concerned with hiring and college admissions policies, but it may even prohibit voluntary desegregation policies in elementary schools).

254. *Id.*

255. Dave Leshner, *Battle Over Prop. 209 Moves to the Courts*, L.A. TIMES, Nov. 7, 1996, at A1.

256. Lyle Denniston, *Vote Rocks Affirmative Action*, AUSTIN AM.-STATESMAN, Nov. 7, 1996, at A6.

257. *Id.*

the California State Lottery Commission that involve race.²⁵⁸ The effects of the voting results may not be felt for a while because many state officials have indicated that they do not intend to comply with Proposition 209 until a court decision is reached regarding its legality.²⁵⁹

B. EFFECT

The California Civil Rights Initiative does not exist in a vacuum. The result of this effort to curb affirmative action in California will send shock waves throughout the nation. In other states, opponents of preferential programs will likely renew efforts to stop these programs which failed a few months ago.²⁶⁰

Many of the public efforts underway to curb affirmative action programs have probably come about as a result of the failure of the individual state legislatures to adopt bills to cut these types of programs.²⁶¹ These state legislatures have taken the attitude that affirmative action should be fixed, but not ended.²⁶²

Louisiana Governor Mike Foster took another approach to end affirmative action programs.²⁶³ Foster has decided to do away with all affirmative action programs in his state government. Also, Foster has said that he will utilize executive order to eliminate those programs that are not shielded by state or federal law.²⁶⁴ By doing this, Foster has taken a political stand, but local minority politicians will likely oppose him in his battle to curb these programs.²⁶⁵

C. THE FEDERAL GOVERNMENT'S ATTITUDE

The California Civil Rights Initiative is only a tiny spark in the continually growing fire over affirmative action. The Republicans began to challenge affirmative action policies in 1980 when Ronald Reagan challenged President Carter's affirmative action programs.²⁶⁶ In 1994, the Republican party gained control of Congress, and many thought that affirmative action programs for women and minorities would quickly disappear.²⁶⁷

258. Leshner, *supra* note 255, at A1.

259. *Id.*

260. Denniston, *supra* note 256, at A6. Groups in over 20 states are preparing to try to follow California's lead. Adam Pertman, *Affirmative Action's Loss in Calif. Expected to Spur Similar Battles*, BOSTON GLOBE, Nov. 7, 1996, at A34.

261. B. Drummond Ayres, Jr., *Efforts to End Job Preference Are Faltering*, N.Y. TIMES, Nov. 20, 1995, at A1, B10. Bills to cut affirmative action programs have not made it through the legislatures of at least 12 states including Mississippi, South Carolina, Texas, and Washington. *Id.*

262. *Id.*

263. *Blacks Vow Affirmative Action Fight*, DALLAS MORNING NEWS, Jan. 16, 1995, at A22.

264. *Id.*

265. *Id.*

266. Neal Devins, Essay, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 354 (1989).

267. Ronald Brownstein, *Blitz Stalls, But a Long War Looms*, L.A. TIMES, Dec. 31, 1995, at A1.

But Congress never passed legislation to cut the affirmative action programs.²⁶⁸

Affirmative action was an issue in the 1996 presidential election campaign. Republican nominee Bob Dole supported the elimination of preferences as set forth by the California Civil Rights Initiative.²⁶⁹ Dole also co-authored the Equal Opportunity Act, which would "prohibit[] the federal government from granting any preference to any person . . . based in whole or in part on race, color, national origin or sex."²⁷⁰ The act was unsuccessful last year, but Republican Representative Charles Canady of Florida, Dole's co-author of the Equal Opportunity Act, plans to re-offer the act when Congress reconvenes.²⁷¹

The two parties see the issue of affirmative action from completely different viewpoints. The Republicans tend to view affirmative action programs as dividing the races and continuing racial prejudices in the country; the Democrats view affirmative action programs as necessary to correct the continuing and worsening problem of discrimination in society.²⁷² Both parties are correct in their assessment of the issue. Clearly, any type of program that handicaps one race in favor of another will facilitate hostility among races. Thus, we must ask ourselves if there will ever be a time when these policies are no longer needed; there will always be an argument that discrimination is present in society. Therefore, affirmative action policies could always be justified on these grounds. But at some point, people must realize that affirmative action policies merely continue the antagonism among the races and do not allow us to peacefully coexist in society.

XII. OTHER ARGUMENTS REGARDING AFFIRMATIVE ACTION

In order to give a complete picture of the issues surrounding affirmative action, one must address some of the other arguments that have been presented in support of and against affirmative action policies in graduate school and college admissions.

Many of the proponents of affirmative action have claimed the need for benefits to be given to minorities in the admissions process because of the heavy reliance on the standardized tests. Studies have suggested that the Scholastic Aptitude Test (SAT) is biased against minorities and puts minorities "behind the eight ball" when applying for admission to law

268. *Id.*

269. *But see* Manny Klausner, *The Sounds of Silence: Dole Retreating from Civil-Rights Views*, L.A. DAILY NEWS, June 23, 1996, at V1 (editorial indicating that Dole may not continue to support the initiative activity).

270. Edwin Meese & Rhett DeHart, *Need for Firm Stance on Affirmative Action*, WASH. TIMES, June 17, 1996, at A19.

271. Denniston, *supra* note 256, at A6.

272. *See id.*

schools.²⁷³ This is a valid concern, but the lower scores of minorities may be more attributable to the low quality of their high schools rather than the problem with standardized tests.

Protestors of affirmative action have raised the interesting idea that affirmative action does not help minority students at all, but actually hurts them by causing academic failure.²⁷⁴ The theory is that minorities, through the affirmative action programs of the universities, are admitted to universities that are beyond their academic abilities.²⁷⁵ The result is that minorities who could fare well at less prestigious universities end up unsuccessful at elite schools.²⁷⁶ It seems that it would be much better to place all students with lower academic potential in universities where they would be able to graduate, rather than having them fail at more difficult universities simply because of affirmative action.

Another problem with affirmative action could be the possibility that white students are actually receiving more of an advantage than minorities. A recent study of Washington's public universities revealed that in 1994, 50.1% of the students admitted under alternative admission procedures were white.²⁷⁷ Even more surprising, at Washington State almost 75% of the students admitted in the fall of 1994 under the alternative admissions standards were white.²⁷⁸ This suggests that minorities should be skeptical of affirmative action programs. But a group evaluation demonstrates that minorities rely more on alternative admissions than whites do, and minorities would be more hurt by the elimination of affirmative action programs.²⁷⁹

Some protestors of affirmative action have even turned to more radical viewpoints. Professor Robert Klitgaard advances the classic argument that all law school admissions should be based on merit.²⁸⁰ He concludes

273. When taken as a group, African-Americans tend to score about 200 points lower than whites on the SAT. Also, children from families with lower incomes (between \$10,000 to \$20,000 a year) tend to score about 120 points lower than children from families with higher incomes (between \$50,000 and \$60,000 a year). This tends to indicate that standardized tests could be biased against minorities. Goodman, *supra* note 250, at B11.

274. Kevin Butler, *Affirmative Action Promotes Failure*, DAILY TEXAN, Nov. 29, 1995, at 4.

275. *Id.* In 1985, only 1928 minorities met the recommended SAT requirements of colleges in the United States. Through mathematics, we can see that each college only had the ability to enroll at most 35 qualified minorities. Upon looking at the actual enrollment figures of Harvard, we notice that since 1970, they have never admitted less than a hundred African-Americans a year. Through their affirmative action programs, universities like Harvard are being forced to accept minorities with lower academic potential. *Id.*

276. *Id.* The author uses Berkeley as an example. Seventy percent of the black students at Berkeley fail to graduate, and it was probably not their fault. According to Thomas Sowell, "[T]he policy of affirmative action places many of [the minorities] in academic environments that they cannot handle." *Id.*

277. John Iwasaki, *Affirmative Action Aids White Students Too*, NEW ORLEANS TIMES-PICAYUNE, Nov. 19, 1995, at A9.

278. *Id.*

279. *Id.*

280. David E. Van Zandt, Book Review, *Merit at the Right Tail: Education and Elite Law School Admissions*, 64 TEX. L. REV. 1493, 1501 (1986) (reviewing ROBERT KLITGAARD, CHOOSING ELITES (1985)).

that "prior grades and standardized test scores are the best predictors of later academic performance."²⁸¹ But he takes a much more controversial viewpoint. Klitgaard contends that students should be admitted who "maximize the value added of the education an institution provides."²⁸² He believes that the admission of minorities who have lower grades and lower board scores costs the institution "in terms of the academic performance of students admitted."²⁸³ Klitgaard argues that the number of minorities in universities should be limited; he advocates a cost-benefit analysis which "weighs the marginal cost in academic performance of admitting an additional black against the marginal benefit of that black's presence in the elite institution instead of that of a higher-scoring white."²⁸⁴ But Klitgaard's attempt to use economic analysis to decide affirmative action policies is rather simplified,²⁸⁵ and economics is not the most important thing to consider when determining university admission procedures. At times, diversity may be more important than the economic costs.

XIII. CONCLUSION

The debate over affirmative action policies is one that will continue. Public opinion suggests that affirmative action may be a disfavored doctrine²⁸⁶ and that it is not even supported by all minorities.²⁸⁷ As economic hardships for Americans continue and competition for employment becomes fiercer, affirmative action programs are going to be continually attacked. The courts have already noticed the potential economic hardships that preferential programs may have on nonminorities. They have even relaxed an important standing requirement, thus allowing certain people to sue even when their claim that they did not receive a job because of the preferential program was attenuated.²⁸⁸ Affirmative action policies in graduate school admissions, as well as in other areas, could be on their way out.

281. *Id.* at 1500.

282. *Id.* at 1498.

283. *Id.* at 1503.

284. *Id.*

285. *Id.* at 1505.

286. See Amy Wallace, *Figuring Out Who to Let In*, L.A. TIMES, Nov. 19, 1995, at 1. Polls have indicated that most Californians favor admissions policies based on merit, not race or gender. *Id.* College freshmen also indicate an opposition to affirmative action, although they do seem to support race as a basis for admission. *Students Wary of Casual Sex, Lenient to Pot*, BATON ROUGE ADVOC., Jan. 8, 1996, at A2.

287. See St. George, *supra* note 75, at A11.

288. See *Bras v. California Pub. Util. Comm'n*, 59 F.3d 869 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 800 (1996) (following the ongoing trend to loosen the standing requirement in a case involving an architect who was prevented from bidding on government contracts because of a law that required state utilities to implement short and long-term goals for the use of minority businesses). The Supreme Court denied writ of certiorari and, in effect, allowed white people to challenge affirmative action goals without the need to show that they had been specifically injured by them. David G. Savage, *High Court OKs an Affirmative Action Challenge*, L.A. TIMES, Jan. 17, 1996, at A1.

Sooner or later, people will realize that we are perpetuating animosity among the races by continuing these programs. We are causing minorities to lose self-respect because of the continuing stigma attached to the programs. Some may think that a minority student may have been granted admission over someone with higher test scores and grades simply because of race. Affirmative action hurts everybody, and when there are no winners in a public policy, it is not a good policy. Hopefully, affirmative action supporters will channel their efforts towards improving high schools in disadvantaged neighborhoods. This way, graduating students will be sufficiently prepared and will have performed well enough to be admitted to college and graduate schools without the need for affirmative action programs.