Blind Leading the "Colorblind:"
The Evisceration of Affirmative Action and
a Dream Still Deferred¹

In the state of nature, men are in fact born equal; but they cannot
remain so. Society deprives them of equality, and they only become equal
again because of the laws.²

Like an incurable cancer, the disease of racism³ continues to plague the
population. This malady incessantly claims "victims"⁴ who, rather than
attempting to find a cure for it, fall prey to its venom and become enemies
amongst each other instead of allies. Nowhere is the abomination of racism
more clear and tragic than in the relationship between African Americans
and white Americans. Unfortunately, this strained relationship stubbornly
persists despite the demise of slavery, Jim Crow laws,⁵ and the enactment
of race-conscious remedial programs designed to curb the effects of racial
discrimination.

Those who believe society has finally moved beyond racism are greatly
mistaken. Racism has recently been manifested in a number of ways. First,

¹. See Langston Hughes, Montage of a Dream Deferred, in THE COLLECTED POEMS
OF LANGSTON HUGHES 387, 388 (Arnold Rampersad & David Roessel eds., 1994). A
"dream still deferred" is a phrase which evokes the purpose of the poem, which is to reflect
on the lifestyles of southern African Americans who migrated north to Harlem, New York,
after World War II. Many of these individuals confronted disappointed expectations. They
anticipated freedom but were met with racial adversity and frustration instead.

². DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN AMERICANS AND THE
CONSTITUTIONAL ORDER, 1776 TO THE PRESENT vi (1991) (quoting CHARLES DE SECONDAT,
BARON DE MONTISQUIEU, THE SPIRIT OF THE LAWS (1748)).

³. The author uses "racism" to describe the conscious or subconscious belief that
one's race is superior to another race.

⁴. "Victims" refers to those who have truly suffered from racial discrimination, such as non-whites, and those who are infected by racism such that they fail to understand its
dynamics and thus exhibit bigoted attitudes.

⁵. "Jim Crow laws" refers to the domineering system of racial segregation established
after the Fourteenth and Fifteenth amendments to the United States Constitution were
mandated. Its purpose was to assure white domination over blacks. White Americans,
through Jim Crow, successfully implanted a widespread belief, both in the North and South,
that blacks were an inferior race and whites were superior. This provided justification to
racially segregate schools, hotels, theaters, etc. This occurred by law in the South and by fact
in the North. See Aldon Morris, CENTURIES OF BLACK PROTEST: ITS SIGNIFICANCE FOR AMERICA AND
THE WORLD, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 19, 40-43 (Herbert Hill &
James E. Jones, Jr., eds., 1993) [hereinafter RACE IN AMERICA].
resistance to school desegregation, which is sometimes racially motivated, still abounds.6 Second, a slew of southern black church fires, perceived to be arson-related and racially motivated, have occurred.7 Likewise, overt racist behavior maintains a stronghold in the judicial and business realms.8 Additionally, the gross disparity between blacks and whites concerning the acquittal of football star O.J. Simpson reveals a remarkable dichotomy in attitudes toward the criminal justice system.9 Racism even appears to affect the movie industry.10

Sadly, reverberating throughout the nation and in spite of this conglomerate of disparaging events, are frustrated cries that affirmative action,11 especially race-based programs, is no longer necessary or should be sharply curtailed.12 These affirmative action opponents have already sought relief.13

Furthermore, the judicial system has begun to quiet the opponents' cries, effectively by using "strict scrutiny" as a standard of review to apply to race-based affirmative action programs14 which has resulted in their

---

7. See William Neikirk, Clinton, Governors Take Aim at Arson 'Fever,' CHI. TRIB., June 20, 1996, sec. 1, at 8.
8. See A. Leon Higginbotham, Jr., Shades of Freedom: Racial Politics and Presumptions of the American Legal Process 149 (1996) (quoting In re Stevens, 645 P.2d 99, 99 (1982) (where concurring Justice Kaus referred to the racially derogatory comments made by a censured judge about blacks)). Moreover, race remains a critical factor in courtroom proceedings as it influences verdict determination, witness credibility, and whether jury instructions are given to juries. Id. at 127.
11. Affirmative Action may be defined as "[p]ublic or private actions or programs which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups." James E. Jones, Jr., The Rise and Fall of Affirmative Action, in Race in America 345, 345-46 (Herbert Hill & James E. Jones, Jr., eds.), [hereinafter Jones, Rise and Fall].
12. See infra pages 31-36.
13. For instance, voters in California approved, 54 percent to 46 percent, a proposition which prohibits race and gender-based Affirmative Action programs in college admissions, contracting, and hiring. See Michelle Locke, Californians Take Affirmative-Action Measure to Court, CHI. SUN-TIMES, Nov. 7, 1996, at 8.
elimination. However, the United States Supreme Court has yet to define an appropriate standard of review for the context of higher education.15

This Comment explores the historic and current judicial treatment of race-based remedial programs, particularly those affecting education. Part I of this Comment provides an analysis of historic trends which concerned Fourteenth Amendment interpretations and their application to school desegregation decrees and affirmative action programs in higher education. Part II assesses the current judicial reluctance to validate race-based remedial action when no constitutional violation has occurred but the segregative effects are caused instead by societal factors. This aversive attitude has made race-based remedies increasingly difficult to implement. Part II furthermore examines the progressive and unfriendly judicial posture toward voluntary affirmative action where constitutional violations are absent. Finally, Part III reiterates the arguments of affirmative action adversaries and supporters and recommends that, when the opportunity arises, the United State Supreme Court should mandate a lesser standard of review to apply to race-based remedial programs in higher education.

I. AN HISTORICAL ANALYSIS: TRENDS UP TO MISSOURI V. JENKINS

The Court has adopted an increasingly hostile view toward race-conscious remedial programs which include school desegregation and affirmative action. Since this attitude concerns disregard of the elimination of societal discrimination against African-Americans as a constitutional goal, it resounds echoes of the “separate but equal” doctrine set forth in the infamous case, Plessy v. Ferguson.16

The phrase “equal protection under the laws”17 has been espoused by fiery debate which has existed for generations.18 Particularly controversial

17. U.S. CONST. amend. XIV, § 1, states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
is its application as support for race-based school desegregation and affirmative action programs which originated in the late 1800s.

A. ENACTMENT AND EARLY INTERPRETATION OF THE FOURTEENTH AMENDMENT TO 1896

Subsequent to President Lincoln’s Emancipation Proclamation of 1862 and prior to the enactment of the Fourteenth Amendment, Congress passionately argued over what kinds of reparations should be made to the newly freed slaves. What resulted was undoubtedly Congress’ first adoption of racial preferential treatment programs, namely the Bureau of Refugees, Freedmen and Abandoned Lands, otherwise known as the Freedmen’s Bureau. It was established in 1865 and was responsible for taking possession of land seized from Confederate rebels under confiscation laws and leasing it to the freedmen. Inarguably, the power of the Bureau was the means for blacks to finally obtain some independence and self-sufficiency.

Despite the benefits blacks incurred from it, legislation concerning the Bureau was bitterly rejected and opposed by some, including Congressmen and President Andrew Johnson. Such opposition seemed to increase as the years progressed as well. Additionally, Johnson felt that the unique problems of blacks were already resolved. Johnson’s antagonism toward the Bureau was complemented by Congressmen who failed to understand the

19. Although Affirmative Action concerns various areas, such as employment and subcontracting, this comment will primarily focus on education.


21. See NIEMAN, supra note 2, at 54-55.

22. Schnapper, supra note 18, at 756-57.


24. NIEMAN, supra note 2, at 60.

25. The Freedmen’s Bureau was empowered by the 1865 and 1866 Freedmen’s Bureau Acts and additional legislation to not only provide land to blacks but also funds, food supplies, and educational facilities. The latter included colleges and universities, such as Howard University. See Schnapper, supra note 18, at 776, 781.

26. NIEMAN, supra note 2, at 58.

27. Schnapper, supra note 18, at 769-70. (“Congress...has never founded schools for any class of our own people...It has never deemed itself authorized to expend the public money for the rent or purchase of homes for...the white race who are honestly toiling from day to day for their subsistence...“) (quoting President Johnson explaining his rationale for vetoing the 1866 Freedmen’s Bureau Bill).

28. Id. at 774.
need for such programs. There was a fear instilled in such individuals that whites would be unfairly harmed by such remedies.

To the contrary, proponents of the Freedmen’s Bureau emphasized its necessity in order to counteract the effects of slavery. What resulted from the controversy was a simultaneous debate over the 1866 Freedmen’s Bureau Bill and the Fourteenth Amendment to the United States Constitution, both of which were enacted primarily to ensure black freedom. Although the Bureau became insolvent in 1870 and Congress did not approve additional federal funding for it, the Fourteenth Amendment was ratified in 1868 which provided hope to those striving to compensate blacks for the dehumanizing and inexpiable harms they suffered as a result of slavery.

The Supreme Court in the Slaughter-House Cases reiterated the intent of the Fourteenth Amendment. The Court heard the argument of butchers who challenged a Louisiana statute on the grounds that it allegedly established a monopoly and thus deprived a class of citizens of their right to exercise their trade. The Court rejected the Plaintiffs’ contentions that their rights under the Equal Protection Clause of the Fourteenth Amendment were denied. It reasoned that the Equal Protection Clause, in consideration of the history of the Thirteenth, Fourteenth, and Fifteenth Amendments, clearly has a remedial purpose, that is, to prohibit state laws which discriminated against the newly freed blacks. Furthermore, the Court stated that the provision obviously pertained to that race and that urgency and a strong case would be essential for it to apply to some other race.

Nevertheless, in 1896 the Supreme Court chose to interpret the Equal Protection clause in a memorable way, the impact of which would have distressing and lasting consequences. This unforgettable case was Plessy v. Ferguson. Plessy concerned a Louisiana law which prohibited “colored persons” and whites from riding together in the same railway compartments.

29. See id. at 776-77 (referring to the dissent of Congressmen who disfavored the exclusion of whites from a bureau’s program crafted to provide food and aid to blacks).
31. Id. at 296.
32. See Nieman, supra note 2, at 66; see also Brody, supra note 20, at 296.
33. Schnapper, supra note 18, at 783.
34. Nieman, supra note 2, at 66.
36. Id. at 60.
37. Id. at 81.
38. Id.
40. 163 U.S. 537 (1896).
unless a member of one race was caring for the children of a member of the other race. Instead, the compartments were "separate but equal." Plessy attempted to justify its holding that the law was constitutional by asserting that although the Fourteenth Amendment was meant to enforce "absolute equality . . . before the law," it did not have the purpose of eliminating distinctions between the races to achieve social equality. Also, Plessy stated it cannot be assumed that a legislature can "fix" social prejudices, rather, social equality must be obtained through the "voluntary consent of individuals."

Additionally, the Court in Plessy reasoned that even though the civil or political rights of no race may be constitutionally inferior, there is no constitutional remedy for social inferiority. Therefore, the statute, by providing "separate but equal" facilities, did not stamp the "colored race with a badge of inferiority," and if any such badge existed it was only because blacks chose to interpret it that way.

Justice Harlan, the lone dissenter, prophesied that the Court's holding would be as destructive as the Dred Scot v. Sanford decision which held that slaves were not "citizens" under the Constitution. He attacked the majority's reasoning by arguing that the Constitution is "color blind" and the statute in question contradicts its spirit and letter. Despite the argument that the statute does not racially discriminate, its obvious intent was to exclude blacks from places at which whites were located. Harlan's prophecy came true. Plessy in effect essentially licensed states, both northern and southern, to continue treating blacks as second class citizens. "Separate but equal" was a concept utilized by various states to expand Jim Crow laws to areas other than passenger trains and schools, such as hospitals, waiting rooms, and the use of "Jim Crow" Bibles

41. Id. at 540, 541.
42. Id. at 544.
43. Id. at 551.
44. Id.
45. Plessy, 163 U.S. at 559 (Harlan, J., dissenting). Dred Scot v. Sanford, 60 U.S. 393, 407 (1856), reaffirmed the acceptability of slavery and reinforced the concept of blacks as inferior. It did this by stating the black man possessed no rights white men were bound to respect.
46. Plessy, 163 U.S. at 559, 560 (Harlan, J., dissenting).
47. Id. at 557 (Harlan, J., dissenting).
48. It is interesting to note Plessy's exclusive application to blacks. Harlan mentioned that although the Chinese, contrary to blacks, were not allowed to become United States citizens, they nonetheless were not banned under the Louisiana statute from riding with whites. Id. at 561.
49. See supra note 5.
in courtrooms. Since African Americans were often intentionally excluded from public graduate and professional schools, they were not allowed opportunities to become, for example, doctors or lawyers. "Separate but equal" in the field of public education finally came to its demise when the Supreme Court decided Brown v. Board of Education ("Brown I.")

B. JUDICIAL RACE BASED REMEDIES: APPLICATION TO SCHOOL SEGREGATION

Brown I was a landmark case because it became the impetus for a greater public acceptance of school integration. The plaintiffs in Brown I were African-Americans who challenged the laws of four states which permitted or mandated racial segregation in their public schools. Brown I held that these laws were unconstitutional under the Equal Protection Clause and also discussed precedent which found that the purpose of the Fourteenth Amendment which was primarily to protect blacks. Brown I emphatically reasoned that "separate but equal" had no place in public education and its effect was to give African-Americans an inferior status. This was particularly devastating in the area of education since it impeded the child's development and motivation to learn and basically deprived black children of opportunities to succeed in life. In sum, although the physical facilities and other "tangible factors" may be equal between black and white schools, such segregated institutions are "inherently unequal."

Despite Brown I's fundamental decision it remained inconclusive regarding proper remedial decrees. Approximately one year later however, the Court began to establish guidelines for implementing Brown

---

51. Id. at 394.
54. Brown I, 347 U.S. at 486-87. The four states were Delaware, Kansas, South Carolina, and Virginia. Id.
55. Id. at 490 & n.5 (citing Slaughter-House Cases, 83 U.S. 36, 67-72 (1872)). See id. at 495.
56. Id. at 494, 495.
57. Id. at 493, 494.
59. Id. at 495-96.
I. *Brown v. Board of Education* ("Brown II"),60 noted that in order to execute *Brown I* it is wise for district courts to appraise the efforts of Defendant school authorities to comply, in good faith, with the constitutional principles embodied in *Brown I*.61 The Court reasoned that courts which initially hear school segregation complaints can best judge the effectiveness of remedial decrees due to their proximity to local conditions.62 In doing so, those courts must develop decrees in an equitable manner by reconciling public and private needs.63

However, courts were to require defendants to make "prompt and reasonable start[s] toward full compliance" with *Brown I* and should evaluate any plans proposed by defendants to carry out a transition to racially nondiscriminatory school systems. During these transitions the courts would reserve jurisdiction of the cases.64 Above all, district courts were to enter decrees and orders which were necessary and proper to admit black children in segregated systems to public schools on a racially nondiscriminatory basis with "all deliberate speed."65

The Supreme Court, in cases following *Brown II*, developed rules with which school boards that perpetuate racial segregation derived from *de jure* segregation were to comply to remedy discrimination and its effects.66 Various methods were suggested by parties of suits to achieve

---

60. 349 U.S. 294 (1955).
61. *Id.* at 299-300.
62. *Id.* at 299.
63. *Id.* at 300.
64. *Id.* at 300-01.
66. *De jure* segregation is that which is mandated by law. See United States v. Fordice, 505 U.S. 717, 727-28 (1992).
67. See Green v. County Sch. Bd., 391 U.S. 430, 431, 437, 438 (1968) (holding that Defendant school board's "freedom of choice" school plan was inadequate to effectuate a transition from a dual segregated system to a unitary, nonracial system and that school boards have an affirmative duty to take necessary steps to eliminate the discrimination "root and branch"); see also Swann v. Board of Educ., 402 U.S. 1, 14-16, 18 (1971) (asserting that district courts are to use their flexible and broad equitable powers to evaluate whether school boards have eliminated all vestiges of state-imposed segregation and those remedial powers were to extend only to the constitutional violation when school officials have failed in their affirmative duties. A prima facie case of such a violation occurs when it is possible to identify a white or black school merely by referring to the racial composition of it if that school is within a system known historically to be segregated); Keyes v. School Dist. No. 1, 413 U.S. 189, 208, 214-15, 224-32 (1972) (reasoning that a finding of intentional segregation in a significant part of a school system creates a presumption that other segregated schooling within the system is also a result of that intent. Thus, the burden is on the defendant to prove otherwise. Likewise, the difference between *de facto* and *de jure* segregation is intent. However, Justices Douglas and Powell believed the distinction between the two should be
solutions and when they were insufficient in meeting those standards, the lower federal courts had the authority to administer their own plans.68

Although progress was made in desegregating schools, such efforts nevertheless met fierce opposition.69 Busing was particularly controversial.70 The Supreme Court following Brown II restricted the scope of desegregation decrees when societal factors were found to contribute to or cause de facto71 segregation.72 In fact, resegregation based not on state

abolished because there was no constitutional difference between them); see also United States v. Fordice, 505 U.S. 717, 743 (1992) (finding that a prior dual system is not sufficiently dismantled by racially neutral university admissions policies).

68. Both plaintiffs, parents and children, and defendants, school officials and states, as well as courts, recommended a plethora of ideas, such as student assignments through racial quotas, Swann, 402 U.S. at 23; busing, id. at 29; zoning, Green, 391 U.S. at 441; "magnet schools", Milliken v. Bradley, 418 U.S. 717, 723 (1974) [hereinafter Milliken]; and remedial education, Milliken v. Bradley, 433 U.S. 267, 272 (1977) [hereinafter Milliken]. These alternatives have been utilized by numerous schools.


70. Flax v. Potts, 864 F.2d 1157, 1160, 1162 (5th Cir. 1989) (holding that a desegregation plan may be changed to eliminate busing in a school district which had not achieved unitary status but was close to doing so). Furthermore, white suburbanites prompted President Nixon to attempt to persuade Congress to prohibit busing. Orfield, supra note 53, at 239-40.

71. Basically, de facto segregation may be defined as segregation in fact which is not caused by legally permissible discrimination of state authorities. See Swann, 402 U.S. at 17-18.

72. Milliken I, 418 U.S. at 738 (determining that an interdistrict remedy for an intradistrict violation is inequitable; rather, the nature of the violation should dictate the remedy). In addition, district courts do not have the power nor may they implement remedies for de facto segregation as doing so would interfere with the authority of local school officials. Id. at 744. Justice Stewart concurred, arguing that the large number of blacks in the city of Detroit was not clearly caused by the defendant state and school officials. They may have been caused instead by "unknowable factors," like racial fears. Id. at 756 n.2 (Stewart, J., concurring). Justices Douglas, White, and Marshall dissented, fearing that the Court was reverting back to the Plessy "separate but equal" era. Id. at 759 (Douglas, J., dissenting); Id. at 782 (Marshall, J., dissenting). Justice White stated that precedent did not proscribe utilization of an interdistrict remedy for an intra district violation. In fact, to him the Court failed to restore the victims of discrimination to the position they would have had absent that conduct and "white flight" would subsequently increase. Id. at 778-81 (White, J., dissenting).

See also Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (declaring that although unitary status may not have been achieved within a segregated school district, since a "racially neutral attendance plan" was established to remedy the constitutional violation, the district court exceeded its authority in making annual adjustments to the racial composition of student bodies because changing demographics attributed to the racial makeup of the Pasadena schools rather than any past or present constitutional violation); Freedman v. Pitts, 503 U.S. 467, 471 (1992) (holding that a Georgia district court may withdraw
action but on private choices through, for example, housing, do not have constitutional implications. This restriction in scope means that courts have no authority or ability to redress segregation resulting from societal discrimination. 73 Instead, there must be a nexus between desegregation plans and actual constitutional violations which either originate from segregation governed by law, 74 or from facially neutral school policies which nevertheless intentionally engender a dual school system. 75

Ironically, despite conjectured images of the South as the perpetrator of racism, which brings to mind visions of the Ku Klux Klan, lynchings, and Jim Crow, the South generally has been more successful than the North in implementing desegregation decrees. The explanation for this may be that segregation in Southern states was typically required by law and therefore has been easier to identify. On the contrary, the Court has found that segregation of Northern schools has commonly been aggravated not by law or intent, but by de facto segregation. 76

Although advocates of racially centered school desegregation plans have confronted some societal ambivalence and outright defiance, the need for race-based remedial programs has been recognized. 77 Subsequently, their application has been extended to higher education facilities by means of preferential treatment programs.

C. APPLICATION OF RACE, CONSCIOUS REMEDIAL MEASURES, AND AFFIRMATIVE ACTION

Following a similar logic used to justify race-conscious solutions to school segregation, (to ameliorate the effects of actual racial discrimina-

judicial supervision over facets of its desegregation plan although the defendant school district had not achieved unitary status with respect to all aspects of the plan).

73. Freedman, 503 U.S. at 495.
75. A dual school system is one in which a white school and black school may be identified by various factors. These factors may include but are not limited to: disparity in the quality of school buildings and equipment and racial composition of teachers and staff. See Keyes, 413 U.S. at 208-09.
76. See supra note 54 and accompanying text; see also Swann, 402 U.S. at 6, 14-16, 18 (involving desegregation in North Carolina). Cf. Milliken I, 418 U.S. 717, 722 (concerning segregation in Detroit, Michigan).

In actuality, Northern racism was more deep and profound than that in the Southern states. Kenneth B. Clark, Racial Progress and Retreat: A Personal Memoir, in RACE IN AMERICA 3, 17 (Herbert Hill & James E. Jones, Jr., eds. 1993). Segregation increased as white parents moved from inner cities to suburbs. Id. at 18.

77. Nathaniel R. Jones, Civil Rights After Brown, in RACE IN AMERICA 97, 105.
tion), universities have implemented special admissions programs in order to recruit more minority students. However, such race-conscious affirmative action programs differ from school desegregation decrees which require constitutional violations for their validation. Instead, they, as the United States Supreme Court has appeared to believe, are often executed in the absence of constitutional violations. These programs have been challenged by white candidates as evidence of "reverse discrimination" and consequently violative of the Equal Protection Clause.

An example of this type of challenge is demonstrated in Regents of the Univ. of Cal. v. Bakke. Bakke was a white male who, despite his Medical College Admissions Test score and grades that were considerably higher than those of some minority applicants who were admitted, was twice denied admission to the University of California at Davis Medical School. The prescribed number of special admissions which was limited to a "minority group" was sixteen. The Bakke plurality held that the program violated the Equal Protection clause.

Contrary to judicial review of affirmative action programs in other areas, Bakke did not establish any one particular standard to be applied to education. Regardless, the Court in Bakke struggled to define and apply one. On the one hand, for instance, Justice Powell asserted that

79. Id.
80. Bakke, 438 U.S. at 301 (finding no constitutional violation on behalf of the University of California); see also Hopwood v. Texas, 78 F.3d 932, 954 (5th Cir. 1996), rev'g 861 F. Supp. 551 (W.D. Tex. 1994).
81. See infra Part III.A.
83. Id.
84. Id. at 274, 275 (stating that a "minority group" consisted of "Blacks," "Chicanos," "Asians," and "American Indians"). Basically, the total number of seats available to both regular and special admits each year was 100. Id. at 272.
85. Id. at 317, 326, 418. Chief Justice Burger, and Justices Stewart, Rehnquist, and Stevens concluded that Title VI of the 1964 Civil Rights Act prohibited race based programs like the one used at U.C. Davis. Id. at 325. To the contrary, Justices Powell, White, Brennan, Marshall, and Blackmun believed that race may be a factor in deciding who to admit. Id. at 325-26.
87. Bakke, 438 U.S. at 299.
preferring individuals of a group solely because of race is discrimination for its own sake but may be justified if that classification is precisely tailored to serve a compelling state interest. He reasoned that a more appropriate method of admitting students than utilizing a racial quota was to use race as a “plus,” that is, to consider factors in addition to race which may promote a diverse student body. Nevertheless, he rejected racial preferences to remedy “effects of societal discrimination.”

Justice Powell also found that Bakke was inapposite to the school desegregation cases which concerned race-based remedies for actual constitutional violations. In the case at bar, no constitutional violation was judicially determined and the Court has never favored “preferential classifications” in the absence of constitutional or statutory violations.

On the other hand, Justice Brennan, joined by Justices White, Marshall, and Blackmun dismissed a “rational basis” standard as well as “strict scrutiny” in reviewing benign racial classifications, and adopted an “intermediate standard.” Under this standard, benign racial classifications must serve important governmental interests and also be substantially related to those goals.

It is unclear at present whether the Supreme Court will eventually apply a “strict scrutiny” standard of review to race conscious programs in higher

88. Id. at 307. Powell also concluded that racial classifications are not per se invalid under the Fourteenth Amendment. Id. at 356.
89. Id. at 299. This is suggestive of “strict scrutiny” which is described by a “compelling interest”/“narrowly tailored” means-end test. See, e.g., infra note 142 and the article’s discussion of Croson. “Compelling interests” encompasses promotion of diversity (Bakke, 438 U.S. at 314) and remedying “identified discrimination” Croson, 488 U.S. at 505. “Narrowly tailored” means which involve racial classifications are those where there are no viable alternatives which are racially neutral. See Croson, 488 U.S. at 507.
90. Bakke, 438 U.S. at 317. These include, among others, personal talents and leadership potential. Id.
91. Id. at 307.
92. Id. at 300.
94. “Benign” generally refers to racial classifications that do not have an “invidious” or oppressive motivation. Rather, they are remedial in nature and do not impose stigmatic effects on persons to whom they do not apply.
95. Justice Brennan stated that the program at U.C. Davis did not establish an invidious quota since it did not inflict such an injury on whites that regardless of what they do they will be treated as second class citizens, as opposed to discrimination against minorities, which does. Bakke, 438 U.S. at 375 (Brennan, J., concurring in part and dissenting in part).
96. Id. at 357-59 (Brennan, J., concurring in part and dissenting in part). Justice Brennan also proposed a “strict and searching” review of such programs which is distinguishable from “strict in theory-fatal in fact,” a characteristic of “strict scrutiny.”
education. What is clear, however, is a continuing pattern abrogating de facto discrimination as a justification for implementing and maintaining them.  

II. CURRENT TRENDS:  
MISSOURI v. JENKINS, HOPWOOD v. TEXAS, AND OTHERS

The Supreme Court, as well as lower courts, continues to refuse to acknowledge societal discrimination as a justification for implementation of race-conscious remedial programs. Thus, such plans are usually subjected to exceptionally narrow scrutiny in terms of purpose, method, and/or scope.  

A. SCHOOL DESEGREGATION

1. The United States Supreme Court

In recent years the United States Supreme Court has once again confronted the school desegregation issue when it decided Missouri v. Jenkins II and III. The result of these cases was to further confine the exercise of the inherent equitable powers of district courts which were addressed in Brown I. Jenkins II concerned a finding by a district court in 1984 that the Kansas City Missouri School District ("KCMSD") and the State of Missouri had operated a segregated school system within the KCMSD. Consequently, the district court ordered the State and KCMSD to enforce certain essential remedies to eliminate the vestiges of the state-imposed segregation. The cost of this was to be shared by the State and KCMSD.

To help finance the plan the District court enjoined the effect of a Missouri Constitution provision which required reductions in property taxes as the school’s trust fund acquired money from the State sales tax. The

97. See, e.g., infra Part II.A.
98. Whereas the Supreme Court initially allowed the broad use of power by district courts in enforcing desegregation plans, supra note 67, it has nonetheless curtailed that power, supra note 72. Likewise, lower courts are currently somewhat restrictive in their approaches. See infra note 136.
102. Those remedies included, for instance, improvement of curriculum quality and implementation of child development programs. Jenkins II, 495 U.S. at 39.
103. Id.
104. Id.
court also approved a "magnet schools" proposal to help desegregate.  However, the "magnet schools" plan became more expensive as the district court allowed it to expand so that most schools in the KCMSD could become magnet schools. As a result, the district court, although reluctant to do so, opted to utilize its "broad equitable powers" and ordered a property tax increase despite the failed efforts of the KCMSD to persuade the voters to approve one. The State appealed and the Eighth Circuit upheld the order but cautioned that federal/state comity principles required deference by the court.

The United States Supreme Court granted certiorari concerning the property tax increase and held that ordering the increase transgressed the precepts of comity. It reasoned that the district court took a "drastic step" by imposing a tax increase and as such, intruded upon and ignored local authority. However, it is clearly within a federal court's power to alternatively order a local governmental body to levy its own taxes.

Justice Kennedy, joined by Justices O'Connor and Scalia and Chief Justice Rehnquist, concurred in part. Kennedy stated that the District
court exceeded its authority to tax but asserted that there really is no
difference between direct taxation by a federal court and an order mandating
a school district to impose the tax.\textsuperscript{114} Finally, although the Court did not
reach the issue of the scope of the "magnet schools" plan, Kennedy briefly
discussed it and claimed that the KCMSD did not adequately consider the
financial consequences of the plan.\textsuperscript{115} The Court did, however, subse-
quently review its scope in \textit{Jenkins III}.

The State in \textit{Jenkins III} challenged the district court's 1985 desegrega-
tion order of salary increases for almost all instructional and non-instruction-
al staff within the KCMSD and its order requiring the State to continue to
fund remedial "quality education" programs since student achievement levels
were still "at or below" national norms.\textsuperscript{116} The Court discussed the
"magnet schools" and capital improvements plan which was designed to
attract non-minorities back to the KCMSD by making the KCMSD schools
comparable to the neighboring suburban schools and to achieve the goal of
"desegregative attractiveness."\textsuperscript{117} The Court stated that even though the
district court and court of appeals found that this case did not concern an
interdistrict constitutional violation calling for interdistrict relief, they
nonetheless believed that since the KCMSD enrollment stayed 68.3 percent
black, a purely intradistrict remedy would be inadequate.\textsuperscript{118}

Regardless of those findings, the Supreme Court first held that the
district court's order of salary increases as a means to eliminate the vestiges
of segregation by improving the "desegregative attractiveness" of the
KCMSD, was beyond its discretion.\textsuperscript{119} The Court further found that the
district court impermissibly enforced an interdistrict remedy by means of the
"magnet schools" plan despite an intradistrict violation, and this was
contrary to the rule in \textit{Milliken I}.\textsuperscript{120} The Court rejected the KCMSD's
reliance on the District court's statement that segregation led to "white
flight" from the KCMSD to suburban districts. Rather, the Court suggested

\textsuperscript{114} \textit{Id.} at 58, 64 (Kennedy, J., concurring in part). The Justice also expressed due

\textsuperscript{115} \textit{Id.} at 59 (Kennedy, J., concurring in part).

\textsuperscript{116} \textit{Jenkins III}, 115 S. Ct. at 2042.

\textsuperscript{117} \textit{Id.} at 2044, 2050.

\textsuperscript{118} \textit{Jenkins III}, 115 S. Ct. at 2050.

\textsuperscript{119} \textit{Id.} at 2055.

\textsuperscript{120} \textit{Id.} at 2051; \textit{see supra} note 72.
that the flight may result not from \textit{de jure} segregation but rather from desegregation.\footnote{121}

Finally, the Court held that the district court’s order requiring the State to continue to fund the quality education programs that were in place because student achievement levels were below national norms is unsustain-

able.\footnote{122} It explained that the district court should decide on remand whether the reduction in the achievement of minority students caused by prior \textit{de jure} segregation has been remedied to the extent practicable.\footnote{123} This decision would thus determine whether the previously segregated district has achieved partial unitary status and to also acknowledge the goal of restoration of local control.\footnote{124} Additionally, the district court should consider that external factors beyond the control of the KCMSD and the State affect minority achievement and as long as they are not caused by unlawful segregation they play no role in developing the remedy.\footnote{125}

Justice O’Connor, concurring, emphasized that many “factors of human existence” can cause discrimination and cannot be readily remedied by the courts absent a constitutional violation but are best addressed by the legislature.\footnote{126} Justice Thomas, also concurring, stated that district courts must not confuse the results of \textit{de jure} segregation with those of private choices or social forces since the latter may have little to do with a \textit{de jure} violation.\footnote{127} He additionally advocated the adoption of strict scrutiny to desegregation decrees.\footnote{128}

In dissent, Justice Souter, joined by Justices Ginsburg, Stevens, and Breyer, asserted that there was a segregative effect that exceeded district borders which the district and appellate courts did find. The Court found that unconstitutionally segregated schools led to “white flight” from the

\footnotetext{121}{\it Jenkins III}, 115 S. Ct. at 2051. Furthermore, the Court supported its rationale by arguing that affirmative implementation of the plan would create no limits to the duration of the district court’s involvement. \textit{Id.} at 2054. Rather, it is crucial to defer to the interests of the State and local authorities in directing their own affairs and to realize that local autonomy of school districts is a national tradition. \textit{Id.}

\footnotetext{122}{\textit{Id.} at 2055.}

\footnotetext{123}{\textit{Id.} at 2056.}

\footnotetext{124}{\textit{Jenkins III}, 115 S. Ct. at 2055.}

\footnotetext{125}{\textit{Id.} at 2056.}

\footnotetext{126}{\textit{Id.} at 2060, 2061 (O’Connor, J., concurring). Also, if legislative efforts classify by race, application of strict scrutiny is not “strict in theory, fatal in fact.” Instead, it is the only way to distinguish between unconstitutional discrimination and narrowly tailored remedial programs which were created to promote the compelling governmental interest in vindicating effects of past discrimination. \textit{Id.} at 2061 (O’Connor, J., concurring).}

\footnotetext{127}{\textit{Id.} at 2063 (Thomas, J., concurring).}

\footnotetext{128}{\textit{Id.} at 2073 (Thomas, J., concurring).}
Additionally, Souter stated that the majority opinion does not follow precedent because it should not review concurrent findings of fact by two courts absent a "very obvious and exceptional showing of error." Thus, the Court has no justification for rejecting the courts’ findings except for its assumption that integration and not segregation caused "white flight." In contrast, Justice Souter suggested that unconstitutional segregation is the origin of the causal link between desegregation and its effects. Justice Ginsburg, in a separate dissenting opinion, concluded by stating that considering the history of segregation in Missouri, and that as late as 1984 a school district was "sorely in need," it is too early to curtail desegregation at this time.

In juxtaposition to the United States Supreme Court, federal district and appellate courts currently search for constitutional violations and their effects in determining whether desegregation decrees should be implemented, modified, or released upon findings that school districts have achieved unitary status. Likewise, similar to Jenkins II and Jenkins III, methods and scope of remedial efforts and the objective to restore local control are additional concerns. In sum, although the lower courts,
consonant with the United States Supreme Court, recognize the validity of desegregation orders which attempt to remedy effects of purposeful past (or present) discrimination which violate the Fourteenth amendment, those decrees cannot be so broad that they encompass means of redress for \textit{de facto} segregation which is presumptively not a result of former \textit{de jure} segregation.

Unfortunately, in as late as 1996, comprehensive desegregation remedial orders are still essential and are being initiated or supplemented to remedy the present effects of intentional discrimination.\footnote{See People Who Care, 1996 WL 364802, at \#1 (N.D. Ill. June 7, 1996). This order concerned the formulation of a remedy necessitated by a 1993 and 1994 finding that the Rockford Board of Education was guilty of intentional discrimination against minority schoolchildren. \textit{Id.} For instance, it consistently \textquotedblleft tracked\textquotedblright students on a discriminatory basis by intentionally placing many minority pupils who scored well above the national mean on tests in \textquoterightracially identifiable\textquoteright low ability tracks. Whites, on the other hand, despite low or average scores, were placed in basic or honors tracks. \textit{Id.} at \#6. See also Pennsylvania Human Relations Comm'n, 681 A.2d 1366 (Pa. Commw. Ct. 1996). The court held that the Commonwealth and Governor should be responsible for remedying the results of continuing \textit{de facto} segregation in Philadelphia public schools. \textit{Id.} at 1389. The court stated that not only was the Philadelphia School District the only district with no power to tax, but for 1994-95, it had the lowest resources and per pupil expenditure in the region. The per pupil expenditure was almost \$2,000 less than that of the average suburban school district. \textit{Id.} at 1372. Thus, although the court appeared to deviate from an emerging judicial norm not to provide remedies for \textit{de facto} segregation, it may be inferred that an exception applied here since the state and governor contributed to the fiscal disparity.}\footnote{Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), rev'd 861 F. Supp. 551 (W.D. Tex. 1994).}


Prior to the \textit{Hopwood} case, the United States Supreme Court decided three cases which have had profound legal implications for race-conscious programs. In effect, \textit{City of Richmond v. J.A. Croson Co.},\footnote{488 U.S. 469 (1989).} \textit{Adarand Constructors, Inc. v. Pena},\footnote{115 S. Ct. 2097 (1995).} and \textit{Shaw v. Reno},\footnote{509 U.S. 630 (1993).} may serve as indicia of the impending destruction of all race-based remedial programs, including those affecting higher education.
Curtailing the employment of race-conscious remedies in the subcontracting arena, Justice O'Connor, in Croson, wrote for a divided Court. Justice O'Connor argued that strict scrutiny is the standard which shall be adopted to demarcate the constitutionality, or lack thereof, of a Minority Business Plan implemented by the City of Richmond. The Plan required prime contractors who are awarded city construction contracts, to subcontract at least thirty percent of the contract price to one or more Minority Business Enterprises. Consequently, the Plan was struck down since it served no compelling purpose, nor were narrowly tailored means used.

Justice O'Connor insisted that in order for a compelling governmental interest in remediying effects of past discrimination to exist, a proper judicial, legislative, or administrative findings must be made of constitutional or statutory violations. Such a finding was not extant in Croson. The fact that prior to the Plan's execution, minority businesses received only .67% of prime contracts from the City while minorities made up fifty percent of Richmond's population was insufficient in finding a prima facie case of a constitutional or statutory violation. She additionally rejected, as compelling interests, the generalized assertion that there has been discrimination in an entire industry as well as remedying societal discrimination. Rather, states and their subdivisions may take race-based remedial

142. Croson, 488 U.S. at 485-86.
143. Id. at 469, 477.
144. Id. at 505-08.
145. Id. at 497 (quoting Bakke, 438 U.S. at 307).
146. Croson, 488 U.S. at 505.
147. Id. at 499, 500. O'Connor points out that the city reveals no knowledge of how many Minority Business Enterprises in the market were qualified to endeavor upon contracting work in public construction projects. Id. at 502.
148. Id. at 498, 500, 505. O'Connor first disregarded the "generalized assertion" argument. Although the City of Richmond contended that Fullilove v. Klutznick, 448 U.S. 448 (1980) was controlling, O'Connor disputed this notion. Croson, 488 U.S. at 486. In Fullilove, O'Connor stated, the Court upheld a minority set-aside plan which appropriated federal funds to state and local governments for public works projects as constitutional under the Due Process Clause of the Fifth Amendment. Id. Fullilove, O'Connor explained, was distinguishable since Congress, contrary to the states, has broad remedial power under the Fourteenth Amendment. Id. at 476, 487-88. It therefore may make "generalized assertions" regarding nationwide discrimination and as a result, mandate compliance by state and local governments to remedy the discrimination by implementing racial set-asides. Id.

Likewise, O'Connor refused to accept the purpose of remedying past societal discrimination as a compelling interest. Croson, 488 U.S. at 505. She reasoned that recognizing such an interest would "open the door" for all disadvantaged groups to state claims for remedial relief. Id. at 505, 506. This would contradict the precept of equality embodied in the Fourteenth Amendment. Id. at 506.
action when they prove their fiscal practices continue a pattern of identifiable and specific discrimination.149

O'Connor also rejected the argument that the thirty percent quota was narrowly tailored since the Plan was partly over inclusive and failed to consider racially neutral means, such as granting preferences to those undercapitalized, irrespective of race.150 Moreover, O'Connor vindicated the divided Court's holding by abolishing the distinction between "benign" and "invidious" discrimination.151 Since racial classifications pose a threat of stigmatization and hostility, they are all pernicious, regardless of which race is burdened or benefited by the classification.152

Justice Marshall, in dissent, chastised the majority for its reversion to the days when it manifested a hostile attitude toward civil rights.153 Marshall, in contrast to the majority, advocated an intermediate standard of review.154 The Justice furthermore reminded the Court that it has historically recognized a remarkable distinction between racist governmental actions and those governmental actions which attempt to eradicate and prevent the effects of racism.155 Marshall candidly explained that the

149. Id. at 504.
150. Id. at 506, 507.
151. Id. at 493; see also infra Part III.B.1 (for an explanation of "benign" as distinguishable from "invidious").
152. Croson, 488 U.S. at 493, 494. O'Connor also reasoned that strict scrutiny is the best method to employ since it can "smoke out" impermissible uses of race, a "highly suspect tool." It additionally ensures that no racial classification is utilized which is motivated by illegitimate prejudice or stereotype because the means chosen closely "fit" a compelling goal. Id. at 493. Furthermore, O'Connor emphasized that the rights guaranteed under the Fourteenth Amendment are personal rights, those possessed by the individual. Id. at 493 (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).
154. Id. at 535 (Marshall, J., dissenting). For instance, Justice Marshall asserted that the City's interest in ameliorating effects of past racial discrimination was an important interest. Id. at 536 (Marshall, J., dissenting). Not only was it important, but compelling. Id. The Plan was also substantially tailored to this goal in that the Plan's duration was limited to a five-year span and additionally contained a "waiver" provision which did not require nonminority firms to comply with the requirement due to lack of feasibility. Id. at 548 (Marshall, J., dissenting). Furthermore, the Plan had a "minimal impact" on "innocent third parties" since the thirty percent set-aside essentially transposed to three percent of overall local contracting. Id.
155. Croson, 488 U.S. at 552 (Marshall, J., dissenting) (quoting Fullilove v. Klutznick, 448 U.S. 448, 518-19 (1980)). Marshall also referred to the characterization of a suspect racial class based on "traditional indicia of suspectness" which nonminorities in Richmond do not possess since they have no "history of purposeful unequal treatment." Croson, 488 U.S. at 553-54 (Marshall, J., dissenting) (discussing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). Finally, Marshall stated the Court should adhere to the
majority "constitutionaliz[es] its wishful thinking" by failing to recognize the continuing impact of racism.\(^{156}\)

Justice Marshall's foreboding and disheartening reproach went unheeded. Once again, a divided Supreme Court, in \textit{Adarand}, held that all racial classifications prescribed by federal, state, or local government actors shall be subject to strict scrutiny judicial review and remanded the case to determine whether the test was met.\(^{157}\) \textit{Adarand} involved a federal law which granted compensation for hiring subcontractors certified as "Small Businesses" and which are socially and economically disadvantaged.\(^{158}\) A presumption existed that the "socially and economically disadvantaged" included minorities and any other person found to be disadvantaged by the Small Business Administration, pursuant to the Small Business Act.\(^{159}\) As a result of the law, a non-minority subcontractor was denied a subcontract despite being the low bidder.\(^{160}\)

O'Connor, writing for the Court, picked up where \textit{Croson} left off by adopting strict scrutiny to the Fifth Amendment analysis.\(^{161}\) O'Connor followed precedent to discover three established approaches: skepticism (racial or ethnic classifications must receive a "most searching examination"); consistency (the type of race concerned is irrelevant in applying a standard of review under the Equal Protection Clause); and congruence (Equal Protection claims under both the Fifth and Fourteen Amendments are subject to the same analysis).\(^{162}\)

Justice O'Connor cited to \textit{Hirabayashi v. United States}\(^{163}\) and \textit{Korematsu v. United States}\(^{164}\) to establish that racial classifications are "immediately suspect" and "odious to a free people."\(^{165}\) Furthermore, O'Connor stated that, without examining whether \textit{Fullilove v. Klutznick} would survive strict scrutiny, it is no longer controlling to the extent that it

---

\(^{156}\) Croson, 488 U.S. at 543-44 (Marshall, J., dissenting).

\(^{157}\) Id. at 2101.

\(^{158}\) Id. at 2102.

\(^{159}\) Id. at 2101-02.

\(^{160}\) Id. at 2110, 2113.

\(^{161}\) Id. at 2111.

\(^{162}\) Id. at 2110.

\(^{163}\) 320 U.S. 81 (1943)

\(^{164}\) 323 U.S. 214 (1944)

\(^{165}\) Adarand, 115 S. Ct. at 2106.
may have held that "federal racial classifications are subject to a less rigorous standard." 166

O'Connor reiterated the necessity of eliminating the distinction between benign and invidious discrimination since racial classifications as a whole are detrimental to society.167 Nevertheless, the Justice, attempting to reassure potential critics, reasoned that strict scrutiny is actually not "strict in theory, fatal in fact."168 O'Connor did leave the "door open" so to speak, by suggesting that the "lingering effects of racial discrimination against minority groups" may, in some instances, "justify a narrowly tailored race-based remedy."169

It is possible that the plan in Adarand may have survived strict scrutiny had it been couched in racially neutral terms instead of enforcing a presumption of disadvantaged status on the part of minority groups. This would have captured the essence of O'Connor's description of "narrowly tailored means."170

Finally, the Supreme Court demonstrated its loyal attachment to the strict scrutiny standard of review when it analyzed affirmative action in the voting field in Shaw v. Reno. Shaw involved a North Carolina reapportionment plan which, as a result of race-based legislation, created a second majority-black congressional district pursuant to the 1965 Voting Rights Act.171 The district was unusually shaped, extending about 160 miles, but was exceedingly narrow.172 Subsequently, North Carolina residents brought suit, alleging an unconstitutional racial gerrymander.173 The crux of the Plaintiffs' argument was that the arbitrary and deliberate concentration of black voters was based on race without regard to other,

166. Id. at 2117.

167. Id. at 2113. Justice Stevens, in dissent, fervently argued the difference between "invidious" and "benign" discrimination. Id. at 2120 (Stevens, J., dissenting). "Invidious" refers to the tools used to maintain oppression and racial subordination while remedial or "benign" preferences are simply constructed to "foster equality in society." Id. Affirmative action is commonly known as being the "benign" type, reflecting good, as opposed to bad, intentions. See id. at 2121 (Stevens, J., dissenting).

Stevens also chided the majority for ignoring the competence of Congress which was accentuated in Fullilove. Adarand, 115 S. Ct. at 2123-24 (Stevens, J., dissenting). Finally, he expressed discontent regarding the use of strict scrutiny in that the standard will indeed assure the fatality of racially benign programs. Id. at 2120 n.1 (Stevens, J., dissenting).

168. Id. at 2117.

169. Id.

170. See, e.g., Croson, 488 U.S. at 506, 507.

171. 509 U.S. 630, 633.

172. Id. at 635.

173. Id. at 636.
non-racial factors, such as political subdivisions or geographical boundaries, and was unconstitutional.\textsuperscript{174} Although O'Connor acknowledged the nation's disparaging racial history in the voting area,\textsuperscript{175} the Court in Shaw ruled that state legislation which imposes racial classifications is required, under the Fourteenth Amendment, to be reviewed under a strict scrutiny analysis.\textsuperscript{176} Since the redistricting was facially so irregular, it can rationally be concluded that it was done not for a compelling reason, but instead for the purpose of racially segregating voters without giving consideration to traditional districting precepts.\textsuperscript{177} The plaintiffs therefore stated a claim upon which relief could be granted.\textsuperscript{178}

Interestingly, the precedent upon which the Court in Shaw relied to afford protection to the plaintiffs was the case law that concerned challengers of policies which allegedly discriminated against blacks. Those challengers, though, were denied the protection given to the Shaw plaintiffs.\textsuperscript{179}

Moreover, O'Connor equated a racial redistricting plan with "political apartheid" but approved redistricting that is based on other criteria, such as making political subdivisions.\textsuperscript{180} As a result, the Court remanded the case to the district court to determine, in the event the alleged racial gerrymander is not contradicted, whether it meets the strict scrutiny test.\textsuperscript{181}

\textsuperscript{174} Id. at 637.
\textsuperscript{175} Id. at 639-41 (discussing the racial subjugation of blacks by means of vote dilution so that they were disempowered by various states, through racial gerrymandering, and thus had little, if any voting clout).
\textsuperscript{176} See Shaw, 509 U.S. at 643 (reiterating the same rationale employed in Croson and emphasizing the prohibition of racially discriminating between individuals). O'Connor claimed that it is impossible to determine the difference between "benign" and "invidious" racial classifications because they both generate stigmatizing and resentful feelings. Id. In addition, the same result occurs when racially neutral standards exist but which are "unexplainable on grounds other than race." Id. (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).
\textsuperscript{177} Id. at 642.
\textsuperscript{178} Id.
\textsuperscript{180} Shaw, 509 U.S. at 647. O'Connor also suggests that racial districting will increase the chance that elected officials will believe their main duty is to represent the interests of the members of the group who are intended to be catered, rather than to represent the whole constituency. Id. at 648. Additionally, this perception will reinforce and foster stereotypes. Id. at 650.
\textsuperscript{181} Shaw, 509 U.S. at 653.
Justice White, with whom Justices Blackmun and Stevens joined in dissent, insisted that the majority diverged from precedent in that it disregarded the fact that the plaintiffs alleged no "cognizable injury" nor did they prove the intent of the defendants to dilute their voting power. Similarly, Stevens dissented and questioned why, if it is legitimate to create districts based on providing representation for other groups, like Polish Americans, Hasidic Jews, and rural voters, is it not also permissible to do the same for African-Americans? After all, African-Americans make up the particular minority group whose place in United States history gave rise to the Equal Protection Clause. Justice Stevens asks a very provoking question. However, the Supreme Court, judging from its rulings in Croson, Adarand, and Shaw, appears to be in no hurry to answer it.

Croson, Adarand, and Shaw are extremely significant in that they conceivably foretell the progressive deterioration of affirmative action programs. Accordingly, they are analogous to recent school desegregation cases, like Jenkins II, because they fail to recognize the perpetuity of subtle and overt racism against minorities. At the same time, however, they contradict their deference to local control by striking down the voluntary race-based remedial programs local officials have undertaken to implement. By promulgating strict scrutiny as an appropriate judicial

---

182. Id. at 659-63 (White, J., dissenting). Historically the question has been whether a particular group has been denied access to the political system. Id. at 661-62. Justice White also argued that there was probably no intent to discriminate against the plaintiffs who were members of the "majority group" by denying them political power. Id. at 666-67 (White, J., dissenting). Additionally, North Carolina has engaged in discriminatory voting practices against black citizens and there is a possibility it may do so again. Id. at 665 (White, J., dissenting).

In sum, there must be an allegation of discriminatory intent and effect in order to state a claim pertaining to redistricting and neither was proven in this case. Id. at 669-70 (White, J., dissenting).

183. Id. at 679 (Stevens, J., dissenting).

184. Id.

185. See Croson, 488 U.S. at 497 (quoting Bakke, 438 U.S. at 308-09 for emphasis that eradicating societal discrimination is not a compelling interest); see also supra notes 121-26 and accompanying text discussing Jenkins III.

186. See supra note 120 and accompanying text (discussing Jenkins III); see also Brown II, 349 U.S. at 299 (stating local school officials have main responsibility for assessing and solving school problems); cf. Croson, 488 U.S. at 497 (quoting Bakke, 438 U.S. at 308-09, and requiring judicial, administrative, or legislative findings of constitutional or statutory violations to justify a governmental interest in remedying effects of past discrimination).

Croson, as a result, ignored such findings which were made by local officials. See supra note 154. Adarand consistently utilized this rationale when, despite deferring to Congress in Croson, it nonetheless declined, even incrementally, to do so.
standard, the Court affords opportunities for its use in other contexts, including higher education.

C. AFFIRMATIVE ACTION IN HIGHER EDUCATION: HOPWOOD v. TEXAS

AND THE AFFIRMATIVE “RACE” TO CONSTRINGE REMEDIAL EFFORTS

1. Hopwood at the District Court

Four white plaintiffs brought suit against the University of Texas Law School and a number of defendants, alleging Fourteenth Amendment violations.188

Recognizing that the Fourteenth Amendment was enacted to remedy racial discrimination and acknowledging the “long history” of its pervasiveness throughout Texas and the rest of society,189 the district court nevertheless held that the school's 1992 affirmative action program failed to pass constitutional muster.190 In making this conclusion, the court applied strict judicial scrutiny and cited to Croson, among others, for support.191 Although

188. The plaintiffs also claimed the defendants violated Title VI of the Civil Rights Act. Hopwood, 861 F. Supp. at 553. They argued that they suffered from racial discrimination in that the Defendants favored less qualified black and Mexican law school applicants by means of a quota system. Id.
Plaintiffs challenged the 1992 admissions process which established separate methods of review of minority and non-minority files. Different “TIs” were used for each group and within the minority group as guides for admission. “TI” stands for Texas Index and is calculated by the Law School Data Assembly Service. It embodies an applicant’s GPA and LSAT scores. Id. at 557 n.9.
The school considered other factors as well, such as undergraduate major and institution, and residency. Id. at 560-61. In effect, presumptive admission and denial scores (utilized to determine automatic admission or denial) differed between whites and non-whites. This resulted in a higher presumptive denial score for non-minorities than the presumptive admission score for minorities. Id. at 562.
In addition, separate committees were established to review minority and non-minority files that were placed in the “discretionary zone,” that is, those considered somewhere between presumptive admission and denial. Id. The consequence was that whereas each member of the non-minority admission committee reviewed and appropriated a limited number of admission votes to files within an assigned stack, the minority sub-committee members met as a group, reviewed each minority candidate’s file, and essentially decided who was to be admitted while attempting to meet numeric goals subject to the pool of qualified applicants. Id. at 562-63.
190. Id. at 554.
191. Id. at 568-69.
the court stated the compelling interest prong\textsuperscript{192} of the strict scrutiny test was met, the program was not narrowly tailored to its goal of promoting ethnic diversity and remedying the effects of past discrimination.\textsuperscript{193} As an alternative, the court advocated Justice Powell's approach in \textit{Bakke} which would entail review of a number of factors, with race as a "plus," in order to determine who is best qualified instead of admitting a minority student solely on the basis of race.\textsuperscript{194}

Finally, although the program failed the second prong of the strict scrutiny test, the court found that the defendants met their burden of proving that even if the admissions process were constitutionally valid, most likely the plaintiffs would not have been offered admission.\textsuperscript{195} As a result, the court refused to order injunctive relief by ordering the plaintiffs' admission to the law school.\textsuperscript{196}

\begin{footnotesize}
\begin{enumerate}
\item The court explained that under \textit{Brown I} the Supreme Court acknowledges the significant role education plays in society. \textit{Id.} at 570 n.59. Therefore, without an express statement from the Court overruling \textit{Bakke}, the attainment of educational benefits resulting from racial and ethnic diversity continues to be a compelling interest which justifies the use of racial classifications. \textit{Id.} at 570-71; \textit{see also supra} note 88 and accompanying text. In addition, the State's colleges and universities are linked to the primary and secondary schools in the system from which minorities have suffered discrimination, i.e., the residual effects of the past. \textit{Hopwood}, 861 F. Supp. at 571-72.

Finally, a system of higher education is under an "affirmative duty" to eliminate all vestiges of racial segregation and discrimination within that system. \textit{Id.} at 571 (quoting United States v. Fordice, 505 U.S. 717, 743 (1992)). Consequently, the remedial purpose of the law school's affirmative action program is compelling. \textit{Hopwood}, 861 F. Supp. at 573.

\item \textit{Id.} at 579.

\item \textit{Id.} at 578; \textit{see supra} note 89 and accompanying text. In order to achieve the compelling objectives of diversity and remedying effects of past discrimination and yet to also respect the interest in protecting individual rights, it is ideal to implement a method where the qualifications of all applicants, minority or non-minority, are evaluated and compared with those of other individuals in the pool. \textit{Hopwood}, 861 F. Supp. at 578.

\item \textit{Id.} at 581. It is also noteworthy that the court discovered that it was not clear that plaintiffs were denied admission due to race or ethnic origin. Even though they had TIs higher than most minorities offered admission, 109 non-minority residents with TIs lower than that of one plaintiff were offered admission and 67 non-minority residents with TIs lower than the other three plaintiffs were also admitted. \textit{Id.} at 581.

\item \textit{Id.} at 582. However, it allowed them to reapply without further administrative costs and entered judgment declaring that the law school's admission process violated the Fourteenth Amendment. \textit{Id.} at 582-83. The law school subsequently established a new procedure for the 1995 entering class which eliminated the separate minority subcommittee and presumptive admission and denial scores. \textit{Id.} at 582 n.87.
\end{enumerate}
\end{footnotesize}
2. Appellate Review

In March 1996, the Fifth Circuit reversed and remanded the district court’s holding. Not only did the appellate court find no compelling interest for the law school’s 1992 admission process under the Fourteenth Amendment or United States Supreme Court precedent, it also concluded that the law school could no longer use race as a factor at all in admissions. It reasoned that pursuant to the tenets embodied in prior Supreme Court cases, preference based only on race or ethnic origin is discrimination and is usually irrelevant and prohibited.

Thus, the court argued that without a doubt courts are to use strict scrutiny when reviewing all racial classifications, whether or not they are “benign.” Also, courts should recognize that the Fourteenth Amendment provides individual guarantees and as such the United States Supreme Court has rejected “group benefits” based on race. In the present case, the court pointed out that no case since Bakke has allowed diversity as a compelling state interest under strict scrutiny. Diversity, the court reasoned, perpetuates rather than minimizes the use of race by treating minorities as a group instead of as individuals. This therefore promotes racial stereotypes and hostility. The court further stated that the admissions procedure did not further this interest because the remedial goal was too broad. It asserted that the Supreme Court has required a showing of prior discrimination by the governmental unit involved before allowing racial classifications as a remedy to that discrimination. In this case, the court believed there was no evidence that the University of Texas has officially allowed discrimination recently at the school. Further, past discrimination in education other than at the law school cannot be used to condone race as a factor in law school admissions. Finding that the first prong of the strict scrutiny test was not satisfied, the court did not reach the

198. Hopwood, 78 F.3d at 934-35.
199. Id. at 940 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943) and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).
201. Hopwood, 78 F.3d at 944.
202. Id. at 944-45.
203. Id. at 951.
204. Id. at 949.
205. 78 F.3d at 954.
narrowly tailored question. It remanded the case to the district court to reconsider the damages issue.

In April 1996, the court denied a rehearing and rehearing en banc. Notably, the dissenters to the rehearing denials predicted that the result of the appellate court’s opinion would fundamentally impact public educational institutions in Texas as well as other states in the country. They argued that the court majority had engaged in “judicial activism” by overruling Bakke, which had stated that racial classifications are not per se illegal. They insisted this was improper since the Supreme Court has ruled that even if its precedent may directly apply to a case being heard by a lower court but seems to contain reasoning rejected by other decisions, the lower court should follow the directly controlling case and leave the Supreme Court the choice of overruling its own decisions. Essentially, just because the majority members believe that the Supreme Court will overrule Bakke, they cannot take the initiative to do so themselves. Therefore, since the Supreme Court has not yet overruled Bakke, the dissenters argued diversity should still be a compelling governmental interest.

3. The United States Supreme Court’s Denial of Certiorari: Why?

The United States Supreme Court denied certiorari in July 1996. It did so because the University of Texas law school discontinued the admissions program previously in dispute. Therefore, the case was

206. Id. at 955.
207. Id. at 962.
209. Id. at 722. This concern is shared by others. See, e.g., Taxman v. Board. of Educ., 91 F.3d 1547 (3rd. Cir. 1996) (concerning a school board’s affirmative action plan of preferring minority over non-minority teachers in layoff decisions); Back v. Carter, 933 F. Supp. 738 (N.D. Ind. 1996) (regarding the use of race and gender quotas for county judicial membership); Associated Gen. Contractors of Am. v. City of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996) (involving a city ordinance allotting a certain percentage of dollar amount of subcontracts to women and minority-owned firms); Sabrina L. Miller, Colleges Defending Affirmative Action Admissions: Texas Ruling, California Action Raise Concerns at Illinois Schools, Chi. TRIB., Apr. 3, 1996, at 1.
210. Hopwood, 84 F.3d at 722, 724.
211. See supra note 88.
212. Hopwood, 84 F.3d at 723.
213. Id. at 724.
215. Id. at 2582.
moot and as a result the Court opted to "await a final judgment on a
program genuinely in controversy." 216

One wonders what will result if that "awaiting" day arrives. Although
only speculative, considering the trends exhibited by the Supreme Court
concerning treatment of race conscious remedial programs, it may be
anticipated that the Court will apply strict scrutiny as well to affirmative
action programs in higher education. Despite the fact that the Court has
recognized the importance of education, its deference to stare decisis217
may induce the Court to apply this standard of review. If this occurs, in
effect affirmative action will come to its demise.

III. AFFIRMATIVE ACTION:
RECONSTRUCTION OR IMPENDING DESTRUCTION?

The school desegregation cases and the use of strict scrutiny in Croson,
Adarand, Shaw, and Hopwood, augurs the inevitable escalation of the
elimination of race-conscious remedial programs. The adversity faced by
affirmative action proponents is especially cumbersome since the Supreme
Court has required proof of actual constitutional or statutory violations, such
as effects of past discrimination, to uphold race-based remedies.218

However, violations are often not judicially found.219

In order to ensure the existence of affirmative action, it is imperative
that, considering the essential and vital role education plays in society,220
the United States Supreme Court adopt a less rigorous standard of review
for affirmative action programs in higher education, especially those which
assist African Americans. However, before analyzing the reasoning of this,
it is necessary to examine the contrary views of those who either whole-
heartedly oppose affirmative action or simply wish for its reformation (those
usually known as "individual rights" advocates), and those who believe it
must continue ("group rights" proponents).

216. Id.
217. To achieve consistency and to avoid multiple standards of review, the Court may
follow Adarand, Croson, and Shaw, and apply strict scrutiny. See supra Part II.B. In
addition, application of strict scrutiny in the context of higher education would comply with
the reasoning exemplified in the school desegregation cases. This would be accomplished
by first rejecting, as a compelling governmental interest, the elimination of de facto segrega-
tion and secondly, by finding that non-racial factors, such as class, are available, and thus,
a race-based affirmative action program is not narrowly tailored. See generally supra Part
II.
218. See, e.g., supra note 145 and accompanying text (discussing Croson).
219. Id.
220. See, e.g., supra note 57 (discussing Brown I); see infra notes 311, 312 and
accompanying text (discussing Plyler v. Doe, 457 U.S. 202 (1982)).
A. INDIVIDUAL RIGHTS

Individual rights advocates argue that the Fourteenth Amendment, by its literal interpretation, protects personal, not group, rights. Consequently, individual rights are controlling and are embodied in the word and spirit of the Fourteenth Amendment.\footnote{1. See Shelley v. Kraemer, 334 U.S. 1, 22 (1948); Brody, supra note 20, at 331; Ken Feagins, Wanted — Diversity: White Heterosexual Males Need Not Apply, 4 WIDENER J. PUB. L. 1, 7 (1994) (indicating that the “national interest” and “welfare of the group” are subordinate to the “autonomy, integrity, and dignity of the individual”).}

Furthermore, individual rights proponents adhere to Justice Harlan’s dissent in \textit{Plessy}, that the Constitution is “colorblind,” to justify their views.\footnote{2. \textit{Plessy v. Ferguson}, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).} Justice Scalia, for example, typifies this belief in his opinions.\footnote{3. See, e.g., \textit{Croson}, 488 U.S. at 520-21 (Scalia, J., concurring), stating that uses of governmental racial classifications are not solutions to the tendency to “classify and judge men and women on the basis of their country of origin or the color of their skin”); \textit{Adarand v. Pena}, 115 S. Ct. at 2118 (Scalia, J., concurring in part and in the judgment) (contending that although persons who have suffered wrongs by unlawful racial discrimination should be compensated, “under our Constitution there can be no such thing as either a creditor or a debtor race”).} Since the Constitution is indeed “colorblind,” they argue, any preferences based on race should be closely analyzed. These include affirmative action programs or school desegregation decrees which interfere with the personal choices of individuals, to achieve racial unitary status.\footnote{4. Neutral policies which result in individual choices regarding work or residence that produce \textit{de facto} segregation are not unconstitutional. \textit{Jenkins III}, 115 S. Ct. 2038, 2065 (1995) (Thomas, J., concurring).}

Individual rights advocates most likely would applaud the Supreme Court’s recent posture toward race-conscious programs in that strict scrutiny is an effective means to discover improper uses of racial preferences and that it is also impermissibly burdensome to “force” compliance with school desegregation efforts.\footnote{5. This may be characterized as “forced association” which presumptively exacerbates antagonism. See Conference, \textit{Race, Law, and Justice: The Rehnquist Court and the American Dilemma}, 45 AM. U. L. REV. 567, 596 (Feb. 1996) [hereinafter \textit{Race, Law, and Justice}].} They view school desegregation as a costly and unnecessary intervention which impairs their ability to decide where their children should live and attend school.\footnote{6. See, e.g., \textit{Jenkins III}, 495 U.S. at 40, 42 (where voters failed to vote for a tax increase to finance a desegregation plan and local taxpayers attempted to intervene in the suit). In addition, those who have resisted school desegregation efforts have at times been hostile. See supra notes 68, 73 and accompanying text.}

Having established that the Fourteenth Amendment protects individuals, as opposed to group rights, the individual rights proponents assert basically
three impediments to racial progress which derive from race-based remedial efforts: it is "reverse discrimination," it disregards the notion of merit, and it evokes racial stigmatization and hostility.

First, it is urged that affirmative action, without proof of actual unconstitutional effects of past discrimination, flagrantly denies "innocent individuals" of the right to be considered for such things as jobs and university admissions, based on personal qualifications. This is inherently unfair because those qualifications are treated as secondary to other, non-meritorious factors, such as gender or race.227 Those considerations based on race are particularly onerous.228 Those favoring individual rights often assert that they are "innocent victims" because they are not responsible for slavery or any other form of racism which caused racial injustices.229

Individual rights advocates claim that there is no difference between "benign" and "invidious" racial classifications since any racial classification generates animosity, frustration, and reinforces racism.230 It is also unclear when a person needs the benefits of an affirmative action program. At times it is both over inclusive in helping those who are not truly disadvantaged and under inclusive by failing to assist those who most need it.231 In sum, affirmative action is fallacious because "two wrongs do not make a right."232 Furthermore, the Constitution does not guarantee equal results.233

228. Bakke, 438 U.S. 265, 303 (noting that gender-based classifications are not considered "inherently odious," contrary to racial ones).
230. See supra notes 150, 151; Bakke, 438 U.S. at 294-96; Feagins, supra note 221, at 21 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 610 (1990)).
232. Croson, 488 U.S. at 520-21 (Scalia, J., concurring).
Secondly, affirmative action critics challenge such programs because they allegedly disregard traditional precepts of merit. Essentially, they contend that affirmative action is an affront to those who possess meritorious attributes. For instance, many aver that qualified whites, particularly white males, are losing opportunities to persons they consider to be less qualified. These are individuals assumed to be the "best and brightest" who are more capable of providing quality services, efficiency, and productivity.

Finally, to make matters particularly vexatious, affirmative action contenders argue that race-based remedial programs encourage racial stigmatization and hostility. Rather than unifying the meritorious interests of individuals without regard to race, gender, or sexual orientation, group-based preferences are not unifying because they perpetuate deep resentment among white heterosexual males. This belief is further supplemented by a perception that the harms suffered by white males caused by intentional racial or gender discrimination is just as sound as those experienced by women and minorities.

Supplementing the idea that affirmative action promotes racial hostility, individual rights proponents insist that affirmative action actually harms those whom it is intended to benefit. The rationale for this proposition is

234. Lugo, supra note 229, at 618.
237. Feagins, supra note 221, at 610; see also Croson, 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995). In Miller, the Court addressed the constitutionality of Georgia's congressional majority-minority redistricting plan pursuant to Shaw. Id. at 2485-86; see supra notes 170-183. According to Justice Stevens, the conclusion of the Miller Court that the plaintiffs had standing to assert a Shaw claim, reflects the Court's great concern regarding what the Justice called the potential "representational harms" suffered by whites, which may ensue as of consequence to such a plan. Miller, 115 S. Ct. at 2497-98 (Stevens, J., dissenting).
Those harms, according to Stevens, are those which arose when deliberate racial gerrymandering is accomplished and persons perceive that the elected individuals will consider the interests of the racial group of which they are members as predominant over those of the whole constituency. Id. at 2497-98 (Stevens, J., dissenting). Although the plaintiffs, as in Shaw, proved no injury as a result of the redistricting plan, the Court held the plan did not meet the strict scrutiny test. Id. at 2491 (Stevens, J., dissenting) (finding no compelling interest).
238. Feagins, supra note 221, at 35-36.
that group-based preferences reinforce stereotypes because they sacrifice traditional standards of merit for the fulfillment of goals only by virtue of one’s affiliation with a certain group. These stereotypes serve to enhance ideas that affirmative action beneficiaries are incapable of being successful based on individual ability. They therefore harbor prejudice by creating assumptions that those beneficiaries share particular characteristics indicated by group membership. Consequently, affirmative action engenders feelings of inferiority among its beneficiaries which Brown I was meant to prohibit.

Additionally, the argument exists that affirmative action recipients are often afflicted with self-doubt regarding whether or not they deserve the benefits received and also remain victimized if they, for example, are admitted to universities despite having lower test scores than whites males who are denied admission. In order for the public to conceptualize this, affirmative action opponents generally utilize African American “figureheads” to vindicate their views. These include, for instance, Justice Clarence Thomas, Shelby Steel, Stephen Carter, and Ward Connerly. Using these individuals for support may indicate an effort to make their views more acceptable to people who disagree with their viewpoints.

Finally, individual rights proponents disparage the use of race-based remedial programs absent proof of a constitutional violation, such as effects of past discrimination. As a result, they, like the Supreme Court in Jenkins III, Croson, and Adarand, strongly disfavor societal discrimination as a

239. Id. at 35-36.
240. Id; see also Harris & Narayan, supra note 231, at 29 (referring to stereotypes about African Americans).
242. See Gerald Horne, Reversing Discrimination: The Case for Affirmative Action 26 (1992); see also Miller, 115 S. Ct. at 2486. See generally Adarand, 115 S. Ct. at 2114. The detriment of stigmatization upon members of certain groups was a concern addressed in Brown I.
243. See Akhil Reed Amar & Neal Kumar Katyal, Bakke’s Fate, 43 UCLA L. REV. 1745, 1772 (1996)
245. For reference to Shelby Steele and Stephen Carter, see Barnes, supra note 231, at 1631. Justice Thomas is well known for his conservative views and is an advocate of individual choices. Finally, Ward Connerly is a member of the Board of Regents of the University of California at Davis who condones the elimination of affirmative action programs. See infra note 282.
validating factor for implementing affirmative action programs.\textsuperscript{246} Furthermore, they approve of plans which also meet the second prong of strict scrutiny, those which offer “narrowly tailored” means of achieving their goals. In other words, the affirmative action plan should be flexible, temporary, and adopted only where there are no less intrusive, neutral options are available.\textsuperscript{247}

Thus, individual rights advocates tend to criticize race-based remedial programs because they are group-based, which is contrary to the recognition of individual rights exteriorized in the Fourteenth Amendment. They are harmful because they result in reverse discrimination, debilitate standards of merit, and immortalize racial hostility and stigmatization.

B. GROUP RIGHTS

Contrary to individual rights proponents, group rights advocates understand race-conscious remedial programs as essential in providing equal opportunities for individuals who, due to stereotypes associated with particular personal characteristics like race, have historically been assigned to particular groups. As a result of that group assignment, they have suffered deplorable harms to the benefit of an oppressive group, generally white males.\textsuperscript{248} Antithetical to individual rights advocates, group rights supporters insist that the thrust behind the enactment of the Fourteenth Amendment was to assist African Americans.\textsuperscript{249}

Group rights proponents have three responses to the aforementioned views of individual rights supporters. First, “reverse discrimination” is sophistic because it essentially fails to exist. Second, the concept of meritocracy is ambiguous and biased, particularly racially. Third, the concern over racial hostility and stigmatization is grossly exaggerated and misconstrued.

1. \textit{The Myth of “Reverse Discrimination”}

First of all, group rights supporters ardently dispute the “reverse discrimination” argument because the alleged detrimental impact suffered by

\textsuperscript{246} See Feagins, \textit{supra} note 221, at 32. On the other hand, educational desegregation decrees do not emote the same negative feelings that typical affirmative action plans do because the former do not grant education to blacks while denying whites the same. \textit{Id.} at 39.

\textsuperscript{247} \textit{Id.} at 42-44.

\textsuperscript{248} See Duncan, \textit{supra} note 236, at 503 (defining affirmative action); see also \textit{supra} note 11.

\textsuperscript{249} See \textit{supra} Part I.A.
white males pales in comparison to that experienced by minorities, especially blacks,\textsuperscript{250} and one cannot, in examining reality, contradict this fact. White males as a group, for instance, have more decision-making control in hiring, business, government, and education.\textsuperscript{251} In addition, white males benefit either directly or indirectly through "good old boy networks." Even if he does not have a controlling position in a company, his chances are significantly greater than an African American of obtaining such a position, not to mention the greater degree of ease which whites experience in searching for jobs in general.\textsuperscript{252}

The further perception that affirmative action has "gone too far" by infiltrating labor markets with unqualified African Americans at the expense of a plethora of qualified whites is vastly misunderstood. In other words, misconceptions abound as far as to what extent affirmative action has provided opportunities to minorities and women.\textsuperscript{253} While affirmative action has had notable positive effects,\textsuperscript{254} its impact has been marginal.\textsuperscript{255}

\begin{itemize}
\item \textsuperscript{250} Due to the unique and oppressive position African Americans have historically held and continue to confront, the author will primarily, for the remainder of this Comment, focus on that group.
\item \textsuperscript{251} See NIEMAN, supra note 2, at 207.
\item \textsuperscript{252} HORNE, supra note 242, at 41-43 (discussing an Urban Institute Study which showed that concerning employment, African Americans have been subjected to subtle forms or racism which is not generally experienced by whites). Blacks, for example, despite equal qualifications to those of their white counterparts, have received shorter job interviews. \textit{Id.} The comments made by some interviewers were unfavorable relative to those given to whites. \textit{Id.} Also, blacks, contrary to whites, have been denied job applications. \textit{Id.}
\item Whites, especially white males, are inarguably the disproportionate beneficiaries of other employment practices which result form conscious or unconscious biases. This subjective form of prejudice is derived from negative stereotypes of minorities, as well as a covert preference for white men to keep or obtain high-paying and higher-level positions. See Harris & Narayan, supra note 231, at 20-21 (stating that "there are rules, practices, and policies" which, regardless of intention, discriminate against minorities and women), see also Arthur N. Frakt, \textit{Affirmative Action: A Dean's Reflections}, 5 WIDENER J. PUB. L. 1, 30 (1995).
\item Although support by white males has decreased over approximately the last five years, a number of them have discovered that affirmative action programs have not caused as great an increase in the hiring of women and minorities as anticipated. See Jonathan Kaufman, \textit{Mood Swing: White Men Shake Off That Losing Feeling on Affirmative Action}, WALL ST. J., Sept. 5, 1996, at A1.
\item See, e.g., Dixon Haynes, \textit{Black Entrepreneurs Foresee New Hurdles, Backlash Against Set-Asides Cited}, CHI. TRIB, Nov. 24, 1996, sec. 1 at 6 (citing a United States Census Bureau report that the number of black-owned businesses increased by 46 percent over the last decade).
\item See Jeffrey H. Birnbaum, \textit{Turning Back the Clock}, TIME, Mar. 20, 1995, at 37; see also Women Still Favor Affirmative Action, MARKETING TO WOMEN, Sept. 1, 1995, available in Westlaw, 1995 WL 8468029; Gabrielle Custer, \textit{AffirmativeAction Programs Level Playing
In fact, due to a lifting of governmental pressure which may be motivated by a societal desire to appease white males, companies throughout the United States are curtailing their affirmative action recruitment programs. The elimination of such programs demonstrates that many companies actually disapprove of affirmative action programs.256

In the educational realm, the "reverse discrimination" argument is manifested by concerns of university students that most minorities who are admitted are unqualified which is thus unfair to white students who are qualified but were denied admission. In addition, many white college students fear that minorities will, due to affirmative action employment programs, "steal" post-graduate jobs from them.257

Group rights supporters have two responses to this perception. First, there is no clear indicia that a large number of qualified students have been denied admission to universities as a result of affirmative action.258 "Institutional interest" may be given credit for this trend because despite failure to meet the usual "merit-based" criteria required for university admissions, many students are admitted for financial and other non-academic reasons.259 More often than not, the beneficiaries of these admissions are whites. While race-based affirmative action programs are severely challenged and blamed for encouraging racism, "institutional interest"

Field for Minority Firms, DAILY REC., June 23, 1996, available in Westlaw, 1995 WL 788582, at *9 (examining the disparities between blacks and whites in terms of employment and the incremental positive effects for minority-owned business enterprises).

256. See Kaufman, supra note 253, at A1, A6; see also Alison M. Konrad & Frank Linnehan, Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?, ACAD. OF MGMT. J., June 1, 1995, at 2, 3, 19-20, available in Westlaw, 1995 WL 12062406 (discussing findings that since "identity blind" hiring measures which discount gender and race are preferred over "identity conscious" means which consider gender and/or race, hiring practices have not resulted in a significant proliferation of minorities and women in United States labor markets).

257. See LUGO, supra note 229, at 618.

258. Miller, supra note 209. HORNE, supra note 242, at 32.

259. There is favoritism for relatives of wealthy alumni. Ken Myers, Sometimes It’s Not What You Know . . . Law Deans Debate Admitting Students for the Wealth and Influence They Bring, NAT’L L. J., Sept. 26, 1994, at A1; see also Jones, Rise and Fall, supra note 11, at 345, 356. Additional favoritism is exemplified by accepting athletes, which include whites, who are of low academic standing. Barbara R. Bergmann, Q: Should Washington Halt Race-Based Policies for Hiring and Contracting? The Jobs-Bias Against Minorities and Women Still Needs a Remedy, INSIGHT MAG., May 6, 1996, at 25. These athletes do displace black students who have better test scores and grades. Id. Furthermore, some university deans have considerable discretion in selecting whichever admittees they prefer to accept.
programs are readily accepted.\textsuperscript{260} Secondly, the argument that minorities, because of affirmative action hiring programs, pose a significant threat to white students since they allegedly will receive the best post-graduate jobs, is unfounded. For example, minority recruitment by large law firms is minuscule.\textsuperscript{261}

These two responses, according to the group rights theology, should quell the "reverse discrimination" fear. Whites, instead of suffering from reverse discrimination, actually benefit from racism in that they have been bequeathed the legacy of slavery since they do not suffer from the negative stereotypes which stigmatize minority groups, particularly African-Americans. Due to the oppressive nature of slavery, white males have benefitted from "white male affirmative action" for centuries.\textsuperscript{262} There has never been a need for any written affirmative policies to assist white males because, by being male and white, they have not been systematically denied advantages that may be had by a power structure which has been maintained by white males.\textsuperscript{263} This situation is contrary to the experience of African Americans.

Currently, whites benefit from racism, whether or not they are responsible for racial injustice. Their claims of innocence are not deceiving because whites enjoy advantages not available to other groups, particularly African Americans. This is explainable by the fact that whites are not burdened with the stigmatic and demeaning stereotypes shared by blacks. The benefits incurred by whites concern multifarious aspects of life, ranging from employment to housing.\textsuperscript{264}

Group rights advocates contend there is a definite distinction between "benign" and "invidious" discrimination which courts must acknowledge. These proponents insist that voluntary affirmative action programs, irrespective or whether a constitutional violation has occurred, are indeed constitutional because the spirit of the Fourteenth Amendment compels the provision of equal opportunities for traditionally disadvantaged groups, most important-

\begin{itemize}
\item \textsuperscript{260} See, e.g., Hopwood v. Texas, 78 F.3d at 946 (5th Cir. 1996) \textit{rev'd} 861 F. Supp. 551 (W.D. Tex. 1994).
\item \textsuperscript{261} Lugo, \textit{supra} note 229, at 620 (analyzing the historic under representation of blacks in the legal profession and citing statistics where the percentage of African American attorneys working for large firms from 1979 to the mid-eighties has not exceeded five percent. \textit{Id.} at 620-21).
\item \textsuperscript{262} See Morton, \textit{supra} note 229, at 1122.
\item \textsuperscript{263} \textit{Id.}
\item \textsuperscript{264} Harris & Narayan, \textit{supra} note 231, at 6-7. Adolph Reed, Jr., \textit{Assault on Affirmative Action}, \textit{THE PROGRESSIVE}, June 1995, at 18 (discussing the historic advantages of being white which include numerous benefits, such as the social welfare policies which originated from the New Deal era, as well as favoritism concerning housing, jobs, and automobile purchases).
\end{itemize}
ly, blacks. Therefore, affirmative action programs should be judicially scrutinized by a more lenient standard of review because their impact on whites is merely benign. This conclusion is most notably buttressed by the further indisputable fact that as a class whites do not share the “traditional indicia of suspectness” possessed by blacks. In other words, they have not suffered, nor been injured as a group by the deleterious effects of an oppressive system which has imposed purposeful discrimination. Instead, blacks have suffered from a system whose roots were established by slavery. African Americans as a group have been labeled as inferior for centuries and continue to be so characterized.

Group rights proponents finally rebut the “reverse discrimination” concept by showing that affirmative action programs are neither overinclusive nor underinclusive. First, even though middle class blacks who benefit from affirmative action may, at first glance, appear to be devoid of the need for affirmative action which gives the appearance of overinclusiveness, they nonetheless suffer from the debilitating stereotypes which accompany their skin color. Moreover, group rights advocates assert that affirmative action is not underinclusive because it has uplifted a myriad of African Americans from the ranks of the lower or working class to middle or upper class status. Affirmative action is also not underinclusive since it furthers yet another important purpose—the creation of positive role models for African Americans which will increase opportunities for them to succeed and can reduce frustration within black communities. Furthermore,

265. See Bakke, 438 U.S. at 359 (arguing that racial classifications designed for remedial purposes must involve “substantially related” means to achieve “important governmental” goals) (Brennan, J., concurring in part and dissenting in part); see also Adarand, 115 S. Ct. at 2097 (Stevens, J., dissenting) (clarifying the distinction between “benign” and “invidious” discrimination); Metro Broad., Inc., 497 U.S. at 565 & n.12 (“‘benign’ racial remedial efforts are as old as the Fourteenth Amendment.”)

266. Bakke, 438 U.S. at 357 (Brennan, J., concurring in part and dissenting in part) (finding that whites as a class do not have any “traditional indicia of suspectness” because they have not, for example, been rendered politically powerless, nor have they been hindered by intentional unequal treatment); see also id. at 375 (Brennan, J., concurring in part and dissenting in part).

267. See Bakke, 438 U.S. at 400 (Marshall, J., concurring in part and dissenting in part).

268. See Duncan, supra note 236, at 516-18 (referring to the racial discrimination confronted by African Americans, regardless of socio-economic background); see also Barnes, supra note 231, at 1647-49.

269. Morton, supra note 229, at 1125-26; see Harris & Narayan, supra note 231, at 8 (noting that most blacks before the Civil Rights Era were of working class status).

affirmative action is not clearly underinclusive because, contrary to popular belief, even poor white males have directly benefitted from affirmative action.\textsuperscript{271} Thus, due to the traditional and current pervasive racism faced by minorities, specifically blacks, and the relative benefits derived by whites because of racism, whites cannot, as a group, suffer from reverse discrimination.

2. \textit{Meritocracy?}

Group rights advocates present a rebuttal to the meritocracy concern. They assert that “merit” is an ambiguous concept as its traditional standards of test scores and grades do not accurately reflect the ability to perform well.\textsuperscript{272} “Merit” is also unclear since society, in spite of its apparent support of it, often does not defer to its mandates.\textsuperscript{273} Likewise, “merit” is tainted by racial bias in that it is dictated by racially prejudiced test scores which serve to, and perhaps are designed to, reinforce perceptions of white racial superiority. Implicit in this conclusion is a historic presumption that white males have merit and are thus deserving of employment or admission to a university.\textsuperscript{274} The societal preference for determining merit by grades and test scores subordinates other indications of quality. This formulates the final result of the denial of equal opportunities to succeed for African Americans. Therefore, the controlling societal belief that only traditional standards of merit are accurate indicators of success is erroneous and other factors should be considered as criteria for college admissions and employment.\textsuperscript{275}

\textsuperscript{271} Harris & Narayan, \textit{supra} note 231, at 10 (providing an example of an expansive New York university “open admissions criteria” which has benefitted lower-middle class whites as well as blacks).

\textsuperscript{272} Horne, \textit{supra} note 242, at 29 (discussing that although the General Aptitude Test Battery utilized by employment agencies reveals lower test scores among blacks and Latinos than whites, they performed better than the scores would indicate); \textit{see also} Lugo, \textit{supra} note 229, at 624-25.

\textsuperscript{273} These include admitting wealthy legacies to universities. \textit{See} Ellis Cose, \textit{The Myth of Meritocracy}, NEWSWEEK, Apr. 3, 1995, at 34; \textit{see also} Lugo, \textit{supra} note 229, at 24 (finding that society is not a well-functioning meritocracy).

\textsuperscript{274} Harris & Narayan, \textit{supra} note 231, at 31; \textit{see also} Duncan, \textit{supra} note 236, at 535-36.

\textsuperscript{275} These factors may include an environmentally disadvantaged background (Horne, \textit{supra} note 242, at 3), or motivation or perseverance (Morton, \textit{supra} note 229, at 1115).
3. Not Stigmatizing but Rehabilitating

Finally, group rights supporters attempt to dispel the argument that affirmative action creates racial hostility and stigmatization in that it is misplaced, misunderstood, and influenced by political leaders. Racial hostility and stigmatization are not novel societal evils. Originating from precepts of white supremacy, they have existed for centuries, even in the absence of contemporary affirmative action programs, and continue to permeate society. Racial extremism is alive and well. Due to its infiltration at various levels of life, it is exceedingly difficult to dispute that racism remains a vitiating and omnipresent force throughout society.

Consequently, racial hostility and stigmatization, group rights theorists argue, will stubbornly linger long after race-based remedial programs are eliminated. This outcome thus provides the impetus for continuing affirmative action programs because the inevitable result of their destruction is too devastating. The situation will resemble the racial polarity which was extant prior to the introduction of present-day affirmative action programs. The assumed stigmatization and resentment experienced by blacks which is currently caused by affirmative action will pale in comparison to the racial subordination they will feel once affirmative action is abolished. This possible future could explain why many, if not most, African Americans support affirmative action.

Private racial biases and racially subjective merit standards will ensure their exclusion from opportunities for success. In fact, those that achieve high levels of success in employment or education will probably be considered the exception rather than the rule. Therefore, blacks as a
group will continue to carry the burden of racial stigma and remain the scapegoats of racial hostility. As a result, affirmative action does not greatly enhance racial hostility and stigmatization, contrary to what individual rights proponents believe. Instead, affirmative action helps prevent these feelings and a further widening of the "racial divide" by striving to provide qualified African Americans equal opportunity.\textsuperscript{284}

Overall, group rights advocates insist that the Fourteenth Amendment demands the enactment and sustenance of affirmative action programs. Perceptions of affirmative action are gravely distorted and do not, in opposition to the typical understanding of them, cause reverse discrimination, shun meritocracy, nor reinforce racial hostility and stigmatization. If anything, it prevents the reversion to a racial climate penetrated by overt and antagonistic behavior whose target has historically mainly been African Americans.

C. JOINING THE GROUP RIGHTS CROWD: ADDITIONAL REASONS FOR UPHOLDING RACE-BASED REMEDIAL PROGRAMS

Society is not blind to color. Individual rights advocates urge that in order to defeat racism it is imperative to disregard race-based remedial programs. However, these proponents appear to take a somewhat oblivious view of reality. Since society continues to make group-oriented distinctions irrespective of affirmative action, group-based racial solutions are essential, even in the absence of constitutional violations. In actuality, group rights and individual rights may not be, at first blush, altogether discordant. Just as those who denounce affirmative action as discriminating against individual whites, blacks will, as individuals, suffer from an increase in discrimination caused by the evisceration of affirmative action. For this reason, the group rights approach presents a rational way of addressing the very real and pervasive devastation of racism which society generally prefers to ignore. Furthermore, there are several fortifying and well-founded reasons for courts to adopt a group-based analysis when reviewing race-conscious remedial plans as will be shown.

1. Racism Exacerbated by Stereotypes Realized or Denied

Perhaps the most notorious example of racism in the United States is slavery. However, long after the prohibition of slavery, blacks continued to bear the deleterious impact of racism. Slavery helped establish an oppressive system based on degrading stereotypes of African Americans which have, in turn, provided "justification" for the continuance in white society of racist

\textsuperscript{284} Jones, \textit{Rise and Fall}, supra note 11, at 351.
behavior and attitudes which still exist today. Many non-blacks still perceive blacks as violent, lazy, and less intelligent. These stereotypes have been the impetus for housing segregation by causing “white flight” which thus results in educational segregation. This chain of causation is emboldened by racially biased media depictions which strengthen “afrophobic” antagonism. The Supreme Court has not been immune to

285. See, e.g., Horne, supra note 242, at 38 (quoting an October 3, 1991, L.A. Times article which states that some businesses down South still have separate entrances for blacks and whites); Barnes, supra note 231, at 1633 (referring to Patricia Williams’ discussion about how the use of racial stereotypes allows society to rationalize a racial double standard); id. at 1642-43 (noting Williams’ and Stephen Carter’s reflections on racial stereotypes and their concurrent stigmatization).


287. This pattern may be explained as follows. First of all, the use of racial covenants to prevent racial mixing has resulted in substandard and overcrowded housing for blacks where they are compelled to reside in crime-ridden areas. See Isaac N. Groner & David M. Helfeld, Race Discrimination in Housing, 57 Yale L.J. 426-32 (1948). Realtors contributed to the problem by evoking fears among whites that desegregated neighborhoods would cause property value loss. Id. at 431. In order to attempt to justify the use of these covenants and the acts of the realtors, it has been argued that blacks are irresponsible tenants despite evidence to the contrary. Id. at 431-32.

Secondly, even in the 1990s, similar racial fears persist. See Massey & Denton, supra note 286, at 93-94, (finding that most whites, contrary to blacks, disfavor a racially integrated neighborhood which is 50 percent black and 50 percent white and who also fear an increase in crime and decrease in property values resulting from desegregation). In addition, regardless of their level of income, blacks remain highly segregated from whites. Id. at 85. This residential segregation, caused by stereotypes and “white flight,” has resulted in educational segregation. See id. at 141-42 (finding that “segregation also concentrates educational disadvantage”).

288. For example, even though whites make up a higher percentage of drug users than blacks, African-Americans are depicted in the news media as the predominant users. See Horne, supra note 242, at 55. A study done by the Center for Media and Public Affairs concerned the research of 800 news stories out of which over 1,000 visuals of areas in which drug activity occurred. Of those visuals, 50 percent showed minorities, especially blacks. Additionally, more whites than blacks receive welfare. In 1993, white mothers made up a higher percentage of welfare recipients than blacks for those mothers between the ages of 15 and 44. See United States, Bureau of the Census, Statistical Abstract of the United States 383 (1996). The racially-focused portrayal of blacks as the primary drug users and as welfare recipients strengthens negative stereotypes of African Americans and consequently perpetuates racism.

289. "Afrophobic" is a term used to indicate the conscious or unconscious belief, which derives from fear and resentment, that African Americans are inferior to whites. It is manifested in society in various ways. See Horne, supra note 242, at 33. For example, white women have been the prime beneficiaries of Affirmative Action. Nevertheless, their beneficence, as compared to that of African Americans, has remained extensively unchal-
“afrophobic” repercussions because it has tended to downplay the hardships experienced by blacks relative to whites and to provide better protection to white females than to blacks by using more lenient standards of judicial review.290

The consequence of this devastating cycle is an ultimate disparity where acquiescent whites benefit from a “racial status quo” while blacks are systemically and unwillfully excluded. As a result, racism may only, at least for the present time, be ameliorated by group-based remedies.

2. Need Not Caused by Inferiority but Self-Fulfilling Prophecy

Not only are African Americans faced with the negative socio-economic effects of racism, but there are also profound psychological effects which affect many blacks. The disparity in test scores between blacks and whites is in all likelihood not an “intelligence” problem but is indicative of other factors.291 A “self-fulfilling prophecy” is shared by many African Americans.


290. Justice Stevens, in Adarand Constructors, Inc. v. Pena, admonished the Court by explaining that the effect of its approach in Adarand, that is, of abolishing the distinction between benign and invidious discrimination, would result in the application of two standards of review regarding benign discrimination. The first would be “intermediate scrutiny” to gender discrimination. The second would concern a “strict scrutiny” approach to race discrimination. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2122 (1995) (Stevens, J., dissenting). The resulting anomaly of this will be that the government can more easily implement “affirmative action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans — even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves” Id.

In addition, if a policy was designed to benefit women, the Court has adopted a more lenient standard, the “fair and substantial relation” test, which then validated the policy. See, e.g., Kahn v. Shevrin, 416 U.S. 351, 355 (1974). However, if a policy was implemented to benefit males and which thus constituted a burden on females, the Court treated women as a suspect class that therefore called for “close judicial scrutiny” which then invalidated the policy. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

See, e.g., Bakke, 438 U.S. at 302-03 (noting that gender classifications do not create the same problems as those racially based). Justice Powell utilized this distinction to provide his justification for using strict scrutiny as the proper standard of review in racial contexts. Id. at 291, 299.

which is the consequence of stereotypical rejection. The victims of the self-fulfilling prophecy are those African Americans who believe society’s demeaning message, revealed both on an interpersonal level and through the media, that blacks as a whole share certain self-perpetuating characteristics which justify their lot. As a result, some African Americans respond to racism by disassociating themselves from the group. The self-prophetic belief is also displayed by the sense of hopelessness and despair caused by pathological “ghettoization,” the result of which is a large number of African Americans who are forced to live in poor and dilapidated urban areas caused by white prejudice and discrimination that restricts the residential mobility of blacks and leaves them isolated from whites. This deters the availability of black role models in that poor black, contrary to white children, are more likely to live in social environments which are marked by joblessness, poor schooling, and consequent expectations of poor scholastic performance. Therefore affirmative action provides an effective means of providing role models for those who feel or are destined to feel a lost sense of hope to achieve.

3. An “Emerging” Protected Class?

The current judicial posture detracts the intent of the Fourteenth Amendment by essentially protecting whites as a group. While African Americans have faced extremely difficult obstacles in judicially challenging alleged racist practices, presently whites do not bear such a burden. The

292. Massey & Denton, supra note 286, at 115, 162-64. Racial isolation has caused self-defeating attitudes among inner city blacks that no matter what they do they will never be accepted by society. Id. at 183. This in turn perpetuates low achievement. Id. at 164.

293. See, e.g., Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring); see also Thomas E. Hanson, Note, Rising Above the Past: Affirmative Action as a Necessary Means of Raising the Black Standard of Living as Well as Self-Esteem, 16 B.C. THIRD WORLD L.J. 107, 124-26 (1996) [hereinafter Hanson, Rising Above the Past]. For example, many blacks refuse to hire people from their own race to perform services for them. Id. at 124. This perpetuates an unjust impression that whites are superior to blacks in providing services. Id. at 125.

294. Higginbotham, supra note 8, at 126; Massey & Denton, supra note 286, at 150-53.

295. Nieman, supra note 2, at 209; Massey & Denton, supra note 286, at 166.

296. The school desegregation cases have always required either evidence of de jure segregation or intentional, invidious segregation despite racially neutral policies to effectuate race-based remedial decrees. See supra Part I.B. The intent element has also been required in areas other than education. See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977); cf. supra Part II.B (where whites need not demonstrate intentional discrimination to prevail). Instead, it suffices to show that an affirmative action program based on race exists which thus calls for application of strict scrutiny test, a
effect of this is that although the Fourteenth Amendment was enforced to assist blacks, whites will now be treated as a protected class.\textsuperscript{297} Therefore, the advantages whites already experience will be enhanced by the elimination of race-based programs. Although some contend that the “plain meaning” of the Fourteenth Amendment bars racial remedies in the absence of constitutional violations, the effect of this interpretation runs afoul of the purpose of the Fourteenth Amendment. Thus, the intent should predominate and racial remedies must thrive.\textsuperscript{298}

4. **Diversity as a Justification for Race-Based Remedies**

Race-based programs involve the quest of not just eliminating discrimination and its effects on African Americans, but they also promote diversity which benefits persons of all races. Through attempts to vary the ethnic composition of, for example, student bodies and businesses, the barriers of racial prejudice and misunderstandings may crumble.\textsuperscript{299} In addition, it enables university students to gain exposure to varying perspectives.\textsuperscript{300} Efforts to diversify additionally make good sense in that they help businesses to succeed\textsuperscript{301} and are fundamentally needed to meet the challenges of the 21st century.\textsuperscript{302} Since diversification undoubtedly provides enriching

\textsuperscript{297.} See Jones, The Harlan Dissent, supra note 235, at 970 (noting that courts are using “heightened standards of proof to invalidate blacks’ group expectations in favor of whites’ individual expectations”).

\textsuperscript{298.} Bakke, 438 U.S. at 340 (Brennan, J., concurring in part and dissenting in part) (finding that no rule of law prohibits the employment of aids to decipher the statutory meaning of words, especially when “plain meaning” conflicts with Congress’ expressed legislative purpose).

\textsuperscript{299.} Cf. Race, Law, and Justice, supra note 225, at 597.

\textsuperscript{300.} See Bakke, 438 U.S. at 312-14.

\textsuperscript{301.} See Janine S. Hiller & Stephen P. Ferris, Separating Myth From Reality: An Economic Analysis of Voluntary Affirmative Action Programs, 23 MEMPHIS ST. U. L. REV. 773, 781 (1993) (explaining that some companies assert Affirmative Action and the promotion of diversity enhances profitability and efficiency). Such programs also have a positive effect on financial markets. Id. at 793-95.

\textsuperscript{302.} Projections forecast that blacks and other minorities will constitute almost 40 percent of the American workforce by the year 2000. See Julius L. Chambers, Brown v. Board of Education, in RACE IN AMERICA 184, 187 (Herbert Hill & James E. Jones, Jr., eds., 1993). Furthermore, by 2010, Hispanics will become the largest minority. Tom Morganthau, What Color is Black?, NEWSWEEK, Feb. 13, 1995, at 64.
experiences for persons of all races, it provides further reason for maintaining race-conscious plans.

5. **The Inadequacy of Race-Neutral Alternatives and Other Means of Recourse**

As an initial alternative to race-based programs, some of those who censure affirmative action propose the implementation of class-based efforts. Supposedly, this substitution will curb resentful feelings and disproportionately advantage blacks. Nevertheless, this may very well not be the result. The disparities in test scores is racial, not class, identified and have been considered racially biased. Since this is the case the situation becomes problematic when, for example, blacks and whites are similarly economically situated and competing to achieve the same goal. The combined effect of this will still be a disproportionate advantage for whites as test scores will still be a factor considered in determining merit. Even if blacks were to incur a greater benefit from class-conscious remedies than whites, whites will probably still complain about reverse discrimination, precisely because the final effect is to advantage blacks. Moreover, class was not meant to be included in affirmative action programs.

A second suggested option is to broaden the racially subjective concept of meritocracy beyond test scores and grades in order to improve the chances of blacks to obtain success. However, thus far society appears to hold steadfast to traditional meritocracy, even though achievement is dictated by factors other than grades and test scores.

A final option is that concerned citizens should petition their legislatures if they dislike the Supreme Court’s requirement of constitutional or statutory violations to validate race-based programs. Those who champion this idea are, however, idealistic. The advent of Shaw will make minority representation more difficult to effectuate and could essentially stifle the voices of African Americans who wish to further the goal of racial

---


304. TESTING, TESTING, supra note 291 at 259.

305. TESTING, TESTING, supra note 291, at 266 (finding that the greater the interaction with the ethnic group which creates the tests, the better the scores of the takers). Hanson also suggests that tests may be a very effective method for excluding minorities. Id. at 260.


307. TESTING, TESTING, supra note 291, at 276. See also HORN, supra note 242, at 3.

progress. Additionally, restricting redress to legislatures ignores the remedial and momentous role the judiciary has historically played in executing the commands of the Equal Protection Clause.

In sum, class-based remedies will not assuredly provide equal opportunities to African Americans, society is unwilling to expand traditional precepts of merit, and legislatures may not effectively compensate for pervasive racism. Accordingly, these alternatives are insufficient and there is thus the necessity to maintain race-conscious affirmative action programs, particularly in higher education.

IV. RECOMMENDED JUDICIAL APPROACH

Education is inarguably the foundation for success in life. It is therefore critical that African Americans and other minorities have opportunities to obtain educational benefits. Societal racism against African Americans continues to present obstinate socio-economic and psychological barriers to achieving access to higher education. It is exacerbated by interminable stereotypes which prevent many blacks from receiving a foundation necessary to acquire the requisite test scores for some university admissions procedures. Blacks are thus frequently inhibited from reaching their full potential.

This problem could forthrightly be solved if serious efforts were made to eliminate de facto housing and school segregation, to provide more jobs through community investment, preferably by financially successful African Americans who could serve as role models, and to generally uplift racial

---

309. See Shaw, 509 U.S. at 680 n.1 (Souter, J., dissenting) (finding that “as long as racial bloc voting takes place, meaning the practice of voters of the same race to vote for like-candidates, legislatures will have to take race into account to avoid dilution of minority voting strength . . . “). Race-conscious redistricting has provided opportunities for minorities to participate in the electoral process. Lani Guinier, The Tyranny of the Majority, Fundamental Fairness in Representative Democracy 135, 139 (1994). Moreover, the chances that black congressional candidates will get elected in districts in which African Americans make up less than 40 percent of the population are slim. This is because a racial group is likely to believe that representatives from its own group will represent the interests of members of that group. Peterson, supra note 282, at 14.


313. See Hanson, Rising Above the Past, supra note 293, at 129 (discussing the positive influence African Americans may exert on populations); see also Peter Annin, supra note 270, at 26.
self-esteem. Unfortunately, changes often occur slowly and they are difficult to carry out when programs designed to achieve them are grossly underfunded and citizens resist school desegregation efforts.

As such, the Supreme Court must acknowledge the persistence of racism when the day arrives during which it must examine the constitutionality of race-conscious affirmative action in higher education. Additionally, the Court should not forget that the purpose of the Fourteenth Amendment is to protect African Americans from discrimination. Failing to remember would be a ponderous mistake. The consequences could result in a significant increase in resegregation of institutions of higher education.

Supreme Court members have recognized the daunting and unique position blacks have encountered due to racism. Nonetheless, there are other minority groups which undoubtedly experience discrimination. Therefore, the Court ought to promulgate a “sliding scale” approach to affirmative action programs in higher education. The more a particular

314. One excellent suggestion concerning raising self-esteem is to provide an Afrocentric curriculum. This academic approach purports to improve self-esteem, confidence, and to therefore ensure educational achievement by mainly focusing on the contributions of Africans. See Sonia R. Jarvis, Brown and the Afrocentric Curriculum, 101 YALE L.J. 1285, 1294 (1992).

315. Morton, supra note 229, at 1138.

316. Many individuals approve of school desegregation but oppose higher taxes and busing. Orfield, supra note 53, at 238.

317. See Adarand, 115 S. Ct. at 2122 (Stevens, J., dissenting) (stating the “primary purpose of the Equal Protection Clause was to end discrimination against the former slaves”). Even Justice O’Connor noted this fact in Miller: (“[T]he driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.” Miller v. Johnson, 115 S. Ct. 2475, 2497 (1995) (O’Connor, J., concurring). See also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978).

318. Amar & Katyal, supra note 243, at 1770 (concluding that overruling Bakke may portend resegregation).

319. See Croson, 488 U.S. at 527 (Scalia, J., concurring) (indicating that blacks have endured discrimination of more significance than any other racial group); see also Jenkins III, 115 S. Ct. at 2091 (Ginsburg, J., dissenting) (providing a historic recount of “official discrimination” suffered by African Americans); Bakke, 438 U.S. at 400-01 (Marshall, J., concurring in part and dissenting in part) (finding that the experience of blacks has been different than that of other ethnic groups); Frakt, supra note 252, at 19 n.17.

320. Varying Affirmative Action plans according to the group concerned has been suggested by at least one dean. See, e.g., Frakt, supra note 252, at 19-21.

A “sliding scale” method was advocated by Justice Marshall in his concurring opinion in Plyler v. Doe, 457 U.S. 202, 230-31 (Marshall, J., concurring) (1982). This case concerned the legality of a Texas law which withheld state funds from local school districts which provided education to children of illegal aliens. The Court, while rejecting the argument that illegal aliens are a “suspect class” that would otherwise call for “heightened scrutiny,” held that the children of illegal aliens are similar to a suspect class in that the law
group resembles a "suspect class," the less stringent the applicable judicial standard of review should be.\textsuperscript{321}

Affirmative action programs in higher education that benefit African Americans should be evaluated under the "intermediate standard" of review suggested by Justice Brennan in \textit{Bakke}.\textsuperscript{322} Adopting the intermediate standard would necessitate an "important governmental goal" and "substantially related means" of achieving it.\textsuperscript{323} Important governmental goals may include ending societal discrimination against blacks\textsuperscript{324} and expanding diversity, which honor First Amendment rights of academic freedom.\textsuperscript{325} Flexible numeric racial goals which are routinely adjusted as university officials may see fit, may suffice as "substantially related" means.\textsuperscript{326}

"imposes [a] discriminatory burden on the basis of a legal characteristic over which children have little control." \textit{Id.} at 217-20 n. 19. These children are powerless to change their societal status. \textit{Id.} Additionally, the law threatened to deny the children an education which is a highly important governmental function. \textit{Id.} at 222. The Court thus adopted a "fair relationship to a legitimate public purpose" test. \textit{Id.} at 216. It subsequently found the law was unconstitutional. \textit{Id.} at 230.

African Americans as a class and relative to whites as a group, like children of illegal aliens, are systematically denied power to alleviate the societal status assigned to them by virtue of racial prejudice. Unlike the children, however, they are a suspect class. Thus, policies which benefit blacks as a class should be accorded even more constitutional protection than that provided to children of illegal aliens, especially in higher education. \textit{Id.} at 231 (Marshall, J., concurring) (approving the demonstrable wisdom of employing differing levels of scrutiny).

321. \textit{Id.} at 231 (Marshall, J., concurring) (approving the demonstrable wisdom of employing differing levels of scrutiny).

322. \textit{See Bakke}, 438 U.S. at 359 (Brennan, J., concurring in part and dissenting in part).

323. \textit{Id.}

324. \textit{Id.} at 396 (Marshall, J., concurring in part and dissenting in part) (ending discrimination should be of the "highest order").

325. \textit{Bakke}, 438 U.S. at 312-15. A diverse student body provides an atmosphere of "speculation, experience, and creation" which are "essential to the quality of higher education." \textit{Id.} at 312. This is a goal protected by the university's First Amendment right of academic freedom. \textit{Id.}

Diversity has also been recognized as a valid First Amendment interest pertaining to the broadcasting industry. \textit{See Metro Broad., Inc. v. FCC}, 497 U.S. 547, 568 (1990); \textit{see also} Amici Curiae in support of Respondent at 9, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (No. 89-453). \textit{Adarand} overruled \textit{Metro Broadcasting, Inc.}, in that strict scrutiny, not intermediate scrutiny as was applied in \textit{Metro Broadcasting, Inc.}, shall apply to federal minority set-asides. \textit{See Adarand}, 115 S. Ct. at 2113. However, it was silent regarding the constitutionality of diversity as a goal.

The Court in both \textit{Bakke} and \textit{Metro Broadcasting, Inc.}, demonstrate a marked respect for policies which protect the First Amendment interest in exposure to diverse viewpoints which may, as a result, benefit all racial groups.

326. In fact, a racial quota, which is more rigid, has been validated under an intermediate scrutiny test. \textit{See}, \textit{e.g.}, \textit{Bakke}, 438 U.S. at 375 (Brennan, J., concurring in part and dissenting in part).
Even if the Court opts to apply strict scrutiny to higher education, affirmative action programs that are founded on race could pass the test. First, diversity has been recognized as a compelling goal. Secondly, in spite of the Court’s disregard of the elimination of societal discrimination which does not emanate from a constitutional violation as a compelling interest, if it found that a “social emergency” or “lingering effects” derived from racism existed, a compelling goal may be inferred. If the Court were to seriously contemplate the reality of education and housing segregation as it did in Brown I, perhaps it may discover the “lingering effects” of discrimination and therefore provide justification for maintaining race-conscious admissions procedures in higher education. Failing to do so may accelerate a historic revisitation to the days proceeding Brown I. Employing flexible numeric goals also may be narrowly tailored to obtaining these compelling goals because it is obvious they cannot be achieved without adopting race-based methods. School officials, however, must take care that the means used are not overinclusive nor underinclusive. In other words, if diversity is the compelling goal, affirmative action plans would most likely have to encompass neutral factors and thus officials should design additional and appropriate non-racial schema to accomplish the goal.

Finally, the need for affirmative action programs based on race should be determined by university admissions officials who have broad authority to implement educational policy. This would constitute “academic freedom,” and conforms to the principles enunciated in Bakke and are afforded First Amendment protection. Similarly, this would conform to the principles substantiated in Swann and Brown II.

327. Bakke, 438 U.S. at 314 (reasoning that diversity is a compelling interest in the context of higher education).
328. See Adarand, 115 S. Ct. at 2117 (O’Connor, J.) (referring to “lingering effects.”); see also Croson, 488 U.S. at 521 (Scalia, J., concurring). The current and sorry state of affairs for many inner city African Americans may indeed constitute a “social emergency.” See Morton, supra note 229, at 1110 & n.96.
330. See Adarand, 115 S. Ct. at 2117.
331. See Bakke, 438 U.S. at 317 (recognizing a permissible admissions program which could “promote educational pluralism” as one that embraces consideration of other, non-racial, factors).
332. See supra note 326 and accompanying text.
333. See Swann, 402 U.S. at 16 (determining that school officials possess extensive power to formulate educational policy to, for instance, achieve pluralistic goals); see also Brown II, 349 U.S. at 299 (“[s]chool authorities have primary responsibility for . . . solving [local school] problems”). Furthermore, although Swann and Brown II did not concern the higher education area, the Supreme Court has utilized Brown II and Swann as precedent to
The Supreme Court must not condone nor succumb to the manifest existence of racism by ignoring its effects, nor may the law give direct or indirect effect to private biases.\textsuperscript{334} If the Supreme Court chooses to ignore the reality of racism, it will secure the disturbing impact of \textit{Shaw}, \textit{Croson}, and \textit{Adarand} and will resemble \textit{Plessy v. Ferguson}.\textsuperscript{335} If and when the Court confronts the issue of race-based remedies in higher education where no constitutional violation is evident, it will have a choice. It may either take another giant step backward\textsuperscript{336} and hasten the destruction of racial progress, or it may choose to walk forward and salvage the vulnerable remains of contemporary affirmative action programs which have been the foundation for eradicating the effects of racism and have been the source of hope for many.

\textbf{CONCLUSION}

Justice Blackmun stated that “In order to get beyond racism, we must first take account of race.”\textsuperscript{337} These words are unfortunately incontestable. The threatening demise of affirmative action in higher education hangs over its proponents like an ominous cloud. It is indisputable that the obliteration of race-based remedial programs will only exacerbate the pestilent effects of racism. Until more viable solutions are established which will seriously combat racism, neighborhoods and schools will remain racially segregated due to societal factors motivated by prejudice which will discourage racial integration and further deny the opportunities of African Americans to obtain the same foundations for success of which whites often take advantage. Consequently, it is absolutely imperative that the Supreme Court considers the need to adopt a judicial analysis which will, in effect, declare race-based university admissions programs as generally constitutionally valid. This may best be accomplished by utilizing an intermediate standard of judicial review.

The Supreme Court has already “constitutionalized its wishful thinking.”\textsuperscript{338} It must not also constitutionalize society’s “racist thinking.” Instead, it should observe and utilize its judicial power to dispel the reality that:

\begin{itemize}
\item \textsuperscript{335} See supra notes 40, 139-41 and accompanying text.
\item \textsuperscript{337} \textit{Bakke}, 438 U.S. at 407.
\item \textsuperscript{338} \textit{Croson}, 488 U.S. at 552-53 (Marshall, J., dissenting).
\end{itemize}
"[T]he ashes of . . . hate" which originate from precepts of black inferiority, "[lie] at the bottom of our memory. . . . [T]hey lie uneasily, like a heavy secret which whites can never quite confess, which blacks can never quite forgive, and which, for both blacks and whites, forestalls until a distant day any hope of peace and redemption."

AMY L. KNICKMEIER