COMMENT

Affirmative Action in Higher Education: Federal Circuit Court Split Over *Bakke's* Diversity Rationale

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INTRODUCTION

A federal circuit court split over whether the legality of affirmative action threatens the status of university admissions policies that use race to achieve a diverse student body. Proponents of affirmative action in university admissions argue that preferences are necessary to remedy past discrimination and to achieve a diverse student body.[1] Opponents contend that affirmative action is reverse discrimination.[2] Opponents are especially critical of the diversity rationale, which is at the center of the

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[1] *See* Jonathan R. Alger, *Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73, 75 (1998) (discussing affirmative action programs established to remedy effects of past discrimination and programs designed to achieve educational benefits of diversity); Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1159-60 (1996) (stating proponents' argument that affirmative action is necessary to remedy long legacy of racism in American society).

[2] *See* TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 6-10 (1996) (describing affirmative action as "a bargain with the devil"); Dinesh D'Souza, *Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned As A National Policy?*, 60 ALB. L. REV. 425, 429 (1996) (questioning whether America's public policy effectively fights historical discrimination by practicing it); Richard Delgado, *Hugo L. Black Lecture: Ten Arguments Against Affirmative Action – How Valid?* 50 ALA. L. REV. 135, 146 (1998) (addressing argument that affirmative action is race discrimination).

current debate.[3] The diversity rationale for affirmative action in university admissions states that a university's pursuit of student body diversity is a compelling governmental interest that satisfies equal protection.[4]

As a result of interpretive disagreement between the Courts of Appeals for the Fifth and Ninth Circuits, the diversity rationale is in jeopardy.[5] The courts' disagreement is over the Supreme Court's landmark decision in *Regents of the University of California v. Bakke*.[6] In *Bakke*, the Supreme Court articulated the basic rationale for affirmative action in university admissions.[7] Writing for the Court, Justice Powell

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[3] *See, e.g.*, E. John Gregory, *Diversity is a Value in American Higher Education, But It Is Not a Legal Justification for Affirmative Action*, 52 FLA. L. REV. 929, 931 (2000) (proposing that Supreme Court has already essentially rejected diversity rationale for affirmative action). *But see, e.g.*, John Friedl, *Making a Compelling Case for Diversity in College Admissions*, 61 U. PITT. L. REV. 1 (1999) (arguing that pursuit of diversity by colleges and universities constitutes compelling interest); Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 MICH. J. RACE & L. 361 (1997) (arguing that narrowly-tailored race-conscious admissions programs are constitutional).

[4] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978) (Powell, J.) (plurality opinion) (setting forth diversity rationale for affirmative action in university admissions).

[5] *See* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2332 (2000) (discussing recent federal court decisions which place efforts by public universities to achieve diverse student bodies in jeopardy); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 934 (2001) (warning that race-sensitive affirmative action at private universities may be in jeopardy); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998) (stating that diversity rationale for affirmative action in higher education is in jeopardy).

The federal circuit court split is not only between the Fifth and Ninth Circuits. Two other circuit courts, the Eleventh and the Sixth, have debated whether diversity is a compelling interest for an educational institution. The Court of Appeals for the Eleventh Circuit declined to resolve whether student body diversity ever may be a compelling interest supporting a university's consideration of race in its admissions process. *See* Johnson v. Univ. of Ga., 263 F.3d 1234, 1244-45 (11th Cir. 2001). Instead, it held the University of Georgia's freshman admissions policy unconstitutional because the university had "plainly failed to show that its policy is narrowly tailored" to serve its interest in student body diversity. *Id.* Recently, the Court of Appeals for the Sixth Circuit weighed in on the debate. In a suit against the admissions policy at the University of Michigan Law School, the entire nine-judge panel of the Sixth Circuit held the law school's admissions policy was narrowly tailored to achieve its compelling interest in achieving a diverse student body, and therefore its policy was valid. Grutter v. Bollinger, 299 F.3d 732 (6th Cir. 2002).

[6] *Bakke*, 438 U.S. 265.

[7] *Id.* at 307 (holding state's interest in remedying effects of past discrimination is compelling). *Id.* at 311-12 (holding state's interest in attaining diverse student body is compelling). In 1995, the University of California (UC) Board of Regents banned the use of affirmative action in the UC system. University of California Regents Resolution SP-1 (July 20, 1995). They rescinded the decision in 2001. However, UC still cannot use race as a

brokered a compromise between two four-justice voting blocs: he prohibited racial quotas, but allowed race to be taken into account as one factor in university admissions.[8] The Court's fractured decision left lower courts struggling to figure out just what the Court decided.[9]

The most contentious issue among lower courts attempting to interpret *Bakke* is whether Justice Powell's plurality opinion is binding precedent.[10] Justice Powell concluded that the pursuit of a diverse student body is a compelling interest in the context of a university admissions program.[11] No other Justice joined the part of Justice Powell's opinion that explicitly discussed the diversity rationale.[12] Thus, the Fifth Circuit has rejected Justice Powell's opinion as binding precedent on the issue of diversity.[13] However, even though no Justice explicitly concurred with Justice Powell's reasoning on the diversity issue, the other opinions in *Bakke* can be read to support the diversity rationale.[14] Thus, the Ninth Circuit has held that Justice Powell's opinion

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factor in admissions because of California's Proposition 209. *See infra* note 142 (explaining Proposition 209).

[8] *Bakke*, 438 U.S. at 271-72.

[9] *Compare* Hopwood v. Texas, 78 F.3d 932, 942 (5th Cir. 1996) (explaining debate over Justice Powell's opinion in *Bakke*), *with* Smith v. Univ. of Wash., 233 F.3d 1188, 1198 (9th Cir. 2000) (describing its task to be deciding just what *Bakke* court decided). *See also* Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738, 747 (2d Cir. 2000) (noting that there is much disagreement among circuit courts as to state of law under current Supreme Court affirmative action jurisprudence). Long before *Hopwood*, the Fifth Circuit voiced its frustration with the Court's fractured *Bakke* decision: "We frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over one hundred and fifty pages of United States Reports, the Justices have told us mainly that they have agreed to disagree." United States v. City of Miami, 614 F.2d 1322, 1377 (5th Cir. 1980).

[10] *Compare Hopwood*, 78 F.3d at 944, *with Smith*, 233 F.3d at 1201. The Fourth Circuit Court of Appeals also weighed in on the debate. In *Tuttle v. Arlington County School Board*, the court "assume[d], without so holding" that diversity may be a compelling governmental interest. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705(4th Cir. 1999).

[11] *Bakke*, 438 U.S. at 311-12.

[12] See *id.* (addressing university's pursuit of diverse student body). Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens joined in the part of the opinion that held the university's special admissions program unlawful. *Id.* at 271. Justices Brennan, White, Marshall, and Blackmun joined in the part of the opinion that reversed the lower court's judgment enjoining the university from considering race in its admissions process. *Id.* at 272. No other Justice joined Part IV (D) of Justice Powell's opinion in which he held diversity is a compelling governmental interest for an educational institution. *Id.* at 311-12.

[13] *Hopwood*, 78 F.3d at 944.

[14] *See Bakke*, 438 U.S. at 324-29 (Brennan, J., concurring in judgment in part and dissenting in part). *See also Smith*, 233 F.3d at 1200 (concluding that Justice Brennan would embrace Justice Powell's diversity principle); Grutter v. Bollinger, 288 F.3d 732, 739 (6th Cir. 2002) (calling dissent's assertion that Brennan concurrence did not endorse Justice Powell's diversity rationale illogical).

is controlling legal authority.[15] The Supreme Court declined review in both cases.[16] Since *Bakke*, the Court has not reviewed the viability of the diversity rationale in the context of education.[17]

This Comment argues that an educational institution's interest in diversity is a compelling governmental interest that satisfies equal protection. Affirmative action university admissions programs, which are narrowly tailored to that compelling interest, are constitutional.[18]

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[15] *Smith*, 233 F.3d at 1201. *Accord Grutter*, 288 F.3d 732 (affirming precedential value of Justice Powell's opinion in *Bakke*); Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) (assuming, without deciding, that *Bakke* remains good law). *Compare* Martin D. Carcieri, *The Wages of Taking* Bakke *Seriously: The Untenable Denial of the Primacy of the Individual*, 67 TENN. L. REV. 949, 950 (2000) (describing Justice Powell's controlling opinion as good law), *with* Alan J. Meese, *Reinventing* Bakke, 1 GREEN BAG 2d 381, 382 (1998) (arguing that Justice Powell's opinion is dicta, not controlling Supreme Court precedent).

[16] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996); Smith v. Univ. of Wash., 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001). In November 2001, the University of Texas decided not to pursue any further appeals of *Hopwood*. The school could have appealed the decision to the Fifth Circuit Court of Appeals ordering it to pay legal fees. Connie Mabin, *School Drops Effort To Use Affirmative Action in Admissions: Texas University Will Not Appeal*, BOSTON GLOBE, November 28, 2001, at A9.

Although the Supreme Court declined review in *Hopwood* and *Smith*, the Court initially granted certiorari in *Adarand Constructors v. Mineta*. Adarand Constructors v. Mineta, 121 S. Ct. 1401 (2001), *cert. granted*. *Adarand* was a challenge to a federal program used to award highway construction jobs to women and minorities. The Court changed its decision to rule on the case because it decided that it was "improvidently granted." The petitioner claimed to be challenging a different aspect of the program from the one the lower courts had examined. Adarand Constructors v. Mineta, 122 S. Ct. 511 (2001), *cert. dismissed*.

[17] *See Smith*, 233 F.3d at 1200 (explaining that since *Bakke*, Supreme Court has not returned to area of university admissions); Liu, *supra* note 5, at 391 (stating that since *Bakke*, Supreme Court has not reviewed directly precedential value of Justice Powell's opinion). The Fifth and Ninth Circuit split creates conflicting standards for those in charge of universities' admissions programs. *Compare Hopwood*, 78 F.3d at 944 (holding diversity is not compelling interest under Fourteenth Amendment), *with Smith*, 233 F.3d at 1201 (holding diversity is compelling interest under Fourteenth Amendment). The Fifth Circuit decision prohibits public universities in Texas, Louisiana, and Mississippi from considering race in their admissions decisions. However, the Ninth Circuit decision tells public universities within its jurisdiction that so long as a race-based admissions program is narrowly tailored to achieve a diverse student body, it may pass constitutional muster. *See e.g.*, Shelby Samuelsen & Demaree Michelau, *Whatever Happened to Affirmative Action?* STATE LEGISLATURES MAGAZINE, Mar. 2001 (discussing California and Washington statewide ballot initiatives that have effectively removed affirmative action policies from higher education). Regardless of where, physically, the educational institution stands, it must understand the status of the law and draft race-conscious diversity programs that fit within it. Lorenzo, *supra* note 3, at 384-85.

[18] Under the Supreme Court's current equal protection jurisprudence, all race-based classifications are subject to strict scrutiny. Korematsu v. United States, 323 U.S. 214 (1944). To be constitutional, a racial classification must be narrowly tailored to a compelling governmental interest. For a more detailed explanation of strict scrutiny analysis, see *infra*

Part I summarizes the history of affirmative action in university admissions, focusing on the Supreme Court's fractured *Bakke* decision. Part II explains the state of the law in the Fifth and Ninth Circuits, highlighting the conflict between the courts' treatment of *Bakke*. Part III contrasts the Fifth Circuit's flawed reasoning with the Ninth Circuit's sound rationale. Part IV introduces empirical support for university admissions policies that pursue diversity and asserts that diversity is a compelling interest for an educational institution. This Comment concludes by arguing that interpretive disagreement over *Bakke*, among lower courts, heightens pressure on the Supreme Court to review affirmative action in university admissions.

I. BACKGROUND

Proponents of affirmative action in university admissions offer two rationales for race-based preferences: to remedy past wrongs (the remedial rationale) and to achieve a diverse student body (the diversity rationale).[19] Opponents argue that both justifications for race-based preferences violate the constitutional guarantee of equal protection.[20] The Supreme Court addressed the constitutional argument in *Bakke*, but the Court did not resolve the debate.[21]

A. The History of Affirmative Action

Affirmative action evolved from a retrospective compensatory tool to a prospective aim for a positive social good.[22] Race-based preferences in education originally sought to remedy years of separate and unequal treatment.[23] Granting racial preferences to minorities became a

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notes 38-40 and accompanying text.

[19] *See infra* notes 26-27 (explaining remedial and diversity rationales).

[20] *See infra* note 35 (explaining opponents' argument that race-based preferences violate constitutional guarantee of equal protection).

[21] *See Smith*, 233 F.3d at 1198 (declaring its task to be deciding just what the Supreme Court decided in *Bakke*); Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) (choosing not to "definitively resolve this conundrum").

[22] *See* Hopwood v. Texas, 861 F. Supp. 551, 553-57 (W.D. Tex. 1994) (tracing history of affirmative action in Texas' system of higher education); Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CAL. L. REV. 1299, 1344-45 (1999) (explaining evolution of affirmative action from procedure to substance); Lawrence III, *supra* note 5, at 960 (defending diversity on moral and ethical grounds because it produces positive good).

[23] The Supreme Court's landmark decision in *Brown v. Board of Education* declared de jure segregation in public schools a violation of the Fourteenth Amendment's equal protection guarantee. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). Through the Civil

widespread practice in 1965 when President Lyndon Johnson issued Executive Order 11,246.[24] Executive Order 11,246 requires all public and private institutions contracting with the federal government to take affirmative action to seek out and employ qualified and underrepresented minorities.[25]

The original justification for affirmative action was remedial.[26] Eventually, proponents of affirmative action in university admissions offered a second rationale for race-conscious decision making: promoting diversity among the student body.[27] The diversity rationale intensified an already contentious debate. Proponents of diversity-based affirmative action policies argue that the educational, moral, and social benefits of diversity in the academic context are compelling.[28] Therefore, narrowly tailored affirmative action policies seeking diversity are constitutional.[29] Opponents contend that diversity is not a compelling interest.[30] They argue that policies which pursue diversity in higher education violate Title VI of the Civil Rights Act of 1964[31] and the Equal

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Rights Acts of 1964, *Brown* became enforceable. 42 U.S.C. §§ 2000a-2000h (2001).

[24] Friedl, *supra* note 3, at 10.

[25] Exec. Order No. 11,246, 3 C.F.R. § 339 (1965). *See* Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 618-620 (1998) (explaining how educational institutions came under Executive Order 11,246).

[26] The remedial rationale is premised on society's long history of discriminating against minorities. Given that history, it is not realistic to assume that the removal of barriers can suddenly make minority individuals equal and able to avail themselves of all opportunities. *Hopwood*, 861 F. Supp. at 554. As President Johnson expressed, "You do not take a person, who for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, 'You are free to compete with all the others.'" President Lyndon B. Johnson, Address at Howard University Commencement Ceremony (June 4, 1965). *See also* Erin E. Byrnes, Symposium, *Therapeutic Jurisprudence: Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535, 544-45 (1999) (describing original goal of affirmative action as remedial); Andy Portinga, *Racial Diversity as a Compelling Governmental Interest*, 75 U. DET. MERCY L. REV. 73, 75-76 (1997) (discussing remedial rationale).

[27] Lorenzo, *supra* note 3, at 368-69; Portinga, *supra* note 26, at 76. *See* Friedl, *supra* note 3, at 15 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) as Supreme Court's first mention of diversity as legitimate goal for educational institutions); Killenbeck, *supra* note 22, at 1344 (characterizing transformation of affirmative action from procedural mandate to substantive goal).

[28] Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1357-58 (1996) [hereinafter *Evidentiary Framework*].

[29] *Id.*

[30] *Id.* at 1358.

[31] 42 U.S.C. § 2000(d) (2001). Title VI of the Civil Rights Act of 1964 provides in pertinent part that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected

Protection Clause of the Fourteenth Amendment.[32] Whereas proponents of race-based preferences believe that affirmative action promotes racial equality,[33] opponents blame affirmative action for stigmatizing its intended beneficiaries and violating the constitutional guarantee of equal protection.[34]

B. The Equal Protection Clause

One of the most common arguments against affirmative action is that race-based preferences violate the constitutional guarantee of equal protection.[35] The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall... deny to any person within its jurisdiction the equal protection of the laws."[36] The Supreme Court has explicitly clarified that racial and ethnic distinctions call for "the most exacting judicial examination."[37] In modern equal protection terms, this means that racial and ethnic distinctions must be analyzed under strict scrutiny.[38] Under strict scrutiny, a racial classification must be held

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to discrimination under any program or activity receiving Federal financial assistance." *Id.*

[32] U.S. CONST. amend. XIV. *See Evidentiary Framework, supra* note 28, at 1357-58 (summarizing opponents' argument against affirmative action).

[33] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1977) (arguing that affirmative action policies which give preferences to minorities make society less race conscious).

[34] *See* Delgado, *supra* note 2, at 139 (explaining stigma argument: we should reject affirmative action, even though most people of color support it, because it would only injure them); Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1608 (2000) (book review) (blaming affirmative action for reinforcing notion that blacks are not academically talented) [hereinafter *Reflections*]. *See also* Adarand Constructors Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas J., concurring in part and concurring in judgment) (blaming affirmative action programs for stamping minorities with "a badge of inferiority"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (recognizing that racial classifications may promote notions of racial inferiority); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (criticizing racial preferences for reinforcing notions of racial inferiority). *See generally* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991) (faulting affirmative action for stigmatizing its intended beneficiaries).

[35] *See* Harvey Gee, *Race, American Values, and Colorblind Justice*, 5 TEX. F. ON C.L & C.R. 121, 129 (2000) (book review) (stating that affirmative action supporters tend to emphasize equality of result while opponents favor equality of opportunity); Russell L. Jones, *Affirmative Action: Should We Or Shouldn't We?*, 23 S.U. L. REV. 133, 135-37 (1996) (explaining connection between Fourteenth Amendment's equal protection clause and affirmative action).

[36] U.S. CONST., amend. XIV, § 1.

[37] *Bakke*, 438 U.S. at 291. *Accord Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 493.

[38] The Supreme Court has formulated three tiers of scrutiny for equal protection analysis: rational basis scrutiny, intermediate scrutiny, and strict scrutiny. Suspect classifications, such as race, are subject to strict scrutiny. *Adarand*, 515 U.S. at 227. *See*

unlawful unless (1) the racial classification serves a compelling governmental interest, and (2) it is narrowly tailored to further that interest.[39] Thus, strict scrutiny analysis is composed of two inquiries: the "compelling interest" inquiry and the "narrowly tailored" inquiry. To be constitutional, a racial classification must satisfy both parts.[40] Race-conscious university admissions programs are examples of racial classifications that require the strict scrutiny standard of review.[41]

The Supreme Court initially examined the issue of racial preferences in higher education in 1974. In *DeFunis v. Odegaard*,[42] DeFunis, a white applicant, sued the University of Washington Law School, alleging that the university's minority admissions program discriminated against him because of his race.[43] The Court never reached the merits of the case because, by the time it reached the Supreme Court, DeFunis was in his third year at another law school.[44]

Four years after *DeFunis*, Allan Bakke presented the Supreme Court with another opportunity to consider the constitutionality of race-conscious admissions programs.[45] This time the Court reached the merits.[46] After considering *Regents of the University of California v. Bakke* for nearly one and a half years, the Court issued six different opinions.[47] The Court's fractured decision invited the current split between the Fifth and Ninth Circuits.[48]

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generally Killenbeck, *supra* note 22, at 1349 (explaining "judicial balancing act" of assessing relative importance of interest at issue and precision with which institution pursues that objective).

[39] *Adarand*, 515 U.S. at 227.

[40] *Id.*; Lorenzo, *supra* note 3, at 385.

[41] *See Bakke*, 438 U.S. at 290-91.

[42] DeFunis v. Odegaard, 416 U.S. 312 (1974).

[43] *Id.*

[44] *Id.* at 319-20. The Court held that the case was moot because DeFunis was only months away from graduation. *Id. But see* DeFunis v. Odegaard, 507 P.2d 1169 (Wash. 1973) (finding University of Washington's goal of diversity consistent with Fourteenth Amendment). For a discussion of Justice Douglas's dissent from the dismissal of the case as moot, see Barbara Phillips Sullivan, *The Gift of* Hopwood*: Diversity and the Fife and Drum March Back to the Nineteenth Century*, 34 GA. L. REV. 291, 298-301 (1999).

[45] *Bakke*, 438 U.S. 265.

[46] *Id.* at 271-72.

[47] *See id.* (explaining separate opinions); Michael Selmi, *The Life of* Bakke*: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 990-91 (1999) (describing Supreme Court's extensive deliberations in *Bakke*).

[48] Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 LAW & SOC'Y REV. 263, 266 (2000) (stating that *Bakke* invited interpretive disagreements). *Compare* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (holding diversity is not compelling interest under Fourteenth Amendment), *with* Smith v. Univ. of Wash., 233 F.3d 1188, 1201 (9th Cir. 2000) (holding diversity is compelling interest under

C. Bakke's *Fractured Decision*

At issue in *Bakke* was the permissibility of a medical school admissions program that reserved sixteen seats in each entering class of 100 for disadvantaged, minority students.[49] Allan Bakke, a white male, was rejected twice for admission to the Medical School at the University of California at Davis (UC Davis).[50] Bakke challenged the university's special admissions program. He claimed the program violated his rights under the Equal Protection Clause of the Fourteenth Amendment by excluding him on the basis of his race.[51] The Superior Court of California sustained Bakke's challenge.[52] The Supreme Court of California affirmed the lower court's judgment, declaring the admissions program unconstitutional and prohibiting the university from considering race in making admissions decisions.[53] The United States Supreme Court affirmed the part of the judgment declaring the special admissions program unconstitutional,[54] but reversed the part that prohibited race from being used as a factor in university admissions.[55]

Six Supreme Court Justices filed opinions in *Bakke*, none of which garnered more than four votes.[56] Justice Powell authored the Court's plurality opinion and provided the swing vote on all issues.[57] Four Justices, led by Justice Brennan, supported the university's quota system as a legitimate response to societal discrimination.[58] Four other Justices, led by Justice Stevens, struck down the quotas on the grounds that federally supported institutions must be colorblind.[59] Justice Powell split the difference: he prohibited racial quotas, but allowed race to be taken into account as one factor in university admissions.[60]

Fourteenth Amendment).

[49] *Bakke*, 438 U.S. at 278-79.

[50] *Id.* at 276-77.

[51] *Id.* at 277-78. For a detailed explanation of the university's special admissions program, *see id.* at 273-278.

[52] *Id.* at 270.

[53] *Id.* at 270-71. The California Supreme Court transferred the cause directly to itself, prior to an opinion by the California Court of Appeal, "because of the importance of the issues involved." Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152, 1156 (Cal. 1976).

[54] *Bakke*, 438 U.S. at 271.

[55] *Id.* at 272.

[56] *See id.* at 271-72 (explaining separate opinions).

[57] *Id.* at 269-72.

[58] *Id.* at 270-71.

[59] *Id.* at 417-18.

[60] *Id.* at 271-72. *See* Bybee, *supra* note 48, at 266 (describing Justice Powell's compromise).

The precedential value of Justice Powell's opinion in *Bakke* is the crux of the current circuit court split. Justice Powell determined that all race-based state policies must pass strict scrutiny to be constitutional.[61] Under the first prong of strict scrutiny review, a university must present a compelling governmental interest for its use of a race-based admissions program.[62] The UC Davis medical school asserted four interests for maintaining the special admissions program, one of which was to attain a diverse student body.[63] Justice Powell held the university's use of race to attain a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education."[64]

Next, Justice Powell considered the second prong of strict scrutiny analysis: was the Davis program narrowly tailored to promote diversity.[65] Justice Powell carefully defined the contours of the diversity rationale. He distinguished an interest in "simple ethnic diversity" from "genuine diversity."[66] A strict quota or rigid set-aside does not pass constitutional muster.[67] To be constitutional, race or ethnicity may be only a "plus" factor in the admissions calculus.[68]

Justice Powell found that because the UC Davis admissions program focused solely on ethnic diversity, it "would hinder rather than further the attainment of genuine diversity."[69] Accordingly, Justice Powell concluded that the Davis admissions program was not narrowly tailored to achieve a compelling governmental interest.[70] In striking down the university's two-track system,[71] Justice Powell joined the Stevens Group (comprised of Justice Stevens, Chief Justice Burger, and Justices Stewart

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[61] *Id.* at 290-91.

[62] *Id.* at 306.

[63] *Id.* at 305-06. The special admissions program purported to serve the purposes of: (i) reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in underserved communities; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. *Id.*

[64] *Id.* at 311-12.

[65] *Id.* at 314-15.

[66] *Id.* at 315. In Justice Powell's view, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.*

[67] *See id.* (rejecting argument that quota system is only effective means of serving interest of diversity).

[68] *Id.* at 317.

[69] *Id.* at 315.

[70] *See id.* at 320 (citing disregard of individual rights as guaranteed by Fourteenth Amendment to be fatal flaw in UC Davis admissions program).

[71] *Id.* at 271.

and Rehnquist).[72]

The Brennan Group (comprised of Justices Brennan, White, Marshall, and Blackmun)[73] would have upheld the admissions program.[74] Applying intermediate scrutiny,[75] the Brennan Group found that the medical school's purpose of remedying the effects of past societal discrimination was "sufficiently important" to support the use of its special admissions program.[76] Justice Brennan acknowledged that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is subject to strict scrutiny.[77] However, Justice Brennan believed that no fundamental right was involved in the case[78] and that Caucasians, as a class, do not have any of the "traditional indicia of suspectness."[79] Thus, he argued that the Court's review under the Fourteenth Amendment should be strict, but not "strict in theory and fatal in fact."[80] In other words, if almost no interest is sufficiently "compelling" to justify imposing further disadvantage on a suspect class, then even benign racial classifications are constitutionally offensive.[81]

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[72] *Id.* at 408.

[73] *Id.* at 324.

[74] *Id.* at 357.

[75] *Id.* at 356-62. An intermediate level of scrutiny calls for the substantial relation test, which requires that the government show "important governmental objectives" for making a race-based classification and that the means chosen by the government to implement this important objective be substantially related to the objective. *See generally* Craig v. Boren, 429 U.S. 190 (1976) (explaining review under intermediate level of scrutiny: state must show that classification was "substantially related" to "important governmental interest").

[76] *Bakke*, 438 U.S. at 368-69. In *Wygant v. Board of Education of Jackson*, the Supreme Court limited the remedial rationale. The Court rejected the argument that the government has a compelling interest in remedying the effects of societal discrimination. Wygant v. Bd. of Educ. of Jackson, 476 U.S. 267, 276 (1986). At issue in *Wygant* was a school board's policy of retaining minority teachers over nonminority teachers in layoff decisions. In his dissent, Justice Stevens emphasized the benefits of diversity: "In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white faculty." *Id.* at 315.

[77] *Bakke*, 438 U.S. at 357.

[78] *Id.*

[79] *Id.* (Brennan, J., concurring in judgment in part and dissenting in part) (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938)). When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. *Id.* at 305 (citing McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641-42 (1950)).

[80] *Bakke*, 438 U.S. at 361-62.

[81] Ronald Dworkin, *Is Affirmative Action Doomed?*, N.Y. REV. OF BOOKS, Nov. 5, 1998, at 57.

II. CIRCUIT COURT SPLIT: *HOPWOOD* AND *SMITH*

The Courts of Appeals for the Fifth and Ninth Circuits disagree about *Bakke's* diversity rationale. The Fifth Circuit, in *Hopwood v. Texas,* expressly rejected Justice Powell's opinion in *Bakke* as binding Supreme Court precedent.[82] The Ninth Circuit, in *Smith v. University of Washington,* held Justice Powell's opinion to be good law.[83] Other circuits have weighed in on the debate.[84] This Comment focuses on the Fifth and Ninth Circuits because the two courts explicitly disagree with each other. The split between the Fifth and Ninth Circuits centers on the courts' conflicting interpretations of *Bakke* and their inconsistent applications of *Marks v. United States,* which is the Supreme Court's guideline for reading its fractured opinions.[85]

A. Hopwood v. Texas

In *Hopwood v. Texas,* the Fifth Circuit Court of Appeals declined to follow Justice Powell's diversity rationale.[86] The *Hopwood* court determined that racial classifications are justified only to remedy the effects of past discrimination.[87] Consequently, using race to achieve a diverse student body is not a compelling state interest within the Fifth Circuit.[88]

At issue in *Hopwood* were the University of Texas School of Law's 1992 admissions procedures.[89] The University had instituted a race-conscious admissions program to remedy the effects of past discrimination and to achieve a diverse student body.[90] The law school maintained two separate admissions committees: one for blacks and Mexican Americans, and another one for whites and non-preferred minorities.[91] For the class

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[82] Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996).

[83] Smith v. Univ. of Wash., 233 F.3d 1188, 1201 (9th Cir. 2000).

[84] *See* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002); Johnson v. Bd. of Regents, 263 F.3d 1234 (11th Cir. 2001).

[85] Marks v. United States, 430 U.S. 188 (1977). In *Marks,* the Court ruled that the plurality opinion in *Memoirs v. Massachusetts* constituted the holding of the Court and provided the governing standards for governmental action aimed at suppressing obscenity. *Id.* at 194. See *infra* note 161 for a discussion of the Court's rationale.

[86] *Hopwood,* 78 F.3d at 944.

[87] *Id.* (holding that any consideration of race or ethnicity by law school for purpose of achieving diverse student body is not compelling interest under Fourteenth Amendment).

[88] *Id.* at 948.

[89] *Id.* at 934-38.

[90] *Id.* at 934.

[91] *Id.* at 936.

entering in 1992, the law school admissions committee placed the typical applicant in one of three categories according to the applicant's Texas Index (TI) Score.[92] The TI ranges that the law school used to place blacks and Mexican Americans in the three categories were lower than those for whites and non-preferred minorities.[93] Four white residents of Texas who applied for admission and were rejected in 1992 sued the law school.[94] They claimed that the two-track admissions program violated their rights under the Equal Protection Clause of the Fourteenth Amendment.[95]

1. The District Court Decision

Applying strict scrutiny, the district court first considered whether the law school's justifications for its race-conscious admissions system served a compelling governmental interest.[96] Second, the district court considered whether the law school's admissions system was narrowly tailored to the achievement of that interest.[97] The law school offered several justifications for its race-conscious admissions system, two of which the district court found sufficient.[98] First, the district court held that the law school could use race in admissions decisions to remedy the effects of past discrimination.[99] Second, the district court held that the law school could use racial preferences to maintain a racially diverse student body.[100]

Although the district court upheld the part of the admissions process that gave minorities a "plus," it struck down as unconstitutional the school's use of separate admissions committees.[101] The court found that the law school's affirmative action plan was not narrowly tailored to

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[92] *Id.* at 935. The Texas Index (TI) number is a composite of undergraduate grade point average and Law School Aptitude Test score. *Id.*

[93] *Id.* at 936. The *Hopwood* court found that the disparate standards greatly affected a candidate's chance of admission. *Id.* at 937.

[94] *Id.* at 938.

[95] *Id.*

[96] *See* Hopwood v. Texas, 861 F. Supp. 551, 571 (W.D. Tex. 1994).

[97] *Id.* at 573.

[98] *Id.* at 571-73.

[99] *Id.* at 569-79.

[100] *Id.* at 570-71. ("Absent an explicit statement from the Supreme Court overruling *Bakke*, this Court finds, in the context of the law school's admissions process, obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications.").

[101] *Id.* at 578-79. *See supra* notes 91-92 and accompanying text (describing law school's separate admissions program).

achieve true diversity or to remedy past discrimination.[102] Therefore, it held that the plan violated plaintiffs' equal protection rights.[103]

The plaintiffs received very little in the way of relief.[104] The district court ordered that the law school allow the plaintiffs to reapply at no cost.[105] However, the court refused to enjoin the law school from using race in admissions decisions[106] and refused to require that the plaintiffs be admitted to the law school.[107]

2. The Fifth Circuit Decision

The Fifth Circuit Court of Appeals reversed the district court's judgment and remanded the case for further proceedings on the issue of damages.[108] Flatly rejecting Justice Powell's diversity rationale in *Bakke*, the Fifth Circuit held diversity is never a compelling governmental interest.[109]

The Fifth Circuit agreed with the district court's standard of review, but disagreed with its conclusion.[110] Like the district court, the Fifth Circuit reviewed the law school's admissions program under strict scrutiny.[111] Accordingly, it considered whether the law school's articulated interests in remedying the effects of past discrimination and maintaining a diverse student body were compelling governmental interests.[112] Unlike the district court, the Fifth Circuit rejected both the remedial and diversity justifications.[113] First, the Fifth Circuit concluded that the law school failed to establish the existence of present effects of past discrimination.[114] Next, the Fifth Circuit determined that there had been no indication from the Supreme Court, other than Justice Powell's

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[102] *Hopwood*, 861 F. Supp. at 579.

[103] *Id.*

[104] *See* Hopwood v. Texas, 78 F.3d 932, 938 (5th Cir. 1996) (calling plaintiffs' victory "phyrrhic at best").

[105] *Hopwood*, 861 F. Supp. at 583.

[106] *Id.* at 582.

[107] *Id.* at 582 n.87.

[108] *Hopwood*, 78 F.3d at 962.

[109] *Id.* at 948. *See* John C. Duncan, Jr., *The American 'Legal' Dilemma: Colorblind I/Colorblind II – The Rules Have Changed Again: A Semantic Apothegmatic Permutation*, 7 VA. J. SOC. POL'Y & L. 315, 427 (2000) (describing *Hopwood's* rejection of diversity as rejection of Justice Powell's opinion in *Bakke*).

[110] *Hopwood*, 78 F.3d at 938.

[111] *Id.* at 940 (affirming strict scrutiny standard of review for all racial classifications).

[112] *Id.*

[113] *Id.* at 962.

[114] *Id.* at 955.

"lonely" opinion in *Bakke*, that diversity constitutes a compelling justification for governmental race-based discrimination.[115]

The Fifth Circuit refused to address the narrowly tailored prong of strict scrutiny analysis because it found that the law school failed to show the requisite compelling state interest.[116] Instead, the court prohibited the University of Texas School of Law from using race as a factor in deciding which applicants to admit.[117] The court supported its holding on three different grounds. First, the court found that Justice Powell's rationale in *Bakke* is not binding precedent on the diversity issue.[118] Specifically, the court pointed out that the word "diversity" is mentioned nowhere except in Justice Powell's "single-Justice opinion."[119] Second, the court found that no case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis.[120] Moreover, the court suggested that recent Supreme Court precedent indicated that the diversity interest would not satisfy strict scrutiny.[121] Third, the court objected to using race as a means of achieving a diverse student body on policy grounds.[122]

In a concurring opinion, Judge Weiner disagreed with the court's conclusion that diversity could never be a compelling state interest.[123] Judge Weiner would have found the program unconstitutional on the ground that it was not narrowly tailored to achieve diversity.[124] The

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[115] *Id.* at 945.

[116] *Id.* at 955.

[117] *Id.* at 934 ("The law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body.").

[118] *Id.* at 944.

[119] *Id.*

[120] *Id.*

[121] *Id.* The *Hopwood* court relied primarily on three Supreme Court cases: *City of Richmond v. J.A. Croson Co.* (invalidating a city set-aside program that favored minority-owned contractors on city projects), *Metro Broadcasting, Inc. v. FCC* (upholding a race-sensitive policy of FCC as substantially related to important governmental interest in promoting broadcast diversity), and *Adarand Constructors, Inc. v. Pena* (striking down federal program that set aside contracts for minority-owned construction companies). For a more complete analysis of the court's discussion of these cases, see *infra* notes 208-35 and accompanying text.

[122] The *Hopwood* court argued that the use of race in university admissions perpetuates stereotypes and serves to stigmatize. *Id.*at 945-48.

[123] *Hopwood*, 78 F.3d. at 962.

[124] *Id.* at 963. *See* Duncan, Jr., *supra* note 109, at 426 (arguing that *Hopwood* departed from Supreme Court precedent established in *Bakke*); Friedl, *supra* note 3, at 21 (explaining Fifth Circuit's judicial activism in rejecting widely held view that Justice Powell's opinion represented binding Supreme Court precedent); Killenbeck, *supra* note 22, at 1363

admissions program at the University of Texas Law School may have been unconstitutional under the analysis of *Bakke* irrespective of the diversity issue.[125] Therefore, as Judge Weiner argued, the case should have been decided on the narrowly tailored inquiry, not the "thornier issue" of compelling interest.[126]

3. *Hopwood III*

Five years after he concurred in the Fifth Circuit's 1996 *Hopwood* decision, Judge Weiner revisited the diversity issue as co-author of the third appeal of *Hopwood* (*Hopwood III*).[127] The *Hopwood III* panel upheld the Fifth Circuit's rejection of the diversity rationale in *Hopwood*[128] and emphatically criticized the Ninth Circuit's decision in *Smith v. University of Washington*.[129]

The Fifth Circuit's characterization of Justice Powell's opinion as a "single-Justice opinion" in *Hopwood* guided its analysis in *Hopwood III*. Judges Weiner and Stewart acknowledged that Justice Powell would have disagreed with the district court's holding that diversity is not a compelling interest.[130] However, the judges decided that the district court's holding did not directly conflict with controlling Supreme Court precedent.[131]

(questioning validity of *Hopwood* panel's conclusion that Justice Powell's opinion was not controlling precedent because it rests on activist view of what Supreme Court might hold on issue of diversity in higher education). *But see* Michael E. Rosman, *Counterpoint: The Error of* Hopwood's *Error*, 29 J.L. & EDUC. 355, 356 (2000) (suggesting that critics of *Hopwood's* judicial activism should be more concerned with Justice Powell's judicial activism in *Bakke*).

[125] *See* Rosman, *supra* note 124, at 363 (calling *Hopwood* decision "unnecessary" because court could have declared system unconstitutional within confines of Justice Powell's opinion in *Bakke*).

[126] *Hopwood*, 78 F.3d at 936-64. *Compare* Philip T.K. Daniel & Kyle Edward Timken, *The Rumors of My Death Have Been Exaggerated:* Hopwood's *Error in "Discarding"* Bakke, 28 J.L. & EDUC. 391, 409 (1999) (arguing that *Hopwood* court overstepped its authority when it discredited role of affirmative action in society), *with* Rosman, *supra* note 124, at 363-64 (arguing that because of procedural posture of *Hopwood*, Fifth Circuit did not have to declare admissions system unconstitutional at all).

[127] Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000).

[128] *Id.* at 274.

[129] *Id.* at 275 n.66.

[130] *Id.* at 275.

[131] *Id.*

B. Smith v. University of Washington

After the *Hopwood* decision, scholars warned that *Bakke* "[hung] by a thread."[132] However, in *Smith v. University of Washington*, the Court of Appeals for the Ninth Circuit strengthened *Bakke's* hold.[133] *Smith* held that Justice Powell's opinion in *Bakke* is binding precedent.[134] Thus, the Ninth Circuit explicitly disagreed with the Fifth Circuit's interpretation of *Bakke* in *Hopwood*.[135]

In *Smith*, a class of Caucasians who were denied admission to the University of Washington Law School brought an action against the Law School.[136] The class alleged that the denials of admission were due to racially discriminatory admissions policies.[137] They claimed that these policies violated their rights under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[138] Additionally, the class sought partial summary judgment on the claim that, in general, race cannot be used as a factor in achieving educational diversity.[139]

1. The District Court Decision

The district court certified the class under Rule 23(b)(2) for injunctive and declaratory relief only.[140] The Law School moved to dismiss the class

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[132] Akhil Reed Amar & Neal Kumar Katyal, *Symposium on Affirmative Action:* Bakke's *Fate*, 43 UCLA L. REV. 1745 (1996). *See also* Daniel & Timken, *supra* note 126, at 392-93 (describing *Hopwood* as tide-turning decision against affirmative action); Liu, *supra* note 5, at 381 (stating that *Hopwood* disturbed settled expectations about constitutionality of diversity-based affirmative action in university admissions).

[133] Smith v. Univ. of Wash., 233 F.3d 1188, 1201 (9th Cir. 2000).

[134] *Id.*

[135] *Id.* at 1201 n.9.

[136] *Id.* at 1191.

[137] *Id.*

[138] 42 U.S.C. §§ 1981, 1983, & 2000d (2001); Smith v. Univ. of Wash., 2 F. Supp. 2d 1324, 1328 (W.D. Wash. 1998).

[139] *Smith*, 2 F. Supp. 2d at 1328. Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. FED. R. CIV. P. 56. A partial summary judgment applies only to part of the claim; it is not a method for disposing of the entire action. *See id.*

[140] *Smith*, 2 F. Supp. 2d at 1328. Federal Rule of Civil Procedure 23(b)(2) provides that a class action is maintainable if the prerequisites of rule 23(a) are satisfied, and the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. FED. R. CIV. P. 23(b)(2). In *Smith*, the district court certified a class comprised of all Caucasian applicants who were denied admission to the law school commencing in 1994. Smith v. Univ. of Wash., 233 F.3d 1188, 1192 n.4 (9th Cir. 2000).

action on the basis that the claims were moot as the result of the passage of Washington's Initiative Measure 200 (I-200).[141] Approved by a majority of Washington voters in 1998, I-200 bans race-based affirmative action in higher education statewide.[142] The district court granted the university's motion to dismiss the class claims as moot due to the passage of I-200.[143] However, the court denied the plaintiffs' motion for partial summary judgment.[144] The district court decided, under Supreme Court precedent, race could be used as a factor in educational admissions decisions, even where it was not done for remedial purposes.[145]

2. The Ninth Circuit Decision

The Ninth Circuit affirmed the district court's decision, finding that it "faithfully followed" Justice Powell's opinion in *Bakke*.[146] Four principles of Justice Powell's opinion framed the Ninth Circuit's review of the university's admissions program.[147] First, strict scrutiny will be applied to classifications based on race and ethnic background.[148] Second, a university's efforts to assure within its student body some specified percentage of a particular group, merely because of its race or ethnic

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[141] *Smith*, 2 F. Supp. 2d at 1331.

[142] WASH. REV. CODE § 49.60.400(1) (2001); *Smith*, 233 F.3d at 1192. Initiative 200 followed in the footsteps of California's Proposition 209, which effectively abolished all affirmative action programs relating to public education, employment, and public contracting in California. *See* CAL. CONST., art. I § 31 (1997). Proposition 209 was challenged in court but with no success. *See* Coalition for Economic Equity v. Wilson, 122 F.3d 692, 710 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

From at least 1994 to the end of 1998, the University of Washington School of Law used race as a criterion in its admissions process so that it could assure the enrollment of a diverse student body. *Smith*, 233 F.3d at 1191. Pursuant to a directive from the president of the University of Washington after the passage of I-200, the Law School eliminated the use of race as a criterion in its admissions process. *Id.* at 1192. The new admissions policy did retain a diversity clause, which set out a list of factors as indicative of diversity, including "social hardships . . .; career goals . . .; employment history . . .; educational background . . .; special talents . . .; geographic diversity." *Id.* The list did not include race, color, or national origin. *Id.*

[143] *Smith*, 2 F. Supp. 2d at 1328.

[144] *Id.*

[145] *Id.* at 1334 (citing *Bakke's* holding that attainment of diverse student body is compelling interest and constitutionally permissible goal for university or graduate program). *See* Killenbeck, *supra* note 22, at 1316 (citing case where Supreme Court sustained voluntary affirmative action measure even though entity adopting it had not itself engaged in discriminatory practices).

[146] *Smith*, 233 F.3d at 1196.

[147] *Id.* at 1196-99.

[148] *Id.* at 1197.

background, is facially invalid.[149] In Justice Powell's own words, "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. . .This the Constitution forbids."[150] Third, the State has a compelling interest in remedying the effects of past discrimination.[151] Finally, attaining a diverse student body is a constitutionally permissible goal for an institution of higher education.[152]

The University of Washington Law School did not assert that its program came within the third principle, but that it did come within the fourth one — the diversity rationale.[153] The district court was unable to determine whether the university's plan was narrowly tailored to achieve diversity.[154] However, it did recognize diversity as a compelling governmental interest.[155] By affirming the district court's treatment of *Bakke*, the Ninth Circuit affirmed the diversity rationale and directly contradicted the Fifth Circuit's holding in *Hopwood*. To explain these inconsistent readings of *Bakke*, it is necessary to understand the circuit courts' application of *Marks v. United States*,[156] which serves as a guideline for reading the Supreme Court's fractured decisions.[157]

C. Marks v. United States

In *Marks v. United States*, the Supreme Court considered whether the standards announced in one of its fractured opinions should apply retroactively to a defendant charged with transporting obscene materials.[158] The Court ruled that the plurality opinion in *Memoirs v. Massachusetts*[159] constituted the holding of the Court and provided the governing standards for governmental action aimed at suppressing

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[149] *Id.*

[150] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

[151] *Smith*, 233 F.3d at 1197.

[152] *Id.* (citing *Bakke*, 438 U.S. at 311-12).

[153] *Id.* at 1198.

[154] Smith v. Univ. of Wash., 2 F. Supp. 2d 1324, 1337 (W.D. Wash. 1998) (declining determination of role race played in admissions process because of insufficient factual record).

[155] *Id.* at 1334.

[156] Marks v. United States, 430 U.S. 188 (1977).

[157] *See* Smith v. Univ. of Wash., 233 F.3d 1188, 1199 (9th Cir. 2000) (calling it "sign of our fractious times" that Supreme Court has had to provide template for reading its fractured opinions).

[158] *Marks*, 430 U.S. at 188-89.

[159] Memoirs v. Massachusetts, 383 U.S. 413 (1966) (plurality opinion).

obscenity.[160] *Marks* clarified that when no five Justices assent to a single rationale, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest grounds.[161]

The Fifth Circuit, in *Hopwood III*, and the Ninth Circuit, in *Smith*, disagree about the holding of *Bakke* under *Marks*.[162] The Fifth Circuit reads *Bakke* as not requiring lower courts to accept diversity as a compelling state interest.[163] However, the Ninth Circuit reads Justice Powell's opinion in *Bakke* to represent the narrowest ground upon which race-conscious decision making could rest.[164]

III. THE NINTH CIRCUIT GOT IT RIGHT — JUSTICE POWELL'S OPINION IS GOOD LAW

The Fifth Circuit decision in *Hopwood* misreads *Bakke*, departs from Supreme Court precedent, and discounts the importance of achieving diversity in higher education. In contrast, the Ninth Circuit decision in *Smith* understands *Bakke*, respects Supreme Court precedent, and appreciates the tension between individual rights and the pursuit of diversity.[165] Part III of this Comment contrasts the Fifth Circuit's flawed rationale with the Ninth Circuit's more persuasive reasoning. Specifically, this section analyzes the courts' conflicting *Marks* analyses and their inconsistent application of post-*Bakke* affirmative action jurisprudence.

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[160] *Marks*, 430 U.S. at 194.

[161] *Id.* at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)). In *Memoirs*, the Supreme Court reversed a state court judgment finding a book obscene. One Justice reversed on the broad grounds that the book was not "hard core pornography." Two other Justices reversed on the more narrow grounds that the First Amendment prohibits any action by government to suppress obscenity. Three other Justices reversed on the most narrow grounds: the book had not been shown to be "utterly without redeeming social value." In *Marks*, the Court concluded that the "governing standards" of *Memoirs* were those announced by the three-Justice plurality because the other Justices who concurred in the judgment did so "on broader grounds." Grutter v. Bollinger, 137 F. Supp. 2d 821, 847 (E.D. Mich. 2001) (citing *Marks*, 430 U.S. at 193).

[162] Hopwood v. Texas, 236 F.3d 256, 275 n.66 (5th Cir.2000); *Smith*, 233 F.3d at 1199.

[163] *Hopwood*, 236 F.3d at 275 n.66 (rejecting *Smith's* application of *Marks*).

[164] *Smith*, 233 F.3d at 1200 (concluding that, under *Marks*, Justice Powell's analysis represents narrowest footing upon which race-conscious decision making process could stand).

[165] *See* Hopwood v. Texas, 861 F. Supp. 551, 577-78 (W.D. Tex. 1994) (discussing competing goals of overcoming effects of past discrimination and preserving individual rights).

A. *The Fifth Circuit Misreads* Bakke

Although the Fifth and Ninth Circuits' interpretations of *Bakke* initially harmonize,[166] they diverge at the diversity principle. The Ninth Circuit reads Justice Brennan's opinion to support the diversity rationale.[167] The Fifth Circuit, by contrast, interprets Justice Brennan's approval of the remedial rationale to foreclose the use of race to achieve diversity.[168]

1. The Ninth Circuit's Interpretation of Justice Brennan's Opinion in *Bakke*

The Ninth Circuit interprets Justice Brennan's opinion to give more weight to the race factor than the diversity principle.[169] For two reasons, the court concludes that the Brennan Group agreed with the conclusion that a diversity-based program is constitutional.[170] First, Justice Brennan never explicitly disagreed with the statement that race can be used as a plus factor, even if there were no past societal discrimination shown.[171] Justice Brennan saw societal discrimination as a given.[172] Thus, he would have allowed much more than a simple plus to be assigned to it.[173] Second, the Brennan Group saw nothing unconstitutional about a diversity-based program that at least purported to take a broad array of special characteristics and talents, including race, into account.[174] There was no need for Justice Brennan to say that "race" could be used to achieve student body diversity because, again, he saw past societal discrimination as a given.[175]

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[166] For example, the *Hopwood* and *Smith* courts both break down *Bakke* into three parts: the Stevens Group, the Brennan Group, and Justice Powell. The courts agree that the Stevens Group argued the UC Davis program violated Title VI when it excluded Bakke from the Medical School because of his race. Hopwood v. Texas, 78 F.3d 932, 942 (5th Cir. 1996); Smith, 233 F.3d at 1198. The courts also agree that the Brennan Group would have upheld the UC Davis admissions program even though it was a quota system. *Hopwood*, 78 F.3d at 942; *Smith*, 233 F.3d at 1198.

[167] *Smith*, 233 F.3d at 1199.

[168] *Hopwood*, 78 F.3d at 944.

[169] *Smith*, 233 F.3d at 1199.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 1200.

2. The Fifth Circuit's Interpretation of Justice Brennan's Opinion in *Bakke*

Judge Smith, writing for the Fifth Circuit, argued that the Brennan Group "implicitly rejected" Justice Powell's opinion.[176] To support his interpretation, Judge Smith cited a relevant footnote to Justice Brennan's opinion.[177] After concluding that race-conscious university admissions are permissible, Justice Brennan wrote: "We also agree with Mr. Justice Powell that a plan like the 'Harvard' plan[178] . . . is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."[179] Judge Smith assumed the Brennan Group rejected the entire diversity rationale because Justice Brennan did not explicitly use the word "diversity" in his opinion.[180]

The assumption is flawed for two reasons. First, Justice Brennan's language does not indicate a rejection of the diversity rationale.[181] Justice Brennan did frame the "central meaning"[182] of the case to be whether government may use race-conscious programs to redress the continuing effects of past discrimination. However, he did not foreclose the use of race to achieve diversity.[183] Second, Justice Brennan's silence regarding diversity could just as easily be interpreted as implicit approval that

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[176] Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996). *See* Killenbeck, *supra* note 22, at 1355 (criticizing *Hopwood's* assumption that Justice Brennan implicitly rejected Justice Powell's position).

[177] *Hopwood*, 78 F.3d at 944.

[178] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 321-22 (1978). The Harvard College Admissions Program offered the following justification for considering race as one of many factors to be used in seeking to attain a diverse student body: "The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangement." *Id.* at 322.

[179] *Bakke*, 438 U.S. at 326 n. 1.

[180] *Hopwood*, 78 F.3d at 944. Akhil Reed Amar and Neal Kumar Katyal suggest that the Brennan Group's hesitation about diversity, insofar as it existed, may have stemmed from a worry that the diversity rationale could be used to exclude "overreppresented" but historically victimized minorities (e.g. Jews or Asians). Amar & Katyal, *supra* note 132, at 1754.

[181] *See Bakke*, 438 U.S. at 324-379 (Brennan, J., concurring in judgment in part and dissenting in part). *See also* Grutter v. Bollinger, 288 F.3d 732, 742-43 (6th Cir. 2002) (contradicting *Hopwood's* argument that Brennan concurrence implicitly rejected goal of achieving student body diversity).

[182] *Id.* at 325 (Brennan, J., concurring in judgment in part and dissenting in part).

[183] *See* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705 (4th Cir. 1999) (finding that nothing in *Bakke* or subsequent Supreme Court decisions clearly forecloses possibility that diversity may be compelling interest).

diversity may constitute a compelling governmental interest.[184] No other Justice joined in the part of Justice Powell's opinion in which he argued that educational diversity is a compelling interest. However, it is not sufficient for the Fifth Circuit merely to point out that no other Justices joined Justice Powell's opinion.[185] The majority of the *Bakke* court would approve any special admissions program that satisfies Justice Powell's standard.[186] Applying *Marks v. United States*,[187] Justice Powell's decision is binding precedent because it represents the narrowest grounds upon which *Bakke* could rest. That is, Justice Powell's "plus" factor approach rests on more narrow grounds than a broad race-based possibility.[188] Therefore, under Supreme Court precedent, Justice Powell's opinion controls, irrespective of the Brennan Group's failure to join the portion of Justice Powell's opinion that discussed diversity.

B. The Fifth Circuit Departs From Supreme Court Precedent

Hopwood's misreading of Justice Brennan's opinion in *Bakke* instigated the Fifth Circuit's misapplication of *Marks* in *Hopwood III*. The Ninth Circuit's *Marks* analysis in *Smith* is more persuasive because the court accurately interpreted *Bakke*.

1. The Ninth Circuit's *Marks* Analysis

The Ninth Circuit's *Marks* analysis justifies its conclusion that Justice Powell's opinion represents the narrowest grounds upon which *Bakke* can rest. First, the court characterized the breadth of each main opinion.[189] In *Bakke*, the Stevens Group voted on the broad basis that Title VI precluded all race-conscious admissions policies.[190] Comparing the opinions of Justices Stevens and Powell, the *Smith* court found that Justice Powell's opinion was more narrow than the Stevens Group.[191] A majority of the *Bakke* court would have allowed for some race-conscious

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[184] *See Grutter*, 288 F.3d at 742. *Contra* Rosman, *supra* note 124, at 360.

[185] Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 597 (2002).

[186] Lorenzo, *supra* note 3, at 388.

[187] Marks v. United States, 430 U.S. 188 (1977).

[188] Smith v. Univ. of Wash., 233 F.3d 1188, 1199 (9th Cir. 2000).

[189] *Id.* at 1199-1200.

[190] *Compare Smith*, 233 F.3d at 1199 (characterizing Justice Steven's opinion as broader than Justice Powell's opinion), *with* Killenbeck, *supra* note 22, at 1354 (describing Justice Stevens's focus as narrow and specific).

[191] *Smith*, 233 F.3d at 1199.

decisions in educational institutions.[192] Therefore, a race-based possibility must be considered the actual rationale adopted by the Court.[193] Second, the Ninth Circuit isolated the opinions of Justices Powell and Brennan.[194] The court concluded that Justice Powell's analysis is the narrowest footing upon which a race-conscious decision making process could stand.[195] The court's rationale is sound: If educational institutions can sometimes use race in their admissions decisions, almost every point in Justice Brennan's opinion would establish broader grounds for allowing that.[196] Because Justice Brennan advocated a broader principle than using race to achieve diversity, he would have embraced the somewhat narrower principle, if need be.[197]

2. The Fifth Circuit's *Marks* Analysis

The Fifth Circuit not only failed to measure the breadth of the opinions of Justices Powell and Brennan, the court failed to engage in a proper *Marks* analysis at all.[198] The *Hopwood* court concluded that Justice Powell's opinion in *Bakke* is not binding precedent on the issue of diversity.[199] This conclusion obstructed a meaningful analysis of the narrowest ground upon which *Bakke* could rest because it eliminated one of the critical grounds.[200]

Without offering a proper analysis of its own, the Fifth Circuit criticized the Ninth Circuit's conclusion. The *Hopwood III* panel faulted

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[192] *Id. See* Killenbeck, *supra* note 22, at 1354 (rejecting argument that Justice Stevens's opinion represents express repudiation of race as decision-influencing characteristic).

[193] *Smith*, 233 F.3d at 1199.

[194] *Id.* at 1200.

[195] *Id. Accord* Grutter v. Bollinger, 288 F.3d 732, 739 (6th Cir. 2002) (concluding that Justice Powell's opinion is binding precedent under *Marks*). *See* Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appeal*, 46 OHIO ST. L.J. 845, 892 (1985) (arguing that Justice Powell took much narrower view of permissible scope of affirmative action programs than did Brennan Group).

[196] *Smith*, 233 F.3d at 1200. *See* Greenberg, *supra* note 185, at 597-99 (concluding that Justice Brennan and three others would have approved more expansive consideration of race in admissions than Justice Powell).

[197] *Id. Grutter*, 288 F.3d at 742-43 (calling it "a mistake" to read that Brennan concurrence's language detracted from Justice Powell's diversity conclusion). *See* Dworkin, *supra* note 81, at 56 (concluding that five of nine justices agreed that affirmative action plans meeting Justice Powell's tests were constitutional); Killenbeck, *supra* note 22, at 1352-59 (arguing that Justices Brennan's and Stevens's opinions accept Justice Powell's central premise regarding importance of diverse learning environment).

[198] *Compare* Hopwood v. Texas, 236 F.3d 256, 275 n.66 (5th Cir.2000) (rejecting *Smith's* application of *Marks*) *with Smith*, 233 F.3d at 1199-1200 (applying *Marks*).

[199] Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996).

[200] *Hopwood*, 236 F.3d at 275 n.66 (rejecting *Smith's* application of *Marks*).

the Ninth Circuit for attempting to divine what the Justices "would have" held.[201] The Fifth Circuit misread Supreme Court precedent when it prohibited the law school from using race in its admissions decisions.[202] Yet, the court justified its criticism of the Ninth Circuit on grounds of deference to the Supreme Court.[203] Besides contradicting itself, the Fifth Circuit in *Hopwood III* effectively resurrected a version of strict scrutiny that is fatal-in-fact.[204]

C. *The Fifth Circuit Misplaces Reliance On Post-*Bakke *Affirmative Action Jurisprudence*

The Fifth Circuit tried to undermine the diversity rationale through the Supreme Court's post-*Bakke* affirmative action jurisprudence, but its reliance is misplaced. The Supreme Court has not addressed affirmative action in higher education since *Bakke*.[205] In holding that diversity is never a compelling governmental interest, the Fifth Circuit cited cases that neither deal with diversity in higher education nor directly relate to the issues in *Bakke*.[206] The Fifth Circuit's dependence on cases unrelated

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[201] *Hopwood*, 236 F.3d at 275 n.66 ("We do not read *Marks* as an invitation from the Supreme Court to read its fragmented opinions like tea leaves.").

[202] *See* Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 599-600 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510-11 (1989). For a more detailed discussion of the Fifth Circuit's misplaced reliance on these cases, see *infra* notes 208-35 and accompanying text.

[203] *Hopwood*, 236 F.3d at 275 n.66 (rejecting *Smith's* reading of *Marks* as invitation to attempt to divine what Justices would have held).

[204] *Bakke* and subsequent Supreme Court cases explicitly cautioned against this notion of strict scrutiny. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361-62 (1978) (Brennan, J., concurring) (arguing that review under Fourteenth Amendment should be "strict – not 'strict in theory and fatal in fact'"). *Accord Adarand*, 515 U.S. at 237 (1995) (emphasizing that strict scrutiny is "not fatal in fact"). *See* Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of* Regents of the University of California v. Bakke, 19 YALE L. & POL'Y REV. 341, 361 (quoting Justice Brennan: "the use of race for purposes of remediating past discrimination should not be subject to traditional 'strict scrutiny' which had been 'strict in theory but fatal in fact'"). For a discussion of Justice O'Connor's opinion in *Adarand* which "dispel[s]" the notion that strict scrutiny is "strict in theory, but fatal in fact," see Lorenzo, *supra* note 3, at 383.

[205] The Supreme Court granted certiorari in two affirmative action cases outside the education context, but the parties in the cases either settled (Piscataway Township Bd. of Educ. v. Taxman, 522 U.S. 1010 (1997), *cert. dismissed*) or the Court dismissed certiorari before oral argument (Adarand Constructors v. Mineta, 122 S. Ct. 511 (2001), *cert. dismissed*).

[206] *See* Amar & Katyal, *supra* note 132, at 1746 (pointing out that *Croson*, *Metro Broadcasting*, and *Adarand* are all cases that deal with affirmative action in contracting); Daniel & Timken, *supra* note 126, at 400 (stating that cases which *Hopwood* court relied on were "totally unrelated to higher education" and "only superficially relate[d] to the issues in *Bakke*").

to education compromises the persuasiveness of its decision.[207]

The *Hopwood* court relied on a trilogy of cases[208] — *City of Richmond v. J.A. Croson Co.*,[209] *Metro Broadcasting, Inc. v. FCC*,[210] and *Adarand Constructors, Inc. v. Pena*.[211] In *Croson*, white-owned construction companies brought suit against a city program that favored minority-owned contractors on city projects.[212] The plan reserved thirty percent of the city's contracts for minority-owned businesses.[213] The *Croson* plurality relied on *Bakke* to support strict scrutiny review.[214] Applying strict scrutiny, the plurality invalidated the city's set-aside program.[215] *Hopwood* assumed that *Croson's* reliance on *Bakke* to support strict scrutiny review undermines Justice Powell's other conclusions in *Bakke*.[216] However, neither the *Croson* plurality opinion, the concurrence, nor the dissent even critiqued the diversity rationale.[217] Thus, *Croson* did not compromise diversity as a compelling interest in the context of education.

The Fifth Circuit's discussion of *Metro Broadcasting* is even less persuasive than its *Croson* analysis because Justice Brennan's opinion in *Metro Broadcasting* expressly endorses Justice Powell's diversity rationale in *Bakke*.[218] *Metro Broadcasting* involved an attack on a congressionally mandated licensing policy designed to increase minority ownership of radio and television broadcast outlets.[219] Under the policy, a broadcaster whose license or renewal application has been designated for a

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[207] *See* Daniel & Timken, *supra* note 126, at 402 (arguing that Fifth Circuit's legal reasoning was unprincipled because it relied on prior cases not directly on point).

[208] Amar and Katyal point out that in these three cases, the Supreme Court said rather little about education. Amar & Katyal, *supra* note at 132, at 1746. *See also* Killenbeck, *supra* note 22, at 1352-59 (pointing out that *Metro Broadcasting* and *Adarand* do not deal with education).

[209] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[210] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

[211] *Adarand*, 515 U.S. 200.

[212] *Croson*, 488 U.S. at 477-78.

[213] *Id.*

[214] *Id.* at 493-94. Daniel & Timken, *supra* note 126, at 401.

[215] *Croson*, 488 U.S. at 505.

[216] Daniel & Timken, *supra* note 126, at 401.

[217] *Id.* at 402.

[218] *See* Amar & Katyal, *supra* note 132, at 1759 (discussing Justice Brennan's attempt to align himself with Justice Powell's position in *Bakke*); Michel Rosenfeld, Metro Broadcasting, Inc. v. FCC: *Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 595 (1991) (arguing that Justice Brennan's reliance on *Bakke* in *Metro Broadcasting* provides precedential nexus for his approval of affirmative action programs designed to promote diversity).

[219] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

revocation hearing may assign the license to a Federal Communications Commission (FCC)-approved minority enterprise.[220] Metro Broadcasting, Inc. challenged the policy as a violation of equal protection.[221] Writing for the majority, Justice Brennan upheld the policy on the ground that it was substantially related to achieving the important governmental objective of broadcast diversity.[222] Citing Justice Powell's opinion in *Bakke*, Justice Brennan analogized student body diversity to broadcast diversity.[223] Just as a diverse student body is a constitutionally permissible goal, enhancing broadcast diversity is an important governmental objective.[224] Concurring, Justice Stevens called public interest in broadcast diversity "unquestionably legitimate."[225] Like Justice Brennan, Justice Stevens cited Justice Powell's opinion in *Bakke*.[226]

Although *Metro Broadcasting* confirms the Justices' support for the diversity rationale, the Court's opinion must be read with caution. Besides opining about the benefits of diversity, Justice Brennan convinced a majority of the Court that intermediate scrutiny, not strict scrutiny, was appropriate.[227] In 1995, however, a five-member majority reversed the Court's direction.[228] In *Adarand Constructors v. Pena*, the Court overruled *Metro Broadcasting*, but only to the extent that it was inconsistent with the holding that strict scrutiny applies to all racial classifications.[229] In other words, *Adarand* nowhere explicitly overruled *Bakke*.[230] In fact, Justice O'Connor, writing for the Court in *Adarand*, expressly stated that the Court's adoption of strict scrutiny does not indicate the end of race-conscious classifications.[231]

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[220] *Id.* at 557.

[221] *Id.* at 558-60.

[222] *Id.* at 566.

[223] *Id.* at 568.

[224] *Id.*

[225] *Id.* at 601-02 (Stevens, J., concurring) (analogizing "public interest in broadcast diversity" to "the interest in . . . diversity in the student body of a professional school").

[226] *Id.* at 602 n.6.

[227] *Id.* at 564-65. Recall that, in *Bakke*, the Brennan Group disagreed with Justice Powell's use of strict scrutiny. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 369 (1978).

[228] Bybee, *supra* note 48, at 268. *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995).

[229] *Adarand*, 515 U.S. at 227 (declaring that "to the extent that *Metro Broadcasting* is inconsistent with [our] holding, it is overruled").

[230] Amar & Katyal, *supra* note 132, at 1768-69.

[231] *Adarand*, 515 U.S. at 228 (emphasizing that objective of strict scrutiny test is to distinguish legitimate from illegitimate uses of race in governmental decision making). *See also* Bybee, *supra* note 48, at 269 (describing Justice O'Connor's position in *Metro*

The Fifth Circuit read the Court's reversion to strict scrutiny to invalidate the Justices' support for the diversity rationale.[232] It is true that no case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis.[233] However, it is true only in that no case dealing directly with diversity in higher education, in a strict scrutiny context, has been decided by the Court since *Bakke*.[234] The *Adarand* court was never confronted with the issue of whether diversity is a compelling governmental interest.[235] Therefore, Justice Powell's conclusion in *Bakke* is unaffected by *Adarand*. Reviewed under strict scrutiny, race-conscious admissions programs that are narrowly tailored to the achievement of genuine diversity are constitutional.

D. The Ninth Circuit Understands Bakke *and Insulates Education From the Supreme Court's Post-*Bakke *Hostility to Affirmative Action*

The Ninth Circuit refused to hypothesize what the Supreme Court might do in an area in which the Court has ducked.[236] Instead, *Smith* followed cases that directly control.[237] *Smith* recognized *Metro Broadcasting's* approval of Justice Powell's *Bakke* opinion.[238] *Smith* appropriately confined *Adarand* to its narrow holding: *Adarand* did not overrule that part of *Metro Broadcasting* that approved of race-based

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Broadcasting and *Croson* as "faithful to *Bakke* as a whole").

[232] *See* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (concluding that no case since *Bakke* has accepted diversity as compelling state interest because *Adarand* specifically overruled *Metro Broadcasting's* endorsement of intermediate scrutiny for race classifications).

[233] *Id.* at 944.

[234] Daniel & Timken, *supra* note 126, at 403 (citing *Hopwood*, 78 F.3d at 944). *See* Liu, *supra* note 5, at 385 (emphasizing lack of Supreme Court review of viability of diversity rationale under strict scrutiny); Lorenzo, *supra* note 3, at 389 (stating that reason no case has affirmed educational diversity as compelling interest is because issue has not yet come before Court).

[235] Daniel & Timken, *supra* note 126, at 403. In fact, Justice Powell's opinion in *Bakke* is consistent with the common rationale of *Croson* and *Adarand*: strict scrutiny is the standard of review for government programs that incorporate racial classifications. *Id.* at 406.

[236] *See e.g.* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). In 1997, the Court granted review in *Piscataway Township Board of Education v. Taxman*, an employment discrimination case, but the parties settled the case before oral argument. Piscataway Township Bd. of Educ. v. Taxman, 522 U.S. 1010 (1997), *cert. dismissed*.

[237] Smith v. Univ. of Wash., 233 F.3d 1188, 1200 (9th Cir. 2000) (noting that although much has happened since *Bakke*, Supreme Court has not returned to area of university admissions).

[238] *Id.* at 1199-1200 (citing *Metro Broadcasting* to show Court's approval of Justice Powell's opinion in *Bakke*). *See* Greenberg, *supra* note 185, at 598 (discussing Justice Brennan's endorsement of diversity in *Metro Broadcasting*).

considerations in educational institutions.[239] Finally, holding Justice Powell's opinion in *Bakke* is good law, the Ninth Circuit left it to the Supreme Court to reject the *Bakke* rationale regarding university admissions policies.[240]

IV. THE VALUE OF DIVERSITY: WHY THE SUPREME COURT SHOULD UPHOLD DIVERSITY AS A COMPELLING INTEREST

The Supreme Court should uphold diversity as a compelling interest because the benefits of diversity are especially important in education.[241] Despite the uniqueness of education, critics of affirmative action in university admissions worry that universities misuse race.[242] They argue that universities use race as the sole criterion for admission and that, even among a mix of criteria, race is a dangerous proxy for diversity.[243] This argument ignores the entire history of race and racism in America.[244]

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[239] *Id.*

[240] *Id.* at 1200. *Accord* Grutter v. Bollinger, 288 F.3d 732, 739 (6th Cir. 2002) (holding law school has compelling interest in achieving diverse student body because *Bakke* remains law until Supreme Court instructs otherwise); Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) (recognizing that Supreme Court has not held diversity is not sufficiently compelling interest to justify race-based classification).

[241] *See* Brief of Amici Curiae Charles Alan Wright, Douglas Laycock & Samuel Issacharoff, Piscataway Township Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997) (No. 96-679) (arguing that intellectual diversity serves purposes that are unique to higher education). Wright, Laycock, and Issacharoff explain that race and ethnic diversity are not the only important sources of intellectual diversity, but they are one important source and "they are the only sources that are largely eliminated by the workings of the ordinary admissions process." *Id.*

[242] *See e.g.* EASTLAND, *supra* note 2, at 88 (discussing practice of affirmative action in higher education); Robert M. Berdahl, *Policies of Opportunity: Fairness and Affirmative Action in the Twenty-First Century*, 51 CASE W. RES. 115, 118 (2000) (criticizing universities' use of race because it distracts from merit); Thernstrom & Thernstrom, *Reflections*, *supra* note 34, at 1584-85 (citing one student's discovery that race was of decisive importance in admissions policies). *But see* Ian Ayres, *Symposium on Affirmative Action: Narrow Tailoring*, 43 UCLA L. REV. 1781, 1784 (1996) (exploring what types of affirmative action would satisfy narrow tailoring requirement and arguing that Supreme Court's antipathy for quotas is overstated).

[243] *See infra* notes 272-75 (addressing argument that universities use race as sole criterion for admission) and notes 287-88 (addressing argument that race is dangerous proxy for diversity).

[244] The Fifth Circuit ignored the entire history of race and racism in America when it argued that the use of race to create diversity only created a student body that "looks different" and was "no more rational" than would be choices based upon the physical size or blood types of applicants. Berdahl, *supra* note 242, at 116-17 (citing Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996)). *See* Donald E. Lively and Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, n.47 (1991) (asserting that efforts to view equal protection from color-blind perspective ignore history and current

A race-neutral program would fail to achieve true diversity because it would cripple schools from uniting diverse people in a unique learning environment.[245]

A. The Benefits of Diversity and the Uniqueness of Education

In *Brown v. Board of Education*, the Supreme Court recognized the vital role education plays in society.[246] Education, the Court declared, "is the very foundation of good citizenship."[247] *Bakke* builds on *Brown* by reaffirming the uniqueness of an academic setting.[248] *Brown* said that schools are different; the separate-but-equal rule had "no place in the field of public education."[249] Likewise, *Bakke* says that schools are different; even if affirmative action is unconstitutional in other spheres, schools may be able to take race into account to bring races together.[250] Unlike contracting set-asides, which encourage racial segregation, universities unite diverse people.[251] Diversity experiences in higher education break apart historically rooted patterns of racial segregation

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presence of racial injustice, disparities, and discrimination).

[245] *See* Delgado, *supra* note 2, at 141 (suggesting that race is best measure of social disadvantage, even better than poverty); Carol M. Swain, et. al., *Life After* Bakke *Where Whites and Blacks Agree: Public Support for Fairness in Educational Opportunities*, 16 HARV. BLACKLETTER L.J. 147, 164 (2000) (arguing that race-neutral policies have not been embraced by liberal elite because of fear that such policies will not lead to kind of diversified workforces and college campuses that many people desire).

[246] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (explaining that education is very foundation of good citizenship). *See also* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (adopting Thomas Jefferson's belief that education is vital to society); Killenbeck, *supra* note 22, at 1309 (discussing American emphasis on value of education). The Supreme Court recognized the educational value of racial diversity over half a century ago. Liu, *supra* note 5, at 386. In 1950, the Court affirmed the value of racial integration in education when it struck down, on equal protection grounds, a separate law school for blacks at the University of Texas. *See* Sweatt v. Painter, 339 U.S. 629 (1950). A unanimous Court declared, "few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *Id.* at 634.

[247] *Brown*, 347 U.S. at 493. *See also* Plyler v. Doe, 457 U.S. 202, 221 (1982) (calling education "a most vital civic institution for the preservation of a democratic system of government").

[248] Amar & Katyal, *supra* note 132, at 1775 (arguing that entire structure of Justice Powell's opinion proclaims that education is special).

[249] *Brown*, 347 U.S. at 495; Amar & Katyal, *supra* note 132, at 1775 (pointing out that *Brown* did not explicitly overrule Plessy v. Ferguson, 163 U.S. 537 (1896), which held segregated train cars constitutional).

[250] Amar & Katyal, *supra* note 132, at 1775 (describing Justice Powell's treatment of education as special).

[251] *Id.* at 1749 (contrasting education with contracting).

by equipping students to participate in an increasingly heterogeneous democracy.[252] Indeed, much of the point of higher education is to teach students about diverse viewpoints.[253] Therefore, the amorphous benefits of diversity rise to the level of a compelling interest in the context of higher education, even if they fall short in other contexts.[254]

However, if diversity is to survive as a legal basis for affirmative action in higher education, the value of diversity must be supported with concrete evidence.[255] Admittedly, measuring the benefits of diversity is more challenging than compensating past wrongs because the diversity rationale is not limited to discrete constitutional violations.[256] However, in 1998, William G. Bowen and Derek Bok, the former presidents of Princeton and Harvard Universities, respectively, tackled the challenge. The authors presented data on more than 80,000 students who matriculated at 28 selective colleges and universities in 1951, 1976, and 1989.[257] In their study, Bowen and Bok concluded that students of all races share a predominantly favorable view about the value of diversity contributing to their education.[258] Contrary to opponents' fear that race-based preferences undermine the goals of equal protection, Bowen and Bok found that a diverse student body reduces racial tensions[259] and

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[252] Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, at http://www.umich.edu/urel/admissions/legal/ expert/summ.html (last visited Feb. 6, 2002) (on file with author) [hereinafter *Gurin Report*]. Patricia Gurin is a Professor of Psychology and Women's Studies at the University of Michigan. Since 1990-91, she has conducted research on student experience with diversity at the university. Professor Gurin examined multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program at the University of Michigan.

[253] Amar & Katyal, *supra* note 132, at 1774 (describing point of education to be teaching students how others think and helping them understand different points of view).

[254] *See* Grutter v. Bollinger, 288 F.3d 732, 749 (6th Cir. 2002) (stating that "the context of higher education differs materially from the government contracting context").

[255] Alger, *supra* note 1, at 78. *See* Liu, *supra* note 5, at 427-29 (predicting that Supreme Court is unlikely to find educational diversity compelling if there is no practical way to determine if university's interest is genuine).

[256] *See Evidentiary Framework*, *supra* note 28, at 1362 (suggesting that benefits of diversity cannot be quantified or verified by scientific proof). *But see* Liu, *supra* note 5, at 427-29 (suggesting that diversity-based affirmative action is no more subjective than remedial theory).

[257] WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

[258] *Id.* at 254.

[259] *Id.* at 266-68. *See* Delgado, *supra* note 2, at 145 (conceding that affirmative action may injure relations between races, but proposing that solution is not to abolish affirmative action).

promotes racial interaction.[260]

Educators and students provide persuasive testimonials in support of this view.[261] Former Harvard President Neil Rudenstine has argued that student diversity contributes powerfully to the process of learning and to the creation of an effective educational environment.[262] Constitutional law professor Erwin Chemerinsky witnesses this valuable contribution in his classes.[263] Chemerinsky has "no doubt" that his students learn more and benefit more from discussions about race and affirmative action when minority students are present.[264] Students themselves recognize the benefits of diversity.[265] A study of the admissions policies at the University of Michigan Law School revealed that Michigan Law students and alumni consider a more diverse student body an educational good in itself.[266]

B. Using Race as a Proxy for Diversity

Even if diversity is a compelling interest in the context of a university admissions program, a university's racial classifications must be necessary to promote diversity.[267] Critics of race-based preferences for diversity purposes argue that race-conscious admissions programs are not a necessary means toward promoting diversity.[268] They allege that

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[260] BOWEN & BOK, *supra* note 257, at 229.

[261] *See Evidentiary Framework*, *supra* note 28, at 1361 (calling testimony of educators particularly vital and persuasive); *Id.* at 1364 (urging courts to rely on testimony of educators because diversity in higher education is not susceptible to direct proof); Friedl, *supra* note 3, at 32 (contrasting lack of definitive measurement of diversity with educational community support for diversity's benefits).

[262] Liu, *supra* note 5, at 410-11 (quoting former Harvard President Neil Rudenstine).

[263] Chemerinsky, *supra* note 1, at 1163.

[264] *Id.*

[265] *See Gurin Report*, *supra* note 252.

[266] *Id.* *See* Lawrence III, *supra* note 5, at 934 (citing Michigan study); Richard O. Lempert, David A. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 418 (2000) (concluding that Michigan Law School students perceive ethnic diversity as adding value to their educational experience). Anthony T. Kronman offers two propositions for the claim that racial and ethnic diversity is an educational good. First, diversity of experience and values is a valuable characteristic in the school. Second, diversity of experience and values is strongly linked to diversity of race and ethnicity. Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 868 (2000).

[267] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314-15 (1978) (addressing whether racial classification in UC Davis admissions program was necessary to promote diversity).

[268] *See infra* notes 273-75 and 287-88 (explaining critics' argument that universities misuse race).

universities use race as the sole criterion for admission and that race, by itself, is a dangerous proxy for diversity.[269] Their allegations not only overlook universities' pursuit of genuine diversity, they also fail to address the faults of a race-neutral admissions program.[270]

1. Is Race the Sole Criterion?

Bowen and Bok's report on affirmative action, and educators' and students' testimony about the benefits of diversity attempt to prove that affirmative action "works." This is only one facet of the ultimate question of whether a university's interest in diversity is genuine.[271] Diversity advocates argue that schools use race as only one of many factors.[272] Critics of race-based preferences for diversity purposes claim that race is of decisive importance.[273] They argue that while the goals of affirmative action are flexible in theory, they become rigid quotas in practice.[274] They attack diversity-based affirmative action by calling diversity a "slippery and problematic concept," which makes it easy to "fixate" on race and ethnicity.[275]

It is a misconception that diversity programs utilize race-conscious classifications as their sole consideration.[276] *Bakke* expressly forbids this.[277] Classifying diversity as a compelling state interest permits

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[269] *Id.*

[270] *See infra* notes 291-93 (describing failure of race-neutral admissions programs to address lingering vestiges of discrimination).

[271] Liu, *supra* note 5, at 438. *See* Lawrence III, *supra* note 5, at 940 (noting that Bowen and Bok's study looks only at nation's most selective colleges and universities). It is also important to recognize that Bowen and Bok confined their study to affirmative action in higher education. The study does not address the effect of racial classifications for other purposes, such as hiring and contracting. For a detailed discussion of THE SHAPE OF THE RIVER, *see* Ronald Dworkin, *Affirming Affirmative Action*, N.Y. REV. OF BOOKS, Oct. 22, 1998, at 91.

[272] Thernstrom & Thernstrom, *Reflections*, *supra* note 34, at 1595-96.

[273] *Id.* at 1596. *See also* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997). *But see* Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 732-33 (1999) (book review) (stating that no one contends that diversity is sole or even primary interest of university).

[274] Dinesh D'Souza & Christopher Edley, Jr., *Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned As A National Policy*, 60 ALB. L. REV. 425, 437-38 (1996). *See* Swain, Rodgers & Silverman, *supra* note 245, at 151-52 (describing how race at most elite institutions became in 1990s more than simple "plus" factor tipping scales in favor of minority candidates who were equally qualified with non-minority candidates).

[275] Thernstrom & Thernstrom, *Reflections*, *supra* note 34, at 1623-24.

[276] Lorenzo, *supra* note 3, at 409.

[277] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (striking down medical school's special admissions program because it focused solely on ethnic diversity). *See*

educational institutions to craft admissions programs that take account of race, among other proxies for diversity.[278] It does not give educational institutions a carte blanche to discriminate unlawfully.[279] Justice Powell's "plus" factor approach allows courts to decide when diversity is compelling enough to withstand strict scrutiny. Applying strict scrutiny when a court finds that a racial classification is the determinative factor in an admissions decision violates equal protection.[280] Alternatively, when a court determines that race is a "plus" in an applicant's file, the race-based classification is constitutionally permissible.[281]

Those who seek to promote diversity in the university should scrutinize admissions policies with the distinction between determinative and "plus" factors in mind.[282] One commentator suggests that universities be more explicit about their real mission.[283] They should abandon rigid entry-level criteria that do not predict the kinds of behavior among their graduates that the school purports to value.[284] In place of strict reliance on test scores, universities should use a mix of criteria, such as leadership and community service records.[285] Some proponents of race-conscious admissions policies call this a "whole person" approach: abandoning traditional academic measures as the sole

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Daniel & Timken, *supra* note 126, at 397 (arguing that Justice Powell's opinion "tightly circumscribed the test of affirmative action").

[278] *See Bakke*, 438 U.S. at 318-320 (contrasting permissible use of race in admissions decisions with two-track admissions system at UC Davis).

[279] To illustrate the pursuit of "genuine diversity," Justice Powell appended his opinion with an example of a narrowly tailored use of race as a "plus" factor in admissions decisions. *See Bakke*, 438 U.S. at 321-24. *See also* Hopwood v. Texas, 861 F. Supp. 551, 569 (W.D. Tex. 1994) (explaining that narrowly tailored analysis ensures that means chosen fit compelling goal so closely that there is little or no possibility that motive for classification was illegitimate racial prejudice); Carl Cohen, *Affirmative Action in Higher Education: Preference Admissions and the Quest for Diversity*, 54 WASH. U. J. URB. & CONTEMP. L. 43, 57 (1998) (noting that Justice Powell's view prohibits universities from deliberate discrimination by ethnic category).

[280] Kira M. Feeny, Comment, *Race-Conscious Admissions Programs in Higher Education: It's Not a Black and White Issue*, 25 DAYTON L. REV. 109, 125 (1999).

[281] *Id. See* Johnson v. Bd. of Regents, 263 F.3d 1234, 1237 (11th Cir. 2001) (striking down university's admissions policy because it was not narrowly tailored to achieve diversity); Amar & Katyal, *supra* note 132, at 1777 n.142 (recognizing that when race looms larger than other diversity factors, admissions program violates *Bakke*).

[282] Daniel & Timken, *supra* note 126, at 418. *See* Killenbeck, *supra* note 22, at 1348 (distinguishing institutional initiative designed to "level the playing field" on nondiscriminatory basis from active consideration of race in admissions process).

[283] Lani Guinier, Commentary, *Law School Affirmative Action: An Empirical Study Confirmative Action*, 25 LAW & SOC. INQUIRY 565, 578 (2000).

[284] *Id.*

[285] *Id.* at 579.

criteria for admittance and admitting qualified applicants based upon an examination of the whole person.[286]

2. Is Race A Dangerous Proxy?

Even if a mix of criteria is considered among the proxies for diversity, should race be among the legitimate ones? Critics of nonremedial affirmative action programs argue that race is a dangerous proxy for diversity.[287] They say that preferences based on race frustrate, rather than facilitate, the goals of equal protection by treating minorities as a group and not as individuals.[288] Proponents of using race as a proxy for diversity assert that universities should consider race because race is a dominant factor influencing a person's experiences and perceptions.[289] They contend that exposure to students from different backgrounds with a variety of life experience adds to students' educational experience.[290]

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[286] Lorenzo, *supra* note 3, at 404-07.

[287] Portinga, *supra* note 26, at 75. *See* Hopwood v. Texas, 78 F.3d 932, 946-47 (5th Cir. 1996) (criticizing university's "resort to the dangerous proxy of race" in its efforts to foster diversity).

[288] *See* Chemerinsky, *supra* note 1, at 1175 (responding to opponents' argument that affirmative action exacerbates racial tensions). Critics of Justice Powell's position in *Bakke* argue that it is internally inconsistent. Rosenfeld, *supra* note 195, at 893. *See* Cheryl I. Harris, Symposium, *The Constitution of Equal Citizenship For a Good Society: Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1768 (2001) (describing Justice Powell's treatment of group identity as schizophrenic). They contend that subscription to the antidiscrimination principle ought to foreclose the government's use of race in conferring benefits and that using race as a "plus" factor necessarily distracts from making decisions about individuals. The Supreme Court has explicitly stated that constitutional rights are guaranteed to the individual, not the group. Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995). Equal protection cannot mean one thing when applied to a non-minority and another thing when applied to a minority. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978). However, the virtue of justice is not understood as something which is good or proper simply for the individual alone; rather, it manifests itself in personal relationships. Rev. Robert John Araujo, S.J., *Justice as Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 PEPP. L. REV. 377, 435-36 (2000).

[289] *See* Chemerinsky, *supra* note 1, at 1163. The idea that minorities offer a distinctive and valuable input to jobs and academics is a strand of critical race theory. Critical race theorists argue that persons from minority ethnic groups have distinctive views, perceptions, and experiences which are not properly recognized in mainstream discussions of law. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 214-19 (2d ed. 1999).

[290] Chemerinsky, *supra* note 1, at 1170 (arguing that education is immeasurably enhanced when students are exposed to others different from themselves, in background, class, and race). *See* Selmi, *supra* note 273, at 729-30 (explaining premise that African-Americans share particular viewpoint and that this viewpoint is what contributes to diversity on campus). In *Grutter v. Bollinger*, Jeffrey Lehman, dean of the University of Michigan School of Law, testified about the educational importance of racial diversity in the student body. Dean Lehman stated that exposure to students of various races and

Considered among other factors, race is a necessary proxy for diversity because a race-neutral program would fail to address lingering vestiges of discrimination.[291] Lower education rates and higher poverty rates among some minority groups as compared to whites are lingering effects of race discrimination.[292] Although American public policy has sought to eradicate race discrimination and has made great strides, we should not be content when the shackles are still apparent.[293]

CONCLUSION

The disagreement among lower courts about the legacy of *Bakke* pressures the Supreme Court to reenter the affirmative action debate. Since *Bakke*, the Court has not addressed the constitutionality of race-conscious affirmative action in university admissions. The Court declined review in *Hopwood*.[294] Justice Ginsburg explained that because the adjudicated affirmative action plan was no longer in effect, it would be inappropriate to review an opinion rather than a final judgment on a program genuinely in controversy.[295] The Court also declined review in *Smith*,[296] despite the Ninth Circuit's frustration with the Court's fractured decision in *Bakke*.[297] The circuit court split not only places the diversity

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perspectives helps students to understand and be sympathetic to differing points of view. Grutter v. Bollinger, 137 F. Supp. 2d 821, 833-34 (E.D. Mich. 2001).

[291] *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (finding that it would be impossible to arrange affirmative action program in racially-neutral way and have it be successful), *and* Herma Hill Kay, *The Challenge to Diversity in Legal Education*, 34 IND. L. REV. 55 (2000) (describing struggle to maintain diversity without using race or ethnicity as criteria for admission), *and* Killenbeck, *supra* note 22, at 1317 (insisting that racial composition constitutes one important element of truly diverse student body), *with* Cohen, *supra* note 279, at 46-57 (rejecting argument that university cannot effectively consider race if it cannot classify its applicants by race).

[292] *Grutter*, 137 F. Supp. 2d at 864 (citing report from Dr. Thomas Sugrue, professor of history and sociology at University of Pennsylvania); Expert Report of Thomas J. Sugrue, at http://www.umich.edu/urel/admissions/legal/expert/sugru4.html (last visited Feb. 6, 2002) (on file with author) (concluding that today's racial and ethnic separation is legacy of past which society has not yet overcome).

[293] *See supra* note 26 (quoting President Lyndon Johnson). *But see* EASTLAND, *supra* note 2, at 39-42 (arguing that affirmative action evolved from President Johnson's shackled runner analogy to society's departure from colorblind principles).

[294] Texas v. Hopwood, 518 U.S. 1033 (1996) (denying petition for writ of certiorari).

[295] *Id.* (Ginsburg, J., concurring).

[296] Smith v. Univ. of Wash., 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001).

[297] *Id.* at 1200 (leaving it to the Supreme Court "to declare that the *Bakke* rationale regarding university admissions policies has become moribund, if it has"). *See* Johnson v. Bd. of Regents, 263 F.3d 1234 (11th Cir. 2001) (pressuring Supreme Court to consider constitutional viability of student body diversity as compelling interest); Marcia Coyle, *It's*

rationale in jeopardy, it compromises the equal protection of the law.[298] Educational diversity is a national value, not only a local ambition.[299] The Supreme Court should address the debate because when race-neutral measures fail, injustice and inequality follow.[300] Although compromise of the ideals of justice and equality is inevitable, their sacrifice is too great a loss.

Baa-aa-kke!, NAT'L L.J., Jan. 22, 2001, at A1 (suggesting that Supreme Court will want case where race is subjective factor, along with other factors).

[298] Lively & Plass, *supra* note 244, at 1313 (contending that modern equal protection jurisprudence continues to be characterized by sophisticated fictions and glosses that deny reality of racial discrimination and inequality).

[299] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (emphasizing importance of education).

[300] *See* Delgado, *supra* note 2, at 148 (singling out civil rights laws as "radically flouted and underenforced").