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A REVIEW OF HIGHER EDUCATION AFFIRMATIVE ACTION CASES

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I. INTRODUCTION

Both federal and state governments have enacted numerous minority assistance programs that are accomplished through the use of affirmative action.[1] Through affirmative action programs remedies are sought to ameliorate the harsh effects of slavery and new social, political, and economic opportunities are provided for minorities.[2]

Many colleges and universities specifically, have implemented affirmative action policies[3] not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body.[4] The quest for diversity in the arena of higher education has given rise to considerable controversy.[5] The courts have been faced with the difficult task of balancing the proper use of race and the benefits and opportunities afforded to disadvantaged students, with the negative impact these programs are sometimes proposed to have on non-minority students.[6]

The Civil Rights Act of 1964[7] spurred the movement in schools of higher education to adopt special admissions policies in order to achieve a student body diverse in race and ethnicity. Such policies generally tend to permit admissions committees to consider candidates based on criteria beyond the traditional objective admission criteria of grades and standardized test scores to consider race, gender, and ethnicity as part of the decision process.[8] These admissions policies have been and continue to be extremely controversial as the public evaluates race based preference policies.[9]

The Supreme Court was faced with its first affirmative action case in *Defunis v. Odegaard*[10] more than twenty years ago. However, a majority decision as to the standard of review by which affirmative action programs were to be assessed was not handed down until 1989 in *City of Richmond v. Croson Co.*, fifteen years later.[11]

Eventually, a majority of the Supreme Court adopted strict scrutiny as the appropriate standard of review for affirmative action programs in *Adarand Constructors, Inc. v. Pena.*[12] The Court stated that "[a]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed under strict scrutiny."[13] Because the many private colleges and universities that receive federal funding are regulated by Title VI,[14] and state colleges and universities are regulated as state actors by the 14th Amendment,[15] these institutions are subject to constitutional limitations in enacting race-conscious classifications.[16]

Recently, two federal courts have struck down race-based preference programs at institutions of higher learning.[17] The Supreme Court has articulated the constitutional criteria that race-based preference programs must meet under the Equal Protection Clause,[18] but has failed to approve a diversity admissions policy. Specifically, the Supreme Court in 1996 denied certiorari to hear a race based preference program in higher education case.[19] The emphasis of this paper is on the effect of these Supreme Court and lower court decisions on affirmative action or race based preference programs, while also considering whether or not it is now possible for schools of higher education to pass the strict scrutiny muster and rigid standards set out in recent Supreme Court decisions.

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[1] See, e.g., Howard Fineman, Affirmative Action, Race and Rage: When Preferences Work — And Don't, Newsweek, April 3, 1995, at 22, 24.

[2] See, e.g., Martin Michaelson, Building a Comprehensive Defense of Affirmative Action Programs, Chronology of Higher Education., July 28, 1995.

[3] Colleges and Universities have employed many different menthods of affirmative action including race- conscious financial aid and the recognition of race as a factor for admission.

[4] See, e.g., Hopwood v. Texas, 861 F. Supp. 551, 569-573 (W.D. Tex. 1994).

[5] See, e.g., Alexander W. Austin, What Matters in College?: Four Critical Years Revisited 429 (1993).

[6] See, e.g., 34 William and Mary Law Review 33, 34 (1992).

[7] Civil Rights Act of 1964, U.S.C. §2000d (1989).

[8] See, e.g., Stephanie Wildman, Integration in the 1980's: The Dream of Diversity in the Cycle of Exclusion, 64 Tulane Law Review, 1625 (1990).

[9] See, e.g., Howard Fineman, Affirmative Action, Race and Rage: When Preferences Work— And Don't, Newsweek, April 3, 1995.

[10] *Defunis v. Odegaard,* 416 U.S. 312 (1974).

[11] *City of Richmond v. Croson* 488 U.S. 469, 493-94 (1989). (holding that strict scrutiny was the applicable standard of review under the Equal Protection Clause of the 14th Amendment for race- based programs.)

[12] *Adarand Constructors Inc. v. Pena,* 115 S.Ct. 2097 (1995).

[13] 115 S.Ct at 2113 (1995).

[14] Title VI prohibits recipients of federal funding from discriminating on the basis of race, color, or national origin. 42 U.S.C. § 2000 (d) (1988).

[15] The Court has interpreted Title VI to allow affirmative action programs that use racial and ethnic classifications if those classifications are permissible under the Equal Protection Clause See. *Regents of the University of the University of California v. Bakke,* 438 U.S. 265, 287 (1978).

[16] *Regents of the University of California v. Bakke,* 438 U.S. 287 (1978).

[17] See *Podbersky v. Kirwan,* 38 F.3d 147 (4th Cir. 1994) ; *Hopwood v. Texas,* 21 F. 3d 603 (5th Cir. 1994).

[18] See *Adarand Constuctors Inc. v. Pena,* 115 S.Ct. 2097 (1995).

[19] *Texas v. Hopwood,* 116 S.Ct 2581 (1996).

When examining the issue of affirmative action in relation to higher education, it is helpful to examine the early decisions in this area. Many of these early cases have helped shape the law, while also leading the Supreme Court on a scavenger hunt to determine their proper application to affirmative action. Thus, this paper will examine not only recent court decisions in the area of affirmative action, but also the cases that were and are fundamental in determining how affirmative action relates to colleges and universities today. Consideration will also be given to whether affirmative action as we know is still possible under the recent Supreme Court decisions.

II. HISTORICAL PERSPECTIVE

A. Pre- Affirmative Action: The Racial Segregation of Public Schools

The 14th Amendment was adopted in 1868 to provide freedom and equal treatment by prohibiting state-sponsored discrimination against emancipated slaves.[20] Although the text of the 14th Amendment provides that "[n]o state shall deny to any person the equal protection of the laws," emancipated slaves continued to confront racial discrimination and racism long after the passage of the 14th Amendment.[21] The Supreme Court's decision in *Brown v. Board of Education,*[22] the Civil Rights Movement, the passage of the Civil Rights Act of 1964,[23] and affirmative action programs have sought to remedy this past discrimination and encourage diversity in the work force as well as in the arena of higher education.[24] The first uses of race-conscious action, similar to race-based preference policies, by the courts as an attempt to aid African-Americans were remedial in nature and intended to remedy the unequal or disparate treatment of African-Americans. Race conscious actions were upheld in two settings in particular; school desegregation and employment.[25]

In *Brown v. Board of Education*[26] the Court invoked the 14th Amendment to strike down laws in Delaware, Kansas, South Carolina, and Virginia that required or allowed racial segregation in the public schools. *Brown*[27] has been highly regarded for many reasons one of which is that *Brown* was one of the first cases to apply strict scrutiny to a race based classification,[28] as is similarly applied today in affirmative action cases.[29]

Although the Court in *Brown*[30] was asked to overrule the "separate but equal" doctrine of *Plessy v. Ferguson,*[31] it did not. Instead, the Court applied the "separate but equal" doctrine, and determined that "[s]eparate educational facilities are inherently unequal."[32] The Court concluded that, "[T]he Negro and white schools involved have been equalized with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible factors'."[33] However, the education that was provided in the segregated schools was inherently unequal to that offered in integrated setting due to the negative psychological effect that the forced segregation had on the black school children.[34] "To separate them from the others of similar age and qualifications because of the their race generates a feeling of inferiority, as to their status in the community, that may affect their hearts and minds in a way unlikely to ever be undone."[35] The Court ultimately concluded that, "[I]n the field of public education the doctrine of 'separate but equal' has no place."[36] African-American children were to be given the equivalent educational opportunities available to other non-minority public school children.[37]

A similar case, *Bolling v. Sharpe,*[38] was decided the same day as *Brown.*[39] In this case the Court held that the 5th Amendment also barred the federal government from segregating schools in the District of Columbia. This separation constituted "[a]n arbitrary deprivation of liberty in violation of the Due Process Clause."[40]

As a result of the *Brown* decision the Supreme Court eventually insisted that school boards take steps to insure that the patterns of segregation present in the schools be abolished.[41] Often these steps were of necessity race-conscious. Sometimes, the only way to break up the pattern of segregation was for the courts to order school boards to enroll a certain number of African- American children in formerly white schools.[42] This ultimately led to race conscious busing in which students were bused out of their school districts in order to achieve a suitable bal-

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[20] See *University of California Regents v. Bakke,* 438 U.S. 265, 293 (1978).

[21] See William Gillette, Retreat From Reconstruction, 379 (1979).

[22] *Brown v. Board of Eduaction,* 347 U.S. 483 (1954).

[23] U.S.C. § 2000e to 2000e-17 (1988).

[24] See Rhonda McMillion ,Affirmative Action Struggle,A.B.A. Journal, Jan. 1995 at 90.

[25] See Gerald D. Jaynes, A Common Destiny; Blacks and American Society (1989).

[26] *Brown v. Board of Education,* 347 U.S. 483 (1954).

[27] 347 U.S. 483 (1954).

[28] *Id.*

[29] *Adarand Constructors Inc. v. Pena,*115 S.Ct. 2097 (1995).

[30] *Id.* at 483.

[31] *Plessy v. Ferguson,* 163 U.S. 537 (1896).

[32] *Id.* at 495.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*487-488.

[38] *Bolling v. Sharpe,* 347 U.S. 497 (1954).

[39] 347 U.S. 483 (1954).

[40] *Id* at 500 (1954).

[41] *Brown v. Board of Education,* 349 U.S. 294, 298 (1955).

[42] See Green v. County School Board 391 U.S 430 (1968).

ance of race. One could hypothesize that the court was promoting the same type of "diversity" through the methods of busing and setting quotas for white schools, that we see many proponents of affirmative action advocating today through race-conscious admissions policies.

After the decision in *Brown*[43] the Court held that racial segregation of public facilities was unconstitutional. Today the Equal Protection clause prohibits the government from mandating racial segregation of any public facilities.

These court opinions of early public school desegregation cases provided much needed answers and remedies to the issues that were applicable at the time of the court proceedings. However, many of the questions of disparate treatment among whites and minorities in education still remain at hand. With higher education becoming commonplace in the homes of many whites and minorities, we are faced with an exceedingly vast array of questions that the Court in *Brown* never considered. The issues resolved in the early school desegregation cases merely touch the tip of the iceberg of affirmative action, and leave many undecided issues for the courts.

B. University of California v. Bakke

Although the Supreme Court has established standards of review for Equal Protection Clause challenges, the Court has struggled with the application of these standards to affirmative action. The Supreme Court first addressed the appropriate standard of review to be applied in this context in *University of California Regents v. Bakke.*[44]

In this case, the Court examined the Medical School of the University of California at Davis's special admission program that established quotas based on the race and ethnicity of the applicant.[45] The purpose of the program was to achieve a racially diverse student body.[46] Although there was no prior discrimination or court order requiring an affirmative action program, Davis created a separate admissions standard for "economically and or educationally disadvantaged" applicants and for minority groups.[47] Those that applied and met the qualifications for this special admissions program were evaluated by a lower standard of review than the regular applicants.[48]

Allan Bakke, a white male, was twice denied admission to the University of California at Davis Medical School despite the fact that his grades and Medical College Admission Test (MCAT) scores were much higher than those of some minority applicants who were admitted under the special program.[49] In response to his second denial, Bakke challenged Davis's affirmative action policy on the grounds that the program violated his constitutional right to equal protection of the laws and the statutory prohibition against racial discrimination in federally funded programs.[50]

Splitting four justices in favor of the program and four justices against, Justice Powell announced the plurality opinion of the Court that the Davis Medical School admission policy must be considered under the "strictest scrutiny" since it provided a quota for minority applicants.[51] Justice Powell further stated that preferential treatment solely based on membership in a racial group was discrimination forbidden by the Constitution.[52] Although the state has a legitimate and substantial purpose in remedying past discrimination, there was no precedent for taking such action without a prior judicial, legislative, or administrative finding of past unconstitutional discrimination.[53]

Justice Powell left open the possibility that other affirmative action programs, based on findings of past racial discrimination which created a substantial interest in exonerating the rights of those victims, could be constitutional.[54] However, he stated, "[I]f petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial, but as facially invalid."[55] Preferring members of one group for no other reason than race or ethnic origin is discrimination which the Constitution forbids.[56] This particular aspect of the *Bakke* decision remains solidly rooted in the law.[57]

Justice Powell also rejected the argument that a preference was a legitimate remedy for past societal discrimination.[58] This holding has been embraced by subsequent cases.[59] *Bakke* recognized that an institution may only act to remedy its own prior discrimination.[60]

Accordingly, Justice Powell approved of programs where, "race or ethnicity can be deemed a plus in a particular applicants file, yet it does not insulate the individual from comparison with all other candidates for the available seats."[61] Thus, the Court found, "no facial infirmity in an admissions program were race or ethnic background is simply one element to be weighted fairly against other elements in the selection process."[62]

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[43] 349 U.S. 298 (1955).
[44] University of California Regents v. Bakke, 438 U.S. 265 (1978).
[45] 438 U.S. 265, 269-270 (1978).
[46] *Id.*
[47] *Id.* at 274.
[48] *Id.*
[49] *Id.* at 265.
[50] *Id.* at 277-278.
[51] *Id.* at 291.
[52] *Id.* at 307.
[53] *Id.*
[54] *Id.* at 307.
[55] *Id.* at 306.
[56] *Id.* at 307.
[57] See *City of Richmond v. J.A. Croson,* 488 U.S. 469, 496 (1989).
[58] *Id.*
[59] See *Croson,* 488 U.S. at 497.
[60] Id. at 307-310.
[61] Id. at 317.
[62] Id. at 318.

C. Fullilove v. Klutznick

The Supreme Court's next major task in the area of affirmative action was *Fullilove v. Klutznick.*[63] In this case, the Minority Business Enterprise (MBE) provision of the Public Works Employment Act (PWEA) of 1977 was challenged.The MBE provision provided that, absent administrative waiver, 10% of the federal funds granted for local public works projects were to be used by the state or local grantees to procure services or supplies from businesses owned and controlled by members of statutorily defined minority groups.[64] Grantees were obliged to provide technical assistance for bonding, solicit federal aid for working capital, and guide minority contractors through the bidding process.[65] The administrative waiver provided that contractors that could not that could not find a qualified MBE were released from this requirement.[66]

The Court examined the (PWEA) using a two prong test assessing whether Congress had the power to enact the legislation, and whether race and ethnicity were constitutionally permissible conditions for achieving Congress's objectives.[67] The Court responded by giving significant deference to Congress's remedial powers, "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with the competence and the authority to enforce equal protection guarantees."[68]

Chief Justice Burger's plurality opinion joined by Justice White, and Justice Powell upheld the Act and rejected the argument that this 10% minority requirement violated the Equal Protection Clause of the 14th Amendment.[69] The Chief Justice reasoned that Congress's legislative authority under Section Five of the 14th Amendment provides sufficient protection for such a program.[70] The Court concluded that, "[A] great deal of deference should be accorded to race-conscious measures taken by Congress, especially when Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination."[71]

The Court further concluded that Congress's goal of fostering equal opportunities for minority businesses to obtain federal grants was within the scope of Congress's spending power, the Commerce Clause, and the 14th Amendment.[72] Congress had legitimately enacted the (PWEA) to give minority groups equitable footing with respect to public contracting opportunities and not to bestow a preference over other contractors.[73]

The Court in *Fullilove* failed to explicitly adopt a specific standard of review. However, Chief Justice Burger and Justice Powell averred that the Act at issue in this case would have satisfied strict scrutiny. Chief Justice Burger concluded, "[R]egardless of whether strict or intermediate scrutiny applied to the program, the program did not violate the United States Constitution."[74]

Justice Stewart's dissenting opinion was joined by Justice Rehnquist and argued that the Equal Protection Clause prohibited "invidious discrimination" by both federal and state governments.[75] Justice Stewart further stated that the Court's decision would have the negative long term consequences of reinforcing a baseless stereotype that certain groups are unable to achieve success without special government assistance.[76] To prevent this effect Justice Stewart reasoned the Court should adopt a strict scrutiny, equal protection analysis for both federal and state affirmative action and minority assistance programs.[77] Justice Stevens dissented from the Court's holding possessing the opinion that there should be absolute prohibitions on all statutory race classifications.[78]

D. City of Richmond v. Croson

In 1989, the Supreme Court returned to the principles established in Fullilove with the case of *City of Richmond v.J.A. Croson.*[79] This case involved a state mandated set-aside program that was modeled after the federal program upheld in Fullilove.

The Court found that the local population was 50% African American, while only .67% of the city's contracts were awarded to minority business enterprises. In order to counteract this situation, the city adopted a program requiring non-minority owned prime contractors to subcontract a minimum of 30% of the dollar amount of each city construction contract to one or more MBE's.[80]

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[63] *Fullilove v. Klutznick* 448 U.S. 448 (1980).
[64] 448 U.S. 448 , 453-453 (1980).
[65] *Id.* at 480.
[66] *Id.*
[67] *Id.* at 473.
[68] *Id.* at 483.
[69] *Id.* at 492.
[70] *Id* at 483-484.
[71] *Id.* at 477-478.
[72] *Id.* at 478.
[73] *Id.* at 486.
[74] *Id.* at 492.
[75] *Id.* at 527-528.
[76] *Id.* at 531.
[77] *Id.* at 523.
[78] *Id.* at 532.
[79] *City of Richmond v.J.A. Croson,* 488 U.S. 469 (1989).
[80] 488 U.S. 469, 478 (1989).

Richmond's plan also devised an administrative waiver in the event that to MBE's were unavailable.[81] Through this legislation, city legislators intended to remedy past discrimination that minority businesses had experienced in the local construction industry.[82]

Petitioner, J.A. Croson was denied a waiver and subsequently lost a city project when it failed to meet the city's minority subcontractor requirements. Croson filed suit alleging that Richmond's plan violated the Equal Protection Clause.[83] The district court's decision upholding the program was reversed by the Fourth Circuit, and the Supreme Court affirmed.

Justice O'Connor wrote the plurality opinion for the Court. The Court held that attempting to remedy the effects of past discrimination, whether public or private, constituted a compelling interest that could justify government racial classifications.[84] The government could remedy the effects of its own discrimination and the government could remedy the effects of private discrimination that occurred within its jurisdiction where the government was acting as a passive participant, and had helped perpetuate that discrimination.[85] The Court ruled however, that the programs could not be based upon general societal discrimination. "[W]hile there is no doubt that the sorry history of both public and private discrimination in this country has contributed to the lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia."[86] Richmond was required to specifically describe the discrimination that it intended to rectify through this affirmative action program.

In holding the plan to be unconstitutional Justice O'Connor was joined by Chief Justice Rehnquist, and Justices White and Kennedy in adopting strict scrutiny as the standard of review for all racial classifications.[87] Justice Scalia agreed with the four justices that strict scrutiny should be applied to all racial classifications, although he declined to join O'Connor's opinion because he did not believe that remedying the effects of past discrimination could ever justify the government's use of racial classification.[88] The Court further applied the two prong strict scrutiny test. In regard to the first prong, "Absent clear evidence of existing discrimination, remedying present effects of past discrimination is generally the only acceptable compelling interest for this type of affirmative action program."[89]

The second prong of the test requires that in order to be narrowly tailored the program must satisfy several requirements: It must be of limited duration; it cannot place undue burdens on third parties; it must be tied to the relevant labor market; and there must not exist a feasible race neutral alternative. The Court found that Richmond failed all prongs of the test.[90]

The Richmond program did not meet the strict scrutiny test because the city failed to present evidence to show that the government contractors were discriminating against minority businesses.[91] The program also constituted an inflexible and rigid numerical quota that failed to disqualify minority applicants that had not been victims of past discrimination.[92] Finally, the program was over-inclusive. Although the city claimed an intent to remedy discrimination against African-Americans, the ordinance also named members of other races as beneficiaries of the program.[93]

The Court distinguished this case from *Fullilove*[94] in recognizing that Fullilove involved an enactment by a co-equal branch of the federal government, Congress, while Croson involved a local program. Thus Congress's finding, that there existed historical discrimination in the public works area was entitled to a degree of deference greater than that due to Richmond.[95] Justice O'Connor stated,

> "[T]hus, while generalized findings by Congress of historical discrimination were sufficient to justify their use of racial classifications in remedial legislation, the city of Richmond was required to particularize its findings of private discrimination, essentially showing that it had been a passive participant in a system of racial exclusion practiced by elements of the local construction industry."[96]

Justices Marshall, Brennan, and Blackmun adhered to the same view that they had expressed in *Bakke*, "race conscious classifications designed to further remedial goals must serve governmental objectives and must be

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[81] *Id.* at 478-479.
[82] *Id.* at 499.
[83] *Id.* 481-483.
[84] *Id.* at 492.
[85] *Id.*
[86] *Id.* at 499.
[87] *Id.* at 492-493.
[88] *Id.* at 520.
[89] *Id.* at 498-506.
[90] *Id.* at 508.
[91] *Id.* at 504-506.
[92] *Id.* at 508.
[93] *Id.* at 506.
[94] Fullilove v. Klutznick, 448 U.S. 448 (1980).
[95] *Id.* 490- 492.
[96] *Id.* at 492.

substantially related to achievement of those objectives in order to withstand constitutional scrutiny."[97] Justice Marshall believed that remedial racial classifications should not be subjected to the Court's traditional strict level of scrutiny which he characterized in *Fullilove* as, "scrutiny that is strict in theory but fatal in fact."[98] Applying their intermediate level of scrutiny, the dissenting Justices believed that the statistical disparities and the congressional findings of past nationwide discrimination, which were rejected by O'Connor, were sufficient bases to justify the city of Richmond's remedial use of racial classifications.[99]

E. Metro Broadcasting v FCC

Only one year after its decision in *Croson,* the Court revisited the issue of the standard of review to be applied in evaluating remedial racial classifications in *Metro Broadcasting, Inc. v. FCC.*[100] This case involved a congressionally mandated FCC program that sought to increase minority representation in the broadcasting industry. The program proposed to achieve increased minority representation in two ways:The FCC pledged to consider minority ownership as one factor in comparative proceedings for new licenses; and The FCC decided to allow broadcasters whose licenses had either been designated for a revocation hearing or whose renewal applications had been designated for a hearing, to assign the license to an FCC approved minority enterprise.[101]

The Plaintiff, Metro Broadcasting, lost a license to a minority owned business and filed suit against the FCC alleging that the congressionally-approved program was in violation of the 14th Amendment. In a 5 to 4 decision, the Court ruled the program constitutional after subjecting it to a less stringent standard of review, intermediate scrutiny.[102] Intermediate scrutiny requires that congressional race-conscious measures be substantially related to the achievement of an important government objective.[103]

The Court held that the preferences promoted an interest in providing a diverse programming content, and that the preferences were the only way to do this because the First Amendment limits the government's ability to control content directly.[104] The program also provided for administrative and judicial review of all Commission decisions and, according to the majority, did not impose an undue burden on non-minorities.[105]

Writing for the Court, Justice Brennan found it, "of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved — indeed, mandated by Congress."[106] Therefore, Brennan distinguished this case from *Croson* by interpreting *Croson* as deeming proper standard of review to be used when examining state and local affirmative action programs, not those created by Congress to which the Court owes appropriate deference.[107]

Through this narrow majority, the Supreme Court, for the first time, upheld an affirmative action program with a middle tier analysis based on reasons other than remedying past racial discrimination.[108] The four dissenters argued that under a strict scrutiny review, the programs would not comply with the established Constitutional principles.[109] Justice O'Connor argued that the Courts holding in Fullilove stood only for the proposition that Congress may enact measures that seek to remedy identified past discrimination affecting a particular industry.[110] Finally, Justice O'Connor criticized the majority's toleration and acceptance of benign racial classifications as unwise, in light of historical evidence that racial classifications must be viewed suspectly and strictly scrutinized.

Although this case helped to clarify the Court's decisions in *Fullilove* and *Croson,* the question of standard of review still remained at issue. This unanswered question set the stage for the *Adarand*[111] case.

III. The Turning Point of Affirmative Action- The Adarand Decision.

In June, 1995, the Supreme Court extended the rigorous strict scrutiny standard of review to federal race based preference programs in *Adararand Constructors, Inc. v. Pena.*[112] In 1989, The Central Federal Lands Highway Division, a part of the United States Department of Transportation (D.O.T.) awarded the prime contract for a highway construction project in Colorado to Mountain Gravel and Construction Company. The contract was subject to the Surface Transportation & Uniform Relocation Assistance Act of

97 Id. at 535.
98 Id. at 552 (quoting Fullilove v. Klutznick, 448 U.S. 519 (1980).
99 Id. at 541-548.
100 Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).
101 497 U.S. 547 (1990).
102 497 U.S. 498-506.
103 Id.
104 Id. at 569-584
105 Id.
106 Id. at 563.
107 Id.
108 Id. at 603.
109 Id. at 602.
110 Id. at 607.
111 Adarand Constructors v. Pena, 115 S.Ct. 2097 (1995).
112 115 S.Ct. 2097 (1995).

1987 (STURAA), a federal appropriations measure. Under STURAA, 10% of appropriated funds were targeted to be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals, with certain racial groups and women being presumed to qualify as such.[113]

The Small business Act provided that Subcontractor Compensation Clauses (SCC's) were to be included in most federal agency contracts in order to achieve targeted goals.

These SCC's award contractors an extra 10% of the subcontract price if they hire one or more disadvantaged business enterprises (DBE's) as subcontractors.

As the D.O.T. policy required, Mountain Gravel's contract provided that as prime contractor, it would receive a monetary bonus if it employed DBE's.[114] According to contract specifications, Mountain Gravel solicited bids from subcontractors to install guardrails along the highway. Adarand Constructors, Inc., a company that specialized in guardrails, submitted the lowest bid. However, Mountain Gravel took advantage of its option to receive a $10,000 bonus on its $1 Million contract by awarding the subcontract to another bidder, Gonzales Construction Company.[115] Logically, Gonzales, a Hispanic company, was certified as a DBE while Adarand, a non-minority owned firm was not.[116]

Adarand Construction brought suit against the Secretary of Transportation alleging that the SCC program violated the Fifth and Fourteenth Amendments, as race and gender were being considered as factors in awarding federal contracts in Colorado, without any findings of past discrimination in the state.[117]

The District Court for the District of Colorado granted summary judgment in favor of the Federal Government.[118] On appeal this judgment was affirmed by the Tenth Circuit.[119] The Supreme Court Granted certiorari in order to revisit the question of what level of equal protection scrutiny should apply to benign race based classifications authorized by Congress.

In a 5-4 decision the Supreme Court vacated and remanded the district courts judgment.[120] Writing for the majority Justice O'Connor, accompanied by Justices Rehnquist and Kennedy who joined the entire opinion, and Justices Scalia and Thomas, who joined most of the opinion, disposed of the issue of Adarand's standing to bring suit,[121] and turned to the central issue in the case; Whether Congress has wider discretion than do states and local governments to authorize race based affirmative action programs? The majority considered the Court's cumulative reasoning in *Fullilove, Croson,* and *Metro Broadcasting.* The Court relied on *Croson,* when it held that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,[122] and overruled *Metro Broadcasting,* in holding that all programs containing racial classifications, whether created by federal, state, or local government were to be subject to a single standard of review, strict scrutiny under the Equal Protection Clause.[123] Essentially, the Court expanded it's holding in *Croson* to include benign race conscious federal actions. The Court remanded the case for determination of whether the legislation at issue was narrowly tailored to meet a compelling government interest.

Although *Adarand* imposed a stricter standard for all race preference policies, several Justices noted that there may be instances where a policy will survive this rigorous test.[124] Specifically, Justice O'Connor made it clear that the Court's decision did not signal the end of affirmative action, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this Country is an unfortunate reality, and government is not disqualified from acting in response to it... When race based action is necessary to further a compelling government interest, such action is within constitutional constraints if it satisfies the narrow tailoring test that the Court has set out in previous cases."[125]

Writing for the plurality, Justice O'Connor, joined by Justice Kennedy, justified the majority opinion's deviation from the doctrine of stare decisis.[126] The plurality attacked the decision in *Metro Broadcasting* as, "creating an indefensible deviation from the tenets of equal protection, and also differentiating racial classifications between state and federal action."[127] Thus, the plurality characterized *Metro Broadcasting* as a misapplication, and proceeded to apply the principle that all racial classifications were subject to strict scrutiny.[128]

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113 115 S.Ct . at 2102 (1995).
114 *Id.*
115 *Id.*
116 *Id.* at 2097.
117 *Id.* at 2014.
118 *Adarand Constructors, Inc. v. Skinner,* 790 F.Supp. 240, 245 (D. Colo. 1992).
119 *Adarand Constructors, Inc. v. Pena,* 16 F.3d 1537, 1547 (10th Cir. 1994).
120 *Id.* at 2102.
121 *Id.* at 2104.
122 *Croson* 448 U.S. at 494.
123 114 S.Ct. at 2113.
124 *Id.* at 2117.
125 *Id.*
126 *Id.* at 2114
127 *Id.* at 2115
128 *Id.* at 2117.

In his dissent, Justice Stevens criticized virtually the entire majority opinion.[129] First, he criticized the majority for its supposed inability to differentiate between invidious and benign discrimination.[130] Second, he criticized the majority for refusing to recognize a significance between affirmative action legislation by the federal government, and the state and local governments.[131] Addressing the issue of stare decisis, Stevens argued that the majority's decision was a departure from the precedent set in *Fullilove* and *Metro Broadcasting,* upholding federal affirmative action programs in deference to Congress, rather than a return to precedent.[132] Justice Souter agreed that the Court's prior decision in Fullilove applied, and noted that the majority failed to contest the factual findings of discrimination in the construction industry upon which *Fullilove* was based. Therefore, according to Justice Souter stare decisis required the Court to uphold the programs at issue.[133]

Justice Ginsberg stated in her dissent that the majority's reason for strict scrutiny of all racial classifications was to, "ferret out classifications in reality malign, but masquerading as benign,"[134] and thus strict scrutiny should not necessarily be fatal to legitimate affirmative action programs.[135] Thus, while she agreed with Steven's argument of according deference to Congress and the precedential value of *Fullilove,* she optimistically viewed the Court's opinion as, "one that allows our precedent to evolve, still to be informed by and responsive to changing conditions."[136] Finally, Justices Stevens, Ginsberg, and Breyer disagreed with the determination that strict scrutiny is not, "strict in theory, fatal in fact."[137]

IV. AFFIRMATIVE ACTION AND HIGHER EDUCATION

Although *Adarand* specifically tried to dispel the notion that, "strict scrutiny in theory does not mean fatal in fact,"[138] the national trend against race-based preference policies may result in the Equal Protection Clause becoming a barrier to diversification. Recently, two federal courts struck down state racially-based post-secondary education programs tied to the admissions process.[139] These holdings are representative of the conservative trends towards which many judicial institutions are beginning to lean. In both of these cases, federal courts considered the issue of whether race- based preference programs that are part of educational admissions policies violated the Equal Protection Clause. In each case the court applied strict scrutiny.

A. Podbersky v. Kirwan

In *Podbersky v. Kirwan,*[140] the United States Court of Appeals for the Fourth Circuit considered whether a race-based scholarship program, which was connected to the University of Maryland admissions program violated the Equal Protection Clause. Daniel Podbersky, a twenty-two year old Hispanic student with a superior high school grade point average, applied for a Benjamin Banneker Scholarship offered at the University of Maryland which was available to African-American students.[141] Although Podbersky's academic credentials far exceeded the minimum requirements, he was unable to compete for the scholarship because he was not African-American. The University of Maryland had adopted the scholarship to counter the black and white segregation that prevalent in the school system.[142] On finding that he was forbidden from competing for the scholarship, Podbersky filed suit against the University of Maryland, alleging that the university had violated the Equal Protection Clause by denying him the opportunity to compete for the scholarship. Podbersky sought injunctive and compensatory relief, claiming that the University's program violated Title VI and 42 U.S.C. §§ 1981 and 1983.[143]

The trial court found that the race-based program triggered strict scrutiny and would be assessed as such.[144] It would uphold the University's program only if they could demonstrate that the program was narrowly tailored to achieve compelling government interest in accordance with *Croson.*

Accordingly, the University would have to prove present effects of past discrimination in order to justify the selectivity of the scholarship.[145] The court granted summary judgment for the University of Maryland and Podbersky appealed.[146]

The Fourth Circuit held that the trial court had correctly found that scholarship program should be exam-

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[129] *Id.* at 2120-2120.
[130] *Id.*
[131] *Id.* at 2122-2123
[132] *Id.* at 2127.
[133] *Id.* at 2131-2132.
[134] *Id.* at 2136.
[135] *Id.* at 2135.
[136] *Id.* at 2136.
[137] *Id.* at 2117.
[138] *Id.* at 2101.
[139] See *Podbersky v. Kirwan,* 38 F.3d 147 (4th Cir. 1994).; *Hopwood v. Texas,* 861 F. Supp. 551 (W.D.Tex. 1994).
[140] 956 F.2d 52 (4th Cir. 1992).
[141] *Id.* at 54-55.
[142] *Id.*
[143] See *Podbersky v. Kirwan,* 764 F.Supp. 364, 366 (D.Md. 1991).
[144] 956 F.2d at 54 (4th Cir. 1992)
[145] *Id.* at 55
[146] *Id.* at 53.

ined under the Equal Protection Clause.[147] However, the court held in applying the strict scrutiny test, that the lower court erred in granting summary judgment, since that remedy did not permit the court to find that there were still present effects of past discrimination.[148] The court reversed and remanded.[149]

On remand the district court found that the University of Maryland's program was justifiable given the sufficient evidence of present effects of past discrimination and the fact that the program was narrowly tailored.[150] Podbersky again appealed to the Fourth Circuit.

The court again applied strict scrutiny to the scholarship program.[151] This time the court found no compelling government interest to justify the program since they determined there were no present effects of past discrimination, rejecting the University of Maryland's claim that a poor reputation in the African American community and a racially hostile environment on campus were sufficient to justify the scholarship program. The court held that "mere knowledge of historical acts is not the kind of present effect that can justify a race exclusive remedy."[152] The court acknowledged the findings of past discrimination, but determined that they did not establish any present effects of past discrimination. Finally, the Court concluded that there was indeed evidence that the scholarship violated the Equal Protection Clause.[153] The Fourth Circuit reversed and remanded for judgment in favor of Podbersky. Ultimately, the Supreme Court declined to review this case, letting stand the Fourth Circuit's opinion which invalidated the scholarship program.[154]

B. Hopwood v. Texas

In August, 1994, a United States district court in *Hopwood v. Texas,*[155] considered whether the University of Texas School of Law's 1992 diversity admissions policy violated the Equal Protection Clause of the 14th Amendment and Title VI. This case began when four white law school applicants sued the University of Texas Law School, claiming that they had been denied admission while African-Americans and Mexican-Americans with lower grade point averages and LSAT scores, had been offered admission.[156] In 1992, the year that the plaintiffs were denied admission, the law school had one admissions committee for minorities and a separate committee for non-minority applicants.[157] Consequently, when reviewing a particular file, a member of the minority committee could not consider a particular minority application against the non- minority applicants.[158] The admissions committee also set distinct numerical cut-offs for African- Americans, Mexican Americans, and others.[159]

The University of Texas advanced several rationales for its affirmative action program, including promoting diversity, providing opportunities for the largest minority groups in Texas, and remedying past discrimination through the educational system.[160] The district court agreed that diversity and remedying past discrimination were compelling interests. However, relying on Justice Powell's decision in Bakke, the court held that the law schools use of a separate committee failed to pass constitutional muster because it was not narrowly tailored to meet the goals of diversity and reversing discrimination.[161] Ultimately, the court held that the policy violated the 14th Amendment because it failed to afford each individual applicant a comparison with the entire pool of applicants.[162]

The court acknowledged the imperative goal of diversity in the educational environment. Further, the court agreed with Justice Powell's opinion in *Bakke* that race or ethnicity could be considered a plus factor in a school's consideration of a particular applicant.[163] However, University's dual admission policy insulated applicants from review against each other, a process which the *Bakke* Court found unacceptable.[164] A school that does not permit a comparison between minority and non-minority applicants unfairly favors one group over another.[165]

Although the court ruled unconstitutional the dual admissions policy in *Hopwood,* it also just as importantly recognized the value that the Supreme Court placed on diversity. Under *Hopwood,* admissions committees may consider race as a factor that is weighted against the characteristics that non-minority applicants posses. In fact, the court held that with the exception of separately reviewing minority candidates, the admissions committees treated applicants similarly. The court suggested that it would have upheld the admissions policy absent the separate reviewing committees.[166] This proposition rings

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[147] *Id.* at 55.
[148] *Id.* at 57.
[149] *Id.*
[150] 38 F.3d 147, 151 (1994).
[151] *Id.* at 153.
[152] *Id.* at 155.
[153] *Id.* at 161.
[154] *Podbersky v. Kirwan,* 115 S.Ct. 297 (1995).
[155] *Hopwood v. Texas,* 861 F. Supp. 551 (W.D.Tex. 1994).
[156] 861 F.Supp. at 553.
[157] *Id.* at 558.
[158] *Id.* at 562.
[159] *Id.* at 561-562.
[160] *Id.* at 569-570.
[161] *Id.* at 578-579.
[162] *Id.* at 579.
[163] *Id.* at 578.
[164] See *Bakke,* 438 U.S. at 317.
[165] *Hopwood,* 861 F.Supp. at 578.
[166] *Id.* at 495.

of the pronouncement made by the Court over 40 years ago in *Brown,* "separate but equal is inherently unequal."[167]

V. CONCLUSION

On July 1, 1996 the Supreme Court denied a petition for writ of certiorari. Surprisingly, along with the denial of certiorari an opinion explaining the denial was also issued.[168] Justice Ginsburg, accompanied by Justice Souter impressed, "[t]he importance of the issue of the constitutionality of a public college or graduate school using race or national origin as a factor in its admissions process is a matter of great national importance."[169] However, the University of Texas was no longer challenging the lower court's judgment that the admissions procedure was unconstitutional.[170] Instead, petitioners challenged the rationale relied on by the Court of Appeals. Accordingly Justice Ginsberg stated, "we must await a final judgment on a program genuinely in controversy before addressing the important issue raised in this petition."[171]

This rare explanation of the denial of certiorari may be indicative of the fact that the Supreme Court realizes the excessive importance of this particular issue, and does not want the denial to be read as a lack of concern on the part of the Court. It seems it is also almost an invitation to revisit this issue. The Court apparently would have preferred to rule on the issue. However the petitioner vacated the constitutionality problem of the admissions policy, having discontinued the policy, and challenged an issue that the Court was unable to review.

Based on current trends, as plaintiffs continue to challenge higher education admissions policies, reviewing courts will most likely apply a strict scrutiny test conservatively. As affirmative action in higher education stands today, the Supreme Court has indicated the level of magnitude that this issue warrants, and hypothetically, it is still possible to construct a diversified admissions policy that will withstand strict scrutiny muster.

As we await an opportunity for the Supreme Court to hear another affirmative action case one of the only things that appears certain is that strict scrutiny is the standard to be applied. However, the Court has applied various gradients of strict scrutiny leaving no clear standards or guidelines that must be met. It is crystal clear however, that the ability to construct a constitutionally acceptable affirmative action admissions program has become increasingly difficult and controversial.

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[167] *Id.* at 495.
[168] *Texas v. Hopwood,* 116 S.Ct 2581 (1996).
[169] 116 S.Ct 2581 (1996).
[170] *Id.*
[171] *Id.*