

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1998

CENTRAL UNIVERSITY SCHOOL OF LAW  
&  
COMMONWEALTH OF DAVIS, Petitioners

v.

Ewing T. BOLES, Respondent

No. 98-100414

September 1, 1998.

ORDER

Case below, *Boles v. Central Univ. School of Law*, 200 F.3d 114 (1998).

The petition for writ of certiorari to the United States Court of Appeals for the Sixteenth Circuit is hereby granted limited to the following two questions:

- 1) Whether a compelling state interest exists to justify, under the Equal Protection Clause of the United States Constitution, the use of race as a factor in Central University School of Law's admissions policy; and
- 2) Whether the admissions program at Central University School of Law is narrowly tailored to accomplish that goal.

Probable jurisdiction noted, and a total of one half hour allotted for oral argument.

The briefs of the parties are to be filed with the Clerk of the Court on or before 6:00 p.m., Friday, September 25, 1998. Cases are set for oral argument in the October 1998 term of this Court.

Ewing T. BOLES,  
Plaintiff-Appellant

v.

CENTRAL UNIVERSITY  
SCHOOL OF LAW  
&  
COMMONWEALTH OF DAVIS,  
Defendants-Appellees

No. 97-CV-1003

United States Court of Appeals,  
Sixteenth Circuit

May 8, 1998

Maureen S. McDeb, Circuit Judge:

With the best of intentions, in order to increase the enrollment of certain favored classes of minority students, Central University Law School (“the law school”) discriminates in favor of those applicants by giving substantial racial preferences in its admissions program. The question we decide today is whether the Fourteenth Amendment permits the school to discriminate in this way.

We hold that it does not. 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.

This court adopts all findings of fact from the court below.

#### I. Standard of Review

The district court recognized the proper constitutional standard under which to evaluate the admissions program: strict scrutiny. The central purpose of the Equal Protection Clause “is to prevent the States from purposefully discriminating between individuals on the basis of race.” *Shaw v. Reno*, 509 U.S. 630, 642 (1993). It seeks ultimately to render the issue of race irrelevant in governmental decision making. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Accordingly, discrimination based upon race is highly suspect.

There is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications including those characterized by their proponents as benign or remedial. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (overruling *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990), insofar as it applied

intermediate scrutiny to congressionally mandated benign racial classifications); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) (“[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to government discrimination.”).

Under the strict scrutiny analysis, we ask two questions: (1) does the racial classification serve a compelling government interest; and (2) is it narrowly tailored to the achievement of that goal? *Adarand*, 515 U.S. at 235. With these general principles of equal protection in mind we turn to the specific issue of whether the law school’s consideration of race as a factor in admission violates the Equal Protection Clause. The defendants argue that two interests support the use of race in admission decisions at Central University; (1) the goal of having a diverse student body; and (2) a remedy for the present effects of past discrimination in both the Central University system and the Davis educational system as a whole.

## II. Diversity

Justice Powell’s separate opinion in *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), provided the original impetus for recognizing diversity as a compelling state interest in higher education. In that case, Allan Bakke, a white male was denied admission to the Medical School of the University of California at Davis, a state run institution. Claiming the State had discriminated against him impermissibly because it considered race in its medical school admissions he brought suit under the Equal Protection Clause. In a plurality opinion announced by Justice Powell, the United States Supreme Court struck down the program on equal protection grounds and ordered that Bakke be admitted but refused to enjoin any consideration of race in the admissions process. The court, however, reached no consensus on a justification for its result.

Specifically, Justice Powell accepted diversity as a sufficient justification for limited racial classification. “[The attainment of a diverse student body] clearly is a constitutionally permissible goal for an institution of higher education.” *Id.* at 311. He therefore approved of race as “one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” *Id.* at 314. Justice Powell ultimately held that the medical school’s program was not narrowly tailored to that goal because it set quotas for races in admissions but that a program that considered a host of factors including race would be constitutional even if an applicant’s race “tips the scales” among qualified applicants. *Id.* at 318.

Justice Powell’s argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. While he announced the judgment, no other justice joined in that part of the opinion discussing the diversity rationale. Thus, only one Justice concluded that race could be used solely for the reason of obtaining the benefits of a diverse student body. The *Bakke* court did not express a majority view and is questionable as binding precedent. *Adarand*, 515 U.S. at

218. Since *Bakke*, the court has accepted the diversity rationale in only one of its cases dealing with race. Significantly, however in that case, *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 564-565 (1990), the majority relied on an intermediate scrutiny standard of review to uphold the federal program seeking diversity in the ownership of broadcasting facilities. In *Adarand*, the court specifically rejected intermediate scrutiny as the standard of review for racial classifications. *Metro Broadcasting* therefore is overruled to the extent it was in conflict with this holding. *Adarand*, 515 U.S. at 227.

No case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis. Recent Supreme Court opinions show that the diversity interest will not satisfy strict scrutiny. The Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs. *See Croson*, 488 U.S. at 493. (plurality opinion) ("Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *See also Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir. 1991) ("The whole point of *Croson* is that disadvantage, diversity or other grounds for favoring minorities will not justify governmental racial discrimination. . .; only the purpose of remedying discrimination against minorities will do so."), *cert. denied*, 500 U.S. 954 (1991).

Accordingly, we see the case law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity even as part of the consideration of a number of factors, is unconstitutional. Any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.

In sum, the use of race to achieve a diverse student body, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny. Consequently, we need not consider the plaintiff's alternative argument that the Central University plan does not pass scrutiny under *Bakke*.

### III. Remedial Purpose

We now turn to the argument that the remedial purpose of the law school's affirmative action program is a compelling government objective. The Plaintiff argues that the law school cannot employ racial criteria to remedy the present effects of past discrimination in Davis' primary and secondary schools. The Plaintiff contends that the proper unit for analysis is the law school and the state has shown no recognizable present effect of the law school's past discrimination. The law school in response notes Davis' well documented history of discrimination in education and argues that its effects continue today at the law school both in the level of educational attainment of the average minority applicant and in the school's reputation.

Before addressing the validity of this interest, clarification of an important constitutional principle is required. When evaluating the proffered governmental interest

of a specific racial classification, to decide whether the program in question narrowly achieves that interest, we must recognize that “the rights created by. . . the Fourteenth Amendment are, by its terms, guaranteed to the individual.” *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). Thus, the Supreme Court consistently has rejected arguments conferring benefits on a person based solely upon his membership in a specific class of persons. As a result, racial classifications cannot be justified as a remedy for societal discrimination against a group as a whole under the Constitution. See *Croson*, 488 U.S. at 498-500 (plurality opinion) (holding that past societal discrimination against a group confers no basis for local governments to provide a specifically tailored remedy to current members of that group); *Wygant*, 476 U.S. at 288 (O’Conner, J., concurring in part and concurring in judgment) (“I agree with the plurality that a government agency’s interest in remedying societal discrimination, that is discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.”).

A majority of the Supreme Court has held that a state actor may racially classify where it has a “strong basis in the evidence for its conclusion that remedial action was necessary.” *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)). Generally, in order to justify an affirmative action program the state must show there are present effects of past discrimination. *Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir. 1992). Because a state does not have a compelling state interest in remedying the present effects of past societal discrimination, we must determine whether the relevant governmental entity is the system of education within the state as a whole, the Central University or just the law school. Moreover, we must identify what types of present effects of past discrimination, if proven, would be sufficient under strict scrutiny review. Finally where the state actor puts forth a remedial justification for its racial classifications, the district court must make a “factual determination” as to whether remedial action is necessary. *Wygant*, 476 U.S. at 277-279. (plurality opinion).

The Supreme Court has “insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.” *Id.* at 274. (plurality opinion of Justice Powell). The state’s use of remedial racial classifications is limited to the harm caused by a specific state actor. *Wygant*, 476 U.S. at 286 (opinion of O’Connor, J., concurring in part and concurring in judgment) (“The Court is in agreement that whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant remedial use of a carefully constructed affirmative action program.”).

The *Croson* Court discussed how to identify the relevant past discriminator. The court struck down a minority business set-aside program implemented by the City of Richmond and justified on remedial grounds. The court held, “... a generalized assertion that there had been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It has no logical stopping point.” *Croson*, 488 U.S. at 498 (plurality opinion). The court refused

to accept indicia of past discrimination in anything but the Richmond construction industry. *Id.* at 505.

The Court analogized the employment contractor situation to that of higher education and noted that “[l]ike claims that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.” *Id.* at 499. The school desegregation cases provide another example. They concentrate on school districts - singular government units - and the use of interdistrict remedies is strictly limited. See *Missouri v. Jenkins*, 515 U.S. 70, 87 (1995); *Milliken v. Bradley*, 418 U.S. 717, 745 (1974). We therefore reject the defendant’s argument that the government actor in this case is the Davis educational system as a whole.

We further reject the proposition that the Central University system, rather than the law school, is the appropriate governmental unit for measuring a constitutional remedy. The law school operates as a functionally separate unit within the system with its own admissions program. For the same reason that we rejected the Davis educational system as the proper unit of measure, we conclude that the Central University system is too expansive an entity to scrutinize for past discrimination. In sum, for purposes of determining whether the law school’s admission system properly can act as a remedy for the present effects of past discrimination, we must identify the law school as the relevant alleged past discriminator.

Next, the relevant governmental discriminator must prove that there are present effects of past discrimination of the type that justify the racial classifications at issue. To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program. *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

The present effects accepted by the district court are the law school’s reputation in the minority community as a “white school”; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities. *Boles v. Central Univ. School of Law*, No. 97-2432, slip op. at 3 & 9 (W.D. Davis January 28, 1998). The district court erred in concluding that the first and third effects it identified, bad reputation and hostile environment were sufficient to sustain the use of race in the admissions process.

The *Podberesky* court rejected the argument that a school’s reputation can justify racial classifications. “Mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books there will be [affirmative action] programs.” *Podberesky*, 38 F.3d at 154. Further, we reject the hostile environment claims. This effect is equivalent to racial tensions, which are the result of present societal

discrimination. *Id.* at 155. All discrimination by the law school ended in the 1960's and the vast majority of the faculty, staff and student at the law school today had absolutely nothing to do with any discrimination that the law school practiced in the past. In such a case, one cannot conclude that a hostile environment is the present effect of past discrimination.

The final effect put forward is underrepresentation of minorities because of past discrimination. No one disputes that Davis has a history of racial discrimination in education. However, the *Croson* Court unequivocally restricted the proper scope of the remedial interest to the state actor that had previously discriminated. *Croson*, 488 U.S. at 499. The district court found that in recent history there is no evidence of overt, officially sanctioned discrimination at the Central University School of Law. *Boles v. Central Univ. School of Law*, No. 97-2432, slip op. at 8 (W.D. Davis, January 28, 1998). Past discrimination in education other than the law school cannot justify the present consideration of race in law school admissions.

The law school has failed to show a compelling state interest in remedying the present effects of past discrimination sufficient to maintain the use of race in its admissions system. It is therefore unnecessary to examine whether the law school's admissions program is narrowly tailored to meet these interests.

IT IS ORDERED, ADJUDGED, and DECREED that the admissions procedure of the law school at Central University is in violation of the Fourteenth Amendment of the United States Constitution. The Court hereby ENJOINS all further consideration of race in the Central University School of Law admissions process and ORDERS Appellant's admission to the law school.

Judgment REVERSED.

Ewing T. BOLES,  
Plaintiff

v.

CENTRAL UNIVERSITY  
SCHOOL OF LAW  
&  
COMMONWEALTH OF DAVIS,  
Defendants

No. 97-CV-2432

United States District Court  
W.D. Davis

January 28, 1998

Breckenridge, District Judge

The plaintiff, Ewing T. Boles, a Caucasian male, has brought suit against the defendants alleging violations of the Fourteenth Amendment, 42 U.S.C. § 1981 (1994), 42 U.S.C. § 1983 (1994), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994).<sup>1</sup> All of these provisions prohibit discrimination because of race. For the alleged violations, plaintiff seeks injunctive and declaratory relief, as well as compensatory and punitive damages. The plaintiff contends that the defendants discriminated against him by favoring less qualified minority applicants for admission to Central University School of Law.

This case focuses on one of the most divisive issues faced by society, affirmative action, and highlights the tension that exists when individual rights of non-minorities come into conflict with programs designed to aid minorities. Mr. Boles contends that any preferential treatment to a group based on race violates the Fourteenth Amendment and therefore is unconstitutional.

**I. Historical Background**  
**A. Discrimination in Primary and Secondary Education.**

The history of official discrimination in primary and secondary education in Davis is well documented in history books, case law, and the record of this trial. The Court, therefore, will address it only in summary fashion.

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<sup>1</sup> The plaintiffs' Title VI, § 1981, and § 1983 claims serve as vehicles to enforce underlying rights guaranteed by the Fourteenth Amendment. Therefore, the law school's admissions program must be evaluated under the equal-protection clause of the Fourteenth Amendment. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 286-287 (1978).



Even after the Supreme Court's decision in *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), the Commonwealth of Davis adopted a policy of official resistance to integration of its public schools. This policy of resistance resulted in numerous lawsuits and court-imposed desegregation plans throughout the past thirty years. Many of the school districts found to be operating dual systems of education were also found to practice official discrimination against African American and Native American students.

The problem of segregated schools is not a relic of the past. Despite the fact that the public school population is approximately 58% Caucasian, 30% African American and 12% Native American, minority students in Davis attend primarily majority minority schools while Caucasian students attend primarily Caucasian schools. More than 75% of African American students attend schools that are at least 82% African American. Further, as of May 1996, desegregation lawsuits remained pending against twenty Davis school districts.

The lack of educational opportunity for minorities has been compounded by the lower socioeconomic status of minorities in Davis. Statistics continue to indicate significant disparities between minority and non-minority students in skills and academic knowledge attained in the public schools. Although the generally lower socioeconomic status of African American and Native American families is partially accountable for some of the disparities, the gap is exacerbated by historically inferior educational preparation of minorities. 76% of schools with a majority minority student body are in older buildings lacking adequate library and laboratory facilities. Further, at each educational level, there is a marked decline in the level of attainment by minorities, as reflected in comparison of drop-out rates between minorities and non-minorities and the percentages of the respective groups that graduate from high school and college.<sup>2</sup>

### **B. Discrimination in Higher Education.**

As with primary and secondary education, Davis' system of higher education has a history of state-sanctioned discrimination. Discrimination against African Americans in the state system of higher education is well documented in history books, case law, and the State's legislative history. The Commonwealth of Davis, by constitution and statute, previously required the maintenance of "separate schools ... for the Caucasian and non-Caucasian children." Davis Const. art. VII, § 7 (1903, repealed 1955). This policy resulted in the establishment of segregated schools for African Americans that were inferior to the Caucasian schools. Further, opportunities available to African Americans to attend college were extremely limited.<sup>3</sup>

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<sup>2</sup> In 1995, the percentage of persons age 25 or older who completed high school was 81.5% of Caucasians, 66.1% of African-Americans, and 44.6% of Native Americans. College graduate rates for the same year reflect 25.2% of Caucasians, 12% of African Americans, and 7.3% of Native Americans.

<sup>3</sup> The Davis Legislature created Douglas Normal & Industrial College for Colored Teachers (now Douglas A & M University) for the education of "students to be taken from the colored population of this State." Until 1948, it remained the only state-supported institution of higher learning open to African American students in Davis; no type of professional training was available to African Americans. In 1948, to avoid integration of Central University, the Davis Legislature created the Davis State University for Negroes (now Davis Southern University) which included Davis State Law School. No college or university was founded in the Commonwealth for Native Americans.

In 1950, a unanimous United States Supreme Court ruled that the State of Texas' provisions regarding the legal education of Caucasian and minority students violated the Fourteenth Amendment and ordered that an African American be admitted to the previously all-Caucasian University of Texas School of Law. *Sweatt v. Painter*, 339 U.S. 629 (1950). In 1955 the legislators and citizens of Davis, concerned by this decision, altered Davis Constitutional Article VII Sec. 7 and dropped all official racial barriers under the Commonwealth's Constitution to gaining admission to Central University School of Law. However, the official policies of the law school prevented African Americans from gaining admission for seven more years. In 1962 the first African American was admitted to Central University School of Law; he did not graduate. The first African American graduated from the law school in 1967.

The record reflects that during the 1950s, and into the 1960s, Central University as a whole continued to implement discriminatory policies against both African American and Native American students. Native American students were segregated in on-campus housing and assigned to a dormitory known by both students and faculty members as the "Tepee," as well as excluded from membership in most university-sponsored organizations. Additionally, until 1965, the Board of Regents policy prohibited African Americans from living in or visiting Caucasian dormitories.

Beginning in the early 1970s, discrimination in Davis' system of higher education came under attack through a court-ordered investigation by the Department of Health, Education and Welfare (HEW) Office for Civil Rights (OCR). The court-ordered investigation of several states, including Davis, began in 1973 and inquired as to whether the states were complying with Title VI.<sup>4</sup> The federal government continues to supervise Davis' efforts to attract minority students to its colleges today.

The evidence presented at trial indicates that the law school has a lingering reputation in the minority community as a "white" school. Statistical studies indicate that 83% of African Americans and 31% of Caucasians still view Central University School of Law as a "white" school. Additionally, studies indicate that 71% of African Americans in the undergraduate institutions of Davis perceive that the law school has an environment that is hostile to minorities. Finally, an under-representation of minorities continues to exist in the law school's applicant pool. Admission and recruitment personnel find difficulties in attracting qualified minorities to enroll in the law school. Minority students testified about their hesitancy to participate in class when they are the sole minority or one of a few in the class. The minority students perceived a hostile racial environment on the campus of Central University Law School, which they assert is reflected in insensitive comments by fellow students and faculty.

Against this historical backdrop, the law school's commitment to affirmative action in the admissions process evolved.

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<sup>4</sup> Title VI proscribes discrimination that violates the equal protection clause of the Fourteenth Amendment. The prohibition against discriminatory conduct contained in Title V governs "program[s] or activitie[s] receiving federal financial assistance." 42 U.S.C. § 2000d.

## **II. Facts of the case**

### **A. Admissions Process**

The Central University Law School is one of this nation's leading law schools. Admission to the law school is fiercely competitive with over 3000 applicants competing for 300 places in each entering class. Numbers are therefore paramount for admission. The law school bases its initial admissions decisions on an applicant's Central University Index ("CUI"). The CUI is a composite score based 40% on an individual's undergraduate grade point average ("GPA") and 60% on the applicant's score on the LSAT. The LSAT score of an applicant is divided by three and the GPA of the student is multiplied by ten, then the two numbers are added together to compute the CUI score. A student who scores perfectly on the LSAT (180 points) and has a 4.0 GPA will have a CUI score of 100.

The law school uses the CUI scores to make initial determinations regarding admissions. In 1995, a CUI of 93 qualified an applicant for automatic admission to the law school. Any applicant with a CUI of less than 85 was automatically denied admission. Applicants with CUI scores between 85 and 92.99 fall within the "discretionary zone".

In 1995, a five member Admissions Committee composed of four professors and the Dean of Admissions met weekly to review the files in the discretionary zone. Pursuant to school policy, all African American and Native American candidates in the discretionary zone had two points added automatically to their CUI score. At the Committee's discretion, applicants within the discretionary zone could also have points added to or subtracted from their CUI for such factors as the strength of their undergraduate program, and participation in extracurricular activities. The Committee could, at its discretion, raise the scores of individual applicants further in order to enhance the School of Law's diversity. However, The Committee could not raise any candidate's score above 92.50. This policy ensured that highly qualified applicants in the discretionary zone would not be eliminated merely because they did not share some of the same attributes as applicants with lower CUI scores.

Pursuant to school policy, the 1995 Admissions Committee ranked all of the discretionary zone applicants based on their adjusted CUI scores. The law school offered the top ranked applicants admission until 350 total offers had been made, including automatic admissions. The next 100 applicants were placed on a ranked waiting list and offered admission on a rolling basis until the law school's 300 seats had been filled. All other applicants were denied admission to the law school.

The purpose of adjusting the automatic admission CUI score for African Americans and Native American students is to cause the law school's student population to reflect

approximately the same percentages of admitted minorities as graduates from undergraduate institutions in Davis. In general, the admissions policy has been successful in accomplishing this goal.<sup>5</sup>

### **B. The Plaintiff**

Ewing T. Boles, a white male, graduated from Bryan Station College with majors in Economics and Religion. While at college he was an active member of the student body. He was the catcher for the college's baseball team (the Defenders), vice-president of his fraternity (Psi Pi Psi), and treasurer of the Student Congress.

In the fall of 1995, Boles applied for admission to Central University School of Law. He scored a CUI of 91.77 reflecting an LSAT score of 164 and an undergraduate GPA of 3.71. This score failed to qualify Boles for automatic admission score of 93 and the law school placed Boles in the discretionary zone. The Admission Committee considered his file but added no points to his score. The Plaintiff received an offer for a place on the ranked waiting list. However, Mr. Boles eventually was denied admission to the law school.

An African American student from Bryan Station College, Richard Samuels, was accepted to Central University School of Law for the 1996-97 school year.<sup>6</sup> After comparing their scores and finding them almost identical,<sup>7</sup> Boles contacted the law school. Central University refused to give him any information citing the confidentiality of the records. Believing he had been denied admission on the basis of his race, Boles undertook the current action.

During discovery Central University School of Law was ordered to disclose its admission records concerning applicants for the 1996-97 school year. In 1995, 3,412 applicants applied and 300 students entered the school in Fall 1996. Of the applicants 2,525 were Caucasian (74%), 614 were African American (18%), and 273 were Native American (8%). 184 applicants were automatically admitted because of their CUI scores; of these students 9 (4.9%) were African American and 3 (1.6%) were Native American. The law school's records indicate that without the adjustments made by the Admissions Committee at most 16 African Americans (5.3%) and 9 Native Americans (3%) would have been admitted. The class that entered Central University

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<sup>5</sup> Generally, Davis graduates from its public and private institutions 71% Caucasians, 21% African Americans and 8% Native Americans. In the last five years, the classes admitted to the law school have been as follows:

Year	Caucasian	African American	Native American
1992	72%	21%	7%
1993	70%	21%	9%
1994	71%	19%	10%
1995	74%	22%	4%
1996	69%	22%	9%

<sup>6</sup> Samuels' background is very similar to Boles. He graduated from Bryan Station College with joint degrees in Government and Philosophy. While attending the college he was a pitcher on the Defender's baseball team, treasurer of his fraternity and vice-president of the Student Congress.

<sup>7</sup> Samuels had an LSAT score of 171 and a GPA of 3.47, giving him a CUI score of 91.70. His adjusted CUI score was 92.5.

School of Law in 1996 had 27 Native Americans, 66 African Americans, and 207 Caucasian students.

Boles seeks an injunction prohibiting the school of law from using race as a factor in admission and an order granting him admission to the School of Law.

### **III. Discussion**

#### **A. Standard of Review**

Affirmative action plans based on race trigger strict judicial scrutiny. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). Further, “the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion). Accordingly, the Court concludes the law school admissions process must be subjected to a strict scrutiny test under the Equal Protection Clause of the Fourteenth Amendment to protect both the integrity of the process and the important individual rights at issue.

Strict judicial scrutiny involves a determination of whether the law school process served “a compelling governmental interest” and whether the process is “narrowly tailored to the achievement of that goal.” *Id.* at 274.

#### **B. Compelling Governmental Interest**

Defendant identified several important and laudable goals of the law school’s affirmative action program. However, in order to be consistent with the Equal Protection Clause the law school’s efforts must be limited to seeking the educational benefits that flow from having a diverse student body and to addressing the present effects of past discriminatory practices. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (environment fostering robust exchange of ideas makes goal of diversity “of paramount importance in the fulfillment of [a university’s] mission”); *United States v. Paradise*, 480 U.S. 149, 167 (1987) (“The government unquestionably has a compelling interest in remedying past and present discrimination by a state actor.”) Accordingly, the court will evaluate the program in light of these goals.

##### **1. Diverse Student Body**

The plaintiffs do not dispute that under the holding of *Bakke*, obtaining the benefits that flow from a racially and ethnically diverse student body is a compelling interest justifying the use of racial preferences. *Bakke*, 438 U.S. at 314-315. Nevertheless, the plaintiff suggests that under more recent Supreme Court decisions, the only compelling interest recognized for race-conscious programs is remedying the past effects of racial discrimination. However, none of the recent opinions is factually based in the education context and, therefore, none focuses on the unique role of education in our society. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Further, at least one court has recognized a compelling interest outside of remedying past

discrimination. *See Hunter v. Regents of the Univ. of California*, 971 F.Supp. 1316, 1327 (C.D.Cal. 1997).

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.

The defendants presented evidence, which included the testimony of deans from law schools across the country and the testimony of law students, showing the benefit to the law school educational experience derived from a diverse student population is substantial. According to the evidence at trial, without affirmative action the law school would not be able to achieve this goal of diversity. Had the law school based its 1996 admissions solely on the applicants' CUIs without regard to race, the entering class would have included at most 16 African Americans and 9 Native Americans.

## **2. Remedying past discrimination**

Although under current law the goal of diversity is sufficient by itself to satisfy the compelling governmental interest element of strict scrutiny, the objective of overcoming past effects of discrimination is an equally important goal of the law school's affirmative action program.

The effects of the history of discrimination against African Americans in this nation are not disputed. An African American child today has a life expectancy that is shorter by more than seven years than that of a Caucasian child.<sup>8</sup> The African American child's mother is over four times more likely to die of complications in childbirth, and the infant mortality rate for African Americans is over twice that for Caucasians.<sup>9</sup> The median income of an African American family is \$25,970, while the median income of a Caucasian family is \$42,646.<sup>10</sup> The percentage of African Americans who live in families with incomes below the poverty line is 26.4%, over three times greater than that of Caucasians, 8.5%.<sup>11</sup>

When the African American child reaches working age, he finds that America offers him significantly less than it offers his Caucasian counterpart. For African American adults, the unemployment rate is over twice that of Caucasians.<sup>12</sup> Although African Americans represent

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<sup>8</sup> Statistical Abstract of the United States 1997, U.S. Department of Commerce – Bureau of the Census, at 88.

<sup>9</sup> *Id.* at 92.

<sup>10</sup> *Id.* at 49. Native American median family income is even less: \$21,619. *Id.* at 51.

<sup>11</sup> *Id.* at 49. 27.2% of Native American families live below the poverty line. *Id.* at 51.

<sup>12</sup> *Id.* at 49.



12.6% of the population,<sup>13</sup> they constitute only 3.4% of the lawyers and judges, 4.5% of the physicians, 1.2% of the dentists, 4.2% of the engineers and 6.5% of the college and university professors.<sup>14</sup>

The relationship between the above figures and the history of unequal treatment afforded to the African American cannot be denied. At every point from birth to death the impact of the past is reflected in the position of the African American in American society. *See Bakke*, 438 U.S. at 387 (Marshall, J., dissenting). As early as 1974 members of the Supreme Court had recognized that societal discrimination may handicap members of minority groups in their attempts to attend the schools of their choice. *DeFunis v. Odegaard*, 416 U.S. 312, 335 (1974) (Douglas, J., dissenting). Although Justice Powell rejected societal discrimination as a basis for affirmative action programs in *Bakke*, not a single Justice joined him in that opinion. *Bakke*, 438 U.S. at 307.

The plaintiff asserts that the Court should limit its review of past discrimination to official acts and policy of Central University School of Law and should not consider discrimination in Davis' educational system as a whole. As support for this contention the plaintiff cites *Croson*, in which the Supreme Court struck down a city set aside program that required thirty percent of the city contracts to be subcontracted to minority businesses. *Croson*, 488 U.S. at 499. Recently, however, the Supreme Court held that a system of higher education is under an affirmative duty to eliminate every vestige of racial segregation and discrimination in its educational system and to reform those policies and practices that required or contributed to separation of the races. *United States v. Fordice*, 505 U.S. 717 (1992).

Thus, it appears the Supreme court has recognized that the restrictions it has applied in ascertaining the present effects of past discrimination in the employment context, specifically the prohibition against remedying effects of societal discrimination and discrimination implemented by another governmental unit, are not appropriate in the education context. "Applicants do not arrive at the admissions office of a professional school in a vacuum," and, in fact have ordinarily been students in an educational system for sixteen years. *Geier v. Alexander*, 801 F.2d 799, 809 (6th Cir. 1986). The Court believes, therefore, the residual effects of past discrimination in a particular component of a state's educational system must be analyzed in the context of the state's educational system as a whole. The States' institutions of higher education are inextricably linked to the primary and secondary schools in the system. Accordingly, this court has not limited its review to the law school, or Davis' higher education system in evaluating the present effects of past discrimination. However, were the Court to limit its review to the University of Davis, the Court would still find a "strong evidentiary basis for concluding that remedial action is necessary." *Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992).

In recent history, there is no evidence of overt officially sanctioned discrimination at Central University. The evidence reflects that the university has made genuine efforts in the last decade to end discrimination by recruiting and maintaining minority faculty members and

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<sup>13</sup> Id. at 14. Caucasians constitute 82.8% and Native Americans constitute .8%. Id.

<sup>14</sup> Id. at 410-412.

students and condemning racial incidents occurring on campus or involving student organizations. Despite these efforts, however, the legacy of the past has left residual effects that persist into the present. The evidence presented at trial indicates those effects include the law school's lingering reputation in the minority community, particularly with prospective students, as a "white" school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities. Admissions and recruitment personnel face difficulties in attracting qualified minorities to enroll in the law school. These difficulties stem from negative perceptions of the racial climate at the law school as a result of past discrimination. An affirmative action program is therefore necessary to recruit minority students because of the present effects of past discriminations.

Many public schools in Davis continued to have a substantial degree of racial and ethnic segregation during the 1970s and 1980s the decade in which the majority of present law school applicants attended primary and secondary schools. This segregation has handicapped the educational achievement of many minorities. The ultimate effect of the inferior educational opportunity, combined with the lower socioeconomic status of minorities in Davis is disproportionately smaller pool of minority applicants to law school. In addition, some minority student enrolled in the law school feel isolated even with the current commitment to affirmative action and diversity and are hesitant to participate in class discussion when they are the sole minority or one or a few in a class. Some minority students continue to perceive a hostile racial environment on the campus, which they assert is reflected in insensitive comments by fellow students and faculty.

Accordingly, despite Bole's protestations to the contrary<sup>15</sup>, the record provides strong evidence of some present effects at the law school of past discrimination in both Central University and the Davis educational system as a whole. Therefore, the Court finds the remedial purpose of the law school's affirmative action program is a compelling governmental objective.

### **C. Narrowly Tailored**

The court must next decide if the admissions process was narrowly tailored to achieve the goals of diversity and overcoming the present effects of past discrimination. This determination requires the application of four factors: the efficacy of alternative remedies; the flexibility and duration of the relief; the relationship of the numerical goals to the percentage of minorities in the relevant population; and the impact of the relief on the rights of third parties. *United States v. Paradise*, 480 U.S. 149, 171 (1987).

The defendants have shown it is not possible to achieve a diverse student body without an affirmative action program that seeks to admit and enroll minority candidates. Further, the record indicates the ultimate effect of abandoning affirmative action at the law school would be to redirect minorities to the historically separate state law school at Davis Southern University, thereby resegregating the law school. Alternatives, such as minority scholarships and increased minority recruitment, while effective tools in conjunction with the affirmative action program,

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<sup>15</sup> Bole's attorney vigorously contests the constitutional and legal relevance of the socio-economic data raised during the trial.



would not be effective means by themselves to meet the compelling governmental interests of true diversity and remedying the effect of past de jure segregation. The evidence show that despite genuine efforts to end discrimination, the legacy of the past continues to hinder the law school's efforts to attract highly qualified minority students. Accordingly, the Court finds affirmative action in the law school's admission program is an effective and necessary means to overcome the legacy of the past and to achieve the diversity necessary for a first-class University.

Certainly an indefinite program would violate the Equal Protection Clause. However, the law school's use of the program until the gap in minority and non-minority credentials has narrowed such that the State will remain in compliance with Title VI without the need for affirmative action does not offend the Constitution.

The third factor, the relationship of the numerical goals to the relevant population is easily satisfied under these facts. The law school has not set definitive goals for minority students. The admission policy is merely to consider race as a factor in admitting students to the school. This program avoids the illegal quota setting rejected in *Bakke*.

The final factor, the impact of the procedure on the rights of innocent third parties is the most difficult to evaluate. By definition if one person is given preferential treatment based on race to overcome a heritage of past societal wrong another person is penalized. Although the past history of societal discrimination in certain institutions may justify the remedy, in the end, individuals pay the price. Therefore it is imperative that the mechanics of any program implementing race-based preferences respect and protect the rights of individuals who sacrifice their interests as a remedy for societal wrongs.

We find that the presence of individual comparison between minority and non-minority files in the discretionary zone allows the law school's program to be sufficiently narrowly tailored to survive strict scrutiny. No applicant whose CUI is above the universal presumptive denial score is denied admission to Central University Law school without being individually compared to all other students within the discretionary zone. In *Bakke*, Justice Powell stated that although race or ethnicity could be a plus factor in consideration of a particular applicant, race or ethnicity should "not insulate the individual from comparison with all other candidates for the available seats." *Bakke*, 438 U.S. at 317. The law school's admissions process truly uses race as a "plus" in admissions decisions and therefore meets the standards enunciated in *Bakke*.

By comparing the entire pool of individual applicants, race and ethnicity become pluses in the weighing of qualifications. In this way the compelling governmental goals of diversity and remedying past discrimination are achieved and the best-qualified class of entering law students are admitted in a constitutionally acceptable manner.

For the foregoing reasons, it is ORDERED that the admissions procedure used by the Central University School of law is adjudged and declared constitutional. All affirmative relief requested by the plaintiff herein is DENIED.