

**FROM PHILOSOPHICAL AND POLITICAL
DEBATE TO REALITY:
HOW TO ENSURE EQUAL OPPORTUNITY
IN ADMISSIONS AND EMPLOYMENT
DECISIONS FOLLOWING COURT DECISIONS
REJECTING TRADITIONAL APPROACHES
TO AFFIRMATIVE ACTION**

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**I. A BRIEF BIBLIOGRAPHY ON AFFIRMATIVE ACTION IN HIGHER
EDUCATION**

(Materials of particular interest are identified with asterisks.)

The Principal Supreme Court and Lower Court Cases on Affirmative Action:

****Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).**

This is the Supreme Court's most recent affirmative action decision. In *Adarand*, the Supreme Court struck down the Small Business Administration's minority set-aside program insofar as it applied to the award of federal highway contracts and subcontracts under the Surface Transportation and Uniform Relocation Assistance Act of 1987. The case involved one relatively narrow category of affirmative action programs, namely *programs mandated by Congress*. The *Adarand* decision essentially held that Congress cannot legislate affirmative action unless there is a compelling governmental justification for it -- a standard to which colleges and universities are arguably held already.

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

This case is discussed on pages 17 and 18 of this outline.

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987).

This Title VII decision upheld a public employee's remedial affirmative action plan that authorized consideration of the sex of a qualified applicant as a "plus" factor in making promotions to a traditionally segregated job classification.

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

This decision struck down a public employer's collective bargaining agreement that provided preferential protection to minorities in layoffs on the grounds that the layoff provision violated the rights of non-minorities.

**Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

This is the Supreme Court's last decision involving affirmative action in the higher education context. The Court's holding is difficult to summarize because no single part of the holding commanded an absolute majority of five Justices. *Bakke's* most enduring legacy, and the only part of the decision remembered and cited today, is Justice Powell's concurring opinion, in which he stated that it *is* constitutionally permissible for a medical school (in that case, the University of California at Davis) to use an applicant's race as a so-called "plus" factor to be taken affirmatively into account by the medical school in making admissions decisions.

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

This decision invalidated the "Banneker Scholarship" program at the University of Maryland College Park, a program explicitly limited to African-Americans, on the grounds that the use of race as a criterion for awarding scholarships violated the constitutional rights of non-minority scholarship applicants.

* *Hopwood v. State of Texas*, 861 F. Supp. 551 (W. D. Tex. 1994), *rev'd and remanded*, 78 F. 3d 932 (5th Cir. 1996), *cert. denied*, ___ U.S. ___ (1996).

This case is discussed on page 11 of this outline.

Recent Monographs, Articles, and Memoranda on Affirmative Action in Higher Education:

Association of American Colleges and Universities, *The Impact of Diversity on Students: A Preliminary Review of the Research Literature* (edited by Morgan Appel, David Cartwright, Daryl G. Smith & Lisa E. Wolf, 1996). Copies can be ordered from AAC&U, Publications Desk, 1818 R Street, N.W., Washington, D.C. 20009, (202) 387-3760, ext. 404, or by e-mail to pub_desk@aacu.nw.dc.us. A Ford-Foundation-funded survey of contemporary scholarship on the relationship between diversity initiatives and the quality of undergraduate education.

*Association of Governing Boards of Universities and Colleges, *Affirmative Action: Few Easy Answers* (written by Martin Michaelson, 1996). Copies can be ordered from AGB, One Dupont Circle, N.W., Suite 400, Washington, D.C. 20036, (202) 296-8400, or by e-mail to 103063.3404@compuserve.com. An accessible, well-written treatment of recent developments in affirmative action jurisprudence, with usefully displayed data and a good bibliography.

Dellinger, Walter, "Memorandum to General Counsels -- *Adarand*," U.S. Dep't of Justice, Office of Legal Counsel, June 28, 1995. A copy of this memorandum is contained in the bound compendium of materials from last year's Stetson Conference. This memorandum, prepared by Assistant Attorney General Dellinger shortly after the Supreme Court issued its decision in *Adarand*, contains a useful and topical discussion of affirmative action law in the employment context and the best and most practical discussion of *Adarand* anywhere in the literature.

*Fetter, Jean H., Chapter 5 ("Affirmative Action") in *QUESTIONS AND ADMISSIONS: REFLECTIONS ON 100,000 ADMISSIONS DECISIONS AT STANFORD* (1995). Written by the long-time Dean of Undergraduate Admissions at one of the nation's most selective universities, this book in its chapter on affirmative action systematically analyzes the most provocative points made by proponents and opponents of affirmative action in higher education. An excellent introduction to the difficult philosophical and policy questions at the heart of the contemporary debate on affirmative action.

Garfield, Leslie Y., *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J. COLL. & UNIV. L. 895 (1996). An understandable summary of affirmative action

jurisprudence focusing on the particular problems associated with law school admission.

Law School Admission Council, *Preserving Affirmative Action Programs in the Late 90s* (written by LSAC's Affirmative Action Work Group, Leo Romero, Chair, 1996). Copies can be ordered from LSAC by telephoning (215) 968-1001. A treatment of affirmative action issues in the context of admission to and financial aid at graduate professional schools. It contains an "audit checklist" and a bibliography emphasizing professional school issues and problems.

Rudenstein, Neil L., *The President's Report: Diversity and Learning* (1996). An essay by the President of Harvard University on the history of affirmative action at that institution. The essay provides a thoughtful justification for the "diversity" rationale underlying most affirmative action programs in higher education.

*United Educators Risk Retention Group, Inc., *Promoting Equal Opportunity in Higher Education: Guidelines for Affirmative Action programs* (written by Robert F. Reklaitis and Deborah A. Terasevich, 1996). Copies can be ordered from United Educators, Two Wisconsin Circle, Suite 1040, Chevy Chase, Maryland 20815, (301) 907-4908, or by e-mail to tconley@ue.org. Written primarily for lawyers, the monograph contains good discussions of the seminal Supreme Court cases and a good checklist of suggestions for drafting affirmative action programs in the post-*Hopwood* era.

Recent Books on Affirmative Action Generally:

Bergmann, Barbara, *IN DEFENSE OF AFFIRMATIVE ACTION* (1996). As one would suspect from the title, the case for affirmative action.

Eastland, Terry, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* (1996). As one would suspect from the title, the case against affirmative action. Includes a long chapter entitled "Remediation and Diversity: Affirmative Action in Higher Education."

*Kaplin, William A., and Lee, Barbara A., *THE LAW OF HIGHER EDUCATION* 400-418 (3d ed. 1995). An excellent treatment of *Bakke* and post-*Bakke* case law, with a good summary of different affirmative-action models for institutions of higher education.

II. AFFIRMATIVE ACTION IN COLLEGE AND UNIVERSITY ADMISSION PROGRAMS

1. ***The issue in a nutshell:*** It is an unavoidable fact of life in contemporary American higher education that, without racial preferences, racial diversity would suffer at selective colleges and universities. For example: to be eligible for admission to the undergraduate colleges of the University of California System, applicants must graduate in the top one-eighth of their high school class. If that criterion were applied without regard to race, only five percent of California's African-American high-school seniors would be in the applicant pool, and the freshman class at the University of California Los Angeles would be one percent African-American. *Under UCLA's Elaborate System Race Makes a Big Difference*, CHRON. OF HIGHER ED., April 28, 1995, page A12.

But preferences are legally problematic. In a prescient passage anticipating much of today's debate over the merits of preferential affirmative action programs, Justice Powell in his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), observed:

[T]here are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. ... Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons ... to bear the burdens of redressing grievances not of their making.

2. ***Starting Point for Analysis: The "Strict Scrutiny" Standard.*** Under Title VI of the 1964 Civil Rights Act, universities are prohibited from discriminating on the basis of race, color, or national origin in the operation of their programs and activities.¹ In a series of decisions over the past two decades, the Supreme Court has placed a heavy burden on institutions whose affirmative action programs are challenged under Title VI. Such programs, the Court has ruled, are inherently suspect because of their reliance on racial characteristics as decisional determinants; and, because they are inherently suspect, courts will subject them to a very demanding standard of proof -- the so-called "strict scrutiny" standard -- when they are challenged on constitutional or Title VI grounds.

¹ In language Justice Powell described in *Bakke* as being "majestic in sweep" (438 U.S. at 264), Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Under the “strict scrutiny” standard, as articulated most recently by the Supreme Court in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), a program that relies on race-based preferences is illegal unless the institution can demonstrate that:

- The program serves a *compelling governmental interest*, and
- The program is *narrowly tailored* to further that compelling interest.

3. ***Compelling Institutional Interest.***

(a) Starting with *Bakke*, and with consistency since then, the courts have recognized two justifications for affirmative action programs that are suitably compelling to satisfy the first prong of the two-part “strict scrutiny” test:

- (i) *Remedying the present effects of past discrimination.* If unlawful discrimination against African-Americans actually occurred (for example, if the institution had a written policy excluding them from applying or making them ineligible for hire), then a remedial affirmative action program serves the compelling institutional interest in removing the lingering vestiges of past discrimination.
- (ii) *Diversity.* An affirmative action program serves a compelling purpose if it is designed to foster racial diversity in the student body or the workforce.

(b) Before turning to a discussion of these two compelling institutional interests, it is worth pausing to consider the large number of purportedly “compelling” justifications for affirmative action that have been offered by colleges and universities over the years only to be roundly rejected by the courts. In *Bakke*, the Medical School of the University of California at Davis reserved sixteen of the hundred places in its entering class for “minority group” members, defined as “Blacks,” “Chicanos,” “Asians,” and “American Indians.” The Medical School offered four supposedly “compelling” justifications for its affirmative action admissions program:

- Reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession;
- Countering the effects of societal discrimination;
- Increasing the number of physicians who will practice in communities currently underserved in terms of citizen access to medical services; and

- Obtaining the educational benefits of an ethnically diverse student body.

Justice Powell rejected the first three and held that the *only* compelling justification advanced for the Medical School's affirmative action program was its interest in fostering the educational benefits that flow from having an ethnically diverse student body (see below).

In *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd and remanded*, 78 F. 3d 932 (5th Cir. 1996), *cert. denied*, ___ U.S. ___ (1996), the admissions committee at the University of Texas Law School asserted that its affirmative action program was designed to serve five compelling purposes: diversity; remedying the present effects of decades of *de jure* discrimination against African-American and Hispanic candidates for admission; and three others:

- “[P]roviding a first class legal education to future leaders of the bench and bar of the state by offering real opportunities for admission to members of the two largest minority groups in Texas, Mexican Americans and African Americans”;
- “To achieve compliance with the American Bar Association and the American Association of Law Schools standards of commitment to pluralistic diversity in the law school’s student population”; and
- To honor the terms of a consent decree entered against the State of Texas in 1983 in a longstanding administrative enforcement proceeding brought by the United States Department of Education’s Office for Civil Rights to desegregate the dual public higher education system in Texas.

The trial court in *Hopwood*, citing *Bakke*, rejected those three purported justifications: “Although all are important and laudable goals, the law school’s efforts, to be consistent with the [Constitution], 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.” 861 F. Supp. at 570.²

² We cannot resist reflecting on the irony of the court’s ruling that *compliance with an OCR consent decree* is an insufficiently compelling justification for an affirmative action program. In the 1970’s and ’80’s, many state universities, including the Universities of Texas and Maryland, were either sued by the Department of Health, Education and Welfare or subjected to administrative enforcement proceedings in a coordinated federal effort to dismantle segregated higher education systems. Many of the affirmative action programs that were subsequently challenged in reverse-discrimination lawsuits -- including the admissions program in *Hopwood* and the scholarship program in the *Podberesky* case at the University of Maryland --

Summary: To withstand legal scrutiny, admissions and hiring programs operated by universities must be supported by a compelling justification. Given the state of the law today, *fostering student-body diversity* may be the only avenue that offers much chance of withstanding judicial assault. Universities seeking to justify their affirmative-action programs on other grounds have been singularly unsuccessful over the years.

- (c) *Remedying the present effects of past discrimination.* To paraphrase slightly the Supreme Court's holding in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492-93 (1989): if a university establishes its former participation in a systematic program of racial exclusion by making "some showing of prior discrimination," then the university may legally take "affirmative steps to dismantle such a system." But that standard comes with a warning: courts are required to make "searching judicial inquiry into the justification for such race-based measures ... [and to] identify that discrimination ... with some specificity before they may use race-conscious relief."

An institution satisfies that heightened standard of evidentiary proof by invoking "judicial, legislative, or administrative findings of constitutional or statutory violations" *Croson, supra*, 488 U.S. at 497. In some states, predominantly southern and border states that operated legally segregated, dual systems of public higher education in the 1960's and '70's,³ public institutions of higher education can satisfy that burden by pointing to judicial and administrative determinations that their state higher education systems formally operated dual higher education systems that were racially segregated by operation of state law.

For private institutions and institutions outside the south, suffice it to say for purposes of this outline that the chances of sustaining an affirmative action program in the admissions office by pointing to the compelling interest in remedying the present effects of past discrimination are dubious at best. *See generally* A. Baida, *Not All Minority Scholarships Are Created Equal: Why Some*

were instituted in response to intense federal advocacy for those programs.

³ Nineteen states are covered by so-called *Adams* decrees, named after the lawsuit filed by the U.S. Department of Health, Education, and Welfare shortly after the enactment of Title VI in 1964. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified*, 480 F. 2d 1159 (D.C. Cir. 1973) (en banc). In *Adams* and successor cases, HEW sought and obtained judicial orders requiring states to dismantle racially separate higher education systems. As part of these court-approved desegregation plans, HEW's Office for Civil Rights insisted upon many of the remedial measures -- affirmative action plans in admission, race-restricted financial aid programs -- that are now under attack in reverse-discrimination lawsuits such as *Hopwood* and *Podberesky*.

May Be More Constitutional Than Others, 18 J. COL. & UNIV. L. 333, 342-49 (1992).

- (d) *Diversity*. The starting point for analysis is Justice Powell's detailed treatment of the issue in *Bakke*.⁴ "[T]he attainment of a diverse student body," he wrote, "... clearly is a constitutionally permissible goal for an institution of higher education." Quoting from two of the Court's landmark decisions on academic freedom, Justice Powell observed that "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.' ... The atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body. ... [I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S. at 264-265, quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), and *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Justice Powell's opinion cites and quotes from an extraordinary essay written in 1977 by Princeton President William Bowen entitled "Admissions and the Relevance of Race." Almost two decades later, this essay remains one of the most lucid descriptions ever written of the pedagogical underpinnings for the ideal of diversity in American higher education. From that essay:

[T]he overall quality of the educational program is affected not only by the academic and personal qualities of the individual students who are enrolled, but also by the characteristics of the entire group of students who share a common educational experience. ... In a residential college setting, in particular, a great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their

⁴ Over the years, the lower federal courts have regarded Justice Powell's discussion of diversity in *Bakke* as something approaching a definitive pronouncement on the issue. See, e.g., *Davis v. Halpern*, 768 F. Supp. 968 (S.D.N.Y. 1991). Nevertheless, it is worth remembering that the portion of Justice Powell's opinion dealing with diversity commanded the support of no other Justice on the Supreme Court, and there is considerable question in the minds of legal commentators whether today's Supreme Court would endorse the notion that affirmative action could ever be justified except as a remedial measure following an explicit finding that it is necessary in order to remedy the lingering effects of past discrimination. See Walter Dellinger, "Memorandum to General Counsels -- *Adarand*," U.S. Dep't of Justice, Office of Legal Counsel, June 28, 1995, pp. 14-19.

differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, "People do not learn very much when they are surrounded only by the likes of themselves."

It follows that if, say, two thousand individuals are to be offered places in an entering undergraduate class, the task of the Admission Office is not simply to decide which applicants offer the strongest credentials as separate candidates for the college; the task, rather, is to assemble a total class of students, all of whom will possess the basic qualifications, but who will also represent, in their totality, an interesting and diverse amalgam of individuals who will contribute through their diversity to the quality and vitality of the overall educational environment. ...

In the nature of things it is hard to know how, and when, and even if, this informal "learning through diversity" actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.

It is of course true -- and it should be recognized -- that the presence on campus of students of different races sometimes results in tensions and even in hostility. But it is also true that acknowledging this reality, and learning to cope with it, can be profoundly educational. In this as in other respects, we often learn at least as much from our bad days as from our good days. ...

These kinds of learning experiences, sometimes very satisfying and sometimes very painful, are important not only for particular students in an immediate sense but also for the entire society over time. Our society -- indeed our world -- is and will be multiracial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can contribute directly to the achievement of this end. One of the special advantages of a residential college is that it provides unusually good opportunities to learn about other people and their perspectives -- better opportunities than many will ever know again. If people of different races are not able to learn together in this kind of setting, and to learn about each other as they study common subjects, share experiences, and debate the most fundamental questions, we shall have lost

an important opportunity to contribute to a healthier society -- to a society less inflicted by the failure of too many people to understand and respect one another. [Pp. 426-29.]

Affirmative action critics, not surprisingly, disagree about the educational and social value of diversity. From Shelby Steele's book *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990), pp. 115-16:

Diversity is a term that applies democratic principles to races and cultures rather than to citizens, despite the fact that there is nothing to indicate that real diversity is the same thing as proportionate representation. Too often the results of this on campuses ... has been a democracy of colors rather than of people, an artificial diversity that gives the appearance of an educational parity between black and white students that has not yet been achieved in reality. Here again, racial preferences allow society to leapfrog over the difficult problem of developing blacks to parity with whites and into a cosmetic diversity that covers the blemish of disparity -- a full six years after admission, only about 26 percent of black students graduate from college. ...

I think that one of the most troubling effects of racial preferences for blacks is the kind of demoralization, or put another way, an enlargement of self-doubt. Under affirmative action the quality that earns us preferential treatment is an implied inferiority. However this inferiority is explained -- and it is easily enough explained by the myriad deprivations that grew out of oppression -- it is still inferiority. There are explanations, and then there is the fact. And the fact must be borne by the individual as a condition apart from the explanation, apart even from the fact that others like himself also bear this condition. In integrated situations where blacks must compete with whites who may be better prepared, these explanations may quickly wear thin and expose the individual to racial as well as personal self-doubt.

- (e) *The Uncertain Future of the "Diversity" Rationale.* The recent decision of the Fifth Circuit Court of Appeals in *Hopwood v. State of Texas*, 78 F. 3d 932 (1996), *cert. denied*, ___ U.S. ___ (1996), marks a startling departure in affirmative action law. Like Alan Bakke before her, Cheryl Hopwood was a white applicant denied admission to a state-supported professional school -- the law school at the University of Texas. Hopwood's undergraduate grade-point average and standardized test scores were higher than those of African-American and Mexican-American applicants whom the law school accepted under its race-based affirmative action program. Hopwood and other unsuccessful white applicants

sued for reverse discrimination. At trial, the judge found that the law school's affirmative action program was necessary both to remedy present effects of decades of formal discrimination against minorities and to foster diversity in the law school's student body. The trial court held that Texas's affirmative action plan was in most respects narrowly tailored to serve those compelling interests, although the court ruled that the use of a separate subcommittee to evaluate minority applicants was unconstitutional and ordered the State of Texas to pay Hopwood one dollar in nominal damages.

Hopwood appealed. The Fifth Circuit decision, rendered March 18, 1996, sent shock waves through the higher education community. The court reversed the trial court and held that the University of Texas Law School violated the law by using an affirmative action program that relied *even in part* on race as an admission criterion. The court took the unusual step of suggesting that Justice Powell's decision in *Bakke* was no longer controlling law (due to the accretion of anti-affirmative-action Supreme Court decisions over the last decade), and that, with *Bakke* essentially overruled, diversity was no longer a sufficiently compelling justification for race-based affirmative action.

4. ***"Narrowly Tailored."*** The second part of the two-part "strict scrutiny" standard requires the university to prove that its affirmative action program has been designed and implemented in the narrowest way possible consistent with the compelling purposes the program is designed to serve. The program cannot be broader, more encompassing, or more ambitious than the minimum required to achieve its goal; otherwise, say the courts, the legal rights of innocent third parties may be trampled.

The first part of the two-part "strict scrutiny" test -- articulating the "compelling institutional interest" served by affirmative action -- focuses on the lofty objectives of affirmative action. The second part -- whether the program is "narrowly tailored" -- focuses on the nitty-gritty details of specific affirmative action programs. In practical terms, as the trial court in *Hopwood* held, the second part of the "strict scrutiny" test requires the university to show, with respect to the *mechanical details* of its affirmative action program, that:

- It considered and rejected alternative program designs with a narrower focus;
- It implement the program for a limited period of time (in other words, the program must "sunset" after a certain number of years); and
- The program does not unreasonably diminish the rights of third parties.

Let's consider each of these showings in turn.

- (a) *Alternative Program Designs.* Justice Powell's opinion in *Bakke* is again instructive. The affirmative action program used by the admissions office at U.C. Davis Medical School was a thinly veiled quota program, under which a specific number of seats in the entering class was rigidly reserved for minority applicants. Justice Powell accepted the notion that a race-conscious affirmative action program *of some sort* was warranted by the goal of achieving a racially diverse class, then asked whether a quota program was "the only effective means" of achieving diversity. No, he concluded:

[T]he nature of the state interest that would justify consideration of race or ethnic background ... is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. [The University's] special admission program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity. [438 U.S. at 265.]

Justice Powell then turned to "[t]he experience of other university admissions programs," which demonstrate that race can be taken into account without "assign[ing] ... a fixed number of places to a minority group" His opinion quotes at length from a description of the affirmative action program utilized by the undergraduate admissions office at Harvard College. The complete written description of the Harvard program is appended to the Powell opinion. Under the Harvard program, as paraphrased by Justice Powell in the most widely quoted paragraph in his opinion:

... race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of

each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. [438 U.S. at 265.]

In sum: Justice Powell's opinion, and in particular his endorsement of the Harvard model of affirmative action, have been interpreted by the lower federal courts to mean that the use of numerical quotas is absolutely, unambiguously prohibited. An affirmative action program that reserves seats for minorities will never pass legal muster. Even the use of flexible goals raises potential problems if the record shows that the goals are reached so regularly and so immutably that they function as the equivalent of quotas.

- (b) *Duration.* Affirmative action is supposed to be a means to an end, namely inclusiveness without regard to non-performance-related criteria such as race. It provides a measure of insulation against legal attack, therefore, if the university (i) specifically recites that the affirmative action program is not indefinite in duration, and (ii) regularly reviews the program, adjusts its operations, and evaluates its efficacy.
- (c) *Protecting the Rights of Non-Minorities.* An affirmative action program must be designed to ensure that every applicant's file is compared to every other applicant's file. Courts have uniformly invalidated programs that exhibit any of the following features:
- The files of all minority applicants are placed in a single batch or pool;
 - The admissions committee constitutes a separate subcommittee to review minority files only;
 - The admissions committee employs separate admissions standards for minority and non-minority applicants.

These prohibited practices have one common characteristic: they bifurcate the admissions process by creating a discrete "path" for consideration or evaluation of minority applicants. One of the strong themes to emerge from affirmative action jurisprudence during the last decade is that the qualifications of every applicant, regardless of race, must be evaluated against the qualifications of every other applicant to ensure that race, in and of itself, is not the sole determinant in the admission process. Any departure from that principle -- any suggestion that minority applicants benefit from a standard or procedure not provided routinely to the applicant pool as a whole -- imperils the program.

III. AFFIRMATIVE ACTION IN COLLEGE AND UNIVERSITY EMPLOYMENT PROGRAMS

1. **Introduction.** Oddly, given the intensity of the political debate over affirmative action in the admissions context under Title VI, little judicial attention has been paid to affirmative action in the employment context under Title VII.⁵ The Supreme Court case law in this area dates from the 1970's and '80's and gives employers surprising -- almost anachronistic -- discretion to adopt voluntary affirmative action programs to eliminate racial imbalance in the workforce. *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). Under Executive Order 11246, federal contractors (a term broad enough to encompass virtually all American colleges and universities) are obliged to maintain statistical information on the racial composition of their workforce, and to have in place written affirmative action programs incorporating detailed goals and timetables for hiring underrepresented racial minorities.

But, as we shall see, this may be changing. *Croson* and *Adarand* signal a new era of judicial scepticism about affirmative action hiring programs, and the Third Circuit's recent decision in *Taxman* (discussed on pages 18 and 19, below), with its endorsement of the Fifth Circuit's decision in *Hopwood* and its flat refusal to accept diversity as a legitimate rationale for affirmative action, may be a harbinger of things to come.

2. **Starting Point for Analysis: The Two-Part Weber Test.** One of the great political and civil rights issues of the 1970s was the extent to which a company could, through the adoption of a voluntary affirmative action program, use minority race as an *affirmative* factor in making employment decisions. Initially, the courts manifested hostility to the notion that race could ever be a legitimate hiring factor. *E.g.*, *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). But in the landmark case of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court held for the first time that Title VII's prohibition against racial discrimination does not bar race-conscious affirmative action programs under all circumstances. In *Weber*, the Court considered a voluntary affirmative action plan adopted by a large manufacturer to overcome the segregative impact of a longstanding hiring preference for workers with prior craft experience. Because African-Americans were for decades excluded from craft unions, the effect of the preference was to diminish

⁵ Titles VI and VII are both parts of the landmark Civil Rights Act of 1964. Title VI prohibits discrimination against any "person" in the operation of programs receiving federal financial assistance. Title VI is the law *students* ordinarily use to allege unlawful racial discrimination in (for example) admission or the awarding of financial aid by colleges and universities. Title VII is a narrower law that prohibits an *employer* from discriminating on the basis of race, sex, national origin, or religion against an employee, and is the law a college or university *faculty member* or *employee* would use to challenge a college's hiring, compensation, or promotion practices.

significantly the representation of African-Americans in the company workforce. In 1974, the company and the union entered into a collective bargaining agreement that contained an affirmative-action hiring plan. Under the plan, openings in the company-sponsored craft training program were to be filled by seniority, but fifty percent of openings were to be reserved for African-Americans until the percentage of African-Americans in the company workforce reached a level commensurate with the percentage of African-Americans in the local labor force. Brian Weber, a white worker with considerable seniority, applied for the craft training program but was not selected. He subsequently filed suit under Title VII, alleging that the program, by reserving spaces for African-Americans on the basis of their race, unlawfully discriminated against white workers. The Supreme Court upheld the validity of the company's affirmative action program. The Court formulated a two-part test for determining whether a voluntarily adopted, race-conscious affirmative action program is lawful under Title VII:

- The *purpose* for which the program was adopted must “mirror” the purpose for which Congress enacted Title VII -- the elimination of “old patterns of racial segregation and hierarchy.”
- In its *implementational details*, the program cannot “unnecessarily trammel the interests of the white employees.” While the *Weber* Court did not provide detailed guidance on acceptable implementational details, the Court did say that a program would be unacceptable if it (1) required the discharge of white employees to create vacancies for the hiring of minority applicants, (2) created an absolute bar (*i.e.*, a freeze or moratorium) to the advancement of white employees while minorities were promoted, or (3) were adopted permanently rather than temporarily, thus manifesting an unlawful intent to “maintain racial *balance*” rather than a lawful intent to “eliminate a manifest racial *imbalance*” -- an interesting duality.

Weber, 443 U.S. at 208 (emphasis added in quoted portions). Thus, the 1979 *Weber* test under Title VII anticipated and to some extent paralleled the “strict scrutiny” test under Title VI: an institution using race as an affirmative action criterion must persuade a reviewing court that its *purposes* are compelling and its *means* as narrowly drawn as possible.

3. ***Subsequent Application and Refinement of Weber in the 1980s.*** In a series of close (and not altogether consistent) decisions in the 1980s, the Supreme Court applied *Weber* in a variety of hiring, promotion, and layoff contexts.
 - (a) *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). By a vote of 5 to 4, the Court invalidated a public employer's collective bargaining agreement with a teachers' union that provided preferential protection to minorities in layoffs. The Court held that race-conscious affirmative action was permissible only if the

employer had a “compelling interest” and the means chosen to achieve that interest were “narrowly tailored.” The affirmative action program in *Wygant* failed both prongs of the test -- the “compelling interest” prong because the board of education impermissibly relied on generalized “societal discrimination” against African-Americans as the justification for its program, and the “narrowly tailored” prong because the program was designed to *maintain* minority hiring at levels that had no relation to the eradication of the effects of past discrimination.

- (b) *United States v. Paradise*, 480 U.S. 149 (1987). In another 5-to-4 decision, the Court upheld the legality of an affirmative action promotion plan adopted by the Alabama Department of Public Safety. The plan required that at least 50 percent of police officers promoted to the rank of corporal be African-American. The Court first held that Alabama had a compelling interest in remedying pervasive, systematic, and longstanding discrimination against African-Americans in the Department of Public Safety, and also concluded that the plan, which was temporary, flexible, consistent with the relative qualifications of applicants, and statistically defensible, did not impose an unacceptable burden on innocent white applicants for promotion.
- (c) *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987). This case involved a gender-based affirmative action plan adopted by a county transportation agency to rectify the manifest underrepresentation of women in skilled craft positions. Under the plan, gender was “one factor” the county was permitted to consider in making promotions to job classifications in which women were traditionally underrepresented. The plan had no specific set-asides or quotas, and was designed to be temporary until the percentage of women in those job classifications reflected the gender composition of the relevant qualified workforce in the county. The Supreme Court, applying *Weber*, found the plan permissible in light of the “manifest imbalance” of gender representation in the skilled ranks and the fact that the plan did not trammel the rights of male applicants for promotion.
- (d) *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Richmond adopted an affirmative action plan that called for the awarding of not less than 30 percent of all city construction contracts to minority-owned contractors. The plan imposed no geographical limits on eligible firms, was established for a defined period, and provided for waivers in limited circumstances. The Court, by a vote of 5 to 4, struck down the plan, holding that it failed to satisfy the “strict scrutiny” standard to which all race-conscious affirmative action plans must adhere. The Court rejected the city’s proffered justification -- remedying the present effects of past discrimination -- on the ground that the record contained no support for the proposition that minorities had ever been discriminated against in the award of city construction contracts. The Court also found that the plan was not narrowly

tailored to accomplish its stated remedial purpose insofar as minority contractors from outside Richmond were eligible and the record failed to show that the city had considered and rejected race-neutral alternatives.

4. ***The 1990s and the Gradual Erosion of the “Diversity” Rationale.***

- (a) *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). In the Supreme Court’s most recent case involving the legality of race preferences in hiring, the Court held that all racial classifications used by federal, state, and local government agencies must be analyzed under the “strict scrutiny” standard, *i.e.*, they must serve a compelling governmental interest and be narrowly tailored to achieve that interest. The program at issue involved a federal statute that gave contractors on federal highway projects a financial incentive to hire minority subcontractors. The decision did not discuss the details of what would constitute a “compelling interest” or how programs should be “narrowly tailored,” but it did make clear that the strict-scrutiny standard applies to *all* race-conscious programs, even those mandated by Congress.
- (b) *Hayes v. North State Law Enforcement Officers Ass’n*, 10 F. 3d 207 (4th Cir. 1993). This case struck down a race-based promotion policy for police sergeants designed to foster diversity because the city employer did not provide sufficient evidence on its claim that racial diversity was “essential to effective law enforcement and constitutes a compelling state interest.”
- (c) *Taxman v. Board of Education of the Township of Piscataway*, 91 F. 3d 1547 (3d Cir. 1996) (en banc). This widely reported decision was hailed by affirmative-action opponents as the convergence of Title VI and Title VII law after the Fifth Circuit decision in *Hopwood*. In 1975, the board of education adopted an affirmative action plan that allowed race-based exceptions to strict seniority protection against layoffs. In 1989, the board had to choose between two teachers with equal seniority -- Sharon Taxman (who is white) and Debra Williams (who is African-American) -- when one position was to be eliminated. On the basis of race, the board selected Taxman for layoff. She sued. The record showed clearly that the board of education justified its minority preference on classical “diversity” grounds; when asked at trial to explain its educational objective, the board president answered:

In my own personal perspective I believe by retaining Mrs. Williams [the board] was sending a very clear message that we feel that our staff should be culturally diverse, our student population is culturally diverse and there is a distinct advantage to students, to all students, to ... come into contact with people of different cultures, different backgrounds, so that

they are more aware, more tolerant, more accepting, more understanding of people of all backgrounds.

(Quoted in *Taxman*, 91 F. 3d at 1552.) This was not enough for the Third Circuit, which struck down the board's affirmative action plan and ordered Ms. Taxman reinstated to her teaching position. Citing *Hopwood* with approval, the court declared, "Although we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures." *Id.* at 1567. The court also held that the plan was not narrowly tailored to serve any lawful purpose:

We begin by noting the policy's utter lack of definition and structure. ... The affirmative action plans that have met with the Supreme Court's approval under Title VII had objectives, as well as benchmarks which served to evaluate progress, guide the employment decisions at issue and assure the grant of only those minority preferences necessary to further the plans' purpose. By contrast, the Board's policy, devoid of goals and standards, is governed entirely by the Board's whim Moreover, both *Weber* and *Johnson* unequivocally provide that valid affirmative action plans are "temporary" measures that seek to "attain", not "maintain" a "permanent ... racial balance." The Board's policy, adopted in 1975, is an established fixture of unlimited duration.

(*Id.* at 1564 [citations omitted].)

5. **Summary.** The parallels between the "admissions" case law under Title VI and the "employment" case law under Title VII are strong:
- Resort to race as a decisional determinant must be based on a *compelling interest*. Remedying the present effects of historically demonstrable past discrimination is a sufficiently compelling interest. Diversity may not be, at least in the Third Circuit.
 - If an institution can articulate an interest that is sufficiently compelling to warrant resort to race consciousness in an institutional affirmative action program, then the use of race must still be *narrowly tailored* to meet the compelling objectives without trammeling the rights of non-minority employees. This means, at a minimum, that --
 - Rigid quotas are unacceptable;
 - The program should be temporary, not permanent;

- The employer should be able to show that it considered and rejected race-neutral alternatives before adopting race as a hiring or promotion criterion.

IV. PRACTICAL ADVICE ON ADAPTING TO THE NEW ERA OF JUDICIAL AND POLITICAL HOSTILITY TO AFFIRMATIVE ACTION

1. *Remember the stakes.*

- (a) In 1970, 4.5 percent of African-Americans over the age of 25 had completed four years of college. In 1980 the comparable figure was 8 percent. In 1990 it was almost 12 percent. Scholars suggest that a large part of the increase in educational attainment rates for African-American is the result of race-conscious affirmative action in admission. Without affirmative action, African-Americans and other minorities would be substantially underrepresented in the college population. Yu, Corrine M., & Taylor, William L., *THE RESOURCE: AN AFFIRMATIVE ACTION GUIDE* (Citizens' Commission on Civil Rights, 1996), page 9.
- (b) At the graduate professional level, there is a direct correlation between minority status and service to the minority community. Research supported by the Robert Wood Johnson Foundation shows that minority physicians are more likely than non-minority physicians to serve patients who are on Medicaid, are poor, or are members of minority groups. Ending affirmative action in medical school admission will result in fewer physicians who serve the poor and will exacerbate existing inequities in the distribution of health care services. *Affirmative Action at Medical Schools Linked to Minority Health Care*, *CHRON. OF HIGHER ED.*, August 9, 1996, page A33.
- (c) Each generation builds on the successes or failures of preceding generations. With affirmative action, the integration of American higher education accelerated in the period from 1964 to 1990. Without affirmative action, it is reasonable to predict that the segregation of American higher education would accelerate with each generation.

2. *There is no effective surrogate for race.* Research conducted by Professor Gary Orfield of the Harvard Graduate School of Education dispels the notion that the substitution of race-neutral *surrogates* -- e.g., "economically disadvantaged background," "first-generation college," etc. -- for overt racial criteria can serve the objectives of race-conscious affirmative action without creating legal exposure. In fact, given the demographic reality of this country, where the large majority of people living below the poverty line are white, reliance on race-neutral surrogates inevitably benefit whites more

than minorities. The result is diluted racial diversity -- preferable to no diversity, perhaps, but not what overt reliance on race is capable of producing.

3. ***Start by doing an inventory of existing affirmative action programs.*** You will be surprised by what you find.
 - (a) Affirmative action programs exist in profusion on most college campuses. For every program you know about, there are ten you will discover only when you do your inventory.
 - (b) Most affirmative action programs are administered informally. Written descriptive information seldom exists. Campus programs are seldom coordinated, even within schools or departments.
4. ***Audit each program.*** We suggest that audits be conducted by legal staff to ensure that the results are privileged and protected from civil disclosure. The audit should consist of interviews or written questionnaires that address the following issues:
 - (a) Is the program described in written materials? When were the materials last revised?
 - (b) What purpose or purposes are served by the program? Diversity? Other? Are those purposes articulated in written materials?
 - (c) Is the program designed to be temporary? Is there a process by which the program is periodically reviewed to determine whether its goal have been achieved? Is that fact reflected in any written material describing the program?
 - (d) How are the program's goals defined? Are they defined in terms of quotas, targets, or other numerical goals? If so, against what population group are the goals compared? What success has the program achieved in reaching those goals? Are they met year after year regardless of qualitative changes in the applicant pool?
 - (e) How is the process structured? Are minority applicants reviewed using a separate process? Are separate standards established for minority and non-minority applicants?
 - (f) Can it be documented that race-neutral alternatives were considered and rejected?
5. ***Rank programs in descending order of risk to the institution.*** Not all affirmative action programs are equal. Some pose heightened risk to the institution, either because they

involve large bureaucracies and large numbers of applicants, or because they are particularly visible, or because they operate in flagrant disregard for changes in affirmative-action law. Identify the programs that pose the greatest risk to the institution and train your resources on them.

6. ***Anticipate backlash.*** Many affirmative action programs have devoted constituencies who may react suspiciously or angrily to institutional efforts to study or change those programs. The institution may be accused of renegeing on its commitment to affirmative action. Explain carefully to affected groups that your mission *serves* the goals of equal educational opportunity and equal employment by enabling the university to marshal evidence that will sustain its affirmative action programs by ensuring that those programs are conducted in a legally defensible manner.
7. ***Insulate by developing written justifications.*** Beginning with the most problematic program, your goal is to ensure that (a) written materials describing the program are developed, and (b) those written materials insulate the program, to the maximum extent possible, from legal attack by determined opponents of affirmative action.

Examples:

Old Language

“Applicants must be members of minority groups”

“[The program] is subject to change at the discretion of the [institution]”

“Applications will be considered by a subcommittee of the admissions committee”

Revised Language

“Applicants must be from groups that have been traditionally under-represented in medicine (African-Americans, Mexican American, ...) or others who meet all eligibility criteria and have a high probability of fulfilling the social and educational goals of this program”

“[This is] an experimental program and is subject to change at the discretion of the institution. Application and program requirements may change from year to year. Race is not the sole admission criterion, although priority will be given to members of all traditionally underrepresented groups.”

“All applications will be considered by the regular admissions committee, and no candidate will be considered until that candidate’s file is compared to the files of all

other candidates for admission. No special index score or other numerical criterion will be used for applicants to this [affirmative action] program.”

8. ***Do this work quietly and with a minimum of fanfare.*** We recommend against the creation of large-scale committees to conduct comprehensive affirmative action reviews. We prefer quiet triage by legal staff, designed to identify problematic programs and fix them to the maximum extent allowed by the law.
9. ***Systematize the review process.*** Inventories and audits of existing affirmative action programs should not be a one-time-only exercise. They should be conducted regularly. We recommend that this be a continuing responsibility of the legal office. Affirmative action programs that have outlived their usefulness should be jettisoned. Goals should be adjusted. Descriptive literature should be reviewed and updated as necessary to reflect changes in affirmative action law.

