

COMMENT

Affirmative Action, *The Bell Curve*, and Law School Admissions

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Affirmative action is now, as it has been since it began, a hot button issue in American politics.¹ There is a pervading sense in the country that affirmative action is no longer necessary, that opportunities for minorities² have become equalized or at least are not worth the “cost” of depriving deserving individuals of jobs based on their demographic characteristics instead of their ability.³ The

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1. See Jonathan Tilove, *Where They Stand on Race and Civil Rights Gore Unequivocal in Support for Affirmative Action; Bush's Stance Is Not So Clear*, S.F. CHRON., Oct. 8, 2000, at A3. The issue also touches on potential new Supreme Court Justices and their effects on the law. A recent *Newsweek* cover story on the likely effects of either a Bush or Gore victory on the Supreme Court listed affirmative action as one of the “cutting-edge issues” that an altered Supreme Court might face in the coming years. Stuart Taylor Jr., *The Supreme Question*, NEWSWEEK, July 10, 2000, at 22. A few weeks later, this article was followed by a cover story titled *Redefining Race in America* on the increasing phenomena of multicultural/multiracial identifications. Jon Meacham, *The New Face of Race*, NEWSWEEK, Sept. 18, 2000, at 38.

2. It should be admitted up front that this Article does not discuss affirmative action in relation to multiracial identities. This is not uncommon among writers on affirmative action, perhaps because the percentages, though increasing, are still relatively small. While this issue is beyond the scope of this Article, it could have a significant impact on how racial classification statistics are determined for higher education admissions. For a further discussion of multiracial identities, including some discussion of the implications of this phenomenon to government forms requiring a singular racial identification, see generally *RACIALLY MIXED PEOPLE IN AMERICA* (Maria P.P. Root ed., 1992).

3. A recent survey shows mixed feelings among Americans about affirmative action. When asked, “Generally speaking, do you favor or oppose affirmative action programs for minorities?” 52% of respondents in 1995 responded that they in fact do favor such policies, as

backlash against affirmative action, motivated by what many see as reverse discrimination against white males,⁴ is reflected in former President Clinton's call to "mend it, but don't end it,"⁵ a sign of the accommodation necessary to preserve a frequently unpopular policy in the face of intense political pressure as manifested in a recent federal court decision in Texas as well as in California's university action and subsequent statewide referendum calling for the elimination of affirmative action in public universities to create what advocates of race-neutral policies consider to be a completely colorblind admissions process.⁶

compared to 29% opposed. LOS ANGELES TIMES POLL, SURVEY NO. 356, Mar. 1995, in 5 CQ RESEARCHER 374 (1995). The survey results showed approval of affirmative action by a 45% to 35% margin among whites, with white men being the only demographic surveyed to oppose affirmative action for minorities. *Id.* Even white men, though, felt that we are not close to eliminating discrimination. *Id.* However, when asked about specific policies, the opinions of affirmative action were reversed. When asked about admission to public universities, 55% said that acceptance should be based solely on the academic record of the student, whereas only 36% felt that acceptance should also be based upon the composition of the general population. *Id.* Only blacks took the latter position, with Hispanics being evenly split. *Id.* An even larger margin (72% to 22%) believed that racial preferences should be used in job hiring practices to correct past inequities. *Id.*

For a further overview of contemporary attitudes toward affirmative action in higher education admissions, see Carol M. Swain et al., *Life After Bakke Where Whites and Blacks Agree: Public Support for Fairness in Educational Opportunities*, 16 HARV. BLACKLETTER L. J. 147, 161-65 (2000).

4. Then again, one could question, following Lester Thurow's lead, why racial groups are thought by many to be undeserving of government aid when few people have problems with other targeted programs such as aid to farmers. Lester Thurow, *Affirmative Action in a Zero-Sum Society*, in FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 235, 237 (Ronald Takaki ed., 2d ed., 1994). This problem becomes especially vexing considering that people can abandon their occupation as farmers if they are unhappy with their situation, whereas they cannot abandon their racial status.

5. Todd S. Purdum, *President Shows Fervent Support for Goals of Affirmative Action*, N.Y. TIMES, July 20, 1995, at A1; *Excerpts from Clinton Talk on Affirmative Action*, N.Y. TIMES, July 20, 1995, at B10.

6. See generally Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181 (1999) (discussing recent trends in and political sentiments surrounding affirmative action policies in university admissions); Jennifer C. Brooks, *The Demise of Affirmative Action and the Effect on Higher Education Admissions: A Chilling Effect or Much Ado About Nothing?*, 48 DRAKE L. REV. 567 (2000) (relating the history behind *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) and California Prop. 209); Thomas Glen Martin, Jr., *UCLA Law School Admissions in the Aftermath of the U.C. Regents' Resolution to Eliminate Affirmative Action: An Admissions Policy Survey and Proposal*, 18 CHICANO-LATINO L. REV. 150 (1996) (situating within larger trends away from affirmative action the decision of the Board of Regents at the University of California to eliminate affirmative action from their admissions policy); Jeffrey B. Wolff, *Affirmative Action in College and Graduate School Admissions—The Effects of Hopwood and the Actions of the U.C. Board of Regents on Its Continued Existence*, 50 SMU L. REV. 627 (1997) (discussing the history of affirmative action in higher education from *Bakke* to *Hopwood* and Prop. 209).

At the same time, minorities are still underrepresented in many jobs of power and influence.⁷ For example, 1995 statistics show that African Americans held only 2.5% of executive and management jobs in the private sector.⁸ Only 2.4% of corporate lawyers in 1996 were African American, with the percentage of African American partners even lower at just over 1%.⁹

The racial and gender inequalities that exist in certain key careers demonstrate what is possibly a larger discrimination somewhere in the educational or occupational system.¹⁰ Proponents of affirmative action give one answer as to the source of racial and gender differences in employment figures, namely, that discrimination against minorities has perpetuated and reinforced prejudices, often unconscious, that prevent minorities from obtaining good educations and positions of power and authority. Opponents of affirmative action respond that while there may be a disparity between white male and minority achievement, establishing a legal system by classifying individuals differently violates fundamental principles of justice.¹¹

This Article will look at this debate by examining the relationship between affirmative action and law school enrollment. Affirmative action can be defined as either setting aside a definite number of spots in an incoming class for members of a particular minority group or groups or as using race to give members of racial minorities a "boost" over relatively similarly-situated students in the majority. As will be seen, the latter is constitutional while the former is not. This Article will be agnostic in its treatment of the two alternatives, as the difference between the two is not greatly significant

7. At this year's Republican National Convention, Colin Powell endorsed maintaining affirmative action programs for minorities in part by criticizing "affirmative action for lobbyists who load our federal tax code with preferences for special interests." Richard L. Berke, *Republicans Open Convention Emphasizing Unity*, N.Y. TIMES, Aug. 1, 2000, at A1; *Excerpts From General Powell's Address to Republicans*, N.Y. TIMES, Aug. 1, 2000, at A18.

8. FEDERAL GLASS CEILING COMM'N, U.S. DEP'T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S CAPITAL 77 (1995). See also David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?*, 84 CALIF. L. REV. 493, 503 (1996).

9. Ann Davis, *Big Jump in Minority Associates, But . . .*, NAT'L L.J., Apr. 29, 1996, at 1.

10. Amy P. Maloney suggests that one way to increase enrollment of women and minorities in law school is for law schools to create more flexible time schedules, including part-time education, to accommodate students who have taken "nontraditional" paths to law school. See Amy P. Maloney, Note, *Flexible Academic Programs in Legal Education: Diversifying Our Law Schools by Creating Opportunities for Nontraditional Students*, 67 UMKC L. REV. 165, 168, 175 (1998).

11. For a brief overview of arguments for and against affirmative action in educational settings and the legal framework into which these arguments fit, see generally Constance Hawke, *Reframing the Rationale for Affirmative Action in Higher Education Admissions Decisions*, 135 EDUC. L. REP., Aug. 1999, at 1.

for purposes of this Article, though it is something that would need to be decided at some point. The difference between the two positions turns on the standard of review for determining the constitutionality of affirmative action programs. Increasingly, courts are imposing higher standards of review on affirmative action programs, even those that purport only to give minorities assistance in, and not guarantees of, admission. This will become clearer in this Article's later discussion of relevant case history. In practice, there may not be much difference between the two approaches, as any "boost" can, in effect, become a guaranteed pass if given enough weight. This is an important debate, but not one this Article will touch.

This Article will view the relationship between affirmative action and law school admissions through the lens of *The Bell Curve*,¹² a book suggesting that a genetic link probably exists between race and intelligence.¹³ In *The Bell Curve*, Charles Murray and Richard J. Herrnstein conduct a statistical analysis on a variety of aptitude tests and other measures of intelligence, concluding that blacks and whites do differ on standardized tests of cognitive ability, even when controlling for such factors as motivation and socioeconomic status.¹⁴ Indeed, much of the book is geared toward discounting environmental explanations of intelligence scores. The relevancy that *The Bell Curve* has to the affirmative action debate is in the ways that arguments for and against affirmative action must be altered when faced with divergent assumptions about genetic differences in human intelligence. The theoretical arguments derived from the thought experiment in viewing affirmative action in light of varying posited levels of intellectual ability are not important, because this Article expects people to be convinced that there *are* in fact genetic differences in intelligence. The author hopes, however, that no one believes there are such differences.¹⁵ Rather, engaging in the thought experiment of assuming *The Bell Curve* to be true allows one to understand not only

12. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

13. Herrnstein and Murray do not claim that all racial differences in intelligence are due to genetics, but they do give it a central role: "It seems highly likely to us that both genes and the environment have something to do with racial differences." *Id.* at 311. Furthermore, these differences correspond to a history of race relations in the United States: "A substantial difference in cognitive ability distributions separates whites from blacks, and a smaller one separates East Asians from whites. These differences play out in public and private life." *Id.* at 315. Lest the conviction of their assertion be questioned, Herrnstein and Murray spend almost all of the 47 pages of Chapter 13 ("Ethnic Differences in Cognitive Ability") refuting explanations of differences in IQ scores as due to factors other than race.

14. *Id.* at 276, 282-83, 286.

15. For those who do believe in such differences, and there undoubtedly are some, this Article's arguments gain added relevancy.

the core principles of the arguments for and against affirmative action, but also any inconsistencies that may exist in these principles.

I. LAW SCHOOL STUDENTS AS REPRESENTATIVE OF THE AFFIRMATIVE ACTION DEBATE

There are several reasons why law school enrollment can be a reasonable proxy for the state of the affirmative action debate in this country today. Before listing the reasons for its choice of law school students, this Article underscores the generalizability of the principles discussed in relation to law students and other beneficiaries of affirmative action. Although this Article provides statistics to frame the issue, it is not meant to be a systematic statistical study of affirmative action.¹⁶ Rather, it is primarily interested in exploring the theoretical underpinnings of the different sides of the affirmative action debate. These underlying principles certainly apply to law school, but, as will be seen, they can easily be extended to other forms of affirmative action as well.¹⁷ Focusing on one particular example of affirmative action, though, provides a hook that helps focus the discussion. With that having been said, the following are reasons why law students provide a particularly appropriate category for framing the affirmative action debate:

1. Admission to law school emphasizes the importance of merit more than college because of the selectivity of law school admissions and the relatively small number of spots available. There are selective undergraduate institutions, yet the most selective undergraduate institutions are still not as selective as the most selective law schools.¹⁸

16. For an example of such a study, see Susan Welch & John Gruhl, *Does Bakke Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 OHIO ST. L. J. 697 (1998). Welch and Gruhl conducted a study of minority enrollment in 1975 (prior to *Bakke*), 1983 (soon after *Bakke*), and in 1995, concluding that minority enrollment was affected little by the Supreme Court decision outlawing explicit quotas. See *id.* at 710. Indeed, the biggest effect of *Bakke* was that it "solidified the existing practice of affirmative action in admissions." *Id.* at 721. This article is a condensed version of SUSAN WELCH & JOHN GRUHL, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS (1998).

17. This is certainly true for affirmative action in other educational settings. One may contend that there is a difference between affirmative action in educational settings and that with regard to employment. The difference lies in some people's feeling that the arguments for merit are more pressing in the employment setting than in the school admission setting. The reasons for this, however, are not entirely clear.

18. For example, the top three ranked law schools (Yale, Stanford, and Harvard) have acceptance rates of 8.7%, 12.4%, and 14.7% respectively. For their college counterparts (Cal Tech, Harvard, and MIT), these figures are 18%, 12%, and 22% respectively. These figures are somewhat misleading because of the self-selectivity in applying to universities specializing in technology. Hence, a better indicator might be liberal arts colleges, where the top three ranked schools (Swarthmore, Amherst, and Williams) have acceptance rates of 19%, 23%, and 26% respectively. All statistics are from U.S. News & World Report, *Annual Survey of the Best*

Furthermore, there are far more relatively unselective undergraduate institutions than there are unselective law schools.¹⁹ Consequently, those who attend law school or obtain some other graduate degree can generally be considered to be of at least moderate intelligence and, thus, to have achieved their position through their intellectual skill and merit.²⁰

2. Though it is by no means a prerequisite for success, few would disagree that a law degree is more of an indicator of academic achievement and future prominence than college education alone. Since much of the debate about affirmative action is about placing people in positions of power and influence, the arguments in favor of affirmative action are perhaps strongest when the beneficiaries can use their position to correct the injustices and discrepancies that created the need for affirmative action in the first place. Having a law degree is a good indicator that one will attain a position of power and influence,²¹ either through wealth²² or through community service of some sort.²³

Colleges and Graduate Schools (last visited July 27, 2000) <<http://www.usnews.com/usnews/edu/college/corank.htm>>.

19. There are over 1300 undergraduate institutions in the United States, but only 184 law schools. The *U.S. News & World Report Annual College Survey* included 1323 schools but did not include junior colleges or trade schools. U.S. News & World Report, *Annual College Survey* (last visited July 27, 2000) <<http://www.usnews.com/usnews/edu/college/rankings/collmeth.htm>>. The figure for the number of law schools comes from the ABA website, as U.S. News & World Report lists only 174 law schools. American Bar Association, *Approved Law Schools* (last visited July 27, 2000) <<http://www.abanet.org/legaled/approvedlawschools/approved.html>>. To be sure, only a small percentage of college graduates even have the desire to go to law school, but this can be counterbalanced by the self-selection process that takes place among some students who might otherwise want to go to law school but choose not to apply, feeling that they do not possess the requisite level of education to be admitted.

20. This is not to suggest that those without post-college education are uniformly unintelligent. Rather, graduate education can be viewed as an indicator of intelligence, whereas there are no clear indicators of intelligence for those without such education.

21. The Minorities Interested in Legal Education group, part of the Law School Admissions Council (affiliated with the LSAT) claims that no racial group comprises more than 4% of lawyers in America. Law School Admissions Council, *Minorities in Legal Education* (last visited July 27, 2000) <<http://www.lsac.org/minorities-in-legal-education.htm>>.

22. The median income for full-time, year-round workers in 1997 was \$35,248 for men and \$26,029 for women (\$25,212 for men and \$13,703 for women when not controlling for employment status); for equity partners in a law firm (of any size), the median income in 1997 was \$200,944 (not controlling for sex). U.S. Census Bureau, *Historical Income Tables—People, Table P-36: Full-Time, Year-Round Workers (All Races) by Median Income and Sex: 1970-1997* (last visited Sep. 29, 2000) <<http://www.census.gov/hhes/income/histinc/p36.html>>; U.S. Census Bureau, *Historical Income Tables—People, Table P-8: Age—People (All Races) by Median Income and Sex: 1947 to 1998* (last visited Sep. 29, 2000) <<http://www.census.gov/hhes/income/histinc/p08.html>>; ALTMAN WEIL, INC., *SURVEY OF LAW FIRM ECONOMICS* (1999).

23. Despite the fact that being a lawyer is likely the most publicly ridiculed occupation in the United States, a large percentage of members of Congress hold a law degree. Though a dramatic decline from the percentage (90%) of members of Congress who were lawyers at the

3. Examining law students provides more reliable statistics than examining legal professionals. Law students enter a wide variety of occupations upon graduation. An increasing number of students are entering business fields that escape statistics gathered on legal professionals.²⁴ However, it is a virtual certainty that practicing lawyers attended law school at some point.²⁵

4. Temporal dynamics suggest that studying law students as opposed to legal professionals provides a better appreciation of both the effects of and the current need for affirmative action. Looking at the figures for minority²⁶ representation among current lawyers, one could argue that the existing disparities can be explained by the fact that many lawyers obtained their legal degrees years ago, before the Civil Rights Act of 1964 and other legal reforms had time to take effect. Indeed, one of the common refrains among opponents is that, regardless of whether affirmative action was ever appropriate, its time has passed.²⁷ Looking at current enrollment figures not only circumvents the argument that there is a delayed reaction to the effectiveness of affirmative action; it also provides a contemporary perspective on whether affirmative action is still necessary.

5. Law school admissions supply a large enough applicant pool to be statistically significant.²⁸ Furthermore, because the number of

beginning of the century, 40% of the members of the current Congress were lawyers at one time prior to being elected. Jenny Brook Condon, *A Tale of Two Congresses*, ROLL CALL, Jan. 18, 1999. The numbers are somewhat lower for state legislatures (22% in New York and 15% in California), but they still show that a law degree can definitely be considered a path to political success. Richard Perez-Pena, *Making Law vs. Making Money: Lawyers Abandon Legislatures for Greener Pastures*, N.Y. TIMES, Feb. 21, 1999, at 4:3.

24. See David Leonhardt & Brian D. Gale, *Battle of the Graduate Schools: Law Gains Edge on Business, and No One Knows Why*, N.Y. TIMES, July 5, 2000, at C1.

25. There are a few states, such as California, that allow people who did not attend an accredited three-year law school to take the bar. It is not necessary for purposes of this article to research the number of current lawyers who took this path, as the figure must be exceedingly small.

26. The term "minority" as used in this Article refers to all non-white racial groups. Because of the prevailing sense that affirmative action deals with race and not gender, this Article does not include women in the category of minorities. See text accompanying note 161. Between the different racial groups, this Article refers to Caucasians as "whites," as the term appears to be a commonly accepted appellation. This Article uses the term "African Americans" instead of "blacks" because of the negative connotations occasionally associated with the latter term, though this article does occasionally use the term "blacks" when discussing historical cases to convey prevailing usage and attitudes at the time. This article uses the term "Hispanics," despite its increasingly infrequent use in mainstream literature, to avoid the gender connotations of the term "Latinos." The other racial categorizations used here are "Asian Americans," which encompasses descendants of all Asian nationalities, and "Native Americans."

27. For a representative presentation of this and other arguments against affirmative action, see generally CLINT BOLICK, *TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT* (1998).

28. In other words, there are enough students in the sample size that the addition or

law school applications appears to be on the rise, as opposed to business school applications,²⁹ the debate between admission based on affirmative action and admission based on merit could become increasingly heated.

6. Although by no means the most important reason, many of the major cases on affirmative action in the educational context focus on law schools.

II. THE LEGAL HISTORY OF AFFIRMATIVE ACTION AND EDUCATION

Before examining the relation between law school enrollment figures and the principles underlying affirmative action, a summary of the key cases in the Supreme Court affirmative action jurisprudence and some lower court decisions on the topic will be helpful. There are two purposes for presenting this history. The first is to provide a background to the current affirmative action doctrine. Some of the themes in the case law will recur later in this Article's more theoretical analysis of the motivations for and against affirmative action in relation to *The Bell Curve*. The second purpose is to show, by examining some lower court opinions, that the debate over the future of affirmative action, at least in an educational setting, is not settled. The uncertainty over the future of affirmative action makes the theoretical arguments that follow pressing.

This Article will not include voting rights cases, as they primarily address access to government and not relations between semipublic entities (like businesses or schools) and those against whom such entities might otherwise discriminate. For similar reasons, this Article will not explore race cases addressing jury composition. Rather, the focus here is on the line of cases addressing the issue of when government actors or private actors under government regulation may consider race in deciding whom to employ or include as students. This history section, which is, in effect, a narration of the judicial treatment of race relations in this country, begins with the Supreme Court's ruminations over segregation.

The Court infamously legalized segregation in *Plessy v. Ferguson*³⁰ by upholding a Louisiana law that required separate railroad accommodations for white and colored passengers. *Plessy*, by

subtraction of a small number of members of a minority classification will not drastically alter calculation of percentage representation. Thus, there is confidence that the results are accurately representative of the desired measurement.

29. See Leonhardt & Gale, *supra* note 24.

30. 163 U.S. 537 (1896).

codifying segregation,³¹ provided the basis against which most of the subsequent cases on race relations and affirmative action have reacted. Writing for the majority, Justice Brown opined that laws requiring separation in order to prevent contact between the races do not imply that one race is inferior to the other.³² Political equality, which Justice Brown was willing to grant blacks possessed, even though he must have known that, in practice, this was far from true, is not the same thing as requiring separation in schools and theaters and so on.³³ Any perceived inferiority, Justice Brown argued, is based on the construction that those affected by the law place on it, and legislation cannot eliminate such differences.³⁴

In a dissent, Justice Harlan took more of a political realism approach by acknowledging that the purpose of the law was not to exclude whites from cars carrying blacks, but rather to exclude blacks from cars carrying whites.³⁵ The law, therefore, enforced white superiority in the state.³⁶ Because the futures of the two races, Justice Harlan contended, are "indissolubly linked together," the government should not be allowed to establish laws that sow the "seeds of race hate."³⁷ The idea that the races must be separated from one another necessarily implies that one of the races is inferior.³⁸ This led Justice Harlan to make his famous assertion that the Constitution is "colorblind."³⁹ This language has been invoked repeatedly ever since.

The next case of importance is *Sweatt v. Painter*,⁴⁰ in which the Court held that a law school established by the State of Texas for blacks was not sufficiently equal to the law school at the University of Texas to justify the latter institution's decision to deny admission to black applicants.⁴¹ *Sweatt* shows cracks in *Plessy's* framework. There, Heman Sweatt had been denied admission to the University of Texas

31. *Id.* at 543 ("A statute which implies merely a legal distinction between the white and colored races. . . has no tendency to destroy the legal equality of the two races, or to reestablish a state of involuntary servitude.").

32. *Id.* at 544. Justice Brown interestingly drew upon the example of segregated schools to show that legal distinctions made on the basis of race are acceptable.

33. *See id.* at 545.

34. *See id.* at 550-52.

35. *See id.* at 557.

36. *See id.* at 557, 563-64.

37. *Id.* at 560. Because of this, Justice Harlan asserted that the Supreme Court's decision in *Plessy* would be as "pernicious" as its decision in *Dred Scott*. *Id.* at 559. This point will be discussed later in this Article.

38. *See id.* at 562.

39. *Id.* at 559. It must be noted that Justice Harlan qualified this assertion with the claim that whites are now and will always remain the dominant race in the country.

40. 339 U.S. 629 (1950).

41. *Id.* at 635-36.

law school solely because he was black.⁴² Despite the assertions of equality in state institutions, the Court concluded:

[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.⁴³

The issue in *Sweatt* was whether the alternative school for blacks provided a comparable education to that received by white students at the University of Texas Law School. If not, the Equal Protection Clause, which requires equal treatment of all United States citizens,⁴⁴ could be invoked to strike down this particular scheme. As the above passage demonstrates, it would be virtually impossible for law schools to maintain segregation and still provide comparable education to students of different races. Thus, the mere existence of separate schools for members of different racial groups would not satisfy the Equal Protection Clause if the education received and the opportunities created at the two schools were not equal.⁴⁵ Theoretically, though, *Sweatt* leaves intact the "separate but equal" doctrine established by *Plessy*,⁴⁶ assuming the two law schools could be completely equalized.

The "separate but equal" doctrine was finally ruled unconstitutional in *Brown v. Board of Education*.⁴⁷ *Brown* involved African American minors who were denied admission to "white"

42. *Id.* at 631.

43. *Id.* at 633-34.

44. U.S. CONST. amend. XIV, § 1. The clause does not specifically mention race, but given that the amendment was passed in 1868, soon after the end of the Civil War, it was clearly meant to cover, at the very least, race. Indeed, the Fourteenth Amendment is the most frequently invoked part of the Constitution in race cases.

45. *See id.* at 635.

46. The phrase is from the first sentence of Justice Harlan's dissent, *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting), the only place it appears in the combined opinions, and does not seem to carry as much weight there as it would in later uses of the concept.

47. 347 U.S. 483 (1954).

Topeka schools on account of their race.⁴⁸ The schools involved were specifically chosen because they were substantially equal, forcing the Court to rule on the “separate but equal” doctrine and not dodge the issue as it arguably did in *Sweatt*. Because the schools at issue were tangibly the same, the Court looked “instead to the effect of segregation itself on public education.”⁴⁹ In an opinion written by Chief Justice Warren, the Court held that segregated schools could not be “separate but equal” because of the social stigma necessarily attached to the different schools.⁵⁰ One purpose of education is to inculcate cultural values in the students by providing them with “the very foundation of good citizenship.”⁵¹ Separating students on the basis of race necessarily engenders feelings of inferiority, which affects students’ learning abilities by dampening their motivation and damaging their “hearts and minds in a way unlikely ever to be undone.”⁵² Consequently, the Court held, “separate but equal” has no place in public education, and the opportunity for black students to attend “white” schools must be guaranteed on equal protection grounds.⁵³ As a result of *Brown*, many schools were forced to integrate their populations,⁵⁴ often creating tense racial confrontations.⁵⁵ The prohibition of segregation was soon extended beyond the educational context to other areas, including restaurants,⁵⁶ public accommodations,⁵⁷ and interracial marriages.⁵⁸

48. *Id.* at 486. The case was actually a consolidation of cases from Kansas, South Carolina, Virginia, and Delaware.

49. *Id.* at 492.

50. *Id.* at 494-95.

51. *Id.* at 493.

52. *Id.* at 494. The Court cited various psychological studies in support of this proposition.

53. *See id.* at 495.

54. Some fear that contemporary emphasis on multiculturalism in society, and to some extent multiculturalism in the law, is leading to a *de facto* re-segregation of different ethnic groups who advance the ends of separatism through claims of autonomy. *See generally* J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993 (1995) (discussing recent temptations and trends toward separatism in politics, entitlements, education, and speech).

55. *See generally* DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995); HARRY S. ASHMORE, *HEARTS AND MINDS: THE ANATOMY OF RACISM FROM ROOSEVELT TO REAGAN* (1982); JEFFREY A. RAFFEL, *HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE* (1998); MARK WHITMAN, *THE IRONY OF DESEGREGATION LAW 1955-1995* (1998).

56. *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding the power of Congress to prohibit discrimination by restaurants through use of the Commerce Clause).

57. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the power of Congress to prohibit discrimination by motels and other public accommodations on the basis of the Commerce Clause).

58. *Loving v. Virginia*, 388 U.S. 1 (1967) (finding a Virginia law prohibiting interracial marriage to be a violation of the Equal Protection Clause); *McLaughlin v. Florida*, 379 U.S. 184

After striking down segregation and other discriminatory laws and practices, the Court turned its attention to the affirmative action issue, with which it still struggles today.⁵⁹ The landmark case in education was *Regents of the University of California v. Bakke*, decided in 1978.⁶⁰ Allan Bakke, a white male, applied and was denied admission to the University of Davis Medical School in 1973 and again in 1974.⁶¹ His discrimination claim was based upon that fact that he had a higher GPA and higher test scores than certain African American, Mexican American, and Asian American students admitted to the school through a special set-aside admissions program.⁶² Justice Powell announced the judgment of the Court, but was unable to get any other Justice to concur with the entirety of his opinion. Justice Powell was able to get four Justices (Brennan, White, Marshall, and Blackmun) to support the proposition that race could be used as a factor in admissions.⁶³ However, Powell did not want to go so far as to say that race could be used as an absolute determinant of admissions, as would exist in a quota system.⁶⁴ To this extent, Justice Powell agreed with the other four Justices on the Court (Burger, Stevens, Rehnquist, and Stewart).⁶⁵ The result is the perhaps confusing holding that race can be used as a *factor* in determining admissions, but not as a necessary qualification.⁶⁶

In writing what was essentially a compromise plurality opinion, Justice Powell acknowledged the complexities of the affirmative action debate. After summarizing both the long history of racism in the United States and the Supreme Court's jurisprudence on race, Powell

(1964) (finding unconstitutional a Florida law prohibiting the cohabitation of interracial married couples).

59. Alexandra Natapoff argues that the Supreme Court is stuck in a black/white dichotomy in its treatment of cases dealing with race and that it needs to embrace Madisonian ideals of plurality in dealing with contemporary multicultural reality to create a legal regime that is sensitive to the diverse history, needs, and claims of different racial groups. See Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1060-65 (1995).

60. 438 U.S. 265 (1978). Previously, in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), a white applicant sued on his own behalf after failing to gain admission to the University of Washington Law School. However, the Supreme Court dismissed the case as moot because Mr. DeFunis had been granted admission on the basis of a state court decision. For further discussion of *DeFunis*, see Ronald Dworkin, *The DeFunis Case: The Right to Go to Law School*, in AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION? 70-89 (Francis J. Beckwith & Todd E. Jones eds., 1997).

61. *Bakke*, 438 U.S. at 276.

62. *Id.* at 278.

63. See *id.* at 324-25 (Brennan, J., concurring in part and dissenting in part).

64. *Id.* at 307.

65. See *id.* at 408, 416 (Stevens, J., concurring in part and dissenting in part).

66. *Id.* at 317-18.

rejected the medical school's argument that racial minorities merit special protection not afforded to the white majority.⁶⁷ Indeed, the very idea of giving preference to a particular racial group conflicts with our current sense of justice defined as equality.⁶⁸ Furthermore, "it may not always be clear that a so-called preference is in fact benign."⁶⁹ Allowing preference to be used to differentiate between races creates a tension between individual and group goals. "Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest."⁷⁰ This result, privileging a group over an individual, is something the Constitution does not allow, especially where the individuals bearing the burden did not perpetuate the harm.⁷¹ Separating individuals on the basis of race may also perpetuate negative stereotypes.⁷² Despite these concerns, however, Justice Powell did find a limited form of affirmative action constitutional.

Justice Powell's position on acceptable uses of affirmative action comes across in his rejection of several of the arguments forwarded by the University of California. Powell rejected as facially invalid the explicit allocation of admission slots according to specific percentages.⁷³ He contended that explicit quotas violate the Fourteenth Amendment Equal Protection Clause because such quotas treat individuals differently explicitly on the basis of race.⁷⁴ Thus,

67. See *id.* at 294-95. Arguing for the University, Archibald Cox contended that affirmative action must be viewed in the larger context of discrimination against minorities. In response to Justice Potter Stewart's question about whether or not the quota at U.C. Davis put a limit on the number of whites admitted, Cox replied:

I think that it limited the number of nonminority, and therefore essentially white, yes. But there are two things to be said about that: one is that this was not pointing the finger at a group which had been marked as inferior in any sense and it was undifferentiated, it operated against a wide variety of people. So I think it was not stigmatizing. . . .

Oral argument to Regents v. Bakke, in MAY IT PLEASE THE COURT . . . : TRANSCRIPTS OF 23 LIVE RECORDINGS OF LANDMARK CASES ARGUED BEFORE THE SUPREME COURT, at 307-08 (Peter Irons & Stephanie Guitton eds., 1993).

68. In this sense, Justice Powell adopted Justice Harlan's view of the Constitution as "colorblind":

The Equal Protection Clause is not framed in terms of 'stigma.' Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened.

Bakke, 438 U.S. at 295 n.34.

69. *Id.* at 298.

70. *Id.*

71. See *id.*

72. See *id.*

73. See *id.* at 307.

74. *Id.* at 319.

Powell aimed to ensure rights as an individual-based category. While Powell allowed for the possibility of taking race into account in order “to promote a substantial state interest,”⁷⁵ this exception is still phrased in terms of the individual. In short, there can be no recognition of the type of group-based rights that would fit well with an analysis of programs like affirmative action unless they are always linked to a specific harm that can be attached to an individual perpetrator or victim.

It should be pointed out that this is the issue on which Justices Brennan, White, Marshall, and Blackmun disagreed with Justice Powell. In an opinion written by Justice Brennan,⁷⁶ concurring in part and dissenting in part, the four Justices argued that Congress intended Title VI to imply that race can be taken into account and racial quotas used when they remedy disadvantages caused by past racial prejudice but not when they demean or insult a racial group.⁷⁷ Congress intended that laws concerning discrimination not be static and permanently fixed but rather that they “be shaped by experience, administrative necessity, and evolving judicial doctrine.”⁷⁸ This allows universities to address existing discrimination as it is actually manifest rather than through a more abstract theoretical treatment of racism.⁷⁹ Such a policy would be allowed even if the institution did not itself have a past history of discrimination.⁸⁰ Remedial programs, the four concurring Justices maintained, must undergo strict scrutiny and must be careful not to burden with a benign program those least able to handle it.⁸¹ In their eyes, the Davis program satisfied this requirement.⁸² It is not necessary for those benefited to show that they were individually harmed by past discrimination; rather, they need only show that they belong to a general class that has likely suffered from past discrimination by demonstrating disparate racial impact.⁸³ In essence, the concurrence written by Brennan values the group over the individual.⁸⁴ In his emphasis on individual rights, however,

75. *Id.* at 320.

76. Justices White, Marshall, and Blackmun also wrote separate concurring opinions. It would bring in inordinate detail to discuss these opinions individually other than to mention Marshall's stringent emphasis on the history of racial discrimination against blacks as a justification for present remedial programs. *See id.* at 400-01.

77. *See id.* at 330.

78. *Id.* at 337.

79. *See id.* at 338-39.

80. *See id.* at 344.

81. *See id.* at 357.

82. *See id.* at 362, 369-76.

83. *See id.* at 366, 369.

84. Charles R. Lawrence argues that because race is socially constructed, remedies to racial conflict are best viewed in terms of groups instead of individuals and individual rights, the latter

Powell rejected this line of argument as transgressing the boundaries of a colorblind Constitution.⁸⁵

In response to the medical school's second argument, Powell left open the possibility that affirmative action is permissible to remedy past wrongs, but only upon a showing of those past wrongs, of which he found none.⁸⁶ Similarly, Powell rejected the University of California's contention that admitting minority students would increase the delivery of health care to "underserved" communities because the University offered insufficient evidence to support that proposition.⁸⁷

Powell did accept, however, the fourth argument for affirmative action, namely, that affirmative action can be used to create a "diverse student body."⁸⁸ On First Amendment freedom of speech grounds, Powell found this principle to be constitutional. Institutions of higher education "must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas.'"⁸⁹ It is not necessary to set aside a specific number of seats in order to achieve racial diversity.⁹⁰ Rather, race can be used as one factor among many in the admissions process.⁹¹ It is thus neither a bar to admission nor an automatic pass. Such a program "treats each applicant as an individual in the admissions process" because one's race becomes a

being a common focus even of critics of affirmative action. Charles R. Lawrence III, *Forward: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824-25, 835 (1995).

85. See *Bakke*, 438 U.S. at 296 n.36, 308 n.44.

86. See *id.* at 307-09.

87. *Id.* at 310-11.

88. *Id.* at 311. There is some resonance to this idea. After all, we would probably not accept, at least from a legal standpoint, setting aside specific scholarships or lowering admissions standards for athletes (it does not matter which) for the purpose of fostering winning football teams, but we might accept this practice from a diversity standpoint (athletes presumed to bring a different perspective than nonathletes). Similarly, colleges can admit skilled musicians on the basis of increasing the cultural experience of its students. If athletic and musical ability can serve as diversity justifications for admissions, then it is unclear why a diversity justification cannot be extended to racial categories as well. Cox noted the similarity between athletic and racial scholarships in his oral argument in *Bakke*. See Oral arguments to *Regents v. Bakke*, *supra* note 67, at 308-09.

89. *Bakke*, 438 U.S. at 313.

90. See *id.* at 315.

91. See *id.* at 316-17. Justices Brennan, White, Marshall, and Blackmun argued that there is no meaningful or constitutional distinction between preferences and quotas for admissions because the former could be turned in essence into the latter depending on how much weight was given to one's race. See *id.* at 378.

In an opinion also both concurring and dissenting in part, Justices Stevens, Burger, Stewart, and Rehnquist asserted that the case was not a class action, so the issue of race should not have been raised. See *id.* at 408, 411. Despite this admonition, though, the opinion does go on to assert that Title VI was meant to reinforce a colorblind Constitution. See *id.* at 416.

component of his or her individual merit in being admitted to the school.⁹² This compromise between the use of racial quotas and the complete exclusion of race from admissions decisions maintains a regime of individual rights, while incorporating key elements of group identity by accepting diversity of opinions as a means of admission.⁹³

Bakke was a watershed case regarding affirmative action in educational settings. The cases following *Bakke* arguably represent a move by the Court away from allowing race to be used as a factor in the selection process. Most Supreme Court affirmative action cases subsequent to *Bakke* have dealt with affirmative action in the workplace.⁹⁴ The Court in *Richmond v. Croson* held that statistical racial disparities cannot be used to establish a prima facie practice of discrimination when special qualifications are required to fill the job in question.⁹⁵ The *Croson* Court further held that mandatory set-asides for government-funded projects must be based upon a showing that the city was a "passive participant" in past discrimination in order to justify the proposed remedial action.⁹⁶ Assuming this burden is met, the program must be narrowly tailored to remedy the demonstrated harm.⁹⁷ This holding exists for both federal and state funding projects.⁹⁸ Justice Powell, the author of the plurality opinion in *Bakke*, somewhat disturbingly concluded in his plurality opinion in *Wygant*

92. *Id.* at 318.

93. Admitting that one's race can lead to a diverse perspective is a clear example of the ecological fallacy in imputing individual characteristics from group identity. The only way to escape this fallacy is to hold that being a member of a particular racial group inevitably leads to a particular set of life experiences, which is to rely upon groups as a meaningful political and legal form of identity. In other words, unless Powell assumed that there are a particular set of experiences to be gained from being a member of a particular group, usually a racial group but not necessarily so, then there is no justification for making the link between race and diversity.

In the alternative, one could contend that the mere presence of people with the outward appearance of being a member of a minority racial group will instill toleration and otherwise dissolve prejudice in those who belong to the majority. In order to maintain the focus on the individual, though, it is necessary to place an unsettling emphasis on appearance rather than group characteristics. There is no evidence in Justice Powell's opinion that he follows either line of reasoning.

94. For a brief overview of this case law, see generally Elizabeth Maier, *A Review of Higher Education Case Law*, 4 RACE & ETHNIC ANCESTRY L.J. 54 (1998).

95. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).

96. *Id.* at 492.

97. *See id.* at 506-07.

98. This position is consistent with Justice Powell's decision in *Bakke*, because he apparently would have been open to specific racial set-asides if they could be shown to remedy past wrongs. No mention was made in the funding projects at issue of using race as a contributing factor for allocating work, though it is not clear why it could not be so used. However, for workplace affirmative action, the Supreme Court does appear to require a demonstration of past wrongs. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

*v. Jackson Board of Education*⁹⁹ that the desire to have minority role models for minority students did not bear a significant enough relationship to remedying prior discriminatory hiring practices to justify a program creating a minority preference in teacher layoffs.¹⁰⁰ On the other hand, in *United Steelworkers v. Weber*,¹⁰¹ the Court held that a plan to reserve a certain number of spots in a factory training program for blacks as a temporary measure until the percentage of skilled black workers in the plant mirrored the percentage of black workers in the labor force was constitutional.¹⁰²

In *Metro Broadcasting, Inc. v. FCC*,¹⁰³ the Court gave deference to Congress's decision to require the FCC to sell a certain number of radio and television broadcasting licenses to minorities in order to promote diversity.¹⁰⁴ This deference, however, was explicitly overruled in *Adarand Constructors, Inc v. Pena*, in which the Court held federal affirmative action programs to the same standard as that applied to states and municipalities in *Croson*, following on the heels of the other cases just discussed.¹⁰⁵ The decision in *Adarand* possibly signals an entrenchment against affirmative action, though it does allow for affirmative action when it is narrowly tailored to remedy past wrongs.¹⁰⁶

It is unclear, however, the extent to which *Croson* and *Adarand* extend to the educational context.¹⁰⁷ At issue is whether or not justifications other than remedying past wrongs can still be applied to school admissions. While Justice Powell's plurality opinion in *Bakke* admitted diversity as an acceptable justification for considering race in the admissions process, it is unclear if Justices Brennan, White, Marshall and Blackmun agreed with it. In a footnote early in their opinion, the four Justices stated that they agreed the "race as a factor"

99. 476 U.S. 267 (1986).

100. *Id.* at 275.

101. 443 U.S. 193 (1979).

102. *Id.* at 208.

103. 497 U.S. 547 (1990).

104. *Id.* at 566.

105. 518 U.S. at 227.

106. *See id.* at 227, 235.

107. There is no justification for differentiating between affirmative action in the educational and in the occupational context other than possibly a sense of degree as far as merit is concerned. There is a prevailing sense that education is preparation for a job and that once the job hunt begins, arguments of merit should reign supreme. This is an artificial distinction. The line at which merit becomes of overriding importance, assuming one believes that this is ever the case, can be drawn at any point in the process. In other words, it is as logically coherent to endorse arguments of merit at the occupational level as it is at the graduate school level, as at the college admissions level, as at the high school level. The only limiting factor is at what point one believes distinctions based upon merit can in fact be made.

plan is constitutional “at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.”¹⁰⁸ While this seems to endorse a “past discrimination” requirement, one could also interpret a lack of diversity as a “lingering” effect of that past discrimination.¹⁰⁹

In *United States v. Fordice*,¹¹⁰ the Court suggested a possible means for reinvigorating the combating of “lingering” effects as a justification for affirmative action, challenging Mississippi’s *de facto* “dual” system of colleges and universities for blacks and whites, which existed despite an ostensibly neutral admissions policy.¹¹¹ By viewing the university system in Mississippi on broad terms, as opposed to focusing more narrowly on identifying specific harms, the Court allowed a more expansive justification of affirmative action.

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.¹¹²

The Court suggested a willingness to look beyond admissions standards to determine whether an institution of higher education is acting discriminatorily.¹¹³ Indeed, the mention of segregative effects resulting from student enrollment decisions is entirely compatible with a concern for diversity, though this motivation is not discussed in *Fordice*. More important, though, is the acceptance that institutional

108. *Bakke*, 438 U.S. at 326 n.1.

109. As will be seen, the majority opinion in *Hopwood v. Texas* suggests that the four Justices implicitly rejected Powell’s “diversity” position. 78 F.3d 932, 944 (1996). To interpret this passage in this way, though, leaves the four Justices in an untenable “all or nothing” stance in which race can either be used as an exclusive criterion for admissions or it cannot be used at all. While the four Justices may not have wanted to rely primarily upon a “diversity” justification for racial admissions, there is nothing in their concurring opinion that contradicts such an approach.

110. 505 U.S. 717 (1992).

111. Specifically, the Court looked at admissions standards, program duplication, institutional mission assignments, and continued operation of all eight public universities. For a historical follow-up to *Fordice*, see generally Robert A. Kronley & Claire V. Handley, *Notes from the Field: Higher Education Desegregation in Mississippi*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 83 (Gary Orfield & Edward Miller eds., 1998).

112. *Fordice*, 505 U.S. at 731.

113. It thus may be possible to use the *Fordice* decision to preserve historically black public colleges and universities. See generally Frank Adams, Jr., *Why Brown v. Board of Education and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 ALA. L. REV. 481 (1996).

racism cannot always be limited to specific actors but rather must sometimes be viewed more systematically. This type of approach addresses "the lingering effects of past discrimination" in a way that would likely be quite agreeable to Brennan, White, Marshall, and Blackmun. This approach, however, has not been adopted by later courts.

III. RECENT LOWER COURT DECISIONS ON AFFIRMATIVE ACTION IN EDUCATIONAL SETTINGS

Recent circuit court opinions have tended to emphasize admissions standards as the primary concern for higher education and race, shifting away from allowing affirmative action to operate within those policies.¹¹⁴ In *Podberesky v. Kirwan*,¹¹⁵ a scholarship at the University of Maryland set aside solely for African Americans was found unconstitutional because it was not narrowly tailored to remedy past discrimination.¹¹⁶ More damaging for proponents of affirmative action was the Third Circuit's rejection of various proffered justifications for the affirmative action program: remedying a poor reputation of the university among African Americans,¹¹⁷ eliminating a climate on campus hostile to African Americans,¹¹⁸ and providing minority role models.¹¹⁹ As will be seen, these justifications for affirmative action are among those offered in Section V.

*Hopwood v. Texas*¹²⁰ took a more direct stance against affirmative action in admissions policies with regard to the University of Texas

114. See generally Scott L. Olson, *The Case Against Affirmative Action in the Admissions Process*, 58 U. PITT. L. REV. 991 (1997) (arguing that recent court decisions signal a trend away from acceptance of affirmative action in admissions policies).

115. 38 F.3d 147 (3d Cir. 1994), cert. denied, 514 U.S. 1128 (1995).

116. *Id.* at 158. The court proceeded to examine the attraction of only high-achieving African American students, the inclusion of non-Maryland residents, the arbitrary reference pool, and race-neutral alternatives as reasons why the program is not narrowly tailored. See also Ellen R. Dassance, *Affirmative Action Implications for Colleges and Universities Beyond the Scholarship and Student Admissions Areas*, 5 WM. & MARY BILL RTS. J. 661, 673 (1997) (suggesting that the principles behind the Fourth Circuit's decision to strike down a minority scholarship in *Podberesky* could also be applied to faculty hiring decisions).

117. See *id.* at 154 (holding that allowing "mere knowledge of historical fact" to justify affirmative action programs would provide a too broad and too easily satisfied justification).

118. See *id.* (noting a lack of a clear connection between past discrimination and current attitudes).

119. See *id.* at 159 (extending *Wygant*).

120. 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996) (denying certiorari to the University of Texas School of Law). Upon remand, the district court found that the applicants who challenged the admissions policies at the law school would not have been admitted anyway. *Hopwood v. Texas*, 999 F. Supp. 872 (W.D. Tex. 1998), *aff'd*, 236 F.3d 256 (5th Cir. 2000). The district court still decided to award the plaintiffs attorney's fees.

Samuel Issacharoff, a law professor and member of the defense team for the University of Texas, asserts that the state had a compelling interest in promoting racial diversity in its law

School of Law. Focusing on the solitary nature of Justice Powell's opinion in *Bakke*, the court held his emphasis on diversity to be nonbinding precedent because "no other Justice joined in that part of the opinion discussing the diversity rationale."¹²¹ Racial differences, Judge Smith argued, were not an accurate predictor of diversity of viewpoints, meaning that diversity could not constitute a compelling state interest justifying the use of racial classifications in affirmative action programs.¹²² Indeed, after *Croson* and *Adarand*, the only compelling justification for racial classifications was "remedying the effects of racial discrimination."¹²³ Judge Smith concluded that

using race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational than choices based upon the physical size or blood type of applicants. . . . To believe that a person's race controls his point of view is to stereotype him.¹²⁴

The admissions policy at the law school, however, was unique enough to call the generalizability of *Hopwood* into question.¹²⁵ More specifically, the law school established different admissions standards

schools and that an affirmative action policy acknowledging the racial identity of the applicants, as opposed to the race-neutral policy pushed by the courts, was necessary in order to achieve this goal. See Samuel Issacharoff, *Bakke in the Admissions Office and the Courts: Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 680-82 (1998).

121. *Hopwood*, 78 F.3d at 944.

122. *Id.* at 944-45.

123. *Id.* at 945.

124. *Id.* at 945-46. Judge Smith was correct, of course, about this last point, but, where there is a high correlation between the stereotype and the actual viewpoint, it might be justifiable to sacrifice the harm done to a small number of individuals through incorrect stereotyping for the greater good created by having diverse viewpoints at the university. This Article's position is premised upon there being at least some commonality, though by no means complete sameness, among the experiences of African Americans and members of other racial groups. To quote John Payton, a prominent proponent of affirmative action,

You can't take two kids—one black and one white—with parents who have the same occupation and live in the same neighborhood, and say that they are interchangeable. That's not how race works in our society. Race will affect them in different ways. That's the jarring reality of our society. There is something different about the experiences of a black student, a Hispanic student, an Asian student, or a white student. . . . Do white students, black students, Asian students, and Hispanic students contribute to a diverse student body? The answer is yes.

Tim Wells, *Affirmative Action in Law School Admissions: Is It Necessary?—Interview with John Payton and Clint Bolick*, THE WASHINGTON LAWYER, Jan.-Feb. 2000.

125. For an extensive discussion of *Hopwood*, the cases leading up to and influencing it, and the implications of *Hopwood*, see generally Laura C. Scanlan, *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. Rev. 1580 (1996); David Schimmel, *Is Bakke Good Law? The Fifth Circuit Says No and Outlaws Affirmative Action*, 113 ED. L. REP. 1052 (1996); Victor V. Wright, *Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down an Affirmative Action Admissions Program*, 34 HOUS. L. REV. 871 (1997).

and review processes and committees for African American and Mexican American applicants and for all other applicants.¹²⁶ This resembles the policy that was struck down in *Bakke* more than the one that was sustained.¹²⁷

Furthermore, when the State attempted to tie its admissions policy to past discrimination, it based its analysis upon the history of primary and secondary schools in Texas rather than upon the law school alone, a move that the Fifth Circuit, drawing on *Croson* and *Wygant*, rejected.¹²⁸ The court did not comment upon whether some form of affirmative action would have been allowed had past discrimination in the law school been demonstrated.¹²⁹ Thus, narrowly interpreted, the *Hopwood* court held a particularly flawed affirmative action program unconstitutional, not affirmative action in general.¹³⁰ The narrow holding explains why the Supreme Court denied certiorari.¹³¹

A situation similar to *Hopwood* arose in *Wessmann v. Gittens*.¹³² The case involved admission to the elite Boston Latin School, a public school that based its admissions largely on the results of a standardized exam.¹³³ The school had established a complicated affirmative action program whereby half of the seats were reserved for the highest scorers on the test and the other half of the seats were

126. See *Hopwood*, 78 F.3d at 936.

127. See Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CALIF. L. REV. 1299, 1364-65 (1999) (asserting that it is unlikely the University of Texas actually believed the law school admissions policy to be in compliance with *Bakke*). Killenbeck later argues that if Texas had structured its minority admissions policy in a more careful way, the policy would have been more likely to pass constitutional muster. *Id.* at 1370.

128. See *Hopwood*, 78 F.3d at 950.

129. The *Hopwood* court mentioned in dicta that even if the entire statewide system of public education were the proper unit of analysis, the law school admissions policy would not withstand review. *Id.* at 951. In addition, the court argued, following *Podberesky*, that a bad reputation cannot be corrected through an admissions program because the applicants have already decided that they want to go to the law school, despite its allegedly bad reputation. *Id.* at 953. This, however, ignores the possibility that more minorities would choose to apply in the first place if the admissions policy and reputation of the law school were different.

130. There is some contention that *Hopwood* and other recent cases are causing universities to drop their affirmative action programs before even going to court. See Michael S. Greve, *The Demise of Race-Based Admissions Policies*, CHRON. OF HIGHER EDUC., Mar. 19, 1999, at B6.

131. In refusing certiorari on *Hopwood v. Texas*, Justices Ginsberg and Souter suggested that the case should have been heard, because “[w]hether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance.” *Texas v. Hopwood*, 518 U.S. 1033, 1033 (1996). The two refused to grant certiorari, though, because the rationale, and not the judgment, was challenged, and the Court only reviews final judgments. *Id.*

132. 160 F.3d 790 (1st Cir. 1998).

133. *Id.* at 791.

distributed to so as to reflect the racial composition of the qualified applicant pool minus those students automatically admitted.¹³⁴ The school claimed the policy was necessary to (1) maintain diversity and (2) remedy past discrimination (the school had formerly been under a court desegregation order) by countering the negative attitudes of teachers toward minorities.¹³⁵

The First Circuit rejected the first claim on the grounds that the school was operating what was, in essence, a racial quota system, thus invoking strict scrutiny, without providing any evidence that their proportional admission policy was "in any way tied to the vigorous exchange of ideas."¹³⁶ The court rejected the second claim because past findings of discrimination are insufficient to justify present race-based action absent further quantifiable evidence and because the remedy was not narrowly tailored, as it admitted not only those students from public schools who had supposedly been harmed by low teacher expectations but also students from private schools as well.¹³⁷

The arguments put forth by the majority may at first be convincing, but they are adequately countered by the dissent. While conceding that the diversity argument may not be a strong one, Judge Lipez argued that the past discrimination argument can be sustained if one interprets *Wygant* and *Croson* as requiring the school to provide only a prima facie showing of discrimination and not the extensive quantitative support that the majority requires.¹³⁸ Judge Lipez found this prima facie case established by expert testimony, thereby requiring the challengers of the affirmative action program to rebut this presumption.¹³⁹ He also found the policy narrowly tailored because it incorporated elements of flexibility and was necessary to provide relief.¹⁴⁰

134. *Id.* at 793. The qualified applicant pool consisted of those scoring in the top 50% on the standardized admissions test. *Id.*

135. *Id.* at 797, 800.

136. *Id.* at 799.

137. *See id.* at 802, 805, 808.

138. *See id.* at 810, 814 (Lipez, J., dissenting).

139. *See id.* at 819-20; *see also* Note, *First Circuit Holds that Public Exam School Policy that uses Race as an Admissions Factor Offends the Equal Protection Clause—Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998), 112 HARV. L. REV. 1789, 1792 (1999) (supporting this point).

140. *Wessmann*, 160 F.3d at 829-30 (Lipez, J., dissenting). In response to the charge that the program was invalid because it admitted students who had not gone to public schools, Judge Lipez responded that parents should not be punished for having decided previously to remove their children from an unsupportive environment. *Id.* at 832. One could also respond that the admissions policy was as narrowly tailored as possible without excluding outright private school children from admission. In other words, if one wanted to restrict the corrective aspects of the admissions policy, it would be necessary to exclude private school students from that admissions pool, which would introduce even further complexity and complications into the admissions program. The establishment of a qualified applicant pool may have salience for affirmative

Judge Lipez introduced a further subtlety into his analysis when, in response to the charge that the admissions program was interested solely in diversity because it failed to reach a minority population reflective of the public school system as a whole, he asserted that the school was fully justified in establishing a minimum threshold of qualification, with the goal of proportionality narrowly tailored to fit that pool of applicants.¹⁴¹

In contrast to *Podberesky*, *Hopwood*, and *Wessmann*, however, other recent federal cases have suggested new life for affirmative action programs at colleges and universities. Just this past December, the Ninth Circuit in *Smith v. University of Washington Law School*¹⁴² determined Justice Powell's opinion allowing for a diversity justification for affirmative action to be both the narrowest possible interpretation of *Bakke* and also still good law.¹⁴³ While the court reasoned that the perception of minorities as victims of "societal discrimination" was not sufficient to justify affirmative action,¹⁴⁴ a five Justice majority in *Bakke* favored giving added weight to minorities under a diversity rationale.¹⁴⁵ This position directly conflicts with that of the Fifth Circuit in *Hopwood*.¹⁴⁶ About a week after the Ninth Circuit decision, the Eastern District of Michigan, in *Gratz v. Bollinger*,¹⁴⁷ also rejected *Hopwood's* conclusion that diversity could not be used to justify racial classifications, reasoning that the Fifth Circuit read too much into the silence on the issue of diversity by the four Justices who would have allowed the university's quota system.¹⁴⁸ While the court "did not necessarily agree" with the Ninth Circuit that Justice Powell's opinion in *Bakke* was "the narrowest footing upon which a race-conscious decision making process could stand,"¹⁴⁹ it did agree that diversity "constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process."¹⁵⁰ Before diversity could be

action programs in the future.

141. See *id.* at 831.

142. 233 F.3d 1188 (9th Cir. 2000) (upholding the possibility of diversity-based affirmative action, but striking it down in the present case as barred by state law).

143. *Id.* at 1200.

144. *Id.* at 1197.

145. *Id.* at 1199.

146. 78 F.3d 932, 944 (5th Cir. 1996).

147. 122 F. Supp. 2d 811, 820-21 (E.D. Mich. 2000).

148. *Id.* at 820-22.

149. *Id.* at 820 (quoting *Smith*, 233 F.3d at 1199).

150. *Id.* In a later decision, the same judge rejected the contention that the college's admissions policies could be construed as a narrowly tailored means of remedying past discrimination, in large part because the defendant-interveners introduced no evidence that remedying past discrimination, as opposed to fostering diversity, was the underlying reason for

used as a compelling state interest, though, the State had to show that the creation of a diverse student body resulted in a better educational environment, which the State did by presenting empirical studies demonstrating that those students in the most racially and ethnically diverse classroom settings exhibited “the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.”¹⁵¹ Furthermore, these students were also better able to understand multiple perspectives, appreciate common values, and deal with conflicts.¹⁵² Because of the social science evidence showing its benefits, the court was able to conclude that “diversity is not a ‘remedy.’”¹⁵³ The court even went so far as to distinguish educational settings from the job hiring context that existed in *Croson* and *Adarand*:

This Court, however, is not convinced that what may be too amorphous and ill-defined in other contexts, i.e., the construction industry context, is also necessarily too amorphous or ill-defined in the context of higher education. In this Court’s opinion, the fact that the University cannot articulate a set number or percentage of minority students that would constitute the requisite level of diversity does not, by itself, eliminate diversity as a potentially compelling interest.¹⁵⁴

Consequently, the court accepted as constitutional the current admissions policy at the University of Michigan College of Literature, Science, and the Arts of giving added “points” to minorities on the admissions scale.¹⁵⁵ A different judge in the Eastern District of Michigan, on the other hand, recently rejected diversity as a compelling state interest in a case involving admissions to the University of Michigan Law School.¹⁵⁶ Though the court there acknowledged the same evidence of educational benefits as cited in *Gratz v. Bollinger*, Judge Friedman did not believe that there was a

the admissions policy. *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

151. *Gratz*, 122 F. Supp. 2d at 822 (quoting a report by Patricia Y. Gurin, Prof. of Psychology and Interim Dean of the School of Literature, Sciences, and Arts).

152. *Id.* For a further overview of the empirical evidence necessary to demonstrate educational benefits of affirmative action, encompassing both studies already conducted and issues that still need to be researched, see generally Jonathan R. Alger, *Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73 (1998).

153. *Gratz*, 122 F. Supp. 2d at 824.

154. *Id.* at 823.

155. *Id.* at 831.

156. *Grutter v. Bollinger*, No. 97-CV-75928-DT 2001 WL 293196, (E.D. Mich. Mar. 27, 2001) (Friedman, Dist. J.).

strong connection between racial diversity and viewpoint diversity.¹⁵⁷ Furthermore, the existence of an “unfair playing field” did not justify implementing an admissions system that made explicit use of racial classifications.¹⁵⁸ Given that different judges in the same district court came to opposite conclusions on admissions policies at the same university, it is almost certain that the Sixth Circuit will need to resolve this contradiction.

The decisions in *Smith* and *Gratz* strongly suggest that there may still be life for affirmative action programs, at least in educational settings where colleges and universities can rely on the diversity rationale articulated in *Bakke*. The conflict between these cases and *Hopwood* and *Podberesky* makes it highly likely that the Supreme Court will need to resolve this issue in the near future. As Judge Wiener stated in his concurrence to *Hopwood*, “if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.”¹⁵⁹ While the diversity rationale, at least as presented in *Bakke*, relies upon more of an individual-rights foundation, as opposed to the group-based rights framework that this Article advocates in its analysis of *The Bell Curve*, the current affirmative action jurisprudence provides room for theoretical debate about the purposes and effects of affirmative action.¹⁶⁰ After presenting strong factual evidence of continuing systematic disparities in law school admissions for minorities, this Article will return to these theoretical arguments.

IV. STATISTICS ON RACE AND LAW SCHOOL ENROLLMENTS

Regardless of judicial precedent, there is an undeniable problem with underrepresentation of racial minorities in institutions of higher education like law school.¹⁶¹ Recent statistics show African Americans

157. *Id.* at 24.

158. *Id.* at 44.

159. *Hopwood v. Texas*, 78 F.3d 932, 963 (5th Cir. 1996) (Wiener, J., concurring).

160. Lest it be feared that the previous overview has been nothing more than a history lesson, this Article will cite Supreme Court precedent where appropriate to support its arguments. In short, this Article’s emphasis on group rights over individual rights does not defeat its claims.

161. One big caveat in this Article is that it addresses affirmative action solely in terms of race and ignores gender almost completely. This is not because gender is unimportant. Rather, race has captured, for whatever reason, most of the focus and heat in the debate over affirmative action. This is perhaps because women are inescapably integrated into the daily lives of men, whereas race is frequently a much more “discreet and insular” classification. Education statistics for gender also vary greatly by field, making it harder to draw generalized conclusions about the principles behind affirmative action. The gender issue is further complicated by the willingness of the courts to accept the possibility that physical differences between men and women justify different treatment, resulting in an intermediate scrutiny standard for gender classifications as

comprise just over 13% of the American population among those age 25-34 (see chart below), but receive under 7.5% of the law degrees, resulting in an underrepresentation of 43% as a percentage of law degrees in relation to their percentage of population. Hispanics suffer even greater underrepresentation at over 58%.¹⁶² Non-Hispanic

opposed to the strict scrutiny standard applied to racial classifications. See, e.g., *Michael M. v. Superior Ct. of Sonoma County*, 450 U.S. 464 (1981) (holding that a California law punishing males but not females for statutory rape was not a violation of the Equal Protection Clause because women bear a risk of pregnancy that men do not). In the education arena, these gender classifications are rarely persuasive. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that an all-female nursing school could not exclude men because to do so would perpetuate the image of nursing as a profession only for women and because the school could not show that admitting men would create an adverse learning environment for female students); *United States v. Virginia*, 518 U.S. 515 (1996) (holding that women must be admitted into the Virginia Military Institute because there was no justifiable reason for believing that the "adversative method" of training would be harmed by allowing women to participate). It would be interesting and helpful to compare gender and race both in Supreme Court jurisprudence and with regard to affirmative action in general, but such a comparison is beyond the scope of this Article. To the extent that one believes that affirmative action can be justified as a means to correct for the absence of minorities in a desired school or field, then the principles discussed below with regard to race will apply to gender as well, especially in relation to many highly paid occupations. For a further discussion of gender and affirmative action, though not focusing on the educational context, see, among others, DEBORAH L. RHODE, *SPEAKING OF SEX* 163-71 (1997); Elizabeth Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 GEO. WASH. L. REV. 338 (1986); Helen Norton, *Affirmative Action as a Women's Issue*, 1995 ANN. SURV. AM. L. 373 (1995); Mary K. O'Melveny, *Playing the "Gender" Card: Affirmative Action and Working Women*, 84 KY. L.J. 863 (1996); Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843 (1997); Sherry Bebitch Jeffe, *Don't Count on the Chief Beneficiaries of Affirmative Action to Rescue It*, L.A. TIMES, Mar. 26, 1995, at M6; Daniel B. Wood, *States' Bid To Change Workplace Hire Laws Leaves Women Split*, CHRISTIAN SCIENCE MONITOR, Apr. 7, 1995, at 1.

Herrnstein and Murray barely discuss gender in *The Bell Curve*. There is a suggestion that men, on average, have a slightly higher IQ than women but also more variation. HERRNSTEIN & MURRAY, *supra* note 12, at 275. However, Herrnstein and Murray fail to make any connections between this apparent similarity in intelligence and the underrepresentation of women in high-paying occupations. They also fail to address why disparities exist between men and women in the receipt of J.D.s. A recent survey showed that in 1996-1997, men received 22,548 J.D.s and LL.B.s (combined) but women received only 17,531 of the same degrees. FRANK B. MORGAN, U.S. DEP'T OF EDUC. NAT'L CTR. FOR EDUC. STATISTICS, [E.D. TABS] DEGREES AND OTHER AWARDS CONFERRED BY TITLE IV ELIGIBLE, DEGREE-GRANTING INSTITUTIONS: 1996-97 20 (1999). To put these statistics in perspective, more white males (17,851) received law degrees than did women of all races combined (17,531). *Id.* This disparity reflects just as poorly on the admission of minorities as it does on the admission of women. In fact, of the dramatic increases in the numbers of women and minorities admitted to law school over the past couple of decades, women have been by far the greater beneficiaries. See Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 378 (1994).

162. Because a Hispanic ethnicity is often thought to be more of a language than a racial classification, self-reporting figures for Hispanics are potentially not as accurate as figures for the other ethnic classifications discussed. This is by no means meant to disparage the discrimination experienced by Hispanics.

whites, on the other hand, comprise 68.4% of the American population of 25 to 34 year-olds but receive 79.8% of the law degrees, resulting in an overrepresentation of almost 17%. Asian Americans, sometimes criticized as unnecessary beneficiaries of affirmative action,¹⁶³ are the most overrepresented in the percentage of law degrees to percentage of population at 35%.¹⁶⁴ Native Americans are the only ethnic category with reasonably close proportional representation of law degrees.¹⁶⁵

Race ^a	Population 25-35 (x1000) ^b	Percent Population ^c	Number Law Degrees ^d	Percent Law Degrees by Race ^e	Percent Change ^f
White, Non- Hispanic	26,506	68.36	30,716	79.84	+16.8
Black, Non- Hispanic	5,059	13.05	2,864	7.44	- 43.0
Hispanic	5,176	13.35	2,146	5.56	- 58.4
Asian and Pacific Islander	1,835	4.73	2,458	6.39	+ 35.1
Native American	308	0.79	289	0.75	- 5.1

- a. The nomenclature here is chosen to match that provided in Census figures.
- b. I chose this age range because the vast majority of law degree recipients are contained within it. The population statistics

163. Alfred C. Yen argues that in the hiring of law school professors, Asian Americans, in contrast to Latinos and African Americans, are, in practice, excluded from affirmative action policies, in part due to the common belief that Asian Americans are unnecessary beneficiaries of affirmative action. Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 *ASIAN L.J.* 39, 49 (1996). For an extensive discussion of the history of the treatment of Asians in America, see generally RONALD T. TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1989); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 *WM. & MARY L. REV.* 1 (1994) (discussing the unique position that Asian Americans are placed in with regard to many contemporary debates about affirmative action); Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 *GONZ. L. REV.* 621 (1996) (outlining how Asian Americans have traditionally been excluded from class action suits and court discussion of affirmative action).

164. One might be tempted here to use the term "overrepresented" to describe the difference between percentages of representation of racial groups in law schools as compared to in the population as a whole. This Article will occasionally use this term as a sort of short-hand, though it will later dispute the term's applicability to minority groups such as Asian Americans.

165. Similar but consistent figures are provided by Paul Brest and Miranda Oshige, who also provide socioeconomic data on different races. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 *STAN. L. REV.* 855 (1995).

are from July 1, 1998, whereas the law degree statistics are from 1996–1997, meaning that you have to shift the age range at graduation back one year. To be sure, there are many students over 33, and perhaps even a few under 24, who receive law degrees, but to include these age ranges would have risked being over-inclusive. (In general, the racial disparities would have been made even more extreme.) Statistics are given in thousands and from the U.S. Census Bureau, *Population Projections Program* (visited July 23, 2000) <<http://www.census.gov/population/projections/nation/summary/np-t3-a.txt>>.

- c. Based upon a total United States population 25-34 years old of 38,774,000. *Id.* Figures add up to slightly more than 100% due to rounding.
- d. Statistics are from Morgan, *supra* note 161. The statistics provided here are consistent with, though not exactly the same as, minority enrollment figures released by the American Bar Association for third year law students. ABA Section of Legal Education and Admissions to the Bar, *Minority Enrollment 1971–1999* (visited July 23, 2000) <<http://www.abanet.org/legaled/statistics/minstats.html>>. I chose to use the statistics from the National Center for Education Statistics because the ABA report did not provide figures for white enrollment. One important thing to note from the ABA report, though, is that total minority enrollment among third year students was higher in 1996-97 than in any year prior or since.
- e. Based upon a total of 38,473 J.D.s and LL.B.s awarded in 1997. Morgan, *supra* note 161 (subtracting statistics for “Race/ethnicity unknown” and “Nonresident alien” to make the results more reflective of racial composition). Figures are slightly less than 100% due to rounding.
- f. Calculated by the increase or decrease of the percentage of law degree recipients for the particular race from the percentage the race comprises of the national population for the specified age range.

The number of minority applications and admissions declined even more dramatically after *Hopwood v. Texas* and Proposition 209 in California prohibiting the use of race in admissions at state universities.¹⁶⁶ For example, there were 19 African Americans and 26

166. For a discussion of the constitutionality of the decision by the University of California Board of Regents to eliminate affirmative action in admissions decisions (which was later publicly approved in Proposition 209), see generally Linda D. Martin, *Affirmative Action in University of California Admissions: An Examination of the Constitutionality of Resolution SP-1*, 19 WHITTIER L. REV. 373, 419 (1997) (concluding that the actions of the University of California to eliminate affirmative action violate the Equal Protection Clause of the Fourteenth

Hispanics in an entering class of about 290 at the UCLA School of Law in 1996, the year before Proposition 209 went into effect.¹⁶⁷ In the entering class of 1999, there were 17 Hispanics and only two African Americans.¹⁶⁸ At Boalt Hall School of Law at the University of California at Berkeley, there was only one African American in the entering class of 1997, and that student had deferred admission from the previous year.¹⁶⁹ The following year, Boalt received 20% fewer applications from African Americans, despite an increase of 10% in overall applications.¹⁷⁰ After *Hopwood*,¹⁷¹ minority applications at the University of Texas Law School, which once produced more minority lawyers than any other law school in the country, dropped by over half for African Americans the year following the decision, down from 225 to 111.¹⁷² Some suggest the drop in applications is due more to

Amendment because they deny minorities access to institutions of higher learning). Martin incorrectly assumes that by eliminating affirmative action, the University of California is taking an affirmative step toward abrogating a duty that it is legally bound to perform. In other words, the only way that Martin's argument is coherent is if there exists a positive legal obligation to institute affirmative action policies. This is quite a bit different from claiming either that there is a moral obligation to institute affirmative action policies or that affirmative action policies are legally acceptable though not legally compelled, both of which are arguments that this Article makes.

167. Timothy Kudo, *Low Minority Enrollment at UCLA Law School Raises Concerns*, DAILY BRUIN, Oct. 22, 1999.

168. *Id.*

169. Pamela Burdman, *Fewer Blacks Applied to Boalt Hall for Fall*, S.F. CHRON., Apr. 4, 1998, at A18.

170. *Id.* Applications by Asian Americans rose 44%, applications by whites 22%, and applications by Native Americans 39% (though with a small sample size); numbers of applications by Hispanics remained exactly the same.

171. Following the *Hopwood* decision, the state legislature adopted a plan whereby the top 10% of a graduating class from any accredited high school in the state is automatically admitted to any school in the University of Texas system. See generally William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL'Y REV. 185 (1999) (discussing the merits of the University of Texas plan); Danielle Holley & Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1998) (detailing the history behind Texas's reaction to the *Hopwood* decision and assessing the effectiveness of the new admissions policy, concluding that more effort needs to be directed to secondary education). This plan has not been extended in any form to the law school.

The plan does, though, raise the issue of whether class could be substituted for race in affirmative action programs. This policy, opponents of affirmative action claim, is fairer, not to mention more constitutional, than drawing distinctions on the basis of race. See Clint Bolick, *Blacks and Whites on Common Ground*, 10 STAN. L. & POL'Y REV. 155, 158 (1999). There are empirical questions, however, as to whether or not this would result in a racially diverse class composition. See Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California*, in CHILLING ADMISSIONS, *supra* note 111, at 38. See also Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS, *supra* note 111, at 28-29 (arguing that explicit acknowledgment of race through set-aside programs demonstrates the importance of race in society).

172. Scott Baldauf, *Minorities Shun Top Texas Law School*, CHRISTIAN SCIENCE MONITOR, Mar. 10, 1998. Applications by Hispanics dropped from 306 to 249.

political protest and a sense of alienation than, as some opponents of affirmative action might suggest, to a fear of not being admitted without preferential treatment.¹⁷³ If declining application figures are due solely to resentment toward the law schools, then such resentment will fade eventually. Indeed, there is some evidence that applications and admissions figures are starting to return to pre-1996 levels in both Texas¹⁷⁴ and California.¹⁷⁵

However, while this “rebound” might suggest that the dropping of affirmative action policies will not make things worse, such an assumption is questionable¹⁷⁶ and ignores the huge disparities in proportional representation for African Americans and Hispanics that existed prior to the dropping of explicit affirmative action policies and that continue to exist today. If anything, the disproportion shows that earlier affirmative action efforts should have been pursued more aggressively; there is no reason to believe that the elimination of affirmative action will achieve proportional representation when moderate forms of affirmative action failed to do so.

Since a large majority of law schools rely heavily on Law School Aptitude Test (LSAT) scores to determine admissions,¹⁷⁷ it should not

173. *Id.*

174. Enrollment figures for both blacks and Mexican Americans rose at the University of Texas Law School from 1997 to 1998 due to increased minority recruitment. Kathleen A. Graves, *Affirmative Action in Law School Admissions: An Analysis of Why Affirmative Action Is No Longer the Answer . . . Or Is It?*, 23 S. ILL. U. L. J. 149, 160-61 (1998). Graves suggests that this increase justifies the dropping of affirmative action in school admissions as no longer necessary, especially since there are other alternatives to increase minority enrollment such as increased recruiting of minorities, minority tutoring programs, and changes in the admissions forms. *Id.* at 168-70; see also Sharon Jayson, *UT Law School Doubles its Ranks of New Black Students*, AUSTIN AMERICAN-STATESMAN, July 8, 2000, at B1.

175. An editorial in the *San Francisco Chronicle* suggests that the increase is due in large part to increased recruiting efforts of the type once reserved for sports stars, though it also notes that enrollments for African Americans are still less than half of what they were in 1996 and that Hispanics also lag behind their 1996 numbers. Editorial, *Boalt's New Numbers*, S.F. CHRON., Aug. 20, 1998, at A28.

176. Linda F. Wightman uses statistical comparisons of undergraduate grade point averages (UGPAs) and LSAT scores among whites and minorities as correlated to admission rates to conclude that affirmative action was widely used in law school admissions in 1990-91. See Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 12 (1997). Roughly speaking, the percentage of applicants admitted for various minorities, including Asian Americans, was significantly higher than their combined scores alone would indicate. *Id.* at 14. Wightman further believes that eliminating affirmative action “would result in a law school body that mirrored the ethnic makeup of law schools of thirty years ago.” *Id.* at 50.

For a critique of Wightman’s methodology and her resulting analysis, see generally Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman’s “The Threat to Diversity in Legal Education”*, 15 CONST. COMMENT. 11 (1998).

177. Of 168 law schools participating in a recent survey, most weighted LSAT scores as

be surprising that there appears to be a correlation between race and LSAT scores. Presumably, those students who are somehow educationally deficient will not score well on the LSAT, but neither should they have high GPAs. The only alternate explanation is if the LSAT reflects a different measure of intelligence than does the student's GPA. While this is certainly a possibility, it is one beyond the scope of this Article to explore.

A recent study shows that even when controlling for GPA to minimize other factors such as differences in education, opportunity, intelligence, etc. that might explain LSAT performance, various minority groups score lower on the LSAT than do whites.¹⁷⁸ The study looked at applicants to Boalt Hall from Harvard, Yale, Stanford, UCLA, and UC Berkeley, all elite undergraduate institutions, and matched their GPAs to plus or minus .10 on a 4.0 scale.¹⁷⁹ The results show that, controlling for GPA among applicants from 1996 to 1998, African American applicants to Boalt scored 9.3 points lower on the LSAT than did whites, Hispanics 6.87 points lower than whites, Native Americans 3.77 points lower than whites, and Asian American applicants 2.48 points lower than whites.¹⁸⁰ These results are especially disturbing considering that a nine-point difference in average LSAT scores separates the University of Texas School of Law, ranked in the top twenty law schools in the U.S. *News and World Report* annual survey from St. Mary's Law School in Texas, ranked 133rd in the same survey.¹⁸¹ This is not the place to engage in an in-depth analysis of whether or not the LSAT is racially or

between 55 and 65% of their admissions formula. GPA made up the remainder of the formula. ABA Sec. of Legal Educ. & Admissions to the Bar, *Report on Diversity in Legal Education* (last visited July 23, 2000) <<http://www.abanet.org/legaled/committees/diversity.html>>. As an example, students with an undergraduate GPA ("UGPA") of over 3.75 and LSAT scores of between 168 and 173 were admitted to Boalt Hall 89% of the time compared to a 44% admission rate for students with an over 3.75 UGPA but LSAT scores between 162 and 167. William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 193 (2000).

178. The study was conducted by Testing for the Public, a Berkeley education research organization, and released before the Committee on Higher Education of the Texas House of Representatives in September of 1998. Chris Jenkins, *Study Finds Racial Bias in LSAT*, DAILY CALIFORNIAN, Nov. 13, 1998.

179. Lori White, *LSAT Hurts Minority Students, Study Shows*, PITT NEWS, Oct. 19, 1998.

180. Jenkins, *supra* note 178.

181. *Id.* A report by the same researcher and organization shows that, ignoring LSAT scores, white applicants with a GPA of between 3.5 and 3.74 were admitted to law schools nationally 85% of the time, whereas African American applicants in the same GPA range were only admitted 76% of the time, Hispanics 80% of the time, Asian Americans 82% of the time, and Native Americans 81% of the time. Kidder, *supra* note 177, at 209; Tanya Schevitz, *Law Schools Rely Too Much on Standard Test, Study Says*, S.F. CHRON. June 28, 2000, at A26.

culturally biased.¹⁸² It is also beyond the scope of this Article to examine whether or not the LSAT is an accurate predictor of success in law school, which is its stated purpose.¹⁸³ However, as this Article turns to its analysis of *The Bell Curve* and the book's asserted connection between race and a genetic basis for intelligence, the results of this study can be used not just as evidence of racial bias in the LSAT, which assumes equal intellectual ability, but also as evidence showing the existence of a genetic connection between race and intelligence.¹⁸⁴

182. For a discussion in support of race neutrality in standardized tests generally, see HERRNSTEIN & MURRAY, *supra* note 12, at 277-83. For a claim that the LSAT is not culturally biased, see Philip D. Shelton, "Top Ten" Misconceptions about the LSAT, LAW SERVS. REP., Jan.-Feb. 1999, at 4 (asserting that the rigorous two-year screening process for each question eliminates racial bias); Wightman, *supra* note 176, at 34 (asserting that the LSAT is as accurate or more accurate than UGPA in predicting first-year grades for minority students as compared to white students (Wightman was formerly the Vice President for Testing, Operations, and Research for the Law School Admission Council)). For a critique of the supposed race neutrality of the LSAT, see, among others, David M. White, *An Investigation into the Validity and Cultural Bias of the Law School Admission Test*, in TOWARDS A DIVERSIFIED LEGAL PROFESSION 155 (David M. White ed., 1981) (asserting that the LSAT is culturally insensitive); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1490-93 (1997) (responding to DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) by employing the techniques of deconstructionism to argue that the LSAT has a historical basis in racism).

183. See Law School Admissions Council, *Frequently Asked Questions—LSAT* (visited July 27, 2000) <<http://www.lsac.org/faqs-and-support-lsat.asp#1>>. For a discussion in support of this proposition, see, among others, DINESH D'SOUZA, THE END OF RACISM 313 (1995) (claiming that the College Board has "made strenuous effort" to ensure that there is no middle-class bias in the SAT and that as a result, even critics of the SAT have been unable to detect a racial bias); T. Anne Cleary, *Test Bias: Prediction of Grades of Negro and White Students in Integrated Colleges*, 5 J. EDUC. MEASUREMENT 115 (1968) (arguing that no racial bias can be detected in aptitude tests and their predictive ability for performance). For a critique of the predictive ability of LSAT scores, see, among others, James C. Hathaway, *The Mythical Meritocracy of Law School Admissions*, 34 J. LEGAL EDUC. 86, 93 (1984) (claiming that while the LSAT may be somewhat predictive of minority performance in the first year of law school, it is not an accurate predictor of performance in later years); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1163-64 (1991) (arguing that empirical tests of general ability have such low validity in predicting success on the job that, in light of the disparate racial effects they cause, the tests do not meet the high standards of proof required by Title VII); Kidder, *supra* note 177; Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957 (1996) (contending that employing aptitude tests in admissions decisions reinforces social oligarchy by keeping the wealthy in power).

184. To make this assertion, one would have to find some way to counteract the correction that the study made for GPA by arguing that GPA, for some reason, is not an accurate predictor of actual intelligence. In response to the LSAT study just discussed, David Murray of the Statistical Assessment Service asserts that this study shows just how unreliable GPAs are, especially as compared to LSAT scores. Brady Dewar & Vassant Kamath, *Report Reveals Discrepancy Between Minority and White LSAT Scores*, HARVARD CRIMSON, Oct. 2, 1998. Richard Herrnstein and Charles Murray do not discuss GPAs in *The Bell Curve*. Their discussion of the LSAT is focused on evidence that on average, whites admitted to any given law

V. THE BELL CURVE AND THE UNDERLYING PREMISES OF AFFIRMATIVE ACTION

One may reasonably ask why this Article bases its discussion of affirmative action on *The Bell Curve*, a book that has been widely criticized and debunked from a variety of angles.¹⁸⁵ Indeed, none of the prominent opponents of affirmative action, other than the authors of *The Bell Curve* themselves, make a genetic claim for racial differences in social position or law school admission. Part of this may be due to the political danger and unsavoriness of suggesting that African Americans and other minorities are genetically inferior to whites, but more likely a genetic basis for opposition to affirmative action is simply, in most instances, not necessary. The reason for this is because those who oppose affirmative action, even if they do so on the basis of what they claim to be racially neutral grounds, implicitly rely upon the same premises that would exist were they to assume that racial minorities were genetically less intelligent than whites. At least, this is one of the contentions that this Article will examine in the discussion that follows.

The reason for the use of *The Bell Curve* in this Article is because the different positions on affirmative action necessarily focus on beliefs about the relationship between merit and intelligence. Examining situations in which differences in intelligence are immutable provides helpful reference points by which to reflect on the

school had a higher mean score on the LSAT than African Americans, Hispanics, and Asian Americans, with the largest disparities existing between whites and African Americans and the smallest between Asian Americans and whites. HERRNSTEIN & MURRAY, *supra* note 12, at 455-56. For example, there were over 1,100 whites with LSAT scores of 170 or higher (out of a possible 180), but only 3 African Americans with such scores. *Id.* at 456 (these results do not, of course, control for socio-economic status). Herrnstein and Murray point to this small number of high-scoring African Americans as evidence of the heavy reliance upon affirmative action at elite law schools. *Id.*

185. This Article leaves criticisms of the methodology and scientific findings contained in *The Bell Curve* to others, as this Article would not be adding anything new to such debate. There are also many critiques of the implications and premises of *The Bell Curve* in areas other than affirmative action that are well worth reading. In addition to multiple articles, there have been several books written and collections of essays compiled in direct response to *The Bell Curve*. These books include THE BELL CURVE DEBATE (Russell Jacoby & Naomi Glauberman eds., 1995) (collecting a variety of documents, including critical responses, relating to *The Bell Curve*); THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA (Steven Fraser ed., 1995) (collecting a variety of articles responding to *The Bell Curve*); CLAUDE S. FISCHER ET AL., INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH (1996) (exploring the policy implications of and responding to *The Bell Curve*); INTELLIGENCE, GENES, AND SUCCESS: SCIENTISTS RESPOND TO THE BELL CURVE (Bernie Devlin et al. eds., 1997) (collecting responses by scientists to the empirical claims about the relationship between genetics and intelligence in *The Bell Curve*); MEASURED LIES: THE BELL CURVE EXAMINED (Joe L. Kincheloe et al. eds., 1996) (responding chapter by chapter to *The Bell Curve*).

principles behind the support of and opposition to affirmative action. The connection here is not that all whites are more intelligent than all blacks, or vice versa.¹⁸⁶ Even under the assumption that there are genetic differences between the two races, some members of the genetically less intelligent race (those on the top of their scale) will be more intelligent than some members of the genetically more intelligent race (those on the bottom of their scale). The point is that systematically, under this assumption, whites would be advantaged over blacks. If affirmative action is viewed more in terms of group-based rights than as a corrective for individual harms, then it is precisely the systematic effects of race relations to which we should be looking. Thus, it is important to keep in mind in the following analysis that we are dealing with groups and not individuals, but that is how it should be. In this sense, this Article rejects, for the most part, the holdings of *Croson*, *Adarand*, and related cases limiting affirmative action to instances where past discrimination can be shown. While this Article's arguments may be more easily paired with notions of group rights, this does not make the arguments incompatible with an individual rights framework. For example, we have already seen in *Bakke* how the diversity justification for affirmative action can be presented as based on individual rights, in this case, the free speech rights of the college or university. The human dignity arguments that this Article will provide later can also be cast, as will be seen, either as individual or group rights. What follows, then, can be viewed as alternate justifications for affirmative action, even if one does not go so far as to endorse group rights.

Interestingly, Herrnstein and Murray make the claim that "it matters little whether the genes are involved at all" in ethnic differences in status in the United States.¹⁸⁷ This claim is hard to believe, especially given all the effort Herrnstein and Murray went through to show that there is in fact a genetic component to intelligence.¹⁸⁸ Genuine or not, though, the statement raises serious questions about the implications for affirmative action if one were to assume the actual existence of genetic differences in intelligence between various racial groups. The ways in which these implications

186. Herrnstein and Murray do not claim that it is: they assert that "differences among individuals are far greater than the differences between groups." HERRNSTEIN & MURRAY, *supra* note 12, at 270-71.

187. *Id.* at 312. For further analysis of this passage, see Mickey Kaus, *The "It-Matters-Little" Gambit*, in *THE BELL CURVE WARS*, *supra* note 185, at 130-38.

188. Indirectly counter to this, there are scientists who suggest that it is biologically impossible to distinguish between different races in the first place. See generally L. LUCA CAVALLI-SFORZA, *THE HISTORY AND GEOGRAPHY OF HUMAN GENES* (1994); STEPHEN JAY GOULD, *THE Mismeasure of Man* (1996).

change on the basis of different genetic assumptions illustrate the complexities and inconsistencies of arguments for and against affirmative action.

This Article will proceed by positing four different (racial or ethnic) groups of people differentiated by their inherent intelligence levels; it will then examine pro and con stances on affirmative action in light of these inherent differences. The groups are as follows:

- Group W is the baseline group; members are of average intelligence and constitute the majority in society, both numerically and in terms of their control over wealth and relations of power and influence.
- Group X is stipulated as being genetically less intelligent than Group W; members are a numerical minority in society and are even less represented in positions of wealth, power, and influence than their overall proportion in the national population.
- Group Y is exactly the same as Group X socially, politically and economically, but is posited as having exactly the same inherent intelligence level as Group W.
- Group Z is defined as of greater inherent intelligence than Group W; as for members' social positions, this Article will look at Group Z in terms of both overrepresentation and underrepresentation in the target population.

This Article will examine affirmative action in turn between Group W and each of Groups X, Y, and Z. These abstract group identifications are used to lessen the charged reactions that a for the most part hypothetical discussion of actual racial groups would cause.¹⁸⁹ The arguments should remain the same no matter to which

189. Conceivably, different justifications for affirmative action work better or worse for different racial groups depending on their history and position in society. See generally, Brest & Oshige, *supra* note 165 (discussing three justifications for affirmative action, i.e., justice, diversity, and external benefits (which, as will be seen, mirrors Herrnstein and Murray's three social concerns surrounding affirmative action) as they relate to African Americans, Native Americans, Hispanics, and Asian Americans). The analysis of the three different hypothetical situations set out here would adequately address most of Brest and Oshige's concerns without getting into specifics about the different races. While it may be socially appropriate to treat different minority groups differently, it is hard to see how this maps onto the context of admission to law school unless one wants to argue that African Americans, who (arguably) have a longer and more appalling history of discrimination, deserve more of a boost from affirmative action than do other minority racial groups (an argument which Brest and Oshige do not make). This point may have some salience if recompense for past wrongs is the primary justification for affirmative action. This Article, however, offers a variety of other justifications for affirmative action that avoid forcing the decision-maker to pit minority groups against each other to

racial groups they refer. Where appropriate or necessary, though, this Article will discuss specific racial groups.

This analysis will be conducted in terms of three primary social concerns laid out by Herrnstein and Murray: justice, institutional benefits, and social utility.¹⁹⁰ Though Herrnstein and Murray apply these themes only to the educational context, there is no reason to believe that they could not be applied to occupational affirmative action as well, though this Article will focus on the educational context. All three of these concepts are frequently interconnected, but it is possible, with some slight oversimplification, to analyze each one separately.

Justice, which Herrnstein and Murray refer to as “just desserts,”¹⁹¹ addresses issues of fairness by touching upon core beliefs about equality and human worth. It proceeds by asking tough questions, such as whether a wealthy student who belongs to a racial minority, someone who has had the best education money can buy, should be admitted to law school over a poor white student who has had to struggle through substandard schools.¹⁹²

The concept of institutional benefits encompasses the effects of affirmative action on daily life in the law school itself.¹⁹³ Effects that would be included in institutional benefits include the composition of the class,¹⁹⁴ racial tension or acceptance at the school, the effects of affirmative action on the level of education at the school, and the reputation of the school.

Finally, social utility addresses the external (i.e., outside of the law school) costs and benefits of engaging in or not engaging in

determine which has suffered the most in the past.

190. HERRNSTEIN & MURRAY, *supra* note 12, at 459-62. Herrnstein and Murray admit borrowing these concepts from ROBERT E. KLITGAARD, *CHOOSING ELITES* (1985). For an analysis of the principles both for and against affirmative action laid out along seven dimensions, see generally, Louis P. Pojman, *The Moral Status of Affirmative Action*, in *AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION*, *supra* note 60, at 175-97.

191. *Id.* at 461.

192. *Id.* at 461-62. Carol Swain et al. raised this exact question to both blacks and whites of differing incomes and educational attainment using different combinations of white, black, privileged, and underprivileged students. The results are complicated, but they generally indicate that while there is no significant preference for either the privileged A student or the underprivileged B student when both are of the same race, there is a preference for privileged black A students over underprivileged white B students. See Swain, *supra* note 3, at 165-75.

193. HERRNSTEIN & MURRAY, *supra* note 12, at 459.

194. Herrnstein and Murray note that it may be a perfectly acceptable goal for educational institutions to give preference to children of alumni or to decide whether they want to emphasize sports or music in their admissions policy. *Id.* The latter dilemma is presumably not one that will arise in the law school context, but it is possible that law schools give preference to children of alumni in order to encourage increased donations to the school.

affirmative action.¹⁹⁵ This concept concerns both the message that the law school's admissions policy sends to potential students and the effect that law students will have on society at large once they graduate.

This Article's assessment of the different scenarios in relation to stances for and against affirmative action will reflect the author's beliefs as to whether or not the position taken is internally coherent and morally acceptable based upon the underlying principles revealed by each of the core concepts.

A. *X < W: Affirmative Action When the Minority Is Genetically Less Intelligent Than the Majority*

If the group (X) potentially to be benefited by affirmative action were genetically less intelligent than the group in the majority (W), then opponents of affirmative action would have a strong justice claim against a policy favoring Group X in the aggregate. Everyone should be treated equally, which requires the implementation of a merit-based method of evaluating law school applicants. There may, of course, be limited instances in which a particular person from Group X is more intelligent, and consequently, more qualified for admission to law school than certain members of Group W, gaining admission in his or her own right, but this person would not then need an affirmative action program and would be admitted instead under a purely merit-based admissions system. However, a policy in which a certain number of members of Group X were automatically admitted to law school or in which members of Group X were given some weight or preference over members of Group W in the admissions process would almost certainly create situations where the less intelligent would be admitted instead of those who are more qualified.¹⁹⁶ This, opponents of affirmative action argue, would destroy the neutrality fostered by a merit-based system of admissions.

More importantly, the genetic connection to intelligence removes the counter-argument by proponents of affirmative action that Group X is the victim of social oppression and that this is the cause for its lower levels of education entering the law school application process and for its lower LSAT scores. Opposition to affirmative action under this scenario is premised on the notion that merit should be the

195. *Id.* at 460-61.

196. For this reason, Clint Bolick disparagingly describes affirmative action as a tool for "social engineers." CLINT BOLICK, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* 76 (1996).

deciding factor in law school admissions.¹⁹⁷ While there may be some concern to ensure that the proportion of underrepresentation of Group X in law schools mirrors its relative lack of intelligence,¹⁹⁸ as long as this condition is satisfied, there can be no complaints about the underrepresentation of Group X.

Furthermore, a belief in the genetic inferiority of Group X potentially leads to negative repercussions, opponents of affirmative action would argue, if members are admitted to Group W's society. In terms of institutional benefits, admitting demonstrably less intelligent students (Group X) over those of high merit (Group W) might very well cause resentment among those not admitted and possibly among those in society writ large who view the law school as acting fundamentally unfairly.¹⁹⁹ The abolition of affirmative action in this scenario would also result in the concentration of the most intelligent students of that level of educational achievement in any given law school.²⁰⁰ This would raise the level of education at the law school because courses could be pitched at a higher intellectual level than would be possible if the professor needed to slow down or "dumb down" the course in order to make sure that the less intelligent members of Group X were following along.²⁰¹

197. This emphasis on merit seems consistent with recent Supreme Court cases in the occupational context like *Adarand*, which limit racial preference to demonstrated past discrimination and a narrowly tailored program to remedy that harm. See generally, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). By rejecting other possible justifications for affirmative action, the Supreme Court is implicitly saying that apart from a very limited exception, merit is the only justifiable basis for awarding government contracts. In other words, without race as a means for distributing contracts, only merit (judged in terms of skill and price) remains.

198. For example, the figures above calculate that African Americans are underrepresented in law schools at a rate of 43% less than their percentage of the population. This underrepresentation would be acceptable if 43% of African Americans could be shown to be less intelligent than some standard baseline for intelligence.

It is not necessary to show in the converse that whites and Asian Americans, who are overrepresented in law school populations, are more intelligent than the standard baseline because they could be exactly at the baseline and simply filling in the spots not taken by African Americans, Hispanics, and Native Americans.

199. Indeed, Stephan and Abigail Thernstrom argue that most of the gains made by African Americans occurred before affirmative action programs were instituted and that affirmative action has in fact exacerbated racial divisiveness. See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 95 (1997).

200. In other words, not only would the most intelligent students be concentrated in the most elite law schools but the next most intelligent students would be concentrated in the best of the second-tier law schools and so on down the line.

201. In the occupational context, Herrnstein and Murray give evidence of how affirmative action has led to decreased performance among schoolteachers, the Washington D.C. police force, and Seattle plumbers and pipefitters. HERRNSTEIN & MURRAY, *supra* note 12, at 492-98. Though Herrnstein and Murray do not make these allegations for university admissions, it

From a social utility perspective, increasing the level of education would raise the productivity of the now better-prepared graduates.²⁰² It would also instill a positive work ethic in society by reinforcing the belief that one succeeds on the basis of merit.²⁰³ These benefits, opponents of affirmative action would argue, outweigh any harm that would result from a socially and economically segregated society,²⁰⁴ especially considering the huge affront to justice that would occur if the less intelligent Group X members were given spots in law school over their more deserving Group W counterparts.

In this scenario, the main response of affirmative action proponents is to question the value of merit as the principle determining factor in law school admissions. Proponents cannot argue that Group X members should be admitted on the basis of past social oppression because we are assuming that there is a scientific/genetic explanation for their past failures in educational attainment.

would not be much of a stretch for them to do so. Herrnstein and Murray do spend a whole chapter (Chapter 18) discussing "The Leveling of American Education," but they do not specifically trace this leveling to affirmative action.

202. Arguably, this would be offset by collecting less intelligent students at the bottom-ranked law schools. This argument, though, is premised on the false notion that all law school applicants are admitted to some law school somewhere regardless of their GPA and LSAT scores. A more realistic scenario would be to say that Group X students, who, absent affirmative action, are not admitted into the top law schools, will displace those Group X students who would go to middle-ranked law schools under an affirmative action policy. Those displaced students will, in turn, displace Group X students in the bottom-ranked law schools, who will, in turn, not go to law school at all. This argument is supported by findings by Linda F. Wightman. See Wightman, *supra* note 176, at 26-27.

Even if all applicants did go to some law school somewhere, the benefits of concentrating the intelligent would not be completely offset by the corresponding concentration of the less intelligent as long as one believes that innovation is more likely to come from those with higher levels of education (meaning that the more highly educated those at elite law schools become, the more likely they are to be innovative).

203. See Charles L. Geshkter, *Affirmative Action in Principle, Non-Discrimination in Fact: Higher Education After Proposition 209*, 10 STAN. L. & POL'Y REV. 205, 213 (1995) (asserting that affirmative action should aim at "increasing the number of people who can compete on an equal basis, not choosing some of them based on skin color or penalizing one generation *ad infinitum* for the sins of another").

Under the current scenario, though, this reasoning would only make sense for Group W members, since Group X members would be led to believe that they could never succeed, at least not collectively.

204. Herrnstein and Murray argue for a sort of welfare state to support the increasingly less intelligent segment of the population that results from social intellectual segregation and the corresponding mating of the less intelligent only with others who are less intelligent (leading to a Darwinian decline in intelligence for that subset of the population). HERRNSTEIN & MURRAY, *supra* note 12, at 510, 523. This includes holding the state responsible for childcare in inner cities and an increased acceptance of strict policing of the underclass. See *id.* at 523-24. Herrnstein and Murray mean this prognosis as a warning, but it is hard to imagine that their suggested solution of equal rights and greater acceptance of one's proper place in the economy would avert the situation they fear most. See *id.* at 507, 530, 538.

Proponents of affirmative action cannot even argue that admitting Group X members to law school will inspire future improvement among other Group X members because there is an inherent barrier to that improvement. However, the argument for alternatives to merit is a strong one because it rests upon principles of innate human dignity and worth.²⁰⁵ These principles would have to assert that justice requires equal participation in all aspects of society by members of different racial groups, regardless of their inherent abilities.²⁰⁶

One such argument for human dignity is advanced by Charles Taylor, who calls for "a politics of equal recognition."²⁰⁷ The politics of recognition requires, Taylor asserts, that all individuals be recognized as having worth equal to every other human being, thus implying an equal voice in a participatory democratic society. When this participation is denied, the "misrecognized" group suffers a "grievous wound" to its sense of identity, resulting in "a crippling self hatred."²⁰⁸ To the extent that circumstances prevent Group X members from participating fully in society, their dignity and sense of self-identity is harmed. This can only be corrected by a program such as affirmative action that values participation by all over a meritocratic system based upon competition. "Fairness," then, refers not to the idea that admission is based solely on supposedly objective test scores, but rather to the notion that social groups must be viewed in relation to each other.²⁰⁹

205. There is a long and diverse philosophical tradition of support for this position, too long and diverse to delve into in any great depth. Prominent philosophers in this tradition include Immanuel Kant (who argues for equal human worth via his Categorical Imperative), Karl Marx (who staunchly critiques a capitalist system based on merit and proposes instead a communist society based on the premise "From each according to his ability, to each according to his needs!"), and John Stuart Mill (who argues for equality for women in *The Subjection of Women* and for self-autonomy in *On Liberty*). See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton trans., Harper & Row eds., 1964); KARL MARX, *THE MARX-ENGELS READER* (Robert C. Tucker ed., 1978); JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (Susan Moller Okin ed., 1988) (1869); JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., 1978).

For an extended attempt to combine legal analysis of the affirmative action debate with philosophical principles, see generally MITCH ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* (1991).

206. It may still be possible to have a meritocracy within racial groups. One need not go so far as to advocate a communist society under this scenario in order to achieve equal participation of the races. Rather, one can argue that because a certain level of intellectual inferiority inheres to Group X as a whole, that deficiency should be corrected so that the relatively more intelligent members of Group X are able to participate in the same activities as the more intelligent members of Group W.

207. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 26-27 (Amy Gutmann ed., 1994).

208. *Id.* at 26.

209. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM*

Furthermore, because Group X members are genetically less intelligent than their Group W counterparts, affirmative action is necessary to overcome this deficiency. Such a principle still forwards concerns about justice, only it tends to look at justice more in terms of the group than the individual by focusing on aggregate levels of participation rather than admissions decisions as they affect individual applicants. As the earlier comparison of Justice Powell to Justices Brennan, White, Marshall, and Blackmun in *Bakke* shows, though, it is unclear that the Supreme Court would adopt this approach.²¹⁰ *United States v. Fordice*,²¹¹ with its emphasis on addressing the “lingering effects” of past discrimination,²¹² might show receptivity to a more group-based approach to rights, but the line of cases leading up to *Adarand Constructors v. Pena*²¹³ suggests that the Court may still require a narrowly tailored program of remediation for demonstrated past harms, a stance that relies upon notions of rights as being attached to individuals and that consequently renders group-based rights impossible.

Even apart from Supreme Court jurisprudence, the emphasis on human dignity with regard to Group X can be criticized by opponents of affirmative action along a couple of different lines. The first is that by structuring admissions on the basis of nonmeritocratic qualifications, the very dignity supposedly conveyed is undermined. In other words, if the dignity inherent in a high-status job like being a lawyer is based on the high qualifications necessary to gain admission to the profession in the first place, then will not this dignity be diminished by loosening the standards of admission?

In response, proponents of affirmative action could argue that this challenge conflates the dignity attached to membership in the profession with that gained through equal participation in society. It may well be the case that the dignity, or perhaps “prestige” is a better word, of being a lawyer would decline due to the implementation of affirmative action programs, though there is no evidence of this, but such a decline in dignity is independent of the dignity inherent in equal participation in society.

Importantly, this creates a potential productivity cost associated with ensuring full participation by all racial groups through the loss of economic output resulting from including people of objectively lesser

CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 277 (1998).

210. See text accompanying notes 60-93.

211. 505 U.S. 717 (1992).

212. *Id.* at 731.

213. 515 U.S. 200 (1995).

intelligence in the workforce, including lawyers. For this reason, minimum thresholds for admission can be justified because they increase the likelihood that those admitted to law school will be successful and will thus gain the level of achievement necessary to make their participation in society meaningful. This is also important for keeping the perception of meaningful participation high among members of society as a way to dampen any resentment Group W members may have toward Group X members as a result of the relaxed admissions standards. If Group W members are able to see that their Group X counterparts become active and successful members of society after graduating from law school, they will be more likely to accept small accommodations in admissions standards than they would if Group X members were admitted to law school and then failed, either in school or once out in society. Where the line is to be drawn, both with regard to social perceptions of "accommodations" and to the trade-off between economic productivity and political participation by Group X members, is a matter the resolution of which is beyond the scope of this Article.

Even if Group X is intellectually inferior to Group W, arguments for human dignity do not lead one to conclude that admissions should be based on some sort of blind lottery system. Merit will still play at least some role in any affirmative action program; it will not, however, be the sole determination in selection. Given the relative levels of power and influence that come with being a lawyer, as discussed above, membership in the legal profession and the participation in the decision-making processes of society that it allows will almost certainly far outweigh any harm to the reputation of the profession itself caused by admitting those without the absolute highest merit-based qualifications.²¹⁴

This participation will also lead to social utility benefits such as the ability to shape public policy in favor of one's race.²¹⁵ Part of the

214. Duncan Kennedy argues in favor of affirmative action programs for law school faculty not only because of "the general democratic principle that people should be represented in the institutions that have power over their lives," but also because cultural diversity will improve legal scholarship. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 159 (Kimberlé Crenshaw et al. eds., 1995).

215. Against justice-based arguments for affirmative action, one could counter that the same logic for admitting intellectually inferior racial groups to law schools should be applied to granting basketball scholarships to short people who cannot jump. The justice-based response would be to say that because human dignity comes from participation in society and not from membership on a basketball team, there is a logical reason for relaxing standards of admission in the first instance and not the second. This is invariably a moral claim based on one's personal beliefs, and the utilitarian might look for reasons beyond moral beliefs, suggesting that people could be taught that human dignity does not come from participation in society just like it does

goal of affirmative action is to place people in positions in society where they can be decision-makers. This ability is more about power than it is about intelligence. Thus, even if Group X were genetically less intelligent than Group W, placing Group X members in positions of power will ensure that their perspectives are heard and that they will have some impact on policy decisions in society. It might be thought that Group W members may, to a limited extent, be able to manipulate Group X members, but in order for this manipulation to be meaningful, the disparity in innate intelligence would have to be enormous. Setting a minimum threshold of competence assures that those who are given the benefits of affirmative action will be able to be effective in their schools or jobs. Rather, decision-making in the business and policy realms is often more about access to the means of carrying one's decisions into effect than it is about relatively small differences in levels of intelligence.²¹⁶ To the extent that Group X members have shared experiences and beliefs, the decisions of one of its members will likely both reflect and have a positive impact on other members of the group.²¹⁷ Thus, allowing members of a minority group access to the decision-making process will benefit not only those who have obtained positions of power, but also the entire group. In this sense, arguments for human dignity in affirmative action create a group right as well as an individual right when viewed from a social utility perspective.

The second line of criticism of affirmative action as advancing human dignity is that there is no reason to accommodate members of a racial group in distinction to other societal classifications. For example, instead of classifying groups on the basis of racial identity, one could just as well assume no genetic racial disparities in intelligence and classify groups according to scores on basic intelligence tests. In other words, you could create a non-racial group of people with mid-level intelligence scores and ask why their claims for admission to law schools should be any different than those of Group X.

not come from playing basketball. The social utility argument answers this criticism by outlining the secondary effects that can be achieved through ensuring participation in society, effects which cannot result from playing basketball.

216. The phrase "policy realm" as used in this Article does not refer to elected positions, since supposedly Group X would not be legally hindered in electing its members to public office if the group possessed a sufficient population concentration or was able to build adequate coalitions. Rather, it refers to promotions within government agencies and other policy forming institutions.

217. This is somewhat of an exaggeration and mischaracterization. However, there is some truth to this assertion and certainly more truth than if only Group W members were in positions of power.

The response would be that race simply cannot be separated from identity in the way that this hypothetical suggests. In society today, race is constitutive of identity in ways that intelligence is not.²¹⁸ Therefore, the stigmatization that would accompany categorizing certain races as lacking intelligence would carry over to other areas of treatment, whereas this extension is much less likely with regard to something like a generic lack of intelligence. A generic lack of intelligence not only does not carry stereotypical cultural associations, it also is not outwardly identifiable. Thus, accommodation to Group X members on account of their race is a necessary consideration, given the history of race in this country (if not elsewhere in the world as well). While there is something to be gained by addressing affirmative action in the abstract, to go too far in this direction misses much of the point of why affirmative action is necessary in the first place, even assuming genetic racial differences in intelligence.

The belief in a colorblind legal system rests on the uneasy dichotomy that all people should be treated equally while acknowledging at the same time that they are not, in fact, equal,²¹⁹ or rather, to borrow a phrase from George Orwell's *Animal Farm*, that some "are more equal than others."²²⁰ This belief runs dangerously close to Social Darwinism's motto of "survival of the fittest, especially considering one is positing a genetic connection to intelligence."²²¹ Indeed, there is no threat to the power of the majority (Group W) in instituting a colorblind system of admissions when it knows that on the whole the minority (Group X) can never catch up. This recalls Justice Harlan's dissent in *Plessy*, where he argued against segregation

218. Cf., e.g., Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection Reckoning with Unconscious Racism*, in CRITICAL RACE THEORY, *supra* note 214, at 235 (arguing that the cultural meaning of racist acts is more important than the intention of the perpetrator); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, in *id.* at 257 (contending that premises of colorblindness have masked the real effects of racial subordination).

219. It is instructive here to compare the government's treatment of those who do not have high levels of intellectual ability with its treatment of those who are physically disabled. In effect, the policy in America is that we are not going to help socially disadvantaged or less intelligent people, only those who are smart but physically disabled. See generally, MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES, 7-8, 195-226 (1997); Laura F. Rothstein, *The Affirmative Action Debate in Legal Education and the Legal Profession: Lessons from Disability Discrimination Law*, 2 J. GENDER RACE & JUST. 1, 19-22 (1998) (arguing that how one treats qualifications for admittance of the disabled can have broader implications for affirmative action toward racial classifications).

220. George Orwell, *Animal Farm: A Fairy Story*, in THE COMPLETE WORKS OF GEORGE ORWELL, at 90 (Secker & Warburg eds., 1987) (1945).

221. For a discussion of Social Darwinism and *The Bell Curve*, see generally, Catherine A. Lugg, *Attacking Affirmative Action: Social Darwinism as Public Policy*, in MEASURED LIES: THE BELL CURVE EXAMINED, *supra* note 185, at 367-90.

by asserting that blacks will never be a threat to the “white race,” who “will continue to be [the dominant race in this country] for all time, if it remains true to its heritage, and holds fast to the principles of constitutional liberty.”²²² In other words, there is no need to create *de jure* segregation when society, under a rubric of fairness, will result in *de facto* segregation.

This is the situation one would expect to result if Group X was genetically inferior to Group W. If Group X was truly less intelligent than Group W, then the results of this “natural” segregation would be quite tempting for Group W. Group W could maintain its position of authority without feeling guilt regarding the active suppression of Group X, whose position in society could essentially be attributed to bad luck. “Fairness” for Group W members would become a rubric for maintaining relations of domination,²²³ just as Justice Harlan did not feel that whites would cease to be the dominant race as long as they maintained their cultural heritage.²²⁴

Affirmative action proponents’ belief in human dignity extends beyond issues of justice or fairness to arguments about social utility as well. Affirmative action in a context of genetically-based differences in intelligence may not be able to inspire future improved achievement because of the unlikelihood of future success absent continued affirmative action, but it can send powerful messages about how different races should be integrated into society as a whole. This argument draws upon the holding of *Brown v. Board of Education*, where segregated schools with equal educational opportunities were deemed unconstitutional because the very fact of segregation harmed the “hearts and minds” of the African American school children involved by instilling “a feeling of inferiority as to their status in the community.”²²⁵ It is hard to imagine anything that would create a greater sense of inferiority than to have opponents of affirmative action tell Group X members that they are in fact genetically and immutably inferior and that as a result, they should not expect to participate fully at the upper levels of wealth, power, and influence in society.²²⁶

222. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

223. For a similar and more extensive analysis of this argument, see Erin E. Byrnes, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535, 534-59 (1999).

224. For a discussion of Justice Harlan’s *Plessy* dissent in terms maintaining implicit white supremacy, see Joel Olson, *The Limits of Colorblind and Multicultural Personhood*, 2 STAN. AGORA 1 (2001) <<http://www.law.stanford.edu/agora>>.

225. 347 U.S. 483, 494 (1954).

226. If Group X members are not told of their genetic inferiority, then the motives of

There is a fundamental tension between human worth and genetic inferiority. Any attempt to mask this tension in a regime of equality is disingenuous at best.²²⁷ If Group X members are to be instilled with a sense of equal human worth, then a policy of affirmative action must be instituted to achieve equal participation in upper levels of society, since we are positing that they cannot obtain social betterment as a group through their own skills. Opponents of affirmative action might argue that such a policy would injure the self-esteem among Group X members because they would receive something they did not earn. However, precisely because we are positing that Group X cannot collectively achieve higher status, affirmative action becomes the only way to integrate society. As such, affirmative action teaches members of both Group X and Group W that their worth comes from the fact of their humanity and not from their intellectual acumen. This may require proponents of affirmative action to accept some slowing down of productivity caused by including people with lesser intellectual skills in elite law schools and other academic institutions, but this cost is worth the benefit of the larger moral message that is sent. As *Brown* says, "education is perhaps the most important function of state and local governments" because it provides "the very foundation of good citizenship."²²⁸ The principles of citizenship being taught should be ones of equal human moral worth.

On an institutional level,²²⁹ proponents of affirmative action argue that the inclusion of racial minorities in law school classes brings diverse perspectives²³⁰ to the educational setting.²³¹ According to Justice Powell's opinion in *Bakke*, this was, in fact, the only acceptable

Group W must be seriously questioned, as they would be using deception to maintain their position in the social hierarchy. If Group W members do not themselves know of the inferiority, we are essentially moved into the scenario in the next subsection, where both groups are posited to be of equal genetic intelligence, because Group W members could not use the genetic inferiority of Group X as a justification for their opposition to affirmative action.

227. Recall here the discussion, *supra* text accompanying note 22, comparing an opposition to affirmative action to Justice Harlan's dissent in *Plessy*.

228. 347 U.S. at 493.

229. For institutional arguments by opponents of affirmative action, see *infra* text accompanying notes 250-54.

230. See generally RONALD T. TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* (1993) (offering accounts of American history from a variety of ethnic perspectives).

231. Bowen and Bok show that, between 1976 and 1989, a dramatic increase took place among white students who wanted the ability to have a rapport and work efficiently with people of different races and cultures and among both African American and white students who believed that their college experience contributed toward these goals. BOWEN & BOK, *supra* note 209, at 224, 227.

justification for using race as a factor in admissions.²³² The concern for diversity was so prevalent in Powell's mind that it allowed him to overcome concerns with equality and stereotyping.²³³ Impressively, Justice Powell was able to argue all of this while still maintaining a rubric of individual rights by making one's race a part of one's unique overall identity²³⁴ and then asserting that schools have a free speech right to include whatever perspectives and identities they desire in the composition of the student body.²³⁵ Academic freedom, though not a specifically enumerated constitutional right, has long been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. If a free speech interest in diversity is really to be of primary concern, then the (posited) fact that Group X is of lower intelligence than Group W is an unfortunate side effect, but one that a law school is allowed to ignore in order to obtain its desired student body.²³⁶ This logic fits well with the social science research cited by *Gratz v. Bollinger*,²³⁷ which pointed to measurable benefits for students of all races from the inclusion of diverse racial perspectives in the university. In other words, a law school can accept the negative of being forced to lower the educational level of its classes in favor of the larger positive of having a diversity of perspectives and identities in its student body.²³⁸ This stops short of requiring law schools to engage in

232. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 315 (1978). This Article has already discussed whether this holding can be extended to Justices Blackmun, Marshall, Brennan, and White or whether it is just Powell's dicta.

233. *Id.* at 294, 298.

234. *Id.* at 318.

235. The passage continues:

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

Id. at 313.

236. Arnold H. Loewy argues that there is a fundamental difference between affirmative action, which focuses on individuals and addressing past wrongs, and diversity, which necessarily focuses on the composition of groups as an independent cognizable entity. Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479, 1480 (1999). This definition, if accepted, cuts against this Article's attempt to portray affirmative action as a group-based remedy. Loewy does contend, though, that diversity is itself defensible on constitutional grounds as a justification for admissions decisions. *Id.* at 1482.

237. 122 F. Supp. 2d 811, 822 (E.D. Mich. 2000).

238. From an economic standpoint, one could say, following Robert Klitgaard, that Group X members should be admitted up to the point where their marginal benefit of a contribution to diversity equals the loss in productivity from the difference between the Group X member admitted and the corresponding Group W member consequently excluded. See KLITGAARD,

affirmative action,²³⁹ but it is perhaps the best that can be hoped for after a scientific demonstration of genetic deficiency in intelligence has taken the force out of the argument that Group X members are in their social position because of a history of oppression.²⁴⁰

In summation, under the circumstances where a racial minority is genetically less intelligent than members of the majority, opponents of affirmative action would argue that giving members of the racial minority places in law schools for reasons other than merit violates fundamental principles of justice. This argument would likely be couched in terms of claiming that everyone should be treated equally, and the only way to do this is through a neutral system based on merit. That members of the racial minority are at a genetic disadvantage is unfortunate but unavoidable. To admit members of this racial minority disproportionately would not only create resentment by nonadmitted members of the majority, it would also result in lowering the level of education provided at the school and, consequently, a downturn in economic production. Proponents of affirmative action would respond by asserting an emphasis on human

supra note 190, at 169.

239. *Bakke* does not force law schools to make race the only motivating factor in admissions. Other merit-related factors can be analyzed as well. For instance, *Bakke* itself closes by attaching an appendix from an amicus curiae brief filed by Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, which suggested that admissions committees may want to admit a black student from an inner-city background who has had to struggle all his or her life over a child of a wealthy black physician. See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 324 (1977). This can be seen as a response to the contention among opponents of affirmative action that it benefits primarily middle and upper class African Americans. See William Julius Wilson, *Race-Neutral Programs and the Democratic Coalition*, in AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION?, *supra* note 60, at 158-59. Wilson is not an opponent of affirmative action, but he does argue that it does little for poor African Americans. *Id.* While to some extent middle- and upper-class African Americans may benefit the most from affirmative action because they are more likely than poor African Americans to have the requisite educational background to make themselves attractive candidates for admission to law schools, preferences can still be given to those who have struggled more to get where they are, if this is a virtue that is seen as being worth rewarding. In other words, affirmative action can be modified to help poor African Americans as well as, or even more than, their middle- and upper-class counterparts.

240. For an argument that an interest in diversity is no less "compelling" than remediation of past discrimination, see Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 411-23 (1998). For an argument to the contrary, i.e. that race-based admissions programs do not survive strict scrutiny, see Michelle M. Inouye, *The Diversity Justification for Affirmative Action in Higher Education: Is Hopwood v. Texas Right?*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 385, 387-88 (1997). This Article will not engage in this particular constitutional debate, but to the extent that Liu's arguments are convincing, they lend further credence to this Article's claims.

See also Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J.C. & U.L. 895, 925-33 (1996) (accepting the validity of the strict scrutiny standard for admissions policies and attempting to craft an affirmative action policy that satisfies this standard).

dignity as an alternative to a merit-based admissions system. Under this argument, racial minorities need to be admitted to law schools and other institutions of higher education, despite some of the institutional and social utility side effects pointed out by the opponents of affirmative action, so that racial minorities can become functioning members of society. Furthermore, race is a unique category in contemporary society, and inclusion of racial minorities will bring valuable diversity to the educational setting.

B. Y = W: Affirmative Action When There Are No Genetic Differences in Intelligence

If the minority and majority groups are of equal intelligence (and the minority group suffers from a lack of proportional representation in positions of wealth, power, and influence), then the arguments in favor of affirmative action become even stronger. The arguments about human worth, diverse perspectives in the educational institution, and “hearts and minds” remain largely the same,²⁴¹ but do not need to be couched in the premise that affirmative action is the only way to overcome immutable genetic differences in intelligence. Rather than being concerned with perpetually creating and re-creating the conditions for equal participation in society through promoting successive generations of racial minorities, affirmative action can now be seen as a tool for eventual and permanent correction the effects of discrimination.²⁴² By positing that Group Y members are of the same intelligence as their Group W counterparts, we have removed the possibility of claiming that members of Group Y somehow “deserve” to be in their socially disadvantaged position.²⁴³ In other words, if

241. The argument about “hearts and minds” is no longer accepted by opponents of affirmative action who feel that societal barriers to minority advancement have largely been removed. This position is summarized by Clint Bolick, who claims that even though racism still persists, the use of racism “as the primary explanation for social pathologies and racial disparities simply doesn’t cut it as the century draws to a close; and to insist otherwise is to ignore painful realities.” BOLICK, *supra* note 27, at 5.

242. For a history of African Americans in law schools and the legal profession more generally, see Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past?*, 12 T. MARSHALL L. REV. 415 (1987).

243. There remains the question of whether or not those African Americans from relatively wealthy backgrounds should be allowed to benefit from affirmative action. Herrnstein and Murray contend that whites from socially disadvantaged backgrounds deserve to be given preference in admissions over African Americans from wealthy backgrounds. HERRNSTEIN & MURRAY, *supra* note 12, at 465. As explained in a previous footnote, these preferences can be incorporated into an admissions program as so desired, since race is to remain only one factor among many in admissions decisions. However, Herrnstein and Murray’s preference is based upon an emphasis on merit that the law school may not want to adopt. Instead, admissions departments may feel that the importance of race outweighs socio-economic status in creating a diverse student body. This Article sticks by its contention that there remain important

members of Group Y possess the inherent *ability* to attain positions of wealth, power, and influence, then their failure to do so must be due to some force or combination of forces that is holding them back. As Cheryl Harris argues, “[a]ffirmative action begins the essential work of rethinking rights, power, equality, race, and property from the perspective of those whose access to each of these has been limited by their oppression.”²⁴⁴ Any credible conception of justice must have at its core the removal of those barriers to advancement.

This removal of barriers, opponents of affirmative action would contend, does not necessarily require the imposition of an affirmative action policy in law school admissions. For one thing, it may be argued that Group Y members have failed to become part of the social elite because of cultural motivations that shift their priorities away from study patterns or because of career paths that lead them away from advancement into the social elite.²⁴⁵ There is some possibility of this being the case, but this argument appears, in most part, to be an excuse to calm the minds of the majority and prevent them from thinking that they are hindering the success of the minority. If cultural explanations for a lack of achievement do exist, they are more likely to have been caused by the majority culture itself than to be an outgrowth of a system of positively held values in Group Y.²⁴⁶ Furthermore, even if there are cultural explanations for Group Y members’ lack of social success, there may be ways to alter affirmative action programs to counteract those differences and still allow them to move into elite positions in society.

differences in perspectives between wealthy whites and wealthy African Americans, as indicated by numerous stories of the latter being unable to catch a cab, to give but one example.

244. Cheryl I. Harris, *Whiteness as Property*, in *CRITICAL RACE THEORY*, *supra* note 214, at 288.

245. See generally D’SOUZA, *supra* note 183 (arguing both that African Americans have suffered from a cultural breakdown and that they have become overly dependent on government support). Clint Bolick, a prominent opponent of affirmative action, rejects this assertion, arguing that blacks and whites in fact “continue to share common values and aspirations.” Bolick, *supra* note 171, at 156.

246. This is a very broad assertion, about which many books, articles, essays, and novels have been written. This Article will point only to two of such works, both of which concern self-image and the law in support of this Article’s claim, because citing more sources is unlikely to convince those who believe in cultural failings as the cause of a lack of social success. See PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999) (relating the story of Lawrence Mungin, an African American graduate of Harvard Law School who, despite a promising start, gradually came to feel marginalized in his law firm and was eventually denied partnership); Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994) (discussing the negative self-image that law school instills in women, leading to lower academic achievement). See also David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999) (summarizing reactions to Barrett’s book)).

Indeed, counteracting a negative social image is one of the primary social utility justifications advanced by proponents of affirmative action. Because there is no genetic barrier to advancement for Group Y, placing Group Y members in positions of authority may have a genuinely meaningful inspirational effect. Seeing that it is possible for fellow members of their race to succeed, younger Group Y members may work hard in school and elsewhere in order to achieve similar success rather than give up trying out of the belief that their efforts will be for naught.²⁴⁷ Opponents of affirmative action may counter that knowing one does not have to achieve as high a level of educational attainment as Group W members will have the reverse effect of discouraging Group Y members from working hard.²⁴⁸ However, it is doubtful that many minorities see affirmative action as a guarantee of success. Rather, they likely view it as creating at least the opportunity for success if one works hard. This view of affirmative action sees it as leveling a playing field that has for so long been skewed. This leveling does not create new advantages for minorities. Rather, it only counteracts existing disadvantages.²⁴⁹

From an institutional standpoint, opponents of affirmative action often argue that it generates racial tension and resentment on campus by creating at least the assumption that a certain portion of the student body did not "earn" its spots at the law school.²⁵⁰ This can subsequently result in both resentment by whites who feel unfairly treated²⁵¹ and a sense of self-doubt among the minorities at the school,

247. See Brest & Oshige, *supra* note 165, at 864, 870 (1995); Pojman, *supra* note 190, at 178-79. It is because of the sense of group identity that race-based admissions creates and the resulting inspirational effects, what Brest and Oshige call the "multiplier effect," that they reject class-based affirmative action programs. Because such programs would invariably incorporate some poor whites and exclude wealthy minorities, the effects of affirmative action on group identity would be diluted. See Brest & Oshige, *supra* note 165, at 898.

248. See, e.g., Dinesh D'Souza & Christopher Edley, Jr., *Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned as a National Policy?*, 60 ALB. L. REV. 425, 431 (1996); Jay B. Howd, *Race-Exclusive Scholarships in Federally-Assisted Colleges and Universities—Will They Survive?*, 16 S. ILL. U. L.J. 451, 451 (1992). Charles Murray makes this claim elsewhere about the effects of welfare on discouraging its recipients from seeking jobs and bettering themselves. CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* 58, 205-18 (1984). For a response to these claims, see BOWEN & BOK, *supra* note 209, at 260.

249. In unveiling affirmative action as a new government policy, President Lyndon Johnson prefaced the program by asserting, "You do not take a person who for years has been hobbled by chains, and liberate him, bring him up to the starting line and then say 'you are free to compete with all the others.'" Lyndon B. Johnson, *Commencement Speech at Howard University*, N.Y. TIMES, June 4, 1965, at A14.

250. See, e.g., HERRNSTEIN & MURRAY, *supra* note 12, at 472-73; Graves, *supra* note 174, at 165; Carl Cohen, Heritage Foundation, *Race Preference in College Admissions*, Lecture No. 611, Apr. 29, 1998.

251. Frederick R. Lynch, *Casualties and More Casualties: Surviving Affirmative Action*

regardless of their qualifications for admission.²⁵² While this sentiment certainly exists, and while it may even be widespread among members of both the majority and the minority,²⁵³ it is also entirely possible, as seems to be the case following *Hopwood* and Proposition 209, that a decline in minority enrollment caused by abolishing affirmative action will also result in racial tensions by creating an increasingly alienated minority population.²⁵⁴

Furthermore, despite years of affirmative action policies, enrollment figures among many minorities are still woefully inadequate. African Americans are underrepresented in law schools by 43%, and Hispanics are even more underrepresented at 58.4%.²⁵⁵ If whites feel threatened by these racial minorities, they are grossly overreacting.²⁵⁶ Any sense of inferiority felt by African Americans and Hispanics is likely imposed on them by misinformed whites who, for some reason, believe that law schools and other educational institutions are being taken over by undeserving minorities.²⁵⁷ Otherwise, one is forced to ask oneself why, if African Americans and Hispanics are getting a bounty of admission spots they do not deserve, there are so few of them in the student population.

One possible but rather depressing response is that African Americans and Hispanics are even less prepared for and deserving of admission to law school than their 43% and 58.4% underrepresentation

(*More or Less*), in AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION?, *supra* note 60, at 90-98.

252. See Shelby Steele, *Affirmative Action: The Price of Preference*, in AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION?, *supra* note 60, at 136.

253. Charles Murray, *Affirmative Racism*, in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 207 (Nicolaus Mills ed., 1994). For Bowen and Bok's response to this claim, see BOWEN & BOK, *supra* note 209, at 263.

254. See Baldauf, *supra* note 172.

255. See table on page 1107. This Article will address the 35.1% "overrepresentation" of Asian Americans in the next subsection.

256. Lest one think that law school admission is a unique situation, similar results can be found in other advanced degree fields. For example, whites received 72% of M.D.s in 1996-97, whereas African Americans received 7.3%, Hispanics 4.6%, Native Americans 0.72%, and Asian Americans 15.4%. MORGAN, *supra* note 161. These results reveal that if anything, whites should feel threatened by Asian Americans and not African Americans or Hispanics. African Americans and Hispanics are not taking a disproportionate number of spots from whites.

257. To those whites who feel that minorities, take African Americans for example, are "unfairly" benefited by affirmative action, this Article poses this question: If you could take (or recommend that your children take) a pill that would change your skin color and appearance to that of a black person but change nothing else about your personality or intelligence, would you take the pill? The author imagines that few whites would—not out of racial pride, but out of a recognition of the overwhelming racism that still exists in this country and the resulting negative experiences they would face. These negatives outweigh any benefits the white-now-black person would gain in the law school admissions process.

figures indicate.²⁵⁸ This reflects the larger argument among opponents of affirmative action, which is that despite their potential for high educational attainment, upon application to law school, Group Y members do not possess the requisite skills for success. The argument goes like this: Admission to law school, especially to elite law schools, is premised on the idea that the admitted students have obtained quality educations prior to beginning law school. However, many of those admitted to law schools through affirmative action programs, it is contended, have failed to acquire the educational background necessary to succeed because of poor experiences in college, high school, or however far back one wants to go.²⁵⁹ Thus, if affirmative action is ever appropriate, it is too late by the time one reaches the law school level. Rather, the only way to help Group Y members is to improve their educational opportunities earlier in life.²⁶⁰

This line of thinking recalls the earlier merit arguments in the discussion of Group X, though without the sinister halo of Social Darwinism. Both arguments, however, are premised on the equation of justice with merit, which this Article has already questioned on human dignity and equal worth grounds. Law schools are free, according to *Bakke's* reliance on the First Amendment Freedom of Speech Clause, to choose what values to emphasize in their admissions process. A selection process based solely on merit stands a strong possibility of creating an overly competitive environment that results in an unpleasant law school experience because students come to see their personal worth only in terms of outperforming their classmates.²⁶¹ In addition, there is evidence to suggest that there is no correlation between law school grades and success in legal practice.²⁶²

Opponents of affirmative action suggest that admitting minority students not adequately prepared for school results in higher dropout rates, and there is some evidence of this.²⁶³ However, there is also

258. Furthermore, Clint Bolick charges affirmative action with diverting attention away from the problems of unpreparedness by minorities by focusing on racial tensions instead of student qualifications. See BOLICK, *supra* note 27, at 80.

259. See, e.g., Wells, *supra* note 124.

260. See *id.*

261. A recent study by Alexander Astin found that there is a negative correlation between social activism and LSAT scores. ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE: FOUR CRITICAL YEARS REVISITED 213 (1993). Furthermore, there is a positive correlation between LSAT scores and a hedonistic personality. *Id.*

262. David L. Chambers et al., *Doing Well & Doing Good: The Careers of Minority and White Graduates of the University of Michigan Law School, 1970-1996*, 42 L. QUADRANGLE NOTES 60, 70-71 (1999). Chambers also points out that minority graduates from the University of Michigan Law School have quite comparable bar passage rates to whites and have accomplished this for the past three decades. *Id.* at 63-64.

263. Even proponents of affirmative action like Bowen and Bok provide statistics showing

evidence to suggest a lack of correlation between SAT scores and graduation rates among undergraduate African Americans,²⁶⁴ a result that perhaps could be extended to law school students as well. These findings call into question the contention that those admitted through affirmative action programs are poor selections to comprise a law school class. Indeed, there may even be a positive correlation between racial diversity and objective measurements such as retention and GPAs, as well as more subjective criteria such as overall satisfaction and intellectual and social self-confidence.²⁶⁵ If there is no correlation between affirmative action admittance and success in school (along a variety of other measures), then why not do both? Why not spend more resources on early educational opportunities for minorities in the front end and assist them with affirmative action at the tail end?²⁶⁶

The resistance to affirmative action for law school admissions points to a hidden underlying premise of its opponents. Let us assume for the sake of argument that there is a real connection between being admitted through affirmative action and poor performance in school. Presumably, many of these minority students admitted to elite schools via affirmative action will get well-paying jobs, even if, arguably, they are not the most qualified for such jobs compared to merit-admitted students at second-tier schools.²⁶⁷ Because they will have well-paying jobs and can afford to live in good neighborhoods, they consequently can send their children to good schools. If there is no genetic link to intelligence, then these minority students from Group Y should be able to compete on an equal level in a pure merit-based system with students from Group W.²⁶⁸ The worst that will happen then is that there will be a temporary sacrifice in economic productivity. Instead, opponents of affirmative action prefer to sacrifice the current generation of underprivileged minorities. Opponents of affirmative action may claim that human dignity comes through individual self-achievement disassociated from a system of

lower college graduation rates for African Americans than for whites when controlling for SAT scores and the selectivity of the schools. BOWEN & BOK, *supra* note 209, at 61-62.

264. BOWEN & BOK, *supra* note 209, at 63.

265. See Alger, *supra* note 152, at 80 (1998) (citing a study in an unpublished dissertation by Mitchell J. Chang).

266. This is the sentiment expressed by John Payton, a lawyer fighting to preserve racial preferences in university admissions, in response to arguments advanced by Clint Bolick. See Wells, *supra* note 124.

267. See BOWEN & BOK, *supra* note 209, at 139.

268. This is presuming there is no cultural explanation for a lack of success. This Article also does not dismiss the contention that there are other important values to an admissions system than merit; this Article is merely engaging opponents of affirmative action on their own terms.

affirmative action that helps those who have not “earned” their success,²⁶⁹ but this presumes a level playing field that simply does not exist.

Arguments against affirmative action for those who meet at least a minimum threshold of competence²⁷⁰ are, in essence, only internally coherent if members of the disadvantaged minorities are in fact perpetually less intelligent than the majority. This is to say that in light of the dramatic underrepresentation of Hispanics and African Americans in law schools and other measures of social status, the perpetual exclusion of these minorities from access to the means to better themselves makes no sense if placing them in higher social brackets through affirmative action will result in the eventual equalization of the races. Otherwise, opponents of affirmative action would be arguing in favor of segregation of the races because of their desire to maintain a social policy that systematically discriminates against minorities.

Affirmative action can achieve integration not just in the future but in the present as well. The counter-argument to this claim is that if the primary concern is providing younger members of Group Y with a quality education, it should be possible to do this without dragging along undeserving older members of Group Y. This position, though, ignores its own psychological impact. The majority in *Plessy* asserted that if blacks feel a sense of inferiority because of being unable to engage with whites in the same activities, it is “solely because the colored race chooses to put that construction upon it.”²⁷¹ Yet, opponents of affirmative action reach a similar result by denying current Group Y members the opportunity to go to the same law schools as Group W.

If Group Y is truly of the same inherent intelligence level as Group W, its lack of attainment on merit-based scales must be due to past discrimination, regardless of whether such discrimination can be linked to specific perpetrators (probably it cannot), or must be viewed more generally.²⁷² Without the genetic link to poor intelligence,

269. This is essentially the position advanced by Clint Bolick in his labeling an end to affirmative action “empowerment” for blacks in America. See Bolick, *supra* note 171, at 159.

270. This admissions policy is one of the “experiments” that the ABA Committee on Diversity in Legal Education recommends to increase minority enrollment in law schools. ABA Comm. on Diversity in Legal Educ., *Report of the Committee on Diversity in Legal Education* (last visited July 23, 2000) <<http://www.abanet.org/legaled/committees/diversity.html>>.

271. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

272. Such a stance may require at least some recognition of group-based rights, a position, as discussed earlier, the Court is not willing to take. As this Article will argue in the next paragraph, though, it may be possible to get around this by relying upon *Sweatt v. Painter* and *U.S. v. Fordice*. Given the nature of this Article’s discussion of relations between groups, it

Group Y members cannot be said to “deserve” social disadvantages. The exclusion from elite law schools and a resulting sense of inferiority is either due to this past discrimination, in which case it should be remedied through affirmative action, or it is all in the heads of Group Y members, as was said about blacks in *Plessy*. Opponents of affirmative action, then, are forced either to abandon their policy position or to implicitly embrace the racist arguments put forth in *Plessy* and later rejected and overturned in *Brown*. If the “hearts and minds” of applicants to law schools from Group Y are to be protected, then they must be allowed to integrate into the rest of society through a program of affirmative action.

It is not sufficient to say that the more intelligent members of Group Y, who by hypothesis do not possess the educational background of equivalent percentile Group W members, still have the opportunity to attend nonelite law schools. The Court in *Sweatt v. Painter* held that members of different races had to be provided with equivalent law school experiences, including faculty, libraries, extra-curricular activities, and even subjective elements such as school reputation and alumni support.²⁷³ This is impossible to achieve if different racial groups are segregated into different law schools, even if this segregation is *de facto* and not *de jure*. Yet, if the only reason for lack of educational attainment for Group Y members is past discrimination, which is an entirely unjustifiable reason for excluding them from activities enjoyed by Group W members, Group Y members must be given some preference in admission to law school. Indeed, this is the message of *Fordice* in striking down Mississippi’s *de facto* “dual” system of colleges and universities for blacks and whites.²⁷⁴ States must act affirmatively to eliminate the effects of prior discrimination and segregation.²⁷⁵ This logically calls for the implementation of affirmative action to correct the socio-economic disadvantage that its victims do not deserve. Only by assuming that minorities are genetically inferior to whites can opponents of affirmative action get away from in effect arguing for segregation of the races. However, as discussed in the previous subsection (on Group X), assuming genetic inferiority logically leads to a segregated society as well, there is no meaningful difference between these two

should not be surprising that the arguments advanced in this Article are better suited for a group-based view of rights. Indeed, since the premise of this Article’s argument is that Group W is systematically, as opposed to individually, suppressing either Group X or Group Y, it is hard to see how it could be otherwise.

273. 339 U.S. 629, 633-34 (1950).

274. *United States v. Fordice*, 505 U.S. 717 (1992).

275. *Id.* at 731.

positions. In this sense, perhaps Herrnstein and Murray were correct when they claimed that "it matters little whether the genes are involved"²⁷⁶ in how the socially and educationally disadvantaged are to be treated—opponents of affirmative action in effect assume that Group X and Group Y are the same.

C. *Z > W: Affirmative Action When the Minority Is Genetically More Intelligent Than the Majority*

The possibility that a socially disadvantaged group may actually be genetically more intelligent than those in the numerical majority raises interesting problems for both proponents and opponents of affirmative action. A lot turns on whether Group Z members are adequately represented in law school. Throughout this thought experiment, this Article has avoided the use of racial identifications in an attempt both to avoid potentially inflammatory statements and to show that the underlying principles on both sides of the affirmative action debate are independent of race; it should be relatively clear here that this Article is referring to Asian Americans.²⁷⁷ Let us refer to this situation as Group Z₁.

The fact of the matter is that Asian Americans are "overrepresented"²⁷⁸ in law schools 35.1% in relation to their percentage of the national population.²⁷⁹ If Asian Americans truly are

276. HERRNSTEIN & MURRAY, *supra* note 12, at 312.

277. The evidence on whether or not Asian Americans are actually more intelligent than whites is mixed. Asian Americans reportedly have higher SAT scores than whites. HERRNSTEIN & MURRAY, *supra* note 12, at 301. However, they also have been shown to score lower on the LSAT, though they are still the best among minority groups when controlling for GPAs. See Jenkins, *supra* note 178. Herrnstein and Murray contend that it is necessary to differentiate between East Asians (Chinese, Japanese, and possibly Koreans) and other Asians. HERRNSTEIN & MURRAY, *supra* note 12, at 272. One possible explanation of why there is a difference in these test scores is that Asians are particularly adept at math skills, which are tested in the SAT, but not the LSAT. Herrnstein and Murray refute this contention, pushing instead for a genetic explanation of differences in test scores. HERRNSTEIN & MURRAY, *supra* note 12, at 300. Part of this may have to do with language difficulties for first and second generation Asian Americans. Whether or not this means that Asian Americans who have no language difficulties should score higher on verbal as well as mathematical tests is up for speculation. Such a discussion is beyond the scope of this Article.

278. For a discussion of why it is inappropriate to talk about Asian Americans in terms of overrepresentation despite disproportionate enrollment in a particular institution of higher learning, see Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 15 (1996).

279. Asian Americans complete high school and college at a higher percentage than do whites; in 1980, the percentage was almost double in the case of college (39.8% to 21.3% for men and 27% to 13.3% for women). Stanley Sue & Sumie Okazaki, *Asian American Educational Achievements: A Phenomenon in Search of an Explanation*, in THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE 133, 134 (Don T. Nakanishi & Tina Yamano Nishida eds., 1995). This higher rate of college completion may partially explain why Asian Americans are

more intelligent than whites, then this would seem to vindicate the merit-based system advocated by opponents of affirmative action.²⁸⁰ There is even some fear that Asian Americans are the victims of reverse discrimination.²⁸¹ Opponents could not argue that affirmative action for Group Z₁ results in the lowering of educational standards, nor that it creates justifiable racial resentment.²⁸² However, since the overrepresentation of Asian Americans is a situation that opponents would supposedly approve of, assuming the parameters of Group Z₁ as being genetically more intelligent, this should not be a problem.²⁸³

proportionately more represented in law schools than whites, though there is no empirical justification for drawing a causal connection here.

Nakanishi and Nishida further suggest that one reason why Asian Americans are relatively successful in education is because they are closed out of other avenues of success, such as politics, sports, and entertainment, making educational attainment the only significant means by which to better themselves. *Id.* at 141. See also Ki-Taek Chun, *The Myth of Asian American Success and Its Educational Ramifications*, in THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE, *supra*, at 95 (contesting the notion that educational success is translated into economic success for Asian Americans).

280. If Asian Americans are not more intelligent than whites, then opponents of affirmative action would probably claim that Asian Americans, unlike African Americans and Hispanics, possess similar levels of educational achievement to whites and have received their "boost" into greater overrepresentation than whites due to benefiting from affirmative action programs.

281. See, e.g., Theodore K. Cheng, *Clarifying Some Misconceptions About Affirmative Action In Higher Education For Asian Americans*, 1 U.S.F. J.L. & SOC. CHALLENGES 129, 135-36 (1997) (contending that affirmative action may hurt East Asians, but not other Asian subgroups). The contention, then, is that if affirmative action and its accompanying limitations on merit-based admissions were eliminated, there would be even more Asian Americans in law school than their 35% overrepresentation reveals. This may indeed be the case. It rests, though, on the belief that Asian Americans are a *de facto* social majority and that they do not suffer the social harms and stigma associated with being nonwhite. Affirmative action can be justified as correcting these social harms. The opposition to affirmative action also assumes that Asian Americans do not benefit from racial preference in law school admissions. This likely varies from institution to institution and is beyond the scope of this Article to explore.

282. Whites may object that they are losing spots to Asian Americans, but the only basis for this argument would be either blatant racism or a reliance on the principle of equal human worth discussed earlier in relation to proponents of affirmative action in the first scenario (X < W). Indeed, it may be the case that Asian Americans continue to be the victims of racial discrimination and would be represented in even higher numbers in law schools absent this discrimination.

283. Such, however, has not always been the case. Large increases in the numbers of Asian Americans at colleges and universities in the early 1980s led to a backlash by many whites, who felt threatened by their increased difficulties in gaining admittance to these institutions. Don T. Nakanishi, *A Quota on Excellence? The Asian American Admissions Debate*, in THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE, *supra* note 279, at 273, 275. This discomfort is ironic considering that whites had for so long excluded African Americans and Hispanics on supposedly meritocratic grounds but appealed to their principles when they were the ones supposedly on the short end of the stick. This points to how a supposedly morally neutral means for determining admissions like test scores can often be employed to serve fundamentally racist ends. See L. Ling-Chi Wang, *Meritocracy and Diversity in Higher Education: Americans in the Post-Bakke Era*, in THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE, *supra* note 279, at 285 (comparing quota limits on Asian Americans to earlier quota limits on Jewish-Americans and

Serious problems would arise, though, if members of Group Z (i.e. posited as being genetically more intelligent than Group W) were not Asian Americans, but, say, African Americans, a racial group that is vastly underrepresented in law schools. Let us refer to this scenario as Group Z₂. Opponents of affirmative action would then have no reasonable grounds on which to rest their claims. They might still argue for a merit-based system, but since a regime of affirmative action would have failed to elevate Group Z₂ members to their deserved place of overrepresentation in law school classes, it is hard to see what justifications there could be for dropping affirmative action altogether.²⁸⁴ Rather, the failure of affirmative action to correct law school enrollments would signal deep-seated racial animosity and discrimination. In fact, the indication of past discrimination might be strong enough to encourage supposed opponents of affirmative action to suggest the need for a narrowly tailored remedy of even more aggressive affirmative action. Perhaps the only argument that those still opposed to affirmative action could marshal in their favor would be a desire to maintain stability and avoid the massive social upheaval that would be required to place the more meritorious yet socially-disadvantaged Group Z₂ members in positions of wealth, power, and influence.

The response of proponents of affirmative action to either situation is a bit more complicated. In the case of Group Z₂, its members are underrepresented in law school and elsewhere. The proponents' claim that this underrepresentation is due to social oppression becomes much stronger, as hinted in the critique of the opponents' arguments in the previous paragraph. This social oppression may be located in inferior primary schooling, so proponents of affirmative action still open themselves up to the charge that affirmative action in law school is not the proper place to correct existing inequities. This argument becomes strained by the very believable proposition that Group Z₂ members would be able to succeed in law school or on the job, if only given the chance, because their intellectual abilities are superior to Group W members. Due to this increased ability to succeed, the inspirational goals of affirmative action become much stronger.

concluding that the limits are a form of latent racism against Asian Americans). See generally Eugenia Escueta & Eileen O'Brien, *Asian Americans in Higher Education: Trends and Issues*, in THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE, *supra* note 279, at 259 (detailing trends in preparation for and attendance at institutions of higher learning by various sub-categories of Asian Americans).

284. The author has not found any sources that engage this line of argument.

However, proponents of affirmative action tread a dangerous line if they suggest that Group Z₂ members *deserve* to be admitted to law school because of their superior intellectual ability. To do so would be to fall into their opponents' merit-based claims and weaken the proponents' positive claims for members of Groups X and Y. Proponents of affirmative action cannot offer the social utility claim that an admissions preference for Group Z₂ members would instill a sense of justice in the mechanics of the admissions process, since such an argument also relies upon the merit-based grounds the proponents wish to avoid. Similarly, proponents of affirmative action could not make the institutional claim that admitting Group Z₂ members raises the intelligence level of the student body. Arguments in favor of diversity, overcoming social oppression, and inspiring others remain and become stronger in the case of the latter two. However, these principles must be kept separate from the temptation to make arguments of desert, lest proponents of affirmative action become no different than their opponents.

In the case of Group Z₁ members, who are overrepresented in law school enrollment, the position of the proponents is more complicated, though by no means impossible to defend.²⁸⁵ Gone are the claims of social oppression, because any past oppression has apparently been overcome.²⁸⁶ Gone as well is the justification that affirmative action provides inspiration for others to go to law school, as this does not appear to be a problem. The key comes through an emphasis on the primary remaining argument in favor of affirmative action: diversity of the student body and student experiences. Those who make meritocratic arguments may ask how this is possible, given that any diversity goals are supposedly satisfied by the stipulated fact that there is a higher percentage of Group Z₁ members in law school than there is in the general population. Yet, the purpose of diversity in academic institutions, drawing from First Amendment academic freedom and

285. For a discussion of the tension between admissions rates and a felt need for affirmative action among Asian Americans to correct past wrongs, see generally Selena Dong, "Too Many Asians": *The Challenge of Fighting Discrimination Against Asian Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995) (discussing racial limits at Lowell High School, a prestigious public magnet school in San Francisco). For an update of this case, see generally David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 HARV. BLACKLETTER J. 39 (2000).

286. This Article works off the premise that this is in fact the case. As suggested earlier, it is still possible that Asian Americans experience some racial discrimination and that their representation in law schools should be higher than it actually is. Under such a scenario, the justifications for affirmative action would expand to include all of those discussed with regard to Group Y.

freedom of speech principles presented by Justice Powell in *Bakke*,²⁸⁷ is to expose students to different perspectives in such a way as to broaden their horizons, not just for the sake of diversity alone.²⁸⁸ Asian Americans have historically been discriminated against in this country and their perspectives have been excluded from mainstream thought.²⁸⁹ Thus, to include Asian Americans in concerns about diversity yields no fewer benefits than does the inclusion of African Americans or Hispanics.²⁹⁰ This is the “robust exchange of ideas” to which Justice Powell refers in *Bakke*.²⁹¹

In order for these exchanges to be meaningful, though, there needs to be a critical mass of Group Z_i members at the law school to maximize the opportunities for interaction and thus for a “robust exchange of ideas” with Group W members.²⁹² It is unclear where this threshold should be placed, but known statistics can be used to show the positive effects of affirmative action. To take the example of Asian Americans, even with their supposed “overrepresentation,” there are still 12.5 times as many whites in law school.²⁹³ To put this

287. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978).

288. While this Article discusses Asian Americans here, the same principles also apply to Native Americans, who are roughly proportionally represented in law schools. A serious numbers problem arises in designing an affirmative action program, though, when you consider the existence of different racial identifications by members of different tribes. The author remembers asking a fellow student at Stanford if she preferred the term “Indian” or “Native American.” She responded that she did not consider herself either but preferred “Navajo.” The author is not sure how many commonly-recognized Native American tribes there are in this country, but his guess is that it is several dozen. If a law school were to admit one member of each tribe (assuming it could find an adequate number of qualified applicants and not lose those applicants to another law school), there would be a greatly disproportionate number of Native Americans in the law school as a whole. This problem is lessened with Asian Americans, whose racial identification exists on the level of nationalities (a larger sample size), while it still exists in relation to any individual law school. It is possible to avoid this problem by taking law schools collectively, but it is not clear how to design an affirmative action program to accommodate this. To the extent that different racial identifications impact concerns of cultural diversity and inspiration to younger members of the race, small population sizes exacerbate the problem.

289. See generally Harvey Gee, *Beyond Black and White: Selected Writings by Asian Americans within the Critical Race Theory Movement*, 30 ST. MARY'S L.J. 759 (1999) (providing an overview of writings on the relationship between Asian Americans and American identity).

290. For a defense of this position, including both a discussion of the historical mistreatment of Asian Americans and ways in which affirmative action creates a better society, see generally Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129 (1996).

291. 438 U.S. at 313.

292. See Expert Report of Patricia Gurin, in *THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION* 99-234 (John A. Payton ed., 1999); Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools* (last visited July 23, 2000) <<http://www.law.harvard.edu/civilrights/publications/lawsurvey.html>> (concluding from survey results that diversity enhances college experience).

293. Figures are adapted from those provided in the table on page 1107.

in a different perspective, the current population of Asian American law students averages out to about 13.4 for every law school in the country.²⁹⁴ If Asian Americans were represented in law schools in exact proportion to their percentage of the relevant age group in the general population, there would be approximately 10 Asian Americans in any given law school.²⁹⁵ This difference of 3.4 students is somewhat significant, but the question then becomes how much more interaction other students at the law school will have because of the presence of those "extra" Asian Americans.²⁹⁶ The average law school contains 217.8 students.²⁹⁷ For each individual course to include an Asian American, there must be more than 21.8 students in each course if there are 10 Asian Americans at the law school as a whole, while there need only be 16.3 students per course if there are 13.4 Asian Americans at the law school.²⁹⁸ In other words, if the law school wants both to reduce course size and include minority perspectives, it must admit a greater number of minorities, even if this results in some "overrepresentation." This perspective demonstrates the advantages to be gained through affirmative action even under the scenario involving Group Z₁. Furthermore, the use of affirmative action to increase the chances that nonminorities will be exposed to minority perspectives can be applied to all other minority Groups (X, Y, and Z₂) discussed above.

294. Actual results vary greatly, not just because of demographic shifts due to geographic location and educational attainment (i.e. better-scoring Asian Americans enrolling in higher-ranked law schools), but also because the entering classes in law schools vary greatly in size. For example, the entering class at Stanford Law School hovers around 180, whereas its Harvard Law counterpart typically reaches 540 students. Thus, the calculations provided should be viewed as representative of larger principles as opposed to contentions about actual experiences in law schools. The numbers are based on the figures in the chart on page 1107 and a denominator of 184 law schools as provided by the ABA. See *Approved Law Schools*, *supra* note 19.

295. Figures are adapted from those provided in the table on page 1107. For this calculation, this Article includes in the base population those students who declined to state an ethnicity but it excludes non-resident aliens, creating a base population closer to the national population as a whole.

296. See BOWEN & BOK, *supra* note 209, at 235 (discussing the probable effects on interaction between whites and African Americans in a context of declining African American enrollment due to the elimination of affirmative action programs).

297. The numbers are based on a law school population of 40,079, which is augmented from the figures in the chart on page 1107 by the addition of those who declined to state an ethnicity, non-resident aliens, and the 184 law schools.

298. This assumes that Asian Americans will be distributed evenly among classes at the law school. This will, of course, never be the case, but the point about relative distribution of minorities remains the same.

VI. CONCLUSION

Clearly, a problem exists with regard to the number of African Americans and Hispanics, and possibly with regard to that of Asian Americans and Native Americans, admitted to law schools. The degree to which African Americans and Hispanics are underrepresented in American law schools is staggering, and affirmative action has been unable to completely eliminate this problem. Does this mean that affirmative action should be abandoned as a failure? No. The fact that disparities still exist does not mean that affirmative action has not created a better society than would exist without it. Can a race-neutral admissions policy achieve the goal of an integrated society? No. As John Payton says, "People didn't suddenly stop discriminating after the passage of the [1964 Civil Rights Act]."²⁹⁹

By playing them off of *The Bell Curve*, this Article has shown the flaws and inconsistencies in arguments against affirmative action. Proponents of affirmative action can suitably maintain their position against challenges by emphasizing societal goals of diversity and human dignity. These principles transcend different levels of educational attainment by members of different racial groups. Politically, this is a harder argument to sell than one based on easily understood objective measures of merit, but it is a battle worth fighting.

299. Wells, *supra* note 124.