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# Rough Terrain Ahead: A New Course for Racial Preference Programs

## I. INTRODUCTION

Debate over affirmative action has dominated recent legislative and court agendas. In November 1996, for example, fifty-four percent of California voters approved a referendum, Proposition 209, which eliminated preference programs in state and local government for minorities and women.[1] Similarly, in 1995 the Board of Regents of the University of California system ended affirmative action in California's public universities.[2] This phenomenon, however, has not limited itself to California. The Court of Appeals for the Fifth Circuit, in *Hopwood v. Texas*,[3] held that the University of Texas School of Law's admissions program, which gave preference to African-Americans and Mexican-Americans, violated the Fourteenth Amendment's Equal Protection Clause.[4] A year later, the Houston city council also placed a referendum on the ballot to abolish affirmative action in city contracting.[5] Although the voters narrowly defeated this measure, similar proposals have been made in roughly half the states.[6] This increasing presence of affirmative action on the political agenda suggests a growing public skepticism towards it.[7]

Bans on preference programs such as these have potentially widespread ramifications. Studies have demonstrated that employers treat

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1. Coalition for Economic Equity v. Wilson, 110 F.3d 1431, 1434-35 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).
2. Susan Yoachum et al., *UC Scraps Affirmative Action*, S.F. CHRON., July 21, 1995, at A1.
3. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).
4. 78 F.3d at 934.
5. Julie Mason, *Voters Keep Affirmative Action Program Alive*, HOUSTON CHRON., Nov. 5, 1997, at A1.
6. Aaron Epstein, *Supreme Court Allows Affirmative Action Ban*, ATLANTA J. CONST., Nov. 4, 1997, at A1.
7. Robert J. Donahue, Note, *Racial Diversity as a Compelling Governmental Interest*, 30 IND. L. REV. 523, 524 (1997).

whites differently from blacks with identical education levels and employment histories.[8] These studies indicate that employers tend to hire whites over blacks, pay whites higher salaries, and fire whites less frequently than blacks.[9] In effect, affirmative action programs have countered this trend and resulted in greater representation of minorities. When California first implemented its affirmative action program under then-Governor Ronald Reagan, the composition of higher salary public work force jobs fell from more than ninety percent white in 1974 to less than seventy percent white in 1993. Representation of minorities in all state jobs climbed from 22.7% to 41.8%. By June 1992 California had achieved parity (the representation proportionate to representation in the labor market) for African-Americans in sixteen of nineteen job categories, for Hispanics in seven of nineteen categories, and for Asians in eleven of nineteen categories.[10] In the category of state contracting, less than one percent of California's contracts with private businesses were minority-owned in fiscal year 1989-90. By fiscal year 1992-93, after the state established a set-aside program, contracts to minority-owned businesses dramatically increased to 10.1%.[11] With the passage of Proposition 209, however, a good chance exists that these advances will cease and that minorities will be under-represented.

Over the last twenty years, the Supreme Court has struggled to define the constitutional constraints on affirmative action and preference programs, and case law in this area is still relatively muddled. During 1997, it appeared that the Court would have the chance to clarify the picture by addressing two cases involving affirmative action. The Supreme Court had granted certiorari in *Taxman v. Board of Education of the Township of Piscataway*,[12] a case that involved the discriminatory layoff of a white teacher and retention of an equally qualified black teacher as part of an attempt to achieve racial diversity. But before oral arguments in January 1998, the parties settled, mooting the legal issue.[13] Similarly, the Court passed an opportunity to test authoritatively the constitutionality of California's Proposition 209 in *Coalition*

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8. Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 999, 1002 (1996).

9. *Id.* (referring to a study provided for the California State Legislature. *See, e.g.*, Mark Bendick, Jr., *Research Evidence on Racial/Ethnic Discrimination for Affirmative Action in Employment*, in DISCRIMINATION AND AFFIRMATIVE ACTION A-61, A-65 (Assembly Judiciary Comm., Cal. State Legis. 1995)).

10. *Id.* at 1007.

11. *Id.* at 1013.

12. 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997).

13. Associated Press, *Deal Wards Off Ruling on Rights*, RICHMOND TIMES-DISPATCH, Nov. 22, 1997, at A1.

*For Economic Equity v. Wilson*[14] after the Court of Appeals for the Ninth Circuit upheld the California initiative in light of an equal protection challenge.[15] Consequently, the Ninth Circuit decision is binding law in nearly twenty percent of the states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

This Comment examines racial preference programs in four different areas and addresses how the lower federal courts have applied the Supreme Court standards. Specifically, Part II illustrates the evolution of the Court's position in equal protection race cases and its current approach to the use of racial preferences. Part III addresses preference programs in the realm of state and local construction contracting. Part IV looks at affirmative action in the public employment sector in terms of both Title VII and equal protection analyses. Part V addresses preferential treatment programs in school admissions. Part VI examines the Court's approach to race-based legislative districting and distinguishes this from the other preference areas. Finally, Part VII suggests a course the current Supreme Court could take should it choose to hear a case involving preference programs. This Comment's thesis is that the courts are taking an increasingly conservative approach to minority preference programs across the board. It establishes that the standards the Court has promulgated are exceedingly difficult to satisfy.

## II. THE COURT'S APPROACH TO RACIAL PREFERENCE PROGRAMS

The Supreme Court's analysis of racial preference programs really began with *Regents of the University of California v. Bakke*[16] when the Court first addressed the constitutionality of minority preference admissions policies in higher education.[17] The facts of *Bakke* involved an affirmative action program at the University of California at Davis Medical School. Under the program the school denied admission to Allan Bakke, a white applicant with grades and Medical College Admissions Test scores higher than most admitted minority applicants.[18] Without a majority opinion on any litigated issue, a divided Court partially upheld Bakke's claim that the medical school's affirmative action program violated the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[19] Justice Powell's decisive opinion held that universities could take into account an applicant's race in certain

14. 110 F.3d 1431 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).
15. 110 F.3d at 1448.
16. 438 U.S. 265 (1978).
17. *Id.* at 265.
18. *Id.* at 276-77.
19. *Id.* at 271-72.

circumstances.[20] Because *Bakke* represented merely a plurality opinion, it left open the appropriate scrutiny level for analysis of preferential admissions programs.[21]

Justice Powell's swing opinion concluded that the Fourteenth Amendment applies to all races equally, protecting no one racial group more than another.[22] He refused to interpret the Constitution as providing more protection to African-Americans and Mexican-Americans than to whites. Accordingly, he wrote that any type of racial or ethnic distinction was inherently suspect and required strict scrutiny.[23] Under his strict scrutiny analysis, Justice Powell discounted several goals as failing to be compelling interests. The goals of reducing the deficit of minorities in medical school,[24] combating the effects of societal discrimination,[25] and increasing the number of doctors who will practice in under-served communities[26] were all insufficient. Justice Powell concluded, however, that one rationale, the promotion of educational diversity, represented a compelling governmental interest that satisfied the Constitution.[27] In recognizing diversity as a compelling interest, he stated, "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."[28]

Despite his recognition of diversity as a compelling interest, Justice Powell qualified its use as a rationale. From his perspective, the diversity rationale could not be concerned solely with an applicant's race. For diversity to suffice as a compelling state interest, it would have to encompass a number of different characteristics of which race was but a single element.[29] As a result, colleges and universities could view race only as a "plus" in the admissions process.[30] Because of the

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20. *Id.* at 296 n.36.

21. *Id.* at 271-72. Justice Powell applied strict scrutiny. *Id.* at 290. Justices Brennan, White, Marshall, and Blackmun applied an intermediate level of review. *Id.* at 359. Chief Justice Burger and Justices Stewart, Stevens, and Rehnquist did not address the constitutionality of the admissions policy because they believed the Title VI issue was dispositive of the entire claim; thus, they did not apply a scrutiny level. *Id.* at 412-13. *See also* Krista L. Cosner, Comment, *Affirmative Action in Higher Education: Lessons and Directions from the Supreme Court*, 71 IND. L.J. 1003, 1018 (Fall 1996).

22. 438 U.S. at 289-90.

23. *Id.* at 291.

24. *Id.* at 307.

25. *Id.*

26. *Id.* at 311.

27. *Id.* at 311-12.

28. *Id.* at 312.

29. *Id.* at 315.

30. *Id.* at 317.

Court's divisions, however, the *Bakke* decision did not clarify the picture surrounding minority preference programs.

The jurisprudential trail moved along two years later in *Fullilove v. Klutznick*[31] when the Court addressed affirmative action in public contracting programs, but once again the Court failed to garner a majority. *Fullilove* addressed the constitutionality of the Public Works Employment Act of 1977,[32] which required at least ten percent of federal funds awarded for local public works projects to be set aside to obtain services from minority businesses.[33] Although the Court held the federal program to be facially consistent with the Fifth Amendment's Equal Protection Clause, it did not resolve the scrutiny level question left open in *Bakke*.[34] Justice Burger justified the program on the ground that it remedied the present effects of past discrimination.[35] Although Justice Powell's opinion in *Bakke* rejected preference programs based on accounting for past societal discrimination, the *Fullilove* decision upheld the program because Congress (as opposed to a state political subdivision in *Bakke*) had intended that the Act halt the denial of public contracting opportunities to minority businesses.[36]

In 1986 the Court in *Wygant v. Jackson Board of Education*[37] continued on the trail when it again confronted the issue of affirmative action in employment. This time, however, a majority of the court held that a termination plan preferring minority teachers over white teachers with greater seniority violated the Fourteenth Amendment.[38] The majority agreed only on the result. In line with the prior affirmative action cases, the Court failed to establish a majority on the appropriate scrutiny level. Justice Powell's plurality opinion applied strict scrutiny

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31. 448 U.S. 448 (1980).

32. Public Works Employment Act, 42 U.S.C. § 6705(f)(2) (1998).

33. 448 U.S. at 453.

34. *Id.* at 492. Chief Justice Burger's plurality opinion did not apply a scrutiny level. *Id.* at 491-92. Justice Powell's concurrence applied strict scrutiny, and Justice Marshall's concurrence applied intermediate scrutiny. *Id.* at 496, 519.

35. *Id.* at 478.

36. *Id.* at 473. The program at issue in *Fullilove* was a pure remedial program as opposed to the program in *Bakke*. *Id.* at 481. Justice Powell's concurrence in *Fullilove* recognized this distinction. He maintained that the race-conscious remedy constituted a compelling interest because: (1) Congress had the authority to respond to the discrimination; and (2) that governmental body had evidence of illegal discrimination. *Id.* at 498. Although *Fullilove* does not answer the scrutiny level question, Justice Powell's concurrence recognizes that pure remedial programs might constitute a compelling interest when the federal government institutes them in response to identified discrimination. *Id.* at 496.

37. 476 U.S. 267 (1986).

38. *Id.* at 284.

and required the employer to justify its classification with a compelling interest and to tailor the plan narrowly to achieve that interest.[39] The plurality opinion reiterated that remedying societal discrimination did not constitute a compelling interest.[40] Justice Powell hinted, however, that remedying the present effects of prior discrimination might be a compelling interest if the employer has a strong evidentiary basis to support remedial action.[41]

Finally, less than three years later a marker was laid down on the trail in *City of Richmond v. J.A. Croson Co.*[42] There, a majority of the Court established strict scrutiny as the appropriate inquiry in cases involving state-created racial preferences.[43] In *Croson* the City of Richmond mandated that construction companies to which the city awarded contracts must subcontract at least thirty percent of each contract to minority- owned subcontractors.[44] Distinguishing *Fullilove*, where Congress established the set-aside program, Justice O'Connor's majority opinion held that the local set aside program in *Croson* violated the Fourteenth Amendment's Equal Protection Clause.[45]

The Court found two bases for strict scrutiny in affirmative action cases: to "'smoke out' illegitimate uses of race" and to reduce the danger of stigmatic harm.[46] Furthermore, the court in *Croson* reiterated the constitutional distinctions between remedying past societal discrimination and remedying the present effects of past discrimination as a basis for affirmative action plans. Citing *Wygant*, the Court held that only the latter produces an adequate rationale for race-based classifications provided that the governmental body imposing the classification specifically can identify with detailed findings the discrimination within the affected industry.[47] Applying its rule to the facts of *Croson*, the Court concluded that Richmond's intent to remedy the present effects of

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39. *Id.* at 273-74.

40. *Id.* at 274-76. The Court in *Wygant* also rejected the "role model" theory (minority teachers would act as role models for minority students) as a compelling reason for the classification because it does not "necessarily bear a relationship to the harm caused by prior discriminatory hiring practices." *Id.* at 276.

41. *Id.* at 277. The Court stated that "a public employer like the Board must ensure that before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Id.*

42. 488 U.S. 469 (1989).

43. *Id.* at 493-94, 505.

44. *Id.* at 477. These minority owned subcontractors were called "Minority Business Enterprises" or "MBEs" for short. *Id.*

45. *Id.* at 505.

46. *Id.* at 493.

47. *Id.* at 497-500.

past discrimination was not compelling because Richmond could not clearly prove past discrimination within the Richmond construction industry.[48] Furthermore, due to the assumed existence of other race-neutral remedies, such as city financing of small firms, relaxation of bonding requirements, and simplification of bidding procedures, Richmond failed to narrowly tailor the program to its objectives.[49]

No sooner had one majority of the Court recognized strict scrutiny as the correct standard of review for state affirmative action set-aside programs when another majority of the Court muddled the picture again in *Metro Broadcasting, Inc. v. FCC.*[50] *Metro Broadcasting* addressed the constitutionality of a federal program that gave preference to minority controlled radio and television stations applying to the FCC for broadcast licenses.[51] Distinguishing *Croson*, the new majority applied an intermediate scrutiny level to congressional programs and held that the FCC preference rule did not violate the Equal Protection Clause.[52] The majority opinion adopted Justice Marshall's concurrence in *Fullilove* as appropriate for congressional programs employing benign racial classifications.[53] Under an intermediate rationale that required only an important government interest (as opposed to one that was compelling), programming diversity met the lower standard.[54] Referring to Justice Powell's *Bakke* opinion, Justice Brennan wrote, "Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values."[55]

*Metro Broadcasting*'s use of intermediate scrutiny was short-lived. In 1995 the Court in *Adarand Constructors, Inc. v. Pena*[56] partially overturned *Metro Broadcasting* and held that "[t]o the extent that *Metro Broadcasting* is inconsistent [with the government's need to demonstrate strict scrutiny] it is overruled."[57] Like *Croson* and *Fullilove*, which

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48. *Id.* at 499-500.

49. *Id.* at 507.

50. 497 U.S. 547 (1990), *overruled in part by* Adarand Constructions, Inc. v. Pena, 515 U.S. 200 (1995).

51. 497 U.S. at 557-58.

52. *See id.* at 564-65.

53. *Id.*

54. *Id.* at 566. Because the Court adopted an intermediate scrutiny analysis, it did not have to address the question of whether diversity is a compelling interest. *Id.*

55. *Id.* at 568 (quoting *Bakke*, 438 U.S. at 311-13).

56. 515 U.S. 200 (1995).

57. *Id.* at 227.

addressed contracting preferences, *Adarand* addressed a congressional program that provided financial incentives to contractors who employed "disadvantaged" subcontractors, including minority-owned construction firms.[58] Justice O'Connor, now with the *Croson* majority, opined that *Croson* had established the correct scrutiny level for racial preference programs, viewed *Metro Broadcasting* as straying from established precedent, and therefore overruled it.[59] Although *Adarand* regularized the scrutiny level, it did not identify objectives that might serve as compelling interests. The Court simply remanded the case after it resolved the scrutiny level question.[60]

These cases illustrate that although the route to a more conservative approach to affirmative action has not been linear, its direction is clear. Following *Croson* and *Adarand*, constitutionally permissible preference programs must satisfy a strict scrutiny analysis. Thus, the program must reflect a compelling government interest and must be narrowly tailored to that goal.[61] However, what constitutes a compelling interest remains murky. In his plurality opinion in *Bakke*, Justice Powell believed that establishing diversity could be a compelling interest at least in educational settings.[62] But other than *Metro Broadcasting*, which *Adarand* overruled as to its use of intermediate scrutiny and which concluded that diversity was an important interest, the Court has not conclusively established diversity as a compelling government interest. It remains to be seen whether a majority of the Court will recognize the diversity interest as sufficient to satisfy strict scrutiny. At this point the case law suggests that remedying the present effects of past discrimination is the only goal the Court will recognize as compelling.[63] Satisfying this interest represents a difficult hurdle because *Croson* requires detailed evidence of past discrimination in the precise area sought to be remedied.[64] As seen in the cases that follow, the federal courts rarely have found that a preference program reflects a compelling interest, nor have they viewed diversity as an alternative compelling interest.

58. *Id.* at 207-10.
59. *Id.* at 227.
60. *Id.* at 239.
61. 488 U.S. at 507, 510.
62. *See* 438 U.S. at 312-13.
63. *See, e.g.*, *Wygant*, 476 U.S. at 277; *Croson*, 488 U.S. at 497-500.
64. 488 U.S. at 499-500.

### III. PREFERENCES IN CONSTRUCTION CONTRACTING

Three cases decided in 1996 and 1997 represent post-*Adarand* decisions and reflect the federal court's approach to remedial preference programs in construction contracting. In September 1997, the Court of Appeals for the Ninth Circuit relied on *Croson* and *Adarand* in the case of *Monterey Mechanical Co. v. Wilson.*[65] *Monterey* addressed California Polytechnic State University's solicitation of bids for the construction of a new heating and air conditioning system. The university disqualified the low bid by a white-owned contracting firm because it did not comply with a California statute that required general contractors to meet a goal of subcontracting fifteen percent of the work to minority business enterprises ("MBEs") or to make a good faith effort to do so.[66] The court held that the statute violated the Fourteenth Amendment's Equal Protection Clause.[67]

The court's analysis is significant because it determined that a nonrigid system of goals and good faith efforts constitutes a classification under the Equal Protection Clause and receives the same strict scrutiny analysis as that used for strict quotas.[68] Although California's statute required only good faith efforts to meet the goals, the good faith requirement still treated contractors differently according to their ethnicity and sex. Minority-owned general contractors were not required to make any good faith attempts to subcontract to minority-owned subcontractors, but white-owned general contractors were mandated to make good faith efforts to subcontract to MBEs.[69] This resulted in compliance expenses incurred by white-owned contractors that minority-owned general contractors did not have to pay.[70]

After the Ninth Circuit determined that the good faith preference system must satisfy strict scrutiny, the court applied the *Croson* and *Adarand* standards to the statutory scheme. The state government was unable to offer any evidence that the university or even the State of California had previously discriminated against minority contractors.

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65. 125 F.3d 702 (9th Cir. 1997).
66. *Id.* at 704.
67. *Id.* at 715.
68. *Id.* at 710-12.
69. *Id.* at 709.
70. *Id.* The nonminority bidders must contact state and federal agencies and minority organizations in order to identify prospective subcontractors. They also must produce advertisements targeted at minority subcontractors. These efforts require time, effort, and expense. *Id.*

This violated the Supreme Court's mandate in *Croson* and *Adarand*.[71] California offered only legislative findings that MBEs held an economically disadvantaged position. The court determined that these legislative findings were insufficiently compelling.[72] Moreover, the program failed because it was not narrowly tailored and included minority groups against whom the California construction industry was extremely unlikely to have discriminated.[73]

In September 1997 the Court of Appeals for the Eleventh Circuit reviewed a similar case in *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*.[74] Dade County promulgated an affirmative action program that established county construction participation goals of fifteen percent for black business enterprises ("BBEs") and nineteen percent for Hispanic business enterprises ("HBEs").[75] The county had five measures it could use to meet these participation goals: set asides, subcontractor goals, project goals, bid preferences, and selection factors.[76] Unlike the plan in *Monterey Mechanical* in which nonminority general contractors had the duty to make a good faith effort to subcontract to MBEs, the plan in *Engineering Contractors* required the county to meet the goals (via one of the five methods). The process resulted in the county passing over certain nonminority contractors and subcontractors in the award of contracts. The court held that the program violated the Equal Protection Clause.[77]

The crux of *Engineering Contractors* involved the court's determination of whether the county produced sufficient evidence as required by *Croson* to show discrimination within the Dade County construction industry. Dade County presented both statistical evidence and anecdotal evidence

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71. *Id.* at 713-14.

72. *Id.* at 714.

73. *Id.* Like the statute in *Croson*, the California statute included groups such as Aleuts and Eskimos. While these groups have suffered oppression, the court stated that "it would be frivolous to suggest that California State Polytechnic University . . . or the State of California, have actively or passively discriminated against Aleuts in the award of construction contracts." *Id.*

74. 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1186 (1998).

75. *Engineering Contractor's*, 122 F.3d at 901. Dade County also had an eleven percent goal for women business enterprises. *Id.* *Engineering Contractors* speaks to this issue in its analysis; however, this Comment does not address affirmative action as it relates to gender.

76. *Id.* A set aside reserves a contract for bidding solely among MBEs. A subcontractor goal requires a general contractor to subcontract a certain percentage of work to MBEs. A project goal creates a pool of MBE subcontractors, and the county selects firms from this pool to carry out portions of the contract. A bid preference actually reduces an MBE bid price for purposes of determining the lowest bid. A selection factor is similar to a bid preference but uses factors besides price. *Id.*

77. *Id.* at 929.

of discrimination within the metropolitan area's construction industry.[78] The statistical evidence included contracting statistics, subcontracting statistics, marketplace data statistics, and two studies. The contracting statistics showed disparities between the bids made by MBEs and the actual percentage of contract dollars awarded to MBEs. The construction industry countered this evidence, however, by providing a race-neutral reason for the disparity: because MBEs were smaller than majority firms, they received smaller contracts.[79] The subcontracting statistics also pointed to a disparity in contracts awarded to minority subcontractors, and the marketplace data statistics indicated that the construction market was responsible for unfavorable disparities.[80] Despite persuasive statistics, the court also discounted them based in part on plaintiff's evidence that the methodology was flawed.[81]

In addition, Dade County presented two studies: the Wainwright and the Brimmer studies. The Wainwright study concluded that as a result of present and past discrimination, minorities are less likely to own construction businesses.[82] Relying on *Croson*, the court rejected the Wainwright study because (1) the lack of minority participation was not necessarily due to discrimination in the construction industry, and (2) other reasons could explain the dearth of minority-owned construction companies.[83] The Brimmer study concluded that a disparity existed in the business receipts from black-owned construction firms and white-owned construction firms in Dade County. The court also rejected this study for failing to account for the smaller size of black-owned construction companies.[84]

The plaintiff's anecdotal evidence attempted to present a picture of discrimination. Owners of minority construction firms and two county employees testified that they believed discrimination persisted in the Dade County construction industry.[85] The Eleventh Circuit concluded that anecdotal evidence alone rarely will be sufficient to establish discrimination within the construction industry, but it can be used to

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78. *Id.* at 912-13, 924-25.

79. *Id.* at 916.

80. *Id.* at 919-20.

81. *Id.* at 920-21. The subcontracting statistics involved firms that performed the majority of their work outside Dade County. Thus, these statistics were "not a reasonable way to measure Dade County subcontracting participation." *Id.* at 920. The marketplace data statistics arguably were flawed because the study included firms that were unqualified to perform certain county construction contracts. *Id.* at 921.

82. *Id.* at 921-22.

83. *Id.* at 922.

84. *Id.* at 923.

85. *Id.* at 924.

supplement statistical evidence.[86] Nonetheless, because the statistical evidence was weak the district court's assessment of the anecdotal evidence as insufficient was not clearly erroneous.[87] Consequently, the court held that the program was unconstitutional.[88]

*Engineering Contractors* illustrates the difficulty of proving discrimination within the construction industry. There is often a lack of data to satisfy the burden. Much discriminatory behavior, both past and present, is not documented. Even when the government presents persuasive statistics and studies, the opponent frequently can take advantage of various flaws in them. A proponent of a preference program has a seemingly insurmountable burden in satisfying the compelling interest requirement of *Croson* and *Adarand*.

Nevertheless, the next case, *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*,[89] suggests how the government might satisfy its evidentiary burden based upon rationales that are not predicated entirely on pure remedial programs. In *Contractors Ass'n*, the City of Philadelphia established a set-aside program for African-American contractors.[90] Ultimately, the Court of Appeals for the Third Circuit held that the program violated the Equal Protection Clause because the program was not narrowly tailored.[91] Before rejecting the plan under the narrow-tailoring prong, however, the court addressed whether Philadelphia had a compelling interest for its program.

In its attempt to satisfy the *Croson* evidentiary standard, Philadelphia argued that three different forms of discrimination had worked against minority contractors. First, Philadelphia presented evidence of discrimination by prime contractors in the selection of minority subcontractors.[92] The court rejected this for lack of sufficient evidence: city records (project engineer logs), which provided the only evidence of such discrimination, failed to record whether a subcontractor was an MBE. Moreover, the evidence only used a random sampling of the logs.[93]

86. *Id.* at 925-26.

87. *Id.* at 926.

88. *Id.* at 929. In rejecting the program, the court also determined that the affirmative action program was not narrowly tailored because Dade County failed to seriously consider race-neutral measures to increase minority participation in the county construction industry. *Id.* at 927.

89. 91 F.3d 586 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 953 (1997).

90. 91 F.3d at 591.

91. *Id.* at 606.

92. *Id.* at 599.

93. *Id.* at 600. The study was based on only twenty-five to thirty percent of the City's Procurement Department's project engineer logs. Moreover, the only basis for identifying a name on the log as an MBE was based on the memory of the person who conducted the

Second, Philadelphia presented evidence that local trade associations had a low representation of MBEs.[94] The court cited *Croson* and stated that evidence of low membership by MBEs in trade associations, standing alone, is insufficient to support a remedial preference program.[95] It also determined that the study contained flaws because no black contractor who had applied to the contractor association had been denied membership. Furthermore, even if the study could show that the contractor association did discriminate, this would not justify a preference program because the city did not participate in the discrimination and did not require membership in the association for the award of a contract.[96]

Finally, Philadelphia presented evidence of past discrimination by the city in the award of prime contracts. This evidence included a disparity index score of 22.5, which showed the disparity in the city's award of prime contracts.[97] Based on this score, the city would have to award minority construction firms 4.5 times more dollars than they actually received in order to achieve an amount proportionate to their representation among all Philadelphia construction companies.[98] The court responded much more favorably to this evidence and rejected the proposed limitations on the study.[99] Although *Croson* requires the

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study. *Id.*

94. *Id.* at 601. Dr. Brimmer, who conducted one of the studies used in *Engineering Contractors*, also conducted the study in *Contractors Association* that concluded that contractor associations discriminated against MBEs. *Id.*

95. *Id.* (citing *Croson*, 488 U.S. at 503).

96. *Id.* at 601-02.

97. *Id.* at 602. A disparity index compares the amount of contracts a group receives to the amount that would be expected based on that group's bidding activity and awardee success rate. Specifically, it measures the participation of a specific group's participation in the award of contracts by dividing that group's contract dollar percentage (percent the specific group of bidders comprises compared to the total number of bidders) by the awardee percentage (percent of contracts actually awarded to that group), and then multiplies that number by 100%. For example, if MBEs represent 10% of the bidders and are awarded 5% of the contract dollars, the disparity index would be: (contract dollar % / awardee %) x 100% = (5% / 10%) x 100% = .5 x 100% = 50%. The closer the index score is to 100%, the greater that group's participation in construction contracts. Generally, disparity index numbers of 80% or more are not considered indications of discrimination. Engineering Contractors Ass'n v. Metro Dade County, 122 F.3d at 914. A disparity index of 22.5% may establish a strong evidentiary basis for inferring discrimination. Contractors Ass'n v. City of Philadelphia, 91 F.3d at 602.

98. *Contractors Ass'n*, 91 F.3d at 602.

99. *Id.* at 602-03. The contractor association claimed that the study was flawed because it (1) was not limited to whether black firms were qualified to perform certain contracting work, (2) provided mixed data from different sources, and (3) did not account for instances when black firms were too busy with other federal projects to allow them to

evidence to show discrimination against the minority group that is capable of performing the relevant work (that is, showing discrimination against qualified blacks in the construction industry), the court stated, "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[100] Because the court later decided that the plan was not narrowly tailored, it was unnecessary to decide whether this evidence was sufficient. However, the court hinted that it might be for future programs.[101]

Ultimately, the court held that Philadelphia's remedial plan violated the Equal Protection Clause requirement that the plan be narrowly tailored.[102] Several factors led to this conclusion. The evidence suggested that the city discriminated against prime contractors, yet the program effectively applied only to subcontractors.[103] In addition, the fifteen percent goal was focused on the number of minorities in the general population and not the number of minority-owned contracting firms. In fact, the evidence indicated that only 0.7% of the construction companies capable of performing city prime contracts were black.[104] While the court did not require that the percentage of the preferred group in the industry be a ceiling, it believed that the fifteen percent mark was not necessary to remedy discrimination.[105] Finally, as in *Engineering Contractors*, Philadelphia did not pursue any race-neutral alternatives.[106]

Although the case law has not conclusively established diversity as a rationale for preference programs, *Contractors Association* suggests that it is possible to create diversity in the contracting industry under the high standards of *Croson* and *Adarand*. Philadelphia could have implemented race-neutral measures to reduce the barriers that minority

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perform city projects. *Id.* at 603.

100. *Id.* at 603.

101. *See id.* at 605. However, the court suggests that if Philadelphia should decide to craft a new preference plan that is more narrowly tailored, it might want to use this evidence to justify the program. *Id.* at 605 n.22.

102. *Id.* at 606. Before commencing the narrow tailoring analysis, the court specified that based on *Croson*, the degree of fit of a remedial program is important for three reasons. First, the lack of a close fit casts doubt on the claim that remedying the identified discrimination and injury was the legislature's objective. Second, a race-based preference imposes a burden on all citizens who are protected by the Equal Protection Clauses. Finally, the program's favored class can be burdened by the preference through the danger of stigmatic harm. *Id.* at 605-06.

103. *Id.* at 606.

104. *Id.* at 607.

105. *Id.* at 608.

106. *Id.*

firms face in entering the city construction market.[107] The city could have reduced qualification and bonding requirements. It also could have established training programs and provided financial assistance for all disadvantaged contractors regardless of race.[108] A race-neutral plan would apply to all groups, such as small construction firms. While diversity would not represent the plan's primary impetus, the plan would have a permissible secondary effect of creating diversity within the construction industry. Thus, by creating race-neutral measures, the city could still aid both existing and start-up minority firms who faced barriers to market entry. A race-neutral plan could achieve diversity without disadvantaging nonminority-owned companies and without the dangers of remedial preference programs that *Croson* highlights.

*Contractors Association* also suggests that if race-neutral measures fail, Philadelphia possibly could take the next step of implementing a narrow preference plan targeted at minorities. In so doing, the city would need to reduce the percentage goal of minority representation. In addition, it would need to target only prime contractors because the evidence demonstrated discrimination only with prime contractors.[109] The lesson of *Contractors Association* seems to be that governments must first experiment with race-neutral measures.

## IV. PREFERENCES IN PUBLIC EMPLOYMENT

In 1996 and 1997, the courts decided two cases in the area of public employment that have struck a blow to affirmative action. The first case, *Taxman v. Board of Education of the Township of Piscataway*,[110] addressed the layoff of a white teacher—and retention of an equally qualified minority teacher—in order to achieve racial diversity. The parties were scheduled to argue the case before the Supreme Court in January 1998; instead, they entered into a settlement while the case was pending. The second case, *Coalition for Economic Equity v. Wilson*,[111] concerned California's Proposition 209, a state ballot measure that ended the use of affirmative action by the state.[112] The Supreme Court

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107. *Id.*
108. *Id.*
109. *Id.* 607-08.
110. 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997).
111. 110 F.3d 1431 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).
112. The affirmative action ban applies to state hiring, contracting, and education. However, this Comment analyzes the case in the section concerning employment preference programs.

declined to review it.[113] Both cases now are binding in their respective circuits.

In *Taxman* the Board of Education of Piscataway, New Jersey developed an affirmative action policy in 1975 for employment decisions. The plan established a tie-breaking system: when two equally qualified candidates applied for a job, the school board would recommend the minority candidate for the position.[114] As part of a down-sizing effort in 1989, the school board reduced the teaching staff of the business department at Piscataway High School by one teacher. Considering two equally qualified and senior business teachers, one African-American and the other white, the board applied the affirmative action plan and retained the African-American teacher. Consequently, the white teacher, Sharon Taxman, sued the school board for a violation of Title VII.[115]

The Court of Appeals for the Third Circuit held that the affirmative action plan used to lay off Taxman violated Title VII.[116] But because this case involved Title VII, it required a different analysis than that used in equal protection cases. The Third Circuit used *United Steelworkers v. Weber*[117] as the basis for its decision.[118] *Weber* concluded that Title VII's prohibitions against racial discrimination do not proscribe all voluntary race-based preference plans.[119] Rather, the Court in *Weber* held that the permissibility of the plan depended on (1) the goal of breaking down old patterns of racial segregation, (2) avoiding unnecessarily trammeling the interests of white employees, and (3) its temporary nature.[120]

The court in *Taxman* first determined that the school board's affirmative action plan lacked a remedial purpose; in fact, it was used only to achieve diversity.[121] African-American teachers were never under-

113. Coalition for Economic Equity v. Wilson, 118 S. Ct. 397 (1997).

114. *Taxman*, 91 F.3d at 1550.

115. *Id.* at 1552. "Title VII makes it unlawful for an employer 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment' or 'to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee.'" *Id.* at 1553 (quoting 42 U.S.C. § 2000e-2(a)). Taxman also asserted a claim under the New Jersey Law Against Discrimination. 91 F.3d at 1552.

116. *Taxman*, 91 F.3d at 1567.

117. 443 U.S. 193 (1979).

118. *Taxman*, 91 F.3d at 1550. The circuit court also applied *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987), which refined *Weber's* holding in a Title VII gender discrimination case. *See* 91 F.3d at 1555-64.

119. 443 U.S. at 208.

120. *Id.*

121. 91 F.3d at 1550-52.

represented nor underutilized in the Piscataway school system.[122] On this score the school board had a good history. By retaining the African-American teacher and laying off the white teacher, the school board's aim was forward-looking: it wanted to keep the teaching staff culturally diverse.[123]

As under the Equal Protection Clause when the remediation of the present effects of past discrimination represents the only recognized compelling interest, the Third Circuit held that Title VII requires an affirmative action plan to have a remedial purpose.[124] It rejected the claim that Title VII was also intended to promote racial diversity.[125] In so doing, the court first determined that equal protection standards under the Constitution do not necessarily satisfy Title VII.[126] It then concluded that even if Title VII incorporated the equal protection standards, the Equal Protection Clause does not recognize racial diversity as a goal.[127] It cited *Wygant* for the proposition that the government must show evidence of prior discrimination by an employer and that the "'role model'" theory (minority teachers would be role models for minority students) was an insufficient justification for a preference program.[128] Moreover, it also rejected *Bakke*'s diversity rationale. The court distinguished *Bakke* because the university's interest in a diverse student body implicated additional First Amendment concerns that were not present in *Taxman*.[129] In addition, the court indicated that *Bakke*'s diversity rationale required preference programs to view diversity as one of a number of factors to consider.[130] Finally, the court determined that the programming diversity interest in *Metro Broadcasting* had nothing to do with the concerns that support Title VII.[131]

After concluding that Title VII advances no diversity interest and is concerned solely with remedial preference plans, the Third Circuit

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122. *Id.* at 1550.
123. *Id.* at 1552.
124. *Id.* at 1557.
125. *Id.* at 1560.
126. *Id.*
127. *Id.*
128. *Id.* at 1560-61 (citing *Wygant*, 476 U.S. at 270-78).
129. *Id.* at 1561-62 (citing *Bakke*, 438 U.S. at 312-13). According to Justice Powell, the First Amendment is concerned about "the atmosphere of 'speculation, experiment and creation'" that is an essential quality of higher education and that is "widely believed to be promoted by a diverse student body." *Id.* at 1562 (quoting *Bakke*, 438 U.S. at 312). In effect, in *Bakke* diversity would be used to achieve a greater goal—fulfilling the interests of the First Amendment. *Id.*
130. *Id.* at 1562 (citing *Bakke*, 438 U.S. at 315).
131. *Id.* at 1562-63.

examined the school board's plan in light of *Weber*. Because the school board admitted the nonremedial nature of its affirmative action plan, the plan automatically failed the first prong of *Weber*.[132] The court also held that the plan unnecessarily trammeled on nonminority interests because the plan had no benchmarks or goals in terms of the number of minorities to hire. Without standards to evaluate the plan's progress, no assurance existed that the plan did not exceed its purpose.[133] Finally, the affirmative action plan was not temporary. Rather, the school board adopted the policy in 1975, did not establish a duration for it, and could implement it any time it sought to achieve diversity.[134] Although the court rejected the affirmative action plan under Title VII because of its nonremedial nature, the court applauded the principles and goals of diversity the plan strived to achieve.[135]

On November 21, 1997, civil rights groups paid $433,500 to settle the suit before the Supreme Court heard oral arguments.[136] Civil rights groups including the NAACP, the Black Leadership Forum, and the Southern Christian Leadership Conference raised this money out of concern that the Court decision could severely hamper racial preference programs. These groups believed *Taxman* failed to present the strongest case in favor of affirmative action that the Court could use to establish precedent. National Urban League president Hugh Price stated, "It won't be easy but we need to make sure the fairest and strongest case possible is laid out to the court. This wasn't the right case."[137] As a result of the settlement, the *Taxman* holding remains binding authority in the Third Circuit.

In April 1997 the Court of Appeals for the Ninth Circuit addressed affirmative action in *Coalition for Economic Equity*, but it went beyond *Taxman*'s Title VII analysis because it arose not as an employment discrimination challenge but in an equal protection context. *Coalition for Economic Equity* resulted from California voters' approval of Proposition 209, a state constitutional amendment that prohibits all public affirmative action programs.[138] After the voters passed the

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132. *Id.* at 1563.

133. *Id.* at 1564. Without goals, the school board is free to grant racial preferences at its whim. In fact, the board could pursue its diversity policy and use its affirmative action plan to discriminate against individuals who Title VII was intended to protect. *Id.*

134. *Id.*

135. *Id.* at 1567.

136. Associated Press, *Deal Wards Off Ruling on Rights*, RICHMOND TIMES-DISPATCH, Nov. 22, 1997, at A1.

137. Associated Press, *Groups Saw Teacher Case as Wrong One for Precedent*, RICHMOND TIMES-DISPATCH, Nov. 22, 1997, at A7.

138. 110 F.3d at 1434.

referendum, plaintiffs brought suit in federal district court seeking a temporary restraining order and a preliminary injunction. The trial court entered a temporary restraining order and granted a preliminary injunction in December 1996.[139] The state appealed to the Ninth Circuit for a stay of the injunction, but the court deferred submission of the stay application. Instead, the court ruled on the merits underlying the preliminary injunction itself.[140] Ultimately, the court held that the prohibition on affirmative action violated neither the Equal Protection Clause nor Title VII.[141]

In its decision the court applied both a "conventional" equal protection analysis and a "political structure" equal protection analysis.[142] The "conventional" analysis examined the substance of Proposition 209 while the "political structure" analysis examined the level of government that enacted Proposition 209.[143] First addressing the conventional analysis, the court determined that the strict scrutiny standard established in *Croson* and *Adarand* applied. The court quickly disposed of the issue because it concluded that Proposition 209 did not even create a classification.[144] In fact, Proposition 209 did just the opposite; it prohibited the state from classifying individuals by race or gender. Accordingly, Proposition 209 did not violate the Equal Protection Clause in the conventional sense, and the court did not have to use the strict scrutiny analysis.[145]

In contrast, the political structure equal protection claim presented a more difficult and obscure challenge to the court. Essentially, the plaintiffs argued that Proposition 209 resulted in an unequal political structure that denies minorities and women the right to seek preferential treatment from lower levels of government.[146] The court cited several precedents that spoke to political structure equal protection challenges. In *Hunter v. Erickson*,[147] the Akron, Ohio City Council amended its charter to prevent the city council from enacting ordinances concerning housing discrimination without city voter approval. There, the Supreme Court found that the amendment created a racial classification that treated racial housing matters differently from other

139. *Id.* at 1435 (referring to Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996)).

140. *Id.* at 1436.

141. *Id.* at 1448. This Comment does not focus on the court's Title VII analysis.

142. *Id.* at 1438-39.

143. *Id.* at 1439.

144. *Id.* at 1440.

145. *Id.*

146. *Id.*

147. 393 U.S. 385 (1969).

racial and housing concerns. Consequently, the amendment resulted in an unconstitutional political structure that disadvantaged racial minorities by making it more difficult to enact legislation on their behalf.[148] Similarly, in *Washington v. Seattle School District No. 1*,[149] a ballot initiative prevented school boards from assigning students beyond their neighborhood schools. A number of exceptions existed, but they all effectively prevented busing to desegregate schools.[150] The Court determined that the initiative resulted in a political structure that violated the Equal Protection Clause because it established a racial classification by removing "'the authority to address a racial problem . . . from the existing decisionmaking body, in such a way as to burden minority interests.'"[151] The court in *Coalition for Economic Equity* interpreted *Hunter* and *Washington* as prohibiting states from allowing higher levels of government to exercise decision making authority over various racial questions. However, it never recognized these decisions as concluding that the repeal of legislation benefitting minorities violates equal protection.[152]

Using these precedents, the Ninth Circuit distinguished the equal protection argument raised in *Coalition for Economic Equity*. The plaintiffs argued that *Hunter* and *Washington* prevented California from withdrawing the jurisdiction of local governments to permit preference programs.[153] The court disagreed and held that the state must reallocate political authority in a racially discriminatory way before the *Hunter* doctrine will apply.[154] Because Proposition 209 prevents the state or localities from discriminating against anyone or providing preferences to anyone, it is a race-neutral law.[155] Moreover, a restructuring of the political process will violate equal protection only when it hampers a person's right to equal treatment.[156] According to the court, Proposition 209 does not impede an individual's right to equal treatment; rather, it impedes an individual's ability to receive *preferential* treatment, which does not violate the Equal Protection Clause.[157] The

148. *Economic Equity*, 110 F.3d at 1440 (citing *Hunter*, 393 U.S. at 390-93).

149. 458 U.S. 457 (1982).

150. *Economic Equity*, 110 F.3d at 1440 (citing *Washington*, 458 U.S. at 462-63).

151. *Id.* at 1441 (quoting *Washington*, 458 U.S. at 474).

152. *Id.* at 1443. In fact, *Crawford v. Board of Education*, 458 U.S. 527, 538-39 (1982), held that the repeal of desegregation laws does not embody an invalid racial classification and fails to violate the Equal Protection Clause. 110 F.3d at 1443.

153. 110 F.3d at 1443.

154. *Id.*

155. *Id.* at 1444.

156. *Id.* at 1445.

157. *Id.*

Equal Protection Clause establishes a burden on preferences. Based on *Adarand*, the court held that for an individual to receive preferential treatment without violating equal protection, a compelling interest must support it.[158] The court emphasized that the Constitution does not require preferential programs.[159] Consequently, the Ninth Circuit concluded that Proposition 209 does not violate political structure equal protection.[160]

Needless to say, the ramifications of *Taxman* and *Coalition for Economic Equity* run deep and go beyond the employment sphere. They provide a green light for certain states to prohibit remedial preference programs. *Coalition for Economic Equity* establishes one circuit's view that the Constitution does not require affirmative action programs. Furthermore, both cases illustrate that achieving diversity is not a constitutional mandate. These cases reflect a growing shift in attitude concerning the significance of remedial preferences. Although binding only in their respective circuits, they also provide a model that future courts may follow, including, perhaps, the Supreme Court.

## V. PREFERENCES IN HIGHER EDUCATION

The circuit courts also have cut the breadth of affirmative action in the realm of public university admissions. For the 1992 school year, the University of Texas School of Law applied its preference program and denied admission to four white applicants who had better grades and Law School Aptitude Test scores than a number of accepted minority applicants.[161] In *Hopwood v. Texas*, the Court of Appeals for the Fifth Circuit held that the law school may not use race as an admissions factor in order to: (1) achieve a diverse student body, (2) combat the perceived effects of a hostile environment, (3) alleviate the law school's poor reputation in the minority community, and (4) eliminate the

158. *Id.* at 1446.

159. *Id.*

160. *Id.*

161. Hopwood v. Texas, 78 F.3d 932, 938 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). The law school based admissions on a "Texas Index" number, which was comprised of an applicant's undergraduate grade point average and Law School Admissions Test score. 78 F.3d at 935. For resident whites and nonpreferred minorities, the law school usually considered 199 to be the minimum presumptive admit score and 192 to be the maximum presumptive deny score. But as part of the school's policy to admit more African-Americans and Mexican-Americans, the school reduced these two scores to 189 (presumptive admit) and 179 (presumptive deny). *Id.* at 936. The white plaintiffs had scores ranging from 199 to 197, but the law school rejected all four applicants. *Id.* at 938.

present effects of past discrimination by parties other than the law school.[162]

The court began its opinion by addressing the purpose of the Equal Protection Clause and concluded that discrimination based on any race is highly questionable.[163] Consequently, a plurality of the Fifth Circuit looked to *Wygant*, *Croson*, and *Adarand* and applied strict scrutiny to the racial preference.[164] It rejected the goals of diversity and remedying the present effects of past discrimination by the University of Texas system and the Texas educational system as compelling interests.[165] In discounting diversity as a compelling interest, the court refused to abide by Justice Powell's opinion in *Bakke* recognizing diversity as an interest.[166] The court noted that Justice Powell's swing vote in *Bakke* received no other votes and that with the exception of *Metro Broadcasting* (which was later overruled in part on other grounds), no other case recognized diversity as a compelling interest.[167] Rather, the use of race to establish diversity contradicts the goals of the Equal Protection Clause in that it fosters the use of race.[168]

While the court also rejected the law school's attempt to remedy the present effects of past discrimination in the University of Texas system and the Texas educational systems, it did not discount that remedying the present effects of past discrimination could be a compelling interest in certain limited situations.[169] Referring to *Croson*, the court held that the use of remedial preferences must be restricted to the state actor who had previously discriminated.[170] Because the admissions policy attempted to remedy either discrimination within the University of Texas system or the entire Texas state educational system, it was too expansive and not sufficiently related to past harms within the law school.[171] In addition, the court claimed that the three alleged effects of prior discrimination—(1) the reputation that the law school was a "white" school, (2) the under-representation of minorities at the law school, and (3) the perception that the law school was a hostile environment for minorities—were only effects of societal discrimination,

162. 78 F.3d at 962.
163. *Id.* at 939-40.
164. *Id.* at 940.
165. *Id.* at 944, 954.
166. *Id.* at 944.
167. *Id.*
168. *Id.* at 945.
169. *Id.* at 951.
170. *Id.* at 950, 954 (citing *Croson*, 488 U.S. at 499).
171. *Id.* at 951 & n.43.

as opposed to effects of prior discrimination in the law school.[172] Only if the law school could prove prior discrimination within the law school itself might the admissions policy satisfy a compelling interest.[173]

Because the majority determined that the admissions policy failed to constitute a compelling interest, it did not address whether the program was narrowly tailored.[174] However, the concurrence believed the court could have taken a more restricted approach by rejecting the program for not being narrowly tailored.[175] It maintained that the court should not have declared *Bakke*'s diversity rationale dead, and it refused to find that diversity in higher education could never be a compelling interest.[176] Consequently, the concurrence shifted its analysis and determined that the law school's sole focus on African-Americans and Mexican-Americans caused the program to be underinclusive.[177] If the law school sought to achieve diversity, it should not have ignored other minority groups that could contribute to diversity.[178] To the concurrence, the admissions program resembled a quota system for African-Americans and Mexican-Americans rather than a narrowly tailored admissions policy attempting to seek true diversity.[179] In July 1996 the Supreme Court declined to review *Hopwood*.[180] Consequently, *Hopwood* is binding in Texas, Louisiana, and Mississippi, the states that comprise the Fifth Circuit.

A second case involving racial preference programs in education is *Podberesky v. Kirwan*,[181] which arose out of the Fourth Circuit. In *Podberesky* the court had to apply the evolving case doctrine on minority preference programs to a University of Maryland scholarship program open only to African-American students.[182] The Fourth Circuit applied the strict scrutiny standard and rejected the scholarship program.[183]

The University alleged that four present effects of past discrimination existed at the school: (1) a poor reputation within the African-American community, (2) an under-representation of African-Americans in the student population, (3) a low retention rate for African-American

172. *Id.* at 952.
173. *Id.* at 954.
174. *Id.* at 955.
175. *Id.* at 962 (Weiner, J., specially concurring).
176. *Id.* at 964.
177. *Id.* at 966.
178. *Id.*
179. *Id.*
180. Texas v. Hopwood, 116 S. Ct. 2581 (1996) (mem.).
181. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).
182. 38 F.3d at 151.
183. *Id.* at 161.

students, and (4) an atmosphere hostile to African-American students.[184] Thus, the University viewed the scholarship program as remedying those present effects.[185] However, the court refused to recognize any of the effects as being sufficient to justify the scholarship program.[186] Concerning the poor reputation and the effects of the hostile environment, the court held that knowledge of historical fact is not a present effect that can justify a race-exclusive remedy.[187] In terms of the remaining two effects, the University failed to demonstrate that the under-representation and higher attrition rate were connected to the prior discrimination.[188] As in *Hopwood*, the Supreme Court refused to hear an appeal; thus, race-based scholarships offered by public universities are unconstitutional in the Fourth Circuit.[189]

*Hopwood* and *Podberesky* appear to make the remedying of the present effects of past discrimination virtually impossible.[190] Both courts refused to view the admissions programs as doing anything more than remedying past societal discrimination.[191] But as a result, both decisions could have an impact on university admissions that may soon reach beyond their circuits.

## VI. RACE-BASED DISTRICTING

Race-based legislative districting is not an affirmative action plan. However, it is similar to affirmative action and preference programs in that legislatures create districts with the distinct purpose of keeping minorities in a voting majority. This Comment discusses race-based districting due to the similarity between preference programs and districting that preserves minority voting strength. Just as with affirmative action, race-based districting calls into play the Equal Protection Clause. Nevertheless, the Court's analysis of "gerrymandered" districts goes one step beyond the typical strict scrutiny approach used for contracting, employment, or education. This Part briefly explains the two seminal cases that establish the constitutional parameters for drawing election districts. It then discusses a recent application of these rules.

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184. *Id.* at 152.
185. *Id.*
186. *Id.* at 151.
187. *Id.* at 154.
188. *Id.* at 155.
189. Kirwan v. Podberesky, 514 U.S. 1128 (1995).
190. 78 F.3d at 952; 38 F.3d at 153, 157.
191. *Id.*

*Shaw v. Reno*[192] addressed North Carolina's redrawn congressional districts after the 1990 census results provided the state an additional seat in the United States House of Representatives.[193] The North Carolina General Assembly reapportioned the state and included two majority-black congressional districts. One of the districts covered the northern part of North Carolina's coastal plain, where the largest concentration of African-Americans live, but extended to near the South Carolina boarder. The second district was even more amorphous and noncompact. It ran for approximately 160 miles, but in many portions it was no wider than the interstate highway.[194]

The Court held that if the redistricting plan is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race," it may violate the Equal Protection Clause.[195] Once this finding is made, a court must apply strict scrutiny analysis and determine whether a compelling interest exists for the plan and whether the plan is narrowly tailored.[196] The Court determined that racial gerrymanders reinforce the stereotype that members of the same racial groups favor the same candidates and political interests.[197] As a result, gerrymanders "bear[] an uncomfortable resemblance to political apartheid."[198] Moreover, individuals elected from these districts are more likely to believe that they must represent members of the racial group that elected them as opposed to the entire constituency.[199] The Court never decided whether the districting scheme satisfied a compelling state interest and was narrowly tailored; rather, it remanded the case for this determination.[200]

Although *Shaw* did not determine whether a bizarre shape is necessary for an equal protection violation, *Miller v. Johnson*[201] established that a strange district shape is not a requirement for an equal protection claim.[202] *Miller* arose in response to Georgia's redistricting following the 1990 census. Of eleven districts, Georgia

192. 509 U.S. 630 (1993).
193. *Id.* at 633.
194. *Id.* at 635-36.
195. *Id.* at 658.
196. *Id.*
197. *Id.* at 647.
198. *Id.*
199. *Id.* at 648.
200. *Id.* at 657-58.
201. 515 U.S. 900 (1995).
202. *Id.* at 912.

established three majority-minority districts.[203] One of these majority-black districts connected Atlanta to parts of Savannah, ran 260 miles, and covered 6,784 square miles.[204]

A plurality of the Court determined that the shape of the district is not dispositive of whether the district violates the Equal Protection Clause.[205] However, it recognized the relevancy of shape because it may provide circumstantial evidence that the legislature viewed race as the controlling rationale behind the districting scheme.[206] Ultimately, the Court held that if the plaintiff demonstrates that race is the predominant factor for the district's design, then strict scrutiny applies.[207] In order to satisfy this burden, a plaintiff may use circumstantial evidence of a district's shape or direct evidence of the legislature's purpose, and the plaintiff must show that the legislature subordinated traditional race-neutral districting principles.[208] Based on shape, General Assembly statements that it was motivated by a desire to create a majority-black district, and Justice Department demands that the state create three majority-minority districts, the Court concluded that the district court's finding that race represented the predominant factor was not clearly erroneous.[209]

The Court then analyzed the district under the strict scrutiny standards. It determined that the Voting Rights Act did not require this district; thus, the Court did not conclude whether complying with the Voting Rights Act can provide a compelling interest.[210] The Court did hold that complying with Department of Justice preclearance requirements does not establish a compelling interest.[211] Only if Georgia demonstrated that the drawing of this majority-black district was necessary to counter the effects of past discrimination might the Court have recognized a compelling interest.[212] Consequently, the districting plan violated the Equal Protection Clause.

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203. *Id.* at 907-08. As a result of the Voting Rights Act preclearance requirement for Georgia, the Department of Justice required that Georgia create more than two majority-minority districts, which the state originally proposed. *Id.* at 906-07.

204. *Id.* at 908.

205. *Id.* at 913.

206. *Id.*

207. *Id.* at 915-16.

208. *Id.* at 916.

209. *Id.* at 917-18.

210. *Id.* at 921. The Voting Rights Act did not require this district because no reasonable basis existed to believe that Georgia's earlier enacted plans violated section 5 of the Act. *Id.*

211. *Id.* at 922.

212. *Id.* at 920-21.

Justice O'Connor's concurrence, which provided the fifth vote, put a twist on the predominant factor test. To invoke strict scrutiny, she believed that the plaintiff must demonstrate that "the State has relied on race in substantial disregard of customary and traditional districting practices."[213] Only in "extreme instances of gerrymandering" would the Court have to apply strict scrutiny.[214]

During the 1996-97 Supreme Court Term, the Court ruled on several cases involving redistricting. One of those, *Lawyer v. Department of Justice*,[215] provides additional guidance for the constitutionality of majority-minority districts. In *Lawyer* Florida established a new redistricting plan based on the 1990 census results. The Department of Justice, however, denied preclearance to the Florida Senate districts under the Voting Rights Act because it divided the minority population and failed to create a majority-minority district in the Tampa Bay area.[216] Subsequently, the Florida Supreme Court ordered the legislature to adopt a new plan. When an impasse occurred, the district court itself adopted a redistricting plan that established a majority-minority district in the Tampa Bay area. The irregularly shaped district had a 45.8% African-American and 9.4% Hispanic voting age population from four counties in the area. Plaintiffs filed suit claiming that this plan violated the Equal Protection Clause. As the suit was pending, the parties settled the suit by creating a new district. This district covered portions of three counties instead of four and reduced the African-American voting age population from 45.8% to 36.2%.[217]

The Supreme Court initially held that the state has the power to enter into a redistricting settlement agreement before the district court has ruled on the constitutionality of the district pending before it.[218] More importantly, however, the Court ruled that the settlement plan did not violate the Equal Protection Clause because the shape and composition of the district was not improper.[219] First, the district was located entirely in the Tampa Bay region and had an area and shape similar to other Florida Senate districts.[220] Second, the black voting age population was only 36.2%; thus, it would not necessarily prefer black candidates over white candidates.[221] The district merely comprised a

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213. *Id.* at 928 (O'Connor, J., concurring).
214. *Id.* at 929.
215. 117 S. Ct. 2186 (1997).
216. *Id.* at 2189-90.
217. *Id.* at 2191.
218. *Id.* at 2193.
219. *Id.* at 2195.
220. *Id.*
221. *Id.*

predominantly lower-income, urban population that represented a "community" of interests.[222] Finally, the Court determined that although the district's number of black voters was significantly higher than the overall number of black voters in any of the counties from which the district was created, this deviation did not prove fatal to the plan.[223] Justice Souter wrote that "similar racial composition of different political districts" is not "necessary to avoid an inference of racial gerrymandering."[224] As a result, race was not a predominant factor in the composition of the district, and the Court did not have to apply a strict scrutiny analysis.

Through the Court's predominant factor test established in *Miller*, the Court set a high standard for states in their creation of legislative districts. However, *Lawyer* indicates that states are not prevented from being race conscious in drawing district boundaries. As with conventional preference programs, race may be considered only in rare, limited situations. If legislatures and courts consider race but also consider goals such as preserving communities of interest, protecting incumbents, and using county or precinct lines, the plan has a good chance of passing constitutional muster. A greater problem results when minorities are widely dispersed as in *Shaw* and *Miller*. In these situations it becomes more difficult to craft a district that is concerned about race without violating the Equal Protection Clause. Following the 2000 census, the Court may have the opportunity to address this issue further.

## VII. CONCLUSION

Recently, the courts have taken an increasingly hostile approach to affirmative action programs. Because all racial classifications for preference programs are subject to strict scrutiny, a preference plan will survive only if it furthers a compelling interest and is narrowly tailored. Over the years the Supreme Court has become more conservative in what it recognizes as a compelling interest. Only when the plan seeks to remedy the present effects of past discrimination as shown by specific evidence in the area in which the program is applied will the courts clearly find a compelling interest. This evidentiary standard is difficult to reach as the preceding cases indicate. Furthermore, the Court has not embraced Justice Powell's diversity rationale that he promulgated in *Bakke*. *Metro Broadcasting*, which considered diversity an important government interest, has been rejected through *Croson*'s and *Adarand*'s establishment of strict scrutiny. Based on the Court's current composi-

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222. *Id.*
223. *Id.*
224. *Id.*

tion, a vote on racial diversity as a compelling interest likely would result in a five-to-four decision against diversity, with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas in the majority and Justices Stevens, Souter, Ginsburg, and Breyer dissenting.[225] Similarly, if the current Court hears a case similar to *Coalition for Economic Equity* addressing a ban on affirmative action, to *Hopwood* addressing the validity of preferential admissions programs, or to *Taxman* addressing affirmative action plans in hiring, the Court likely would uphold a prohibition on affirmative action or strike the preferential program.

In the areas of contracting, public employment, university admissions, and even districting, the courts have established a rigid framework for responding to the interests of minorities. Based on this evolving case law, rarely can a preference program withstand a court's scrutiny. In fact, only in extraordinary circumstances might a program survive. As *Engineering Contractors* and *Contractors Ass'n* illustrate, it is exceedingly difficult for a plaintiff to provide evidence sufficient to illustrate past discrimination within a particular construction industry. Without this showing a contracting program virtually has no chance of withstanding a court's analysis. Even if a plaintiff meets this burden, the plaintiff also must establish that the program is narrowly tailored. Because entities often implement preference plans under the mandate of local or state government, in many instances these entities have not experimented with less intrusive or race-neutral measures. Consequently, the narrow tailoring criteria becomes an additional stumbling block. To further dissuade the use of preference programs, *Coalition for Economic Equity* paves the way for other states, and even the federal government, to completely prohibit the use of affirmative action plans in public employment.

With the goal of diversity no longer accepted by the courts, the same high burden in the realm of contracting and hiring awaits preference programs in public higher education. Unless colleges and universities develop new plans that will promote minority enrollment without violating constitutional mandates, the numbers of minorities in the classroom could drop. Nevertheless, to achieve some diversity, universities will be forced to adopt race-neutral measures such as looking at economic disadvantage when admitting students. These race-neutral measures, however, may lack the effectiveness of preferential admissions programs in creating diverse student bodies and providing minorities greater access to higher education.

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225. Robert J. Donahue, Note, *Racial Diversity as a Compelling Governmental Interest*, 30 IND. L. REV. 523, 549 (1997).

Even in the realm of legislative districting, it remains difficult to create a district that is geared to minority interests. When the sole focus of the district is race, a court most likely will order a redrawing of the district. Although some of the gerrymandered districts have verged on the extreme, the impact of not considering race could be reflected in the composition of Congress and various state legislatures.

While debate continues to persist over the efficacy and need for affirmative action and preference programs, the net result is likely to be a stagnation of the racial composition of schools, public payrolls, and governing bodies. This Comment does not attempt to address the positive or negative impact of racial preferences or whether affirmative action plans should be scrapped, but it does conclude that the Court's current course reduces the ability to create diversity in the public realm. Under the current framework, rarely will a court recognize the importance of diversity.

As the current political climate continues to question the significance of preference programs, many state legislatures, and possibly Congress, may soon pass legislation modeled on California's Proposition 209. If this indeed happens, a good chance exists that the Supreme Court will address the constitutionality of these laws. Similarly, the Court may choose to hear a case similar to *Taxman*. But until that time, the continued viability of preference programs appears grim.

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