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The Inevitable Collision: Affirmative Action and the Constitution

I. INTRODUCTION

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.¹

The interests of Title VII² and those of the Equal Protection Clause of the Fourteenth Amendment³ therefore collide.⁴ In order to clarify the constitutional questions involved, the Supreme Court must address affirmative action.⁵ As the

1. *Plessy v. Ferguson*, 163 U.S. 537, 559, 562 (1896) (Harlan, J., dissenting) (rejecting the “separate but equal” doctrine stating that “[t]he arbitrary separation of citizens, on the basis of race, . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution”), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (rejecting “separate but equal” doctrine of *Plessy*).

2. Title VII, which addresses discrimination in the workplace, states that individuals may not be discriminated against on the basis of race. *See* 42 U.S.C. § 2000e-2(a) (1994); *infra* text accompanying note 80. “The legislative history of Title VII suggests both that Title VII was intended to remedy discrimination against historically disadvantaged groups, in particular ‘Negroes,’ and that the statute’s broader purpose was to eliminate prohibited employment discrimination as applied equally to everyone.” E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class In Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 446 (1998).

3. The Equal Protection Clause of the Fourteenth Amendment states, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1; *see infra* text accompanying note 70.

4. *See infra* note 66 and accompanying text (noting that interpreting a statute to authorize discrimination is contrary to the protections within the Constitution).

5. *See infra* text accompanying note 63 (discussing the division in affirmative action legislation among various states).

twentieth century draws to a close, the topic of race-based preferences⁶ has become exceedingly divisive and politically charged.⁷ The state of race relations in America has become increasingly volatile because what constitutes equal opportunity is subject to fierce debate.⁸ From college admissions⁹ and employment issues,¹⁰ to lucrative business contracts,¹¹ affirmative action has crept into nearly every facet of modern American life. It is ironic, as Time Magazine notes, that “for all the effort to make the racial issue irrelevant, it has become more pervasive and indelible.”¹²

This Comment, like a traditional Comment regarding affirmative action, will provide analysis pertaining to the historical events that shaped modern affirmative action policies. However, this Comment will also examine the recent settlement of *Taxman v. Board of Education*,¹³ a most intriguing display of political maneuvering which remains shrouded in controversy.¹⁴ *Taxman* would have

6. Preferential affirmative action refers to “a system—be it quotas, timetables, goals, preferences, set-asides—by which an institution utilizes group classification and preferences to reach desired racial, ethnic or gender representation.” See Robert D. Alt, *Toward Equal Protection: A Review of Affirmative Action*, 36 WASHBURN L.J. 179, 181 (1997) (footnote omitted).

7. See generally David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921 (1996) (discussing the controversy surrounding affirmative action). “The term ‘affirmative action’ is a political lightning rod. A discussion of its merits is almost always heated, and accompanied by an underlying consideration of the sensitive subjects of race and racism, gender and sexism.” *Id.* at 922.

8. See David Hall, *Reflections on Affirmative Action: Halcyon Winds and Minefields*, 31 NEW ENG. L. REV. 941 (1997) (discussing the importance of affirmative action in the creation of opportunities for minorities as well as the emotion evoked in debate on affirmative action).

9. See generally *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (determining that race may be a factor in admission process where white medical school applicant was denied admission to medical school in favor of lesser qualified black students).

10. See generally *Taxman v. Board of Educ.*, 91 F.3d 1547 (3rd Cir. 1996) (discussing the merits of a diversity rationale for affirmative action where a white school teacher lost a teaching position in favor of a black teacher to increase racial diversity in the school district).

11. See generally Robert Salladay, *San Jose Suit Tests How 209 Affects Cities: Wilson Targets 35 State Laws He Says Violate Measure*, S.F. EXAMINER, Sept. 10, 1997, at A1, available in 1997 WL 4345915 (discussing an electrical firm that lost a \$200,000 contract, despite generating the lowest bid, as a result of affirmative action policies).

12. See Tamala M. Edwards, *Throwing the Book at Race: a Benchmark New Work Turns the Accepted History of Racial Progress in America Upside Down*, TIME, Sept. 8, 1997, at 60.

13. 91 F.3d 1547 (3rd Cir. 1996).

14. On November 20, 1997, a coalition of “key black leaders” paid Sharon Taxman and her attorneys \$433,500 to “drop her lawsuit.” See David G. Savage, *Civil Rights Leaders Pay to Settle Key Bias Case Law*, L.A. TIMES, Nov. 22, 1997, at A1, A24. “The highly unusual settlement, . . . should end the case, which was pending before the high court and had the potential for a landmark ruling restricting affirmative action.” *Id.* at A1. The surprising settlement shows that civil rights leaders feared that the Supreme Court, which was scheduled to hear the case on January 14, 1998, would rule that race could not legally be considered a factor in “hiring, promotions and layoffs.” See *id.* “The Black Leadership Forum, which arranged the settlement, includes the leaders of the NAACP Legal Defense Fund, the National Council of Negro Women, the Southern Christian Leadership Conference and the Rev. Jesse Jackson’s Operation PUSH.” *Id.* at A24. “Critics of race-based affirmative action said the big-money payoff shows desperation on the part of the old-line civil rights establishment.” *Id.*

presented the Supreme Court with an ideal lens through which to examine the constitutionality of affirmative action.¹⁵ However, as a result of industrious manipulation, the Court narrowly missed that opportunity.¹⁶ Because a live controversy no longer exists, this Comment will focus on the Supreme Court's lost chance to interpret the Constitution and articulate the appropriate legal principles raised in *Taxman*.¹⁷ Although a case of similar content will inevitably reach the Supreme Court, the Court's unavoidable and unfortunate silence regarding the issues in *Taxman* necessitates an additional term where civil rights legislation lacks a definitive mandate.¹⁸ *Taxman* would likely have confirmed that Title VII and the Constitution are currently in conflict and hence, require resolution.¹⁹ Unfortunately, that inevitable conclusion, along with true equality, must wait.

II. HISTORICAL BACKGROUND AND ANALYSIS

The Civil War Amendments were fundamentally important in establishing the foundation for the modern paradigm of civil rights legislation.²⁰

Nearly fifty years after the adoption of the Civil War Amendments, the Court refined the scope of the education system through a series of critically important

"[T]he Center for New Black Leadership, a young and conservative group, denounced the settlement as a 'bribe' and a 'new low for the "civil rights" organizations.'" *Id.* In fact, the president of that group said, "[i]magine if, in 1954, wealthy white racists could have stopped the Supreme Court from hearing the *Brown v. Board of Ed.* case by simply putting up a few hundred thousand dollars. This action by the Black Leadership Forum is just as pernicious." *Id.* (italics added). However, Jesse Jackson rebutted the criticism arguing that the settlement was "wise and good for the country." *See id.*

15. *See infra* notes 52-56 and accompanying text (discussing *Taxman* and Title VII).

16. *See Savage, supra* note 14 and accompanying text.

17. *See infra* notes 52-56 and accompanying text. *Taxman's* importance for the future of race conscious policies was not underestimated. *See* John W. Borkowski, *The 1996-97 Term of the United States Supreme Court and Its Impact on Public Schools*, 122 ED. LAW REP. 361, 362 (1998). "On the last day of the 1996-97 Term, the Supreme Court granted certiorari in *Piscataway Township Board of Education v. Taxman*, a case that will likely be among the most important cases of the 1997-98 Term." *Id.*

18. *See infra* note 63 and accompanying text (discussing the confusion among state legislatures and Congress in drafting affirmative action policies).

19. *See infra* notes 108-14 and accompanying text.

20. The Thirteenth Amendment ends slavery by stating, "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The Fourteenth Amendment requires that citizens of the United States shall have "due process of law" and establishes that no person shall be denied the "equal protection of the laws." *See* U.S. CONST. amend. XIV, § 1. The Fifteenth Amendment gives all men the right to vote regardless of their "race, color or previous condition of servitude." U.S. CONST. amend. XV, § 1. Each Amendment also provides that Congress has the power to enforce through appropriate legislation. *See* U.S. CONST. amend. XIII, § 2, XIV, § 5, XV, § 2.

decisions.²¹ These cases invoked the Equal Protection Clause of the Fourteenth Amendment,²² thereby declaring segregated schools to be unconstitutional.²³

Almost twenty-five years later, the Supreme Court made another crucial decision in *Regents of the University of California v. Bakke*,²⁴ in which the Court rejected a white student's constitutional challenge under Title VI of the Civil Rights Act of 1964²⁵ regarding the University of California at Davis Medical School's policy of reserving sixteen positions exclusively for minority students.²⁶ Justice Powell, who wrote the opinion of the Court, referenced the First Amendment in order to justify the holding that the state may look to race as a factor for medical school admission due to the importance of a "robust exchange of ideas."²⁷

Subsequent to *Bakke*, the Supreme Court decided another noteworthy case. In *United Steelworkers of America v. Weber*,²⁸ a white employee brought suit against a steelworkers' union, claiming that the union's quota, which required fifty percent minority employees, was discriminatory under Title VII.²⁹ *Weber* relied on a strict interpretation of Title VII and argued that the policy was discriminatory because it permitted junior level black employees to be promoted ahead of senior level white employees, thus violating the language in Title VII.³⁰ The Court held that voluntary race-based affirmative actions policies do not violate Title VII.³¹ The Court in *Weber* thus expanded Title VII beyond the confines of its language stating that although white employees are discriminated against "solely because they are white . . . a thing may be within the letter of the statute and yet not within the statute, [although it is] not within its spirit, nor within the intention of its makers."³² The Court then examined Title VII against the "legislative history" and

21. See generally *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that the Equal Protection Clause of the Fourteenth Amendment prohibits segregated schools); *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950) (holding that if a black law school is not equal to a white law school, the black student must be admitted to the white law school); *Missouri ex. Rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (holding that black students must be admitted to white law schools if no black law schools exist); *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (holding that political equality is separate from social equality, hence education facilities can be separate if equal), *overruled by Brown*, 347 U.S. 483.

22. The Fourteenth Amendment states in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

23. See *Brown*, 347 U.S. at 495.

24. 438 U.S. 265 (1978).

25. 42 U.S.C. § 2000d (1994).

26. See *Bakke*, 438 U.S. at 312.

27. See *id.* at 313. Justice Powell also determined that a "diverse student body" is a legitimate and Constitutional directive for a university. See *id.* at 311-12.

28. 443 U.S. 193 (1979).

29. See *id.* at 198-200. The union's goal was to require that fifty percent of those hired be black until the number of black craftworkers was equivalent to the number of blacks in the "local labor force." See *id.* at 199.

30. See *id.* at 199-200; see also *supra* note 2 and accompanying text (noting that an individual may not be discriminated against in the workplace, under Title VII, on the basis of race).

31. See *Weber*, 443 U.S. at 208.

32. See *id.* at 201 (citation omitted).

“historical context from which the Act arose.”³³ In order to weigh the amount of racial discrimination permitted under Title VII’s confines, the Court instituted a two-tiered criterion.³⁴ This criterion proposed first, that the purpose of affirmative action plans could not “unnecessarily trammel the interests of white employees.”³⁵ Second, the plan would be required to “mirror those of the statute.”³⁶ In *Weber*, the Court granted leeway to the affirmative action policy of the union because the plan was temporary and had a definitive termination point.³⁷

The Court made another landmark decision in *Wygant v. Jackson Board of Education* (Board),³⁸ where white employees brought suit against the Board for violation of the Equal Protection Clause of the Fourteenth Amendment as well as Title VII.³⁹ Specifically, the white employees claimed that the Board’s policy of giving minority preferences in employment retention was discriminatory.⁴⁰ In *Wygant*, the Court delineated that general societal discrimination could not justify the Board’s policy and that the Board would need to show proof of prior discrimination in order to grant preferences based on minority status.⁴¹ The Court held that the Board’s decision to layoff white employees as a “means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.”⁴²

33. *See id.* The Court wrote that “Congress’ primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with ‘the plight of the Negro in our economy.’” *Id.* at 202 (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)). After examining the historical context surrounding the passage of Title VII, the Court wrote “we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve.” *See id.* at 204.

34. *See id.* at 208.

35. *See id.*

36. *See id.* The plan must be similar to the goal of Title VII which the Court examined from a historical standpoint. *See id.*

37. *See id.* at 208-09. The Court noted that preferential selection of black employees over white employees “will end as soon as the percentage of black skilled craftworkers . . . approximates the percentage of blacks in the local labor force.” *See id.*

38. 476 U.S. 267 (1986).

39. *See id.* at 272.

40. *See id.* at 273.

41. *See id.* at 274.

42. *See id.* at 284 (footnote omitted). The Court also noted that the Board’s definition of a minority includes “blacks, Orientals, American Indians, and persons of Spanish descent” but the Board never explained why they chose those specific groups or attempted to prove that they discriminated against those specific minority groups. *See id.* at n.13.

In 1996, “affirmative action suffered three major defeats . . . which collectively signal[ed] the end of the preferential policies practiced [over] the last thirty years.”⁴³ *Hopwood v. Texas*,⁴⁴ *Taxman v. Board of Education*,⁴⁵ and California’s Proposition 209,⁴⁶ although indicating an end to affirmative action policies, also served to exacerbate the confusion in the current state of civil rights jurisprudence.⁴⁷ The Court of Appeals for the Fifth Circuit determined in *Hopwood* that racial classifications are justified only in order to remedy the effects of past discrimination. Thus, racial distinctions must be narrowly tailored in order to legally achieve that important government purpose.⁴⁸ In evaluating *Hopwood*, the Fifth Circuit determined that “there ha[d] been no indication from the Supreme Court, other than Justice Powell’s lonely opinion in *Bakke*, that the state’s interest in diversity constitutes a compelling justification for governmental race-based discrimination”; hence, the Fifth Circuit departed from the *Bakke* precedent.⁴⁹ The Fifth Circuit further found that the use of race to create diversity only created a student body that appeared “different” and was “no more rational . . . than would be choices based upon the physical size or blood type of applicants.”⁵⁰ The *Hopwood* Court clearly distinguished diversity from race.⁵¹

43. Alt, *supra* note 6, at 179.

44. 78 F.3d 932 (5th Cir. 1996).

45. 91 F.3d 1547 (3rd Cir. 1996).

46. CAL. CONST. art. I, § 31 (1996).

47. See generally Alt, *supra* note 6, at 179-80.

48. See *Hopwood*, 78 F.3d at 940-41. The Fifth Circuit examined *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), the latest Supreme Court case discussing racial preferences, and concluded that the strict scrutiny test applies to situations where race is a consideration for different treatment. See *id.* at 941 n.18. Observers of the *Hopwood* decision noted that the decision “sent shockwaves through the world of higher education.” See Michael S. Greve, *Hopwood and Its Consequences*, 17 PACE L. REV. 1 (1996) (footnote omitted). “Defenders of racial preferences have emphasized that *Hopwood* binds only institutions inside the Fifth Circuit” and have argued that the Supreme Court has not yet dismissed the rationale of diversity that Justice Powell’s “lone opinion” in *Bakke* espouses. See *id.* at 2 (footnotes omitted).

49. See *Hopwood*, 78 F.3d at 945. The Fifth Circuit noted that Justice Powell alone wrote that a diverse student body is a basis for preferential treatment, hence that opinion was not a Supreme Court mandate. See *id.* “Judge Jerry Smith’s trenchant opinion for the Fifth Circuit—arguably the first unambiguous, forthright judicial endorsement of official color blindness in three decades—has blown a huge hole in the ‘diversity’ defense on which racial preferences in higher education have been based.” Greve, *supra* note 48, at 2-3. Some have argued that the *Hopwood* decision may be entirely ignored as:

Racial preference policies . . . supported by entrenched bureaucracies and by powerful interest groups. These constituencies have responded to *Hopwood* with a mixture of outrage, denial and defiance Given the higher education establishment’s iron commitment to racial “diversity,” universities need no such encouragement; one must frankly doubt that they will readily comply with court-imposed restrictions on racial preference policies.

See *id.* at 3.

50. See *Hopwood*, 78 F.3d at 945.

51. See *id.*

In *Taxman*, a white school teacher lost her teaching position in favor of a black teacher of equal merit as an attempt by the school board to foster racial diversity in the business department.⁵² The Court of Appeals determined, as stipulated by the school board, that this affirmative action policy did not “act to remedy the effects of past employment discrimination.”⁵³ Additionally, both parties agreed that minorities were not under-represented in the school and that racial discrimination was not a specific problem in their school district that required a remedy.⁵⁴ Hence, the court determined that, under Title VII, affirmative action plans which are non-remedial cannot justify ignoring the powerful anti-discrimination mandate of Title VII.⁵⁵ Essentially, the holding in *Taxman* strengthened Title VII’s purpose as a statute designed to remedy the effects of past discrimination. Title VII does not permit discrimination as a means of promoting diversity.⁵⁶

Then, in November 1996, California voters passed the California Civil Rights Initiative or Proposition 209,⁵⁷ which established that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”⁵⁸ Proposition 209 “stands unique in the affirmative action debate as a popular initiative, rather than a legislative act or a judicial dictate of the court.”⁵⁹ Robert D. Alt, the Director of Public Relations and Education at the Center for Individual Rights and who also served as co-counsel to Cheryl Hopwood,⁶⁰ noted that citizens of California voted to end race and gender based preferences despite “an extravagant scare campaign.”⁶¹ Ironically, Proposition 209, which promotes equal protection of all

52. See *Taxman v. Board of Educ.*, 91 F.3d 1547, 1551-52 (3rd Cir. 1996). The Superintendent stated, “In my own personal perspective I believe by retaining Mrs. Williams it was sending a very clear message that we feel that our staff should be culturally diverse” *Id.* at 1552.

53. See *id.* at 1563.

54. See *id.* at 1550-51.

55. See *id.* at 1563. Further, the court determined that the *Weber* two-prong test was not satisfied because there was no termination point and the policy “unnecessarily trammel[s] the interests of the [non-minority] employees.” See *id.* at 1565 (alteration in original) (quoting language from *Weber* discussed *supra* notes 28-37 and accompanying text).

56. See *id.* at 1557. The court wrote, “the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.” *Id.* The court further noted that “there is no congressional recognition of diversity as a Title VII objective requiring accommodation.” *Id.* at 1558. But see *supra* notes 32-33 and accompanying text (discussing the Court’s decision in *Weber* which focused on the historical rationale for Title VII).

57. Proposition 209 passed by a vote of 54% to 46%. See *Elections ‘96 State Propositions*, L.A. TIMES, Nov. 7, 1996, at A29.

58. CAL. CONST. art. I, § 31 (1996).

59. Alt, *supra* note 6, at 180.

60. See *id.* at 179.

61. See *id.* at 180.

people by forbidding any discrimination based on race, was attacked “as a violation of equal protection.”⁶²

The division among the various state legislatures highlights the division of opinions regarding the future of affirmative action in America.⁶³ Both the United States Congress and state legislatures are actively drafting and debating new affirmative action legislation.⁶⁴ At present, there is little consensus regarding the future of racial preferences, a fact which underscores the need for a definitive judicial opinion by the Court.⁶⁵

III. LEGAL ARGUMENTS

A. *The Constitution and Title VII*

1. The Constitution Clearly Prohibits Racial Preferences

“To interpret a statute designed to give greater remedy to constitutional discrimination as authorizing discrimination contrary to the Constitution is surely flawed.”⁶⁶ Title VII, which has been interpreted to permit race conscious affirmative action policies,⁶⁷ clearly contradicts the language in the Constitution, which does not permit discrimination based on race.⁶⁸ The Constitution of the United States explicitly states that no person shall be denied “equal protection of the laws.”⁶⁹ To treat people differently based solely on race certainly defies the

62. *See id.* n.10. “The very idea that an initiative passed to prohibit discrimination and to promote equal protection would be challenged as a violation of equal protection defies both logic and the law.” *Id.*

63. *See Hall, supra* note 8, at 960. “While twenty states have introduced bills or resolutions to limit or ban affirmative action, sixteen states have introduced bills to strengthen or expand their affirmative action programs.” *Id.*

64. *See id.*

65. *Taxman* would have provided the Court with its first opportunity to examine voluntary affirmative action in over 10 years. *See supra* notes 52-56 and accompanying text (examining the legal issues in *Taxman*).

66. Brief Amici Curiae of the Institute for Justice and Campaign for a Color-Blind America in Support of Respondent at *11, *Taxman v. Board of Educ.*, 91 F.3d 1547 (3rd Cir. 1996) (No. 96-679), available in 1997 WL 626045 [hereinafter *Amici Curiae Brief in Support of Respondent*].

67. *See Weber, supra* notes 28-37 and accompanying text.

68. *See U.S. CONST. amend. XIV, § 1; see also infra* note 70 and accompanying text.

69. *See U.S. CONST. amend. XIV, § 1.*

term "equal."⁷⁰

The Declaration of Independence, commonly regarded as "America's first and foremost statement of equal protection principles" adds clarification to the Fourteenth Amendment of the Constitution.⁷¹ The Declaration of Independence states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men . . ."⁷² Supporters of affirmative action, "[r]ather than recognizing the need for government to protect rights equally—without regard to race—rely on [the] government to grant rights and privileges (in the form of preferences) specifically on the basis of race."⁷³ This idea, however, is specifically prohibited by both the Constitution and the Declaration of Independence.⁷⁴

70. See generally Scott L. Olson, Comment, *The Case Against Affirmative Action in the Admissions Process*, 58 U. PITT. L. REV. 991, 1013 (1997). Olson notes that,

The Fourteenth Amendment states that all people should be treated *equally*. If the drafters of the Amendment intended to treat one person differently than another, using the term "equal" would be frivolous. "Equality" means "under the same conditions and among persons similarly situated;" it does not mean that one group should be treated differently and a preference should be given to the disadvantage of another group, whether that disadvantaged group is black or white.

Id. (footnotes omitted) (emphasis in the original).

71. See Alt, *supra* note 6, at 183.

72. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See generally Alt, *supra* note 6, at 183. "When the Declaration states that all men are created equal, it speaks not to equality in physical stature, talents, or property, but to the possession of rights." *Id.* "According to the Declaration of Independence, the equal protection of these natural rights is the very reason for the institution of government." *Id.*

73. See Alt, *supra* note 6, at 183-84. Robert Alt argues that affirmative action policies are inherently illogical, noting,

To treat someone differently — in this case to grant a preference—based upon the probability of an outcome arising from an individual's membership in a group is logically consistent with an officer who pulls over a black individual on suspicion of trafficking crack cocaine simply because the overwhelming majority of individuals sentenced for that crime are black.

See *id.* at 190 (footnote omitted).

74. See generally John Marquez Lundin, *The Call for a Color-Blind Law*, 30 COLUM. J.L. & SOC. PROBS. 407, 453 (1997) (discussing that "[o]ur national ideal of equality before the law has been with us from the beginning").

2. Congress Does Not Have the Authority to Alter the Constitution

In the landmark case *Marbury v. Madison*,⁷⁵ the Supreme Court held that the Constitution cannot be altered by Congress.⁷⁶ In its most recent term, the Supreme Court ruled in *City of Boerne v. Flores*,⁷⁷ that “Congress does not enforce a constitutional right by changing what the right is. [Congress] has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”⁷⁸ As noted by the Court in *Flores*, “If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’ It would be ‘on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.’”⁷⁹ A rich legal precedent supports the supremacy and finality of the Constitution.

3. Title VII and the Rise of Affirmative Action

Title VII of the Civil Rights Act of 1964 states that an employer cannot “fail or refuse to hire” or to “discharge any individual” or discriminate with respect to “compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁸⁰ Thus, the Civil Rights Act explicitly prohibits discrimination based on race.⁸¹ However, many argued that the statute was meaningless and that “[g]overnment should take positive steps to achieve real, not merely formal, equality.”⁸² It was this proposition that heralded the first uses of affirmative action.⁸³ The Supreme Court ruled in 1971 that government “may do what is necessary to achieve the compelling interest of eliminating the effect of past constitutional violations.”⁸⁴ The Court again ruled in *Bakke* that race-based affirmative action plans were justified only if they furthered important governmental objectives.⁸⁵ In *Weber*, the Court expanded Title VII

75. 5 U.S. (1 Cranch) 137 (1803).

76. *See id.* at 177.

77. 117 S. Ct. 2157 (1997).

78. *See id.* at 2164.

79. Amici Curiae Brief in Support of Respondent at *6, *Taxman v. Board of Educ.*, 91 F.3d 1547 (3rd Cir. 1996) (No. 96-679) (quoting *Flores*, 117 S. Ct. at 2168 (quoting *Marbury*, 5 U.S. at 177)), available in 1997 WL 626045.

80. *See* 42 U.S.C. § 2000e-2(a) (1) (1994).

81. *See id.*

82. *See* Donald L. Beschle, “You’ve Got to be Carefully Taught”: *Justifying Affirmative Action After Croson and Adarand*, 74 N.C. L. REV. 1141, 1149 (1996) (examining the Supreme Court’s decision in *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971)).

83. *See id.*

84. *Id.* at 1150.

85. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *see also supra* notes 24-27 and accompanying text (discussing *Bakke*).

beyond the confines of its language and examined its meaning in a historical context.⁸⁶ From that basis, the Court determined that Title VII was established to prohibit discrimination against “historically disadvantaged groups”;⁸⁷ hence, Title VII could be used to remedy the “plight of the Negro in our economy.”⁸⁸ Title VII was thus interpreted by the courts to allow the government to enact affirmative action policies.⁸⁹

B. What Standard Should the Court Apply?

1. Diversity as a Compelling State Interest

Supporters of affirmative action argue that both the Constitution and Title VII allow the use of racial preferences to increase ethnic diversity among faculty, students, and employees.⁹⁰

Supporters claimed that the furtherance of diversity was consistent with both the Constitution and Title VII because it did not “unduly interfere with the rights of non-minority employees.”⁹¹ Congress “acknowledged the importance of combating stereotypes and misconceptions among students in order to prevent future discrimination”; hence, the rationale that diversity is a sufficiently compelling interest to justify preferences is somewhat persuasive.⁹² Likewise,

86. See *supra* notes 28-37 and accompanying text.

87. See Cunningham, *supra* note 2, at 446.

88. See *United Steelworkers of Am. V. Weber*, 443 U.S. 193, 202 (1979) (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)).

89. See *supra* notes 24-27 and accompanying text.

90. See, e.g., Brief Amici Curiae of the American Civil Liberties Union, the ACLU of New Jersey, the National Employment Lawyers Association, the Rainbow PUSH Coalition, Americans United for Affirmative Action, and People for the American Way in Support of Petitioner, *Taxman v. Board of Educ.*, 91 F.3d 1547 (3rd Cir. 1996) (No. 96-679), available in 1997 WL 528610 [hereinafter *Brief Amici Curiae in Support of Petitioner*].

91. See *id.* at *12 (citing *Weber*, 443 U.S. at 208).

92. See *id.* at *15. In the case of Sharon Taxman, the ACLU stated that “one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural and national backgrounds that have been brought together in our famous ‘melting pot’ do not identify essential differences among the human beings that inhabit our land.” *Id.* at *22. The ACLU further argued that “[e]vidence from educators and social scientists . . . [show that] a diverse faculty enhances the education provided to students.” *Id.* Proponents of affirmative action therefore support the Piscataway school board’s decision to retain a black school teacher to the detriment of a white school teacher. See *supra* notes 52-56 and accompanying text. However, this view, according to critics of affirmative action, poses a potential danger because people inevitably argue “that if you are not my color, you are not qualified to police me, to represent me, or to judge me; you do not know my experiences, and therefore you lack legitimacy.” See Alt, *supra* note 6, at 189.

proponents of affirmative action argue that racial preferences are valid only when a compelling state interest is satisfied.⁹³

A line of cases that look to a compelling state interest in order to justify racial preferences supports affirmative action policies.⁹⁴ *Bakke*⁹⁵ and *Weber*⁹⁶ are among these cases.

2. Affirmative Action to Remedy the Effects of Past Discrimination

In its 1986 consideration of *Wygant v. Jackson Board of Education*,⁹⁷ the Court determined that a state's use of race-based preferences could be justified only when a compelling interest was at stake.⁹⁸ The plurality decision determined that a compelling interest exists only when an affirmative action policy seeks to remedy prior discrimination.⁹⁹

In *Johnson v. Transportation Agency*,¹⁰⁰ "Justice O'Connor observed that in enacting Title VII, Congress sought to balance two concerns: [(1)] the rooting out of invidious discrimination on the basis of race or gender, and [(2)] the elimination of lasting effects of past discrimination."¹⁰¹ Simply stated, affirmative action is justified when its purpose is solely remedial; it cannot be justified when used for the purpose of enhancing or furthering general societal goals.¹⁰²

3. Strict Scrutiny Analysis

The Court wrote that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and as such, are subject to the highest possible level of scrutiny.¹⁰³ In determining which affirmative action policies are

93. See *Brief Amici Curiae in Support of Petitioner* at *21, *Taxman* (No. 96-679), available in 1997 WL 528610.

94. See *supra* notes 24-42 and accompanying text.

95. See generally *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (holding that race may be a factor in admission to medical school to increase the "robust exchange of ideas"); *supra* notes 24-27 and accompanying text.

96. See generally *Weber*, 443 U.S. at 208 (holding that affirmative action can be permitted if it mirrors the purpose of Title VII and does not "unnecessarily trammel the interests of white employees"); *supra* notes 28-37 and accompanying text.

97. 476 U.S. 267 (1986).

98. See *id.* at 273-74.

99. See *id.* at 277. Justice Powell wrote in order for affirmative action to be justified, there must be "sufficient evidence to justify the conclusion that there has been prior discrimination." See *id.*

100. 480 U.S. 616 (1987).

101. *Brief Amici Curiae in Support of Respondent* at *15, *Taxman v. Board of Educ.*, 91 F.3d 1547 (3rd Cir. 1996) (No. 96-679) (explaining Justice O'Connor's concurrence in *Johnson* and reaffirming her belief that affirmative action must exist only to remedy prior discrimination), available in 1997 WL 616045.

102. See *id.*

103. *Lundin*, *supra* note 74, at 418 (examining *Korematsu v. United States*, 323 U.S. 214 (1944), which was the first case to apply the strict scrutiny standard).

remedial, the Court has stated that “[p]ublic decisions that promote vague conceptions of diversity are not remedial.”¹⁰⁴ The Court also determined in *Adarand Constructors v. Pena*,¹⁰⁵ that even “benign” racial classifications are subject to strict scrutiny.¹⁰⁶ Not only does this decision serve to reject racial classifications as a permissible mechanism for increasing diversity, but it also reconfirms the Court’s continuing skepticism of such tactics.¹⁰⁷

4. Conflicting Standards

The Court has examined racial preferences under both the Fourteenth Amendment and Title VII.¹⁰⁸ Depending on which premise is employed to analyze affirmative action policies, “the Court has developed two distinct analytical frameworks.”¹⁰⁹ For actions based on the Constitution, the Court applies the strict scrutiny standard.¹¹⁰ Strict scrutiny not only requires satisfaction of a compelling government interest, but also requires the “showing of specific instances of past discrimination in order for government to apply race-based preferences.”¹¹¹

When the Court examines Title VII cases, it requires only “a lawful purpose and *de minimis* infringement on the rights of non-minorities. To date, the Court has not clearly defined what conditions satisfy its requirement of a lawful purpose.”¹¹²

The Court determined that a statute cannot alter the text of the Constitution.¹¹³ Therefore, the Court will likely insist that Title VII conform to the constitutional standard requiring strict scrutiny.¹¹⁴

104. See *Brief Amici Curiae in Support of Respondent at *24, Taxman* (No. 96-679), available in 1997 WL 626045. Douglas Kmiec, counsel of record for amici curiae in support of Sharon Taxman, also noted that when the Court examined *Wygant* it determined that the “role model” justification for affirmative action is not remedial. See *id.* Additionally, there is no logical stopping point for affirmative action policies when they seek only to better society rather than remedying past discrimination. See *id.* “As a constitutional matter, there are no ‘justifications beyond’ because all such rationalizations prove to be a denial of the Constitutions’ color-blind standard.” *Id.* at *24.

105. 515 U.S. 200 (1995).

106. See *id.* at 227-28.

107. See *id.* at 227.

108. See *supra* notes 66-74 and accompanying text.

109. See Henry Schuldinger, Note, *Still Searching For the Limits of the Permissible Use of Affirmative Action: United States v. Board of Education of the Township of Piscataway*, 6 GEO. MASON U. CIV. RTS. L.J. 97, 98 (1996).

110. See *supra* notes 85-89 and accompanying text.

111. See Schuldinger, *supra* note 109, at 98 (footnote omitted).

112. See *id.*

113. See *supra* note 78 and accompanying text.

114. See *supra* notes 74-78 and accompanying text (discussing *Marbury* and *Flores*, which establish that the Constitution is unchangeable and unalterable by the legislature).

IV. IMPACTS AND ALTERNATIVES

A. Impacts

1. Increased Social Debate

Jesse Jackson, Ward Connerly, Pete Wilson, President Clinton and a host of other prominent political figures have increased social dialogue on issues concerning affirmative action.¹¹⁵ In fact, President Clinton went so far as to pledge an unprecedented "dialogue" on race relations in America.¹¹⁶ As part of this promise, President Clinton and Vice President Gore recently unveiled a new civil rights initiative which seeks stronger enforcement of already existing federal anti-discrimination laws.¹¹⁷

As part of the heated battle between affirmative action proponents and foes, the words of the pioneering civil rights leader, Martin Luther King, Jr., have commonly been used both to give support and to denounce affirmative action.¹¹⁸ Jesse Jackson marched in opposition to California's Proposition 209, a state-wide voter initiative that made it illegal for the state to base decisions on consideration of skin color.¹¹⁹ Jackson argued that he supports racial preferences in an effort to make society more "inclusive"; however, a newspaper noted that the "racial preferences he was defending were those that until recently excluded many high-

115. See *infra* notes 118-21 and accompanying text (noting the heated debate surrounding affirmative action policies).

116. See Rochelle Sharpe, *Stark Transformation: Asian-Americans Advance in U.S. Business Program*, ASIAN WALL STREET J., Sept. 10, 1997, at 1, available in 1997 WL-WSJA 11016015. President Clinton's pledge has not been met with unqualified support. See William Neikirk, *Clinton's Race Initiative Being Labeled as Divisive: Some of President's Supporters Urging More Open Dialogue*, CHI. TRIB., Dec. 14, 1997, at 3, available in 1997 WL 16802799. "Liberals and conservatives alike have expressed disappointment with the president's national 'conversation' on race while some of Clinton's advisers fear that the initiative could wind up being counterproductive." *Id.* Other comments include, "I think this whole process is tearing people apart, and not putting people back together again . . ." *Id.*

117. See *infra* notes 159-72 and accompanying text.

118. Jesse Jackson recently attacked Governor Pete Wilson and Proposition 209 supporters for their use of Martin Luther King's famous dream speech. See Jesse Jackson, *Where Would King Walk in California?*, L.A. TIMES, Oct. 26, 1997, at M5.

Gov. Pete Wilson and his retainers did not march with King. They were not at Montgomery. They were not bloodied at Selma. These propagandists invoke King's dream-of an America where one day all of God's children will be judged not by the color of their skin but the content of their character-to justify an attack on U.S. civil rights laws. They suggest that King would support measures such as California Proposition 209

Id. Jackson wrote that if Martin Luther King were alive today, "he would be leading the march to save the dream and stop the assault on the nation's civil rights laws in California." See *id.*

119. See *supra* notes 57-62 and accompanying text (discussing generally Proposition 209).

achieving Asian-American students from the University of California in order to make room for lower-scoring African Americans and Hispanics."¹²⁰

The question of who should be included, and at what cost to other groups, continues to perplex many. Undeniably, there is a bitter irony in the social debate that has followed both the controversial cases regarding affirmative action and California's Proposition 209.¹²¹

2. Changes in Minority Education

Following Proposition 209 and *Hopwood*,¹²² Jesse Jackson wrote that a "racial cleansing of incoming classes of the law and medical schools" has occurred.¹²³ Although minority enrollment at the University of California at Berkeley's Boalt Hall Law School did decline, this was not a universal consensus.¹²⁴ While "[e]ighty percent fewer [African Americans] and [fifty] percent fewer Hispanics were admitted" to Boalt Hall after racial preferences were discontinued,¹²⁵ a "little-reported" and surprising finding was made this year as the Law School Admission Council reported that "[f]irst-year minority student enrollments in ABA-approved

120. See *Whose Dream Is It? Preferences Preclude an Inclusive Society*, COLUMBUS DISPATCH, Sept. 11, 1997, at A14 (noting that the civil rights movement is often seen as espousing "contradictory goals") [hereinafter, *Preferences Preclude*].

121. "San Francisco Mayor Willie Brown . . . likened Proposition 209, which forbids racial discrimination, to the Jim Crow laws that once mandated discrimination throughout the South. In other words, Brown, who wants the state to be able to discriminate on the basis of race, says that to abolish such discrimination would be like returning to a system in which the state was able to discriminate on the basis of race." *Id.*

122. See *supra* notes 48-51 and accompanying text (discussing the Fifth Circuit's decision in *Hopwood*).

123. See *Preferences Preclude*, *supra* note 120, at A14.

124. The Law School Admission Council reported that Hispanic students admitted to law school has increased from 5.7 percent to 5.8 percent, "African-American first-year students remained the same, while Native-Americans declined, from 0.9 percent to 0.8 percent. Asian-Americans increased from 6.3 percent to 6.5 percent." See Di Mari Ricker, *The Changing Face of Legal Education?*, STUDENT LAW., Dec. 1997, at 22. Many believed that affirmative action may reduce the number of minority students, but only for a short length of time. See Greve, *supra* note 48, at 20-21. "Affirmative action advocates are correct that the demise of racial preferences will (at least in the short term) reduce the number of blacks and, to a lesser extent, of Hispanics in elite institutions." *Id.* However, according to some, this is not entirely negative because "[t]he beneficiaries of racial preferences, as heretofore administered, will not drop out of higher education; they will attend other institutions, where they are more likely to compete and succeed." See *id.* at 21 (footnote omitted). "While lower minority representation in elite schools will be a social loss, a reduction of the 'diversity' induced mismatch between minority students and institutions of higher learning would improve minority graduation rates, and students and their prospective employers will be more confident that minority graduates are not 'quota products.'" *Id.* (footnote omitted).

125. See Ricker, *supra* note 124, at 21.

law schools nationwide showed a slight *increase*” from the previous enrollment period.¹²⁶ Medical schools in California report that contrary to the fears of many, the number of African American and Hispanic medical students has not diminished as a result of Proposition 209, but has actually increased.¹²⁷ Texas state medical schools also report that “[m]inority enrollment . . . appears to be rebounding after a 1997 slide blamed on a court ordered ban on affirmative action” in Texas.¹²⁸ The increase in minority numbers in Texas is especially noteworthy because the standard for admission actually increased following the decision in *Hopwood*.¹²⁹ It seems that the implementation of *Hopwood* in Texas and Proposition 209 in California have not had the effect predicted by Jesse Jackson.¹³⁰

3. Re-Invigorated Search for Alternatives

As a result of recent court battles and public initiatives, debate has been stimulated and policy-makers have begun to look for alternatives to replace affirmative action. Such debate fosters an increased awareness of the social and racial problems which continue to plague our nation.

Unfortunately, discussion and debate alone cannot fix America’s inequalities. A lesson from “Dr. King’s life is that racism cannot be undone by national conversations.”¹³¹ Instead, racism must “be defeated one conflict at a time.”¹³² Those conflicts must be isolated, defined, and solved.

126. See *id.* (emphasis in original). The survey showed that at ABA-accredited law schools, “20.7 percent of this year’s entering students are minorities; in the fall of 1996, that figure was 20.5 percent.” See *id.*

127. See *The Admissions Question*, CHRISTIAN SCI. MONITOR, Jan. 22, 1998, available in 1998 WL 2365399. The Christian Science Monitor reported that unlike California law schools, medical schools and “most other graduate programs in the University of California system . . . have not seen anything like the same drop-off in minority enrollments one year into the restructured admissions standards, which exclude ethnic preferences. In the med schools, the numbers of black and Hispanic students have remained steady, or increased slightly.” See *id.*

128. See Jeanne Russell, *Minority Enrollment Up in State’s Medical Schools*, SAN ANTONIO EXPRESS-NEWS, Jan. 22, 1998, at 3B.

129. See *id.* “The grade-point average of students accepted in 1997 was 3.66, compared with 3.64 in 1998 In pre-*Hopwood* 1996, the average was 3.60.” *Id.* (italics added).

130. See generally George Cantor, *Affirmative Action Debate Really Focuses on Prestige*, DETROIT NEWS, Dec. 13, 1997, at C6. “[I]n the California university system, only at Berkeley was there a massive outcry when Proposition 209 passed. At the San Diego campus (the seventh best public university in America, according to the authoritative U.S. News & World Report ratings), black enrollment actually went up 48 percent after 209 passed.” *Id.*

131. See *Talking About Race*, SALT LAKE TRIB., Jan. 19, 1998, at A8, available in 1998 WL 4034017.

132. See *id.*

B. Alternatives

If affirmative action is abolished entirely, we as a society must search for new alternatives. It is critical that the fundamental problems, which have caused many to look to affirmative action as a solution, be addressed.¹³³

In a recent speech, Vice President Al Gore spoke out against those who naively believe that our nation is truly color-blind.¹³⁴ He noted that although the disparity between African American earnings and Caucasian earnings has been reduced by fifty percent, “the wealth of [African American] and Hispanic households still averages less than one-tenth that of white households.”¹³⁵ Additionally, although the difference between African American and Caucasian high school graduation rates has virtually been eliminated, the “drop-out rate among Hispanic Americans is still eight points higher, with barely half finishing high school, and far fewer going on to college.”¹³⁶ Educational opportunities for minorities are often limited by poor educational facilities and resources.¹³⁷ Such problems must be eliminated. However, it is imperative to recognize that the solutions to these crises do not come in the form of discriminatory preferences, but instead require new and innovative alternatives.

1. Better Education

The nation must revitalize its commitment to educate every student in America regardless of the student’s racial classification. As one commentator noted, the

133. See generally Cedric Merlin Powell, *Blinded By Color: The New Equal Protection, The Second Deconstruction, and Affirmative Action*, 51 U. MIAMI L. REV. 191 (1997). Powell noted that in America’s “search to find ways to move quickly to equal opportunity,” America developed affirmative action. See *id.* at 192. The purpose of affirmative action was to “address the systemic exclusion of individuals of talent, on the basis of their gender or race, from opportunities to develop, perform, achieve and contribute.” See *id.* Affirmative action functioned to “open the doors of education, employment, and business development opportunities to qualified individuals who happen to be members of groups that have experienced long-standing and persistent discrimination.” See *id.* (footnote omitted). While these goals were admirable and necessary, Professor Powell further wrote that “[d]iscrimination does not justify preferential treatment, but I want to know that the person who stands with me against preferences understands the problem that inspired them.” See *id.* at 193 (footnote omitted). It is imperative that society address and remedy the problems leading so many to support preferential treatment.

134. See *The White House: Remarks by Vice President Al Gore*, M2 PRESSWIRE, Jan. 21, 1998, available in 1998 WL 5046654 [hereinafter *Remarks by Gore*].

135. See *id.*

136. See *id.*

137. See *infra* notes 138-48 and accompanying text.

problem of sub-standard education is often seen in inner-city neighborhoods.¹³⁸ Such schools have “far fewer experienced teachers than suburban schools and few computers or other valuable teaching tools” which result in less educational opportunities for many minority students.¹³⁹ Before students enter college, this nation must address the inequalities that occur in the classrooms which limit the success of minority students.¹⁴⁰ Robert Berdahl, the Chancellor at the University of California at Berkeley recently stated, “[w]e know, from an abundance of sources, that educational opportunities are not anywhere near equal—not in funding, not in facilities, not in teacher experience and not in access to college preparatory classes.”¹⁴¹ It seems apparent that the nation’s appalling inequalities¹⁴² can be traced to educational disparities between Caucasian students and minorities.¹⁴³ For example, “on average, [an African American twelfth] grader reads almost four years behind the average Caucasian student.”¹⁴⁴ As a consequence, it is clear that affirmative action policies, including those which promote preferential treatment and quotas, do not remedy the underlying problem of the American educational system.¹⁴⁵ As a prominent educator notes, “It is not an exaggeration to say the process of selection of who will go to college begins in the first grade. With each passing year, students denied equal access to challenging classes and ultimately to college-prep courses see their chances of college admission decline.”¹⁴⁶ It is unfair to expect students from unsafe schools with poor facilities and less qualified teachers to adequately compete with students from more privileged backgrounds.¹⁴⁷

To effectively create a just educational system, affirmative action policies

138. See Myriam Marquez, *Seeking Equal Opportunity For All*, ST. LOUIS POST-DISPATCH, Jan. 21, 1998, at C7, available in 1998 WL 3314837.

139. See *id.*

140. See Thaa Walker, *UC Chancellor Puts Focus on Poor Kids, He Warns that Better Schools Needed*, S.F. CHRON., Jan. 24, 1998, at A14, available in 1998 WL 3905632. Chancellor Berdahl warned that “public universities will become increasingly segregated unless equal education opportunities are provided to poor and minority students from kindergarten on.” See *id.*

141. See *id.*

142. See *supra* notes 134-37 and accompanying text (discussing the unequal distribution of wealth between minority and non-minority households).

143. See Abigail Thernstrom, *Going Toe to Toe with Bill: The Conservative Who Sparred with Clinton over Race on What She Didn't Get a Chance to Say About Affirmative Action*, NEWSWEEK, Dec. 15, 1997, at 35, available in 1997 WL 13931772.

144. See *id.*

145. See generally Maimion Schwarzschild, *The Prop. 209 Debate Continues—Will the Law Be Put Into Practice*, SAN DIEGO UNION & TRIB., Sept. 14, 1997, at G3, available in 1997 WL 3154274. Schwarzschild further notes that, “[a] spoils system of quotas and preferences is a sad counterfeit of social justice. Real social justice requires, first and foremost, a rigorous, non-watered-down system of education—kindergarten thru [twelfth] grade and higher—that opens the door of individual opportunity to all.” *Id.*

146. Walker, *supra* note 140, at A14 (quoting Robert Berdahl, University of California at Berkeley’s Chancellor).

147. See *id.* Chancellor Berdahl stated, “if poor and minority students are most likely to be saddled with unsafe schools and less qualified teachers, how can we ever expect those students to perform equally with more advantaged students?” *Id.*

cannot be used as a crutch; schools must instead be improved such that every student in America, regardless of race or gender, may benefit equally.¹⁴⁸

2. Outreach Programs

Assuming that the Court determines that strict scrutiny analysis should be applied and affirmative action may only be used to remedy past discrimination,¹⁴⁹ outreach programs will remain feasible. Outreach programs are those which attempt to "diversify the pool from which selections are made by reaching out to minorities."¹⁵⁰ Importantly, programs designed to seek out qualified minority applicants would likely survive the Court's strict scrutiny analysis because preferential hiring or admissions would not be granted.¹⁵¹ Outreach programs do not guarantee that a minority will receive preference in being hired or admitted, but simply serve to "diversify the pool of qualified persons" under consideration.¹⁵² Information concerning opportunities to groups traditionally unaware would serve to increase the participation of such under-represented groups.¹⁵³

The Department of Justice, in its analysis of Adarand,¹⁵⁴ stated that:

148. *See id.*

149. *See supra* notes 97-102 and accompanying text (discussing the holdings in *Wygant* and *Johnson*).

150. *See Oppenheimer, supra* note 7, at 931. To understand why outreach is necessary consider the following hypothetical:

An employer may find that it is hiring largely by word of mouth, and thus limiting its searches to those persons friendly with or related to its current employees. Given typical patterns of residential, social and familial segregation, if its workforce is largely white, it will be perpetuated as largely white.

Id.

151. *See generally Beschle, supra* note 82, at 1177-78.

152. *See* Margaret E. Montoya, *Of "Subtle Prejudices," White Supremacy, and Affirmative Action: A Reply to Paul Butler*, 68 U. COLO. L. REV. 891, 910 (1997) (rebutting the controversial essay, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995), which discussed racially based jury nullification and the criminal justice system).

153. Programs to help minority high school students learn about a certain school's admission requirements or programs to inform minority groups about "employment, career or promotional opportunities" may help to increase awareness. *See Oppenheimer, supra* note 7, at 931-32.

154. *See supra* notes 105-07 and accompanying text.

Mere outreach and recruitment efforts . . . typically should not be subject to the *Adarand* standards. Indeed, post *Croson* cases indicate that such efforts are considered race-neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision. If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, *Adarand* ordinarily would be inapplicable.¹⁵⁵

As an example, one can look to the extensive educational outreach programs in California which actively attempt to bridge the gap between privileged and disadvantaged students.¹⁵⁶ California's programs provide extensive tutoring for students in disadvantaged schools in order to increase academic achievement, as well as workshops to assist teachers in the classroom.¹⁵⁷ Educational outreach programs are only one way to reach students who are traditionally disadvantaged. The Chancellor of the University of California at Los Angeles is careful to note that outreach programs are "long-term solution[s]" not immediate remedies.¹⁵⁸ Upon close examination of racial inequality, it seems apparent that long-term solutions are what is needed to solve this problem.

3. Enforcement of Existing Civil Rights Legislation

Enforcement of federal civil rights law is the keystone of any successful move toward real equality.¹⁵⁹ "The first step toward the goal of achieving a color-blind law is a strict enforcement of anti-discrimination laws."¹⁶⁰ The Constitution explicitly states that all are equal before the law.¹⁶¹ Furthermore, modern statutes delineate that race cannot be used as a basis for discrimination.¹⁶²

Anti-discrimination methods could take several forms.¹⁶³ First, employers

155. S. Jenell Trigg, Comment, *The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of Adarand Constructors, Inc. v. Pena*, 4 COMM LAW CONSPICUOUS 237, 246 (summer 1996) (footnotes omitted) (emphasis added) (quoting, Memorandum from Walter Dellinger, Esq., Assistant Attorney General, Office of Legal Counsel, United States Dept. of Justice, to all Agency General Counsel (June 28, 1995) (footnotes omitted)).

156. See Julie Chao, *UC Outreach to Double Spending Regents Seek Funds to Promote Minority Recruitment*, S.F. EXAMINER, Jan. 16, 1998, at A2, available in 1998 WL 5176642.

157. See *id.*

158. See *id.*

159. See Lundin, *supra* note 74, at 457.

160. *Id.*

161. See *supra* notes 3 and 68 and accompanying text (discussing the Constitution).

162. See *supra* notes 80-89 and accompanying text (discussing Title VII).

163. See Oppenheimer, *supra* note 7, at 932. Techniques may include, "(1) anti-discrimination or non-discrimination policies distributed to employees; (2) complaint resolution procedures aimed at preventing or rapidly remedying discrimination; and (3) diversity training, sensitivity training and sexual harassment training for employees and management to promote cross-racial and cross-gender understanding in the workplace." See *id.*

could be informed that discrimination on the basis of race or gender is illegal.¹⁶⁴ Second, better and more efficient methods for enforcement of existing law could be devised.¹⁶⁵ It is critical that those who engage in discriminatory practices be severely punished.¹⁶⁶ "The legal mandate for strict enforcement of anti-discrimination laws is clear and must be used to ensure that individuals who suffer from racial discrimination are made whole and that individuals who discriminate on the basis of race are called to account."¹⁶⁷

President Clinton and Vice President Gore recently announced a plan which attempts to address many of these issues.¹⁶⁸ The initiative seeks to increase enforcement of existing federal legislation prohibiting discrimination.¹⁶⁹ If Congress approves the initiative, civil rights funding would increase by seventeen percent.¹⁷⁰ Currently, the Equal Employment Opportunity Commission (EEOC) is backlogged with thousands of complaints based on discriminatory practices in the work force.¹⁷¹ President Clinton and Vice President Gore's initiative would "reduce the EEOC's caseload backlog by more than half by [the year] 2000 and cut the average time it takes to process cases by a third."¹⁷² Federal laws prohibiting racial discrimination currently exist; however, when unenforced, the words of the statutes are meaningless. A plan to vigorously enforce already existing federal anti-discrimination laws deserves support from everyone.

164. *See id.*

165. *See id.*

166. *See* Lundin, *supra* note 74, at 457.

167. *Id.*

168. *See Remarks by Gore, supra* note 134. Vice President Gore, during an emotional speech to honor Martin Luther King Jr., announced that as part of President Clinton's dialogue on race, they were proposing "the largest single increase in the enforcement of our civil rights laws in nearly two decades." *See id.* Gore continued his remarks by stating that the new legislation will attempt to "prevent discrimination before it occurs, and punish those who do discriminate." *See id.* While the legislation exists, it does little good if not enforced. *See id.*; *see also Teeth for Anti-Bias Laws*, L.A. TIMES, Jan. 21, 1998, at B6 [hereinafter *Teeth*]. Nearly everyone in America wants equal opportunities regardless of their race, "and in this nation of laws that should be assured. But like the speed limit, such laws mean nothing unless they are strictly enforced, so a proposal by the Clinton administration to boost civil rights enforcement could make a real difference." *See id.*

169. *See Teeth, supra* note 168, at B6.

170. *See id.* The budget would increase from \$516 million to \$602 million. *See id.*

171. *See id.*

172. *See Editorial*, ATLANTA CONST., Jan. 21, 1998, at A8, available in 1998 WL 3672915.

V. CONCLUSION

Preferential treatment based on race violates fundamental principles established by the Constitution.¹⁷³ Although affirmative action narrowly missed review during this Supreme Court term,¹⁷⁴ the issue will inevitably arise again in the future. Although race-based policies most likely will not survive judicial scrutiny,¹⁷⁵ every attempt must be made to effectively eliminate discrimination.¹⁷⁶

It is indeed unfortunate that affirmative action has evolved from a well-intentioned tool designed to combat racism into a vague and poorly articulated masterpiece of political wrangling. It can be argued that in its modern form, affirmative action is certainly no less dangerous than the discrimination it purports to remedy. Inasmuch as it would be both unreasonable and unenlightened to advocate discrimination as an acceptable societal norm, so too would it be unreasonable to expect that society could long endure as a mosaic of peoples held together, not by mutual respect, but by an ever proliferative system of quotas and preferences.¹⁷⁷ Social justice cannot be legislated in piecemeal fashion. As the Constitution assures, and as the people concur, diversity and tolerance are among the critical defining points of our country. As a nation we must live together in peace and security because we, as a society, demand it of ourselves. To relegate the American people to tolerate based solely on affirmative action would unequivocally subjugate the spirit of equality which our forefathers fought to ensure. Systems that seek to micro-manage diversity cannot claim to foster the oneness of our nation, and as such, amount to nothing more than tyranny. This tyranny is perhaps most blatantly evidenced by the recent tide of racial tension within the country.

It is disheartening that "race relations" have become something of a taboo topic among the politically astute. As a people, we have become polarized by extremists who lack the foresight to know that real solutions can only come from fair and equitable discourse regarding issues of racial liberty. This polarization of the few has had the effect of silencing the many who have the capacity to envision a world free of color lines, but who fear the reprisals of the polarized. Who can be

173. See *supra* notes 69-70 and accompanying text.

174. See *supra* note 14 and accompanying text (examining the unusual settlement of *Taxman*).

175. See *supra* notes 159-72 and accompanying text (analyzing existing anti-discrimination law).

176. See *supra* notes 103-07 and accompanying text (noting that race conscious decisions are subject to a strict scrutiny standard).

177. Justice O'Connor, examining the mosaic of peoples living in America, wrote that,

We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens.

Metro Broad., Inc. v. FCC, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting).

expected to fight for social justice in a world where the socially just are unfairly called racists? This vicious circle of silence and fear, amplifies the need for the Supreme Court to exercise its role in "secur[ing] the blessings of liberty" to all people.

JENNIFER MOORE

