

Affirmative Action: Path to Equality or Reverse Discrimination?

By Natalie A. Noel

Higher education is the door to opportunity for social advancement in our society and is often tied to political and social power. This paper will consider the use of race-based preferential treatment in university and college admissions. By examining key court rulings concerning the implementation of affirmative action in Washington, California, Texas, and Michigan, the nature of the Court's fragmented opinions regarding affirmative action programs with respect to university and college admissions will become evident. The debate over affirmative action is generally split between the need to balance the individual guarantee of equal protection under the law, as stipulated in the Fourteenth Amendment and the interpretation of Title VI of the 1964 Civil Rights Act, with the desire to remedy past discrimination and promote diversity in institutions of higher learning. It is the contention of the author that affirmative action policies such as minority outreach and targeted recruitment, strike a balance in the affirmative action debate and are more effective, constitutional methods to achieve opportunity for all and increase diversity, than are quota-based admissions policies that can themselves be discriminatory.

INTRODUCTION

Education is perhaps one of the great equalizers of opportunity. Education increases our understanding of the world in which we live and provides access to the marketplace of ideas. Likewise, in our competitive society, education opens the door to our economy. Employment opportunities and one's socioeconomic status can be directly tied to both formal and informal education. Similarly, one's social and political power can also be tied to one's access and participation in education. Thus, opportunity for admission to state university and colleges is an important local and national concern. Affirmative Action policies in higher education implemented to remedy past or current racial and gender discrimination, remedy low minority enrollment, or increase diversity in higher education have been the source of contention and the center of national debate since the mid-1960s.

This paper will examine the course of affirmative action in the United States over the past thirty years, with respect to preferential treatment based on race, in the admissions

process of institutions of higher education. Quota based, dual admission programs, and numerically based affirmative action policies that give preferential treatment to race and gender in college and university admissions are generally constitutionally suspect. It is the belief of the author that affirmative action programs that are not quota based, but rather are focused on minority recruitment and outreach benefit a broad base of individuals and are more inclined to provide a fair admissions system in which persons from both genders and all races have access to higher education.

AFFIRMATIVE ACTION: EARLY HISTORY

In the early 1960s, the Warren and then the Burger Court attempted to address the difficult problem of racial segregation in the nation's public schools. During this period the judicial branch ruled that the Equal Protection Clause of the Fourteenth Amendment required an "affirmative duty" of local school boards to desegregate former "dual-school" systems. Furthermore, the Civil Rights Act of 1964 created the framework for introduction of affirmative action in employment and education. Title VII of the Act applies a comprehensive code of equal employment and opportunity regulations to public and private employers with fifteen or more employees. Title VII leaves the judicial branch the charge to take "such affirmative action as may be appropriate," to remedy the situation. Except in the case of being ordered by a court, employers are not required to adopt affirmative action

Natalie Noel is a senior graduating with a Bachelor of Arts in English and a Certificate in Practical Politics from the Hinckley Institute of Politics. She served as co-editor for this edition of the Hinckley Journal of Politics. Natalie will serve an internship with Senator Robert F. Bennett during the summer of 2001. She wishes to thank those at the Hinckley Institute of Politics and her parents for their continuing support.

remedies. However, “The Equal Employment Opportunity Commission (EEOC) has guidelines to help protect employers or unions from charges of ‘reverse discrimination’ when they voluntarily take action to correct the effects of past discrimination” (Dale 2001, 3).

Title VI of the 1964 Civil Rights Act prohibits racial and ethnic discrimination in all federally assisted programs and activities; this includes public or private educational institutions. “The Office of Civil Rights of the Department of Education interpreted Title VI to require schools and colleges to take affirmative action to overcome the effects of past discrimination and to encourage ‘voluntary affirmative action to attain a diverse student body’” (Dale 2001, 3). In addition, “another Title VI regulation permits a college or university to take racial or national origin into account when awarding financial aid, if the aid is necessary to overcome effects of past institutional discrimination” (Dale 2001, 3). Thus, beginning in 1965, the awarding of occupational and educational opportunities proportionally emerged as an element in preferential affirmative action programs (Ball 2000, xi). Since that time the debate over quota based affirmative action programs has been the focus of much controversy.

AFFIRMATIVE ACTION: THE DEBATE

At its core, the debate over affirmative action is one of issue definition. According to many national polls, the public is more in favor of the concept of “affirmative action” than “preferential treatment.” The finding that the former term is more accepted than the latter illustrates the public’s concern for fairness and equity, but likewise a reaction against policies that are identified as racially preferential. Given this central dispute about issue definition, both terms will be used throughout this essay.

A primary stance taken by many affirmative action supporters, centers on the issue of redressing past wrongs. Remedial affirmative action addresses the concern that minorities are underrepresented in higher education and have been the victims of past discrimination. Proponents of preferential treatment on this basis argue, “because of America’s past racial discrimination, affirmative action programs had to move beyond simple race neutral non-discrimination” (Ball 2000, 12).

Similarly, in regard to higher education, some minorities are underrepresented and proponents advocate the need to diversify campuses by “providing preferential treatment to members of certain identified racial groups” (Ball 2000, 9). Ensuring diversity of students on college campuses is seen as a worthy goal in and of itself, even if it means rejecting in a sense the concept of a color-blind United States Constitution, at least for the purposes of determining admission to institutions of higher learning. This claim “concentrates on the future; its claim is that preferential treatment...go[es] far beyond the benefits received by those who are favored under the policy” (Cahn 1995, 193). Rather, the

argument insists that diversity enhances the learning environment in the academic setting. Furthermore, some link diversity to the free expression of ideas. They tie diversity to free speech rights or First Amendment rights. In addition, they counter that we allow for geographic diversity, so why not account for racial diversity, too? Thus, proponents of preferential treatment, on the basis of both remedial and diversity justifications, see the need for positive racial classifications.

On the other hand, opponents of preferential-based affirmative action contend that race and ethnicity are “neutral factors” and should not be relevant in a university admissions process (Ball 2000, 14). They argue that a society committed to the “concept of a color-blind constitution” cannot embrace preferential treatment based on race. Furthermore, they argue that affirmative action admissions policies violate the Equal Protection Clause contained in the Constitution’s Fourteenth Amendment, as well as the statutory language of the 1964 Civil Rights Act (Ball 2000, 15). Similarly, opponents contend that admissions policies that use preferential treatment unfairly discriminate against the individual, are unconstitutional, and constitute reverse discrimination. They argue that racial classifications therefore have a negative impact, and as such are rarely positive.

However, some opponents see racial diversity as irrelevant; they assert that “Western learning survived centuries before anyone even thought of carefully balancing the racial composition of classrooms” (Lowry 2001). Others question our traditional focus on race and classification. “Why should ethnic categories that never made sense in the first place (neither Latinos or Asians constitute a race anywhere outside America), and which are becoming less relevant by the day, be accorded more importance than individuals?” (Economist 2001). Furthermore, while some opponents of preferential treatment do agree that racial diversity on college campuses is a worthy goal, they reject quota-based or numerical goal oriented admissions policies as the means for achieving that diversity.

AFFIRMATIVE ACTION PROGRAMS

There are three kinds of affirmative action programs used by colleges and universities in admissions. One type of policy focuses on seeking out qualified minority applicants who will provide diversity to the incoming class. Under this model, the race of an individual is weighed as a positive factor in the decision of the college’s admissions committee. A second type of program focuses admissions decisions mainly on traditional numerical scores, but university administrators set a minority recruitment “goal” (i.e. five percent minority admissions). Thus, under this model, the ethnicity of applicants is a factor, but the focus remains upon consideration of those who are the most qualified minority applicants. Hence, implicit in this model is the idea that the university may not meet the “goal” if the selection committee cannot identify enough qualified minority applicants. A third type of affir-

mative action college admission program is a dual admissions process, in which a certain number of seats are set-aside for minority applicants. This program is a quota-based system and differs from the previous program in that all seats set aside for minority applicants are filled (Ball 2000, 9).

COURT RULINGS ON THE USE OF AFFIRMATIVE ACTION IN ADMISSIONS DECISIONS

ODEGAARD V. DEFUNIS 1971

In the early 1970s the University of Washington was a leader in the academic community with regard to their newly implemented admissions policy that took applicants' race and ethnicity into account. Their use of race as a positive factor illustrates a key legal question regarding the use of positive and negative racial classifications.

The University of Washington employed three general criteria in their new law school admissions policy.

- 1) The past academic performance of the applicant including the Law School Admission Test (LSAT) score; the undergraduate grade point average (GPA); the quality of the undergraduate institution the applicant attended; grades in difficult courses; and the applicant's predicted first year average (PFYA) based on grades in their junior and senior year.
- 2) The applicant's ability to "make significant contributions to law school classrooms and the community at large."
- 3) The applicant's "social or ethnic background," as "one factor in the admission committee's assessment of the likelihood of the applicant's successfully graduating from law school" (Ball 2000, 23).

To be automatically admitted, an applicant's PFYA had to be 77 or higher, with the highest possible PFYA score being 81. An applicant with a PFYA score of 74.5 or less was rejected. However, University of Washington School of Law (UWSL) treated two groups differently: those considered "returning military veterans who had at one time been admitted but then were called for military service" and "applicants from one of four identified minority groups: African-American, Hispanic-American, Native-American, and Philippine-American" (Ball 2000, 24). The committee randomly distributed white and non-preferred minority applicants to committee members. Individual committee members used the PFYA index as the major guide in making their recommendation to the committee that the applicant be admitted, rejected, or held for possible placement on a waiting list. However, "the applicant screening process provided special treatment to preferred minority applicants" (Ball 2000, 24). Committee members considered preferred minority applicants' files separately and their files were not distributed randomly. For example, African-Americans' files went to an African American law school student and a faculty committee member who had previously worked in a university program for disadvantaged students, thus resulting in a dual admissions policy.

Marco DeFunis applied to UWSL in 1970 and was reject-

ed. In 1971 he applied again as one of 1,600 applicants competing for 150 seats. Though DeFunis had a PFYA of 76.23 he was initially placed on a wait-list and then rejected. 48 percent of the minority applicants that were considered in the special category that year were admitted, although most scored below the 74.5 cut off point for those considered in the regular admissions process, or non-minority applicants. Of the 150 applicants admitted to UWSL that year, 44 were minority students, a significant number considering that minorities only made up four percent of the applicant pool. It is important to note that DeFunis had a higher PFYA than 38 special minority students.

In 1971, DeFunis levied a lawsuit against UWSL alleging that their admissions policy violated his right to the equal protection of the laws and was therefore a violation of the Fourteenth Amendment's Equal Protection Clause. DeFunis argued that race could not be the determining factor in university admissions and as such was also in violation of Title VI of the 1964 Civil Rights Act (Ball 2000, 22). Furthermore, DeFunis argued that UWSL's policy required "strict scrutiny" by the courts to determine whether or not the affirmative action program served a "compelling interest." DeFunis also argued that "there was no record of the UWSL ever deliberately discriminating against racial and ethnic minorities. Therefore, there was no compelling interest warranting the use of racial goals in the law school admissions process" (Ball 2000, 25). Thus, if it was determined that UWSL had not previously deliberately discriminated against racial and ethnic minorities, then was UWSL's goal of increasing minority enrollment and representation in their law school and the legal profession a "compelling interest" that justified the use of racial goals in the admissions process?

Slade Gorton, the state Attorney General, arguing in behalf of the University of Washington, asserted that UW did have a compelling state interest in overcoming the negative consequences of past racial and ethnic discrimination across America. In 1970, less than two percent of those practicing law were African Americans. Gorton argued that there was a "compelling interest" to diversify the law school, as well as the legal profession (Ball 2000, 26).

At the core of both DeFunis and UW's legal claims lay the issue of racial and ethnic classification. Both agreed that racial or ethnic classifications could be factors in university admissions, but the parties disagreed on whether the Fourteenth Amendment barred benign or positive racial classification. In a certain sense, one of the central disagreements was founded upon the notion of negative and positive racial and ethnic classifications. Is there a difference between positive and negative racial discrimination? This question lies at the heart of the debate between proponents and opponents of affirmative action.

Judge Lloyd Shorett of the Superior Court for King County upheld DeFunis's claim that he had been denied equal protection under the law. Judge Shorett quoted from the historic 1954 *Brown v. Board of Education* opinion stating,

“Public education must be equally available to all regardless of race.” Similarly, the judge commented that, “the Fourteenth Amendment could no longer be stretched to accommodate the needs of any race...The only safe rule is to treat all sides alike” (Ball 2000, 27). The remedy for the case resulted in DeFunis’s immediate enrollment in UWSL for the class of 1974.

However, the Washington State Supreme Court disagreed and reversed Judge Shorett’s order, stating that racial classifications may be used for either of the purposes set forth by UWSL of: 1) remedying past national discrimination and 2) promoting the integration of the races. However, the two dissenters accepted DeFunis’s argument that the Constitution is and must be “color-blind.” Similarly, they argued “racial bigotry, will never be ended by exalting the political rights of one group or class over that of another. The circle of inequality cannot be broken by shifting the inequalities from one man to his neighbor” (Ball 2000, 28).

Ultimately, the U.S. Supreme Court considered an appeal to hear DeFunis v. Odegaard. In his appeal, DeFunis posed two questions: 1) “Is the affirmative action program in violation of the ‘Equal Protection’ clause because preference is given to certain racial minorities?” 2) “Is Title VI of the 1964 Civil Rights Act violated because white applicants must meet different and more stringent standards than do persons of certain other races in obtaining admission?” (Ball 2000, 29). Ultimately, the Court did not answer these questions, but instead issued a brief per curiam opinion in which the Court majority of five remanded the case on account of mootness. (DeFunis was scheduled to graduate from UWSL the following June). However, the Court could not dodge the issue for long, as the same controversy over the use of affirmative action arose with regard to the University of California at Davis Law School.

REGENTS OF THE UNIVERSITY OF CALIFORNIA AT DAVIS V. ALLAN BAKKE 1978

In 1973, thirty-two year old Caucasian, Vietnam marine veteran, Allan Bakke, challenged the University of California at Davis (UCD) Medical School’s dual admission program. Like many universities and colleges at this time, UCD was attempting to increase the small number of minority admissions to its professional schools. Paralleling the DeFunis case, high scores on threshold tests were critical for admission because of the limited number of seats compared to the much larger number of qualified applicants. The university’s dual admission program set aside sixteen places for minority students and the regular admission program required a minimum GPA whereas, there was no minimum GPA for minority applicants. Table 1 shows the considerable statistical disparity between those admitted under the two programs. The associate dean and chair of the admissions committee, Dr. George Lowery, argued that the “special admittees were qualified for medical school education; they were, however, just less qualified than the regular admittees” (Ball 2000, 52).

Table 1

MCAT	MCAT	MCAT	General GPA	
Science (percentile*)	Verbal (percentile)	Quantitative (percentile)	Information (percentile)	
Regular/				
Special	R/S	R/S	R/S	R/S
83/35	81/46	76/24	69/33	3.5/2.6
Bakke:				
97	96	94	72	3.44

*For all, Regular, Special, and Bakke, percentiles are the two-year average (Bakke applied two years in a row) [Ball, Howard. 2000. *The Bakke Case: Race, Education, & Affirmative Action* p. 52]

Bakke contended that the medical school’s practice of setting aside 16 of the one hundred seats annually filled by first-year medical students solely for minority applicants was, in effect, reverse discrimination. This case also centered on whether or not the Constitution’s Equal Protection Clause or Title VI of the 1964 Civil Rights Act prohibited a public university from using a quota-based or set-aside admissions policy for minority students.

The first court to hear the *Bakke* case ruled in 1974 that, “The use of this program did substantially reduce the plaintiff’s chances of successful admission to medical school for the reason that, since 16 places...were set aside for this special program, the plaintiff was in fact competing for one place, not in a class of 100, but in a class of 84, which reduced his chances for admission by 16 percent.” In conclusion, the Yolo County Superior Court said, “No race or ethnic group should ever be granted privileges or immunities not given to every other race” (Ball 2000, 57). However, UCD successfully argued that Bakke would not have been accepted even without the 16 set-asides, citing his age (32) as one factor. Thus, the judge did not order that Bakke be admitted to UCD, but rather ordered the UCD admissions committee to reconsider Bakke’s application without regard to either his or any other applicant’s race.

A half a year later in a 6-1 ruling, the California Supreme Court concurred that that UCD’s preferential admissions policy violated the Fourteenth Amendment. The majority opinion stated that “The Equal Protection Clause applies ‘to any person,’ and its lofty purpose to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher degree of protection against unequal protection than others” (Ball 2000, 59). Because at this time several universities in California had been implementing quota-based affirmative action programs with regard to admissions, a few months following the state Supreme Court ruling the California Board of Regents approved the filing of a petition of certiorari to the U.S. Supreme Court. The question the regents posed was,

When only a small fraction of thousands of applicants can be admitted, does the Fourteenth Amendment’s “Equal Protection” clause forbid a state university professional school

faculty from voluntarily seeking to counteract the effects of generations of pervasive discrimination against discrete and insular minorities by establishing a limited special admission program that increases opportunities for well-qualified members of such racial and ethnic minorities? (Ball 2000, 64).

Thus, the regents question centers on the notion of using positive racial classifications to achieve remedial affirmative action.

The different groups that filed *amicus curiae* (friend of the court) briefs with the petitioner's request for writ of certiorari illustrates the polarization of the debate surrounding affirmative action. Two of the amicus briefs stated that without the highest court's grant of certiorari and subsequent overturning of the California State Supreme Court ruling, "the movement of minority groups toward meaningful representation in the professions will virtually cease." In contrast, two other amicus briefs asserted that it was necessary for the Court to stem the tide of "rampant" reverse discrimination in higher education (Ball 2000, 64).

The essence of the disagreement in *Bakke* hinged upon the battle over the scope of judicial review. The petitioner preferred to view the special admission program for minority applicants as a means of reaching a "goal" of minority representation at the UCD Medical School, while those siding with Bakke saw the special admissions program as a racial quota. Those defending the UCD Medical School contended that the level of review or judicial scrutiny of the program should be reserved for "discrete and insular minorities." On the other hand, Bakke's lawyers argued that "the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the 'rights established [by the Fourteenth Amendment] are personal rights'" (*University of California Regents v. Bakke* 1978).

Unlike *Odegaard v. DeFunis*, the Supreme Court heard *Bakke*. However, their ruling was far from unanimous. On the basis that the institution itself was not shown to have deliberately discriminated in the past, four Justices voted to strike down, as a violation of Title VI of the 1964 Civil Rights Act, UCD Medical School's special admissions program. In addition, another bloc of four Justices asserted that UCD's minority admissions quota designed for remedial purposes in regard to discrimination was not justified by the Constitution, nor the Civil Rights Act. Justice Powell was the tie-breaking vote, though he was certainly fragmented in his decision as well. In his deciding vote, Justice Powell added a fifth vote to one four-Justice bloc by arguing that he "found that neither the state's asserted interest in remedying 'societal discrimination' nor of providing 'role models' for minority students was sufficiently 'compelling' to warrant the use of 'suspect' racial classification in the admission process" (Colamery 1998, 3). However, Justice Powell also added a fifth vote to the other four-Justice bloc by declaring that the goal of achieving a

"diverse student body" was a "clearly permissible goal for an institution of higher education." In addition, he contended that race could be considered during the admissions process as "one element of a range of factors," provided that it "did not insulate the individual from comparison with all the other candidates for the available seats" (Colamery 1998, 3). Justice Powell's opinion illustrates his support for affirmative action as a factor in admissions decisions as a means to achieve racial diversity.

In effect, the majority opinion of the Court reaffirmed that the rights detailed in the first section of the Fourteenth Amendment are guaranteed as individual rights and inherently personal rights. Thus, the guarantee of equal protection must be accorded to individuals regardless of their race or their membership or non-membership as a "discrete and insular minority," as stated by the Yolo County Superior Court. Furthermore, the Supreme Court said in *Bakke*,

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.' The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal (*University of California Regents v. Bakke* 1978).

It is important to note that though the Court declared specific quotas in medical school admissions impermissible, it did not disprove the practice of taking race into account as a factor in admissions. The Court affirmed that, "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny" (*University of California Regents v. Bakke* 1978). Thus, the historic Bakke ruling affirmed that dual admissions programs and quota-based affirmative action policies violate the Fourteenth Amendment's Equal Protection Clause, while simultaneously holding that positive racial classifications may be permissible, but must be subjected to "strict scrutiny" by the Court and meet the standard of a "compelling interest."

The Court's ruling in *Bakke* stands in stark contrast to the lower courts' rulings in *DeFunis*. Over the past thirty years, the fragmented and unclear stance of the judicial branch with regard to affirmative action mirrors the similar lack of consensus on the issue within the public at large. President Clinton's "mend it, don't end it" caution and current President Bush's "affirmative access," mantra, illustrate a desire to provide equal opportunity but a disagreement as how to most effectively proceed. The numerous amicus briefs that were filed on both sides in the *DeFunis* and *Bakke* cases illustrate the fragmentation of opinion among public interest groups.

Two examples of the many public interest groups and parties that filed amicus briefs are, the Anti-Defamation League and the Jewish Rights Council (JRC). Both filed amicus briefs in support of DeFunis's case, while the NAACP and other civil rights organizations filed amicus briefs in support of the University of Washington. The primary interest of the JRC was founded upon the history of anti-Semitism in American higher education. Up to the 1950s, many Jewish applicants encountered problems in their attempt to enter certain undergraduate schools and many professional graduate schools of law and medicine. Many schools limited the number of Jews admitted by using a quota-based admissions process. Thus, this background of religious quotas designed to exclude Jewish applicants from university and college admission led the JRC to reject the idea of positive, or benign, racial quotas that have resulted in their former exclusion. The JRC contended that any racially preferential policies violate the Fourteenth Amendment because, as in the case of *DeFunis*, there were better qualified students who were not accepted. Though not opposed to university recruitment efforts targeted toward qualified minorities, the JRC affirmed their opposition to university admissions processes that used quotas, goals, or set-asides. (Ball 2000, 30).

In contrast to the JRC and other opponents of preferential based affirmative action, amicus briefs in support of Odegaard in the case against UWSL, center on the notion put forth by Justice Blackmun and Marshall in the *Bakke* case, "that color-blindness has come to represent the long-term goal. It is now well understood...that our society cannot be completely color-blind in the short term if we are to have a color blind society in the long term" (Ball 2000, 35). Thus, this argument for racially preferential policies seeks to achieve equity in the long term by advocating positive racial classifications that necessitate making racial distinctions in the short term.

CITIZEN PARTICIPATION IN LAWMAKING

CITIZEN ACTIVISM

As twenty states allow citizens to propose laws, and to vote directly on laws through the initiative process, it is not surprising that a contentious issue like affirmative action would result in ballot measures. A most notable example of a citizen activist opposed to preferential treatment is University of California Regent, Ward Connerly. Connerly spearheaded the effort to eliminate racial preferences in the University of California system and on July 20, 1995, Connerly and other Regents voted to end the University of California's nearly 29-year old policy of giving preference for minorities and women in admissions and jobs. The impact of the policy change resulted in an 81 percent drop in minority enrollment in Berkeley's law school. With regard to the immediate drop, Connerly conceded that, "No one can look at the sharp decline in non-Asian minority admissions and not feel sad-

dened...but I see plenty that is positive." Connerly asserted that, "those blacks who will enter Berkeley today can say with pride that they were admitted on their own" (Terry 1998).

Though Connerly is strongly against preferential treatment based on race and gender, he is a proponent of preferences based on economic need. Connerly advocates giving extra consideration to qualified students who are poor (Terry 1998). Likewise, in the wake of the Regents' change in policy, and in order to address the immediate decrease in minority enrollment, the Regents adopted policies to target low-performing schools and began sending tutors with the goal of helping minority students become more academically competitive.

In 1996, about one year following the University of California Board of Regents ban on preferential treatment based on race and gender, California voters passed by a 54 to 46 percent margin a controversial ballot initiative, Proposition 209. The crux of Proposition 209, the *Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities*, stipulated that "The 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."

Also called the California Civil Rights Initiative, Proposition 209—like the 1995 California Board of Regents ban on preferential treatment of race and gender—was also led by Regent Ward Connerly. He asserted that, "We can continue perpetuating the outdated premise on which race and gender preferences are based...that blacks, women, and other minorities are incapable of competing without a handicap. Or we can resume the journey to a fair and inclusive society. I wouldn't accept a job or college admission based on color. I would not want the stigma, the cloud hanging over me. There could be no greater insult" (Terry 1998).

Opponents of Proposition 209, claimed that with regard to university admissions it "reinforces the 'who you know' system that favors cronies and the powerful." Similarly, they assert that "whether intentional or not, it pits communities against communities and individuals against each other" (*Proposition 209 Initiative Constitutional Amendment* 1996). However, proponents of Proposition 209 countered that the California Civil Rights Initiative, or Proposition 209, simply restated parts of the 1964 Civil Rights Act. Similarly, they asserted that instead Proposition 209 "will stop terrible programs which are dividing our people and tearing us apart." Furthermore, they argued that Proposition 209 will "bring us together under a single standard of equal treatment under the law" (*Proposition 209 Initiative Constitutional Amendment* 1996). The debate over California's Proposition 209 evolved into much more than an individual state proposition. Soon the entire country became embroiled in the issues surrounding the controversy. Proposition 209 merely added fuel to the already flaming national debate sparked by *Bakke*.

Two years following California's Proposition 209, Washington state embarked upon a similar course. After unsuccessfully trying several times to gain approval of legislation similar to the language used in Proposition 209, Washington state Representative Scott Smith filed his proposal as an initiative. The initiative's key provision stipulated that:

The 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 (Bruno 1999, 1)

What became Initiative 200, Washington State Civil Rights Act, differed procedurally from Proposition 209, in that 209 was an amendment to California's state constitution and Initiative 200 proposed a new state statute. In this instance, supporters of the Washington State Civil Rights Initiative (WSCRI) had to garner 179,248 registered voters' signatures in order to require the legislature to either address the issue or require a vote on it by the people. The Washington State Legislature could pass it into law, take no action, or reject it and the initiative would then appear on the November general election ballot, or the legislature could develop an alternative measure to send to the ballot along with the initiative (Bruno 1999, 1).

The backers of the initiative were successful in their signature gathering efforts and thus the initiative went to the Washington State Legislature. The representatives took no action on the measure and as a result Initiative 200 was placed on Washington's November 3rd, 1998 ballot. On election day, Washington state voters passed Initiative 200 with a vote of 58 percent in favor and 42 percent opposed.

Given the earlier discussion of the controversy over how the issue should be defined, it is not surprising that prior to the general election, the American Civil Liberties Union (ACLU) filed a lawsuit challenging the ballot title, alleging that it should include the term "affirmative action," rather than the current wording referring to "preferential treatment." The ACLU was not successful in changing the wording of the initiative title and a judge in Washington state affirmed that the ballot title did accurately and impartially describe the intent of the initiative (Bruno 1999, 2).

Public perception as measured by a *Seattle Times* poll that took place several days prior to the election, reinforces the importance of how the issue is defined. The poll indicated that Initiative 200 had garnered widespread support across all age and income groups. The poll also found that both Initiative 200 supporters and opponents agreed that "affirmative action" needed to be reformed. However, the groups differed on whether or not Initiative 200 was the best approach to reform. The *Seattle Times* poll and the ACLU's attempt to change the wording on the ballot provides additional evidence that, public perception and opinion is divided. By and large, it would seem that Americans don't want to end "affir-

mative action" altogether, but rather have serious qualms with "preferential treatment" (Bruno 1999, 2).

Following Initiative 200's approval, Ward Connerly, backer of Proposition 209 and leader in the movement to end preferential treatment, stated his belief that, "We are one [Supreme] Court decision away from ending preferences" (Bruno 1999, 7). Whether Connerly is right about the Supreme Court or not, the judicial branch will certainly play a role in interpreting initiatives such as 200. For example, the Washington Attorney General issued a memorandum prior to the election that identified some of the major impact-related questions raised by the initiative. Specifically, the unspecified meaning of "preferential treatment" the memorandum stated, "is not defined in the statute [proposed by the initiative] and does not have a historical legal use or 'well-accepted, ordinary meaning'" (Bruno 1999, 4). Determining the exact or even relative meaning of "preferential treatment" is important in the case of Initiative 200 because, unlike Proposition 209, which amended the state constitution, Initiative 200 as a new state statute would be interpreted in terms of existing laws. Thus, according to the memorandum,

One [of] the most significant questions of interpretation, if the initiative were approved, would be how to square the "no discrimination or preferential treatment" language with older statutes requiring agencies to consider the needs of particular groups, some of which are the same categories mentioned in the initiative (Bruno 1999, 4).

The memorandum explained that it would be up to the courts to decide, "if the legislative intent behind the Initiative is clear enough to supersede any pre-existing, inconsistent statutory language" (Bruno 1999, 5). However, the complication occurs in the fact that "legislative intent" of an initiative is in effect voter intent. Therefore, the fracture in public opinion, (as illustrated in the pre-election polls), over what constitutes effective affirmative action reform illustrates the difficulty in ascertaining public opinion generally, as well as a specific meaning of "preferential treatment." Clearly, disputes about the implementation of Initiative 200 will have to be resolved by the courts.

RECENT LEGAL DEVELOPMENTS

STUDENT DIVERSITY IN HIGHER EDUCATION

Justice Powell's argument in *Bakke* was that using preferential treatment to attain a specific percentage of minorities for its own sake is unlawful. However, he argued that diversity as a way to improve education was a "constitutionally permissible goal," because learning "is widely believed to be promoted by a diverse student body" (*University of California Regents v. Bakke* 1978). Powell's opinion in the *Bakke* case has given rise to the notion that diversity in the educational setting is a "compelling interest." However, Justice Powell made it clear that he views this type of diversity in broader terms than simply race. He stated, "[t]he diversity that furthers a compelling

state interest encompasses a far broader array of qualifications and characteristics of which ethnic origin is but a single though important element.” (Dale 2001, 6). Powell’s opinion illustrates the importance that the race of a candidate not be the “sole” or “determinative” factor, while simultaneously asserting that diversity in higher education is a worthy goal.

Recently, the Supreme Court denied review of a Fifth Circuit Court decision in a 1996 case *Hopwood v. State of Texas (Hopwood II)*¹. The Fifth Circuit concluded that any use of race in the admissions process was forbidden by the Constitution. The University of Texas School of Law had two separate paths for assessment of applicants; one for blacks and Mexican-Americans and another for whites and all other “non-preferred” minorities. Much like *Bakke*, there was a disparity in the application of standards to the differing groups. Similarly, the applications for the preferred group were never compared to those in the other group. “Race was always an overt part of the review of an applicant’s file” (Dale 2001, 7).

In direct contrast to Powell’s opinion in *Bakke*, the three judge appellate court rejected Powell’s diversity rationale and held in *Hopwood II* that the desire to create a diverse student body never provides a “compelling” justification for the use of race in student admissions. The *Hopwood II* court recognized Justice Powell’s rationale as “not binding precedent,” in consideration that no other Justice formally joined in his opinion.

Similarly, the court determined that the law school failed to demonstrate sufficient continuing effects of prior illegal acts that would justify remedial affirmative action.

Instead, the appellate panel held that,

For the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the “plus” given to applicants to remedy that harm. A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny (Dale 2001, 7).

The effect of *Hopwood II* was to narrow the scope in relation to what constitutes sufficient past discrimination and its continuing effects upon the admissions process. Thus, without an adequate justification the implementation of a preferential admissions policy was rejected.

To heighten the difference between Powell’s opinion and that of *Hopwood II*, and to complicate matters further, another Fifth Circuit panel “reviewed an appeal from an injunction order entered by a federal district court from the 1996 *Hopwood II* decision” (Dale 2001, 8). In the latter part of

2000, *Hopwood v. State of Texas (Hopwood III)*, affirmed the ruling in *Hopwood II* that rejected Powell’s diversity rationale in *Bakke*. However, *Hopwood III* reversed the injunction that *Hopwood II* placed to forbid any consideration of racial preferences in admissions. Instead, in *Hopwood III*, the district court held that the injunction resulting from *Hopwood II* was in conflict with *Bakke*. Specifically, the court held that the injunction,

Forbids the University from using racial preferences for any reason, despite *Bakke*’s holding that racial preferences are constitutionally permissible in some circumstances. Consistent with that position, *Hopwood II* does not bar the University from using race for any and all remedial purposes; rather *Hopwood II* bars the University from using race to remedy the effects of previous discrimination in other components of Texas’s public education system only. By enjoining any and all use of racial preferences, the district court went beyond the holding of *Hopwood II* and, in the process, entered a judgment that conflicts with *Bakke* (Dale 2001, 9).

Thus, the overall effect of *Hopwood III*, was to lift the previous court’s injunction, while leaving in place the constitutional rationale and conclusion of the appeals court in *Hopwood II* (Dale 2001, 9).

In Washington, the Ninth Circuit court created a conflict with the Fifth Circuit court by ruling in the case *Smith v. University of Washington* that the “extensive use of race-based factors” in UWSL admissions process was constitutional. Instead of rejecting Justice Powell’s diversity rationale in *Bakke*, the Ninth Circuit court argued that Justice Powell’s opinion provided “the narrowest footing upon which a race-conscious decision making process could stand” (Dale 2001, 9). Though passage of Initiative 200 limits the significance of this ruling, it does shed light on the fragmented nature of the judicial opinion. *Bakke*’s precedent is important because the Supreme Court has yet to address affirmative action in higher education since the *Bakke* decision (Dale 2001, 9).

The judicial divide inherited from the fragmented *Bakke* opinion is also mirrored in two recent cases involving the University of Michigan. Two separate federal district courts took decidedly different approaches to the University of Michigan’s admission policies (Dale 2001, 9). The University of Michigan has been operating under what is commonly known as the “Michigan Mandate.” Under the Michigan Mandate, undergraduate applicants are evaluated using a grid system in which applicants are ranked by their test scores and high school GPA. The admissions system awards a 20-point advantage to black and Hispanic students on a 150-point scale. Incidentally, the university also awards “six points for geographical factors, five points for leadership skills, three points for an outstanding essay, and so on” (Dale 2001, 10).

In the first case, *Gratz v. Bollinger* decided in 2000, the Ninth District court upheld for diversity reasons the University of Michigan’s race-based undergraduate admissions policy. In *Gratz*, the court reached a similar conclusion as the Ninth Circuit court in *Smith*. That is, they held that

1 *Hopwood v. State of Texas* 1994 (*Hopwood I*) A federal district court ruled that the University of Texas School of Law’s dual admissions policy violated the Fourteenth Amendment’s Equal Protection Clause and held that separate evaluations for minority applicants were unconstitutional because they were not “narrowly tailored to the state’s compelling interest in diversity and overcoming past discrimination.” The court held that giving a “plus” to minority students was lawful, though a separate standard for minorities and non-minorities was not (Springer 2001).

the practice of using race as a “plus” factor is necessary to ensure a diverse student body, which is a “compelling governmental interest.” The *Gratz* district court disagreed with “*Hopwood*’s conclusion that the reticence by a majority of the *Bakke* Justices to embrace the Powell rationale necessarily implied a rejection of that theory” (Dale 2001, 10). Likewise, the *Gratz* court majority opinion justified affirmative action in higher education as a “permanent and ongoing interest.” This ongoing interest being diversity, the *Gratz* court stated the following:

On the diversity issue, diversity is not a ‘remedy.’ Therefore, unlike the remedial setting, where the need for remedial action terminates once the effects of past discrimination have been eradicated, the need for diversity lives on perpetually. This does not mean, however, that universities are unrestrained in their use of race in the admissions process, as any use of race must be narrowly tailored. Hopefully, there may come a day when universities are able to achieve the desired diversity without resort[ing] to racial preferences. Such an occurrence, however, would have no effect (sic) on the compelling nature of the diversity interest. Rather, such an occurrence would affect the issue of whether a university’s race-conscious admission program remained narrowly tailored. In this Court’s opinion, the permanency of such an interest does not remove it from the realm of “compelling interests,” but rather, only emphasizes the importance of ensuring that any race-conscious admissions policy that is justified as a means to achieve diversity is narrowly tailored to such an interest (Dale 2001, 10).

This opinion clearly illustrates this court’s view that using a “plus” factor or positive racial classifications for preferred minority students is not the same as the unconstitutional dual admissions system in the case of *Bakke*. In addition, the *Gratz* court’s strong support of the diversity rationale focuses the question of preferential treatment upon the diversity justification, rather than the argument of race-based admissions policies as a remedy for past discrimination.

Recently, in the case of *Greutter v. Bollinger* 2001, a federal district court contradicted the *Gratz* ruling by nullifying a special admissions program for minority law students at the University of Michigan School of Law. Judge Friedman disagreed with Powell’s diversity rationale and subsequently *Gratz* by concluding that diversity was not a compelling state interest. Friedman declared racial classifications to be unconstitutional “unless they are intended to remedy carefully documented effects of past discrimination” (Dale 2001, 12). In addition, the court held that even if diversity were to rise to the status of a “compelling state interest,” the University of Michigan School of Law’s policy was not sufficiently narrowly tailored. The court found the policy to be too “ill defined” and “amorphous” to allow for “predictable and quantifiable bounds” (Dale 2001, 12). The court also held that the law school’s goal of 10-12 percent minority enrollment was in effect a “quota system.” Further, the “lack of principled explanation” for giving preference to certain groups resulted in a policy that was not narrowly tailored. Finally, the court was

critical of the school’s implementation of affirmative action without first expanding recruiting efforts or trying alternatives, such as, a lottery system to combat the problem of low minority enrollment.

THE JUDICIAL FUTURE OF AFFIRMATIVE ACTION IN ADMISSIONS DECISIONS

The issues surrounding the use of race in admissions decisions reflected in court opinions illustrate the controversy over the two theoretical justifications for preferential treatment. Though nearly all the cases presented in this section agree with the concept of requiring that affirmative action policies demonstrate a “compelling state interest;” the courts are divided as to the standard that either the diversity rationale or remedial justification argument must meet.

In addition, public opinion illustrates this same philosophical divide. How does an admissions policy fairly determine applicants who warrant redress from past discrimination? If the policy compensates groups rather than individuals, as an editorial in the *Economist* argues:

Poor Latinos might ask why their children are being held to higher academic standards than the children of black doctors. And a wide array of other groups could legitimately ask why they were being denied the fruits of preferential treatment: Chinese-Americans whose ancestors were treated like chattels; Japanese-Americans, whose ancestors were interned during the second world war; and native Americans whose ancestors were robbed of their land and their dignity (*Economist*, March 2001).

Justice Douglas’s separate dissent in *DeFumis* argued that giving preferences to applicants who were economically disadvantaged, such as, “a poor Appalachian white or a second-generation Chinese in San Francisco,” or other “would-be lawyers with limited backgrounds,” was a more constitutional policy than using race or ethnicity (Ball 2000, 45). If affirmative action is used as a method for increasing the opportunity of the disadvantaged, is race a proper determining factor? Affirmative action proponents that contend the policy’s goal is increased opportunity for the socioeconomic disadvantaged ignore larger issues of demographics and in particular the untenable implication that poverty plagues only minorities or the converse implication the all minorities are poverty-stricken.

ALTERNATIVES TO PREFERENTIAL TREATMENT

PERCENTAGE PLANS

In November 1999, Florida Governor Jeb Bush unveiled his “One Florida Initiative” ending racial or gender set-asides, preferences, and quotas in state hiring, contracting, and university admissions. The initiative’s “Talented 20” plan guarantees Florida high school graduates in the top twenty percent of their classes admission to at least one state school. Bush declared the plan would “further increase minority enrollment in the state university system” (*Egalitarian* 1999).

In addition to the Talented 20 Program, the One Florida Initiative calls for an increase in funding for need-based scholarships, funding for free Preliminary SAT (PSAT) testing for all Florida tenth graders, increased minority outreach and recruitment, and forms “opportunity alliances” between Florida universities and low-performing schools (Hirst 2000).

The Florida plan is similar to the Texas “10% Plan” which was implemented in 1997, and California’s 4 percent plan which was adopted soon after Proposition 209 as an alternative to race-based preferential treatment. However, unlike the Florida and Texas plan, California’s percentage plan retains existing eligibility requirements.² Proponents of the percentage plans contend that they are a more progressive way to achieve diversity than preferential treatment. Instead of focusing solely on race they account for relative disadvantage. This focus on disadvantage, as Clint Bolick of the Institute of Justice puts it, “begins to address the roots of the problem, which are more economic and educational than racial, even though they disproportionately afflict minority individuals” (Bolick 2000).

Florida Governor Jeb Bush attributed a twelve percent increase in the number of minority freshmen enrolled at the state’s ten universities to the first year success of his “Talented 20” plan. David Colburn, Provost at the University of Florida publicly questioned Bush’s plan at its initial release, but now praises Bush for his efforts toward challenging the university. Colburn said that the university increased minority recruitment by giving out an extra \$200,000 in grants to minority students in Jacksonville area high schools (Selingo 2000a). However, while Bush and Colburn hailed such programs as a means to expand opportunity to a greater number of minority students, other critique percentage plans as more problematic than beneficial.

For example, the academic quality and rigor of high schools varies widely. Thus, as a result some students are more qualified than others to attend college. Critics contend that the plan lowers academic standards and requires remedial courses (Selingo 2000b, A34). In addition, academic disparities among high schools will in turn adversely affect student class ranking, such that one student may not make the top twenty percent in a highly competitive, high-achievement high school, while another student with a lower GPA may be eligible for the “Talented 20” plan in their less rigorous high school. As one author puts it “at bad high schools, some top seniors aren’t ready for college. Do they deserve guaranteed seats? And at the best schools, students cram in honors courses yet can’t beat out the academic superstars at the top of their class. Is it fair to have their destinies ride on class rank?” (Selingo 2000c, A31). More specifically, one student who attends one of Florida’s more competitive high schools,

Palmetto Senior High, and ranks 213th out of her class of 634, has a 3.9 GPA, high SAT score, and several advanced placement courses will not make the top twenty. She says she feels cheated and is frustrated that “Here you are at a different school working harder, while the people at other schools are doing easier work and getting further ahead” (Selingo 2000c, A31). However, Florida Education Chancellor, Adam Herbert contends that students from top schools should not have a problem getting in. Rather, he asserts that, “What we are really talking about is an additional group of students that come from our low-performing schools that previously did not apply” (Diamond 2000).

Despite immediate minority enrollment increases, many affirmative action proponents still advocate a return to preferences. Palmetto’s principal, Janet Hupp asserts that minority students at her school may have lower GPAs and class ranks as a result of a competitive, integrated high school, such as Palmetto. She contends that they score higher than the national average on the SAT and are better helped by affirmative action programs than class rank based percentage plans. In addition, the U.S. Civil Rights Commission deems California, Texas, and Florida’s percentage plans an inadequate replacement for racial preferences. The Commission contends that the class rank systems further discourages the integration of high schools and argue that in the long term percentage plans will not increase minority enrollment at public institutions (Selingo 2000c, A31).

Thus, not only does the disparity among high school achievement raise concerns about equity, but percentage plans also raise constitutional questions similar to those that arise with dual admissions systems. Could the academic disparities among students who are eligible for Florida’s “Talented 20” be a violation of the Fourteenth Amendment’s Equal Protection Clause? Proposition 209 backer and race-based preferential policy foe, Ward Connerly calls Florida’s “Talented 20” plan a “lawsuit waiting to happen.” Connerly contends, “If you’re picking a number because you know that number is going to favor one group or another based on race, that’s no different than a system of explicit preferences” (Selingo 2000c, A31). Connerly supported California’s 4 percent plan only after assurances that it would not result in lower academic standards.

The primary benefit of percentage plans is that they have the potential of drawing in economically disadvantaged students of all races. Percentage plans aim to increase the opportunities of underprivileged students, by admitting students who perform at the top of their class in a disadvantaged school. However, in so doing, students who may be unprepared for college are guaranteed admission alongside higher achieving students. Percentage plans may increase opportunity, but they must also prevent declining standards, and be “narrowly tailored” in order to pass constitutional muster. Clearly, the “percentage plan” concept is too recent to receive close scrutiny from policy makers or the courts. Perhaps

2 Though it is not in the scope of this paper to discuss this, it is important to note Richard C. Atkinson’s, President of the University of California system, recent proposal to eliminate the requirement that applicants take the SAT. There is widespread opinion both favorable and unfavorable concerning the proposal.

Florida's twenty percent plan is too broad. California's 4 percent plan, because it is more closely tied to test scores, may constitute a more "narrowly tailored" plan. However, the smaller the percentage plan, the less impact it will have for better or for worse. "Narrowly tailored" percentage plans, more likely to pass constitutional muster, may help provide opportunities to some disadvantaged students, but unlike Florida's twenty percent plan, they will have a smaller impact on minority students.

EXPANDED OUTREACH & RECRUITMENT PLANS

In addition to percentage plans, Florida as well as other universities, have increased their efforts to recruit underrepresented minorities. Despite the concern that the demise of affirmative action in admissions would result in a lack of commitment to minority students, the opposite seems to be true. On the whole, "colleges from coast to coast are aggressively vying for qualified³ minority students" (Kleiner 2000). Though it is important to note the decline in minority student enrollment at UC Berkeley directly following passage of 209; the increased efforts of universities to aggressively expand outreach and recruiting of underrepresented minorities is a positive outcome of court rulings and citizen lawmaking. According to recent figures, "The percentage of minority students admitted to the University of California has nearly reached affirmative action levels" and "of the students the UC system admitted for the fall 2001 first-year class, 18.6 percent were black, Latino, Chicano, and American-Indian." The percentage is just slightly under 1997's 18.8 percent, which was the last time that UC system used racial preferences in admissions (Sturrock 2001). Dennis Galligani, associate vice president for the UC system student academic services, states that he is "especially pleased with the high increase in underrepresented students who were admitted," and adds that, "we'd like to believe the investment in our outreach efforts is paying off" (Sturrock 2001). The increases in minority enrollment across the board are promising, though at the state's most prestigious school, UC Berkeley, the increase in underrepresented minorities has yet to reach the 1997 level.

In the long run, focusing on outreach and recruitment efforts to attract qualified minorities and economically disadvantaged applicants is a much better process than creating a dual admissions system in which individuals are discriminated against, less qualified students are given admittance over more qualified students, or race is used as a determinative factor in deciding between equally qualified students. Furthermore, "many public institutions in the states with affirmative action bans have tinkered with their race-based scholarship programs to try to maintain diversity—opening them up to all students from economically disadvantaged schools" (Kleiner 2000).

Similarly, in the aftermath of Proposition 209, the University of California at Berkeley greatly expanded its outreach programs. They are spending \$150 million, more than twice the pre-209 number, in efforts "to increase the pool of qualified minority students" (Kleiner 2000). Again, though the initial drop in minority enrollments is unfortunate, the benefit of increased outreach and recruitment efforts for both minority and disadvantaged students is a more constitutional method for reaching both short term and long-term goals of increasing diversity and opportunity. Similarly, The University of Washington is focusing on college transfers as a way to increase diversity and compensate for Initiative 200's ban on preferential treatment.

In certain academic disciplines women are a minority. Similar to programs that seek to increase racial diversity; some universities also focus on outreach programs that seek to increase the gender diversity in certain disciplines. One local example of an outreach program is the University of Utah's Access Program for Women. This program is designed to increase the number of women who choose to study science. Twenty-one female high school graduates who have committed to attending the University of Utah and have indicated their interest in studying the sciences are selected to live on campus during the summer semester immediately following their graduation from high school. The women are chosen based upon an application that considers their GPA, class rank, ACT/SAT scores, a one page letter expressing their interest in science and career goals, high school transcripts, two letters of recommendation from high school science or math teachers, advanced placement test scores, academic awards, science projects, extracurricular activities, high school honors, etc. The program is a fifteen-week, semester program and each week the students learn from professors from various science-related programs. The advantages of this program are numerous; students are able to meet advisors and professors in their specific field of study prior to their initial semester. One former ACCESS Program participant who is nearing completion of her degree in materials science and engineering stated, "It was helpful to know some teachers already and have an idea of what to expect in the classroom" (Miller 2001).

Similarly, other benefits associated with these types of programs are directly tied to the opportunity of minorities within a specific major, and in this particular case women. The ACCESS Program gives women a chance to interact with other women prior to the regular classroom setting, and as this particular ACCESS Program participant commented, "It was really nice to be around other girls who had similar goals," and "it was nice to start out in an all girls' class in a male-dominated field." Similarly, she commented that it was "nice to know other women that would be in your Fall Semester classes" (Miller 2001).

Other types of efforts that illustrate "affirmative action" in higher education include scholarships and programs that

³ "Qualified" here refers to scholastic achievement as measured by standardized tests and GPAs

specifically target minority students. The University of Utah Eccles School of Business was recently awarded a 2001 University of Utah Diversity Award. The business school provides scholarships and support for minority business students through their Minority Opportunities Program. "About half the recruits are first-generation college attendees and 86 percent are Utah residents. In addition to scholarships, the program offers a four-week Summer Institute to introduce students to the campus and provide preparatory coursework and learning skills. Since the program's inception in 1996, the business school has seen a 30 percent increase in enrolled minority students" ("U of U Announces 2001 Diversity Awards").

CONCLUSION

Though the intentions of quota based affirmative action programs are laudable, the fact remains that under a quota based system individuals remain victims of discrimination. Admissions policies that utilize dual admissions programs and numerical goals in the form of quotas are clearly in violation of the Fourteenth Amendment's guarantee of equal protection under the law because judicial rulings have in effect determined Fourteenth Amendment rights to be largely individual and not group rights. In contrast, judicial decisions have been in conflict in regard to the use of racial classifications as a positive factor in admissions decisions. While opinion is divided over whether or not there can be positive racial classifications, the only definitive judicial theme in this regard, has been the consistent holding that positive racial classifications cannot be *the* determining factor in admissions decisions. The lower courts continue to remain divided, though, over the issue of using race as a "plus factor" specifically to increase diversity. The Supreme Court's holding in *Bakke* that positive racial classifications must undergo "strict scrutiny" and serve a "compelling interest," is the only judicial precedent set by the high court in which the use of positive racial classifications was considered. Thus, the question of how as a society we can most equitably increase opportunity for higher education to all our citizens remains a difficult one. The "percentage plans" enacted by governors of several states show promise in terms of increasing enrollment of underprivileged students. However, these plans raise equity issues as well, and have yet to be tested by the courts.

Affirmative action policies that do not rely on quotas, set-asides, or numerical goals, but rather focus upon outreach and recruitment programs for targeted students can be effective in increasing enrollment and participation among underrepresented groups. Though increased recruitment and outreach programs will not immediately yield large numbers of underrepresented minorities, they are a more equitable way to increase opportunity and bring about racial diversity than overtly, racially preferential admissions policies. Though these approaches to affirmative action may take longer to

bring about change; the coupling of this approach with plans to improve failing high schools and improve the academic rigor and opportunity offered disadvantaged students of all races is not only a far better solution constitutionally, but a far better solution ethically.

REFERENCES

- Ball, Howard. 2000. *The Bakke Case: Race, Education, & Affirmative Action*. University Press of Kansas: Lawrence, Kansas.
- Bolick, Clint. 2000. "Skillfully Redefining Affirmative Action." <<http://www.myflorida.com/myflorida/government/learn/>> (accessed 20 April 2001).
- Bruno, Andorra. 1999. "Affirmative Action in Washington State: A Discussion and Analysis of Initiative 200." *CRS Report for Congress*. February 18.
- Cahn, Steven M. 1995. *The Affirmative Action Debate*. New York: Routledge.
- Colamery, S.N. 1998. *Affirmative Action: Catalyst or Albatross?* Nova Science Publishers, Inc.: Commack, New York.
- Dale, Charles V. 2001. "Affirmative Action and Diversity in Public Education—Legal Developments." *CRS Report for Congress*. April 5.
- Diamond, Laura. 2000. "One Florida's Guaranteed Seats Won't Clog Colleges: Less Than Half of Top 20% Try Getting In." <http://www.myflorida.com/myflorida/government/learn/one_florida> (accessed 20 April 2001).
- "An Analysis of Governor Jeb Bush's 'One Florida Initiative.'" 1999. *Egalitarian*. *American Civil Rights Institute*. <<http://www.acri.org/newsletter/december99/dec1.html>> (accessed 20 April 2001).
- Hirst, Elizabeth. 2000. "One Florida Yields Big Gains in Minority Enrollment." 29 August Press Release <<http://www.myflorida.com/myflorida/government/learn/>> (accessed 20 April 2001).
- Kleiner, Carolyn. 2000. "Wanted: A Whole Rainbow of Talent." *U.S. News & World Report*. 18 September, 3.
- Lowry, Richard. 2001. "Quota U: Ann Arbor Shows Its Colors." *National Review*, 19 March, 39-42.
- Miller, Carrie. 2001. Personal Interview. 14 April.
- Proposition 209 Initiative Constitutional Amendment. 1996. "Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities." <<http://vote96.ss.ca.gov/Vote96/html/BP/209.htm>> (accessed 20 April 2001).
- "Scrap Affirmative Action." 2001. *Economist*, 17 March.
- Selingo, Jeffrey. 2000. "Florida's Universities See Rise In Minority Enrollment After End of Racial Preferences." *Chronicle of Higher Education*. 8 September.
- Selingo, Jeffrey. 2000. "U. of Texas Defends the Program Affirmative-Action Foes Love to Attack." *Chronicle of Higher Education*. 2 June. p.A34.
- Selingo, Jeffrey. 2000. "What States Aren't Saying About The 'X-Percent Solution.'" *Chronicle of Higher Education*. 2 June. A31.

Springer, Ann. 2001. "Update on Affirmative Action in Higher Education: A Current Legal Overview." American Association of University Professors.
<<http://www.aaup.org/aalegal.htm>> (accessed 20 April 2001).

Sturrock, Carrie. 2001. "UC Schools Say Minority Admissions Rebound." *Salt Lake Tribune*, 4 April.

Terry, Wallace. 1998. 'Racial Preferences Are Outdated.' *Parade Magazine*. May 31. 4-5.

"The U of U Announces 2001 Diversity Awards." 2001.
<http://www.utah.edu/unews/041601_diversity.html> (accessed 16 April 2001).

University of California Regents v. Bakke. 1978. 438 U.S. 265.