Fatal in Fact?
Federal Courts' Application of Strict Scrutiny to Racial Preferences in Public Education

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I. Introduction

In 1995, the Supreme Court declared in *Adarand v. Pena*[1] that all federal and state racial classifications were subject to strict scrutiny.[2] Along with *City of Richmond v. Croson*, *Adarand* settled the debate over the proper judicial scrutiny of "benign discrimination," racial preferences intended to help ethnic groups who have suffered past or present discrimination. Commentators and dissenting justices feared that strict scrutiny would invalidate all affirmative action programs contributing to ethnic diversity or remedying past discrimination. Justice Stevens, in dissent, declared that "[T]here is a danger that the fatal language of 'strict scrutiny' will skew the analysis and place well-crafted benign programs at unnecessary risk."[3] In a well-known part of the Court's opinion, Justice O'Connor declared that if the main objection to strict scrutiny was that it was "strict" in name only and automatically invalidates, that objection fails because strict scrutiny is intended to carefully differentiate between legitimate and illegitimate affirmative action programs.[4] Justice O'Connor concluded by declaring that strict scrutiny was not to be "strict in theory, fatal in fact."[5]

The merits of Justice Stevens' fears could only be tested when lower courts began applying the principles of *Adarand* and *Croson* to public affirmative action programs. Of particular interest was the

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1. 515 U.S. 200 (1995).
2. *See id.* at 227.
3. *Adarand*, 515 U.S. at 243 n.1 (Stevens, J., dissenting).
4. *Id.* at 228.
5. *Id.* at 237.

application of *Adarand* and *Croson* to the politically controversial issue of affirmative action programs in public education. *Adarand* and *Croson* dealt only with government contracts that provided racial and ethnic preferences. It was up to lower courts to apply these cases to other contexts, including education.

Justice Stevens' remarks have been proven to be remarkably prescient. Following *Adarand*, several federal circuits have visited the issue of race-conscious preferences in public education,[6] and the results do not bode well for public school affirmative action programs. With few exceptions, courts have invalidated public school affirmative action programs and have greatly narrowed the circumstances in which these programs can be implemented. Until the Supreme Court revisits the issue of racial preferences in education, these decisions will influence public schools' use of racial preferences and other courts' scrutiny of their programs.

Education has long been a forum for the debate over the proper public policy towards race. The federal judiciary has occupied a unique position in this dispute, ushering in desegregation with *Brown v. Board of Education*[7] and monitoring schools through desegregation orders and injunctions.[8] Commentators credit the judiciary with helping eradicate norms of white supremacy and creating a more equitable society.[9]

Despite the federal judiciary's importance to desegregation, or perhaps because of it, the judiciary is now at the center of a movement to remove affirmative action programs and preferences from public education, in grades K-12 and in higher education. The Court has yet to directly address racial preferences in education, apart from the 1978 case of *Regents of University of California v. Bakke*.[10] *Bakke* was a splintered decision that saw only one justice sign the Court's opinion and two equally divided pluralities deciding on significantly different grounds. The tenor of the Supreme Court's then limited approval of racial preferences has changed greatly since *Bakke*. The Court has since

6. *See* Gratz v. Bollinger, 122 F.Supp. 2d 811 (2000); Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (2000); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Hunter ex rel. Brandt v. Regents of The Univ. of Cal., 190 F.3d 1061, 1064 (9th Cir. 1999); Brian Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854 (9th Cir. 1998); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Podbersky v. Kirwan, 956 F.2d 52 (4th Cir. 1992).

7. 347 U.S. 483 (1954) (holding that racially segregated schools violate the Equal Protection Clause of the Constitution).

8. After *Brown*, federal courts began issuing injunctions that ordered attendance assignments and busing arrangements to desegregate schools. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970); Green v. County Sch. Bd., 391 U.S. 430 (1968). For a description of the history of court-ordered desegregation see GARY ORFIELD AND SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVOLUTION AGAINST BROWN V. BOARD OF EDUCATION (1996).

9. *See* RICHARD KLUGER, SIMPLE JUSTICE (1975).

10. 438 U.S. 265 (1978).

issued opinions relating to affirmative action programs in employment,[11] electoral re-districting,[12] and government contracting.[13] These cases have neither overruled nor followed *Bakke*.[14] Lower courts must struggle with this complex confluence of Supreme Court opinions, pluralities, concurrences, and even dissents in trying to discern the governing law on racial preferences in education.

This paper describes the proper Supreme Court framework for analyzing racial preferences in education, and examines federal courts' adherence to that framework. It argues that the majority of lower federal courts have misapplied Supreme Court precedent, resulting in disastrous consequences for the education of racial minorities.

Part II describes how the Supreme Court has applied a contextual strict scrutiny, rather than conforming to one framework. The term "contextual strict scrutiny" emphasizes that there are different strict scrutiny frameworks for different government classifications, dependent upon whether government is acting as a contractor, subsidizer, employer, or educator.

Part III examines the traditionally recognized compelling interests for educational affirmative action programs, and how a program must be narrowly tailored to that interest. The compelling interest inquiry is bifurcated into two prongs.[15] The first is a normative inquiry of what kinds of interests are acceptable. The second is an empirical inquiry examining the evidence required to show that an acceptable compelling justification in fact exists. In the evidentiary inquiry, the allocation of

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11. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1985); Johnson v. Transp. Agency, 480 U.S. 616 (1987).

12. *See* Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

13. *See* Adarand v. Pena, 515 U.S. 200 (1995); City of Richmond v. Croson, 488 U.S. 469 (1989).

14. *Adarand*, 515 U.S. at 218-19, and *Croson*, 488 U.S. at 493, cite to *Bakke* for the proposition that racial classifications deserve strict scrutiny, but do not address the other holdings of that opinion.

15. The framework of examining the compelling interest inquiry as two prongs is not novel. *See* Goodwin Liu, *Affirmative Action In Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C. R.-C. L. L. Rev. 381, 385 (1998). Courts have, at least implicitly, separated the policy analysis of which interests can be compelling from the evidentiary analysis of whether a compelling interest in fact exists. *In Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court first determined what interests could be compelling for preferences aimed at increasing minority representation among a public school's faculty: remedying societal discrimination, the interest in providing role models for minority students, and remedying discrimination by the school itself. *Wygant*, 476 U.S. at 274. After concluding that only remedying prior discrimination by the Jackson School District itself could be compelling, the court examined whether there was evidentiary support for that interest. *Id.* at 277. Similarly, lower courts have bifurcated the compelling interest analysis into two inquiries. *See, e.g*, *Wessman*, 160 F.3d at 796 (determining first whether diversity could be a compelling interest, and then examining whether the Boston Latin School's program met the evidentiary requirements for diversity as a compelling interest); *Tuttle*, 195 F.3d at 701 (assuming, without deciding, that diversity is a compelling interest, and then evaluating the evidentiary basis for it); Podbersky v. Kiran, 956 F.2d at 55-56.

the burden of proof proves to be pivotal to evaluating whether a school has a compelling interest for an affirmative action program.

Part IV examines federal court decisions in several circuits that have applied strict scrutiny to educational preferences. Though the Supreme Court has noted that strict scrutiny analysis should account for the context of the government's specific action, lower courts have applied strict scrutiny as if there were one universal framework. Applying one framework to different contexts fails to account for important distinctions in government policies. Also, these courts have failed to accept compelling interests ratified by the Supreme Court, and have misconstrued the proper allocation of the burden of proof in benign discrimination decisions. Part IV concludes by arguing that lower courts apply principles that would invalidate any conceivable racial preference, making strict scrutiny fatal in fact.

Finally, Part V argues that when the Supreme Court adjudicates the validity of a preference in public education, the Court should expressly ratify diversity as a compelling interest and adopt a burden shifting mechanism. This mechanism should place the initial burden of production on the defendant, but then shift the ultimate burden of persuasion on the plaintiff non-minorities to show an absence of a compelling interest or narrow tailoring. The paper then recommends a framework for the Court to examine racial preferences in education, whether to remedy past discrimination, attain ethnic diversity, or other compelling interests. This framework would produce more consistent results between lower courts and allow government to realize tangible benefits of some racial preferences without the danger of invidious discrimination or racial stereotype.

This paper focuses on the proper application of strict scrutiny to affirmative action in education. It is hoped that future analysis of race-based government policies will flesh out the different frameworks and policies underlying strict scrutiny of government race-based classifications in employment, government contracts, electoral redistricting, and other areas of government.

II. Contextual Strict Scrutiny

Racial classifications can take many different forms, as government can act through numerous mechanisms to advance its policies. The government can act as a sovereign within its jurisdiction and exert its will through the power of law. It can also act as a business contracting with private entities to provide public services; as an

educator through state-funded schools; or as an employer in government agencies or state-funded entities.

The idea that strict scrutiny should be modified according to context is not new. The Court has adjusted its strict scrutiny analysis when examining laws that restrict fundamental rights other than racial preferences,[16] and commentators have attempted to determine how the Court's strict scrutiny analysis may change according to the government program examined.[17]

Historically, racial classifications predominantly reinforced norms of white supremacy. When such statutes were invalidated, beginning with *Brown v. Board of Education*,[18] the Court did not use the modern parlance of strict scrutiny. As an analytical tool, strict scrutiny traces to *Korematsu v. U.S.*[19] Although validating the internment of Japanese-Americans during World War II, *Korematsu* declared that racial classifications were immediately suspect and subject to the highest judicial scrutiny.[20] Strict scrutiny eventually evolved into a formalistic doctrine that considered whether the racial classification was "narrowly

16. It has been traditionally recognized that the proper First Amendment scrutiny of governmental content-based speech restrictions depends on the context in which the government acts. *See, e.g.*, Board of County Commisioner v. Umbehr, 518 U.S. 668 (comparing the different frameworks of First Amendment scrutiny for government as contractor and government as employer); Pickering v. Board of Education, 391 U.S. 563 (1968) (providing a First Amendment balancing test when government acts as an employer restricting its employees' speech); *see also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1997). Volokh explains that First Amendment strict scrutiny of a content-based speech restriction by the government applies only when the government acts as sovereign, not as "employer, landlord, or primary or secondary school educator, where it has more discretion." *Id.* at 2417 n. 1.

17. The idea that context should matter in strict scrutiny analysis has been raised by other commentators. *See* Akhil Reed Amar and Neal Kumar Katyal, *Symposium On Affirmative Action: Bakke's Fate*, 43 UCLA L. REV. 1745 (1996) (arguing that there are distinct contextual differences between minority contract set-asides and affirmative action programs in public education); Susan M. Maxwell, *Racial Classifications Under Strict Scrutiny: Policy Considerations and The Remedial-Plus Approach*, 77 TEX. L. REV. 259, 270 (1998) (arguing that in some contexts, including education, non-remedial rationales could constitute compelling interests for narrowly tailored racial classifications); Krista L. Cosner, Note, *Affirmative Action In Higher Education: Lessons and Directions From the Supreme Court*, 71 IND. L.J. 1003 (1996) (diversity should be a compelling interest only in higher education); Ellen R. Dassance, Note, *Affirmative Action Implications For Colleges and Universities Beyond The Scholarship and Student Admissions Areas*, 5 WM. & MARY BILL RTS. J. 661 (1997) (education should be treated differently from employment and other contexts scrutinizing government racial classifications).

18. 347 U.S. 483 (1954).

19. 323 U.S. 214, 223-24 (1944) (holding that while classifications based on race are immediately suspect, the internment of Japanese-Americans during World War II was justified because of the threatened danger of the war with Japan).

20. It is questionable whether *Korematsu* would be decided the same way today. As American political elites finally recognized the injustice done to Japanese-Americans during World War II, the legitimacy of relocation became first questioned, then universally condemned. Justice O'Connor stated in *Adarand*, 515 U.S. at 236, "even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification" and cited to *Korematsu*, 323 U.S. at 216, implying that the Court's decision to not invalidate an "illegitimate racial classification" was wrong.

tailored" to a "compelling interest."[21] However, Supreme Court decisions adjudicating challenges to white supremacist statutes did not always employ the strict scrutiny methodology.[22]

Under the pressures of the civil rights movement, federal and state governments sought to remedy public and private discrimination.[23] Many began strong remedial efforts to end discrimination against minorities and compensate for past injustice.[24] Some of these efforts took the form of race-conscious preferences. During the 1970s, the Court began to examine whether these preferences should be subject to the same scrutiny as the invidious discrimination of the previous era.[25]

Until 1989, no majority of justices could agree on the proper scrutiny. Instead, shifting coalitions of justices developed different approaches for federal and state classifications in employment, education, and legislative redistricting. However, in 1989, the Court held in *City of Richmond v. Croson*[26] that all state and local racial preferences would be held to strict scrutiny, regardless of the racial groups benefiting and the government's stated intentions. In 1995, the Court in *Adarand v. Pena*[27] held federal racial classifications to strict scrutiny. The 5-4 majorities cited to a litany of horrors that racial classifications produce, and interpreted past Court decisions invalidating white supremacist statutes as creating a principle that race-neutrality and

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21. Adarand v. Pena, 515 U.S. 200 (1995).

22. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (invalidating an anti-miscegenation law by stating that laws based on race must be "shown to be necessary to the accomplishment of some permissible state objective"). *Loving* notably stated that the law only banned miscegenation involving white persons and was obviously a measure designed to maintain white supremacy. While *Loving* and other decisions following *Brown v. Board of Education* stated that laws based on race are subject to the most rigid scrutiny, the court did not use the terms "narrowly tailored" or "compelling justification."

23. The philosophy behind federal and state government affirmative action programs was stated eloquently by President Lyndon Johnson in a commencement speech to Howard University. Johnson stated that attaining equality of opportunity is not enough, for African-Americans bore the burden of centuries of oppression. "You do not take a person who for years has been hobbled by chains and liberate him, bring up to the starting line of a race and then say 'you are free to compete with all the others,' and still justly believe that you have been completely fair." LYNDON B. JOHNSON, COMMENCEMENT ADDRESS, HOWARD UNIVERSITY (1965), *reprinted in* GREAT ISSUES IN AMERICAN HISTORY, FROM RECONSTRUCTION TO THE PRESENT DAY 1864-1981, at 461 (Richard Hofstadter & Beatrice Hofstadter ed) (1982).

24. The federal government began requiring federal contractors to integrate their workforces in the mid 1960s and Ivy League Colleges began employing racial preferences in the early 1970s to increase African-American enrollment. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 6-7 (1998). *See id.* at 3-10 for a history of government racial preferences.

25. *See, e.g.*, Defunis v. Odegaard, 416 U.S. 312 (1974) (dismissing a Caucasian student's suit against university use of an affirmative action program because of lack of standing, and reserving the issue of the proper scrutiny of benign discrimination); United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

26. 488 U.S. 469 (1989).

27. 515 U.S. 200 (1995).

color-blindness are the only constitutional uses of race, absent compelling circumstances.[28]

At issue in *Adarand* was a federal subcontracting provision included in government contracts with construction contractors.[29] The provision dictated that a prime contractor awarded a government bid would receive additional compensation for hiring subcontractors certified as small businesses controlled by "socially & economically disadvantaged individuals," presumed to be African-Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities.[30] Other persons not members of a listed group had to prove disadvantage "on the basis of clear and convincing evidence."[31] The Court considered this a race-conscious classification and concluded that the Court's jurisprudence dictated that all such classifications be subject to strict scrutiny.[32] The Court then remanded the case for a determination of whether the preference was narrowly tailored to a compelling interest.[33]

While *Adarand* firmly decreed that strict scrutiny would apply to all classifications, the Court subtly modified strict scrutiny's application. Responding to the dissenter's fears that strict scrutiny is "strict in theory, fatal in fact,"[34] and that the Court's decision failed to account for relevant differences between invidious and benign discrimination,[35] Justice O'Connor's majority opinion took care to clarify that strict scrutiny is intended to take "relevant differences into account."[36] Strict scrutiny was to separate illegitimate uses of race from legitimate remedial ones.[37] Justice O'Connor intimated that the main objection to strict scrutiny was the automatic invalidation that usually follows when applying strict scrutiny.[38] Justice O'Connor believed this objection faltered since strict scrutiny does not necessarily mean invalidation. It only means that the Court will not defer to the legislature's reasoning,

28. *See, e.g., Croson*, 488 U.S. at 493 (describing all racial classifications as carrying the "danger of stigmatic harm" and promoting notions of racial equality, leading to the politics of racial hostility); *Adarand*, 515 U.S. at 25-26, (declaring that "distinctions between citizens solely because of their ancestry are by their very nature odious.").

29. *Adarand*, 515 U.S. at 206.

30. *Id.* at 226.

31. *Id.*

32. *Id.*

33. *Id.* at 236-38.

34. *See Adarand*, 515 U.S. at 243 (Stevens, J., dissenting) (arguing that "[strict scrutiny] has usually been understood to spell the death of any governmental action to which a court may apply. . . . [T]here is a danger that the fatal language of 'strict scrutiny' will skew the analysis and place well-crafted benign programs at unnecessary risk.").

35. *Id.*

36. *Id.* at 228.

37. *Id.*

38. As explained above, no court had validated a racial classification under strict scrutiny, with the exception of the now largely discredited *Korematsu*, 323 U.S. 214 (1944).

but will independently inquire into the governmental action to ensure that its use of race is justified as an exception to the equal protection clause's mandate of race-neutrality.[39] Justice Stevens accused the Court of using a definition of consistency that equated remedial discrimination to invidious discrimination.[40] For Justice O'Connor, "[the principle of consistency] says nothing about the ultimate validity of any particular law; that determination is the job of the Court applying strict scrutiny."[41] The Court then remanded the case to determine if the classification was narrowly tailored to a compelling government interest. A "relevant difference" was that a statute was remedial rather than invidious.[42] Strict scrutiny was used to ensure that the statute was truly remedial and not masking an illegitimate motive. Despite its strong language condemning racial classifications, the Court held that there are some legitimate uses of race that can satisfy strict scrutiny.[43] Strict scrutiny helps validate legitimate uses while dismissing those masking illegitimate motives.

Both *Adarand* and its predecessor *City of Richmond v. Croson*[44] reflected that not all government units are alike, and not all government uses of race should be subject to the same rules of analysis. In *Croson*, the Court invalidated the city's Minority Business Utilization Plan, under which prime contractors awarded construction contracts must subcontract at least thirty percent of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs).[45] MBEs were defined as businesses where "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts" held at least a 51% ownership share.[46] A qualified MBE from anywhere in the United States could benefit from the set-aside.[47] The Court subjected the plan to strict scrutiny and invalidated it as not narrowly tailored to a compelling government interest.[48] The Court held that a compelling interest of remedying past discrimination existed only when the government could demonstrate a "strong basis in evidence for its conclusion that remedial legislation was necessary."[49]

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39. *Adarand, 515 U.S.* at 228.

40. Justice Stevens argued that "[t]he Court's concept of consistency assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority." *Adarand,* 515 U.S. at 243 (Stevens, J., dissenting).

41. *Id.* at 230.

42. *Id.* at 229-30.

43. *Id.*

44. 488 U.S. 469 (1989).

45. *Id.* at 477.

46. *Id.* at 478.

47. *Id.*

48. *Id.* at 510.

49. *Croson,* 488 U.S. at 510 (*citing* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

The Court has addressed two other contexts regarding governmental racial classifications. The first includes government hiring practices when the government acts as employer and the second is preferential admission processes in public schools. In *Wygant v. Jackson Board of Education*,[50] the Court invalidated a provision in the public school's collective bargaining agreement with the teacher's union giving minority teachers greater protection from termination than non-minority teachers.[51] The provision provided that when layoffs were necessary, teachers with lower seniority would be terminated first, except that the percentage of minority teachers terminated could never be greater than the percentage of minority teachers in the district.[52] A four-justice plurality subjected the provision to strict scrutiny and invalidated it as not narrowly tailored to a compelling governmental interest.[53]

The plurality held that the plaintiff non-minority teachers bore the ultimate burden of proof of showing that the program was not narrowly tailored to a compelling interest.[54] The Court also declared that a preferential layoff plan was more burdensome and more suspect than a preferential hiring program.[55] In particular, the Court compared the program to a preferential admissions program in higher education.[56] While the burdens of preferential hiring and preferential admissions processes are generally diffused over society,[57] the burdens of preferential layoff processes are borne by specific individuals, such as the plaintiffs. Importantly, it was the different context between racially preferential hiring and admissions processes on one hand and racially preferential layoff practices on the other that informed the court's ultimate decision to invalidate.[58]

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50. 476 U.S. 267 (1986).

51. *Id.* at 273.

52. *Id.* at 270.

53. *Id.* at 282-83.

54. *Id.* at 277.

55. *Wygant*, 476 U.S. at 282.

56. *Id.* at 283-84. The plurality cited *Defunis v. Odegaard*, 416 U.S. 312 (1974), for the proposition that school admissions are very similar to hirings, and that hiring preferences place lesser burdens on non-minorities than do layoff protections. "The 'school admission' cases, which involve the same basic concepts as cases involving hiring goals, illustrate this principle." *Id.* at 284, n.11.

57. Preferential hiring practices and admissions practices only indirectly affect applicants for jobs and admission to school. *Wygant*, 476 U.S. at 282. These applicants do not have a reliance interest on the job, for they are hoping for the opportunity. They have other options for employment and education, and expect that they are not guaranteed entrance into any program or employment in any job. Preferential layoff practices, however, directly affect those who already hold jobs but are fired. *Wygant*, 476 U.S. at 282. They do have a reliance on their jobs, and face much harder choices when laid off. *Id.* These reasons led to the plurality's conclusion that preferential hiring practices, like preferential admissions practices, place a lower burden on plaintiff non-minorities than do preferential layoff practices. *Id.*

58. Scrutiny of public employment and public programs is thus more similar than contractor

The context of preferential admission processes in public schools was examined in *Regents of University of California v. Bakke*,[59] the only Supreme Court decision directly addressing educational preferences. In *Bakke*, the medical school of the University of California, Davis separately evaluated the applications of minorities who were economically and educationally disadvantaged, from those in the racial majority.[60] Candidates in the first category did not have to meet a minimal grade point average (GPA) required of those in the latter.[61] The School had to fill at least 16 of its 100 spots with minorities, even if the minority candidates had less academic credentials than some rejected applicants in the non-minority category.[62] Justice Powell authored an opinion of the Court in which only he joined in its entirety. Justice Powell's first conclusion, joined by four other justices, subjected the reverse discrimination program to the same scrutiny extended to invidious discriminatory statutes invalidated by the Court in *Brown v. Board of Education* and *Loving v. Virginia,* and invalidated Davis' program.[63] However, in another part of the opinion joined by four different justices, Powell held that the medical school was not precluded from ever using racial classifications, so long as the program was narrowly tailored to a compelling interest.[64] Powell declared that race could be a factor in the admission process so long as it was a properly devised program servicing a substantial interest.[65] An interest that could be legitimately served by race included ethnic diversity, when it was part of a broader interest of genuine academic diversity.[66]

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cases or political redistricting cases, particularly when the focus is on the admission and hiring processes. The scope of this paper extends to race-based scholarships and admissions, two particular areas in education which are similar to hiring practices in employment. This is not to suggest that education and employment are similar in every respect, or that all racial classifications in public employment and public education should be governed by the same principles. *See* Ellen R. Dassance, Note, *Affirmative Action Implications For Colleges and Universities Beyond The Scholarship and Student Admissions Areas*, 5 WM. & MARY BILL RTS. J. 661 (1997). Education programs outside of admissions can invoke very different standards, and are beyond the scope of this paper. Because this paper is limited to student admissions and scholarships, employment cases and education cases can be considered to invoke the same principles.

59. 438 U.S. 265 (1978).

60. Although Caucasians could apply to be considered economically and educationally disadvantaged, the Special Committee did not accept any Caucasians who so applied. Powell reasoned that the Special Committee decided that only minorities could be economically and educationally disadvantaged. *Bakke*, 438 U.S. at 276.

61. *Id.* at 275.

62. *Id.*

63. Powell declared that the Davis admission program was unlawful and ordered that plaintiff Bakke be admitted. Justices Burger, Stewart, Rehnquist, and Stevens concurred in that judgment.

64. Justice Powell reversed the lower court's opinion that enjoined Davis from ever considering the race of any applicant. *Bakke*, 438 U.S. at 320. Justices Brennan, White, Marshall, and Blackmun concurred in that judgment.

65. *Id.*

66. *Id.* at 317-18. Powell declared that while ethnic diversity could not be a compelling interest by itself, a school could have a compelling interest in creating a student body that included

Although *Bakke* is the only case adjudicating a constitutional challenge to an affirmative action program, the long involvement of the judiciary in school desegregation provides much judicial pronouncement on the place of race in education.[67] *Brown's* mandate of desegregation began an era of direct judicial control over many school districts. In *Green v. County School Board of New Kent County*,[68] the Court described several factors in which courts can order desegregation. Recently, the Court has relaxed constitutional requirements for public schools, and provided principles for lower courts to apply in releasing schools from the judicial control instituted to enforce constitutional protection of minorities.[69] These principles set schools free from judicial control, but declare that schools are still responsible for continuing to provide equitable education and that judicial control can still be ordered to enforce that responsibility.[70]

Such liability is unique to public education. Government programs other than education share no comparable history of judicial monitoring.[71] This threat of liability creates unique concerns for public schools—concerns making educational programs different from other government programs.

Wygant, *Bakke*, and the school desegregation decisions imply that there are some uses of race that are legitimate, and that context matters when examining racial classifications in government programs. These propositions were not overruled in *Adarand* and *Croson*, despite the changing judicial alignments that led to the application of strict scrutiny to all racial classifications.

In *Croson*, the Court specifically criticized the lower court of appeals because it did not appropriately consider the differences in

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"genuine academic diversity." *Id.* at 315. He cited to the plan then used by the admission committee at Harvard, known as the "Harvard plan." *Id.* at 316. In that plan, quotas of minority students were not established. However, when the committee decided which students to admit, it could pay attention to the distribution of the types and categories of students seeking admission. *Id.* at 316-17. In that determination, race or ethnic background can be deemed a "plus" in an applicant's file. *Id.* at 317. Powell considered such a program to be constitutional because it treated students as individuals, not as members of a racial or ethnic group. *Id.* at 318.

67. *See* Freeman v. Pitts, 503 U.S. 467 (1992); Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237 (1990); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970); and Green v. County Sch. Bd., 391 U.S. 430 (1968).

68. 391 U.S. 430 (1968).

69. *See Freeman*, 503 U.S. 467.

70. *See id.* at 490.

71. The history of judicial monitoring of public schools through desegregation orders may make desegregation decisions even more relevant than standard strict scrutiny decisions when applied in other contexts, such as contracts or political redistricting. *See* Note, *The Constitutionality of Race Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 HARV. L. REV. 940 (1999) (arguing that "although the Supreme Court's decisions on race-conscious admissions in other contexts are relevant in evaluating race-conscious admissions programs in elementary and secondary schools, no consideration of these programs can be divorced from the history of desegregation litigation and the special context of the public school").

context between programs where government acts as employer and those where government is a contractor.[72] The Court of Appeals in *Croson* analogized to *Wygant* to invalidate the subcontractor preference, stating that a government preference can only be used to remedy discrimination by the government actor itself, not to remedy private discrimination.[73] The Court's opinion, authored by Justice O'Connor, did not so narrow the City of Richmond's power, and held that "on the question of the city's competence, the Court of Appeals erred in following *Wygant* by rote in a case involving a state entity which has state law authority to address discriminatory practices within local commerce under its jurisdiction."[74] A different analysis was required when applying strict scrutiny to a legislature's governing law than to a public institution's administration of its own employees.

The converse of Justice O'Connor's holding in *Croson* is also true; lower courts should not automatically apply *Croson* and *Adarand* to preferences in employment and public school admissions processes.[75] Public schools are subject to different obligations and responsibilities and require subtly different applications of strict scrutiny.

Adarand and *Croson* help establish three propositions: (1) all race-based classifications are subject to strict scrutiny;[76] (2) strict scrutiny cannot be automatically fatal and render all uses of race illegitimate;[77] and (3) different government uses of race require different analyses.[78]

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72. *Croson*, 488 U.S. at 492.

73. The preference used by the City of Richmond was to favor subcontractor construction companies; however, there was no direct evidence that the city government itself had discriminated against subcontractors. The Court has generally held that a public institution can use a racial classification to remedy past discrimination only when that discrimination was by the government actor in question. *See Wygant*, 476 U.S. at 276 (rejecting the compelling interest of remedying societal discrimination to justify a government employment plan that favored minorities); *See also* Part III, *infra*. The 4th Circuit Court of Appeals invalidated the Richmond government's contracting preference partly on these grounds. The Supreme Court affirmed the 4th Circuit's decision, but held that this analysis was improper. The context of *Wygant* involved a government unit–a public school–advancing a racial preference within its own workforce. In *Croson*, the City of Richmond was a sovereign government using a racial preference within its jurisdiction. The Court declared that the city could use a preference to prevent itself from being a passive participant in wider discrimination, a use not allowed to the public school in *Wygant*. Thus, Justice O'Connor and the majority deliberately rejected a rote application of *Wygant* to the situation in *Croson*.

74. *Croson*, 488 U.S. at 492.

75. Public school admissions resemble government employment policy more than they do government exercise of sovereignty. Public schools have no coercive power of law over their students, but only have power over which applicants will be admitted, and which matriculants are permitted to stay. Similarly, public schools' employment policies do not involve coercion of law, but only the power to decide which applicants will be hired, and which employees remain. The Court has held that school admissions are similar to employment decisions in other contexts. *See Wygant*, 476 U.S. at 284 n.11 (plurality opinion), citing to *Defunis*.

76. *Adarand*, 515 U.S. at 236; *Croson*, 488 U.S. at 494.

77. *Adarand*, 515 U.S. at 237 (declaring that "we wish to dispel the notion that strict scrutiny is 'strict in theory, fatal in fact'" (*quoting* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980))).

78. *Croson*, 488 U.S. at 492 (rejecting lower court's rote application of *Wygant*, a case involving

III. Contextual Strict Scrutiny and Racial Preferences in Education

A. Racial Preferences and Quotas Must be Narrowly Tailored to Serve Compelling Government Interests.

Strict scrutiny is the dominant analytical framework when addressing fundamental rights under the equal protection clause of the Constitution.[79] Race is a particular subset of equal protection clause analysis. As a threshold inquiry, it must be determined what types of educational policies constitute racial classifications that are subjected to strict scrutiny.

Racial preferences in admissions and attendance boundaries can take various forms. They generally fall into two categories. The first includes rigid racial quotas, where a percentage of admissions are reserved for a particular race.[80] The second category includes admissions processes using race as one of several factors for admission.[81] Typically, the candidate's race is operationalized and

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government's relationship with its own work force, to the situation in *Croson*, in the context of the City of Richmond exercising legislative authority over procurement policies).

79. The fourteenth amendment protects an array of individual rights, only a portion of which are dealt with in this paper. The amendment protects individuals in two different spheres: unequal treatment because of membership of a suspect class, and deprivation of a "fundamental right." The fundamental rights doctrine began with *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the Court invalidated an Oklahoma statute that authorized the sterilization of certain classes of criminals. The court recognized the fundamental rights include voting, access to the judicial process, interstate travel, welfare, and privacy. *See* STONE, ET AL, CONSTITUTIONAL LAW (3d ed. 1996). The Court has also struggled with the issue of whether education is a fundamental right, particularly the right to equitable educational opportunity. *See* Stuart Biegel, *Reassessing The Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy after Kadrmas v. Dickinson Public Schools*, 74 CORNELL L. REV. 1078 (1989); John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1217 (1999).

80. Quotas were first described as such in *Bakke*, where the Court invalidated a University of California Davis medical program that reserved sixteen seats for applicants who were members of minority groups or educationally or economically disadvantaged. *See Bakke*, 438 U.S. 265, 274-75. K-12 schools can also employ quotas by establishing maximum percentages for particular racial group attendance in a school, or even mandating that no racial group exceed a certain percentage. For example, the San Francisco Unified School District was required by a 1983 consent decree to develop an attendance system in which each school had at least four racial or ethnic groups represented and no racial group constituted more than 45% of each school's population. *See* Brian Ho v. San Francisco. Unified Sch. Dist., 147 F.3d 854, 856-57 (9th Cir. 1998). Although the defendants argued that the consent decree requirement did not mandate a racial quota system, the Court nonetheless declared it a racial classification subject to strict scrutiny since students were required to identify their race and since each school was subject to a racial cap in the form of the 45% cut-off for any race or ethnicity. *Brian Ho*, 147 F.3d at 862.

81. In *Bakke*, Justice Powell ratified this kind of racial classification by lauding the "Harvard

added to other quantitative or qualitative assessments to determine admission.[82] The difference between the two may sometimes be only one of degree, dependent upon how strongly race is quantified in the latter category.[83]

Racial quotas and preferences in the admissions process are distinct government polices. As the Court has explained, they most resemble hiring quotas and preferences used in employment.[84] Decisions that examine hiring quotas are thus relevant to analyzing admissions preferences. Admissions preferences that use race on their face, are subject to strict scrutiny.[85] However, facially neutral statutes and classifications are subject to strict scrutiny only if they are so bizarre or irrational that they can be explained only by race.[86] The Supreme Court has addressed facially neutral statutes involving race in the context of race-conscious electoral redistricting.[87] Electoral districts drawn to create "majority-minority" districts were subject to strict scrutiny when traditional districting criteria were subordinated to matters of race.[88] Implied in the political redistricting cases was that a scheme that used race as a minor factor would be deemed facially neutral and spared strict scrutiny, so long as the districts were not so bizarre or irrational that they could be explained only by race. In *Bakke*, Justice Powell hinted in dicta that an admission program that uses race as a plus in an applicant's file but does not create specially reserved

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plan" as a constitutional use of race in higher education admissions. The Harvard plan involved Harvard University's admissions policy, which did not reserve a percentage of seats for minority applicants, but exercised discretion to use a student's race as an affirmative factor when that student would contribute to racial diversity of the student body. *See Bakke*, 438 U.S. at 316-17.

82. The use of race is likely to be more nuanced than what is described here. Some systems do not target particular racial groups, but only evaluate the degree to which a prospective candidate contributes to the school's diversity. That evaluation is then operationalized and added to the other quantitative assessments of the student. Another system would be to mandate a certain percentage for each racial group, and then assess whether the student helps the school maintain that percentage. *See* Samuel Issacharoff, *Bakke In the Admissions Office and the Courts: Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669 (1998).

83. The difference between the two can be especially difficult when racial preferences, theoretically only using race as a plus and not quota, employ set-asides and minimum floors of certain racial groups as prerequisites for admission. Furthermore, quantifying a student's contribution to diversity, which logically changes with the composition of the student body, is complicated when admissions committees must predict which students will actually accept offers for admission and plan accordingly. See Samuel Issacharoff, *Bakke In the Admissions Office and the Courts: Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669 (1998) for an excellent description of the differences between hiring quotas and preferences and their relationship within the entire admissions process.

84. *Wygant*, 476 U.S. at 283-84 n.11.

85. That classifications which use race in some form are subject to heightened scrutiny is evident in Adarand v. Pena, 515 U.S. at 212-13.

86. Miller v. Johnson, 515 U.S. 900, 913 (1995).

87. *See* Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630, 644 (1993) (holding that a facially neutral electoral redistricting scheme that could only be described as racially-motivated districting was subject to strict scrutiny).

88. *Miller*, 515 U.S. at 916.

ethnic seats was facially neutral.[89] This implies that such preferences should not be subject to strict scrutiny unless race clearly dominates the admissions process.

However, it is likely that the Court will subject even limited educational preferences where race is a minor factor to strict scrutiny. While it is possible to design an admissions process that subordinates race to many other factors, the Court is likely to treat even the slightest use of race with strict scrutiny. In *Adarand*, the Court isolated the racial component of the Subcontracting Compensation Clause and subjected it to strict scrutiny. That the racial element was subordinate to many other factors was not deemed relevant to the Court's decision to apply strict scrutiny.[90] Lower federal courts have rejected arguments that such preferences are facially neutral.[91]

The modern Court has interpreted the precedents invalidating invidious discriminatory statutes, such as *Brown v. Board of Education* and *Loving v. Virginia*, as creating a constitutional principle that government must be completely race-neutral.[92] The Court's explanation for treating benign and remedial discrimination with strict scrutiny contains strongly emphatic dismissals of any use of race classifications by governmental agencies.[93] According to the Court, using race breeds

89. *See Bakke*, 438 U.S. at 318 (declaring that "A facial intent to discriminate, however, is evident in [Davis's] preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process.").

90. *See also* Cedric Merlin Powell, *Hopwood: Bakke II and Skeptical Scrutiny*, 9 SETON HALL CONST. L.J. 811, 828 (1999) ("What is striking about the *Adarand* decision is that the highway subcontracting program at issue in that case was not a purely race-conscious remedy.").

91. *See* Brian Ho v. San Francisco Unified Sch. Dist., No. C-78-1445, WHO, 1998 U.S. Dist. LEXIS 21406, at *23 (N.D. Cal., Oct. 20, 1998). Subsequent to the 9th circuit's holding that the consent decree's racial classification system would be subject to strict scrutiny. *See Brian Ho*, 147 F.3d 854 (1998) (the parties settled and agreed to develop a non-racial attendance program). The district developed a program that used race as a factor. The Court rejected the district's argument that the racial redistricting cases mandated that a plan that used race as a minor factor was not subject to strict scrutiny. *Id.*

92. *See Adarand*, 515 U.S. at 223 (declaring that some cases create a principle that all racial distinctions are objectionable); Richmond v. Croson, 488 U.S. at 493 (finding that *Shelly v. Kramer* and other cases invalidating invidious discrimination dictate that the fourteenth amendment protects persons' rights as individuals, regardless of race), Miller v. Johnson, 515 U.S. 900, 911 (declaring that Court decisions preventing segregation in schools and other public facilities create a principle that the equal protection clause mandates a simple command "that the Government must treat citizens 'as individuals, not as "as simply components of a racial, religious, sexual or national class.'"" (*quoting* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (J. O'Connor dissenting (*quoting* Arizona Governing Comm. For Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083 (1983))).

93. *See Miller*, 515 U.S. at 911-12 (declaring that "[w]hen the state assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"); *Croson*, 488 U.S. at 493 (holding that "[u]nless they are strictly reserved for remedial settings, [racial classifications] may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

racial stereotypes and the idea that a person's race is an indicator of how he or she thinks or performs. However, electoral districting is a unique aspect of governance, separate from government employment and government subsidized education, one where the Court must reckon with substantial congressional involvement[94] and special political considerations. It is probably the only area where race can be used as a factor and still acquire the modifier of "facially neutral" and spared strict scrutiny.[95]

For the recent Court majorities, any use of race, no matter how well-intentioned, contains the seeds for eventual societal destruction.[96] As questionable as these broad generalizations may be,[97] the Court has strongly declared that even minimal uses of race invoke strict scrutiny. Using race as a factor is an express use of race, even if it is only a minor factor.

Thus both rigid racial quotas and flexible racial preferences, including those involving the slightest uses of race, are subject to strict scrutiny. These preferences must be narrowly tailored to serve compelling government interests. "Narrowly tailored" refers to the method, or means, by which government uses racial classifications.[98]

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94. The Voting Rights Act of 1965 directly mandates that the Justice department monitor certain jurisdictions for deprivation of voting rights based on citizens' race. The Court has declared that the right to vote can be deprived when a citizen's voting power is diluted as well as when the citizen is prevented from voting. *See* Allen v. State Bd of Elections, 393 U.S. 544, 569 (1969). In 1982, Congress amended the Voting Rights Act to include a cause of action against jurisdictions which diluted minority voting power but did not violate the Constitution. It was thus the context of substantial congressional involvement in which the Court examined the constitutionality of race-based redistricting.

95. After *Miller v. Johnson*, it is extremely difficult to imagine even a "majority-minority" district that used race as one of many factors that would not be subject to strict scrutiny. In *Miller*, compact and contiguous districts of majority African-Americans were created in a process that used race but conformed to districting criteria such as compactness and contiguity. 515 U.S. at 907-08. Nonetheless, the Court held them subject to strict scrutiny and invalidated the districting scheme. *Id.* at 927.

96. *See* Shaw v. Reno, 509 U.S. 630, 643 (1993) (declaring that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility").

97. *See* Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1601 (1994) (criticizing J. O'Connor's use of the term "political apartheid" to describe race-conscious districting given that racial segregation is not an obvious descriptor of a majority-minority district); T. Alexander Aleinkoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 611-12 (1993) (arguing that attempts to give political minorities adequate representation are not equivalent to denying racial groups a role in the political process).

98. For the purposes of this paper, the "means" of government uses of race in education include race-based quotas and racial preferences, whether for public scholarships for education or actual admission, as well promotion and transfer decisions. *See* Part I *supra*. These are certainly not the only methods of using race. *See* Ellen R. Dassance, Note, *Affirmative Action Implications For Colleges and Universities Beyond The Scholarship and Student Admissions Areas*, 5 WM. & MARY BILL RTS. J. 661 (1997). However, in admissions and scholarships, they tend to be the dominant form. Narrowly tailored will be primarily considered in Part III (D).

Compelling interests are the goals, or ends, to which government can direct race-based policies.

Although all uses of race are subject to strict scrutiny, not all uses of race are invalidated by it. An important corollary to the principle that context matters when applying strict scrutiny is that context matters when determining acceptable compelling interests. The context of the racially discriminatory program is also important. Even in *Adarand*, the Court remanded the case for the ultimate decision of the program's validity under strict scrutiny.[99] The strict scrutiny decisions of *Adarand* and *Croson* are a necessary starting point, but do not complete the analysis. Compelling interests for educational preferences should be determined by Supreme Court educational affirmative action decisions and public school desegregation decisions.

B. Normative Inquiry: Compelling Interests in Education

The major areas of preferences addressed directly by the Court include education, employment, government contracts, and electoral redistricting. As explained above, Court decisions examining preferences in employment and education are most relevant. These decisions point to a particular framework for analyzing preferences in education, both at the compelling justification prong and the narrowly tailored prong.

Bakke is the only Supreme Court decision that speaks directly to race conscious preferences in education.[100] Although it has not been expressly overruled, the precedential value of *Bakke* has been questioned by commentators and courts because of subsequent decisions analyzing public race conscious classifications.[101] Nonetheless, *Bakke* explicitly recognizes two different compelling interests: remedying past discrimination and achieving a diverse student body.[102] As shown below, subsequent Court decisions have approved of these interests as compelling justifications for affirmative action programs.

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99. *Adarand*, 515 U.S. at 237-39.

100. *Bakke*, 438 U.S. 265.

101. *See* Hopwood v. Texas, 78 F.3d 932, 944-45 (1996). Other courts have assumed without deciding that *Bakke* is valid precedent, reserving the question for the Court. *See* Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Hunter ex rel. Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061, 1064 (9th Cir. 1999).

102. *Bakke*, 438 U.S. at 307.

1. Remedying Past Discrimination

In almost every context, government units have a compelling interest in remedying past discrimination by the government actor. Such an interest is compatible with the equal protection clause, and is even mandated by it.[103] Two kinds of interests are included in the category of remedying past discrimination: (1) eliminating the present effects of past discrimination by the government actor; and (2) eliminating liability for violations of federal anti-discrimination laws.[104] Both are discrete inquiries that should be analyzed separately.

Sovereign government organs can use their spending power to remedy racial discrimination through racial preferences in a jurisdiction if necessary, to respond to the practice and lingering effects of racial discrimination.[105] Public K-12 schools have similar constitutional authority to remedy vestiges of discrimination by those schools.[106] Schools that do not enact such remedies can be subject to judicial oversight and injunction.

Relatedly, government units are allowed to use race to avoid present statutory civil rights liability.[107] Government units, including public schools, can engage in affirmative action programs to avoid liability for employment discrimination under Title VII of the 1964 Civil Rights Act.[108] Public schools are prohibited by Title VI of the 1964 Civil

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103. The Court has recognized that the equal protection clause requires public schools to eliminate every vestige of racial segregation and discrimination in schools. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1985); *Id.* at 290 (O'Connor, J., concurring) (declaring that the remediation of government discrimination is of unique importance).

104. *Id.*

105. *See* , 488 U.S. at 492 (ratifying as compelling, a public entity's interest in ensuring that public dollars drawn from citizens' taxes do not "serve to finance the evil of private prejudice").

106. *See* Green v. County Sch. Bd., 391 U.S. 430 (1968); *See* Freeman v. Pitts, 503 U.S. 467 (1992).

107. *See Wygant*, 476 U.S. at 274-75.

108. Title VII of the Civil Rights Act of 1964 declares:

> It shall be an unlawful employment practice for an employer
>
> (1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2000). The Court has held that employers can be liable for employment policies that create either a disparate impact or a disparate treatment of minorities based on their race. The Court has accepted statistical proof of disparate impact as evidence of a compelling interest for purposes of remedial affirmative action. See *Wygant*, 476 U.S. at 274-75.

Rights Act[109] from discriminating against anyone on the basis of race. Title VI cases employ the same principles as Title VII cases, and courts have cited cases interpreting one law under the other.[110] It follows that a public school can employ an affirmative action program to avoid liability under Title VI.

2. *Diversity*

More controversially, the Supreme Court in *Bakke* allowed diversity as a compelling interest justifying the use of race.[111] While invalidating a special admission program at the University of California, Davis that reserved seats for African-Americans, Hispanics, Native Americans, or Asian-Americans, *Bakke* held that "genuine academic diversity" of a public school's student body was compelling and a student's race could be one of several factors used.[112] A student's race can strengthen his or her application for admission, so long as that applicant competes as an individual against all other applicants. Justice Powell hinted that such a program would not evidence an intent to discriminate but, rather, would be considered facially neutral such that strict scrutiny would not apply. Although this dicta is most likely disavowed by the current Court in its electoral redistricting decisions,[113] many commentators have argued that the broader conclusion that a program creating academic diversity is compelling, and that race can be part of that diversity, has not been reversed.[114] Some circuit courts, notably *Hopwood v. Texas*,[115] have stated that the acceptance of diversity

109. Title VI of the 1964 Civil Rights Act provides that "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2000).

110. *See* Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518 (M.D. Ala. 1981) (applying Title VII disparate impact analysis to university admissions); Erik V. v. Causby, 977 F. Supp. 384, 390 (E.D. N.C. 1997) ("[L]itigants under Title VI need only show the disparate impact of the challenged policy . . . ."); *see also* Hagit Elul, Note, *Making The Grade, Public Education Reform: The Use of Standardized Testing To Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 516 (1999).

111. *Bakke*, 438 U.S. 265, 315-17.

112. *Id.* at 317.

113. After *Miller v. Johnson* and *Adarand v. Pena*, the Court is likely to subject any use of race to strict scrutiny. *See generally* Part II(a),*supra*.

114. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 391-92 (1998); Akhil Reed Amar & Neal Kumar Katyal, *Symposium on Affirmative Action: Bakke's Fate*, 43 UCLA L. REV. 1745 (1996).

115. 78 F.3d 932 (5th Cir. 1996).

as a valid compelling interest has been implicitly overruled by the Court in *Adarand* and *Croson*.[116]

Contrary to the holdings of these courts, the Supreme Court has not foreclosed diversity or other compelling justifications. Courts have argued that *Adarand* and *Croson* both imply that only remedial justifications are allowable uses of race. The precise holding of *Adarand* is that all government racial classifications are subject to strict scrutiny, regardless of the race benefited or burdened.[117] The Court remanded the case to the lower courts for a determination of whether the classifications were narrowly tailored to compelling government interests.[118] The lower court was ordered to determine whether the proffered interests were compelling. There was no instruction as to what interests were compelling, only that the determination must "conform to the Court's strict scrutiny cases." The Court did not need to decide which interests were compelling. The *Adarand* Court reserved that issue, and instructed the lower court to make that determination in light of past Court decisions.

The Court has stated that strict scrutiny should be used to ensure that the interest furthered is "strictly remedial."[119] However, Justice O'Connor's opinion was primarily a defense of why strict scrutiny, rather than intermediate scrutiny,[120] should apply to preferences proffered to remedy past discrimination, not an explanation of which interests were compelling. Justice O'Connor was fearful that intermediate scrutiny would make it easy for a government to declare its interest remedial when it was really serving another illegitimate purpose.[121] O'Connor did not expressly state that only remedial interests were allowed, and did not foreclose other interests.

In *Croson*, Justice O'Connor, writing for the Court, discussed the *Bakke* decision, citing it favorably for the proposition that all racial

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116. *Hopwood* invalidated the University of Texas's use of racial preferences in its admission process. The *Hopwood* Court rejected diversity as a compelling interest, interpreting *Croson* as overruling Powell's conclusion in *Bakke*. 78 F.3d at 944.

117. 515 U.S. at 235.

118. The lower courts had upheld the statute as narrowly tailored to significant governmental purposes. *Id.* at 237-39.

119. *Id.* at 226 ("'Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are . . . illegitimate notions of racial inferiority or simply racial politics.'") (*quoting Croson*, 488 U.S. at 493).

120. *Adarand* specifically held that government classifications that employ race are subject to strict scrutiny, and must be narrowly tailored to a compelling government interest. *Adarand*, 515 U.S. at 235-36. Its holding reversed Metro Broadcasting v. FCC, 497 U.S. 547 (1990), which held that federal government classifications would be subjected to "intermediate scrutiny," and need only be substantially related to serve important government objectives. *Metro Broadcasting*, 496 U.S. at 564-65.

121. *Adarand* declared that strict scrutiny was necessary since it was not always clear that a preference is "benign," and that more than good motives were needed to justify racial classifications. *See Adarand*, 515 U.S. at 227 (*citing Bakke*, 438 U.S. 265, 298).

classifications deserve the highest scrutiny.[122] The Court did not discuss *Bakke*'s ratification of diversity as a compelling interest, much less overrule it. *Bakke* was never expressly or implicitly narrowed.

Given her importance as a swing vote, Justice O'Connor's opinions are instructive in interpreting the Court's strict scrutiny analysis, particularly in a context not otherwise addressed. Justice O'Connor's concurring opinion in *Wygant* expressly ratified the *Bakke* holding that diversity in higher education was a compelling interest.[123] She also pointed out that the Court's plurality opinion did not preclude other compelling interests that lower courts may develop.

Lower courts have pointed to Justice O'Connor's strong language in *Metro Broadcasting v. FCC*[124] as disapproving of diversity and declaring that only remedial justifications are allowed.[125] Indeed, Justice O'Connor declared that "[m]odern equal protection doctrine has recognized only one interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest."[126] It is instructive that although the first sentence is generally worded, Justice O'Connor's critique of diversity in the second sentence only addresses the issue of "broadcast viewpoints." It was not a general denunciation of diversity. Her dissent primarily criticized the majority's use of intermediate scrutiny, articulating her belief that all government uses of race are presumptively illegitimate, allowed only under the most exceptional of circumstances. She extended this point to conclude that in this situation, broadcast diversity was not compelling.[127] There was no denunciation of diversity in all contexts.

Decisions do not have to be perfectly analogous to the facts of a particular dispute to serve as precedent. Absent other evidence, Justice O'Connor's rejection of broadcast viewpoint diversity as compelling gives valuable insight into her and the Court's view of diversity in education. However, *Metro Broadcasting* was decided only a few terms

122. Richmond v. Croson, 488 U.S. at 493-94.

123. The *Hopwood* opinion refused to acknowledge Justice O'Connor's concurrence, stating that it was "purely descriptive." Hopwood v. Texas, 78 F.3d 932, 945 n.27 (5th Cir. 1996). This interpretation was extraordinarily disingenuous. Justice O'Connor expressly declared that the plurality in *Wygant* was not precluding other compelling interests, and cited favorably to *Bakke* to support this proposition. This general point makes Justice O'Connor's citation to *Bakke* more than "descriptive."

124. 497 U.S. 547 (1990), *rev'd* in Adarand v. Pena, 515 U.S. 200. *Metro Broadcasting v. FCC* held that benign discriminatory statutes were subject to intermediate scrutiny, meaning they need only be substantially related to important governmental objectives. 497 U.S. at 564-65 (1990). The Court then upheld racial preferences in the distribution of broadcast licenses as substantially related to the important government interest of broadcast diversity. *Id.* at 567-68.

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

126. *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting).

127. *Id.*

after *Wygant*, where Justice O'Connor expressly ratified diversity as a compelling interest in higher education and held that other compelling interests were not foreclosed.[128] *Bakke* is the only decision that expressly deals with diversity in higher education. Absent an express reversal in either O'Connor's dissent in *FCC* or in the majority opinions of *Adarand* and *Croson*, courts should not interpret the strict scrutiny decisions of *Adarand* and *Croson* as confining acceptable compelling interests only to remedying past discrimination.

This reaffirms the importance of context when applying strict scrutiny. Broadcast television programs differ markedly from education admissions. *Bakke* pointed to the need for a diverse student body to prepare students for a multicultural world, and the importance of government-sponsored education.[129] These interests are not implicated in broadcast television, and were not presented to the *Metro Broadcasting* court.

The Court has expressly rejected only two interests as not sufficiently compelling: remedying societal discrimination and the role model interest.[130] Both interests were considered too amorphous to appropriately tailor a remedy towards, and as being potentially timeless in reach.[131] Other lower courts have correctly held that other compelling justifications exist.[132]

C. *Evidentiary Inquiry: Empirically Supporting Compelling Interests*

After stating its compelling interest, the government must produce evidence that the interest exists within the school. With this inquiry, the Court leaves the abstract and enters the phenomenal, scrutinizing the components of the race-conscious program and the institution itself. This empirical inquiry is particularly important because it is intimately connected to the narrow tailoring prong. The evidence supporting a compelling interest is ultimately the evidence of the problem to which a preference must be narrowly tailored. The government's racial

128. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1985).

129. *Bakke*, 438 U.S. 265 at 312-13.

130. *See Wygant*, 476 U.S. at 275-76.

131. *Id.* at 276. (The *Wygant* Court believed that allowing schools to justify race conscious teacher hiring preferences by the need for adequate minority role models for minority students would lead to the system of segregation rejected in *Brown v. Board of Education.*).

132. *See, e.g.*, Hunter ex rel. Brandt v. Regents of the Univ. of Ca., 190 F.3d 1061, 1064 (9th Cir. 1999) (holding that the UCLA Graduate School of Education's operation of a research-oriented elementary school dedicated to improving the quality of urban education was a compelling state interest); Smith v. Univ. of Wash. Law Sch., 233 F. 3d 1188, 1198-1200 (9th Cir. 2000).

classification should be tailored towards removing the ills constituting the compelling interest. It is at this juncture that many public institutions fail in defending racial preferences.[133]

Lower courts have much guidance when analyzing a program directed toward remedying past discrimination.[134] There is comparatively little guidance for analyzing diversity, the only other explicitly recognized compelling interest in education. Courts must examine by analogy when considering still other compelling interests. The framework for considering remedying past discrimination must serve for other compelling interests, and courts should apply similar evidentiary standards when examining other compelling interests.

Perhaps the most important legal decision affecting this evidentiary showing is the allocation of the burden of proof, which is discussed later in Part V.

1. Remedying Past Discrimination

A public school has a compelling interest in remedying the effects of its own past discrimination. There are both statutory and constitutional provisions that prohibit schools from discriminating against minorities and command them to remedy any effects of past discrimination.

a. Statutory Liability: A Prima Facie Case Of Disparate Impact

A governmental unit can demonstrate a compelling interest for an affirmative action program by showing a strong basis in evidence that it would be civilly liable for discriminating against minorities unless it created an affirmative program. A strong basis exists when a school can show that it is liable for civil rights violations under Title VII of the Civil Rights Act.[135] Evidence of gross statistical disparities between the number of qualified minorities hired and the number of minorities who

133. The majority of courts have invalidated preferences because of lack of narrow tailoring to at least one compelling interest. *See* Richmond v. Croson, 488 U.S. 469 (1989); *Wygant*, 476 U.S. 267; Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998).

134. In particular, both *Wygant* and *Croson* dealt with the proper analysis of preferences justified by the compelling interest of narrow tailoring.

135. 42 U.S.C. § 2000d (2000). *See Wygant*, 476 U.S. at 275-76.

can be considered for the job can make a prima facie case of Title VII liability.[136] "Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."[137] However, the disparity must be between the number chosen and the "relevant pool" of applicants.[138] Once the proper relevant pool is found, a disparate impact showing a prima facie case of Title VII liability is all that is needed to reach *Croson*'s "strong basis in evidence" standard.[139]

The non-minority plaintiff can rebut the prima facie case by showing that factors other than discrimination created the statistical disparity. The ultimate burden of demonstrating the unconstitutionality of the program and the lack of a prima facie case rests with the plaintiffs.[140] This is as true for a plaintiff suing under a theory of reverse discrimination under Title VII as it is for a minority making a more traditional claim of Title VII liability.[141] *Wygant v. Board of Education*, involving the constitutionality of a school's layoff system that favored minority teacher-employees, expressly placed the burden on the non-minority plaintiff.[142] Justice O'Connor, concurring in the judgment, pointed out that the ultimate burden of proof lies with the non-minority plaintiff suing under a theory of reverse discrimination.[143]

This burden of proof allocation serves a public policy favoring both voluntary efforts by public institutions to prevent civil rights liability and removing the effects of civil rights violations. *Wygant* established that a plaintiff has the burden of proof in a reverse discrimination case. Justice O'Connor reaffirmed the plurality opinion's

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136. When a plaintiff minority cannot show direct intent, the plaintiff has two different theories through which to make a prima facie case of discrimination. The plaintiff can show the defendant exercised disparate treatment of a minority with respect to a non-minority. *See Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983 (1999). After showing disparate treatment, the defendant has the burden of showing that the disparate treatment was the result of business necessity, under Title VII, or educational necessity, under Title VI. The plaintiff can also show that a particular policy has a disparate impact on persons of a different race. *See* Hazlewood Sch. Dist. v. U.S., 433 U.S. 299 (1977) (holding that a prima facie case of employment discrimination can be made through statistical disparities between race, particularly when examined in the context of the company's hiring practices generally).

137. *Richmond*, 488 U.S. at 501 (quoting Hazlewood, 433 U.S. at 307-08).

138. *Id. Richmond* rejected the disparity between minority contractors and minorities in the population because minorities in the population were not the "relevant pool." Other factors, such as the choice of professions of blacks and migrating labor pools, mitigate against using the general population as the relevant pool.

139. *Id.*

140. *Wygant* at 277-78.

141. Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987).

142. *Wygant*, 476 U.S. at 277.

143. *Wygant*, 476 U.S. at 277-278. *See also* Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987) (holding that the burden of proof in showing that a public employer's affirmative action program violates Title VII of the Civil Rights Act of 1964 should rest on the plaintiff non-minorities).

allocation of the burden of proof upon non-minority plaintiffs burdened by affirmative action programs.[144] Concurring in the judgment, Justice O'Connor explained that public institutions should not be required to solicit judicial findings of discrimination to justify affirmative action programs. Such a requirement severely undermines institutional incentives to meet civil rights obligations, and "would clearly be at odds with this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'"[145] The public institution does not have the burden of convincing the court of its liability for past or present discrimination. After the non-minority plaintiff has demonstrated that a racial classification exists, the government has the initial burden of producing evidence supporting means-ends tailoring, including that a "relevant pool" of qualified applicants has suffered discrimination. However, once that evidence is presented, the burden shifts to the non-minority to prove that the "evidence does not support an inference of discrimination and thus a remedial purpose."[146]

The relevant pool analysis applies to claims against educational institutions as well. A school can be liable under Title VI of the Civil Rights Act when its admissions process disproportionately disfavors minority applicants.[147] The school must show that any admissions process discriminating against minorities is justified by educational necessity.[148]

Schools can be liable for relying on placement tests that disproportionately harm minorities.[149] Standardized tests have become politically controversial criteria for evaluating student's abilities, particularly when used to determine advancement and placement within schools.[150] Standardized tests have been criticized for creating disparities in performance between Caucasians and minorities, particularly African-Americans and Latinos.[151] Schools can be held

144. *Johnson*, 480 U.S. at 652-53.

145. *Wygant*, 476 U.S. at 277 (*quoting Bakke*, 438 U.S. at 364 (opinion of Brennan, White, Marshall, and Blackmun)).

146. *Id.* at 292-93 (O'Connor, J., concurring).

147. *See* Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518 (M.D. Ala. 1981) (applying Title VII disparate impact analysis to university admissions); Erik V. v. Causby, 977 F. Supp. 384, 390 (E.D. N.C. 1997). *See also* Hagit Elul, Note, *Making The Grade, Public Education Reform: The Use of Standardized Testing To Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 516 (1999).

148. *See* Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984). This burden allocation completes the mapping of Title VI onto Title VII, where the defendant can maintain as a defense that the policy serves a business necessity. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

149. Board of Educ. of New York v. Harris, 444 U.S. 130 (1979). *See also Riles*, 793 F.2d at 981.

150. *Riles*, 793 F.2d at 981-82. See Elul, supra note 147, for an analysis of standardized testing and liability under Title VI for disparate impact claims by minorities.

151. *See* Elul, note 147.

liable for using standardized tests to make placement decisions when those tests were either originally used to achieve racial segregation,[152] or were used in good faith but disproportionately resulted in harming African-Americans and Latinos.[153] Furthermore, schools can be held liable for failing to admit minorities, or for "tracking" minorities into low-achievement classrooms that merely aggravate existing disparities.[154]

Relevant pool analysis was referenced in *Croson*, where the Court considered a government contracting race-based incentive.[155] The Court rejected several findings, including: (1) a declaration that the classification was remedial; (2) testimony of a single councilperson indicating discrimination in the industry; (3) a finding that minority businesses receive .67% of contracts even though minorities are 50% of the population; (4) a finding of a lack of minority contractors in state and local contractors' associations; and (5) a 1977 congressional determination that the effects of past discrimination had stifled minority participation nationally.[156]

This evidence was deemed insufficient to furnish a compelling government interest. Mere declarations of the remedial nature of the program were easily dismissed as inadequate; a government unit needs more than "good motives" to employ a racial classification. The lone testimony of a single person's perspective on discrimination was similarly insufficient.[157] Most significantly, the proportional disparity between minority contractors and minority population was judged to be the wrong comparison. As explained below, a prima facie case of discrimination under the disparate impact principles of Title VII or Title VI discrimination suits can provide a compelling interest of remedying past discrimination. However, the percentage of minorities in the population was an inappropriate comparator to show a disparate impact that may indicate discrimination against minority contractors, since many other factors such as minority qualifications and minority interests could decrease the number of minorities who eventually become

152. *See* U.S. v. Fordice, 505 U.S. 717, 736 (1992) (finding that a university employing standards based on standardized test scores cannot rest on their objectivity when the standards were initially instituted to maintain segregation).

153. *See Riles*, 793 F.2d at 981-82.

154. Tracking involves measuring students' abilities and placing them in different tracks ranging from academically successful "honors" tracks to low-achieving student classrooms. Measurement can be done by standardized tests, prior grade point averages, or teachers' subjective observations and evaluations. Tracking has been criticized for segregating students according to color rather than ability, and for aggravating existing disparities between non-minorities and minorities. *See* JEANNIE OAKES, KEEPING TRACK (1985).

155. City of Richmond v. Croson, 488 U.S. 469, 501-02 (1989).

156. *Id.* at 499.

157. *Id.* at 500.

subcontractors.[158] Finally, findings of national discrimination and national harm cannot be routinely applied to a local jurisdiction. The findings must be specific to the actual jurisdiction in question.[159]

A public school must provide more evidence than the defendant in *Croson* to show an extant compelling interest. However, *Croson* is only the beginning of the analysis. The case cannot shed much light on the legitimacy of racial preferences employed by public schools that produce more evidence than did the City of Richmond. "Relevant pool" analyses include thorough descriptions of the qualified pool of applicants, special findings of past discrimination, and social scientific evidence of present effects.[160] All are components of extrinsic evidence not considered in *Croson*. It would be inappropriate to compare such complex findings to the minimal evidence offered by the government in *Croson*.

Voluntary efforts by schools to avoid civil rights liability are considered beneficial because they avoid disruptive litigation that drains scarce resources. O'Connor, concurring in *Wygant*, expressly declared that pubic schools should receive deference and leeway to use racial preferences.[161] This public policy highlights a major distinction between educational preferences and *Croson*'s contractor incentives. Although Richmond had a compelling interest in not being a passive participant in private discrimination,[162] the city faced no statutory liability and had no particular civil rights obligations. Schools facing such a dilemma receive more leeway from the Court. In Part IV, it is argued that these and other public policies encourage modifying strict scrutiny when applying it to educational racial preferences.

158. *Id.* at 501. Since there were special qualifications required to become a contractor, the *Croson* Court stated that it was inappropriate to find that evidence that the percentage of contractors who were minority was lower than the percentage of minorities in the general population makes a prima facie case of a disparate impact against minority contracts. The proper comparator would be minorities who were qualified or clearly interested in becoming contractors.

159. *Id.*

160. In *Wessman v. Gittens*, for example, the Boston school district showed a disparity between the achievement scores of Asian-Americans and Caucasians on one hand versus African-Americans and Hispanics on the other, expert testimony from an established expert on racial inequalities in public schools, and on-site testimony from school officials charged with examining racial disparities in the school. *See* Wessman v. Gittens, 160 F.3d at 820-26 (Lipez, J., dissenting) for a complete description of the evidence presented by the Boston School District defending the flexible racial preferences used in its admissions process.

161. *Wygant*, 476 U.S. at 290-91 (O'Connor, J., concurring).

162. *Croson*, 488 U.S. at 492.

b. Constitutional Liability: Vestiges of Past Discrimination

Public schools must comply with constitutional as well as statutory civil rights laws. Schools must provide desegregated and equal educational opportunities to Caucasians and minorities, and remove any vestiges of past discrimination.[163] As with statutory liability, voluntary efforts to remove vestiges of past discrimination and to meet constitutionally mandated civil rights obligations are favored, dictating that the burden of proof be ultimately allocated on the plaintiff non-minority.[164]

Brown v. Board of Education[165] declared educational segregation to be unconstitutional, and ordered public schools to desegregate with all deliberate speed.[166] It began an era of federal judicial supervision over many public schools.[167] Public schools have a constitutional duty not only to end the dual system of de jure segregation, but to remove the vestiges of discrimination from that era.[168]

Minority students can sue to compel public schools to remove the vestiges of discrimination and to compel the adoption of both race-based and race-neutral classifications. The judiciary can order injunctive relief when students suffer from present de jure segregation, or from the

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163. *See* Green v. County Sch. Bd., 391 U.S. 430 (1968).

164. Vestiges of past discrimination were first defined in *Green*, where the Court held that schools were constitutionally mandated to desegregate themselves and to remove any vestiges or remnants of prior segregation in certain facets of the school. *Green*, 391 U.S. at 435. Specifically, *Green* named five areas, later referred to as the "*Green* Factors," where schools must ensure that no segregation exists: faculty, staff, transportation, extracurricular activities, and facilities. *Id.* Differential achievement scores between different racial groups, inferring poor educational quality for the racial group, can be included as a vestige. *See* Freeman v. Pitts, 503 U.S. 467, 493 (1992) (ratifying the District Court's adding of "quality of educational" to the traditional *Green* factors, and stating that "[i]t was an appropriate exercise of its discretion for the District Court to address the elements of a unitary system discussed in *Green*, to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to ensure full compliance with the court's decree"). Vestiges include differential disciplinary action and other disparate educational practices in public schools.

165. 347 U.S. 483 (1954) (*Brown* I).

166. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955) (*Brown* II).

167. Green v. County Sch. Bd., 391 U.S. 430 (1968) (declaring that schools must take affirmative efforts to desegregate schools and remove vestiges of past segregation); Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1970) (ratifying the use of federal court-ordered busing to attain desegregation). *See Freeman*, 503 U.S. at 472 (declaring *Green* to be a turning point in desegregation law ending the intransigence and inaction that followed *Brown* II). See GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 1996 7-19 for an excellent history of federal desegregation orders.

168. Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 249-50 (1990) (requiring good faith compliance with desegregation orders and eliminating the vestiges of discrimination before desegregation orders are removed). *See also Wygant*, 476 U.S. at 277 (declaring that public schools "are under a clear duty to eliminate every vestige of racial segregation and discrimination in the schools").

effects of vestiges of past discrimination. Judicial determinations of whether a school no longer discriminates against minorities are governed by a series of Court desegregation decisions beginning with *Green v. County School Board of New Kent County.*[169] In *Green*, the Court determined whether a school that had adopted an officially race-neutral "freedom of choice" plan conformed to the constitutional mandate that "separate but equal" policies be removed from public education.[170] Under the New Kent County School Board's plan, African-American students could choose to attend formerly Caucasian-only schools, but no attendance system required desegregation.[171] It could occur only by choice. However, the school had suffered from de jure racial segregation for so long that few African-American students could withstand the social pressures and intimidation experienced when they attempted matriculation at an Caucasian-only school.[172] The School Board took no affirmative actions to desegregate. The Court decided that it had the power not only to order schools to abolish segregation, but to remedy the effects of past discrimination.[173] It declared that the Board must not only abolish laws that mandate segregation, but must remove the effects of previous segregation, and has a "continuous duty to take whatever action may be necessary to create a truly non-racial system."[174] The school must be unitary in every facet: faculty, staff, transportation, extracurricular activities, and facilities.[175] In addition to these factors, the Court has ratified the monitoring of the quality of education given to minorities and non-minorities.[176]

The school district has the burden of showing that it has achieved unitary status and that no student suffers from vestiges of discrimination in any of the *Green* factors.[177] The school district must show that for each of these factors, the school has achieved unitary status such that minority students are no longer disadvantaged.[178]

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169. 391 U.S. 430 (1968).

170. *Id.* at 437.

171 *Id.* at 433-34.

172 *Id.* at 440-41.

173. *Id.* at 438.

174. *Id.* at 440 (*quoting* Bowman v. County Sch. Bd. of Charles City County, 382 F.2d 326, 333 (4th Cir. 1967)).

175. These factors have been known as the "Green" factors, and courts have used them to judge schools' compliance with the Constitution. *See* note 163. *See also* Freeman v. Pitts, 503 U.S. 467, 492-93 (1992).

176. *See Freeman*, 503 U.S. at 492-93. In *Freeman*, the district court examined whether the School District was providing adequate "quality of education" to minorities as compared to non-minorities, in addition to the enumerated *Green* factors. *Freeman*, 503 U.S. at 473. On review, the Supreme Court approved of the lower court's examination of an additional factor as illustrating that the *Green* factors need not be a rigid framework, and of illustrating that federal courts can fashion flexible remedies in their equitable discretion. *Freeman*, 503 U.S. at 492-93.

177. *Id.* at 494.

178. *Id.*

Courts can release schools from injunctions when the districts have complied in good faith with previous desegregation orders and have eliminated vestiges of de jure discrimination.[179] Courts can also remove judicial control from any factor for which the school has attained unitary status.[180] However, courts can retain judicial control over any factors that have not attained unitary status.[181] Lower courts have discretion to maintain or reject judicial controls, subject to review by appellate courts.

Freeman v. Pitts and its related desegregation cases declared that schools should be released from judicial control over any factors in which there cannot be shown remaining vestiges of discrimination. However, it held that public schools still retain the responsibility for removing the effects of past racial discrimination, even where those effects were not enough to justify judicial liability.[182] In fact, Justice Kennedy's majority opinion informed schools that while they can retain control over school admissions, they have the duty and responsibility to ensure that the pernicious effects of racism and discrimination do not interfere with the education of minority children:

> Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility.[183]

The Court did not limit the school's responsibility of remedying the effects of past de jure discrimination, but also included present societal discrimination. *Freeman* places a burden on schools to ensure that broader societal discrimination does not affect education. Granted, it did not require or even encourage schools to use race conscious classifications. Nonetheless, the burden on schools remains high. Refusals to prevent the effects of racism and discrimination from permeating the education process can lead to judicial monitoring.

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179. *Dowell*, 498 U.S. at 249-50.

180. *Freeman*, 503 U.S. at 489.

181. *Id.* The term "unitary" has not been expressly defined by the Supreme Court, and the determination of unitary status for a Green factor is left to the federal court applying traditional equitable principles. *See Dowell*, 498 U.S. at 245 (declaring that "it is a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution").

182. *Freeman*, 503 U.S. at 490.

183. *Id.*

Furthermore, once a plaintiff has demonstrated an imbalance in a *Green* factor, the school has the burden of showing that the imbalance is not traceable to past de jure discrimination.[184]

Justice Blackmun's concurrence in the judgement, which Justices O'Connor and Stevens joined, further explained that the school must show that its own policies did not contribute to current segregation or imbalances.[185] It was not enough to show that external factors beyond the school's control predominantly caused the imbalance.

Simply applying race-neutral measures to a previously segregated school may not be enough to prevent constitutional liability. In *United States v. Fordice*,[186] the Court contemplated whether the University of Mississippi could be released from a judicial desegregation order because it had adopted race-neutral admissions policies such that all students had the freedom of choice to enter any school. The Court held that the University must eradicate all policies and practices of the prior de jure system, including neutral policies that perpetuate past discrimination.[187] "That college attendance is by choice and not by assignment does not mean that race-neutral admission policies cure the constitutional violation of a dual system."[188]

The Court found that several university policies were race–neutral on their face but nonetheless restricted the choices of racial minorities.[189] Four policies in particular excluded minorities: "admissions standards, program duplication, institutional missions assignments, and continued operation of all eight public universities."[190] The admissions standards included a facially neutral standardized test. When the University officially ended its de jure segregation, the minimums for admission to the three flagship historically white schools was deliberately set at a number so that the majority of whites could be admitted and the majority of African-Americans excluded.[191] Because the admission policy was traceable to a de jure system, was originally adopted with discriminatory intent, and had present discriminatory effects, the Court ordered that judicial control remain.[192] Under *Fordice*, affirmative efforts may be required when the effects of de jure segregation are still present and exacerbate re-segregation. Neutral standards such as standardized test scores are subject to liability if they are traceable to efforts to maintain de jure segregation or evade federal desegregation orders.

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184. *Id.* at 494.
185. *Id.* at 509 (Blackmun, J., concurring in the judgment).
186. 505 U.S. 717 (1992).
187. United States v. Fordice, 505 U.S. 717, 729 (1992).
188. *Id.*
189. *Id.* at 732-33.
190. *Id.* at 733.
191. *Id.* at 734.
192. *Fordice*, 505 U.S. at 734.

Admittedly, the desegregation decisions of the early 1990s have lessened the probability of liability. Schools only have to demonstrate unitary status for a few years, given that local control of education is ultimately favored by the Court and a major influence of the contemporary desegregation decisions.[193]

Nonetheless, the quality of education given to minorities when compared to non-minorities remains a salient factor by which schools can be judged. *Freeman* and *Fordice* dictate that schools are not left completely off the hook. They have a responsibility to ensure that there are no effects of past segregation and that past segregation does not cause even some present disparate achievement.[194] The threat of liability and judicial control of local schools has inspired voluntary efforts to remove the vestiges of discrimination.[195]

Schools that use race-conscious preferences fall into a double bind, for they then become liable for discriminating against non-minorities. However, voluntary efforts by public schools to remove vestiges of discrimination through race-based classifications should be scrutinized differently from judicially imposed racial preferences classifications to remove those vestiges.[196] While judicially-imposed preferences involve federal intrusion into local government control and have been disfavored, voluntary action by schools is favored.[197] *Freeman* and its progeny released schools from judicial control specifically to allow schools to voluntarily provide equitable education.[198]

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193. Prior to *Freeman v. Pitts*, 503 U.S. 467 (1992), courts could maintain judicial control when any of the *Green* factors showed remnants of past discrimination. Together, *Freeman* and *Dowell* declared that public schools need only show a few years of compliance with desegregation orders to be released from court monitoring. See GARY ORFIELD AND SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVOLUTION AGAINST BROWN V. BOARD OF EDUCATION (1996) for a critique of *Freeman*, *Dowell*, and other 1990s desegregation decisions relaxing judicial control over public schools.

194. Furthermore, the sudden relaxation of the Court's supervision may prove illusory, given the tendency for constitutional law to shift when changing political alignments result in different judicial appointees. Schools must consider all of these factors when determining whether their educational policies satisfy constitutional prerequisites.

195. Although the Court's requirements have been relaxed, minority plaintiffs that document substantial present effects of past discrimination can still solicit judicial control. *See Freeman*, 503 U.S. at 490 (school systems unsure of their compliance with the Constitution are thus threatened with judicial liability).

196. In some cases, the procedural posture of the school district has changed. Where once the district opposed the classifications, they now support and defend it. *See* Brian Ho v. San Francisco Sch. Dist., 147 F.3d 854 (9th Cir. 1998). In these situations, the program should be considered a voluntary program of preferences and analyzed as such, not as a judicially mandated remedy.

197. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 290 (1985) (O'Connor, J., concurring in the judgment).

198. *Freeman*, 503 U.S. at 490. The *Freeman* Court held that returning schools to local control was "essential to restore their true accountability in our governmental system." *Id.* Desegregation orders must therefore be temporary measures ultimately ending with a return to local control.

In equal protection cases brought by non-minorities, plaintiff non-minorities bear the burden of showing that these voluntary programs are no longer necessary because there are no vestiges of discrimination to remedy.[199] *Wygant* explained that the burden shifting of Title VII applied equally to constitutional challenges. That burden allocation is unchanged by the Court's relaxation of judicial monitoring in *Freeman*'s desegregation doctrine. Although the judiciary can only impose race-conscious remedies on public schools in the most serious situations, public schools receive more deference when voluntarily using race-conscious remedies. The context of education makes these preferences different from the contractor decisions of *Croson* and *Adarand* or the electoral redistricting decisions of *Miller v. Johnson* and *Shaw v. Reno*. Educational preferences need to be examined in relation to the Title VII frameworks, which employ burden shifting to help protect public institutions from excessive liability. Important distinctions lie between judicially-mandated affirmative action and voluntary affirmative action. Part V will show that the Court has a strong policy of encouraging voluntary efforts including affirmative action, a policy that justifies placing the ultimate burden on non-minority plaintiffs.

2. *Diversity and Other Compelling Justifications*

As discussed above, the Court has recognized diversity in the context of higher education and has not foreclosed other compelling justifications in its application of contextual strict scrutiny. Due to the contextual nature of such preferences and interests, the Court has not spelled out the evidentiary framework as it has for remedying past discrimination. In Part V this paper shows that the best approach would be to replicate the burden-shifting mechanism of remedying past discrimination. Once the non-minority plaintiff has demonstrated a race-based classification, the burden is on the government to show that a compelling justification exists, that there is acceptable social scientific evidence, and that the preference is narrowly tailored to that evidence. Then, the ultimate burden lies with the plaintiff to show that the evidence cannot support the existence of a compelling justification, or that the preference is not narrowly tailored to that justification.

199. *See Wygant*, 476 U.S. at 277-78.

D. Narrow Tailoring

In Sections B and C, it was shown that the Court must first determine what kinds of compelling interests can justify an affirmative action program and how the Court determines whether a school has furnished enough evidence of that compelling interest. Once the evidentiary standard is met, the public institution must show that the preference is narrowly tailored to the compelling interest proffered. This inquiry examines the process of the affirmative action program, be it a preference or a quota. Several factors inform the Court's analysis. First, the preference must not be overinclusive and benefit minority groups who are not within the compelling interest,[200] nor can it be underinclusive and ignore specific minorities that fall within the interest. The government must consider race-neutral means toward the compelling interest, particularly if it appears that minorities are unable to gain admittance because of race-neutral barriers, such as poverty and lack of educational resources, rather than discrimination.[201] In addition, the program should be designed to not last longer than is necessary to reach the compelling interest, and must have a "logical stopping point."[202] Finally, the preference must be flexible enough to not place too high a burden on innocent parties.[203] Flexibility means that the racial preference should be a minimal factor that provides for an individualized assessment of candidates, so that a candidate's race is not the primary factor determining his or her admittance. Individualized assessment was also emphasized in *Bakke*, where the Court sanctioned race when used as a limited factor.[204] The more flexible the preference is, such that one racial group is not the only beneficiary, or such that a racial minority is not guaranteed admittance, nor non-favored racial groups guaranteed failure, the more likely the preference is to satisfy the equal protection clause.

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200. *See Croson*, 488 U.S. 469, 506 (declaring that Richmond's preference covered Aleuts, Eskimos, and Native Americans,— groups for whom no evidence of past discrimination was produced. These groups could not be within the compelling interest of remedying past discrimination. The gross overinclusiveness of the preference indicated a lack of narrow tailoring). *See also Wygant*, 476 U.S. at 284 n.13 (declaring that overinclusiveness of racial groups benefiting from the preference "further illustrates the undifferentiated nature of the plan").

201. *Croson*, 488 U.S. at 509-10 (describing the myriad of race-neutral alternatives available to the City Council).

202. *Adarand*, 515 U.S. at 238 (finding as an element of narrow tailoring an inquiry into whether "the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate'" (*quoting* Fullilove v. Klutznick 448 U.S. 448, 513 (1980) (Powell, J. concurring)).

203. *Wygant*, 476 U.S. at 282 (finding that the high burden that preferential layoff policies place on innocent parties indicates lack of narrow tailoring).

204. *Bakke*, 438 U.S. 365, 318.

These factors necessarily overlap, and have yet to be systematically applied by the Supreme Court. This threatens confusion for lower courts and danger for public schools. Government units are given little instruction in how to construct a program that does not offend at least one of the narrow tailoring factors. A preference constructed to follow one factor may offend another. For example, a program can be flexible in that it gives only a minor plus to members of some racial minorities, providing for an individualized inquiry that enables disfavored racial groups to be admitted. However, because the minority can still lose out to a member of another race, the preference risks gaining little for minorities and failing the underinclusiveness prong. A preference can also be designed to help minorities only when they are disproportionally underrepresented, to guarantee flexibility and individualized competition. Under this system, a Caucasian could benefit if Caucasians were underrepresented. It then risks offending the overinclusiveness prong by benefiting groups not within the compelling interest. However, a targeted system that gives racial minorities a major plus will appear as a racial quota and be invalidated.

These hypotheticals demonstrate the extraordinary minefield that is faced when looking at narrow tailoring. Any preference can easily be characterized, or mischaracterized, so that it violates one or more of these prongs. Therefore, the burden of proof allocation should be applied to the narrow tailoring prong of strict scrutiny as it is to compelling interests, and should be placed on the plaintiff. Schools will then actually be able to actually construct a program that balances these factors.

IV. Fatal in Fact: The False Construction of Strict Scrutiny Analysis

Lower federal courts have two responsibilities when applying the Court's strict scrutiny framework to education—to faithfully apply Supreme Court precedent and create clearly ascertainable standards that public institutions can follow when determining whether to implement affirmative action. The courts have failed at both. The majority of the courts have misplaced the burden of proof in reverse discrimination cases on the government, making remedying past discrimination an impossibility. They also have all but erased any attempt to advance diversity. Some courts, most notably the Fifth Circuit[205] in *Hopwood*, have declared that diversity can never be a compelling interest. Others have applied standards that make ethnic diversity impossible for a public

205. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996).

institution to employ as a compelling interest, causing the same consequences as the *Hopwood* decision even as they express that decision's error. *Hopwood* made diversity expressly impermissible; other circuits have implicitly done so. All have made strict scrutiny automatically fatal.

A. Remedying Past Discrimination

1. Burden of Proof

The allocation of the burden of proof can be a judge's most important decision. The party with the burden has the responsibility of proving its case with the most and best evidence. Difficult decisions where the judge sees equally valid competing evidence on both sides are often resolved against the party with the burden. Judges are less susceptible to being reversed on appeal when they decide against the party with the burden, and they can more easily dismiss its evidence as insufficient. Appellate courts are less likely to consider judges clearly erroneous, or abusive of their discretion. Parties are less likely to appeal or pursue further litigation in the first place.

The burden of proof is even more important when scrutinizing racial preferences. Arguments proposing the use of race are as sensitive and difficult to articulate as they are to prove. Because of the consensus that past racial oppression has perhaps irreversibly damaged the nation by creating massive social and economic disparity, race and ethnicity are immediately suspect even where employed to aid members of groups once oppressed. The Supreme Court has turned this sensitivity into constitutional principle.

The general aversion to race is used to strike down specific uses of race in public schools, often without clear analysis. Little analysis is needed when the burden is placed on the government and raised higher than the Court intended.[206] In *Wessman v. Gittens*,[207] the First Circuit

206. The placing of the burden of proof on the government makes it much easier for courts to invalidate preferences. Evidentiary support for the links between past discrimination and present effects, or between diversity of student body and academic benefits, can be extraordinary difficult to make, and investigation of those effects is only beginning. *See* Jonathan R. Alger, *Unfinished Homework For Universities: Making the Case For Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73 (1998). Alger argues that the placing of the legal burden on public schools makes proving the benefits of affirmative extremely difficult, even though the ultimate burden should be on the plaintiffs. "The legal burden may rest squarely on the shoulders of the proponents of affirmative action to make the case, but the historical burden should arguably fall at least as much upon the shoulders of the opponents of affirmative action programs. In spite of the irony of this

most strikingly misinterpreted *Adarand* and *Croson* when it invalidated a racial preference used in admissions to an academically selective "examination school" in Boston, Massachusetts.

Wessman involved a plaintiff non-minority suing to enjoin the use of racial classifications in admission to a prestigious secondary school.[208] In *Wessman*, the Boston Latin School applied flexible racial preferences to influence the admissions decisions for half of the available spots.[209] The Court first held that while diversity may be a compelling interest, the preference was not narrowly tailored. The Court then examined the evidence showing a compelling interest of remedying past discrimination.[210] First the Court implicitly placed the burden of proof on the government to justify its preference, citing to *Croson*.[211] *Croson* may indeed be interpreted as placing the burden of proof on the government. In *Croson*, Richmond had no compelling interest of avoiding liability for civil rights violation; there was no liability for contracting with construction companies that may currently or previously have practiced discrimination.[212] *Croson* asserted the compelling interest, when framed by the Supreme Court, was to avoid being a "passive participant" in private discrimination.[213]

Croson dealt with government using its contracting power to remedy private discrimination. Boston Latin employed a preference to

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burden-shifting, the legal burden imposed on affirmative action programs was never intended by the Supreme Court to be impossible to meet." *Id.* at 76.

207. 160 F.3d 790 (1st Cir. 1998).

208. *Id.* at 793. The *Wessman* litigation started in 1974, when minorities secured a desegregation order that mandated a race-conscious admission process for the academically selective schools in the Boston School district, due to the prevalence of de facto segregation and the pernicious effects of past de jure segregation. The Boston Latin admission process first operated as a strict quota. *Id.* at 792. The school was released from judicial control in 1986, but continued the quota until a plaintiff non-minority sued under the equal protection clause. *Id.* at 792-93. The school then changed to a flexible racial preference system that led to the latest decision. *Id.* at 793. For a full description of the litigation history of the parties in *Wessman v. Gittens*, *see also* Preston Green, *May Examination School Use Racial Preferences in Their Admissions Process?: Wessman v. Gittens*, 135 ED. LAW REP. 873, 875-77 (1999)

209. Boston Latin is an academically selective high school, and admission is determined by grade point average and scores on a standardized test. *Wessman*, 160 F.3d at 793. The school uses a mathematical formula that creates an index for applicant, based on his or her grade point average and standardized test score. Those whose index scores rank them in the upper 50% of their school are placed in a "qualified applicant pool," and are the only ones considered for admission. Half of the spots are filled solely based on their index rank. *Id.* The other half, deemed the "remaining qualified applicant pool" is determined on the basis of "flexible racial ethnic guidelines." *Id.* Each applicant is assigned an ethnic or racial group. Spots are filled by the next highest ranking person, but only if their applicants admitted bear the same racial make-up of the RQAP. *Id.*

210. The court stated, "[b]efore embarking on such projects, however, government actors must be able to muster a 'strong basis in evidence' showing that a current social ill 'in fact has been caused by such conduct.'" *Wessman*, 160 F.3d at 800. The court later made reference to the "state actor's burden of producing the reliable evidence required to uphold race-based action." *Id.* at 802.

211. *Id.*

212. *Croson*, 488 U.S. 469, 492.

213. *Id.*

both (1) eliminate potential liability under Title VI of the Civil Rights Act, liability based on an achievement gap between African-American and Hispanic students on one hand, and Caucasian and Asian-American students on the other, and (2) fulfill its constitutional duty of remedying vestiges of past discrimination. As *Wygant* and *Johnson* mandate, the ultimate burden of proof in a reverse discrimination case against a government unit using race-conscious preferences in its own workforce or admittees is on the non-minority plaintiff.

The Boston Latin School Committee combined both interests into one and presented it as "remedying vestiges of past discrimination." The Committee pointed to the racial disparities caused by the achievement gap to show that vestiges of discrimination remained. The *Wessman* court did not accept that as evidence of vestiges, since a standardized test achievement gap between minority and non-minority students cannot be considered a present effect of past discrimination, unless the tests were challenged as racially discriminatory.[214]

The School Committee and the Court incorrectly framed this interest. The Committee can show a compelling interest of avoiding continuing constitutional and Title VI liability. The prima facie evidence of Title VI liability is the achievement gap. Although the school could show that it used "objective criteria" such as standardized test scores and shift the burden back to a minority plaintiff, that plaintiff can still show liability by tracing the use of objective scores in the past as actual discrimination.[215] Liability against such practices is similar to liability for intra-school and inter-school "tracking," where students are tracked according to objective measures of ability.[216] Purportedly "objective" indicators, such as grades and standardized test scores, can be wrongly used to segregate students. The Supreme Court has previously found liability where objective indicators that were initially placed to achieve segregation continued that segregation.[217]

These arguments were not examined by the Court. Instead, any evidence of vestiges was dismissed simply because it can be traced to "objective" indicators. That only begins the analysis. The government should have had the opportunity, on remand, to show that a plaintiff could build such a case of Title VI liability against the school, thus justifying some form of racial preference. The plaintiff non-minority, Sarah Wessman, would then bear the burden of showing that the objective indicators were not intended and did not in fact create

214. *Wessman*, 160 F.3d at 803. The court described this not as Title VI liability, but as an attempt by the school to remedy the vestiges of past discrimination.

215. *See* U.S. v. Fordice, 505 U.S. 717, 731-33 (1992) (finding the use of "objective indicators" as really an attempt to achieve segregation).

216. *See* JEANNIE OAKES, KEEPING TRACK (1985).

217. *See Fordice*, 505 U.S. at 734.

segregation, and that the compelling interest is thus not present. If the Court had properly placed the burden on the plaintiff, it could not have so easily dismissed the government's argument.

The Court continued its conclusory analysis by dismissing the evidence of Dr. Trent showing that vestiges of discrimination included teachers' low expectations of minorities.[218] With the burden erroneously placed on the government, Dr. Trent's arguments were dismissed because he had not performed the precise social scientific analysis of the Boston school system he had performed in other districts.[219] However, Dr. Trent was an expert witness using "generally accepted methods," and who examined the Boston school system as an expert. Experts do not have to follow a precise formula every time they make an expert conclusion.[220] Although Dr. Trent's conclusions would have had greater weight had he had the time and resources to perform a systematic study akin to his Kansas study, his conclusions should not have been so flippantly dismissed. His testimony was particularly strong when considered with the testimony of Deputy Superintendent Jackson, a person with the time, expertise, and experience to make systematic conclusions about low teachers' expectations in the school. It is likely that the timing of the litigation schedule and the resources of the school precluded a more systematic study.

The Court placed an impossible burden on the school—to prove beyond certainty that past school discrimination caused present effects. Such certainty is rarely achieved in social science, and is not demanded by *Wygant* and *Johnson*. The government had supplied enough evidence to demonstrate that a compelling interest exists and shift the burden to the plaintiff to show that no present effects were caused by past school discrimination.[221] *Adarand* and *Croson*, which dealt with preferences used by the government acting as contractor, did not alter *Wygant* and *Johnson*, which dealt with government acting as employer, and by implication, educator.

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218. *Wessman*, 160 F.3d at 804.

219. *Id.*

220. The standard for evaluating expert evidence was established in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Expert evidence must be scientifically valid as established by several factors: whether the theory or technique has been or can be tested, whether the theory or technique has been subjected to peer review and publication, and whether the theory or technique is generally accepted in the particular scientific community. Importantly, the *Daubert* standard (referenced in *Wessman*, 160 F.3d at 805), emphasizes the theory and technique used by the scientist in making his expert testimony. By requiring Dr. Trent and the School District to present evidence conclusively showing that past discrimination was the only cause of the present achievement gap, the First Circuit required Dr. Trent to satisfy standards that very little social scientific evidence could achieve.

221. *Wygant* at 277-78; Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616, 626 (1987).

The Fourth, Fifth and Ninth circuits have echoed the First in their misapplication of the strict scrutiny burden. *Podbersky v. Kiran*[222] restated *Croson*'s requirement of a "strong basis in evidence" and cited to *Wygant*, but missed the crucial allocation of burden of proof in *Wygant*. After placing the burden on the government, it concluded that the recent success of African-Americans in gaining admission and the success of the school in reaching its goals of minority admissions mitigated against any finding of present effects of past discrimination.[223] Given that the burden should be on the plaintiffs, the Court should have remanded for a more thorough investigation of any present effects of past discrimination or for other civil rights liability justifying the race-based scholarship.

Hopwood v. Texas cited to *Podbersky* for its erroneous allocation of the burden of proof,[224] and echoed *Wessman* in its dismissal of any challenge to the University of Texas Law School's use of objective admissions factors such as grades and standardized test scores. *Hopwood* refused to examine whether present achievement gaps between African-Americans, Mexican-Americans and other groups were caused at least in part by the University of Texas Law School's past discrimination.[225] *Hopwood*, like the *Wessman* and *Podbersky* courts, demanded schools to prove beyond doubt that their past policies are either the sole or primary cause of present discriminatory effects. Such a requirement seriously misinterprets the Supreme Court's strict scrutiny analysis of racial preferences in education and the school desegregation decisions of *Fordice*, *Freeman*, et al.[226] Under those decisions, schools can still be liable even when their policies only partially caused present effects. They are thus commanded to remove all present effects. These principles must be adhered to when examining voluntarily engaged race-based effects of past discrimination.

Finally, the Ninth Circuit continued the misapplication of the school desegregation cases of *Freeman*, et al, in *Brian Ho v. San*

222. 95 F.2d 52 (4th Cir. 1992).

223. *Podbersky*, 95 F.2d at 57.

224. Hopwood v. Texas, 78 F.3d 932, 952 (5th Cir. 1996).

225. The Court concluded that since law school discrimination was eliminated in 1953, any official discrimination was eliminated by the late 1960s. *Id.* at 953. Such developments certainly make it difficult for law schools to show present effects of past discrimination by the law school alone. Nonetheless, the Court did not examine the impact that the Texas law school's policies may have had on Texas legal environment and society, effects which at least in part discourage minority commitment and application to the University of Texas Law School. Schools do not have to be the sole cause of such effects for there to be a constitutional duty to remove the effects through race-based policies.

226. *Fordice* and *Freeman* place an affirmative duty on schools to remove any effects of past discrimination, even when those effects are only partly caused by the school's policies. The schools also have a duty to ensure that they are not infected with societal discrimination, local discrimination, that may impede their educational mission. Federal courts prevent the execution of this duty when they conclusorily invalidate race-based remedial efforts.

Francisco Unified School District.[227] *Brian Ho* reviewed a challenge to an attendance system that used racial and ethnic criteria to maximize diversity in each school. The system was the result of a consent decree that settled a suit by the NAACP claiming that segregation in the San Francisco Unified School District had harmed minorities, primarily African-Americans and Latinos.[228] Although the school opposed the initial order, the current administration supported the consent decree's imposition of racial quotas to remove vestiges of discrimination.[229] Despite this change in litigation posture, the Ninth Circuit reviewed the consent decree as if it were a judicially mandated racial quota, not a voluntary affirmative action program.[230] In a strange twist of legal analysis, the Ninth Circuit interpreted *Freeman v. Pitts* and the desegregation decisions as placing the burden on the government to prove that the racial balancing is needed to remedy vestiges of discrimination.[231] However, *Freeman* stands for the proposition that courts can remove desegregation decrees only when the public school can prove that current racial imbalances are not the result, even partly, of past discrimination.[232]

Brian Ho correctly instructed the lower court to apply strict scrutiny to the consent decree, since it now functioned as a voluntary affirmative action program.[233] However, once the school offered evidence of a compelling justification of remedying the vestiges of past discrimination in SFUSD, the burden should have rested on the plaintiffs to show that the school was not justified in using race-based policies to

227. 147 F.3d 854 (9th Cir. 1998).

228. *Brian Ho* I, 147 F.3d at 859.

229. *Id.* at 857.

230. *Id.* at 865. A major focus of the litigation was Lowell High School, an academically selective high school that admits students based on their performance, not their residence. The racial quotas thus acted as an affirmative action program for minority groups that had lower achieving students according to the academic performance standards used in the admissions process.

231. *See Brian Ho* I, 147 F.3d at 865. "It will also be the task of the school district to demonstrate that paragraph 13 is still a remedy fitted to a wrong—to show that the racial classifications and quotas employed by paragraph 13 are tailored to the problems caused by vestiges of the earlier segregation. Racial balancing cannot be the objective of a federal court unless the balancing is shown to be necessary to correct the effects of government action of a racist character." (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)). In the first sentence the Court begins by discussing the school district's role in defending the preference. It ends the paragraph by enumerating the burden and framework for judicial imposition of preferences. Although it is now a voluntary racial preference, the Court declares that it is allowable only if a federal court can mandate it. As explained in Part II, *infra*, preferences voluntarily made by a school are subject to a different analysis than preferences that are judicially imposed.

232. *Freeman*, 503 U.S. at 494. *See also* Freeman, 503 U.S. at 512-13 (Blackmun, J., concurring in the judgment) (clarifying that the burden is on the government, and that the government cannot rely on other causes as removing liability, even when the other causes are the primary cause).

233. *Brian Ho* I, 147 F.3d at 865.

avoid liability under either Title VI or the U.S. constitution. This comports with the proper interpretation of *Wygant*.[234]

The effects of *Brian Ho*'s interpretation are revealed in Judge Orrick's decision in further litigation between the same parties.[235] In *Brian Ho* II, Judge Orrick rejected the District's attendance plan for using race as a primary factor, stating it violated both the equal protection clause and the parties' settlement agreement. Judge Orrick similarly interpreted *Freeman* as placing the burden on the government, and invalidated the plan since there were no traceable vestiges of discrimination.[236]

Wygant and *Johnson* have placed the burden of proof on the plaintiff in a reverse discrimination case. *Freeman* and the desegregation cases describe how schools can be constitutionally liable for vestiges of past discrimination, creating a double duty under the equal protection clause. The decisions addressing educational and employment preferences have accorded public schools more deference than that accorded to the government contracting in *Adarand* and *Croson*, given schools' special civil rights obligations. By ignoring those principles and focusing on *Adarand* and *Croson*, lower courts have misapplied strict scrutiny to invalidate racial preferences that conform to the constitutional principles enunciated by the Supreme Court.

2. *Narrow Tailoring*

Narrow tailoring can be the most important prong for preferences aimed at remedying past discrimination, particularly given the consensus that remedying past discrimination is normatively a compelling justification. Courts will invalidate a preference geared to remedying the effects of past discrimination only by either finding no evidence that a compelling justification of remedying past discrimination exists, or by finding that the preference is not narrowly tailored. The two inquiries are intimately related. The preference must be tailored to removing the present effects of past discrimination that are the basis for the interest.

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234. *Wygant*, 476 U.S. 267, 275-76.

235. *Brian Ho* v. San Francisco Unified School District, 59 F.Supp.2d 1021 (9th Cir. 1999) (*Brian Ho* II).

236. Given that the government did not present any evidence or argument on the constitutional issue, see *Brian Ho* II, the misallocation of the burden of proof was probably not a factor. Nonetheless, Judge Orrick could easily have decided the case solely as a violation of the settlement agreement, which was clearly breached by the district, and not reached the constitutional issue. Instead, Orrick compounded the 9th Circuit's initial error. Furthermore, placing the burden on the government seriously hampers the ability of the school to prevent resegregation and the damaging effects of past discrimination.

Because the burden has been placed on the government, lower courts have easily rejected preferences as not being narrowly tailored. Part of the dilemma for schools is the catch-22 nature of the analysis.

First, schools must develop a preference that ameliorates the concrete harm of present effects without burdening non-minorities. A preference that aggressively helps minorities through high admission rates automatically prevents innocent non-minorities from being admitted.[237] Such a program would not be narrowly tailored because the burden on non-minorities is too high.[238]

However, a preference limited to avoid the burden on non-minorities may do little to remedy the harm of past discrimination. In *Wessman*, the Court noted that even if the school could show that teachers' lower expectations of minority students were a vestige of discrimination, a racial preference to provide more minority enrollment does little to remedy those expectations.[239]

A court willing to engage in conclusory observations of social phenomena based on little empirical evidence can easily invalidate a preference, by quickly finding the burden on non-minorities too high or the benefits to minorities too low. In *Wessman*, there was no examination of evidence of how preferences affected teachers' expectations, and whether preferences could actually ameliorate them by providing teachers with examples of high-achieving minority students. Because the burden was erroneously placed on the government, the court was able to easily dismiss the benefits of the program.

The flexibility of the program is also an important pitfall for academic preferences. An inflexible preference that targets only certain racial groups will place too high a burden on non-minorities. It also risks offending the equal protection clause by treating applicants as members of a racial group, not as individuals. Racial quotas, the most inflexible of all preferences, were invalidated in *Bakke* and have been used rarely since. Schools that employ individualized flexible preferences can take account of other relevant characteristics such as socioeconomic status or geographical diversity. Flexibility can take the form of fluctuating preferences that change depending on which racial group is

237. Non-minorities may not necessarily be innocent victims of racial preferences. Scholars have explained how current non-minorities benefit from a status quo that leaves discrimination unremedied. *See, e.g.*, Cedric Martin Powell, *Hopwood: Bakke II and Skeptical Scrutiny*, 9 SETON HALL CONST. 811, 825 (1999); Ann C. McGinley, *Affirmative Action Awash in Confusion: Backward-Looking-Future-Oriented Justifications For Race-Conscious Measures*, 4 ROGER WILLIAMS U. L. J. REVIEW 209, 224-26 (1998). Nonetheless, the Court has stated that "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *See Wygant*, 476 U.S. at 276.

238. *See Wygant*, 476 U.S. at 267 (the Court invalidated a racially preferential layoff plan because it was not "sufficiently narrowly tailored" within the constructs of the Equal Protection Clause).

239. *Wessman*, 160 F.3d 790, 807.

underrepresented. Under this system, Caucasians who do not benefit currently may eventually benefit should their numbers dwindle. Even some quota systems, such as the one used in the San Francisco Unified School District before the current settlement agreement,[240] are flexible in that they favor no racial group but only mandate that any racial group cannot exceed a certain percentage of matriculants.

Unfortunately, the gains in flexibility mean losses in tailoring and targeting. If racial groups that are not the victims of past discrimination potentially benefit, the program can be perceived as overinclusive. In *Wessman*, the Court pointed out that Hispanic students may be passed over because of the flexibility of the preference, thus injuring the students the school purported to defend.[241] It stated that if Hispanics did particularly well but were clustered at the top of the bottom half, many Hispanics could be passed over for other students.[242] The Court did not comprehend that the policy was designed so that when a particular minority began to do well, preferences favoring it would be relaxed, thus increasing the benefit for those who clearly need a preference. Instead, it pointed to the possibility that an irregularity in admissions scores could jeopardize the goals of the preference.[243]

Again, a court that engages in little real analysis of how preferences affect students and their environment can easily invalidate a preference merely by pointing to examples where the preference does not perfectly benefit those who suffer from past discrimination without burdening a non-minority.[244]

It may be that strict scrutiny is intended to allow only the most exceptional of circumstances to justify exceptional preferences. But it is difficult to see what kind of preference could survive the lower courts' analyses. Lower courts have raised the burden high, and have invalidated preferences without any supporting evidence, making for an automatic invalidation under strict scrutiny.

240. *See* Brian Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854 (9th Cir. 1998).

241. *Wessman*, 160 F.3d at 808.

242. *Id.*

243. *Id.*

244. Although the Supreme Court has noted that non-minorities may bear the responsibility of remedying past discrimination against minorities, *see Wygant*, 476 U.S. at 267, lower courts have done little analysis as to how much burden a non-minority should bear. Considered separately from all other factors, any burden can be deemed too much without any analysis as to how much persons can bear without offending the Constitution.

B. Diversity as a Compelling Interest

It is questionable whether the Supreme Court would accept diversity in contexts other than education as a compelling interest. Within education, the precedents are clearer. *Bakke* affirmatively accepted diversity as a compelling interest in higher education,[245] a ruling that has not been expressly overruled. Nevertheless, at least one court has held that diversity is an impermissible end in itself.[246] Furthermore, because the Supreme Court has yet to rule expressly on diversity, lower courts have much less guidance for analyzing the evidentiary support of diversity.

Some lower courts have assumed without deciding that diversity is a compelling interest in education. The courts then rule on whether the preference is narrowly tailored to that goal.[247] The circuits have so far made diversity an even more difficult compelling interest for schools to adopt. Instead of a precise framework that considers the evidence of a preference's effects, the courts examine narrow tailoring through several policy arguments regarding the use of race. The courts have uniformly rejected the preference as narrowly tailored toward diversity based on these policy arguments, regardless of whether empirical evidence supports their arguments.

The *Hopwood* decision held that diversity is not a compelling interest under the Fourteenth Amendment. It did so on two main grounds: (1) the Supreme Court has implicitly overruled *Bakke*, which never was legal precedent,[248] and (2) the use of racial classifications to achieve diversity conflicts with the goals of the Equal Protection Clause.[249]

As described in Part III, the first argument is an erroneous interpretation of precedent, based more on a prediction of future Supreme Court jurisprudence rather than an application of stare decisis. O'Connor expressly ratified diversity of education in *Wygant*, and did not overrule *Bakke* in either *Adarand* or *Croson*.

Almost as an afterthought, the *Hopwood* Court enumerated several policy conclusions for invalidating the preference. According to Hopwood, a university that admits a student because she contributes to

245. *Bakke*, 438 U.S. 265, 311.

246. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996).

247. *See, e.g.*, Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Wessman v. Gittens, 60 F.3d 790 (1st Cir. 1998).

248. Hopwood, 78 F.3d at 946-48.

249. *Id.*

diversity[250] assumes that her character can be predicted by her race.[251] This racial stereotyping is forbidden by the fourteenth amendment. The *Hopwood* court continued to explain that using racial stereotypes considers students as members of a group, contravening the fourteenth amendment's protection of persons as individuals.[252] The stereotypes contribute to stigmatism and aggravate racial antagonism.[253] Finally, correcting past discrimination can always be used as a reason for an affirmative action plan, making it a "timeless" remedy whose scope is unbounded.[254] These are all factual arguments that can, but do not necessarily apply.[255]

Each of these policy arguments has been used by the Supreme Court to invalidate preferences in other contexts. However, none of them can be empirically supported in *Hopwood*, and there is little analysis of how the University's preference actually worked—only general assertions of the evils of using race. It is highly unlikely that *Hopwood* could have precluded diversity based on these policy arguments alone, absent its interpretation of Supreme Court precedent.

However, these policy arguments figure prominently in the narrow tailoring analysis of other lower courts that have correctly rejected *Hopwood*'s distortion of stare decisis. Because there is no precise analytic framework for diversity, lower courts are forced to analogize to the framework applying to the compelling interest of remedying past discrimination. Instead of applying a defined framework, lower federal courts resort to the same policy arguments enumerated in *Hopwood*. These arguments serve as weapons to be called upon when the court innately feels that a preference cannot be legitimate.

In *Wessman*, the Court depicted the preference as "racial balancing," given that it sought to maintain an optimal ethnic make-up

250. Even though race is only one factor, and very few students can be said to be admitted solely because of their race, *Hopwood* and other courts have depicted any student benefiting from a racial preference as being admitted "solely because of their race," even though other factors may have supported their admission. *See Hopwood*, 78 F.3d at 946-47; *Wessman*, 160 F.3d at 799; *Tuttle*, 195 F.3d at 707.

251. *Hopwood*, 78 F.3d at 946.

252. *Id.* at 947.

253. *Id.*

254. *Id.* at 949 n.39.

255. The argument that diversity is a "timeless" remedy is more of a legal conclusion than a factual argument, and thus could legitimately be used by the *Hopwood* court to preclude diversity, without any supporting factual predicates. However, it merely begs the question of whether diversity can always be used to justify a preference. The *Hopwood* court failed to realize that ethnic diversity can be held inapplicable in some cases, presumable when racial diversity can regularly be achieved via race-neutral means. In that case, a court could scrutinize the school's policies and its history of admissions to determine whether it was sufficiently compelling for a school to use a preference to achieve diversity. Presumably, if racial diversity can regularly be achieved with race-neutral means, there would be little evidence that the need for a preference is "compelling," and more evidence that the diversity was a mere pretext for another, illegitimate rationale.

of each school. "A single-minded focus on ethnic diversity 'hinders rather than furthers attainment of genuine diversity.'"[256] The Court felt that placing a judicial imprimatur on racial balancing would endanger democratic ideals and is always constitutionally forbidden.[257] Admitting students because of their race treats them as members of a group, instead of as individuals.[258] The court found no evidence that racial balancing was tied to a vigorous exchange of ideas, or any of the other benefits of diversity.[259] Finally, the Court stated that attaining ethnic diversity is acceptable only if the means did not foreclose some candidates from admittance because of their race.[260]

The *Wessman* Court's reference to a "single minded focus on race" was a complete mischaracterization. The school did not admit anyone based solely on their race. The students had to attain certain minimal qualifications, and whether their race helped them gain admittance depended on the already existing ethnic make-up of admitted students. Giving a student a "plus" because of his or her membership in a racial group, or because of his or her contribution to ethnic diversity, can always be characterized as treating the student as a member of a group. The student is favored in part because of his or her group membership. If the *Wessman* court could reject diversity as a compelling interest for these reasons, then every court must reject a school's use of diversity. Any attempt to defend diversity relies on assumptions that a student's race can predict his or her contribution to the school, an assumption that is apparently at odds with the equal protection clause.

The Court declared that the racial preference is invalid because, at a certain point, some persons are foreclosed from admission because of their race. However, any racial preference will foreclose some students "at a certain point"; the preference would be ineffective otherwise. The point of a preference is to give some students' applications added weight; those with other qualities equal but lacking the plus of contributing to racial diversity are effectively "foreclosed because of their race." Under this reasoning, any preference would be unconstitutional.

The Fourth Circuit considered this issue in *Tuttle v. Arlington County School Board*.[261] The Arlington County school district had no academic requirements for admission to several schools.[262] Since there

256. *Wessman*, 160 F.3d 790, 798 (*quoting Bakke*, 438 U.S. at 265, 315).
257. *Id.* at 798.
258. *Id.*
259. *Id.*
260. *Id.* at 799.
261. 195 F.3d 698 (4th Cir. 1999).
262. *Id.* at 701.

were more applications than spots, the school admitted students via random lottery. The process was not completely random, however. Students' chances for admission were given weighted probabilities according to their socioeconomic status, their status as second-language students, and their contribution to the school's ethnic diversity.[263] As to ethnic diversity, the school picked an ethnic distribution that matched the district's ethnic distribution. Students who contributed to attaining that optimum were given higher probabilities of winning the lottery.[264]

The Court first declared that it must analyze the ethnic diversity preference separately from the socioeconomic and language factors, even though all three equally influenced the process.[265] As such, it described the preference as "racial balancing," similar to the *Wessman* Court.[266] Some students were allowed in solely because of their race, so that the school could obtain an optimal racial balance. Once described as racial balancing, the preference had little chance of validation. The Court declared that the preference treated students as members of a group, rather than as individuals, admitting them solely because of their race rather than allowing them to compete as individuals.[267]

As in *Wessman*, there was no empirical evidence supporting the claim that the preference treated individuals as members of a group, or that it created the evils of racial balancing condemned by the Supreme Court in other contexts. More importantly, the Court was able to depict the preference as racial balancing only by intentionally ignoring that there were other factors used in the lottery, namely socioeconomic status and the student's first language. A racial preference examined separately will cause racial balancing by definition. The Court did not examine to see how many students were actually eliminated from admission because of their failure to contribute to diversity, and did not inquire into how much of a factor race really was in the admissions process–both of which are essential steps in a narrow-tailoring analysis.

A recent exception to the analyses by these courts is *Gratz v. Bollinger*,[268] which did not resort to mere policy arguments in determining whether a race-based admissions program was narrowly tailored to the interest of ethnic diversity. In *Gratz*, the court evaluated the admissions process of the University of Michigan college of Literature, Science, and Arts ("LSA"), which since 1998 has given additional points in the admissions process to members of underrepresented minorities, thus increasing the weight of their

263. *Id.*
264. *Id.*
265. *Id.* at 705.
266. *Tuttle*, 195 F.3d at 707.
267. *Id.*
268. 122 F. Supp. 2d 811 (E.D. Mich. 2000).

applications in admissions decisions.[269] Holding that on the whole there is a "thin line that divides the permissible from the impermissible," the LSA's admissions program was a narrowly tailored use of race.[270] The Court argued that the educational benefits associated with a racially diverse student body require more than a token number of minority students,[271] and that the plaintiffs could not show another process which could attain these benefits.[272] The Court thus properly, even if implicitly, placed the burden of proof on the plaintiff to show that the program was unconstitutional. The Court allowed Michigan to develop a program that could solicit the benefits of diversity without falling into a narrow-tailoring trap. Nonetheless, the Court invalidated the system used by the LSA from 1995-1998, which deemed certain minority candidates "protected candidates," who were admitted should the LSA's rolling admissions system fail to admit enough underrepresented minorities.[273] The Court felt that this system verged too near the impermissible "quota" prohibited by *Bakke*.[274]

The Court may have placed too great an emphasis on terminology when invalidating one system for being a quota while allowing another because it used race as a plus factor. When it examined the 1995-1998 program, the Court engaged in no discussion of whether the "ills" of a race-based system were more likely to occur in that program than in the one instituted after 1998. It only discussed whether the latter LSA admissions process fell into the category of "quota" or "plus." These terms may ultimately prove to be distinctions without differences, and a solid analysis of whether the 1995-1998 system created racial antagonism, failed to produce the benefits of ethnic diversity, or stigmatized members of certain racial groups would have been a more appropriate determinant of whether the 1995-1998 system was narrowly tailored. Nonetheless, the Court's opinion as a whole took a step in the right direction of analyzing race-conscious programs under relevant narrow tailoring factors rather than general policy arguments, even if it ultimately had to rely upon formalistic categories rather than substantive analysis. Given that the district court's ruling is itself on appeal, it is unclear what influence *Gratz* will have. Even if *Gratz* survives appeal, the district court's conclusions are limited; its invalidation of the 1995-1998 program illustrates how easy it has become for courts to dismiss programs tailored to produce ethnic diversity with a superficial analysis.

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269. *Gratz*, 122 F. Supp. at 827-28.
270. *Id.* at 827.
271. *Id.* at 830.
272. *Id.* at 830-31.
273. *Id.* at 831.
274. *Gratz*, 122 F. Supp. at 831-32.

Aside from Gratz, the lower federal courts have accomplished implicitly what *Hopwood* did expressly. They have precluded any attempt to justify a racial preference as narrowly tailored towards ethnic diversity. If contributions to ethnic diversity are measured by a "plus" based on the student's race, than the student is explicitly treated, for the purposes of the preference, as a member of a group. If that preference is then analyzed separately, it is by definition the only factor that can influence the student's admission. It then becomes racial balancing abhorred by the Constitution and the equal protection clause.

Rather than analyzing race separately, lower courts should examine the relation between race and other factors affecting the decision. Furthermore, the courts must carefully examine the evidence of benefits produced by a limited racial preference. No court investigated how the challenged preference worked, how much the preference affected admissions decisions, whether students really felt treated as members of a group, whether the preference caused more segregation, bred ethnic antagonism, or if it hindered rather than contributed towards ethnic diversity.

For an interest to be compelling, it must produce tangible benefits for the school. To argue that ethnic diversity produces benefits, one must argue that a class with members of various racial groups is preferred to a class dominated by one race. This requires arguing that a student's views and contribution to the class can at least partly be predicted by their race. If this is racial stereotyping, and if this is always forbidden by the constitution, then racial preferences can never be justified as producing ethnic diversity.

The courts have applied the Equal Protection Clause's mandate of color-blindness to forbid an ascription of meaning to race. But if race has no meaning, then diversity can never be a compelling interest.[275] The lower courts adopting this reasoning have essentially produced the same result as *Hopwood*, only without the same candor.

V. A Framework for Contextual Scrutiny

A proper interpretation of the Court's strict scrutiny decisions means cabining strict scrutiny to the particular context of the program. Each preference is unique within the different contexts of government as

275. The *Hopwood* court dismissed the benefits of a racial preference by explaining that "the use of race, in and of itself, to choose students simply achieves a student body that looks different." Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996). Unfortunately, the Hopwood court neglected to examine social scientific evidence of the benefits of racial diversity. This evidence is considered in Part V, *infra*.

employer, government as educator, government as contractor, and government as sovereign. Forced analogies between different contexts render erroneous decisions.

The Court must establish a clearer framework for government as educator. The Court must clarify the analysis so that lower courts know whether diversity can be a compelling interest, and if so, when it is compelling. The Court must also clarify the proper burden of proof in reverse discrimination cases for all compelling interests.

A. Diversity as a Compelling Interest

The Supreme Court has not recognized education as a fundamental right under the Constitution.[276] Nonetheless, the Court's jurisprudence affirms its importance to the polity. Education has been described as pivotal to "sustaining our political and cultural heritage"[277] with a fundamental role in maintaining the fabric of society.[278] The importance of public education in particular was established in *Brown v. Board of Education:*

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the Armed Forces. It is the very foundation of good citizenship.[279]

Education has been at the forefront of litigation and legislation concerning inequality and injustice in America, a fact recognized and validated by the Supreme Court.[280] Not only is education important to these societal goals, but a diverse student body can be an important part

276. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding that education is not a right either explicitly or implicitly guaranteed by the Constitution and denying a challenge to Texas' inequitable funding of public schools).

277. Plyler v. Doe, 457 U.S. 202, 221(1982).

278. *Id.*

279. Brown v. Board of Ed., 347 U.S. 483, 493 (1954).

280. *Id.* Decisions such as *Plyler v. Doe* demonstrate how the importance of education, both to society and the children educated, affects the Court's allocation of rights. Although the plaintiffs in *Plyler* were not a suspect class, and education was not deemed a fundamental right, the necessity of education to achieve social and economic betterment influenced *Plyler*'s ultimate decision to invalidate a Texas law prohibiting illegal immigrants from attending public schools. *See Plyler*, 457 U.S. at 224.

of educational practice. In *Bakke*, Justice Powell explained that universities have a special mission to prepare students for a multicultural society.[281] The Court expressly recognized that universities need broad academic freedom to prepare students for the professions and world they seek to enter.[282] A diverse student body creates an atmosphere of "speculation, experiment and creation," to create future leaders of that multicultural society.[283] This is particularly true for those selective universities and secondary schools that admit students largely based on academic performance. Because of the credentialed nature of the modern professional environment, these schools shoulder the responsibilities of creating the next generation's professional and managerial elite.[284] Because these public schools do not have an obligation to accept every student who meets very minimal criteria, these schools can selectively create a diverse student body.[285]

This ideal is as true for public K-12 schools as it is for higher education. *Brown* was based on the premise that education was uniquely important to creating future American leaders. Although there is no federal constitutional right to education, the obligation to create both effective and equitable public schools has been recognized by state constitutions, providing the basis for litigation to enforce such obligations.[286]

Schools have long used various criteria to further the goal of diversity. Geographical diversity, legacy admissions, preferences to student-athletes or student-musicians, and preferences for the socio-economically disadvantaged have all been used to further diversity.[287]

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281. *Bakke*, 438 U.S. at 312.

282. *Id.*

283. *Id.* (*quoting* Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

284. Commentators have argued that a diverse student body can aid all racial groups by breaking down racial stereotypes. "When studying side by side, in a diverse setting, students grow to understand and respect the differences among them as they share life in a complex, pluralistic society." Jonathan R. Alger, *Unfinished Homework For Universities: Making the Case For Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73, 80 (1998). Diverse student bodies also aid public schools in their mission to educate the next generation of elites in academia, the professions, and government. *See* Samuel Issacharoff, *Bakke In the Admissions Office and the Courts: Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 684-88 (1998) (arguing that the mission of public schools is in part to prepare students of all races for society and to ensure that members of all races have equal opportunity to reach the elite class). Such goals may be jeopardized when schools cannot use race at all in admissions processes.

285. Bowen and Bok explain that the majority of schools, particularly state-funded public schools, do not have issues of racial affirmative action because they must accept all students above a minimal standard. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 6, 15 (1998). Bowen and Bok report that only the top 20% of all four-year universities use a marked degree of racial preference. *Id.* (*citing* Thomas J. Kane, "*Racial and Ethnic Preferences in College Administration*," in THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks and Meredith Phillips, eds.).

286. For example, the California Supreme Court held the State's inequitable funding of public schools as violative of the state Constitution. *See* Serrano v. Priest, 557 P.2d 929 (Cal. 1977).

287. *See* BOWEN AND BOK, note 285 at 18-20. Bowen and Bok state that diversity's importance

Bakke recognized that racial or ethnic diversity can legitimately be used as one of those criteria.[288]

Courts, such as the Fifth Circuit in *Hopwood*, resist the idea that ethnic diversity can legitimately be part of a compelling interest because it undercuts the norm of color-blindness.[289] This norm dictates that our society cannot reach the color-blind utopia we hope for if government distributes benefits, makes admissions and employment decisions, or otherwise assigns meaning based on the color of a person's skin.

Stating that government should be color-blind is merely stating the principle of equal protection. Because of the principle of color-blindness, the Court has subjected all racial classifications to strict scrutiny.[290] However, there is an express exception to the color-blindness norm: classifications that are narrowly tailored to a compelling government interest. When discussing classifications that may fall into this exception, the Court must realistically consider that color blindness may need to be secondary to another interest or policy. Otherwise, there could never be an exception.

The contours of this "exception" are realized through the analysis of strict scrutiny. When government is acting as educator, the Court has continually explained that the government has a special responsibility to remove racial imbalance and prevent societal imbalances from affecting public education.[291] These cases express a general policy that racial considerations can be an important part to the government's educational mission. When properly tailored, ethnic diversity can contribute to the broader interest in preparing students for a world that is geographically, religiously, and ethnically diverse.

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to education has been followed for over 150 years. "Direct association with dissimilar individuals was deemed essential to learning. The dimensions of diversity subsequently expanded to include geography, nation of birth, upbringing, wealth, gender and race." *Id.*

288. *Bakke*, 438 U.S. 265, 312.

289. *See* Hopwood v. Texas, 78 F.3d 932, 946 (5th Cir. 1996). For the *Hopwood* court, use of race to further diversity treats individuals as if they were members of a racial group, not as individuals. Most important to the Court's conclusion was that racial preferences imply that a person's characteristics can be determined by their race, and controls their point of view. The court then argues that these cognitions underlie invidious discrimination and stereotype, and therefore cannot be allowed. Thus, the norm of color-blindness, as expressed by the fourteenth amendment, is preeminent.

290. Commentators have criticized the Court's definition of the equal protection clause of the fourteenth amendment as mandating color-blindness. See *Bakke*, 438 U.S. at 320 for Justice Powell's, description of how the norm of color-blindness causes courts to ignore the present effects of past discrimination and to return jurisprudence to the era of *Plessy v. Ferguson*. He argues that color blindness simplifies constitutional analysis but forces the Court to legitimate a status quo that contains much prejudice against persons of color and allows few minorities to succeed at academically selective schools.

291. *See* Freeman v. Pitts, 503 U.S. at 490 (explaining that schools have a special responsibility to ensure that racism and racial inequality do not harm the education of students in public schools).

As Justice Powell emphasized in *Bakke*, furthering ethnic diversity may not be the sole compelling interest.[292] Whether ethnic diversity is properly used, however, is an issue of narrow tailoring. A strict quota system may not be the most narrowly-tailored means to the ends of general diversity, in part because it subjugates other indicia of diversity to ethnic diversity. It may also burden non-minorities more greatly than is needed, and it can be an indicator that diversity is not the true compelling interest. However, these considerations inform how ethnic diversity should be attained, not whether ethnic diversity can be a legitimate interest. The issue of whether general academic diversity can be a compelling interest is a normative one. The government's responsibility to prepare students for a multicultural society should outweigh the norm of color blindness, as long as the preference is properly tailored.

B. The Proper Allocation of the Burden of Proof In Measuring Compelling Interest and Narrow Tailoring

1. Burden on Plaintiff Must be Two-Fold

As explained in Part III, showing a possible compelling interest is only part of the government's burden. It should further have the initial burden of production to prove that the compelling interest in fact exists for the school, and the initial burden of showing that the means are narrowly tailored. However, the ultimate burden of persuasion should lie with the plaintiff, as the Court has recognized in *Wygant*[293] and *Johnson.*[294] This analysis is similar to the burden shifting of Title VII, where the plaintiff has the ultimate burden of showing that discrimination is the real reason behind a policy that causes racial disparities.[295]

For remedying past discrimination, this would mean that the school has the initial burden of showing that there was either a threat of

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292. *Bakke*, 438 U.S. at 314.

293. *Wygant*, 476 U.S. 267 (1985).

294. *Johnson*, 480 U.S. 616, 626 (1987).

295. *See id. Johnson* explained that the ultimate burden of proof should lie with the plaintiff-nonminority challenging an affirmative action program under Title VII, as it lies in a challenge under the Equal Protection Clause. The issue of the proper burden of proof in a challenge by a Caucasian to an affirmative action program under Title VII of the Civil Rights Act of 1964 is complex, and beyond the scope of this paper. *See* Angela Onwuachi-Willig, *When Different Means The Same: Applying A Different Standard of Proof To White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53 (1999).

present civil rights liability, under a reasonable and constitutional interpretation of those laws, or that there are present vestiges of past discrimination. These are two distinct inquiries. Under the first inquiry, the government need only show that there is a strong basis in evidence that a minority student could bring a disparate impact claim under Title VI against the school, and that the school could not maintain an affirmative defense of educational necessity or a legitimate nondiscriminatory rationale.[296] When using an affirmative action program to counter present civil rights liability, the school does not have to prove that there are present effects of past discrimination. The second inquiry examines whether the school has a compelling interest in remedying the vestiges of past discrimination. The school should demonstrate that the present effects were caused at least in part by past discrimination. The school does not have to show that past discrimination was the sole cause.[297] In both of these inquiries, the plaintiff should have the ultimate burden of persuasion of showing that there is neither present civil rights liability or present-day effects from past violations.

When rebutting the government's evidence of present day vestiges of past discrimination, the plaintiff should not be able to merely show that factors other than past discrimination by the school caused some present effects. A school can be liable under the Constitution for causing the present effects of past discrimination, even if only in part.[298] Conversely, a school should be able to avoid liability to non-minorities burdened by affirmative action programs by showing that minorities suffer from present effects of discrimination caused partly by past official actions.

For maintaining ethnic diversity, the school has the initial burden of showing that diversity produces palpable benefits for the school, and that the preference helps create some of these benefits.[299] This would meet the school's evidentiary burden. The school also has the initial

296. The disparate impact analysis under Title VI mirrors Title VII's. *See* Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984).

297. This serves the policy explained in *Freeman v. Pitts*, 503 U.S. 467, 490, 512-13 (Blackmun, J., concurring in the judgment). Blackmun's concurrence emphasized that a school could be liable to minorities for the constitutional violation of allowing vestiges of past discrimination to harm minorities, even when those vestiges only caused part of the present harm to minorities. Conversely, when defending an equal protection challenge to an affirmative action program, public schools should not have to show that those vestiges were the sole cause of present harm to minorities; they can still be liable for causing part of the harm.

298. *Id.* at 512-13 (Blackmun, J., concurring in the judgment).

299. Proving the benefits of diversity in an academic setting will require more than merely stating that diversity aids education. Schools will have to carefully investigate these benefits when tailoring and then defending their affirmative action programs. *See* Jonathan R. Alger, *Unfinished Homework For Universities: Making the Case For Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73 (1998).

burden of showing that its racial preference is part of a process that produces general academic diversity. A preference that is merely part of a scheme to produce general diversity can be more flexible than a strict quota, and thus burden non-minorities less. Such a preference would be narrowly tailored.

Again, the plaintiff should have the ultimate burden of proving either that there are no tangible benefits from diversity, or that the preference used is not narrowly tailored. The plaintiff can show that the preference is too inflexible, or that it burdens the non-preferred too greatly. By showing inflexibility of the preference, the plaintiff can show that the school is admitting and denying students primarily because of their race, thus denying students their rights as individual citizens under the equal protection clause. The plaintiff should not be able to rest on merely showing that the ethnic preference does not produce all of the benefits of diversity—because the benefits of diversity are produced by the school's entire admissions process, not merely its racial preference.[300]

2. *Advantages of the Burden Shifting*

The burden shifting mechanism adheres more faithfully to the Court's civil rights doctrine. When a school uses an affirmative action program properly, either to remedy past discrimination or further ethnic diversity, it is not using race in the invidious manner that the Court's decisions in *Loving v. Virginia* and *Brown v. Board of Education* condemned. Under Title VII, when a public institution asserts a legitimate non-discriminatory rationale, the plaintiff has the burden of showing that the non-discriminatory rationale asserted is merely a pretense, and that the real reason is discrimination. Remedying past discrimination, or furthering academic diversity of which ethnic diversity is a part, are legitimate non-discriminatory rationales. It should thus be the plaintiff's burden of showing that the real reason is discrimination against non-minorities, or favoritism not grounded in serving those interests.

Furthermore, the burden shifting mechanism applies more faithfully the Court's strict scrutiny decisions. Strict scrutiny, as Justice O'Connor emphasized in *Adarand*, is not to be fatal in fact. There are

300. *See Bakke*, 438 U.S. 265, 312-13 (explaining the benefits that flow from a genuinely diverse student body, where ethnic diversity is only part of the broader diversity). If schools are allowed to use ethnic diversity only on a limited basis and as one of many criteria, it would be disingenuous to require that ethnic diversity produce all of the benefits that diversity is supposed to provide.

relevant differences between invidious discrimination seeking to breed inferiority in members of some race, and benign discrimination seeking to furthers remedial or educational diversity.[301] Burden shifting enables courts and schools to take account of those relevant differences and use a preference properly directed towards them.

Finally, the burden shifting will prevent plaintiffs and lower federal courts from using unsupported policy arguments without reasoned analysis of the evidence supporting a preferential program. For remedying past discrimination, placing the burden on the plaintiff prevents both the plaintiff and the court from resting on a finding that past discrimination was not the sole cause, or that the school's data could not account for every variable that may cause racial disparities. Requiring such precise findings demands too much from generally accepted methods of social science. Predicting human behavior is an inexact science, and high correlations are strongly indicative of causality even where sole causality can not be found. If a court demands sole causality of past discrimination for present effects, a preference can never be justified.

For the compelling interest of diversity, placing the burden on the plaintiff prevents the court from relying on the policy argument that racial preferences can occasionally create destructive stereotypes and indicate invidious discrimination. Courts cannot simply rely on the norm of color blindness and invalidate every proffered racial preference. The plaintiff must show, and the court must find, that the preference used by the school actually creates stereotypes about the minorities admitted, or that racial interactions are disrupted by the stereotype. A preference can always hypothetically create racial tensions or deny equal protection clause rights. The courts cannot assume that they always do. So in fact, in *Brown v. Board of Education*, there was real social scientific evidence that African-American students were inflicted with feelings of inferiority by de jure segregation in mid-twentieth century America.[302] Stereotypes were not assumed evil. There was concrete evidence of their humiliating effects. In the same vein, modern-day plaintiffs suing to enjoin affirmative action programs must show

301. The court should always keep in mind the context of strict scrutiny. Diversity many not be a compelling interest in other circumstances, such broadcast licenses or subcontractor preferences. It has been emphatically claimed an interest for education, however. *See Bakke*, 438 U.S. at 312-13; *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in the judgment). By applying a burden shifting mechanism placing the ultimate burden on the plaintiff-non-minority, and by allowing the government to use ethnic and racial preferences to attain a diverse school body, the Court would merely be ratifying the principles it has developed in strict scrutiny decisions from *Bakke* to *Adarand*, in a way that minimizes confusion and misinterpretation among lower courts.

302. Brown v. Board of Educ., 347 U.S. 483 at 494-95 (citing to social-psychological research supporting the conclusion that segregated schools breeds inferiority and stigmatization in African-American children).

concrete social science evidence that a preference directed towards diversity actually creates invidious stereotypes, discrimination, and feelings of inferiority. Lower courts can not invalidate preferences solely on policy arguments that may not apply to the specific program.

The ultimate goal of burden shifting is not to make it easy for schools to use race-based preferences. The lower courts are correct in interpreting the modern Court's equal protection clause decisions as allowing race to be used in only the most exceptional of circumstances. However, the federal courts' application of strict scrutiny cannot invalidate every conceivable racial preference. Strict scrutiny would then become automatically invalidated, that is, fatal in fact.

VI. Conclusion

Justice Stevens feared that applying strict scrutiny to benign discriminatory statutes would endanger "well-crafted" programs that are narrowly tailored to compelling state interests. They would be invalidated because of the fatality that accompanies the label "strict scrutiny." His fears were not ameliorated by a carefully worded majority opinion that explained that strict scrutiny was not to be fatal in fact.

As Part III showed, lower federal courts have indeed made the label of strict scrutiny automatically fatal, at least when examining preferences geared towards the compelling interests of remedying past discrimination or diversity. It is not clear how many of the educational preferences invalidated in the aftermath of *Adarand* would have been validated had lower courts accurately applied Supreme Court affirmative action decisions. At the very least, the government defendants would have been able to produce better evidence defending their programs, and that evidence would have been scrutinized carefully, both by plaintiff non-minorities who would have the burden of proof, and by Courts that examine preferences understanding that the burden of invalidation lies with the plaintiff. The preferences may have still been invalidated. Nevertheless, they would have received a fuller and fairer trial, and other schools may have gotten more guidance in fashioning racial preferential programs.

Racial stereotyping and race discrimination have justly attracted condemnation, due to the damage caused by past pro-White legislation and practices. Nonetheless, such characteristics as race and ethnicity can be used for purposes other than oppression and exploitation.

Ultimately, the use of race to further ethnic diversity in public institutions can begin an inquiry into the possible beneficial uses of race.

Deep cynicism seems to pervade the view that race can never be used as a benefit. Given that the nation is barely a generation removed from the regime of racial segregation and oppression of African-Americans and other minorities, such cynicism may appear to be justified. The same cynicism pervades the use of strict scrutiny; once the standard of review is determined, the question of the legitimacy of a racial preference is decided. The inquiry in this paper sought to show that the standard of review need not be the only determining factor. Strict scrutiny can be a real analytical tool for determining which racial preferences are valid and which should be invalidated.

This inquiry ultimately touches on a deeper question of law: can courts enunciate principles of law which public institutions and private actors can follow, or are courts prohibited from actually creating rules that regulate behavior? The conclusion that strict scrutiny can be an effective analytical tool for determining the validity of racial preferences implies that courts can regulate behavior, even in the sensitive area of racial and ethnic preferences.

The Supreme Court may yet revisit the issue of racial preferences in higher education. While the conclusion the Court would reach is still in doubt, this much is clear: the fate of public school racial preferences would lie not only with the express holding, but also with the framework that the Court would apply to educational preferences, and lower federal courts' interpretation of that framework.