



K I R W A N
I N S T I T U T E
for the Study of Race and Ethnicity

Affirmative Action: Annotated Bibliography 1995-2004

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Definition and Supporting Points

Definition:

Affirmative action policies include any policies that:

1. Attempt to actively dismantle institutionalized or informal cultural norms and systems of ascriptive group-based disadvantage, and the inequalities historically resulting from them, and/or that
2. Attempt to promote an ideal of inclusive community, as in ideals of democracy, integration, and pluralism (multiculturalism),
3. By means that classify people according to their ascriptive identities (race, gender, ethnicity, sexual orientation, etc.).(E. S. Anderson, 2003)

General Publications

Anderson, Terry H. (2004). *The pursuit of fairness: a history of affirmative action*. New York: Oxford University Press.

Beginning with the roots of affirmative action, this book gives readers a balanced, non-polemical, and lucid account of the issue. It is a historical/political account that brings to life the politicians, legal minds, and ordinary people who have fought for or against affirmative action.

Curry, George E. West, Cornell (eds.) (1996). *The Affirmative Action Debate*. Reading MA: Addison-Wesley.

This book is a collection of essays that presents many sides of the debate on affirmative action from well-known scholars, businessmen, political and civic leaders. It clarifies the legal, political and social significance of affirmative action. It dispels many of the misconceptions of the policy while highlighting its inherent flaws, and explains the goals of the policy in its intended form.

Babkina, A.M. (2004). *Affirmative Action: An Annotated Bibliography*. New York : Nova Science Publishers.

This guide to the literature presents 451 descriptions of books, reports and articles dealing with all aspects of affirmative action including: Race relations; Economic aspects; Reverse discrimination; Preferences; Affirmative Action programs; Public opinion; Court decisions; Education and many more. Complete author and subject indexes are provided.

Beckman, James A. (2004). *Affirmative Action : An Encyclopedia [Two Volumes]*. Westport, Conn: Greenwood Press.

This title's stated purpose is "to provide an overview of current scholarship on topics related to affirmative action and impacting a diverse array of disciplines, such as law, political science, history, and sociology." More than 500 A-Z entries--illustrated and cross-referenced--offer information significantly related to affirmative action, including coverage of concepts, court cases, ethnic and social groups, events, government agencies, individuals, issues, laws, and movements. This reference work brings together a variety of information spanning the period from the end of the Civil War to the Supreme Court decisions handed down in June 2003 relating to the University of Michigan's admissions policies. A timeline traces the development of affirmative action in the United States

from 1865 to the present, a bibliography lists important general works, and a "Guide to Related Topics" allows readers to trace broad themes across a range of entries.

Lawrence, Charles III & Matsuda, Mari J. (1997). *We Won't Go Back: Making the Case for Affirmative Action*. Boston: Houghton Mifflin.

Each chapter includes narratives from beneficiaries of affirmative action along with the authors' personal experiences. The authors look at the debate related to color blindness, meritocracy, feminism, and class. Lawrence and Matsuda have done an excellent job of presenting the facts and have added a humanistic angle that allows one to explore the impact of the policy in the U.S. The book puts forth a strong case that as a society we should not want to regress to a time when such a policy was necessary to provide the liberty and justice a democracy promises.

General Outcome Studies

Bowen, William and Bok, Derek. (1998). *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*. Princeton: Princeton University Press.

By far the most sophisticated, empirically grounded, comprehensive study of the outcomes of affirmative action programs in American universities. Based on a huge database, and packed with charts and tables. This has been said to be the definitive work thus far on outcome assessment of affirmative action in higher education. The most important finding is that the "mismatch" hypothesis is false: black students who attend a more selective school do *better* (with respect to graduation rates, attainment of advanced degrees, income, satisfaction with college experience) than their academically equivalent peers who attend a less selective school (i.e., the schools they would attend if affirmative action were abolished). This study is good on educational outcomes, and post-graduation outcomes for the direct beneficiaries of affirmative action, but considerably weaker on impacts of affirmative action on blacks beyond those directly targeted.

Davidson, RC and Lewis, EL. "Affirmative action and other special consideration admissions at the University of California, Davis, School of Medicine," *Journal of the American Medical Association(JAMA)* 278(14):1153-8, 1997, Oct 8. [published erratum appears in JAMA 1998 Feb 18; 279(7): 510].

(From the abstract:) Twenty-year, retrospective, matched-cohort study of affirmative action admissions at U-C Davis Medical School. Found that graduation and failure rates of special admissions and regular admissions students were comparable, as were career patterns after graduation. Concludes that criteria other than undergraduate grade point average and Medical College Admission Test scores can be used in predicting success in medical school. An admissions process that allows for ethnicity and other special characteristics to be used heavily in admission decisions yields powerful effects on the diversity of the student population and shows no evidence of diluting the quality of the graduates.

Chang, M., Witt, D., Jone, J., Hakuta, K. (Eds.) (2000) *Compelling interest: Examining the evidence on racial dynamics in higher education. Report of the AERA Panel on Racial Dynamics in Colleges and Universities*.

Book reviews social science literature that addresses the intersection of race and higher education. The focus is on fairness, merit, and benefits of diversity. Four misconceptions are addressed: 1. Past

inequalities in access and opportunities that racial and ethnic minority groups have suffered have been sufficiently addressed and no longer require attention; 2. Merit can be defined by test scores; 3. Fairness is best achieved through race-neutral policy; and 4. Diversity programs benefit only students of color. Policy conclusions are drawn related to these four misconceptions.

Justice & Reparations

Arguments on grounds of **justice** defend affirmative action as a compensation or corrective for past and continuing racism/sexism.

Forde-Mazrui, Kim. (2004). *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*. California Law Review. Vol. 92 (3) 685-753.

Underlying the debate over affirmative action and reparations for black Americans is a dispute about the extent to which American society is responsible for present effects of past racial discrimination. To the extent society participated in wrongful discrimination, society is obliged, as a matter of corrective justice, to make amends to its black victims. A potential moral conflict thus exists between society's obligation to refrain from "reverse" discrimination and its obligation to remedy past discrimination. That is, the moral case against affirmative action also supports a moral case in its favor. This article responds to the most serious objections to a societal obligation to remedy past discrimination. The author asserts that the moral imperative to remedy past discrimination outweighs the risk of imprecision in doing so.

McGary, Jr., Howard. (1977-1978). Justice and Reparations. *Philosophical Forum*, 9 (2-3), 250-263.

Argues that African-Americans are entitled to receive preferential treatment in employment and college admissions as reparations for slavery, Jim Crow, and institutional discrimination.

Duster, Troy. (1998) Individual Fairness, Group Preferences, and the California Strategy, in Robert Post and Michael Rogin, eds. *Race and Representation: Affirmative Action* (New York: Zone Books, 1998), pp. 111-133.

Updates the redress argument, exploring the history of racial discrimination from the New Deal through the civil rights era. Makes interesting parallels with the caste systems of South Africa and India, and affirmative action systems in these countries. Considers the political motives behind the movement to prohibit affirmative action in California. Also contains an intriguing discussion of Brandeis University's decision to practice affirmative action for men upon its discovery that exclusive reliance on criteria of academic merit would lead to a student body that was 70% female.

Ezorsky, Gertrude. (1991). *Racism and Justice: the Case for Affirmative Action*. (Ithaca, N.Y.: Cornell University Press).

For those who are skeptical about reparations for harms incurred a generation or more ago, Ezorsky argues that affirmative action can be justified on the ground that the harms of discrimination are current, and require compensation.

Axelson, Diana. (1977-1978). With All Deliberate Delay: on Justifying Preferential Policies in Education and Employment, *Philosophical Forum* 9, 264-288.

Widely reprinted defense of affirmative action as a necessary correction for current discrimination. Documentation of continuing institutional racism is central to the article. Has the advantage over

Ezorsky of brevity; makes an excellent companion piece to Pojman's anti-affirmative action paper (cited below), for those who wish to present students with a pair of highly representative articles on affirmative action, pro- and con. Its disadvantage is that it is somewhat dated; for this reason the Ezorsky book, with its updated argument and evidence, may well be preferred as a teaching source. Relevant portions of Ezorsky can be excerpted for those who don't want to assign the entire book.

Fish, Stanley. (November 1993). Reverse Racism, or How the Pot Got to Call the Kettle Black. *The Atlantic*.

Lively, highly accessible defense of affirmative action, more by replying to criticisms than by direct argument. Argues that the charge of reverse discrimination ignores history, and that objections on grounds of merit ignore the weak justification of conventional criteria of merit such as the SAT as well as current obstacles to equality of opportunity.

Anderson, Elizabeth. (2002). "Integration, Affirmative Action, and Strict Scrutiny," *NYU Law Review*, 77, 1195-1271.

This article defends racial integration as a central goal of race-based affirmative action. Racial integration of mainstream institutions is necessary both to dismantle the current barriers to opportunity suffered by disadvantaged racial groups, and to create a democratic civil society. Integration, conceived as a forward-looking remedy for de facto racial segregation and discrimination, makes better sense of the actual practice of affirmative action than backward-looking compensatory rationales, which offer restitution for past discrimination, and diversity rationales, which claim to promote nonremedial educational goals. Integrative rationales for affirmative action in higher education could also easily pass equal protection analysis, if only the point of strict scrutiny of racial classifications were understood. Unfortunately, the development of strict scrutiny as an analytical tool has been hampered by the Court's confusion over the kinds of constitutional harm threatened by state uses of racial classification. This Article sorts out these alleged harms and shows how strict scrutiny should deal with them. It shows how the narrow tailoring tests constitute powerful tools for putting many allegations of constitutional harm from race-based affirmative action to rest, and for putting the rest into perspective. It also argues that there is no constitutional or moral basis for prohibiting state uses of racial means to remedy private sector discrimination. Integrative affirmative action programs in educational contexts, which aim to remedy private sector discrimination, can therefore meet the requirements of strict scrutiny, properly interpreted.

Edley, Christopher, Jr. (1998). Not All Black and White-Affirmative Action and American Values. New York: Farrar Straus & Giroux.

This book makes the powerful argument that affirmative-action laws are essential to social justice in this country, though they have flaws and drawbacks (for both of which Edley suggests remedies). Throughout, the focus is on the deeper reasons why we disagree, and on the moral choices about values that we all must make in thinking about race in America. His book offers a lesson in reasoning about difficult policies, and he searches for the traces of truth on all sides of the debate. He shows us what is at stake in the positions our elected officials take and in the arguments we make about fairness, justice, and progress.

Renner, Edward K. (2004). *The More Things Change, the More They Stay the Same: The Elusive Search for Racial Equity in Higher Education*. *Analyses of Social Issues & Public Policy*. Vol 4 (1) p. 227-241.

In 1965, when **affirmative action** officially became part of the national consensus to achieve racial social justice, it was based on the compelling justification of establishing equality and remedying the effects of past discrimination. Since then, there has been a slow but steady shift from "equity" to "diversity" as its rationale. The shift has had a negative effect on achieving the original goal of racial equality. The diversity rationale has permitted parallel procedures to evolve that provided majority students with an even larger differential advantage than that conferred on minority students by **affirmative action**. In addition, we continue to have massive segregation. Minorities are concentrated in second level schools in urban areas, while whites are concentrated in higher quality institutions in the educational suburbs. It is without factual or legal foundation that whites can argue that they (relative to minorities) are the victims of discrimination through unfair and unequal educational policies and practices that determine access to higher education.

Democracy

Arguments on grounds of **democracy** view group-conscious representational devices as necessary under certain conditions for realizing a democratic society.

Post, Robert. (1998). "Introduction: After Bakke," in Robert Post and Michael Rogin, eds. *Race and Representation: Affirmative Action* (New York: Zone Books), pp. 13-27.

Argues that race-based affirmative action policies are necessary in college admissions because a central mission of the university is to promote a democratic culture. This requires building the cultural capital of all citizens, so that they have the communicative and imaginative skills necessary for creating a universally inclusive, democratic discourse. Colleges and universities "aspire to cultivate the remarkable and difficult capacity to regard oneself from the perspective of the other, which is the foundation of the critical interaction necessary for active and effective citizenship", p. 23. Without a diverse student body (to which end affirmative action is necessary), educational institutions will be able to inculcate only limited capacities for critical interaction across group divisions. Post stresses that this argument does not depend on the thought that identities correspond to cultures, or that individuals have fixed identities. Part of the point of a democratic culture is to free individuals and citizens acting collectively to engage in self-definition and self-determination, without being beholden to definitions based on birth or ancestry.

Issacharoff, Samuel. (1998). "Can Affirmative Action be Defended?" *Ohio State Law Journal* 59 (1998): 669-695.

Important paper by a former University of Texas law professor who was recruited by his university to help defend UT's affirmative action policies in the famous *Hopwood* case (they lost). Argues that the democratic state has a compelling interest in training a racially integrated elite. Race-based affirmative action is the only way to enable schools to simultaneously pursue their compelling interests in meritocracy and in integrating all groups into the nation's elite. Contains important data and arguments explaining why race-neutral attempts to secure integration either fatally compromise academic standards or fail to generate significant black and Hispanic enrollment in selective schools.

Estlund, Cynthia. (2000) "Working together: the workplace, civil society, and the law," *Georgetown Law Journal* 89.

Novel democratic defense of affirmative action in employment, arguing that places of employment are major sites of civil society, in which citizens interact and share their views. The democratic interest in promoting an integrated civil society--ensuring that citizens from different socially salient groups share their views with one another--supports affirmative action in the workplace.

Guinier, Lani. (2003). *Social Change and Democratic Values: Reconceptualizing Affirmative Action Policy*. Western Journal of Black Studies. 27, 1, 45-50.

The current debate over affirmative action continues the tradition of focusing on quantifiable measurements and merit as the criteria for the distribution of benefits, i.e., university admission seats. This paper joins the current discourse on affirmative action by suggesting that we move beyond the present polarized debate by illuminating how the concepts of merit and fairness might be more meaningfully explored in a democratic society. Introducing what I tentatively call a process of confirmative action, this paper urges the establishment of policies that link all admission practices to the broad purposes and public character of higher education in a multiracial democracy.

Gurin, Patricia, Nagda, Biren A., & Lopez, Gretchen E. (2004). The Benefits of Diversity in Education for Democratic Citizenship. Journal of Social Issues. 60 (1), 17-34.

The social science statement in *Brown v. Board of Education* (1954) stressed that desegregation would benefit both African American and White children. Eventually, it was recognized that integration, rather than mere desegregation, was important for benefits to be realized. A parallel argument is made in the legal cases concerning **affirmative action** in higher education: educational benefits of diversity depend on curricular and co-curricular experience with diverse peers, not merely on their co-existence in the same institution (Gurin, P., 1999, Gurin, Dey, Hurtado, & Gurin, 2002). Positive benefits of diversity were demonstrated in a study comparing students in a curricular diversity program with students in a matched control group (n = 114), and in a longitudinal survey of University of Michigan students (n = 1670). The authors focus on preparation for citizenship, which we argue is an important outcome of experience with racial and ethnic diversity just as it was seen as an important aspect of personal development at the time of *Brown v. Board*. They argue that experiences with diversity education and prepare citizens for a multicultural democracy.

Social Utility

Arguments on grounds of social utility claim that affirmative action policies promote desirable goals such as better mentoring of members of disadvantaged groups or delivering professional services to the disadvantaged.

Dworkin, Ronald. (2000a) "Affirmative Action: Does it Work?" "Affirmative Action: Is it Fair?" in *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass: Harvard University Press).

Important defenses of affirmative action by one of the leading legal scholars in the U.S., and one of the leading advocates of affirmative action. Vigorously denies that affirmative action is unfair to whites, using a battery of arguments. Dworkin distinguishes himself by offering a predominantly forward-looking, rather than compensatory, rationale for affirmative action.

Harwood, Sterling. "Affirmative Action Is Justified: A Reply to Newton," *Contemporary Philosophy* (1990): 14-17.

Defense of affirmative action with replies to a major critic (cited below). Besides appealing to considerations of compensatory justice, offers a battery of arguments for its good consequences: (1) role models; (2) diversity in education; (3) increases in the pool of applicants and hence competition;

(4) replacement of diminishing marginal utility for richer whites with more utility for poorer blacks; and (5) unskewing biased and incomplete tests of merit.

Cantor, JC; Miles, EL; Baker, LC; Barker, DC. (Summer 1996) "Physician service to the underserved: implications for affirmative action in medical education," *Inquiry* 33(2):167-80.

(From the abstract:) Using two large physician surveys, finds that minority and women physicians are much more likely to serve minority, poor, and Medicaid populations. Weaker, but significant association exists between physician and patient socioeconomic background. Service patterns are sustained over time and are generally consistent with physician career preferences. Argues that ending affirmative action in medicine may imperil access to care. Results do not support affirmative action based on economic disadvantage instead of race, ethnicity, and sex.

Komaromy M. Grumbach K. Drake M. Vranizan K. Lurie N. Keane D. Bindman AB. (1996). "The role of black and Hispanic physicians in providing health care for underserved populations," *New England Journal of Medicine* 334(20):1305-10.

(From the abstract:) Analyzed data on physicians' practice locations and the racial and ethnic makeup and socioeconomic status of communities in California in 1990. Also surveyed 718 primary care physicians from 51 California communities in 1993 to examine the relation between the physicians' race or ethnic group and the characteristics of the patients they served. Found that communities with high proportions of black and Hispanic residents were four times as likely as others to have a shortage of physicians, regardless of community income. Black physicians practiced in areas where the percentage of black residents was nearly five times as high, on average, as in areas where other physicians practiced. Hispanic physicians practiced in areas where the percentage of Hispanic residents was twice as high as in areas where other physicians practiced. After controlling for the racial and ethnic makeup of the community, black physicians cared for significantly more black patients (absolute difference, 25 percentage points; $P < 0.001$) and Hispanic physicians for significantly more Hispanic patients (absolute difference, 21 percentage points; $P < 0.001$) than did other physicians. Black physicians cared for more patients covered by Medicaid ($P = 0.001$) and Hispanic physicians for more uninsured patients ($P = 0.03$) than did other physicians. Concludes that Black and Hispanic physicians have a unique and important role in caring for poor, black, and Hispanic patients in California. Dismantling affirmative-action programs as is currently proposed, may threaten health care for both poor people and members of minority groups.

Purdy, Laura. (1984). "In Defense of Hiring Apparently Less Qualified Women," *Journal of Social Philosophy* 15 (1984): 26-33.

Argues that women are often perceived to be less qualified than they are, so that affirmative action corrects for a sexist perceptual bias in evaluations of merit.

Davis, Michael. (1983). "Race as Merit," *Mind* 92: 347-367.

Argues that under certain circumstances, being black can count as a merit or qualification for office. Affirmative action thus does not necessarily contradict the principle of merit or constitute reverse discrimination.

Moskos, Charles. (1986). "Success Story: Blacks in the Military," *The Atlantic*, May 1986.

Argues that the U.S. military's implementation of affirmative action policies on behalf of blacks is highly successful: it has resulted in a higher proportion of blacks in management positions than in any other sector of U.S. society. Key points of its program are rigorous enforcement of integration

and antidiscrimination principles and inclusion of race-relations skills as a dimension of merit in evaluating performance of officers. Moskowitz went on to write a book with John Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* (New York: Basic Books, 1997), which stressed as elements contributing to the success of military integration its uncompromising and uniform application of standards of merit for promotion, combined with intensive investment in skills and training of disadvantaged blacks so they can meet these standards.

Goldstein, Joel K. (2004). Beyond Bakke: Grutter-Gratz and the Promise of Brown. *Saint Louis University Law Journal*, 48, 899.

The author outlines the contours of the O'Connor opinion in Grutter in terms of its logic, how it compares to Powell's plurality in Bakke and the scope of its meaning. The article illustrates how much broader the diversity rationale that O'Connor paints is than in Bakke, and how it is also instrumental, as it wasn't in Bakke. The author suggests some interesting ways in which the instrumental dicta might be seized upon to craft future legal arguments which appeal to bettering overall social utility. In an important way, this returns to the Brown idea of including African-Americans in civic life.

Curtis, James L. (2003). Affirmative action in medicine: improving health care for everyone. Ann Arbor: University of Michigan Press.

The author maintains that affirmative action is needed not merely to remedy the legacy of racial segregation and exclusion from professional training, and not merely for the good of minorities, but that it is an essential part of the effort to create a more equitable American society and to improve the health care of everyone. Affirmative Action in Medicine, then, rests on two premises. The first is that such programs must always be considered in the context of ongoing and persistent -- not merely historical -- racial and class inequities. The second is that admission to medical school and other institutions of postgraduate training is a social good -- not just a prized award to individuals but a response to public need.

Education & Free Speech

Arguments on grounds of free speech and education defend affirmative action policies for the ways they create the diverse set of participants in discourse, research, and learning that is claimed necessary to promote the internal mission of educational institutions.

Butler, Judith. (1998). "An Affirmative View," in Robert Post and Michael Rogin, eds. *Race and Representation: Affirmative Action* (New York: Zone Books), pp. 155-173.

Criticizes the Regents of the University of California decision to abolish consideration of race, ethnicity, and gender in admissions and hiring for its failure to consider and respond to the educational value of diversity. Argues that diversity is not to be defended on the assumption that the meaning or value of an individual's contribution to inquiry can be reduced to or predicted by their social identity. Rather, discourse in a diverse community is valuable in providing inquirers with opportunities to change and reinterpret the significance of their identities through exchange with others who are differently positioned.

["The Compelling Need for Diversity in Higher Education." Expert Testimony of Witnesses for Defendants in Gratz v. Bollinger, Grutter v. Bollinger](http://www.umich.edu/%7Eurel/admissions/legal/expert/index.html)
<http://www.umich.edu/%7Eurel/admissions/legal/expert/index.html>

The most comprehensive empirically based defense of the diversity rationale for affirmative action available on the Web, developed by the University of Michigan for its defense in two legal challenges to its policies.

Alger, J. (1997, Jan/Feb). [The educational value of diversity](#). *Academe*, 20-23.

Examines why the affirmative consideration of race to achieve diversity in higher education fallen into legal and social disrepute. Argument for the necessity of diversity; race as a mere proxy for a particular perspective or point of view; educational benefit.

Biernat, Monica and Theresa K. Biernat. (1993). *Categorization and stereotyping: Effects of Group Context on Memory and Social Judgment*, 29 J. Experimental Social Psychology 166-202.

Three studies examined several hypotheses concerning the effects of group context on categorization and the subsequent effects of categorization on memory and social judgment, in essence, diversity's impact on the reduction of prejudice. Findings are discussed in regard to modern racism, construct accessibility, perceptual salience, and contextual changes in category use.

Hallinan, Maureen T. (1998). *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 Ohio State Law Journal 733 (1998).

The primary consideration of this article is the effects of diversity on student learning, as indicated by measures of academic achievement, although other effects of diversity are considered. In general, the research shows that the effects of diversity on college students are predominantly positive. Studies examining the impact of diversity on student academic achievement, educational attainment, satisfaction with college, racial and ethnic attitudes, multicultural understanding, and social behavior provide broad support for the conclusion that racial and ethnic diversity benefit both white and minority students without measurable disadvantages for any group of students.

Hurtado, Sylvia (1999). *Reaffirming Educators' Judgment: Educational Value of Diversity*. *Liberal Education*, 85(2), 24-31.

Drawing from a wide range of national and institutionally based studies, the author has identified three key premises directly addressing whether the diversity of the student body makes a difference in the education of students, and reviews the social science research related to each premise. The first premise is that college peers are an important part of the educational process in any educational environment. The second premise is that student interactions among diverse peers are associated with a broad range of educational outcomes. If one accepts the fact that colleges are responsible for enhancing student learning--and there is evidence to support both the first and second premises--then a third premise follows from emerging research: Colleges can create the conditions to maximize the learning that occurs in an environment with a diverse student population.

Pettigrew, T. F. & Tropp, L. R. (2000). *Does intergroup contact reduce prejudice: Recent meta-analytic findings*. IN: Stuart Oskamp (Ed). Reducing prejudice and discrimination. Mahwah, NJ:Lawrence Erlbaum Associates, Inc.

The authors reported the results of an encompassing meta-analysis that looked closely at Allport's Contact Hypothesis.

Orfield, Gary & Kurlaender, Michal. (2001). *Diversity Challenged: Evidence on the Impact of Affirmative Action*. Boston: Harvard Education Publishing Group.

This author predicts that affirmative action's survival may turn on just one question- whether or not the educational value of diversity is sufficiently compelling to justify consideration of race as a factor in deciding whom to admit to colleges and universities. Researchers and policymakers discuss substantial developing evidence showing that diversity of students can and usually does produce a broader educational experience, both in traditional learning and in preparing for jobs, professions, and effective citizenship in a multiracial democracy. The evidence also suggests that such benefits can be significantly increased by appropriate leadership and support on campus.

Gurin, Patricia, Dey, Eric L., Hurtado, Sylvia, Gurin, Gerald. (2002). Diversity and higher education: Theory and impact on educational outcomes. *Harvard Education Review*. 72 (3), 330-366.

Explores the relationship between students' experiences with diverse peers in the college or university setting and their educational outcomes. Rooted in theories of cognitive development and social psychology, the authors present a framework for understanding how diversity introduces the relational discontinuities critical to identity construction and its subsequent role in fostering cognitive growth. Using both single- and multi-institutional data from the University of Michigan and the Cooperative Institutional Research Program, the authors go on to examine the effects of classroom diversity and informal interaction among African American, Asian American, Latino/a, and White students on learning and **democracy** outcomes. The results of their analyses underscore the educational and civic importance of informal interaction among different racial and ethnic groups during the college years. The authors offer their findings as evidence of the continuing importance of **affirmative action** and diversity efforts by colleges and universities, not only as a means of increasing access to higher education for greater numbers of students, but also as a means of fostering students' academic and social growth.

Affirmative Action in the Workplace

Hiller, Janine S. & Stephen P. Ferris. (1993). Separating Myth from Reality: an Economic Analysis of Voluntary Affirmative Action Programs, 23 Memphis State University Law Review 773

Diversity enhances profits.

Reskin, Barbara. (1998). The Realities of Affirmative Action in Employment (Washington, D.C.: American Sociological Association), pp. 32-37.

Useful survey of the empirical research on how affirmative action works in employment settings, its impact and outcomes. Many empirical studies are covered in this brief work, which undermine some prominent criticisms of affirmative action -- e.g., that it increases workplace inefficiency by hiring less qualified people, and that it puts psychological burdens on its recipients by making them feel undeserving.

Affirmative Action-Legal Reviews

Affirmative Action Alternatives

Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity. U.S. Department of Education Office for Civil Rights. (2003).

<http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html>

A report released in March 2003 by the Office for Civil Rights providing a catalogue of race-neutral options available to educational institutions. The report divides these approaches into two categories, "developmental" and "admissions" approaches and emphasizes connections between secondary and postsecondary institutions.

A response to *Race Neutral Alternatives* from The Harvard Civil Rights Project:

http://www.usnewswire.com/topnews/qtr1_2003/0328-128.html

Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity—Are They Viable Substitutes for Affirmative Action? U.S. Commission on Civil Rights. May 2003. <http://www.usccr.gov/aaction/ftn1>

A critique of *Race-Neutral Alternatives* challenging the document's credibility and value to education policymakers. This report highlights the weaknesses and limitations of *Race-Neutral Alternatives*, such as the lack of criteria on which the programs it lists are judged "notable", the absence of independent assessments of the programs, and the uncritical acceptance of program's declarations of their own success. This argues that the report's most significant flaw is that it ignores the growing body of research that challenges assertions that some of the programs are viable substitutes for affirmative action.

Achieving Diversity: Race-Neutral Alternatives in American Education. U.S. Department of Education Office for Civil Rights. February 2004.

<http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>

This 2004 follow-up report to the *Race-Neutral Alternatives* (above) report states its primary goal as providing a catalogue of both developmental and admissions-oriented race-neutral approaches. It includes information concerning race-neutral alternatives for K-12, graduate and professional programs, and private colleges and universities, while recognizing that additional research is required. The publication has descriptions of several types of programs, as well as examples currently in place across the US.

Orfield, Gary. (1998). *Chilling admissions: The Affirmative Action Crisis and the Search for Alternatives.* Boston: Harvard Education Publishing Group.

After a generation of efforts to reverse the historic exclusion of minorities from their campuses, U.S. colleges and universities are facing a frontal attack on the programs, policies, and commitments born of these efforts. *Chilling Admissions* documents and examines their struggle to foresee the consequences of abandoning affirmative action in admissions and financial aid, and to devise viable alternatives for promoting and preserving campus diversity. The essays represent the work of the leading scholars of affirmative action in higher education, and place the current crisis on campus in its larger context of historical discrimination and the legal battle for educational equity.

Guinier, Lani & Strumm, Susan. (2001). *Who's Qualified?* (New Democracy Forum). Boston: Beacon Press.

Affirmative action originated as a plan to correct the historical disadvantage of women and people of color—to make the system more fair. Yet, for over twenty years, it has been repeatedly attacked

for being unfair to whites, and even un-American. Guinier and Sturm begin with a critique of affirmative action as it stands now, arguing that a system of selection that determines "qualification" from test scores and then adds on factors like race and gender doesn't work—either for the people it includes or the people it leaves out. But they go further, asking us to rethink how we evaluate merit. Marshaling lively examples from education and the workplace, they expose the failure of tests to predict success. They provide evidence that people's success depends on the opportunities they have to perform, and that institutions do best when they are open to unanticipated contributions.

Class-Based

Kahlenberg, Richard. "Class, not Race," *New Republic*, April 3, 1995, pp. 21-26.

An excellent *very brief defense of class-based affirmative action*.

Malamud, Deborah. "Affirmative Action, Diversity, and the Black Middle Class," *University of Colorado Law Review* 68 (1997): 939-999.

Argues that diversity defenses of affirmative action in education cannot stand alone; they must be supplemented by justice rationales. Class-based affirmative action cannot compensate for the distinctively race-based disadvantages suffered by the black middle class. Meaningful levels of racial integration therefore cannot be achieved without race-based affirmative action. Especially valuable for extensive documentation of the socioeconomic disadvantages the black middle class suffers because of race.

Malamud, Deborah. "Assessing Class-Based Affirmative Action," *Journal of Legal Education* 47 (1997): 452-471.

Argues that class-based affirmative action cannot significantly increase the opportunities of the poor without significantly reducing admissions standards at selective schools. In practice, it will advance the prospects of some lower middle class applicants over others. Discusses difficulties of constructing color-blind criteria of class-based disadvantage *within* the middle class. In practice, class-based affirmative action will expand opportunities to lower middle class whites at the expense of middle class blacks, who suffer from race-specific socioeconomic disadvantages not recognized by the policy. This will have the effect of enabling whites to more effectively transmit their middle-class status to their children, while depriving blacks in the middle-class from doing the same. Race-based affirmative action offers the best prospects of enabling blacks to establish an intergenerational presence in the middle class, at least cost to the other goals of higher education.

Young, John W. & Johnson, Paul M. (2004) *The Impact of an SES-Based Model on a College Undergraduate Admissions Outcomes*. *Research in Higher Education*. Vol. 45 (7). 777-797.

In *Grutter vs. Bollinger*, the U.S. Supreme Court ruled that the use of race as one factor, among many in admissions decisions is constitutional. It is not known, however, whether future legal opinions will continue to uphold the use of **affirmative action** policies. Some have argued that class-based preferences can achieve many of the same goals as in **affirmative action** while being more likely to withstand legal challenges. To date, no empirical studies have been conducted on the potential impact of a class-based admissions policy if implemented at an undergraduate institution. This paper reports on a study at a selective public college and compares a number of outcomes under three admissions models: the original admissions decisions, a purely academic model, and an socio-economic status (SES)-based model. The findings showed that use of the SES-based model would have led to a more academically qualified class than in the original admitted class while maintaining substantially greater student diversity

that was found under the academic model. An admissions policy based on preferences for socio-economically disadvantaged applicants appears to hold promise for other colleges and universities with similar institutional and applicant characteristics. The ideas and research design reported in this paper are based on the doctoral dissertation study of the second author, "Undergraduate Admissions Models Incorporating Socioeconomic Factors"

Percentage Plans

US Commission on Civil Rights. November 2002. *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*.

<http://www.usccr.gov/pubs/percent2/main.htm>

This analysis is guided by the question: Can percentage plans achieve the goal of equal educational opportunity? Based on the analysis performed here, the US Commission on Civil Rights found that the answer is no. This report asserts that percentage plans alone do not improve diversity by reaching underrepresented minority groups and will only have their desired effect if affirmative action and other supplemental recruitment, admissions, and academic support programs remain in place.

Montejano, David. "Maintaining Diversity at the University of Texas," in Robert Post and Michael Rogin, eds. *Race and Representation: Affirmative Action* (New York: Zone Books, 1998), pp. 359-369.

In response to the *Hopwood* decision, which prohibited race-based affirmative action at the University of Texas, the Texas state legislature acted to limit the threat it posed to resegregate higher education by mandating that the top 10% of each high school class be automatically admitted to the Texas university of their choice. This geographical standard prevents segregation by taking advantage of the fact that high schools themselves are highly segregated, due to the concentration of black and Hispanic populations in particular residential districts. This paper offers a preliminary assessment of this proposal.

[Horn, Catherine and Flores, Stella. "Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences". Harvard Civil Rights Project](#)

One of the now numerous studies documenting that "top x% plans", requiring the admission of the top x% of any in-state high school graduates to state university, have failed to live up to their billing of improving racial diversity on selective college campuses. To the extent that they have achieved any diversity, they are reliant on underlying race-conscious policies, such as vigorous recruitment from minority high schools and massively increased financial aid. Cites to other studies making similar findings can be found at the University of Michigan's website on [Research Supporting Affirmative Action in Higher Education](#).

Marin, Patricia & Lee, Edgar K. [Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida](#). Cambridge, MA: The Civil Rights Project at Harvard University.

This report describes the history, implementation, and effects of the Talented 20 Program, a program in Florida guaranteeing the top 20% of public high school graduates admission to the state university system. The report concludes that Talented 20 Plan is, in fact, not race-neutral and is not an effective alternative to race-conscious affirmative action.

Horn, Catherine L., & Flores, Stella M. (2003). [Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences](#). Cambridge, MA: The Civil Rights Project at Harvard University.

This report focuses on the effectiveness of percent plans on maintaining racial/ethnic diversity without using race or ethnicity as a factor in university admissions, in Texas, California, and Florida. It draws on data from state agencies, the federal National Center for Education Statistics, the U.S. Census, institutional and state documents, and interviews. It shows that in almost every case, institutions have not been successful in maintaining racially/ethnically diverse campuses through percent plans.

Focus on the Merit Gap

Jencks, Christopher and Phillips, Meredith. "[America's Next Achievement Test: Closing the Black-White Test Score Gap](#)," *The American Prospect* 40 (September-October 1998): 44-53.

Argues that, in light of the rollback of affirmative action programs in higher education, the best chance for advancing black prospects is to close the gap between blacks and whites in performance on standardized tests. Provides data on the persistent but declining gap, and suggests strategies for closing the gap.

Jencks, Christopher and Phillips, Meredith, eds. *The Black-White Test Score Gap* (Washington, D.C.: Brookings, 1998).

Highly important collection of articles on the causes and potential remedies of the black-white educational achievement gap.

Limitations of Affirmative Action

Wilson, William Julius. *The Truly Disadvantaged*. (Chicago: University of Chicago Press, 1987. (see below)

Wilson, William Julius. *When Work Disappears*. (New York: Vintage Books, 1997).

Criticizes affirmative action for failing to help the most disadvantaged and for increasing racial divisiveness, thus posing obstacles to cross-racial coalition building. Massive public works projects, designed to bring jobs to the inner cities where jobs have disappeared, are a better, color-blind alternative.

Owen Fiss, *A Way Out: America's Ghettos and the Legacy of Racism* (Princeton: Princeton University Press, 2003).

While not specifically criticizing affirmative action, this book takes up Wilson's challenge to focus on the most disadvantaged, those who are not directly benefitted by affirmative action. Defends aggressive state measures to enable poor blacks to move out of the inner cities (which provide poor job and educational opportunities, and prevent their residents from accumulating savings or avoiding victimization from crime) and achieve racial integration in more successful suburban neighborhoods. Contains numerous critical responses to his proposal and replies by Fiss. See especially the sharply worded critique by Jim Sleeper, author of *Liberal Racism*. A fresh, provocative book.

Affirmative Action Attitudes and Beliefs

Bobo, Lawrence. (1998). *Race, Interests, and Beliefs About Affirmative Action: Unanswered Questions and New Directions*. American Behavioral Scientist. Vol. 41 7 985-1003.

Studies of public opinion on affirmative action have focused heavily on the views of White Americans. Two contending schools of thought tend to concur that Whites generally oppose affirmative action, but sharply disagree over whether the hostility to affirmative action rests on cherished American values of individualism or on anti-Black racism. This article questions both perspectives and the assumptions about public opinion that they share. It is important to examine the views of Whites and of racial minority group members and to recognize that group interests play an important part in the politics affirmative action. The analysis focuses on beliefs about the effects of affirmative action. The results point to real but far from irreconcilable race-based differences in opinion, a clear dependence of Whites' views on perceived threats from Blacks, and no influence of individualism on Whites' beliefs about the effects of affirmative action. The research suggests ways of moving beyond the political stalemate of opposing claims to moral virtue in the debate over affirmative action.

Stoker, Laura. (1996). *Understanding Differences in Whites' Opinions across Racial Policies*. Social Science Quarterly. Vol. 77, 4 768-777.

Presents the views of the author on the article by Steven A. Tuch and Michael Hughes about the racial policy attitudes of whites. Policy attributes, and their implications for opinions; Affirmative action; Issues related to policy-specific differences in opinion.

Aberson, Christopher L, & Haag, Sarah C. (2003). *Beliefs About Affirmative Action and Diversity and Their Relationship to Support for Hiring Policies*. Analyses of Social Issues and Public Policy, Vol. 3, No. 1 121-138.

Two hundred seventy-three White undergraduates participated in an investigation of how beliefs relate to support for affirmative action (AA) policies. Beliefs included belief in the fairness of AA, belief in merit, and belief in the value of diversity. Analyses predicted support for a general affirmative action policy, a tiebreak policy, and a policy using banding from beliefs and individual-level variables such as future benefit from AA and demographics. For the general policy, each belief predicted support for AA. Fairness and value of diversity predicted support for a tiebreak policy. Value of diversity predicted support for aptitude testing. Individual characteristics improved prediction for AA in general but not for tiebreak policy or aptitude testing. We discuss predictions and results in terms of procedural and distributive justice, fairness heuristic theory, and models of support for AA.

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Crosby, Faye J. (2004). *Affirmative Action is Dead; Long Live Affirmative Action*. New Haven : Yale University Press.

A close analysis of the history, law, and practice of affirmative action, the book analyzes the attitudes held towards affirmative action as these are reflected in the media, scientific studies, polls, and other expressions of political and public opinion. The author looks at the controversy surrounding affirmative action linking attitudes to American's deeply held views about bias, fairness, and justice.

Kravitz, David A. & Platania, Judith. (1993). *Attitudes and Beliefs About Affirmative Action: Effects of Target and of Respondent Sex and Ethnicity*. Journal of Applied Psychology. Vol. 78 No. 6. 928-938.

Undergraduates ($N = 349$) at a multicultural metropolitan university were surveyed to assess (a) beliefs and evaluations of potential components of affirmative action plans (AAPs), (b) correlations between attitudes toward affirmative action and such beliefs and evaluations, (c) differences in reactions as a function of the AAP target (minorities, women, or people with disabilities), and (d) gender and ethnic differences in the results of a, b, and c. Many beliefs about affirmative action were incorrect. Recruitment, training, and attention to applicant qualifications were favored, whereas discrimination, quotas, and preferential treatment were opposed. Opposition to potential AAP components was directly related to the weight given to demographic status. Responses varied depending on respondent gender and ethnicity. Conflict associated with affirmative action can be minimized by eliminating certain misperceptions about AAPs and by incorporating positively evaluated components.

Kravitz, David A. & Klineberg, Stephen L. (2000). *Reactions to Two Versions of Affirmative Action Among Whites, Blacks, and Hispanics*. Journal of Applied Psychology. Vol. 85 No 4. 597-611.

Houston-area Whites ($n = 414$), Blacks ($n = 392$), American-born Hispanics ($n = 162$), and Hispanic immigrants ($n = 177$) evaluated a self-defined "typical" affirmative action plan (AAP) and a tiebreak AAP that applies under conditions of equal qualifications and underrepresentation. Whites preferred Tiebreak; Blacks and Hispanics preferred the typical AAP. The groups differed in beliefs about the procedures and fairness of affirmative action (AA), perceptions of workplace discrimination, and political orientations. Perceived fairness predicted support for both AAPs in all American-born groups, but the impact of other predictors varied greatly across AAPs and ethnic groups. The results clarify the bases for Whites' opposition to AA as they construe it. The results also underscore the importance of specifying the AAP procedures, of uncovering the predictors of AA attitudes among target-group members, and of conducting separate analyses in each ethnic community.

Aberson, Christopher, L. (2003). *Support for Race-Based Affirmative Action: Self-Interest and Procedural Justice*. Journal of Applied Social Psychology. Vol. 33, 6. 1212-1225.

The current study examines attitudes toward affirmative action. Hypotheses related to self-interest concerning perceptions of the benefits of affirmative action and hypotheses derived from procedural justice research regarding the structure of policy statements both received support. A survey completed by 387 undergraduate and graduate student participants found greater perception of benefits resulting from affirmative action policies, defined in terms of increased opportunity (concrete benefit) and increased satisfaction (abstract benefit), related to greater support for affirmative action. Policies presented with justification received more support than did policies

presented without justification. Ethnicity did not directly affect support for affirmative action; however, ethnicity did affect perceptions of the benefits of affirmative action. Perceptions of the benefits of affirmative action mediated ethnicity effects. Suggestions for increasing support for affirmative action are provided.

Schuman, Howard & Krysan, Maria. (1999). *A Historical Note on Whites' Beliefs about Racial Inequality*. *American Sociological Review*. Vol. 64, 6. 847-855.

Beliefs about sources of the socioeconomic disadvantage suffered by blacks have been investigated by major continuing surveys since the 1970s. Results indicate that most whites tend to place responsibility mainly on blacks themselves, with the primary emphasis on a presumed lack of motivation on the part of blacks. Drawing on two survey questions used by the Gallup organization, we show that at the height of the civil rights movement in 1963, white respondents tended to blame whites and blacks equally for racial disadvantages, but that this changed sharply in the late 1960s. The change, which may well have been a reversion to pre-1960s beliefs, was probably a result of both the enactment of civil rights legislation, which supposedly ended racial discrimination, and the eruption of riots in Detroit, Newark, and other cities, which differed drastically from the earlier nonviolent protests in the South. This shift in public beliefs indicates that attributions of blame for socioeconomic disadvantage are not as fixed as later data suggest. Our analysis makes strategic use of a split-sample experiment to distinguish substantive change over time from change resulting from variations in the wording of survey questions.

Kluegel, James R. & Smith Eliot R. (1982). *Whites' Beliefs about Blacks' Opportunity*. *American Sociological Review*. Vol. 47, 4. 518-532.

This paper presents a description and explanation of the current character of whites' beliefs about blacks' opportunity: perceptions of equality of opportunity, discrimination, "reverse discrimination," and the over-time trend in black opportunity. Data from a recent national survey show that whites tend to perceive widespread reverse discrimination, to see blacks' opportunity as having greatly improved in recent years, and in general to deny structural limits to blacks' opportunity. We propose that these perceptions are, in part, the product of the prevailing beliefs about stratification held by the American public. Empirical analysis shows that whites' beliefs about blacks' opportunity are significantly influenced by persons' perceptions of their own opportunity, by stratification ideology explaining opportunity in general, and by feelings of relative deprivation.

Gamson, William A. (1999). *Ambivalences About Affirmative Action*. *Society*. Vol. 36, 6 41-45.

Discusses the nature of the ambivalences that white and Afro-American working people in the United States (US) experience in thinking about affirmative action. Individualism and rights of people of the US; Nature of Afro-American and white ambivalences; How justifications for color cognizant programs can embrace the idea of the person as an individual.

Tuch, Steven A., & Hughes, Michael. (1996). *Whites' Opposition to Race-Targeted Policies: One Cause or Many?* *Social Science Quarterly*. Vol. 77, 4, 778-788.

Presents the views of the author on article written by Steven A. Tuch and Michael Hughes regarding racial policy attitudes of whites. Political explanation as basis of support for racial policies; Impact of casual measures for social and political attitudes.

Andolina, Molly, W. & Mayer, Jeremy D. (2003). *Demographic shifts and racial attitudes: how tolerant are whites in the most diverse generation?* The Social Science Journal. Vol. 40 1 19-31.

The authors used cohort analysis to examine white Americans' attitudes to questions of race and racial equality over a period of 20 years to determine if Generation Xers have a unique orientation to these issues. We find that Xers are distinct from their elders and earlier cohorts of young adults in their greater support for school integration and their endorsement of government action to enforce such efforts, but not in their attitudes toward employment opportunities or affirmative action.

Legal Affirmative Action Cases

Key Civil Rights Cases Relevant to Affirmative Action

Important civil rights cases not specifically about affirmative action, but that articulate principles and arguments often cited for or against affirmative action.

[Plessy v. Ferguson, 163 U.S. 537 \(1896\)](#)

Notorious decision upholding the constitutionality, under the 13th and 14th Amendments, of state laws requiring racially segregated public facilities (in this case, of Louisiana's railroad cars), provided they are "separate but equal". This decision was overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954). The case remains relevant because of Justice Harlan's vigorous dissent, now taken by many to represent the correct Constitutional analysis, not only of this case, but of the constitutional status of race-conscious laws. Harlan's declaration that "our Constitution is color-blind" (559) is often cited in opposition to the constitutionality of affirmative action programs. Less noticed is his declaration, immediately preceding this sentence, that "in view of the Constitution. . . [t]here is no caste here," which suggests different implications if color-conscious remedies are needed to dismantle caste barriers. Another interesting feature of the case is its stress on analysis of the 13th Amendment (prohibiting slavery) rather than the 14th Amendment (requiring states to provide equal protection of the laws). The 13th Amendment does not merely prohibit slavery, but state imposition of the "badges of servitude." Harlan exposed the disingenuousness of the Court's pretense that racial segregation imposed equal burdens on whites and blacks, arguing that its manifest intent was to stigmatize blacks. Yet, Harlan hardly disavowed racism as a social philosophy, declaring that "every true man has pride of race" (554), and that "The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage. . . ." (559).

[Korematsu v. United States, 323 U.S. 214 \(1944\)](#)

Notorious decision upholding the constitutionality of the internment of Japanese-Americans during World War II, on vague and unsubstantiated suspicions that they might be involved in espionage and sabotage on behalf of Japan. This case has never been overruled, and indeed is still cited as establishing the principle that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and must pass the test of "rigid [i.e. strict] scrutiny" (216). The Court's use of this standard did not reflect the later Court's concern with means (requiring narrow tailoring), focusing only on the overriding importance of the military end in view, and deferring to the judgment of the military and of Congress that Japanese-American internment was necessary. Strong dissents by Justices Roberts, Murphy, and Jackson. *Hirabayashi v. United States*, 320 U.S. 81 (1942) established the key precedent for *Korematsu*. It declared that "[d]istinctions between citizens

solely because of their ancestry" are "odious to a free people whose institutions are founded upon the doctrine of equality." (100)

[Shelley v. Kraemer, 334 U.S. 1 \(1948\)](#)

Prohibited states from enforcing private agreements to exclude people from buying real estate or renting housing on account of their race. Notable for its unusually expansive conception of state action. Since the Civil Rights Cases, 109 U.S. 3 (1883), the 14th Amendment has been held to prohibit state action only, not the discriminatory actions of private individuals. (The *Civil Rights Cases* overturned the Civil Rights Act of 1876, by which Congress prohibited segregation of privately owned public accommodations, as not falling within the scope of Congress' power to enforce the 14th Amendment. The Civil Rights Act of 1964 achieved the same end as the 1876 act by appealing to Congress' power to regulate interstate commerce.) *Shelley v. Kraemer* took the unusual step of arguing that, although private individuals could still make restrictive covenants, it would violate the Equal Protection clause of the 14th Amendment for states to enforce them.

[Brown v. Board of Education, 347 U.S. 483 \(1954\)](#)

[Brown v. Board of Education, 349 U.S. 294 \(1955\)](#)

Perhaps the most important Supreme Court case of the 20th century, declared state-imposed racial segregation of schools unconstitutional under the equal protection clause of the 14th Amendment, thereby overturning [Plessy v. Ferguson, 163 U.S. 537 \(1896\)](#). "Separate educational facilities are inherently unequal." (495). Although its holding is now a fixed point of constitutional adjudication, some have criticized its reliance on social scientific evidence that segregation harms the self-esteem of black children. (Shouldn't racial segregation be condemned as inherently unequal, even if black children showed unusual psychological resilience in the face of stigmatization?) The 1955 decision required public schools to desegregate "with all deliberate speed" (301). In practice, the order to be "deliberate" was used by the states to slow down and obstruct desegregation orders, leading to a protracted, decades-long struggle to enforce Brown.

[Griggs v. Duke Power Co., 401 U.S. 424 \(1971\)](#)

A key case for understanding the Civil Rights Act of 1964, prohibiting discrimination in employment on account of race, color ethnicity, national origin, religion and sex. Held that the Civil Rights Act of 1964 prohibits not only intentional racial discrimination, but hiring and employment policies that have a differential impact by race that (a) perpetuates the effects of past discrimination and (b) is not justified by business necessity. Black plaintiffs in *Griggs* challenged Duke Power Company's requirement that applicants for its better-paying jobs pass a general test of academic ability. The test was not valid (performance on the test did not predict performance on the job), but black job applicants were much more likely to fail it than white applicants were, due to the history of racially segregated schools, which deprived black applicants of an adequate education. The Court agreed that the 1964 Civil Rights Act required private employers to remove arbitrary obstacles to black advancement, even if those obstacles were not put in place with the intention to discriminate against them. *Griggs* revolutionized the enforcement of the Civil Rights Act of 1964, by shifting focus away from intent and toward a disparate impact standard. It established that a company's failure to employ a workforce whose racial composition reflected the racial composition of the *local, qualified* labor pool constituted prima facie evidence of a violation of the Act. This shift set the stage for outcome-sensitive affirmative action policies. Should be read in conjunction with [Washington v. Davis, 426 U.S. 229 \(1976\)](#) (see below).

[Washington v. Davis, 426 U.S. 229 \(1976\)](#)

Held that the Due Process Clause of the 5th Amendment (holding the Federal Government to the same equal protection standards imposed on the states by the 14th Amendment) prohibits only intentional racial discrimination, and does not require the government to correct for the unintended differential racial impact of its policies. A fascinating companion case to [Griggs v. Duke Power Co., 401 U.S. 424 \(1971\)](#), because the fact pattern presented is nearly identical to that in *Griggs*, but the outcome was different. Black plaintiffs sued the Washington D.C. police department for using a reading test to screen applicants for police jobs, arguing that the use of the test disproportionately disadvantaged black applicants, who did not score as well on it, and that the test was not validated. The Court declined to hold the Federal Government to the same disparate impact standard under the 5th Amendment as private employers are held under the 1964 Civil Rights Act.

[Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 \(1977\)](#)

Following up on *Washington v. Davis*' requirement that discriminatory intent be proven before a violation of Equal Protection is found, held that local governments are free to adopt zoning regulations (e.g., prohibition of multi-family dwellings) with disproportionate racial impact as long as the specific history of such regulations does not reveal a discriminatory motive. The chief difficulty with the evidentiary standard articulated in *Arlington Heights* for proving racist intent is that it assumes a requirement to show specific intent with respect to the particular case in question. It thus neglects the sorts of evidence for the causal impact of race on zoning regulations that can only be developed via statistical analysis of many cases across different local government units. In addition, it fails to inquire into deeper motivations behind constitutionally permitted motives--for example, whether a legitimate concern to adopt certain zoning regulations for the protection of property values reflects an underlying belief that the regulations protect property values precisely by keeping out unwanted racial groups. This opinion effectively gives local governments carte blanche to exclude racial groups by means of nonracial proxies, so long as they keep quiet about their motivations, enact the regulations before facing a specific threat of integration, and apply the regulations consistently thereafter, regardless of race.

Cases Establishing the Constitutionality of Affirmative Action

[Regents of the University of California v. Bakke, 438 U.S. 265 \(1978\)](#)

[\(RealAudio version of oral argument\)](#)

The key case establishing the Constitutionality (and compatibility with Title VI) of race-conscious admissions by universities. The Court found a majority for its holdings--permitting race-based admissions, rejecting UCal's particular admissions system--but could not agree on a rationale. Justice Powell's famous opinion argues that universities may practice race-conscious affirmative action for purposes of enhancing educational diversity, in recognition of their First Amendment right to academic freedom in judging what qualities of a student body would most enhance education. However, the following constraints must be observed: (a) racial quotas are not allowed; (b) all students must be evaluated according to common standards, by a common admissions committee; (c) race may not operate as an overriding factor, but only as a "plus" on a par with "a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." Four other justices joined Powell in agreeing that universities may use race-conscious affirmative action, but none joined the part of his opinion endorsing his "diversity" rationale. Instead, they argued that universities may practice affirmative action to remedy societal (private) discrimination.

Powell disagreed: the university's *remedial* uses of race must be confined to constitutional or statutory violations of equal protection and antidiscrimination law. In a less noticed aspect of his opinion, Powell allowed that delivery of medical services to underserved populations is a compelling state interest that could justify race-based affirmative action, provided the use of race is necessary to advance that interest. However, he rejected UCal Davis' argument to this effect as merely speculative, not supported by evidence. Thus, *Bakke* leaves this line of argument open to future evidentiary developments.

[United Steelworkers of America, AFL-CIO-CLC v. Weber, 443U.S. 193 \(1979\)](#)

The key case establishing the permissibility under Title VII of a voluntary race-conscious affirmative action program instituted by an employer or union designed to remedy past discrimination in employment. Upheld a temporary reservation for black employees of half the training opportunities for skilled steel jobs as a means to undo racial segregation of these positions. The case illustrates how far the Court may go in adopting a purposive interpretation of a law at variance with its plain meaning and a considerable part of its legislative history, in light of evidence that Congress' purposes could not have been achieved with the means it expressly contemplated at the time of enactment. Title VII prohibits, in plain language, an employer or union's acting "to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race" (42 U.S.C. 2000e-2), and the legislative history reveals proponents of Title VII vigorously denying that the law would require employers to implement racial quotas. Brennan's opinion, relying on a tortured reading of the legal text, is valuable for one insight into the legislative history: that Title VII had 2 purposes: (1) to end employment discrimination, (2) to remedy the consequences of past discrimination so as to enable the integration of minorities into the economy. The second purpose may sometimes require race-based remedies. Focus instead on Blackmun's concurring opinion, succinctly stating the practical problem at the core of Title VII: a literal reading of the law would put employers who had engaged in racial discrimination in an impossible bind, subject to being dragged into court for violating Title VII whether it fails to remedy its discrimination, or voluntarily remedies it. But it is absurd to interpret a law in such a way that it prevents violators from taking voluntary action to bring themselves into compliance with it. White Respondent Weber's reading of Title VII would require employers, against their interest, to specifically identify all victims of their past discrimination (thus exposing their liability for backpay), a task that in any event is impossible under the *Griggs* disparate impact standard, which recognizes that it is not always possible to identify those who would have been hired but for an employment practice (e.g., recruiting new employees by relying on their connections to current employees) that perpetuates racial exclusion. Respondent Weber's reading of Title VII, forbidding admission to training for skilled positions a greater % of blacks than prevails in the qualified labor pool, would also unjustly "lock in" the effects of prior job segregation (given that the low % of blacks in the pool is a reflection of prior discrimination). With this decision, the Court thus authorized employers not only to implement a voluntary affirmative action plan to remedy past, unadmitted if "arguable," violations of Title VII, but (1) to redress discrimination that lies beyond the scope of Title VII (e.g., for pre-Act discrimination), (2) in ways that benefit blacks who may not have been victims of that discrimination. Don't miss Rehnquist's blistering dissent, which offers a powerful reading of Title VII's plain meaning and legislative intent, although it does not address the practical problem of voluntary compliance identified by Blackmun and ignores the evidence of broader remedial purpose evinced in Brennan's opinion.

[Fullilove v. Klutznick, 448 U.S. 448 \(1980\)](#)

The key case establishing the Constitutionality of race-conscious affirmative action in government contracting with private businesses. Held that the Federal Government may set aside a percentage of contracting funds for minority-owned businesses, for the purpose of ensuring that federal funds are not used in such a way as to perpetuate the racially exclusionary effects of prior discrimination against minority businesses, provided (1) the set-aside does not continue longer than the effects of discrimination; (2) the set-aside can be waived if sufficiently qualified minority contractors cannot be found, or if they charge a higher price than can be explained by their attempts to cover costs inflated by the present effects of prior disadvantage and discrimination; (3) a procedure is available to prevent minority businesses that are not disadvantaged from claiming the set-aside; (4) the set-aside does not place too great a burden on innocent nonminority businesses. Private parties (prime contractors) can be required to subcontract 10% of their business to minority businesses even if they had not been guilty of discrimination themselves. (A line of decisions following *Griggs* had already established that under the Commerce clause, Congress may prohibit business practices that perpetuate the effects of discrimination that, because it took place prior to the Civil Rights Act, was not illegal. *Fullilove* reasoned that Congress has the same power over private parties under its authority to spend for the general welfare, and over states under its 14th Amendment enforcement authority. *Fullilove* thus permits Congress to regulate state action under *Griggs*-style differential impact analysis, even though *Washington v. Davis* does not directly grant private parties such a cause of action under the Equal Protection clause of the 14th Amendment.) Powell, concurring with the Court's judgment, held that the set-aside must and did meet the standards of strict scrutiny, but no other justices joined him in that view. Thus, to the extent (not yet determined by the Court) that *Fullilove*'s analysis depends on a less than strict scrutiny of Federal racial classifications, it has been overruled by *Adarand*. Check out Stevens' vigorous dissent, rejecting the use of race for backward-looking (reparations-based) remedies to discrimination. Stevens was later to become the Court's greatest advocate of a lax standard of review for forward-looking (instrumental) uses of race, as in his dissent in *Wygant*, accepting the role-model justification for race-based affirmative action.

Cases Consolidating and Extending the Scope of Permissible Affirmative Action

[Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 \(1979\)](#)

Held that an affirmative action program that gave an *absolute lifetime preference* to U.S. veterans of the armed forces, regardless of the inferiority of their qualifications, for employment in the Massachusetts civil service did not violate the state's duty to offer equal protection to women, even though it effectively barred women, no matter how highly qualified, from access to better civil service jobs. (Petitioner Feeney was passed over for lower-scoring veterans for numerous jobs, including one for which she got the second highest examination score, another for which she got the third highest score.) This case instantiates the following principles: (1) the disparate gender impact of a state policy, no matter how extreme, of itself raises no constitutional questions, as long as that disparate impact is not purposeful (see *Washington v. Davis*); (2) discrimination among citizens in the allocation of benefits other than fundamental constitutional rights, on grounds other than race, ethnicity, sex, or religion, are accorded mere "rationality review"--a standard of review so lax almost any preferential treatment, no matter how extreme, can satisfy it; (3) if a preference based on a nonsuspect classification is constitutional, the degree of the preference, no matter how great, cannot make it unconstitutional; (4) states are free to discriminate on the basis of a facially gender-neutral classification even if another government unit (in this case, the Defense Department) has purposefully prevented women from joining it. (At the time *Mass. v. Feeney* was litigated, the Pentagon's ceiling on female enlistment in the Armed Forces resulted in a class of veterans only 2%

female.) See Marshall's eloquent dissent, which demonstrates how Supreme Court precedents on the 14th Amendment could have been taken in a different direction.

[Firefighters v. Cleveland, 478 U.S. 501 \(1986\)](#)

Upheld the right of employers and unions to enter into a voluntary consent decree that provides a race-conscious remedy for prior employment discrimination, even if the remedy benefits individuals not identified as victims of that discrimination. Follow-through on *Weber*, decisively affirming Blackmun's concurring opinion in that case, stressing the need to permit employers to remedy their discriminatory action by voluntary means. Rejects the view that Section 706(g) of Title VII, which precludes a district court from entering an order requiring the hiring or promotion of an individual who was refused employment or promotion for any reason other than discrimination, prevents employers' voluntary adoption of a remedy for discrimination that has the effect of hiring or promoting individuals who had not been discriminated against.

[Sheet Metal Workers v. EEOC, 478 U.S. 421 \(1986\)](#)

Upheld an EEOC imposed racial membership quota on the Sheet Metal Workers' union, as a narrowly tailored remedy to stubborn and egregious racial discrimination practiced by the union, in defiance of court order under Title VII. While Title VII prohibits racial quotas for the purpose of racial balancing, it does not prohibit quotas as a remedy for discrimination. Nor does it limit remedies to actual victims of prior discrimination: when a history of egregious discrimination shows that mere injunctive relief will not stop the violations, imposition of temporary race-based affirmative action, including a quota, may be necessary to stop the illegal behavior. Rejects the view that section Section 706(g) of Title VII prevents a court-ordered imposition of such a remedy, interpreting its provision to mean only that the court may not order the employment, promotion, or admission to a union of someone who would have been refused this even in the absence of discrimination. *Sheet Metal Workers* therefore empowers courts to impose race-conscious remedies in the same way that *Firefighters v. Cleveland* empowers employers and unions to voluntarily remediate their discrimination through consent decrees.

[United States v. Paradise, 480 U.S. 149 \(1987\)](#)

Upheld the constitutionality under the 14th Amendment of a court-ordered temporary racial promotion quota on a government unit (the Alabama Department of Public Safety) as a remedy for its "pervasive, systematic, and obstinate discriminatory exclusion of blacks" in defiance of multiple previous court judgments. As in *Weber*, approved an "accelerated" promotion quota (in which the ratio of blacks to whites promoted exceeds the ratio of qualified blacks to qualified whites in the workforce, until the percentage of blacks in higher positions equals the percentage of qualified blacks in the workforce). Four justices argued that the quota survived "strict scrutiny." This case does for the 14th Amendment what *Sheet Metal Workers v. EEOC* does for Title VII. More than that, it articulates some considerations that fall under the "narrow tailoring" requirement for racial classifications: (1) necessity (lack of race-neutral alternatives to the same end); (2) flexibility (goal or quota waived if there is a lack of qualified minorities); (3) limited duration (preference is temporary, with a foreseeable stopping-point); (4) means-end fit (reasonable relationship between the goal/quota and numerical representation of minorities in the qualified labor pool); (5) burdens on innocent third parties are not too great. (Other cases have insisted that racial preferences not be (6) overinclusive (help those not disadvantaged by discrimination) or (7) underinclusive (fail to help disadvantaged nonminorities))

[Johnson v. Transportation Agency, 480 U.S. 616 \(1987\)](#)

Upheld the legality under Title VII of a *gender*-based affirmative action plan adopted by a state actor to remedy the traditional gender segregation of transportation agency jobs. The plan did not establish quotas, but allowed a woman's sex to count as a "plus" in applying for traditionally male jobs for which she was qualified, and established as a goal the representation of women in traditionally male job categories in proportion to their representation in the local labor force. Followed through on *Weber's* contention that an employer need not admit to prior discrimination to justify an affirmative action plan; a statistical disparity between the % of women in the job category and in the local labor pool is enough to justify the adoption of a plan. *Johnson* shows how the logic of affirmative action, as it develops, pushes very hard on the distinction between remedying the effects of discrimination and straightforward race- and gender- proportional representation. Johnson distanced itself from the latter purpose by distinguishing (1) long-term (not controlling) from short-term goals of a program (where the long-term goal may take proportional representation as a benchmark); (2) goals to be *attained* rather than *maintained* (attainment signifies the end of discrimination, maintenance signifies an interest in proportional representation for its own sake). Scalia correctly observes in dissent that this case holds, without admitting it, that an employer may adopt an affirmative action program intended to overcome "societal discrimination" (i.e., general social attitudes discouraging women to pursue certain occupations) rather than just its own discrimination. Scalia intends this as a criticism, arguing that the antidiscrimination requirements of Title VII cannot be less stringent than those in the 14th Amendment (which, *Bakke* and *Wygant* suggest, forbid a state from using racial classifications to remedy any discrimination other than its own). If Scalia's equivalence claim is accepted, *Johnson* could be viewed in the other direction as a precedent for state uses of suspect classifications to remedy societal discrimination.

[Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 \(1990\)](#)

Upheld the constitutionality of the FCC's policies establishing a preference for awarding broadcast licenses to minority owners of radio and TV stations. Held that the minority preference is justified in light of the state's important First Amendment interest in enabling the expression of diverse viewpoints to the public. This is the only Supreme Court case other than *Bakke* upholding racial preferences on "diversity" rather than remedial grounds. A very odd decision, since it applied mere "intermediate scrutiny" to a racial classification even though it postdated *Croson's* move toward strict scrutiny. O'Connor's dissent expresses important objections to the very idea of linking race to viewpoint diversity, arguing that it illegitimately trades on racial stereotypes and ultimately conflicts with First Amendment requirement that the state remain viewpoint neutral. To the extent that *Metro Broadcasting* relies on intermediate scrutiny, it has been overruled by *Adarand*. Few legal scholars believe that the FCC's program would be upheld under strict scrutiny.

Key Supreme Court Cases Reducing the Scope or Constraining the Shape of Programs

[Firefighters v. Stotts, 467 U.S. 561 \(1984\)](#)

A precursor to *Wygant*, limiting remedial action available under Title VII. Held that a court may not override a bona fide seniority system with a race-based system for determining layoffs just because the employer was under a consent decree covering hiring and promotion (but not mentioning layoffs).

[Wygant v. Jackson Board of Education, 476 U.S. 267 \(1986\)](#)

Held: (1) Race-based affirmative action, even when valid for hiring, training, and promotion, may not be practiced for layoffs, because the burdens placed on innocent whites are unfairly concentrated on particular individuals. (2) To justify a race-based affirmative action employment program, the employer must have a "strong basis in evidence" that remedial action is necessary. (3) Rejected a "role model" theory for justifying the hiring of black public school teachers in proportion to the percentage of black students in a school, as a remedy for "societal discrimination." (The Jackson Board's theory appeared to be that black students needed black teachers to help them cope with societal discrimination against the students.) (4) Powell's decision is also widely regarded as holding that government units may use racial classifications only to remedy their own discrimination, not discrimination in society or by other government units. However, his reasoning against "societal discrimination" as a ground for state action seems to be addressed more to the peculiarities of the role model theory and to the *vagueness* and *indeterminateness* of a raw appeal to "societal discrimination," without precise identification of the specific discriminatory actions being remedied, than to the *source* of discrimination in state or private action.

[Richmond v. J. A. Croson Co., 488 U.S. 469 \(1989\)](#)

Held that state and local government race-based affirmative action programs are subject to strict scrutiny: they must be shown (1) to be pursuing a compelling government purpose and (2) the use of race must be narrowly tailored: (a) neither under- nor over- inclusive, and (2) lacking race-neutral alternatives that could achieve the same end. Although commonly reported as a great blow to affirmative action programs, in requiring the highest level of scrutiny for state and local race-based affirmative action programs, O'Connor's opinion for the Court in fact opened up a remedial justification for affirmative action seemingly foreclosed by Powell's opinions in *Bakke* and *Wygant*, which suggested that the state may use racial criteria only to remedy its own discrimination, and not the discrimination of private parties. O'Connor argued that the state has a compelling interest in not being a "passive participant" in private discrimination. Race-based set-asides in contracting could therefore be justified if sufficient evidence were produced that race-neutral contracting awards would amount to state complicity in or perpetuation of the effects of the racially exclusionary practices of contractors. Issues of evidence loomed large in this decision, which overturned the City of Richmond's 30% contracting set-aside for minority owned businesses on account of the city's failure to amass sufficient evidence of discrimination in contracting requiring a race-based remedy. However, the evidentiary issues have also been widely misinterpreted, as supposedly reflecting the Court's skepticism about the continued existence of racial discrimination. The point of requiring states to amass evidence of discrimination, and to tailor their program to empirical evidence about local conditions, is that this is evidence that the state's *purpose* in establishing a set-aside for minority subcontractors is to avoid passive participation in the racially exclusionary practices of contractors (a legitimate and compelling purpose), rather than just to establish a racial spoils system (an unconstitutional purpose).

[Adarand Constructors, Inc. v. Peña, 515 U.S. 200 \(1995\)](#)

Held that Federal race-based affirmative action programs, no less than state and local programs, must satisfy the requirements of strict scrutiny. *Croson* had not settled this matter, since much of that opinion had stressed how the 14th Amendment empowered the Federal government while constraining the states. O'Connor, writing for the Court, justified this position on the basis of three principles. First, skepticism: given the dismal history of race-based state action, the motivations of the state in using a racial classification must be closely scrutinized by the courts, and its mere

assertion that its motives are benign cannot be taken at face value. Second, consistency: the same level of scrutiny must be applied to all race-based state policies, whatever the race of those affected by that policy. Third, congruence: equal protection analysis under the Fifth Amendment (which applies to the Federal government) is the same as under the Fourteenth Amendment (which applies to the states). To the extent (not determined by the Court in this decision) that *Fullilove* and *Metro Broadcasting* relied on a less than strict scrutiny in upholding the race-based policies they reviewed, they are overruled.

Cases Decided or Being Considered by Federal Courts Below the Supreme Court

Weber and subsequent Title VII cases building on this precedent have put private race- and gender-conscious affirmative action plans in employment on a fairly secure legal footing; thus, lower courts are not currently deciding cases that are likely to unsettle legal doctrine or established practices in this area. Litigation is more active for 14th Amendment cases. (a) Numerous affirmative action plans by state employers have been litigated; results have been mixed, with no clear trend for or against such plans. Most litigation in this area focuses on assorted ambiguities in narrow tailoring requirements. (b) Since *Crosby*, state and local set-asides for contracting have been vigorously challenged. Results here are also mixed, but with a decided trend against set-asides. Most decisions in this area have focused on evidentiary requirements; set-asides survive only if supported by elaborate and expensive studies demonstrating a cause for remedial action. The key question the Supreme Court will eventually need to answer is how much and what kind of evidence of discrimination by private contractors is sufficient to warrant a public contracting set-aside. The major new development in this area is a lower-court decision on the famous *Adarand* case, upholding a racial preference in state contracting. This section therefore focuses on the major recent lower-court cases dealing with public education, with an aside to the unusual *Wittmer v. Peters* and the important *Adarand* decision.

[Wittmer v. Peters, 87 F.3d 916 \(7th Cir. 1996\)](#)

Unusual opinion by Judge Richard Posner, upholding a nonremedial racial preference in promotion for corrections officers, on the ground that the state has shown that minority officers are needed to achieve law enforcement objectives. The state provided evidence that black inmates were unlikely to play the "correctional game of brutal drill sergeant and brutalized recruit" unless some of the black corrections officers held positions of authority. The Supreme Court refused to review this case on appeal, *cert. denied* 117 S. Ct. 949 (1997).

[Adarand Constructors, Inc. v. Rodney Slater, 2000 Colo. J. C.A.R. 5574 \(10th Cir., 2000\)](#)

The latest disposition of the famous *Adarand* case, which, when reviewed by the Supreme Court (as *Adarand v. Peña*) firmly established strict scrutiny as the standard for evaluating all government affirmative action programs. The Supreme Court remanded the case back to the district court, instructing it to judge it by the strict scrutiny standard. The district court ruled that the state's incentive to hire minority subcontractors failed strict scrutiny in *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556 (D. Colo. 1997). In this eighth round of adjudication, the 10th Circuit Court of Appeals reversed. It stressed the fact that the Supreme Court's *Adarand* decision insists that some affirmative action programs can pass strict scrutiny. It found that Congress has a compelling interest in redressing the effects of current and past racial discrimination and that it had a strong basis in evidence to conclude that such discrimination occurred in the construction industry. The Court's summary of evidence on the extent of discrimination in the construction industry is a worthy

reference on this issue. It also found that the design of Congress' current program, as recently revised to meet strict scrutiny standards--were narrowly tailored to the compelling purpose. This opinion stands as an exemplar of how a race-based affirmative action program in contracting can meet strict scrutiny.

[Podberesky v. Kirwan, 38 F.3d 147 \(4th Cir. 1994\)](#)

Invalidated the University of Maryland's scholarship program reserved for African-Americans. (1) Applying *Croson's* evidentiary demands, denied that UM had sufficient evidence that current factors discouraging black enrollment and achievement were caused by UM's own past discrimination: (a) UM's bad reputation in the black community, being tied solely to knowledge of UM's historic discrimination, cannot justify a racial preference because such knowledge will always be available but remedies must be temporary. (b) UM's alleged hostile environment, due to the hostility of white students, is a form of societal discrimination not specifically attributable to UM's past discrimination. (2) UM's statistical underrepresentation of blacks and lower retention and graduation rates, [even if, in the face of weak evidence, the cause is stipulated to be UM's own past discrimination], cannot justify the scholarship program, which fails narrow tailoring requirements: (a) it is overinclusive, in attracting high achieving blacks, who were not victims of UM's past discrimination, and in being awarded to non-Maryland blacks, when the program is alleged to be needed to remedy the underrepresentation of Maryland blacks at UM; (b) it relied on the role-model theory rejected in *Wygant*; (c) the benchmark of underrepresentation was determined against an arbitrarily inflated reference pool that failed to factor out nonrace-based causes of underrepresentation, and that hence failed to constrain the extent of remediation to the extent of the effects of past discrimination; (d) it failed to consider (unspecified) race-neutral alternatives. [Sorry, I could not find a link to the full text of this opinion; the link is to an extended summary.]

[Piscataway Township Board of Education v. Taxman, 91 F. 3d 1547 \(3d Cir. 1996\)](#)

Invalidated a race-conscious affirmative action plan for faculty employment decisions, adopted for diversity rather than remedial purposes. The Court viewed the case solely within the terms of Title VII, holding, on its reading of *Weber* and *Johnson*, that it permits race-based employment decisions only for remedial purposes. Notwithstanding *Bakke's* claim that schools have a compelling interest in diversity, Title VII forbids schools from pursuing that nonremedial interest through racially discriminatory employment (as opposed to admissions) policies. Even if diversity were admitted as a valid purpose, (1) the state provided no benchmark of adequate diversity to measure progress and termination of the program, and thus acted arbitrarily and (2) placed an undue burden on white petitioner Taxman through its layoff provision. The dissent disputes the claim that *Weber* and *Johnson* restrict valid affirmative action plans to remedial purposes, holding that neither case determined the outer bounds of permissible aa plans. This case was set to go to the Supreme Court, *cert. granted*, 117 S. Ct. 2506 (1997), until it was settled by a financial intervention by civil rights groups, worried that its fact pattern was not a favorable one under which to review the general principles of affirmative action in education. *Cert dismissed*, 118 S. Ct. 595 (1997). The case had an unfavorable fact pattern for the resolution of a diversity claim, because it involved a layoff decision (see *Wygant*), and because the % of blacks who were teachers exceeded their % in the population. (On the other hand, the affirmative action plan allowed a racial preference only among equally qualified candidates with equal seniority.)

[Hopwood v. State of Texas materials, including 78 F.3d 932 \(5th Cir., 1996\)](#)

Invalidated the University of Texas' law school's race-based admissions program, reversing the district court's judgment that UT had compelling interests in using race-based admissions, Hopwood

v. Texas, 861 F. Supp. 551 (W.D. Tex.1994). (1) Audaciously, the Court claims that Powell's opinion in *Bakke*, permitting racial diversity as a compelling state interest in educational contexts, is not controlling, because no other justice joined him in that part of his opinion; only remedial justifications for racial classifications are allowed. Equating race with skin color, the Court found not even a rational basis for connecting such a superficial characteristic to educational outcomes. It denied that race may be used as a proxy for socially relevant characteristics, regarding this as an assertion of harmful, stigmatizing stereotype. (2) The Court rejected UT's remedial claims, arguing that (a) the law school may only remedy its own discrimination, not discrimination in society or even in the Texas school system at large, or even in UT at large, because it is not in a position to measure the discrimination of other agents; (b) Following *Podberesky v. Kirwan*, rejected UT's claims of bad reputation among and hostile environment to minorities as justifying remediation. Judge Weiner, concurring, assumed that an educational interest in diversity could justify a race-conscious admissions policy, but held that UT's policy was not narrowly tailored to achieve this aim: it was underinclusive, in that it did not include goals for all racial/ethnic groups that could contribute to diversity; it operated too much like a quota; and it assured only "facial diversity," not "true diversity" (suggesting that the quest for racial diversity is a quest for skin color diversity, which is irrelevant to education).

[Wessman v. Gittens, 160 F.3d 790 \(1st Cir. 1998\)](#)

Invalidated Boston Latin School's race-conscious admissions program. Half the places in the school were allocated in rank order of test scores in a competitive examination; the other half were allocated by proportional race/ethnic representation among those who scored in the top 50% of all applicants. Without rejecting *Bakke's* claim that diversity is a compelling state interest, the Court found that BLS's admissions program violated *Bakke's* strictures: (1) race and ethnicity were the only admissions factors other than test scores, while the pursuit of true diversity allows racial/ethnic status to count as but one factor among other factors contributing to diversity; (2) race-neutral admissions on the basis of test scores alone would yield a combined Black and Hispanic student population of 15-20%, why does "diversity" require more?; (3) BLS's use of proportional representation in selection shows that its purpose was "racial balancing"--impermissible under the 14th Amendment. The Court also rejected BLS's remedial claims, observing that the Boston school district, although once under a desegregation order, had been declared unified and that it had failed to provide sufficient evidence that the currently observed racial academic achievement gap was a vestige of the district's own past discrimination. It rejected anecdotal evidence as insufficient to support claims about systemic causes of disadvantage, and statistical evidence gathered in another district as irrelevant to the Boston school district. Finally, it found BLS's proportional representation admissions not narrowly tailored for remedial purposes: causally ineffective, in not eliminating the purported cause of disadvantage (low teacher expectations in elementary school); and overinclusive, in admitting minorities from private schools and nondisadvantaged white and Asian students. The opinion relies heavily on its reading of *Crosby's* evidentiary requirements. The dissent articulates a laxer standard of those evidentiary requirements, holding that the state need only make out a prima facie case of discrimination, and arguing that it had.

[Hunter v. Regents of the University of California, 190 F.3d 1061 \(9th Cir. 1999\)](#)

Upheld a race-conscious admissions program to an elementary school run by the UCLA Graduate School of Education and Information Studies on unusual instrumental grounds. The school was set up to as a site for research and training teachers to cope with the educational needs of California's increasingly diverse student population. Students are therefore selected on the basis of their suitability for research interests. Applying strict scrutiny, the Court ruled that the school served the

compelling state interest of improving the quality of education in urban public schools, and that racial and ethnic criteria were narrowly tailored to serve that interest. UCLA submitted extensive evidence that ensuring a racially and ethnically diverse student population was necessary to advance their goal, because such diversity is needed to capture educationally relevant differences in students' cultures, language proficiency, learning styles, and important data on intergroup interaction and conflict. Holding that researchers have First Amendment academic freedom interests in defining their research needs, the Court refused to second-guess academic judgments that race and ethnicity were indispensable selection criteria for research subjects. The Supreme Court declined to hear this case, cert. denied 121 S. Ct. 186 (2000).

[Johnson v. Regents of the University of Georgia, 106 F. Supp. 2d 1362 \(11th Cir., 2000\)](#)

Rejected the University of Georgia's affirmative action program, on the ground that "the 'diversity' interest is so inherently formless and malleable that no plan can be narrowly tailored to fit it." Found that the University of Georgia had not provided compelling evidence that racial diversity advanced important educational goals, and followed O'Connor's opinion in *Metro Broadcasting* in casting doubt on any connection between racial diversity and the "robust exchange of ideas," upon which Powell based his diversity defense in *Bakke*. Followed *Hopwood* in also finding that Powell's diversity argument is not binding precedent. An interesting feature of the case is that the University of Georgia gave an admissions preference to men (an extra .25 points, compared to .50 points for being non-white). The court rejected the gender preference on the same grounds as the racial preference, *viz.* that neither racial balancing nor gender balancing were legitimate state purposes.

[Johnson v. Regents of the University of Georgia, 263 F.3d 1234 \(11th Cir., 2001\)](#)

Affirms the district court ruling above, rejecting the University of Georgia's affirmative action policy, but on different grounds. The Court of Appeals declined to rule on the validity of the diversity defense, although its review of the legal precedents suggests skepticism about the viability of such a defense. Instead, it chose to reject the University of Georgia's policy for its failure to meet narrow tailoring requirements. A mechanical, fixed increment of points added to an application simply due to the applicant's race is (1) of arbitrary weight, (2) effectively screens out applications before taking into consideration any other dimensions of diversity that the applicant may contribute to a student body, (3) fails to treat applicants as individuals, and (4) fails to consider race-neutral alternatives to the same purpose of diversity. This opinion has potential implications for the upcoming case in the 6th circuit, *Gratz v. Bollinger*. Although the 6th circuit, in *Grutter v. Bollinger*, has upheld the University's Law School admissions policy, which does not add a fixed number of points to an application on account of the applicant's race, it has not yet ruled on the university's undergraduate case (*Gratz*), which employs a procedure not unlike that rejected in *Johnson*.

[Katuria Smith v. University of Washington Law School, 233 F.3d 1188 \(9th Cir., 2000\)](#)

Upheld the constitutionality of the University of Washington's Law School admissions program, on the ground (*contra Hopwood*) that Justice Powell's opinion in *Bakke* remains good law. The case has no direct practical effect for affirmative action, as the citizens of Washington had already prohibited it by referendum in proposition I-200. The legal importance of the decision lies in its argument that Powell's opinion is controlling because his diversity argument is the narrowest ground on which the holding of *Bakke* can be rationalized. This follows the legal rule that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188 (1977). The 9th circuit's application of the *Marks* rule to *Bakke* is disputed by Judge Friedman in *Grutter v. Bollinger*, below.

Supreme Court Decisions

[Grutter v. Bollinger, et. al \(slip opinion\), 539 U.S. ---- \(2003\)](#)

[Transcripts of the Arguments](#)

In the most important Supreme Court decision in 25 years (since *Bakke* was decided), the Supreme Court upheld the University of Michigan Law School's affirmative action program on the ground that it was narrowly tailored to meet the compelling state interest of realizing the educational value of diversity in the context of public and private schools. O'Connor, as widely predicted, held the swing vote in this 5-4 decision. And, as the oral arguments indicated, the Court dispensed with the task of trying to figure out the precedent set under the *Marks* test by *Bakke's* notoriously fragmented opinion, instead deciding to evaluate the merits of the diversity defense *de novo*. O'Connor's decision appeals to several additional rationales distinct from the educational argument: (1) the Military Academy's argument that the legitimacy and hence effectiveness of its officer corps would be diminished if it were not racially representative; (2) an integrationist argument, that "effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized"; (3) a more general argument that the legitimacy of the U.S. elite depends on its "visible" openness to all races ("the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity"). Consistent with precedent, the opinion draws a clear distinction, muddled in public discourse, between quotas (prohibited) and goals (permitted). It also clarifies the "race-neutral alternatives" test for narrow tailoring, allowing that alternatives need only be considered, not implemented, if there is good faith reason to believe implementation would fail to realize the school's diversity objectives or compromise its interest in maintaining academic standards. This endorses Sam Issacharoff's justification for affirmative action, cited above, that it is the only way to achieve the dual goals of racial diversity and academic excellence. The opinion raises some puzzles: (1) O'Connor grants deference to the Law School's representation of its own benign motives (p. 17: the Law School's "good faith" is "presumed" "absent a showing to the contrary"), in apparent contravention of what O'Connor once defined as the main point of strict scrutiny of racial classifications--namely, to probe the state defendant's professions of benign motivation with skepticism (*Adarand*). (This point is noted by Thomas in his partial dissent.) (2) What is the significance of the Court's stated "expectation" that affirmative action will no longer be needed to bring about diversity in 25 years? Thomas, partially concurring, takes this to signify an absolute termination date. This, however, would be inconsistent with the rationale of strict scrutiny, which is that racial means must be permitted by the Court as long as the compelling interest remains and racial means are needed to satisfy it. I interpret it, rather, as a signal that the Court doesn't trust educational institutions to terminate programs that have outlived their usefulness. The Court is setting up a date with future affirmative action litigants, 25 years hence, to revisit the issue. Justice Scalia's intemperate dissent adds nothing of interest to the debate, and plainly contradicts both Supreme Court precedent and the original intent of the Framers of the 14th Am. in declaring a categorical prohibition of state-sponsored racial discrimination. Focus instead on Justice Thomas' much more interesting partial dissent, opening with the forceful words of Frederick Douglass. Thomas' interpretation of Douglass' insistence that white attempts at benevolence rather than justice toward blacks do them harm (by expressing and promoting patronizing attitudes, stigmatization, and policies that hook blacks into underachieving dependency, claiming benefits on the ground of victimization and pity rather than achievement) go to the core of Thomas' moral objections to affirmative action. (They are not,

however, Constitutional objections, since unintended racially harmful effects are not unconstitutional; under *Washington v. Davis*, only invidious racially discriminatory purposes are.) Note in particular Thomas' claims on behalf of the beneficial effects of de facto racially segregated Historically Black Colleges on black students' achievement. He both takes them seriously as a ground for preserving the racially specific mission of the HBC's (see his opinion in *Fordice*), and denies that they could justify racial discrimination--thereby exposing the double-edged sword of relying on "diversity" as a 1st Amendment rationale for affirmative action: what if racial homogeneity were appealed to as a 1st Amendment ground for keeping out minority groups? In contrast with Thomas' ringing and forceful critique of affirmative action, the dissents of Rehnquist and Kennedy focus on legal minutia.

[Gratz et al v. Bollinger et al, \(slip opinion\) 529 U.S. ----- \(2003\)](#)

[Transcripts of the Arguments](#)

This companion case to *Grutter v. Bollinger*, above, rejected by a 6-3 vote the University of Michigan College of Literature, Science, and the Arts affirmative action admissions program, on grounds of failure to narrowly tailor its use of racial means to the state's compelling interest of diversity. The Court's main objection to the U-M's undergraduate policy is that its mechanical "point system," which automatically grants every black, Hispanic, and Native American applicant 20 points in admission, is too crude and mechanical to satisfy the requirement that each applicant's contribution to diversity must be subject to individualized review. From a legal point of view, this case is less significant than *Grutter*. However, it will certainly require many schools across the country to revise their admissions systems, and increase the costs of admissions programs that directly seek racial diversity in their student bodies.

A Global Perspective

Jain, Harish C., Sloan, Peter J. & Frank M. Horowitz. (2003). *Employment Equity and Affirmative Action: An International Comparison*. Armonk, NY: M.E. Sharpe.

The authors of this comparative study of affirmative action compare the employment practices of six countries: the U.S., Canada, Great Britain/Northern Ireland, India, Malaysia, and South Africa. They look at mandatory quota policies; legislated versus voluntary policies; goals and timetables; restrictions and other policies; as well as recruitment, selection, compensation, performance appraisal, promotion, training, and career development.

Sowell, Thomas. (2004). *Affirmative Action Around the World: An Empirical Study*. New Haven, CT: Yale.

This book moves the discussion of affirmative action beyond the United States to other countries that have had similar policies, often for a longer time than Americans have. It also moves the discussion beyond the theories, principles, and laws that have been so often debated to the actual empirical consequences of affirmative action in the United States and in India, Nigeria, Malaysia, Sri Lanka, and other countries. Both common patterns and national differences are examined. Much of what emerges from a factual examination of these policies flatly contradicts much of what was expected and much of what has been claimed.

Weisskopf, Thomas E. (2004). *Affirmative action in the United States and India : a comparative perspective*. London ; New York : Routledge.

Affirmative-action policies in the United States and reservation policies in India are the two most important examples of positive discrimination in favor of members of under-represented racial/ethnic groups. The author compares how such policies have worked over the past 40 years in each country, examining the consequences of affirmative action in both countries using a clear cost-benefit analysis.

Affirmative Action Websites

[Supporting Research Reports Prepared for the Lawsuits](#), University of Michigan

Links to expert testimony and amicus briefs on behalf of the University of Michigan in *Grutter v. Bollinger* and *Gratz v. Bollinger* as well as links to much other research.

[Affirmative Action Review: Report to the President](#)

In 1995, President Clinton ordered a comprehensive review of federal affirmative action programs, under the slogan "mend it, don't end it." This is the report that resulted from his order. Useful for the numerous citations to empirical research on the need for and impact of affirmative action programs.

[The Affirmative Action and Diversity Project: A Web Page for Research](#)

Bibliographic reference on race, racism, gender, sexism, and affirmative action. Huge list of citations with many links to brief articles. Stresses the variety of opinions. Extremely well organized by theme; comprehensive in scope.