

**Affirmative Action and
Preferential Treatment in
Public Education:
Has America had its Fill or is
More Affirmative Action
Needed?**

prepared by

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Chapter I:

Introduction and Research Purpose

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness. it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair. –Charles Dickens – *A Tale of Two Cities*~

Chapter Introduction

Charles Dickens wrote the above quote in his account of the French Revolutionary War, *A Tale of Two Cities*. The quote is applicable to the current situation of race and race relations in the United States. When established as a nation, the United States was founded on the premises of individual freedoms and liberties. At the same time, the nation held one third of its population in slavery and denied fundamental rights to females. The best of times at the birth of the nation was the establishment of the new nation as an independent state. The worst of times were the accepted ideologies that underlie the practice of slavery and the lack of suffrage for women. Native Americans were killed and displaced because the European colonists regarded them as savages in need of domestication and religion. The rights of those peoples were disregarded much the same as the rights of African-Americans, who were held in bondage through fear, coercion, and torture. The United States has fought wars to ensure individual rights and liberties. Examples of such wars include the American Revolutionary War and the American Civil War. Each of those wars was fought, in part, to ensure the individual liberties of Americans first, against the British monarch and second against the tyranny of the slave lords of the Confederate States of America.

Furthermore, the nation has entered international wars to ensure democracy and liberty throughout the world. Such wars include World War I, World War II, the Korean War, the Vietnam War, and the Gulf War, for example. However, while the United States was engaged in international conflicts with other nations, it denied those fundamental rights and liberties, for which Americans had fought and died, to other Americans. In fact, as America fought World

War II, Japanese-Americans were detained in concentration camps and excluded from certain areas within America by Civilian Exclusion Order Number 34 (see *Korematsu v United States*, 323 U.S. 214 (1944) in Chapter 3). Additionally, as American troops fought and died in Korea and Vietnam, race was used to exclude African-Americans from certain schools and to segregate them in public places such as restaurants, cafeterias, libraries, etc. As a result of such atrocities, Americans, in the 1960s, saw both the escalation of the war in Vietnam and the escalation of the war for civil rights in the streets at home.

In short, even though the American public generally agrees that liberty and justice are values germane to human beings in free societies, disagreement surrounds the execution of those ideals. American school children pledge allegiance to the United States when they cite the Pledge of Allegiance:

I pledge allegiance, to the flag, of the United States of America, under God, indivisible, with liberty and justice for all.

But, to whom did justice apply? Disagreement about the nature and scope of liberty has haunted the American public since the birth of the nation.

The American judicial, executive, and legislative branches of government have all been involved in the enforcement of justice throughout American history. The executive branch sent troops to Central High School in Arkansas to enforce desegregation, and enacted executive orders enforcing desegregation and civil rights. The legislative branch has enacted numerous laws to ensure justice and equality. Such laws (legislation) include, but are not limited to, the Civil Rights Act of 1964, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Family Medical Leave Act, etc. Finally, the judiciary, including the Supreme Court, has ruled in numerous cases which have helped shaped American justice.

Research Purpose

Why is the study of affirmative action in higher education important to public administration? Public administrators are generally professionally educated in colleges and universities throughout the nation. All states have public supported colleges and universities. Such institutions are supported by taxation to help keep the costs of higher education manageable and within the grasps of all segments of society. Specifically, if education was the bailiwick of private institutions, only the elite and socially advantage would benefit. Under the current system of state supported education, all classes of society can obtain the benefits of a college or university education. Therefore, to ensure public administrators and other professional classes are representative of all segments of society, public education needs to be protected and accessible to all classes. That is, all persons wishing to obtain a college or university, or other professional education should not be denied access because of their race, gender, religion, sexual orientation, skin color, national origin, etc. Additionally, affirmative action is a public policy issue under the umbrella of issues relevant to public administration in general.

Affirmative action is one way to ensure everyone is treated equally. Unfortunately, current definitions of **affirmative** action include preferential treatment, set-asides, etc. These definitions have yielded negative connotations for many Americans. In fact, reverse discrimination is attributed to modern definitions of affirmative action. Reestablishing the definition of affirmative action as described in the Civil Rights Act of 1964 is important not only to public administration, but to the continued success of the nation. For example, if minorities and women are excluded from higher education, the nation could revert back to the racially segregated Jim Crow era. Or, if minorities and women were given preferential treatment **and/or** set-asides, Anglo males would be the recipients of discrimination. Unfortunately, in American history, discrimination has transgressed into the halls of America's colleges and universities.

Thus, a comprehensive examination of the impacts of affirmative action in higher education is warranted. Specifically, when segments of society (e.g., African-Americans and women) were denied access to education, they remained subjugated to their husbands and masters for most major decisions including voting. Even after the elimination of slavery and the establishment of women suffrage, members of these groups remained subjugated to those who were "knowledgeable" of the electoral process and of the candidates. Hence, a woman or an African-American who was illiterate was not only dependent on someone else to explain the voting process to **her/him**, but the person providing the explanation could manipulate the woman or the African-American into voting for certain candidates. Such candidates did not necessarily have the best interests of African-Americans or women in mind. By gaining access to higher education, specifically, not only can African-Americans and women make more intelligent voting and other decisions, they can participate more fully in the **electoral/political** process and public administration, generally. In fact, they can become politicians or public administrators themselves.

This project is divided into the chapters herein listed:

- a. Chapter One – Introduction (Research Question and Research Purpose) – the reasons for studying affirmative action in higher education and background information is presented here;
- b. Chapter Two – Literature Review – a review of current discussions and literature is presented in this chapter;
- c. Chapter Three – Legal Review (including Proposition 209) – in this chapter, relevant court cases and Proposition 209 are discussed;

- d. Chapter Four – Correspondence from the United States Department of Education, Office for Civil Rights – letters from the Office for Civil Rights to colleges and universities are discussed in this chapter;
- e. Chapter Five – Conceptual Framework and Methodology – how the research was done is the focus of this chapter; and
- f. Chapter Six – Results and Summaries – the conclusions from the study are presented here.
- g. Chapter Seven – Conclusion – sums up the study.

Finally, included as appendices are the Statement by Professor Lino Graglia of the University of Texas at Austin about affirmative action and the Text of Proposition 209. Dr. Graglia's statement is included as an example of aversive racism (discussed in Chapter 2). Proposition 209 is included to show how California's voters feel about affirmative action.

Working hypotheses are used in this project; therefore, the research purpose of this project is explanatory. The research question, then, is what are the effects of *Hopwood* and Proposition 209 on minority enrollment at the University of Texas at Austin, Louisiana State University, the University of California at Berkeley, and the University of Georgia at Athens? The next chapter focuses on recent discussions on affirmative action.

Chapter II:

Literature Review

The Bridge Builder

An old man, going a lone highway,
Came at the **evening**, cold and gray,
To a chasm **vast** and deep and wide;
The old man crossed in **the twilight** dim,
The sullen stream had **no fear** for him;
But he **turned** when safe on the **other** side
And built a bridge to span the tide.
"Old man," said a fellow pilgrim near,
"You are wasting your strength with building here;
Your journey **will** end with the ending day,
You **never** again will pass **this** way;
You've crossed the chasm deep and wide:
Why **build you** this bridge at evening tide?"
The builder **lifted** his old gray head --
'Good friend in the path I have **come**," he said,
"**There followeth after** me today,
A youth whose feet **must** pass **this** way;
This chasm **that** has been naught to me
To that fair-haired youth may a **pitfall** be;
He, too, must cross in **the twilight** dim --
Goodfriend, I am building **this** bridge for him."

–Will Allen Dromgoole–

Chapter Introduction:

Dromgoole's poem is about a traveler who decides to stop in his journey and build a bridge for a younger traveler who must pass the way the older traveler did. In his book, *The Spirit of Public Administration*, Frederickson (1997) comments about intergenerational ethics. According to Frederickson, intergenerational ethics suggest current generations have obligations to future generations. That is, what people do today will have impacts on people in the future. For example, nuclear waste produced today will impact future generations since radioactive materials have half-lives of thousands of years. Thus, as suggested in Dromgoole's poem, the current generation is obligated to provide future generations with the tools to succeed. Such success includes ensuring that equality and justice are available for all people, including those

people of future generations. Therefore, today's generation is obligated to build "bridges" of individual liberty and freedom for future generations to appreciate.

The United States is a nation which was founded on the premise of individual liberty and freedom. However, even at the birth of then nation, African-Americans were enslaved and held in bondage. At the beginning of this century, African-Americans were denied the right to vote. Thus, American history indicates values such as equality and fairness have not always been extended to all segments of society (Skedsvold and Mann: 1996, 3). In fact, slaves were bound by fear and torture to obey their masters (Moland: 1996,405).

The federal government has taken steps to correct the wrongs of discrimination and segregation African-Americans faced throughout much of American history. For example, in the 1950s, President Eisenhower sent the 101st Airborne Division to Central High School in Little Rock, Arkansas, to protect African-American students who had been admitted there. By the 1970s, Central High School had become one of the most integrated schools in the nation (*A Conversation about Race*: 1997, 3). Other initiatives undertaken by the federal government and some local governments to correct the ills of discrimination and segregation include affirmative action and preferential treatment for underrepresented groups. For a time in American history, many Americans were willing to make sacrifices to compensate the heirs of slavery, Jim Crow segregation, and discrimination (Zuckernan: 1997, 82).

One resolution to correct the ills of past discrimination is **affirmative** action. Currently, support for affirmative action has weakened. In addition, much debate about affirmative action and fairness has been undertaken by legislatures and scholars concerning the rights of states to govern in a federal system. In fact, not only has affirmative action been stigmatized with controversy since its inception in 1964 (Opotow: 1996, 19), but, according to Pratkanis and

Turner (1996, 111), affirmative action is one of the most controversial issues in America today. Plous (1996, 25) states affirmative action has been debated more in the past year than at any other time in its history. Despite the controversy surrounding affirmative action, Opatow (1996, 20) states few people would disagree with the position that target groups of affirmative action were excluded from the scopes of justice when they were considered property and lacked most human rights. And, according to Shedsvold and Mann (1996, 13), Americans still cherish the principles of fairness and equality. Therefore, the purpose of this chapter is to examine affirmative action from its inception to its present day debates.

Definition of Affirmative Action:

In this section, a definition of affirmation action is established. According to Murrell (1996, 77-78), "any assessment of the overall effectiveness of a given initiative must first begin with a clear understanding of the definition of the terms." Thus, to understand affirmative action, a definitive definition must be developed to provide a common denominator of understanding. Unfortunately, little agreement exists on the definition of affirmative action among scholars, legislators, economists, etc. And, the definition of affirmative has changed considerably over time (Murrell: 1996, 77).

The United States Commission on Civil Rights offers the following definition of affirmative action:

Any measure, beyond simple termination of discriminatory practice, adopted to correct or compensate for past discrimination or to prevent discrimination from recurring in the future (Murrell: 1996, 78).

Other federal regulations define affirmative action as "a set of specific and results-oriented procedures to which a good faith effort is applied (Skedsvold: 1996, 17).

Pratkanis and Turner (1996, 112-113) posit affirmative action as a set of policies and procedures which involve (a) a workforce analysis determining the percentage of women and minorities employed by an agency, (b) an availability analysis assessing the number of qualified minority and women applicants, (c) a utilization analysis determining the underrepresentation of minorities and women in the workforce, and (d) a plan to correct underrepresentation, if present. Furthermore, Pratkanis, and Turner (1996, 113) add that affirmative action is the "proactive removal of discriminatory barriers and the promotion of institutions leading to the integration of in-groups and out-groups," thus promoting the inclusion of a group that has a history of exclusion.

Dodge adds another definition of **affirmation** action. According to Dodge (1997, 431), affirmative action is a self-conscious way to counteract the effect of subtle bias in employment and education, and produce statistics on outcome diversity. Change (1996, 96) comments that affirmative action programs should be designed to provide equal opportunity to "learn, work, and contribute." Finally, Wittig (1996, 145) states that affirmative action is a "set of United States policies and practices for advancing equal opportunity and overcoming the effects of historical racial/ethnic and gender discrimination in higher education and employment."

In short, affirmative action has many definitions although the original intent of affirmative was to eliminate discrimination (preferential treatment) against or on behalf of anyone based on race, color, religion, sex, or national origin (Sender: 1997, 12). Most definitions of affirmative action support the ideals of equality and equal treatment for everyone; yet, translating those ideals into practice is challenging for many Americans. For purposes of this study, however, affirmative action is defined as a set of policies established to ensure equal

opportunity for all persons regardless of race, color, creed, national origin, sex, or sexual orientation.

Race Discrimination:

To understand why affirmation action was initiated, an understanding of racism is necessary. Racism differs from discrimination in that racism is a set of beliefs about ethnic/racial groups based on negative stereotypes. Racism can be overt or covert (see following section on aversive racism). Since racism is an attitude, racism cannot be ended through legislation. Dovidio and Gaertner (1997, 51) argue "white Americans" are rejecting negative stereotypes of African-Americans and endorsing the ideology of equal opportunity for all people. Racism, however, is still prevalent in American society.

On the other hand, discrimination is the overt act or acts of excluding people because of their race, sex, national origin, sexual preference, or handicap. Since discrimination is overt acts perpetuated against others, legislation can proscribe discrimination. The Civil Rights Acts of 1964 and 1991 seek to eliminate racial discrimination through legislative mandates. This section, therefore, explores the issue of discrimination and its effect on affirmative action.

One fundamental argument against affirmative action is whether or not race discrimination is still prevalent in the United States. Justice Black stated, "[O]ne wonders whether the majority still believes that race discrimination – or, more accurately, race discrimination against nonwhites – is a problem in our society, or even remembers that it ever was" (Belliveau: 1996, 100). A survey of Anglo students reveals fewer Anglos describe African-Americans in strongly, negative terms in 1996 as they did in 1933 (see table 2-1; Dovidio and Gaertner: 1996, 52). Additionally, according to Dovidio and Gaertner (1996, 53),

Table 2-1

Percent of Subjects Selecting a Trait to Describe Black Americans (Formerly "Negroes") in 1933, 1951, 1967, 1982, 1988, 1990, 1993, and 1996

	1933	1951	1967	1982	1988	1990	1993	1996
Superstitious	84	41	13	6	2	3	1	1
Lazy	75	31	26	13	6	4	5	2
Happy-go-lucky	38	17	27	15	4	1	2	1
Ignorant	38	24	11	10	6	5	5	2
Musical	26	33	47	29	13	27	12	18
Ostentatious	26	11	25	5	0	1	1	0
Very religious	24	17	8	23	20	19	17	23
Stupid	22	10	4	1	1	3	0	0
Physically dirty	17	--	3	0	1	0	1	0
Naïve	14	--	4	4	2	3	1	0
Slovenly	13	--	5	2	1	1	0	0
Unreliable	12	--	6	2	1	4	1	0
Pleasure loving	--	19	26	20	14	14	14	12
Sensitive	--	--	17	13	15	9	4	5
Gregarious	--	--	17	4	6	2	4	6
Talkative	--	--	14	5	5	8	13	9
Imitative	--	--	13	9	4	3	0	1
Aggressive	--	--	--	19	16	17	24	21
Materialistic	--	--	--	16	10	3	13	6
Loyal to family	--	--	--	39	49	41	39	39
Arrogant	--	--	--	14	7	7	5	3
Ambitious	--	--	--	13	23	16	24	18
Tradition loving	--	--	--	13	22	16	16	18
Individualistic	--	--	--	--	24	17	19	16
Passionate	--	--	--	--	14	17	19	14
Nationalistic	--	--	--	--	13	13	19	6
Straightforward	--	--	--	--	12	15	24	19
Intelligent	--	--	--	--	--	14	5	21
Sportsmanlike	--	--	--	--	--	13	8	17
Quick-tempered	--	--	--	--	--	12	13	13
Artistic	--	--	--	--	--	12	6	9
Argumentative	--	--	--	--	--	--	14	11
Loud	--	--	--	--	--	--	11	24
Progressive	--	--	--	--	--	--	11	14
Radical	--	--	--	--	--	--	10	8
Revengeful	--	--	--	--	--	--	11	5
Suspicious	--	--	--	--	--	--	10	6
Talkative	--	--	--	--	--	--	13	9
Faithful	--	--	--	--	--	--	--	15

Source: John F. Dovidio and Samuel L. Gaertner, *Journal of Social Issues*, Winter 1996, v52, n4, p52

Anglo acceptance of African-Americans is at an unprecedented high – Anglos are more apt to allow African-Americans into the neighborhood, tolerate interracial marriages, and invite African-Americans home for **dinner**.

Racism and prejudice, however, begin with the exclusion and avoidance of minorities in private contexts and run the gamut from "old fashion" racism to symbolic racism (Dovidio and Gaertner: 1996, 55). For example, in emergency situations, Anglos are more likely to assist other Anglos before helping African-Americans (Dovidio and Gaertner: 1996, 56). Furthermore, according to Pollitt (1997, 9), Anglos are more apt to move in "segregated worlds" such a living in all-white buildings, sending their children to mostly white schools and camps, and socializing with mostly other Anglos. Murray, Terry, Keller, and Washington (1997,368-369) argue that not only does racism still exist in America, but they offer the following examples to support their position:

- ⇒ The 19 April 1995 terrorist bombing of the Albert P. Murray Federal Building in Oklahoma City, Oklahoma, made the public painfully aware of the wide-spread growth of survivalist and militia groups that often embrace the white supremacist doctrine of hate.
- ⇒ In Fayetteville, North Carolina (a United States Army town near Fort Bragg), an African-American couple was shot in the head and killed by two young soldiers who publicly expressed a disdain for African-Americans, Jews, and homosexuals.
- ⇒ A small North Dakota town was racially divided over a trial of two white men accused of killing and raping a sixteen-year-old Native American Sioux girl.
- ⇒ The United States Department of Justice investigated suspicious fires that destroyed numerous African-American churches in the South.
- ⇒ More than a decade after the city of Baton Rouge, Louisiana, and its unincorporated suburbs consolidated their government, federal officials contend that the consolidation was racially motivated and designed to discriminate against African-Americans.
- ⇒ A perception exists that race and gender played, and continues to play, a major role in the California initiative that eliminated all affirmative action programs in that state.

These examples suggest supremacist groups have shaped the American psyche through random acts of violence perpetrated against innocent persons, especially minorities.

Aversive Racism:

Not all people are racists, nor are all racists overt. In this section, aversive (covert) racism is examined. Generally speaking, Anglos have become more accepting of African-Americans and are less likely to say disparaging things about African-American leaders such as Dr. Martin Luther King, Jr., the Reverend Jesse Jackson, and Retired General Colin Powell (Dovidio and Gaertner: 1996, 53). Thus, aversive racists, modern racists, and symbolic racists believe they are non-prejudicial and often believe discrimination no longer exists in American society (Dovidio and Gaertner: 1996, 67-68). In other words, aversive racists often justify their actions regarding African-Americans on grounds other than race, underestimating the continuing impact of race on their decisions (Dovidio: 1997, A60).

Some scholars agree racism still exists in America and they generally agree that attitudes toward race have changed over time resulting in more positive opinions of African-Americans by Anglos. Scholars also agree racists' attitudes are less likely to be overtly expressed by racists (Powell and Butterfield: 1997, 113-114), hence the term aversive racism. Although many Anglos believe they are non-prejudiced and non-discriminating, they may unintentionally participate in continued discrimination against African-Americans because of aversive racists' tendencies (Dovidio and Gaertner: 1996, 60-61). This complements Dovidio's (1997, A60) position that racism today is not like racism of the past where racists openly discriminated against African-Americans and other minorities, but practice more subtle forms of dislike or hostility.

According to aversive racists beliefs, negative feelings toward minorities are acquired early in life and persist into adulthood even though they are generally expressed indirectly or symbolically (Dovidio and Gaertner: 1996, 54). That is, whenever possible, aversive racists find ways/reasons to hire other Anglos without admitting to themselves racism played a role in the decision (Dovidio: 1997, A60). Whereas traditional forms of prejudice are direct and overt, contemporary forms, such as aversive racism, are indirect and subtle (Dovidio and Gaertner: 1996, 53). Therefore, traditional forms of racism have been replaced by symbolic racism, and like old-fashioned racists, aversive racists are apt to discriminate on the basis of race (Powell and Butterfield: 1997, 114). Specifically, Anglos more often associate positive characteristics with other Anglos than with African-Americans (Skedsvold and Mann: 1996, 9). Hence, aversive racists endorse egalitarian values and do not show their prejudices (Dovidio: 1997, A60). That is, according to Dovidio and Gaertner (1997, 53), "many people who consciously and sincerely support egalitarian principles and believe themselves to be non-prejudiced also unconsciously harbor negative feelings and beliefs about Blacks."

Professor Graglia of the University of Texas at Austin School of Law exemplified aversive racism when he commented about race and education. After being chastised in the local media for his comments, Professor Graglia issued a written statement justifying his initial statement (see Appendix One). Professor Graglia justified his position based on issues other than race. This logic flows with Dovidio and Gaertner's (1996, 60) assertion that aversive racism is usually expressed when other reasons justifying biases are present.

Some aversive racists claim the only way to achieve equality is through color-blind policies treating people as individuals rather than groups (Wittig: 1996, 156). Proponents of affirmative action, such as Dovidio (1997, A60), argue that color-blind policies are insufficient

Table 2-2

Propositions of the Aversive Racism Framework: Summary of the Evidence	
Aversive racists	
• Have a conscious commitment to equality; they	<ul style="list-style-type: none"> ➤ score low on self-report measures of prejudice ➤ do not discriminate when these actions can readily be attributed to racial bias
• But at the same time harbor negative feelings toward Blacks; they	<ul style="list-style-type: none"> ➤ have unconscious negative associations with Blacks ➤ typically express more positive attributions of Whites than Blacks while avoiding overtly negative attributions of Blacks
• Discriminate unintentionally in subtle and rationalizable ways, such as	<ul style="list-style-type: none"> ➤ when a negative response can be justified on the basis of some factor other than race ➤ when evaluating criteria are ambiguous ➤ in terms of ingroup favoritism rather than outgroup derogation
• Are more likely to manifest subtle discrimination in response to direct or symbolic threats to the <i>status quo</i> , such as	<ul style="list-style-type: none"> ➤ by showing less acceptance of and support for high status relative to low status Blacks ➤ by resisting policies designed to change the <i>status quo</i> that benefit Whites when these policies can be opposed on nonracial grounds
Source: John F. Dovidio and Samuel L. Gaertner, <i>Journal of Social Issues</i> , Winter 1996, v52, p4, p66	

to combat racism since aversive racists are not color-blind. That is, proponents of affirmative action take the position that color-blind policies do not take into consideration the fact that racism still exists (Skedsvold and Mann: 1996, 14; Table 2-2 highlights some aversive racists attitudes). Thus, Dovidio and Gaertner (1996, 57) state that due to unintentional biases, providing color-blind equal opportunity may not be sufficient to ensure fair and equal outcomes for all people. Ironically, the Civil Rights Act of 1964 proscribes discrimination in favor of, or against, people on the basis of race, sex, national origin, etc. And, according to Dovidio and Gaertner (1997, 65), color-blind policies generally receive the most public support.

Another way aversive racists discriminate against others is by providing special support, such as mentoring or special opportunities for promotions, to people with backgrounds similar to their own (Dovidio: 1997, A60). As previously mentioned, aversive racists do not openly

express feelings of racism nor do they intentionally act out of prejudice or hatred. Instead, biases are expressed in subtle and indirect ways which do not threaten the aversive racists' non-prejudicial self-image (Dovidio and Gaertner: 1997, 54). Nonetheless, the negative attitudes that aversive racists have about minorities are automatically activated (Dovidio: 1997, A60). Thus, research by Skedsvold and Mann (1996, 14) indicates that despite the best of intentions, racial biases affect the behavior of aversive racists to the detriment of minorities, especially African-Americans.

Consequently, subtle forms of racism are difficult to validate, complex to interpret, and have the added complexity of often not being recognized even by its victims (Murrell and Jones: 1996, 88). Hence, a situation which may appear to offer equal opportunity to well-qualified applicants, according to Dovidio and Gaertner (1997, 54&58), still favors Anglos over African-Americans because aversive racists rationalize negative decisions regarding minorities on factors other than race. And, as recent trends suggest, the complexity of measuring the overall impact of aversive racism will increase in the future (Murrell and Jones: 1996, 88)¹.

Disparate Impact and Reverse Discrimination:

An unfortunate reality of affirmative action is the connotation of the term. As mentioned earlier, affirmative action has numerous meanings. Consequently, because of varied definitions, much of the current debate about affirmative action is not actually about the merits of affirmative action. The current debates focus on whether or not affirmative action is still needed and

¹ Even though this section discusses aversive racism, no information was found which discussed the views of conservative African-Americans such as Supreme Court Justice Clarence Thomas, California businessman Ward Connerly (see also page 64), or Professor Johnny S. Butler of the University of Texas at Austin. Their views, perhaps if held by non-African-Americans, would be considered aversive racists under the **argument** presented in this section.

Table 2-3

Survey Results Suggesting That the Public Wants to Reform Rather Than Eliminate Affirmative Action				
Item	Source	Date	n	Responses in %
In your view, should federal affirmative action programs that give preferences to women and minorities be continued as they are, be continued but reformed to prevent discrimination, or should they be ended?	NBC/ <i>Wall Street Journal</i>	8/95	1005	Kept as are: 13 Kept but reformed: 57 Ended: 26 Not sure: 4
What is your view of affirmative action today – it is fundamentally flawed and needs to be eliminated, it is good in principle but needs to be reformed, or, it is basically fine the way it is?	Gallup	7/95	1208	Needs to be eliminated: 22 Needs to be reformed: 61 Fine as is: 9 Don't know: 9
What do you think the federal government should do with its affirmative action programs . . . eliminate all of them, eliminate many of them, keep many of them, or keep all of them?	Gallup	7/95	0801	Eliminate all: 11 Eliminate/keep many: 67 Keep all: 10 Don't know: 11
If you had to choose, would you rather see the federal government's affirmative action programs mended – that is, changed in certain ways – or ended altogether?	<i>Time/CNN</i>	7/95	1000	Mended: 65 Ended: 24 Kept as is: 1 Not sure: 10
What about affirmative action programs that set quotas. . . Do you favor affirmative action programs with quotas, or do you favor affirmative action programs without quotas, or do you oppose all affirmative action programs?	Associated Press	7/95	1006	Favor with quotas: 16 Favor without quotas: 47 Oppose all: 28 Don't know: 9
Source: Scott Plous, <i>Journal of Social Issues</i> , Winter 1996, v52, n4, p28				

whether or not the goals of its policies have been achieved (Murrell: 1996, 77). This confusion has led many to question the validity of affirmation action. According to Plous (1997, 28), most people want to reform, rather than eliminate affirmative action (see Table 2-3). At the same time, most people are opposed to disparate treatment and reverse discrimination. Therefore, this section addresses the issue of disparate impact and reverse discrimination.

To begin, affirmative action must be perceived as fair by its proponents and opponents to be accepted as a means to achieve equality and equity. Thus, one major problem with affirmative action is a lack of understanding of its premises. Another problem with affirmative action is the disagreement between opponents and proponents if the premises are fair, and if so, for whom (Opotow: 1996, 19-20). Chang (1996, 93) suggests opponents of affirmative action find it problematic because affirmative action "seems to focus on" group-preferences at the expense of others in education, employment and other public services. When groups are excluded from participation or enjoying the benefits of a policy, disparate impact exists.

Furthermore, if non-minority groups are excluded based on race or ethnicity, reverse discrimination exists. Critics of affirmative action often cite reverse discrimination, which favors members of "protected classes" over those not in protected classes, as a source of unfairness of affirmative action and its policies (Dovidio: 1997, A60). Thus, affirmative action programs must ensure all workers "suffer or enjoy the same fate," and face the same challenges as others to ensure integration and to protect against being ostracized (Chang: 1996, 95-96). In short, affirmative action programs should be focused on filling positions with qualified applicants and/or students, and the selection/application process should be open and merit based (Chang: 1996, 96).

The Initiation and Perpetuation of Affirmative Action:

Although President Eisenhower sent the 101st Airborne Division to Central High School in the 1950s, the phrase "affirmative action" did not appear as federal policy until the passage of the Civil Rights Act (CRA) of 1964 (Dodge: 1997, 431). Since that time, affirmative action has received much attention in the press, in private homes, in the workplace, and in scholarly debates

and discussions. This section, therefore, discusses development and perpetuation of affirmative action policy.

To begin, affirmative action policy was officially "set in motion" by two forces, the CRA of 1964 and President Johnson's Executive Order 11246 (Pratkanis and Turner: 1996, 112). The CRA of 1964 specifically "forbade discrimination based on race, sex, color, religion, and national origin" (Pratkanis and Turner: 1996, 112). Plus, though the original intent of the act was to protect the rights and liberties of African-Americans, other minority groups, such as women, Asian-Americans, Mexican-Americans, the disabled, and homosexuals*, etc., also benefited from affirmative action (Wittig: 1996, 147; Skedsvold and Mann: 1996, 4). Hence, the definition adopted for this study does not violate the premises of the CRA of 1964. Affirmative action opponents support this position by calling for color-blind equal opportunity and the elimination of group-based (e.g., race and gender-based) preferences.

As stated above, President Johnson's Executive Order was one of two forces which officially prescribed affirmative action in the United States. President Johnson's Order reiterated the language of the CRA of 1964 ensuring "fairness in selection decisions with respect to race, color, national origin, or religion," President Nixon expanded the doctrine of affirmative action in 1969, and President Bush reinforced it in 1991 when he signed the CRA of 1991. At no time

² Homosexuals have not fared well in America, legally speaking. In the 1950s, not only did the Federal Bureau of Investigations (FBI) develop techniques to "purge lesbians and gay men from the civil service," State Department and military officials "testified that moral perverts are bad national risks..." The FBI, in association with local law enforcement agencies, launched a campaign to report all arrests of homosexuals to the Civil Service Commission. Homosexual behavior was considered "criminal" and "immoral." The Civil Service Commission, in its 1954 annual report, indicated 618 dismissals for "sex perversion" under President Eisenhower's Executive Order 10450; by 1955, that number grew to 837. Finally, on 21 December 1971, the Civil Service Commission issued a bulletin stating a person is not unfit for federal service because s/he is a homosexual. However, the Supreme Court ruled in *Bowers v Hardwick*, 478 U.S. 186 (1987) that there is "no fundamental right to homosexual sodomy." The following states have legislation protecting the rights of gay and lesbian citizens: California, Connecticut, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin (Lewis: 1997,387-395).

did any of these orders contain language to allow, nor did they endorse, preferential treatment for any group or groups.

Even the Supreme Court, the final arbitrator of jurisprudence in the United States, has been inconsistent on the matter of **affirmative** action in its decisions, at times ruling it constitutional, and at others, ruling it unconstitutional (Williams: 1995,254). One clear position of the Supreme Court, however, according to Justice Powell, is that the Court will likely rule an affirmative plan constitutional if it gives "some weight to group membership, but not decisive weight" (Nacoste: 1996, 135). Yet, a state may use group-based differentiation where it "finds a compelling state interest" (Nacoste: 1996, 136). In this case, the Court would likely rule the plan constitutional. For example, eradication of group-based discrimination through quotas has been ruled constitutional under the premise of "compelling state interests" (Nacoste: 1996, 136).

To be perpetuated by the courts, an affirmative plan must be narrowly tailored so that its policies do not encroach on individual liberties (Nacoste: 1996, 137). Essentially, the courts seem willing to uphold an affirmative action plan when (1) serious racial imbalances exist, (2) the rights of non-minorities are not trammled, (3) non-minorities are not barred entirely, and (4) the plan is temporary (Williams: 1995, 255).

Conversely, an affirmative action plan which violates the premises of equality, equity or fairness is likely to be ruled unconstitutional and terminated. Quotas, for example, have been ruled illegal by the courts unless the quotas were specifically mandated by the courts (Pratkanis and Turner: 1996, 124-127). In other words, even though the courts, including the Supreme Court, have been inconsistent on their rulings on affirmative action, if an affirmative action plan is not tailored to fit the appropriate and individual circumstances, it is likely to be ruled unconstitutional (Nacoste: 1996, 142).

President Clinton's Stance on Affirmative Action

The President of the United States generally sets the tone of federal policy on national issues. When the president takes a stance on an issue, the federal bureaucracy generally adopts his philosophy. Therefore, when President Clinton spoke about **affirmative** action at the University of California in San Diego on **14 July 1997**, opponents and proponents were eagerly awaiting his presidential guidance on the issue. This section discusses President Clinton's views and executive guidance on affirmative action and anti-affirmative action policies.

During his San Diego speech, the President remarked, "I know **affirmative** action has not been perfect, but when used in the right way, it has worked" (*A Conversation About Race*: **1997**, 3). President Clinton proudly called America "the world's first truly multi-racial democracy" (*A Conversation About Race*: **1997**, 3) while quoting Dr. Martin Luther King, Jr.'s exhortation to judge people "not by the color of their skin," but by the "content of their character" (Kelly: **1997**, 6). At the same time, the President called for adjustments in preference programs to ensure they meet the standards set forth by the Supreme Court (Benac: **1995**, 2). He also authorized the elimination of any program which creates or perpetuates "a quota, creates preferences for unqualified individuals, creates reverse discrimination, or continues even after equal opportunity" has been achieved (Benac: **1995**, 1). The President, **furthermore**, assured the nation that the Supreme Court did not eliminate affirmative action or preferential treatment (Benac: **1995**, 2).

In defense of affirmative action, President Clinton declared, "Let me be clear, affirmative action has been good for America. We should have a simple slogan: Mend it, but don't bend it" (Benac: **1995**, 1). Supporting this position, the President issued an executive directive and a **100** page report advocating reforms, ensuring benefits are benefiting those who have the most need, and mandating that federal agencies review sex-based and race-based preference programs

eliminating any abuses or inequalities (Belliveau: 1996, 102). According the President Clinton, "It is simply wrong to play politics with the issue of affirmative action and divide our country at a time when, if we really want to change things, we have to be united" (Benac: 1995, 1).

Additionally, the President called for new set-aside programs targeted at businesses which locate in "distressed areas" as opposed to race-based or gender-based preferences (Benac: 1995, 1). According to Benac (1995, 2), affirmative action programs apply to approximately 200,000 businesses employing about 25 million people which is about 20% of the American workforce.

President Clinton spoke in California about affirmative action after the passage of Proposition 209 ended affirmative action, specifically preferential treatment, in that state (A *Conversation About Race*: 1997, 3). President Clinton "warned against the resegregation" of America in the wake of Proposition 209 and recent judicial rulings such as *Hopwood* (Pollitt: 1997, 9). The President said the recent decline in minority enrollment at public universities in California is directly attributed to the elimination of "preferential treatment for minority applicants" (Kelly: 1997, 41). He further stated the "plummeting" enrollment rates of minorities at public colleges and universities would "leave it to the private universities to do the public's work" (Pooley: 1997, 34).

The In-Group (we-ness) and Out-Group (them-ness) Dichotomy:

Affirmative action must be perceived as fair for its premises to be effective. One way of ensuring fairness is to remove the "them-ness" mentality and accentuate the "we-ness" mentality. As Dovidio and Gaertner (1996, 70) point out, creating the perception of a common in-group (we-ness) promotes "self-sacrificing" behaviors which affirmative action requires for the

Table 2-4

Position on Affirmative Action		
Perceptions of Target Groups	Affirmative Action is Procedurally Fair	
	No	Yes
Outside one's scope of justice		
Have achieved societal parity	Oppose	Oppose
Have not achieved societal parity	Oppose	Oppose
Inside one's scope of justice		
Have achieved societal parity	Oppose	Oppose
Have not achieved societal parity	Oppose	Support
<p>Note: Individuals' positions on affirmative action depend on three factors: (1) Are target groups inside their personal scope of justice? (2) Have target groups achieved societal parity? (3) Is affirmative action procedurally fair? Each person may consider one or more of these factors.</p>		
<p>Source: Susan Opatow, <i>Journal of Social Issues</i>, Winter 1996, v52, n4, p22.</p>		

advantage majority to yield its privileges to a disadvantaged minority since people generally apply different standards of morality, justice, and fairness to in-group members, and are more willing to assist other in-group members. This section examines the we-ness and them-ness dichotomy and explains the importance of in-group (we-ness) membership to affirmative action.

Opatow (1996, 20) offers three consistent attitudes of in-group members about affirmative action: (1) the belief that considerations apply to them; (2) the willingness to allocate a share of community resources; and (3) the willingness to make sacrifices to foster well-being. Opatow provides evidence of in-group members' positions on affirmative action in Table 2-4. Although the table may seem ambiguous at first glance, a further examination reveals that in-group members are opposed to affirmative action except when other in-group members are the recipients and the recipients have not achieved social parity.

Therefore, the more weight given to category-based criteria, such as ethnicity or gender, the less fair the procedure is perceived to be and the more negative the reaction to the policy and the beneficiaries of the policy (Dovidio and Gaertner: 1996, 61). This is especially true when in-group members feel out-group members are extended special benefits (preferential treatment) that are not extended to in-group members. Thus, an unfortunately reality in some affirmative action programs, according to Chang (1996, 94), is the inclusion of "categorical membership such as race and gender" at the expense of others – the perpetuation of the we-ness and them-ness dichotomy. In short, according to Chang (1996, 95-96), to effectively understand and revise affirmative action, the we-ness and them-ness dichotomy must be eliminated.

Chapter Summary:

This chapter has explored affirmative action from its inception with the 1964 CRA. Plus, some common trends surrounding affirmative action and its policies were also discussed. The chapter began by providing a definition of affirmative action after discussing some common confusion associated with the term. A definitive definition of affirmative action, which does not violate the premise of the 1964 CRA, was provided.

Another theme of this chapter is that Americans have become less racists since the 1960s (Zuckerman: 1997, 82). Nonetheless, Americans still insist on fairness and equality even though agreement on what constitutes fairness or equality is at best abstract. As Chang (1996, 94) points out:

It appears that Americans do value equality as a principle but that such equality, enforced through programs such as affirmative action, is seen to be at odds with other principles, such as meritocracy or fair competition – values highly cherished by the average words, equality is seen to have come at the expense of equity which is found to be a favored principle in distributing of wealth and resources in the United States.

All in all, minorities have **faired** better in America since the inception of affirmative action. Even though racism still exists in America, especially covert racism such as aversive racism, minorities have been granted access to employment, education, housing, and other areas to which they were once denied access. In short, although affinnative action, specifically preferential treatment, has recently received both positive and negative attention by the media, . legislators, public officials, etc., the edits of Section One of the 14th Amendments have become a reality for millions of historically excluded Americans, excluded solely because of their race, ethnicity, color, national origin, gender, sexual orientation, etc. From a review of current literature in this chapter, this study will now focus on court decisions, including Proposition 209 of California, in the Chapter 3.

³ Fourteenth Amendment – Section One: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter III:

Legal Review

MANZANAR – In the early part of World War II, 110,000 persons of Japanese ancestry were interned in relocation centers by Executive Order 9066, issued on 19 February 1942. Manzanar, the first of ten such concentration camps, was bounded by barbed wire and guard towers, confining 10,000 persons, the majority being American citizens. May the injustice and humiliation suffered here as a result of hysteria, racism and economic exploitation never emerge again. ~California Registered Historical Landmark Number 850 near Bishop, California~

Chapter Introduction:

A discussion of affirmative action would be incomplete without a discussion of court decisions which have shaped affirmative action and equal protection in the United States. Therefore, the purpose of this chapter is to examine some relevant court decisions which were instrumental in shaping affirmative action and race relations in the United States. The reader must be aware, however, that a complete examination of all case law related to this issue is beyond the scope of this study. Thus, this discussion is admittedly limited. Furthermore, since the Supreme Court decides which cases it reviews, no continuity exists between the cases herein presented. Hence, this chapter may seem choppy and staccato.

Nonetheless, the cases represent the Supreme Court's changing position on affirmative action, specifically race relations in the United States. This is to say the Court has wavered on issues of race relations much the same as the general public has. For example, the opening quote of this chapter illustrates one example of racial discrimination in the United States. Though the United States was engaged in a war to promote and protect democracy, the United States interned a portion of its population in concentration camps based solely on ethnicity. That is, on one hand, the nation was committed to protecting democracy. On the other hand, the nation deprived portions of its own citizens of those rights which are guaranteed by the United States Constitution and its amendments.

Finally, the cases provide several definitions the Court has developed and/or adopted over the years. Each case in this discussion is cited using standard legal citation. Plus, each case

Table 3-1
Court Case Rulings and Proposition 209

Case Names:	Case Summaries:
<i>Goesert v Cleary</i> , 335 U.S. 464 (1948)	Rational basis to treat people differently based on their classification and such differential treatment must be a "constitutionally permissible objective"
<i>Koermatsu v United States</i> , 323 U.S. 214 (1944)	Establishment of "strict scrutiny" by the Court
<i>Kramer v Union Free School District</i> , 393 U.S. 818 (1969)	Voting standards can be based on classification, but such control will receive "strict scrutiny" from the courts (reinforced strict scrutiny established in <i>Koermatsu</i>)
<i>Adarand Constructors, Inc. v Peña</i> , 515 U.S. 200 (1995)	Preferential treatment for "socially and economically disadvantaged" subcontractors vacated
<i>Plessy v Ferguson</i> , 163 U.S. 537 (1896)	Establishment of "separate but equal" doctrine
<i>Shelley v Kraemer</i> , 334 U.S. 1 (1948)	Infringement on personal rights by private individuals, specifically a private agreement which excludes others based on race or color, is proscribed by the 14 th Amendment
<i>Sweatt v Painter</i> , 339 U.S. 629 (1950)	"Separate but equal" must be equal in fact
<i>Brown v Board of Education of Topeka</i> , 347 U.S. 483 (1954)	"Separate but equal" is unconstitutional and has no place in public education – separate facilities are "inherently unequal"
<i>Griggs v Duke Power Company</i> , 401 U.S. 424 (1971)	Past discrimination subject to remedial action
<i>Swann v Charlotte-Mecklenburg Board of Education</i> , 402 U.S. 1 (1971)	Paring and busing of students between paired schools allowable (school desegregation)
<i>Milliken v Bradley</i> , 481 U.S. 717 (1974)	School desegregation involving a "core city" and its suburban schools allowable (cross-district and inter-district consolidation)
<i>Washington v Davis</i> , 426 U.S. 229 (1976)	"Job-related" pre-employment tests are allowable
<i>Regents of the University of California v Bakke</i> , 438 U.S. 265 (1978)	Affirmative action and preferential treatment in professional/graduate schools (racial quotas) require the "most exacting judicial scrutiny"
<i>Baston v Kentucky</i> , 476 U.S. 79 (1986)	Right to participate as a juror in the administration of justice regardless of race
<i>City of Richmond v J.A. Croson Company</i> , 488 U.S. 469 (1989)	Set-asides for minority-owned businesses not allowed unless specifically "induced" by the Congress
<i>Piscataway Township Board of Education v Taxman</i> , 91 F.3d 1547 (3d Cir. 1996)	Race cannot be used as a criterion in employment decisions to further non-racial objectives
<i>Hopwood v Texas</i> , 78 F.3d 932 (5 th Cir. 1996)	Preferential treatment based on classification (e.g., race, etc.) not permissible
Proposition 209 (California)	Amendment to Article I eliminating the use of preferential treatment and set-asides in California

is chronologically arranged within its respective sections presented below. A complete listing of all cases herein discussed is provided in Table 3-1. Note, however, the words "Supreme Court" and "Court" are used interchangeably throughout this chapter. Both refer to the Supreme Court of the United States.

The Traditional Test of Equal Protection:

Goesaert v Cleary, 335 U.S. 464 (1948)

The first time the Supreme Court addressed the question of equal protection was in the case of *Goesaert v Cleary*, 335 U.S. 464 (1948). Background information surrounding this case reveals that the equal protection clause does not forbid all legal classifications of persons. The courts recognized that such a grouping (e.g., classifications) lends itself to the type of abuse that the 14th Amendment seeks to eliminate. To balance the rights of states to govern and rights of individuals to exist in a democratic society, the courts use the "rational basis" test. This test requires the government to have a "rational basis" for treating people or activities differently based on their classifications, and such treatment must be related to a "constitutionally permissible objective." At the same time, the courts recognize the oppression of people is not constitutionally permissible.

In *Goesaert*, a Michigan law prohibiting women from working as bartenders, with an exception for women who were married to, or the daughters of, men who owned bars, was challenged. The law was challenged as unconstitutional under the Equal Protection Clause of the 14th Amendment. The judgement was affirmed. That is, the Michigan law was ruled constitutional.

Justice Frankfurter delivered the opinion of the court. Justice Frankfurter noted Michigan could, beyond question, proscribe women from working behind a bar. Furthermore, according to

the Court's opinion, bartending by women "may give rise to moral [and/or] social problems" against which the State of Michigan could devise preventative measures. The Court did not specify what moral or social problems may arise because of female bartenders. The Court specified, however, a state did not have to enact the "full length" of prohibition to eliminate or reduce moral and/or social problems. Therefore, proscribing certain females from bartending was not unreasonable, according to the Supreme Court.

Justice Rutledge, Justice Douglas, and Justice Murphy all dissented. They concluded, "there could be no conceivable justification for such discrimination against women." In their opinion, the statute should have been ruled invalid as a "denial of equal protection."

Strict Scrutiny:

Goesaert, supra, explains how the Court derived the "rational basis" test, but the Court went further when it established the doctrine of "strict scrutiny." Thus, this section examines court cases which helped establish the strict scrutiny test used by the courts when trying to determine if the edicts of the 14th Amendment are being constitutionally applied or denied. Specifically, the Supreme Court has recognized the fact African-Americans have faced discrimination throughout the annals of American history. Since other minorities have also faced racial discrimination, the cases presented here and throughout the remainder of this chapter do not necessarily involve African-Americans.

Korematsu v United States, 323 U.S. 214 (1944)

As a greater variety of laws began to get challenged under the Equal Protection Clause of the 14th Amendment, the rational basis test began to take form. The rational basis test, however,

was "insufficient" in safeguarding against racial discrimination. In other words, allowing a state to discriminate on the basis of race any time it could show a "rational" relationship to a "legitimate" governmental interest would provide little to no protection to racial minorities. Thus, the higher standard of "strict scrutiny" was delineated in *Korematsu*. In *Korematsu*, the Court, for the first time in history, identified race as a "suspect" classification. Justice Black, writing for the majority opinion, stated that "because [race] is a suspect classification, it must be subjected to the 'most rigid scrutiny.'" Justice Frankfurter wrote a concurring opinion. The strict scrutiny test is used whenever a law employs a suspect classification.

In this case, Korematsu was an American of Japanese descent. He was convicted in a federal district court for remaining in San Leandro, California, in a "military area" contrary to Civilian Exclusion Order Number 34 of the Commanding General of the Western Command of the United States Army during World War II. The Order was issued on 06 May 1942. However, Korematsu's loyalty to the United States was not questioned.

The Court noted all legal restrictions of the civil rights of a single group are "immediately suspect." Yet, according to the Court, not all such restrictions are unconstitutional. In the case of martial law, for example, such restrictions would be constitutional. But, in any case, the courts must subject such infringement of rights to the "most rigid scrutiny."

Exclusion Order 34 was based upon Executive Order 9066 which was issued after the United States entered the war against Japan. The predicate of Executive Order 9066 was to protect the United States "against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." Korematsu admitted he violated the Exclusion Order. However, Korematsu indicated conflicting orders existed simultaneously. One order forbade Korematsu from remaining in the area and the other forbade him from leaving the

area. The Court, however, ruled the orders were not contradictory since the requirement to report to an assembly area was merely a step in an "orderly program of compulsory evacuation from the area."

Justice Black said the Court's concern here was the imprisonment of a citizen in a concentration camp because of racial prejudice. The Court reasoned Korematsu's detainment was not racially motivated. Korematsu was excluded from the area and imprisoned because the United States was at war with the Japanese Empire, not because of race, according to the Supreme Court. Additionally, Korematsu's detention and exclusion were temporary. Therefore, the judgement of the lower courts was affirmed – ruled constitutional – and Korematsu was "legally" detained and excluded, according to the Supreme Court.

Justice Roberts dissented stating, "...I think the indisputable facts exhibit a clear violation of Constitutional rights." He further stated in this case, Korematsu was imprisoned not because of criminal activity, but solely because of his ancestry.

Justice Murphy also dissented. Justice Murphy stated, "This exclusion of 'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area on a 'plea of military necessity' in the absence of martial law ought not be approved. Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." He further stated in the absence of martial law, limits should be placed on military discretion. That is, individuals should not be deprived of their constitutional rights on a plea of military necessity which has "neither substance nor support." Therefore, according to Justice Murphy, the Exclusion Order

deprived everyone subjected to the Order of her/his 5th Amendment⁴ guarantee of equal protection.

Justice Jackson also dissented. He said, "But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." In Justice Jackson's opinion, the judgement should have been reversed, and Korematsu set free.

Kramer v Union Free School District, 393 U.S. 818 (1969)

Kramer reinforced the "strict scrutiny" doctrine established in *Korematsu, supra*. Specifically, under strict scrutiny, at least two concepts prevail. One concept is the rights of individuals, including the right to appeal a conviction. Such rights are so basic that once a state opts to grant them, it must do so universally unless the state can show a compelling state interest for doing otherwise.

The other concept is composed of fundamental rights which are implicit in the Constitution, such as the right to travel. A state cannot differentiate among individuals regarding these rights without a "compelling governmental interest" which cannot be satisfied in some other way. Nonetheless, the Supreme Court has allowed the "greatest respect for the constitutional interpretations necessarily made by Congress in the passing of legislation." Thus,

⁴ 5th Amendment – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, ***nor be deprived of life, liberty, or property, without due process of law***; nor shall private property be taken for public use, without just compensation.

Congress is given great latitude by the Court in making laws which may or may not infringe upon the fundamental rights of individuals.

Chief Justice Warren wrote the opinion of the Supreme Court in this case. Chief Justice Warren noted in 92012 of the New York Education Law violated the Equal Protection Clause of the 14th Amendment. Section 2012 stated certain citizens of New York who could otherwise vote in national and state elections could vote in school district elections only if (1) they owned (or leased) taxable real property within the district, or (2) were parents (or custodians) of children enrolled in the district, or (3) were the spouse of someone who owned or leased qualifying property within the district.

Kramer, the plaintiff, recognized the state's right to impose reasonable age, residency, and citizenship requirements on voting eligibility. The question here was whether or not 92012 violated the 14th Amendment. Specifically, did §2012 deny persons equal protection of the laws? The Supreme Court felt it did. Therefore, although a state may effect measures to control voting behavior, such controls will receive "close scrutiny" from the Supreme Court.

Justice Stewart, Justice Black, and Justice Harlan dissented. They stated, "So long as the classification is rationally related to a permissible legislative end, therefore – as are residence, literacy, and age requirements imposed with respect to voting – there is no denial of equal protection."

***Adarand Constructors, Inc., v Peña*, 515 U.S. 200 (1995)**

The final case in this section involved the issue of awarding contracts to subcontractors based on preferential treatment. In 1995, the Court, once again, upheld the doctrine of "strict scrutiny." Justice O'Connor delivered the opinion of the Court in this case.

The facts of this case reveal federal contracts were awarded with a "subcontractor compensation clause." The clause gave the prime contractor a financial incentive to hire subcontractors certified as a "small business controlled by socially or economically disadvantaged individuals" as determined by the Small Business Administration (SBA). The judgement of the lower court was vacated and the case remanded. In short, the Court, as in earlier cases, determined "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny."

Race Relations and Racial Discrimination:

The cases in the previous sections were presented to demonstrate how the Supreme Court has decided issues of fairness, equality and equity. Although the cases did not necessarily involve race relations or affirmative action, they provided the reader some insights into the Supreme Court's decision-making process. That is, the cases outlined some of the logical processes undertaken by the Supreme Court in deciding issues of equality, equity, and fairness. In this section, cases which pertain specifically to racial discrimination are examined. Since this study examines trends in higher education in relation to race, this section is more encompassing than the others are.

Plessy v Ferguson, 163 U.S. 537 (1896)

This case involved the constitutionality of a Louisiana law passed in 1890 which provided for separate railway cars for "the white and colored races." The constitutionality of the

act was challenged on the grounds it violated the edicts of the 13th Amendment⁵, abolishing slavery, and the 14th Amendment. Justice Brown delivered the opinion of the Supreme Court.

Justice Brown noted the objective of the 14th Amendment was to enforce "absolute equality of the two races before the law." However, Justice Brown concluded the 14th Amendment was not intended to abolish distinctions based on color, nor to enforce social, as distinguished from political, equality, nor a commingling of the two races "upon terms unsatisfactory to either." He went on to say laws permitting or requiring the separation of people by races did not necessarily imply the inferiority of either race. Justice Brown cited segregated schools (e.g., "schools for white and colored children" in Washington, D.C.) as an example to justify his position. He said laws requiring the separation of the races on public conveyances were no "more obnoxious" to the 14th Amendment than were segregated schools which were sanctioned by the United States Congress. He went on to say the argument against segregation assumed racial prejudice could be overcome by legislation and enforced commingling of the races. He concluded by stating, "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

Justice Harlan wrote the dissenting opinion. He opined the Constitution of the United States does not "permit any public authority to know the race of those entitled to be protected in the enjoyment" of individual liberties and freedom. He noted the United States does not have a "superior, dominant, ruling class of citizens." That is, the Constitution is color-blind and treats all citizens equally before the law. Thus, the Constitution, according to Justice Harlan does not tolerate "classes among citizens."

⁵ 13th Amendment – Section I: Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section II: Congress shall have power to enforce this article by appropriate legislation.

Justice Harlan further stated he regretted the fact the Supreme Court, "the final expositor of the fundamental law of this land," had concluded the Louisiana act was constitutional. However, he stated the "destinies of the two races" are "indissolubly" linked together and the interests of both would not allow "race hate" to be planted under the law. In his opinion, the Louisiana statute was inconsistent with the personal liberty of African-Americans and Anglos, and "hostile" to both the spirit and letter of the United States Constitution.

***Shelley v Kraemer*, 334 U.S. 1 (1948)**

Without question, the Bill of Rights forbids the federal government from infringing upon the individual liberties citizens. The 14th Amendment forbids the states from infringing upon those same rights. Yet, neither specifically forbids private citizens from discriminating against other private citizens. The 5th Amendment specifically refers to the federal government and the 14th Amendment to the states.

In this particular case, private individuals were accused of infringing upon the rights of others. Chief Justice Vinson delivered the opinion of the Supreme Court. According to Chief Justice Vinson, the questions in this case relate to the validity of court enforcement of private agreements among individuals even though such agreements led to the exclusion of designated persons based on race or color.

The trial court denied relief in this case because the restrictive agreement had not become final. Specifically, the restrictive agreement required the signatures of all property owners in the district, but not all signatures had been obtained. The Supreme Court of Missouri, however, directed the trial court to grant relief in favor of the respondents. That court held that the restrictive agreement violated no rights guaranteed by the federal constitution. Yet, the

petitioners argued they were denied equal protection of the laws, deprived of property without due process of law, and denied privileges and immunities of citizens of the United States.

The Supreme Court noted the rights guaranteed by the 14th Amendment are to be enjoyed by all citizens to acquire, enjoy, and dispose of property. Thus, §1978 of the Revised Statutes, derived from §1 of the Civil Rights Act of 1866 which was enacted by the Congress while the 14th Amendment was also under consideration, provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Furthermore, Chief Justice Vinson noted the decisions of the Supreme Court pertaining to civil rights reflects that the 14th Amendment proscribes certain acts by states and the Amendment provides no such proscription for private individuals however "discriminatory or wrongful."

Chief Justice Vinson also noted the states provided full coercive powers of the state to individuals to discriminate against persons based on race or color. He stated "granting judicial enforcement of the restrictive agreements," the states have denied petitioners the equal protection of the laws, and the actions by the states must be rescinded. He opined the rights created in the first section of the 14th Amendment are guaranteed to the individual and those rights are personal rights. According to Chief Justice Vinson, "Equal protection of law is not achieved through indiscriminate imposition of inequalities."

The Supreme Court thus reversed the decision of the appellate court in this case asserting the 14th Amendment proscribes discrimination by private parties against other private parties. Justice Reed, Justice Jackson, and Justice Rutledge took no part in the consideration or decisions in this case.

***Sweatt v Painter*, 339 U.S. 629 (1950)**

This case involved Sweatt's denial of enrollment at the University of Texas at Austin School of Law. Sweatt was denied admission solely because he was a "Negro" and state law at the time forbade the admissions of "Negroes" to that law school. Although Sweatt was offered admission to the "newly" established "law school for Negroes," he declined admission and filed suit. Sweatt claimed his rights under the Equal Protection Clause of the 14th Amendment were denied by the law school.

The University of Texas at Austin School of Law was one of the most prestigious law schools in the nation. The law school had, at the time this case being considered by the Supreme Court, sixteen full-time and three part-time professors, 850 students, 65,000 volumes in its library, a law review, moot court facilities, scholarship funds, an order of the coif⁶ affiliation, many distinguished alumni, and much tradition and pride. And, the law school offered "qualities which [were] incapable of objective measurement." Such qualities included the reputation of the faculty, the experience of the administration, the positions and influence of the alumni, community standing, and the traditions and prestige of the University.

The law school for Negroes had five full-time professors, 23 students, 16,500 volumes in its library, a practice court, a legal aid association, and one alumnus who was admitted to the State Bar of Texas. Thus, Sweatt claimed the separate facility was not equal (see *Plessy v Ferguson*, *supra*).

Chief Justice Vinson delivered the opinion of the Court. He commented, "It is difficult to believe that one who had a free choice between these law schools would consider the question

⁶ Coif - an honorary legal fraternity in the United States.

close." He asked, "To what extent does the Equal Protection Clause of the 14th Amendment limit the power of the state to distinguish between students of different races in professional and graduate education in a state **university**?" Chief Justice Vinson noted at the time Sweatt's application was rejected in December 1946, no law school in Texas admitted African-Americans. He recognized the fact the state denied Sweatt the opportunity to get a "legal education" while granting that privilege to others. Thus, the state deprived Sweatt of equal protection of the laws under the 14th Amendment.

The trial court found the "new school" for "Negroes" offered Sweatt "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas." The Court of Civil Appeals affirmed the trial court's decision. The Supreme Court, however, granted *certiorari*⁷ because of the "constitutional issues involved."

The Court stated unanimously that "the State must provide [legal education] for [Sweatt] in conformity with the Equal Protection Clause of the 14th Amendment and provide it as soon as it does for applicants of any other group." *Sweatt*, however, did not present the dilemma of whether or not a state could satisfy the Equal Protection Clause by establishing a separate law school for African-Americans.

In short, the Supreme Court stated Sweatt could claim his right to a legal education which was equivalent to that offered students of other races. The Court also pointed out such education was not available to Sweatt at the separate law school. Therefore, the Court held the Equal

⁷Certiorari: to be informed of a means of gaining appellate review; a writ issued from a superior court to one of inferior jurisdiction, commanding the later to certify and return to the former the record in a particular case (Gifis: 1984, 65).

Protection Clause of the 14th Amendment required Sweatt be admitted to the law school. Even though the judgement was reversed, the separate but equal doctrine was not.

***Brown v Board of Education of Topeka*, 347 U.S. 483 (1954)**

Although the Supreme Court reversed the appellate court's decision in *Sweatt supra*, it did not reverse the doctrine of separate but equal. In the present case, the Supreme Court specifically examined the separate but equal doctrine. In this case, the Court concluded the segregation of white and "Negro" children in the public schools of a state solely on the basis of race denies to African-American children the equal protection of the laws, specifically of the 14th Amendment. The Court said segregation was unconstitutional even if the separate school facilities were physically and tangibly equal.

The Court opined where a state has undertaken to provide an opportunity for education in its public schools?such opportunity is a "right which must be made available to all on equal terms." The Court also concluded segregation of children in public schools solely on the basis of race "deprives children of the minority group of equal educational opportunities." Lastly, the Court determined the edicts of *Plessy v Ferguson*, "separate but equal," had "no place in the field of public education."

Chief Justice Warren delivered the opinion of the Court in this case. He noted the case actually was a combination of cases from Kansas, South Carolina, Virginia, and Delaware. Each of those states had statutes requiring or permitting segregation of public schools. In each case, except Delaware, a three-judge federal district panel denied relief for the plaintiffs on the "separate but equal" doctrine. Although the Supreme Court of Delaware adhered to the doctrine,

it ordered the plaintiffs in that state be admitted to the "white schools" because of their "superiority to the Negro schools."

The plaintiffs, through their legal representatives, claimed segregated public schools were not "equal" and could not be made "equal." They further asserted they were denied equal protection of the laws, specifically the 14th Amendment. At the time this issue was being debated, according to the Chief Justice Warren, free education, supported by taxation, had not taken hold. More specifically, education of African-Americans was almost nonexistent – most of the members of the race were illiterate. Some states even forbade the education of African-Americans.

The Supreme Court interpreted the edicts of the 14th Amendment as "proscribing all state-imposed discrimination against the Negro race." However, Chief Justice Warren noted six cases had come before the Court involving "separate but equal," yet the validity of "separate but equal" was not challenged in any of **them**⁸. Therefore, he opined the Court had to consider the effects of segregation on public education, not just case law.

The Court noted education had become more important in America as demonstrated by compulsory school attendance and the great expenditures for public education. It further noted education was the "very foundation of good citizenship." Also, according to the Court, education "is a principal instrument in awakening the child to cultural values, in preparing him [or her] for later professional training, and in helping him [or her] adjust normally to his [or her] environment." Thus, the Court posed the question, "Does segregation of children in public

⁸ The following cases involved "separate but equal," but did not challenge the validity of the doctrine: *Cummings v County Board of Education*, 175 U.S. 528; *Gong Lum v Rice*, 275 U.S. 78; *Missouri ex rel. Gains v Canada*, 305 U.S. 337; *Sipuel v Oklahoma*, 332 U.S. 631; *Sweatt v Painter*, 339 U.S. 629; and *McLaurin v Oklahoma State Regents*, 339 U.S. 637.

schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"

As mentioned earlier, the Court felt segregation was detrimental to the development of children.

The Court took this premise one step **further**. It said the negative effects of segregation "apply with added force to children in grade and high schools." That is, the Court said segregating children from others of similar age and qualifications "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Thus, the Court concluded segregation of children in public schools was detrimental to African-American children. And such segregation, when sanctioned by law, "has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." Therefore, "separate but equal" was found to have no place in public education since separate facilities are "inherently unequal," according to the Supreme Court in this case.

***Griggs v Duke Power Company*, 401 U. S. 424 (1971)**

In this case, African-American employees of the Duke Power Plant filed suit against the company. The plaintiffs challenged the company's requirement of a high school diploma or passing of an intelligence test as a condition of employment or transfer within the company. These requirements were not related to, nor were they intended to be related to, one's ability to learn to perform certain tasks.

The district court noted 703(a) of the Civil Rights Act of 1964 made it unlawful for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely affect their status because of race, color, religion, sex, or national origin. 703(h) of

the Act authorizes the use of any professionally developed ability test which is not designed to discriminate. The appellate court reversed the district's ruling in part, rejecting the holding that residual discrimination stemming from prior discriminatory practices was exempt from remedial action. The appellate court, however, concurred with the district court that no discriminatory purposes were evidenced by the diploma requirement or the intelligence tests.

Chief Justice Burger delivered the opinion of the Supreme Court. All justices, except Justice Brennan, concurred with the opinion. In fact, Justice Brennan took no part in consideration of this case. The Court held:

- (1) The [Civil Rights] Act [of 1964] requires the elimination of artificial, arbitrary, and unnecessary barriers to employment which operate invidiously to discriminate on the basis of race. If an employment practice which operates to exclude minorities cannot be shown to be job-related, it is proscribed regardless of lack of discriminatory intent.
- (2) The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a reasonable measure of job performance.

Furthermore, the Court determined the Act does not command that any person be hired because s/he is a member of a minority group. The Court noted Senator Case of New Jersey and Senator Clark of Pennsylvania, the Senators who proposed Title VII of the Act, issued a memorandum of understanding. The memorandum specified the intention of Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." Thus, "the

judgement of the Court of Appeals is, as to that portion of the judgement appealed from, reversed." Hence, according to the Court in this case, past discrimination is subject to remedial action.

Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)

This case involved the school district of Charlotte-Mecklenburg, North Carolina. The district court rejected a plan by the "anitbusing" school board stating the plan was not producing sufficient integration at the elementary school level. The district court adopted its own plan which was drafted by a third party "expert." The plan called for the paring and grouping of elementary schools and the busing of pupils between the paired schools.

Chief Justice Burger delivered the opinion of the Supreme Court. In his opinion, Justice Burger noted four central issues in this case: (1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system; (2) whether every "all-Negro and all-white school" must be eliminated as in indispensable part of a remedial process of desegregation; (3) what are the limits, if any, on the rearrangements of school districts and attendance zones, as a remedial measure; and (4) what are the limits, if any, on the use of transportation facilities to correct state-enforced racial school segregation?

Racial Balances or Racial Quotas: According to Chief Justice Burger, the "constant theme and thrust of every holding [of the Supreme Court] from *Brown* to [1971] is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause." The remedy was to "dismantle" the dual school systems. The Chief Justice noted, however, the elimination of discrimination in public schools was a large task. Yet, the task was

not to be "retarded" by efforts to achieve broader purposes beyond the jurisdiction of school authorities.

The Chief Justice further explained the objective of the Court was to ensure school officials discriminated against no student on the basis of race neither directly nor indirectly. Specifically, he indicated the constitutional command to desegregate schools does not indicate all schools in every community must "always" reflect the racial composition of the school system as a whole. Thus, a school district's remedial plan is to be judged by its effectiveness.

One-Race Schools: This case revealed the phenomenon that minority groups are generally concentrated in certain parts of cities. Therefore, some schools in a city would remain all or largely one-race schools until new schools could be provided or neighborhood patterns altered. Hence, the Court specified schools which are all or predominately of one race require "close scrutiny" to determine school assignments are not the result of state-forced segregation. In scrutinizing such schools, the burden of school authorities is to prove racial composition is not the result of present or past discriminatory action on the part of school authorities.

In desegregating schools, transfer provisions have been accepted as a "useful part of every" plan. But, to be effective, such a transfer arrangement must grant the transferring student free transportation to and from school. And, space must be available at the receiving school.

Remedial Altering of Attending Zones: The Court determined the maps which were submitted in this case demonstrated one of the principle tools used by school planners and the courts to eliminate the dual schools was "gerrymandering of school districts and attendance zones." Other steps used were pairing, clustering, or grouping of schools. African-American students were transferred from predominately African-American schools to predominately Anglo schools, and vice versa. The Court determined this plan, as an interim corrective measure, to be

within the remedial authority lower courts. Furthermore, the Court recognized the goal of the courts to dismantle the dual school system. And, in doing so, the Court determined the paring and grouping of non-contiguous school zones a permissible tool.

Transportation of Students: The Court acknowledged bus transportation was an "accepted tool of educational policy." The district court had concluded the assignment of children to the school nearest their homes would not effectively dismantle the dual school system. The Supreme Court concurred with that assessment, The Court decreed busses would be used to implement the plan. The Court also decreed students would be picked up at schools near their homes and transported to the schools they would attend. The plan was therefore ordered - students were bussed to end racial desegregation in public schools.

Milliken v Bradley, 418 U.S. 717 (1974)

This is another case which involved discrimination in a school system. In this case, the district court and the court of appeals found the actions of the school board contributed to the segregation of the district. Thus, both courts ordered a plan involving the "core city" and suburban school districts to desegregate the "core city" schools. The cost of the plan, however, was to be shared by the school district and the state of Michigan.

Chief Justice Burger delivered the opinion of the Supreme Court. The Court noted desegregation of school systems cases had begun with the standard: "[I]n the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." This philosophy was set out in *Brown, supra*. The aim of *Brown* was clear in the Court's mind: "The elimination of state-mandated or deliberately maintained dual school

systems with certain schools for Negro pupils and others for white pupils. This duality and racial segregation were held to violate the Constitution in cases subsequent to [*Brown*].”

The Court, in this case, was to desegregate the public schools in Detroit. The Court reasoned it was imperative to "look beyond the limits of the Detroit school district for a solution to a suburban problem of segregation in the Detroit public schools [since] school district lines are simply matters of political convenience and may not be used to deny constitutional rights."

Although the district court findings of segregation were limited to Detroit proper, the appellate court approved a metropolitan desegregation plan. That is, the appellate court rationalized it would have been "impossible to declare 'clearly erroneous' the district court's conclusion that any Detroit only segregation plan would lead to a single segregated Detroit school district. At the same time, Detroit would have been surrounded by suburban school districts composed mostly of Anglo students (87% Anglos and 13% African-Americans)."

The Court also recognized the importance of local control of schools. The Court stated, "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and the quality of the educational process." The Court stated no state law is "above the Constitution." Therefore, the Court felt it had the authority to determine the validity of a remedy mandating cross-district or interdistrict consolidation to remedy segregation which was found in only one school district.

Furthermore, the Court determined before "the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes," a constitutional violation must have occurred. The violation must have been of such significance to have had an impact of segregation in another district. Specifically, "it must be shown that

racially discriminatory acts of the state or local school districts, or of a single school district" were the catalysts of interdistrict segregation. Conversely, without interdistrict violations, according to the Court, no constitutional violation has occurred. Therefore, since "the nature of the violation determined the scope of the remedy," the isolated instance affecting two school districts would not justify a broad metropolitan solution.

Justice Stewart concurred in part. He noted, "Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines...by transfer of school units between districts...or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines might well be appropriate."

Justice Douglas dissented. He stated, "When we rule against the metropolitan area remedy we take a step that will put the problem of the blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy v Ferguson*." Justice Douglas said the reason for this ruling reinforces the idea that poor school districts must "pay their own way." He noted predominately minority school districts, those comprised mostly of African-American, Mexican-American, and similar minority group members, are primarily poorer districts. His position was this decision indicated no violation of the Equal Protection Clause exists even though schools were segregated by race and despite the fact the "black" schools were not only "separate" but "inferior" as well.

Justices White, Douglas, Brennan, and Marshall dissented and offered the following opinion: The district court and the court of appeals found over a long period of years, the Michigan school authorities had engaged in various practices which led to segregated schools in Detroit. As applied in this case, the remedy for "unquestioned violations of the equal protection

rights of Detroit's African-American students by the school board and the state may not reach into surrounding districts unless "interdistrict" violations were proved. That is, unless it was proved the school board of Detroit had a direct impact on segregation in surrounding districts, or that Detroit had been influenced by the surrounding districts, no violation occurred and the metropolitan remedy was inappropriate.

These justices recognized "remedies calling for school zoning, paring, and pupil assignments, become more and more suspect" since students would spend more time en route to and from school and less time at school, and more tax dollars would be needed to transport students. At the same time, the justices recognized the "unwavering decisions" of the Court that remedial power does not terminate at "school district lines." Thus, they concluded the obligation to rectify the unlawful conditions rested on the state.

Justices Marshall, Douglas, Brennan, and White dissented and opined the following: "After twenty years of small, often difficult steps toward that great end, the Court today takes a giant step backwards." Specifically, in their opinion, the Court held the district court and the appellate court powerless to remedy a "constitutional violation in any meaningful fashion." They concluded "school district lines, however innocently drawn, will surely be perceived as fences to separate the races when under a Detroit-only decree, white parents withdraw their children from the Detroit city schools and move to the suburbs in order to continue them in all-white schools."

***Washington v Davis*, 426 U.S. 229 (1976)**

In this case, two African-American police applicants filed suit against the District of Columbia Metropolitan Police Department. The plaintiffs claimed the Department's recruiting

practices, including a written test (Test 21), were "racially discriminatory and violated the Due Process Clause of the 5th Amendment." Even though Test 21 was given to prospective government employees to determine verbal ability, the plaintiffs contended the test was not job related. The plaintiffs also claimed Test 21 eliminated a "disproportionately high number of Negro applicants."

The district court, noting the absence of intentional discrimination, found the plaintiffs evidence supported the following conclusions:

- (a) the number of African-American police officers was not proportional to the city's racial mix,
- (b) a higher percentage of African-Americans failed Test 21 than Anglos, and
- (c) Test 21 had not been validated to establish its reliability for measuring job performance.

Justice White delivered the opinion of the Court. The opinion was joined in parts by Justices Burger, **Blackmun**, Powell, **Rehnquist**, Stevens, and Stewart. Justice Stevens also filed a concurring opinion. Justice **Brennan**, joined by Justice Marshall, dissented. The Court held:

- (1) The Court of Appeals erred in resolving the 5th Amendment issue by applying standards applicable to Title VII cases.
 - (a) Though the Due Process clause of the 5th Amendment contains an equal protection component prohibiting the government from invidious discrimination, it does not follow that a law or other official act is unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose.

- (b) The Constitution does not prevent the government from seeking through Test 21 modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to **communicate** orally and in writing. And, the petitioners in this case, as African-Americans, could no more ascribe their failure of the test to denial of equal protection than could Anglos who also failed.
 - (c) The disproportionate impact of Test 21, which is neutral on its face, does not warrant the conclusion that the test was a purposely discriminatory device, and on the facts before it the district court properly held any inference of discrimination was unwarranted.
 - (d) The rigorous statutory standard of Title VII involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where, as in this case, special racial impact but no discriminatory purpose is claimed. And extension of that statutory standard should await legislative prescription.
- (2) Statutory standards similar to those obtained under Title VII were also satisfied here. The district court's conclusion that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and that program was **sufficient** to validate the test is fully supported on the record in this case, and no remand to establish further validation is appropriate.

Thus, the test was sustained by the district court and invalidated by the appellate court. The Supreme Court reversed the appellate court's decision, validating the use of Test 21.

***Regents of the University of California v Bakke*, 438 U.S. 265 (1978)**

Bakke is considered the turning point of affirmative action rulings of the Supreme Court. That is, the Supreme Court all but eliminated affirmative action and preferential treatment in the United States when it issued its ruling in *Bakke*.

The case involved the rejection of Allan Bakke as a student at the University of California at Davis. Bakke was twice rejected even though his pre-admission scores exceeded those of minority students who were admitted under the university's affirmative action program. Under its affirmative action plan, the university reserved sixteen places for "qualified" minority students in each entering class. The university drafted and adopted its plan to "redress longstanding, unfair minority exclusions from the medical profession." The Supreme Court simply asked if the discrimination in this case was prohibited by the 14th Amendment's Equal Protection Clause and/or the Civil Rights Act of 1964.

Generally, the university rejected candidates whose undergraduate grade point averages fell below 2.5 on a 4.0 scale. However, the university had a separate admissions program for "economically and/or educationally disadvantaged" applicants and members of minority groups (e.g., African-Americans, Mexican-Americans, Asian-Americans, and Native-Americans). "Special candidates," as they were called, were exempt from the 2.5 grade point average cut-off point. Yet, during a four-year period, 63 minority students were admitted to Davis under the special program and 44 under the general admissions program. No "disadvantaged Anglos" were admitted under the special program although many applied for admissions under the

program. After his second rejection, Bakke filed suit alleging the special admissions program excluded him solely on the basis of race in violation of the Equal Protection Clause.

A majority decision by the Supreme Court was not reached in this case. Four justices contended the "racial quota system" at Davis violated the Civil Rights of 1964. Four others held "the use of race as a criterion" in admissions decisions was constitutional. Justice Powell, Jr. cast the deciding vote and agreed in part with both positions.

On one hand, Justice Powell, Jr. agreed the "racial quota system" violated the Civil Rights Act of 1964 and ordered the medical school to admit Bakke. He also concluded the use of racial quotas violated the Equal Protection Clause of the 14th Amendment. On the other hand, Justice Powell, Jr. joined the dissenting decision. Here, he noted "the use of race was permissible as one of several admission criteria." The issue of affirmative action, however, was remanded to a later date.

The Supreme Court determined Title VI of the Civil Rights of 1964 proscribes only those racial classifications which would violate the Equal Protection Clause if employed by a state or its agencies. The university is a state agency. Furthermore, the Court noted "racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny." The Court recognized the goal of achieving a diverse student body was "sufficiently compelling to justify consideration of race in admissions decisions under some circumstances." The admissions program in this case was "unnecessary to the achievement" of diversity. Therefore, the plan was ruled invalid under the Equal Protection Clause. Finally, the Court ruled since the university could not prove Bakke would not have been admitted under "normal" circumstances, the university had to admit Bakke to the medical school.

***Baston v Kentucky*, 476 U.S. 79 (1986)**

In this case, the conviction of a county judge was upheld. The judge excluded African-Americans from jury duty solely because of their race. The judge was convicted for racial discrimination.

Justice Powell delivered the opinion of the Supreme Court. Justice Powell began by referring to *Swain v Alabama* (1965) concerning the evidentiary burden placed on a criminal defendant who claims to have been excluded from jury duty because of race. He noted it was impermissible to "exclude blacks from the jury" for reasons not related to the trial at hand. He further stated it not permissible to exclude African-Americans from the opportunity to participate in the administration of justice enjoyed by Anglo citizens.

Justice Powell also indicated the burden of proof is on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." However, once the defendant makes the requisite showing, the burden shifts to the state to explain the racial exclusion. The state must demonstrate "permissible racially neutral selection criteria and procedures have produced the monochromatic result." In this case, the Court found no showing of jury prejudice. Thus Justice Burger and Justice Blackmun dissented even though the county judge's conviction was upheld.

***City of Richmond v J.A. Croson Company*, 488 U.S. 469 (1989)**

This case is about set-aside programs which favored minority-owned businesses. Justice O'Connor delivered the opinion of the Court. According to Justice O'Connor, the Court was faced, once again, with the "tension between the 14th Amendment's guarantee of equal treatment for all citizens, and the use of race-based measures to ameliorate the effects of past

discrimination." She cited past decisions in which the Supreme Court upheld the use of set-aside programs for minorities. She also made note of the fact that lower courts had mirrored the Court in deciding issues of race-based set-aside programs under the 14th Amendment.

Justice Rehnquist and Justice White joined the decision. The Court pointed out the "appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination." They also noted the Court had "upheld the minority set-asides in §103(f)(2) of the Public Works Employment Act of 1977 against a challenge of the Due Process Clause." Furthermore, the justices cited the following requirement of the Act:

Except to the extent the Secretary determines otherwise, no grant shall be made under this Act...unless the applicant gives satisfactory assurance to the Secretary that at least ten percent of the amount of each grant shall be expended for minority business enterprises.

The justices, therefore, were concerned with two questions which were derived from the principle opinion in *Fullilove v Klutznick (1980)*: First, were the objectives of the legislation within the powers of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause?

On the issue of congressional authority, the Chief Justice, in *Fullilove* determined "Congress' commerce power was sufficiently broad to allow it to reach the practices of prime contractors on federally funded local construction projects." Thus, Congress could mandate state and local government compliance with the minority set-aside program under its §5 power to enforce the 14th Amendment. The justices cited the Chief Justice's conclusion in *Fullilove*, "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as [in *Fullilove*], authorize and induce state action to avoid such conduct."

On the second issue, the justices considered two points: (1) the effects of past discrimination had impaired the competitive position of minority businesses, and (2) "adjustment for the effects of past discrimination" would assure at least ten percent of the funds from the federal grant program would go to minority-owned businesses. The appellant in this case argued that a city council, like Congress, did not need to make a "specific" finding of discrimination to "engage in race-conscious relief." However, according to the justices, the appellant failed to realize Congress, unlike any state or local governmental entity, has a constitutional mandate to enforce the edicts of the 14th Amendment. Further, the justices stated they believed such a remedy would be contrary to the intentions of the framers of the 14th Amendment. At the same time, the justices stated the city of Richmond had "legislative authority" over its procurement policies. Therefore, the city could use its spending powers to rectify private discrimination.

Justices Rehnquist, White, Stevens, and Kennedy offered the following opinion: "As this Court has noted in the past, the 'rights created by the first section of the 14th Amendment are, by its terms, guaranteed to the individual.'" They opined the purpose of "strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." Thus, according to these justices, unless racial preferences are used solely for "remedial purposes," they may promote the ideology of racial inferiority.

Justice Rehnquist, Justice White, Justice Stevens, Justice Scalia and Justice Kennedy offered the following opinion: "The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone." They opined the set-aside dollars seemed to "rest on the unsupported assumption that white prime contractors simply will not hire minority firms." And, without any data on minority participation in subcontracting, it would be impossible to evaluate the city's

overall minority representation in the city's construction expenditures. In short, these justices concluded none of the evidence presented before the Court in this case identified any discrimination in the Richmond construction industry.

Justice Rehnquist and Justice White stated, "The Court here assures cities the right to deal with 'identified' discrimination and points out nondiscriminatory ways in which small contractors could legitimately be aided. Accordingly, the judgement of the Court of Appeals for the Fourth Circuit is affirmed." The Richmond plan was overturned.

Justice Marshall, joined by Justice Brennan and Justice Blackmun, dissented. They stated:

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In [our] view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from – and in fact was patterned upon – the federal set-aside plan which [the Supreme Court] upheld in *Fullilove v Klutznick*.

However, according to these justices, a majority of the Court held the Richmond plan violated the Equal Protection Clause of the 14th Amendment. Nonetheless, Richmond had determined minorities had been the recipients of racial discrimination in the past and excluded from contracting with the city.

These justices stated the Court's decision in this case marked a "deliberate and giant step backward" in affirmative action. They also opined the Court's decision would discourage other states and localities from engaging in positive activities to rectify past discrimination.

Admittedly, cities like Richmond may not be required to take actions to remedy past discrimination, but "there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through its own decisionmaking, it served an interest of the highest order." Their conclusion is the decision in this case did a "grave disservice not

only to the victims of past and present discrimination" but also to the Court's longstanding reputation and stance of approaching issues of race with the "utmost sensitivity."

Justice **Blackmun**, joined by Justice **Brennan**, offered a dissenting opinion as well. "[We] never thought [we] would see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination." The Court, the "bastion of equality," struck down Richmond's plan as "though discrimination had never existed or was not demonstrated in this particular litigation." Their concluding remarks, "So the Court today regresses. [We] are confident, however, that, given time, [the Supreme Court] one day again will do its best to fulfill the great promises of the Constitution's Preamble⁹ and the guarantees embodied in the Bill of Rights – a fulfillment that would make this Nation very special."

***Piscataway Township Board of Education v Taxman*, 91 F.3d 1547 (3d Cir. 1996)**

Although this case pertains to the 3rd Federal Circuit, it is significant to this study because it provides **further** evidence of judicial interpretations of affirmative action. The questions in this case was whether the petitioner's layoff decision imposed an "unnecessary and unjustified burden on Sharon **Taxman** resulting in "impermissible discrimination" under Title VII of the **CRA** of 1964. The second question in this case was whether Title **VII** prohibits all non-remedial, race-conscious employment decisions.

⁹ Preamble of the United States Constitution - We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosperity, do ordain and establish this Constitution for the United States of America.

The facts of the case are as follows: the Board of Education of the Township of Piscataway (petitioner) decided to eliminate a position in the Business Education Department of the Piscataway High School in May 1989. At the time, New Jersey law required dismissals to be based on reverse tenure. That is, the last hired would be the first fired. The two junior teachers in the Business Education Department were Sharon **Taxman** (Anglo) and Debra Williams (African-American). Williams was the only African-American teacher in the Business Education Department.

Even though the petitioner had discretion under New Jersey law to break the seniority tie, the Superintendent of Schools, Burton Edelchick, recommended retaining Williams based on the school district's affirmative action policy. The policy, adopted in 1975 and modified in 1983, specified:

In all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended.

The policy was applicable to every facet of employment including layoffs. African-Americans were among those employees "meeting the criteria of the affirmative action program." Yet, the policy was not adopted to correct the ills of prior discrimination, nor did the district have disproportionately fewer African-Americans in the work force as represented by the qualified applicant pool. Furthermore, Superintendent Edelchick admitted his decision to retain Williams was based solely on the basis of Williams' ethnicity. The petitioner accepted Edelchick's recommendation in a 5-0 vote.

In a letter to **Taxman** from petitioner, the petitioner explained its layoff decision as follows:

[T]he board of education has decided to rely on its commitment to affirmative action as a means of breaking the tie in seniority entitlement in the secretarial studies category. As a result, the board, at its regular meeting on the evening of May 22, **1989**, acted to abolish one teaching position and to **terminate** your employment as a teaching staff member effective June **30, 1989**.

In her decision, Paula Van Riper, petitioner's Vice-President at the time, explained her vote to retain Williams as follows:

In my own personal perspective I believe by retaining Mrs. Williams it was sending a very clear message that we feel that our staff should be culturally diverse, our student population is culturally diverse and there is a distinct advantage to students, to all students, to be made – come into contact with people of different cultures, different background, so that they are more aware, more tolerant, more accepting, more understanding of people of all backgrounds.

After she was laid off, **Taxman** filed a discrimination action with the Equal Employment Opportunity Commission alleging she was the victim of wrongful discrimination under Title VII of the **CRA** of 1964. The charge was referred to the U.S. Department of Justice, and the United States filed a Title VII suit against the petitioner.

The district court found the petitioner violated Title VII. The district court noted that the petitioner's "asserted purpose of promoting faculty diversity for educational reasons" was not permissible under Title VII. Specifically, the district court held the petitioner's affirmative action plan was "overly intrusive to the rights of **nonminorities** [*sic*]." **Taxman** was awarded \$144,014.62 in monetary relief and retroactive seniority.

The petitioner appealed the district court's ruling and the United States sought leave to file a brief as *amicus curiae*¹⁰ supporting reversal of the judgement. The court of appeals denied the United States leave to participate *amicus curiae*. Instead, it treated the United States' motion as a request to withdraw from the action. The appeals court granted the motion to withdraw.

The court of appeals, sitting *en banc*¹¹, affirmed the district court's decision. Thus, the appeals court held "affirmative action plans" are valid under Title VII only when they (1) have purposes that mirror those of the statute, and (2) do not "unnecessarily trammel the interests" of

¹⁰ *Amicus curiae* – friend of the court (Gifis: 1984, 21).

¹¹ *En banc* by the full court (Gifis: 1984, 154).

nonminority [*sic*] employees. The appeals court stated an affirmative action plan cannot be said to "mirror the statue" unless the plan has a remedial purpose. The appeals court also noted the plan failed to determine what degree of diversity was sufficient. Thus, according to the appeals court, the plan "unnecessarily trammels nonrninorities [*sic*] interests."

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

The final judicial case discussed in this chapter is *Hopwood v Texas*. This case is relatively new. The United States Supreme Court, in 1997, declined to review *Hopwood*. Therefore, since *Hopwood* was decided by the United States Court of Appeals for the 5th Circuit (5th Circuit), it applies only to Texas, Louisiana, and Mississippi. Furthermore, the Attorney General of Georgia has directed public universities and colleges in that state to abide by the *Hopwood* edicts even though Georgia is not obligated to abide by the rulings of the 5th Circuit.

In this case, four prospective students to the University of Texas at Austin School of Law were rejected under the university's affirmative action plan. The applicants, Cheryl J. Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers filed suit in federal district court. The case was appealed to the 5th Circuit.

In the early 1990s, the Law School based admission decisions on an applicant's Texas Index (TI) number¹². This number was composed of the applicant's grade point average and her/his Law School Aptitude Test (LSAT) score. The Law School used this number as a "matter of administrative convenience" to rank candidates and predict their chances of success in law school.

¹² To compute a candidate's TI number, the law school used the candidate's LSAT score + (10)(GPA) for those candidates with three digit LSAT scores. For candidates with two digit LSAT scores, the law school used (1.25)(LSAT score) + (10)(GPA).

African-American and Mexican-American candidates were treated differently by the Law School. Specifically, their TI numbers were lower than Anglos and non-preferred minorities. In March 1992, Anglo and non-preferred minority candidates whose TI numbers fell below 192 were rejected. Yet, during that same period, Mexican-American and African-American candidates whose TI numbers were 189 or higher were admitted. The 5th Circuit determined the law school discriminated in favor of certain classes of students and prospective students. It acknowledged the efforts of the law school to increase enrollment of certain "favored classes of minorities." At the same time, it acknowledged the fact that Mexican-American and African-American candidates were the beneficiaries of this enrollment program at the expense of Anglos and "non-preferred minorities."

Yet, the 5th Circuit determined the law school presented no "compelling justification" under either the 14th Amendment or any Supreme Court precedent which allowed such discrimination. The 5th Circuit, quoting Justice Scalia in *City of Richmond v J.A. Croson Company, supra*, commented, "Racial preferences appear to 'even the score' . . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white." Hence, although the 5th Circuit determined the University of Texas acted in "good faith," the 5th Circuit concluded the law school could not use race as a factor in its admissions process. The 5th Circuit also stated schools which "elevate some races over others, even for the wholesale purpose of correcting perceived racial imbalances in the student body," violate the 14th Amendment.

Proposition 209:

Although Proposition 209 was not derived from a court decision, it is included in this chapter because of its implications on race and racial issues in California. A synopsis of the Proposition is included below and a copy of the complete text is included at the end of this study as Appendix Two. Additionally, arguments in favor of and against Proposition 209, as well as rebuttals to each, are presented in this section.

Text of Proposition 209

Proposition 209 was approved by California voters on 05 November 1996. The Proposition effectively ends affirmative action, specifically preferential treatment, in California. Proposition 209 is an addition to the California State Constitution, Section 31. Some of the relevant issues covered by the Proposition are Section 31 (a) the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting; (c) nothing in [Section 31] shall be interpreted as prohibiting bona fide qualifications based on sex which are necessary to the normal operation of public employment, public education, or public contracting; (e) nothing in [Section 31] shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal **funds** to the state. Thus, Proposition 209 ensures the edicts of the Civil Rights Act of 1964 are enforced in California (see The Initiation and Perpetuation of Affirmative Action in Chapter 2).

According to the California Legislative Analyst, federal, state, and local governments operate many programs to increase opportunities for various groups including women, and **racial/ethnic** minorities. These programs are collectively called "affirmative action programs."

Such programs include public college and university scholarship, tutoring, and outreach programs, goals and timetables, and state and local programs required by the federal government as a condition to receive federal funds.

Proposition 209 eliminated state and local government programs in public employment, public education, and public contracting which involved "preferential treatment" based on race, sex, color, ethnicity, or national origin in California. Specifically, the Proposition proscribes preferential treatment except when necessary for any of the following reasons:

- ◆ to keep the state or local governments eligible to receive money from the federal government,
- ◆ to comply with a court order in force as of the effective date of Proposition 209 (after 05 November 1996),
- ◆ to comply with federal law or the United States Constitution, or
- ◆ to meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

Thus, Proposition 209 eliminated affirmative action programs used to increase hiring and promotion opportunities for state and local government jobs where sex, race, or ethnicity were preferential factors in hiring, promotion, training, or recruitment decisions. Additionally, programs which gave preference to women-owned or minority-owned businesses in public contracting were eliminated.

Furthermore, Proposition 209, according to California's legal analyst, may result in savings to the state and local governments. For example, government agencies would no longer incur the costs associated with administering the affirmative action programs. And, since governments would be able to accept the lowest bids in all cases regardless of minority status, the cost of government contracting would decrease. Hence, the estimated \$60 million the state

and local governments spend on desegregation is no longer needed for that purpose. Other programs such as outreach, counseling, tutoring, student financial aid, etc., which cost an estimated \$15 million per annum, are eliminated under the Proposition. In short, Proposition 209 will save California taxpayers approximately \$75 million dollars in public school spending annually.

Argument in Favor of Proposition 209

Pete Wilson¹³, Ward Connerly¹⁴, and Pamela Lewis¹⁵ co-authored the argument in favor of Proposition 209. They argued the United States “did it right” in 1964 when the Civil Rights Acts was passed into law. They see preferential treatment initiatives as affronts to the Act. Specifically, they see quotas, preferences, and set-asides as threats to equality. To them, students and job applicants were turned away from colleges and universities, and employment based solely on their race or ethnicity.

According to their position was government should not discriminate against or for any person or persons based on sex, race, color, national origin, etc. They felt government should treat all people equally before the law, and were confident Proposition 209 would eliminate “government-sponsored discrimination,” and ensure equal opportunities for all citizens in California. Thus, they opined Proposition 209 did not eliminate federal protections against discrimination, it just ensured the government did not discriminate in favor of any group against others.

¹³ Pete Wilson, Governor – State of California.

¹⁴ Ward Connerly, Chairman – California Civil Rights Initiative.

¹⁵ Pamela Lewis, Co-Chair – California Civil Rights Initiative.

In their opinion, government should not discriminate, must not award a job, a university admission, or a contract based on race or sex, and should judge all people equally. Wilson et al stated, “**Government** cannot work against discrimination if government itself discriminates,” and pointed out the high cost of administering affirmative action **programs** in California. According to this trio, affirmative action programs cost California taxpayers approximately \$125 million annually.

Their solution was to encourage the passage of Proposition 209, reiterating the “real” meaning of affirmative action – “no discrimination.” This group believed Proposition 209 was the best way to address inequalities of opportunity by making sure “all California children are provided with the tools to compete in our society,” and then allow them to compete in a color-blind and gender-blind society. Their resolve was “individual achievement, equal opportunity and zero tolerance for discrimination against – or for – any individual.”

Rebuttal to Argument in Favor of Proposition 209

Prema Mathai-Davis¹⁶, Karen Manelis¹⁷, and Wade Henderson¹⁸ provided this rebuttal to the argument in favor of Proposition 209. This trio began by referencing Rosa Parks' historic feat of not surrendering her seat on a bus during the segregation era. They believe Proposition 209 “highjacks civil rights language and uses legal lingo to gut protections against discrimination.”

According to their position, Proposition 209's aim of eliminating quotas was false since the United States Supreme Court had already **ruled** quotas unconstitutional. They, therefore,

¹⁶ Prema Mathai-Davis, National Executive Director, YWCA of the United States.

¹⁷ Karen Manelis, President – California American Association of University Women.

¹⁸ Wade Henderson, Executive Director – Leadership Conference on Civil Rights.

stated the aim of Proposition 209 was the elimination of "affirmative action equal opportunity programs for qualified women and minorities including tutoring, outreach, and mentoring." This trio opined Proposition 209 changed the California Constitution allowing state and local governments to discriminate against women, excluding them from job categories. However, this argument is not supported by Section 31 (c) of Proposition 209: Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting. Mathai-Davis et al concluded by quoting retired General Colin Powell: "There are those who say, we can stop now, America is a color-blind society. But it isn't yet, there are those who say we have a level playing field, but we don't yet."

Argument Against Proposition 209

Fran Packard¹⁹, Rosa Parks²⁰, and Maxine Blackwell²¹ offered this argument against Proposition 209. This trio began by noting California law allowed tutoring, mentoring, outreach, recruitment and counseling to help ensure equal opportunity for women and minorities. Packard et al feared Proposition 209 would eliminate programs such as these. They stated the language of the Proposition was so "broad and misleading" that it eliminated "equal opportunity" programs such as

- tutoring and mentoring for minority and women students,
- affirmative action which encourages the hiring and promotion of qualified women and minorities,

¹⁹ Fran Packard, President – League of Women voters of California.

²⁰ Rosa Parks, Civil Rights Leader.

²¹ Maxine Blackwell, Vice President – Congress of California Seniors, Affiliate of the National Council of Senior Citizens.

- outreach and recruitment programs to encourage applicants for government jobs and contracts, and
- programs designed to encourage girls to study and pursue careers in math and science.

The group stated Proposition 209 would allow state and local governments to deny women opportunities in public employment, education, and contracting solely based on their gender (see Section 31(c) of Proposition 209). And, they concluded by quoting retired General Colin Powell: "Efforts such as the California Civil Rights Initiative which poses as an equal opportunities initiative, but which puts at risk every outreach program, sets back the gains made by women and puts the breaks on expanding opportunities for people in need."

Rebuttal to Argument Against Proposition 209

Daniel E. Lungren²², Quintin L. Kopp²³, and Gail Heriot²⁴ offered this rebuttal to the argument against Proposition 209. This group stated Proposition 209 bans discrimination and preferential treatment. Those affirmative action programs which did not discriminate or grant preferential treatment remained unchanged, according to this trio. The group also stated programs designed to ensure all persons are treated equally regardless of race or gender would continue.

Furthermore, they pointed out Proposition 209 does not proscribe special consideration of the economically disadvantaged. That is, they stated the state "must remain free to help the economically disadvantaged, but not on the basis of race or sex." Lungren et al provided the following example to illustrate their point: Under California law prior to the passage of

²² Daniel E. Lungren, Attorney General – State of California.

²³ Quintin L. Kopp, State Senator.

²⁴ Gail L. Heriot, Professor of Law.

Proposition 209, a wealthy doctor's son could receive preference for college admission over a dishwasher's daughter simply because the son was from an "underrepresented" class and the daughter was not.

Furthermore, they opined Proposition 209 added new protection against sex discrimination. They referred to Section 31(c) to emphasize their point reminding voters Proposition 209 reinforces the language of the Civil Rights Act of 1964 allowing sex to be considered if it is a bona fide qualification. They concluded by stating anyone opposed to Proposition 209 would also be opposed to the Civil Rights Act of 1964 since Proposition 209 reiterates the edicts of the 1964 Act.

Chapter Summary:

This chapter began with an explanation of some of the issues surrounding affirmative action. The common theme of inconsistency in court rulings was indicated in the introductory section. Additionally, the fact that the cases presented have no smooth transactions between them was also indicated.

In the second section, *Goesaert* was used to demonstrate how the Supreme Court defined the equal protection test. In the Strict Scrutiny section, *Korematsu* and *Kramer* were used to show the extent the Court has gone to define "strict scrutiny" and its applicability. In the next section, Race Relations and Racial Discrimination, several cases were presented. The cases show how the Supreme Court has often reversed not only lower courts, but also itself. For example, in *Plessy*, the Court said separate but equal was constitutional. The Court reversed itself in *Brown*. *Hopwood* was included although it is not a Supreme Court case. Perhaps the case demonstrates the future of affirmative action. However, since the Supreme Court has not

ruled on *Hopwood*, any conclusions of *Hopwood* beyond the 5th Circuit are premature and tentative at best. *Piscataway*, like *Hopwood*, is not a Supreme Court case. The edicts of *Piscataway* apply only to the 3rd Federal Circuit; however, the Supreme Court may intervene in affirmative action at a later date. However, for purposes of this study, *Hopwood* and *Piscataway*, as well as the other court cases and Proposition 209, have laid the legal foundation. Finally, a discussion of Proposition 209, including arguments in favor of and against, was included since Proposition 209 ended the use of preferential treatment in California under most circumstances. As stated in the chapter introduction, however, this discussion is admittedly limited, many more cases could have been included. Nonetheless, in the next chapter, correspondence from the Office for Civil Rights of the United States Department of Education is examined.

Chapter IV:

Correspondence from the United States Department
of Education,
Office for Civil Rights

Chapter Introduction

In the previous chapter, court decisions and Proposition 209 were examined to demonstrate how the courts and California voters have responded to affirmative action and race relations in the United States. In this chapter, several letters written by the Office for Civil Rights (OCR) of the United States Department of Education are examined to provide insight into the decision making of OCR since OCR is tasked with enforcing affirmative action in education.

To begin, the U.S. Department of Education is the federal agency that administers federal funds for education programs, conducts and disseminates education research, focuses national attention on issues and problems in education, enforces federal statutes prohibiting discrimination in activities receiving federal funds, and ensures equal access to education for every individual. Furthermore, the Office for Civil Rights, which is located in Washington, D.C., serves as the "principal advisor to the Secretary of Education on civil rights matters and issues" (U.S. Department of Education: 12 September 1997).

The OCR's mission is to "ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights" (U.S. Department of Education: 06 February 1997). The OCR enforces the following federal statutes:

- **Title VI of the Civil Rights Act of 1964** prohibiting discrimination on the basis of race, color, and national origin;
- **Title IX of the Education Amendments of 1972** prohibiting discrimination based on sex;
- **Section 504 of the Rehabilitation Act of 1973** prohibiting discrimination on the basis of handicap;
- **the Age Discrimination Act of 1975** prohibiting discrimination on the basis of age; and

- **the Americans with Disabilities Act of 1990** prohibiting discrimination based on handicap (mental or physical) (U.S. Department of Education: 06 February 1997).

The civil rights statutes enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive Department of Education funds. Such programs or activities include, but are not limited to admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment (U.S. Department of Education: 06 February 1997). Incidentally, a discrimination complaint can be filed by anyone who believes a recipient of U.S. Department of Education funds has discriminated against anyone on the basis of race, color, sex, national origin, or age. The person filing the complaint does not have to be the alleged victim of the discrimination (U.S. Department of Education: 06 February 1997). Thus, since OCR is involved with enforcement of this type, the letters herein contained, *infra*, provide guidance on OCR's stance on **affirmative** action in recent years.

Letters from the Office for Civil Rights

This section specifically examines letters drafted by members of OCR²⁵. Since the *Hopwood* ruling and Proposition 209 effect **affirmative** action policies in Texas and California, respectively, this section is divided into two subsections: "Before Anti-Affirmative Action Mandates" and "Since Anti-Affirmative Action Mandates."

²⁵ All letters used in this chapter are available via internet at <http://www.ed.gov/offices/OCR/>.

Before Anti-Affirmative Action Mandates

Letter from John E. Palomino, Regional Civil Rights Director, to Charles E. Young, Chancellor, University of California at Los Angeles (not dated) – In this letter, Palomino explains the purpose of the U.S. Department of Education and the Office for Civil Rights. He explains that OCR was investigating the University of California at Los Angeles (UCLA) because of its undergraduate admissions policy. Specifically, OCR was concerned if UCLA discriminated against Asian-American applicants who applied to the College of Letters and Science and the School of Engineering and Applied Science in violation of Title VI of the Civil Rights Act (CRA) of 1964. Secondly, the investigation was to determine if the student affirmative action plan was in compliance with Title VI of the CRA of 1964.

Based on information provided by UCLA, interviews conducted with UCLA administrators, students and faculty, and "extensive statistical analyses," OCR did not find any quotas or admissions caps established by UCLA in its admissions policy. Additionally, OCR determined UCLA did not engage in "discrimination against Asian applicants in the implementation of its admission programs." In fact, OCR determined that UCLA's affirmative action program was "in compliance with Title VI and the standard outlined in Regents of the *University of California v Bakke*."

Letter from Gary D. Jackson, Regional Civil Rights Director, Region X, to Dr. Chang-Lin Tien, Chancellor, University of California at Berkeley (25 September 1992) – This letter discusses considerations for determining permissibility of the affirmative action admissions program at the University of California at Berkeley School of Law (UCal Berkeley – Law) under Title VI: (1) whether the program was a true diversity program; (2) whether applicants of one

race/ethnicity were compared to applicants of other races/ethnicities; (3) whether applicants competed for available seats on the basis of race or ethnicity; and (4) whether the program was administered in a manner designed to ensure equal treatment.

On 16 July 1990, OCR informed the UCal Berkeley that it has been selected for compliance review under authority of Title VI of the CRA of 1964. The review focused on whether the UCal Berkeley's affirmative action program for admissions to the School of Law (Boalt Hall) was consistent with Title VI requirements. Upon completion of its investigation, OCR determined Boalt Hall's admissions procedures were "inconsistent with the Title VI regulation."

Specifically, Boalt Hall began its admission procedure in 1978. The procedure set-aside "23%-27% of each class [for] certain racial/ethnic groups that the law school determined should receive 'special consideration' in the admissions process." Boalt Hall set-aside seats for each "special consideration" group as follows: (a) eight to ten percent for African-Americans, (b) eight to ten percent for Hispanics, (c) five to seven percent for Asians, and (d) one percent for Native-Americans. Thus, Boalt Hall consistently met or exceeded its 23%-27% set-aside goal since 1978.

According to OCR, the admissions program was in violation of Title VI. That is, Title VI prohibits discrimination on the bases of color, race, and national origin. An affirmative action program, which gives consideration to race or national origin, is permissible under Title VI if it is operated within certain parameters. For example, race or national origin may be considered if such consideration was necessary to "remedy a specific finding of discrimination by a court, legislative, or administrative body." Or, an entity could voluntarily consider race or national origin of applicants to "overcome the effects of conditions which resulted in limiting

participation by persons of a particular race, color, or national origin." No finding of discrimination or past discrimination was found in the past admissions procedures of Boalt Hall.

Although Justice Powell opined race or ethnicity may be used as a "plus factor" in admissions, OCR concluded that some of Boalt Hall's admissions procedures were not consistent with Title VI requirements. In short, OCR concluded that in practice, Boalt Hall administered its affirmative action plan in a manner designed to ensure the affirmative action percentage goals would be met. However, "in effect, the admissions process allowed the affirmative action percentages to control the decision-making as necessary to gain the desired result of a particular racial-ethnic mix in the school's population." As administered by Boalt Hall, race and ethnicity "had the effect of isolating one aspect of educational diversity from all others, and in doing so, failed to ensure that all applicants would be afforded fair consideration with respect to potential diversity contributions."

Policy Guidance, Federal Register Vol. 59, No. 36 / Wednesday, 23 February 1994 / Notices – Non-discrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, issued by Richard W. Riley, Secretary of Education (17 February 1994) – This policy was issued to provide guidance "to help clarify how colleges can use financial aid to promote campus diversity and access to minority students to postsecondary education without violating Federal anti-discrimination laws."

The Secretary (of Education) began this notice by iterating the fact that he "encourages continued use of financial aid as a means to provide equal educational opportunity and to provide a diverse educational environment for all students." Furthermore, the Secretary also encouraged the "use by postsecondary institutions of other efforts to recruit and retain minority students, which are not affected by this policy guidance."

In short, the Department of Education revised four aspects of the policy guidance as follows:

- (1) *Principle 3* – Financial Aid to Remedy Past Discrimination has been amended to permit a college to award financial aid based on race or national origin as part of affirmative action to remedy the effects of its past discrimination without waiting for a finding to be made by OCR, a court, or a legislative body, if the college has a strong basis in evidence of discrimination justifying the use of race-targeted scholarships.
- (2) *Principle 4* – Financial Aid to Create Diversity has been amended to permit the award of financial aid on the basis of race or national origin if the aid is a necessary and narrowly tailored means to accomplish a college's goal to have a diverse student body that will enrich its academic environment.
- (3) *Principle 5* – Private Gifts Restricted by Race or National Origin has been amended to clarify that a college can administer financial aid **from** private donors that is restricted on the basis of race or national origin only if that aid is consistent with other principles in the policy guidance.
- (4) A provision has been added to permit historically black colleges and universities to participate in race-targeted programs for African-American students established by third parties if the programs are not limited to students at historically black colleges and universities.

Since Anti-Affirmative Action Mandates

As previously noted, the letters presented in the previous section were written before the anti-affirmative action mandates were effected. In this section, letters, which were written since anti-affirmative action mandates were enacted, are considered.

Letter from Judith A. Winston, General Counsel, Department of Education, addressed "Dear College and University Counsel:" (30 July 1996) – In this letter, Winston explains the Department of Education's position on affirmative action in light of *Hopwood*. Winston notes, "under the Constitution and Title VI of the Civil Rights Act of 1964, it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions and granting financial aid." According to Winston, colleges and universities make race-conscious decisions "to promote diversity of their student body, consistent with Justice Powell's landmark opinion in *Regents of the University of California v Bakke*." Additionally, such "discretion" may be used to "remedy the continuing affects of discrimination by the institution itself or within the state of local educational system as a whole."

Winston stated that by denying *certiorari*, "the [S]upreme Court neither affirmed nor reversed the Fifth Circuit panel's decision in *Hopwood*, which took the position that the University of Texas Law School could not take race into account in admission either to promote diversity or to remedy the effects of the State's formerly segregated system of public education, but could only seek to remedy the Law School's own discrimination." In short, according to Winston, the denial of *certiorari* does not mean the "[S]upreme Court departed from Justice Powell's opinion in *Bakke*..." Nor does the denial mean the "Supreme Court accepts the Fifth Circuit's narrow view of the permissible remedial predicate justifying the consideration of race by institutions of higher education."

In conclusion, according to Winston, the U.S. Department of Education “continues to believe that, outside the Fifth Circuit, it is permissible for an educational institution to consider race in a narrowly tailored manner in either its admissions program or its financial aid program in order to achieve a diverse student body or to remedy the effects of past discrimination in education systems.” Within the Fifth Circuit, however, Winston admits the law is unclear because of *Hopwood*, and the U.S. Department of Education will await further judicial rulings before offering “further guidance.”

Letter from Barbra Shannon, Acting Director, Atlanta Office, Southern Division, Office for Civil Rights, to Mr. John C. Scully, Counsel, Washington Legal Foundation– Shannon addresses the results of an investigation of Florida Atlantic University's (FAU) MLK scholarship program. The Department of Education received Scully's complaint against FAU on 14 May 1990 alleging FAU's MLK Scholarship was “restricted to black applicants on the basis of their race.”

The OCR, however, determined the MLK scholarship programs were legally “supportable as narrowly tailored means to pursue the University's interest in seeking a diverse student body.” Specifically, OCR noted the scholarship programs were modified during the 1996-97 academic year to include the MLK Scholarship, based on financial need, and the MLK Scholars Award, based on academic achievement. Both programs, however, still use race as a “plus factor.” FAU justified the programs based on Principle 4 of the Guidance (financial aid to create diversity). And, FAU agreed “to monitor the allocation of financial aid and make adjustments, as necessary, to ensure that the allocation of financial aid does not create undue burden on non-minority students...”

Letter from Richard W. Riley, Secretary of Education, entitled "Dear Colleague:" (19 March 1997) – Secretary Riley, in this letter, explains the U.S. Department of Education's position on affirmative action in California since the adoption of Proposition 209. Riley explained that even though Proposition 209 severely limits the use of preferential treatment for women and minorities, the U.S. Department of Education's position has not changed in this regard. That is, in order to maintain its federal education funding, California colleges and universities must continue to "abide by federal civil rights statutes." He reiterated that "students and other beneficiaries of programs administered by schools and colleges receiving Department of Education funds are protected from discrimination on the basis of race, color, or national origin, as guaranteed by Title VI of the Civil Rights Act of 1964." Thus, "school districts and colleges" have an obligation to eliminate the effects of prior discrimination on the basis of race, color, or national origin, or gender," and Proposition 209 has not changed that obligation.

Letter from Norma V. Cantu, Assistant Secretary, Office for Civil Rights, to Texas Senator Rodney Ellis (11 April 1997) – Cantu opened her letter by explaining to the Senator that Governor Bush had been informed OCR was conducting a review of Texas higher education to ensure all remnants of the prior *de jure* segregated system were eliminated. Additionally, if OCR concluded "that there are current effects of past discrimination in the Texas higher education system in violation of Title VI," and such discrimination could not be "remedied through race-neutral means," Texas would be "required to take narrowly tailored affirmative action measures to eliminate the vestiges of its discrimination." Cantu assured Senator Ellis that such mandates would be consistent with the 5th Circuit's edicts in *Hopwood*, which "recognized that affirmative action by an institution may be warranted in such circumstances in order to eliminate vestiges of that institution's own discrimination."

Furthermore, Cantu stated "the *Hopwood* panel decision prohibits institutions in the Fifth Circuit from engaging in race-conscious affirmative action in the admissions process that is designed either to achieve a diverse student body or to counter the present effects of past discrimination that the institution itself did not cause." And "absent further legal developments, within the Fifth Circuit or at the Supreme Court, the federal government would not require or encourage any institution in the Fifth Circuit that receives federal funds to engage in race-conscious affirmative action that is inconsistent with the prohibitions set forth by the *Hopwood* panel." Lastly, Cantu noted "the United States continues to believe that the *Hopwood* panel was wrong in its rejection of Justice Powell's *Bakke* opinion and in its narrow interpretation of the permissible remedial predicates for affirmative action." Cantu stated she is hopeful the Fifth Circuit *en banc* or the Supreme Court will overturn the *Hopwood* ruling.

Letter from Gary D. Jackson, Director, Seattle Office, Western District, to Joseph W. Cox, Chancellor, Oregon State System of Higher Education (03 July 1997) – This letter was intended to address the issue of minority scholarships. In his letter, Director Jackson reminded Chancellor Cox that "race restrictive programs" are subject to "strict scrutiny and need to be narrowly tailored to ensure that race is used only to the limited extent necessary to achieve otherwise compelling interests."

Chapter Summary

As mentioned in the chapter introduction, the letters presented in this chapter demonstrate the direction of the U.S. Department of Education since anti-affirmative action mandates have been enacted. Prior to the passage of the mandates, the U.S. Department of Education used strong language to ensure compliance by colleges and universities receiving federal funds. After

the enacting of the mandates, the language changed somewhat, but the U.S. Department of Education remains committed to ensuring diversity continues in the halls of America's colleges and universities. The next chapter examines current empirical evidence of minority enrollment trends in colleges in universities since the enactment of *Hopwood* and Proposition 209.

Chapter V:

Conceptual Framework and Methodology

Chapter Introduction

In this chapter, the conceptual framework and the research methodology are presented. The chapter begins by discussing the conceptual framework. It progresses to a discussion of the research methodology, including the research design and the strengths and weaknesses of this study. In Table 5-1, the comparison groups and the operationalization of the variables are presented. Finally, a discussion of how the results of the empirical inquiry (see Chapter 6).

Conceptual Framework

A review of the literature reveals differing views and opinions of affirmative action (preferential treatment) and its effect on minority enrollment in public colleges and universities throughout the United States. Proponents, on one hand, believe affirmative action is needed to ensure minorities and women have an equal opportunity to compete in education and employment. Opponents, on the other hand, believe affirmative is no longer needed and that its policies have created "reverse discrimination" (disparate impact) for non-minorities. As mentioned earlier, the empirical investigation in this study is necessarily preliminary and exploratory due to the limited data available since *Hopwood* and Proposition 209. Therefore, the conceptual framework for this study is the working hypotheses herein listed:

- ❖ **Working Hypothesis One:** Since the *Hopwood* ruling has eliminated affirmative action policies at public schools in the 5th Circuit, it is hypothesized that the *Hopwood* ruling has led to a decrease in minority enrollment at the University of Texas at Austin and at Louisiana State University.

- ❖ **Working Hypothesis Two:** Since Proposition **209** has eliminated most affirmative action plans in California, it is hypothesized that Proposition **209** has led to a reduction in minority enrollment at the University of California at Berkeley.
- ❖ **Working Hypothesis Three:** Since the Attorney General of Georgia has mandated that public schools in Georgia abide by the **Hopwood** ruling even though Georgia is not in the **5th** Circuit, it is hypothesized that minority enrollment at the University of Georgia at Athens has declined because the state has opted to abide by **Hopwood**.

Methodology

◆ Research Designs

The research design selected for this project was descriptive **statistics/comparison** groups. First, data collected examine trends in enrollment prior to and immediately **after** the respective anti-affirmative action mandate (1996-1997). However, since anti-affirmative action mandates are relatively new, this examination was limited to the post-anti-affirmative action mandates period of 1997. The data include the total number of students enrolled and the total number of minority students enrolled. The data collected were for the fall semesters since universities generally use enrollment statistics from the fall semesters for reporting purposes to entities such as the Office for Civil Rights of the United States Department of Education.

Next, the University of Texas at Austin, the University of Georgia at Athens, the University of California at Berkeley, and Louisiana State University were compared to similar universities (see Table 5-1 for comparisons and operationalization of variables). Thus, comparison groups were used

Table 5-1
Comparison Groups and Operationalization of Variables

Mandate	School	Variable	Data Source and Comments
Hopwood v Texas	The University of Texas	Total enrollment Minority enrollment	The University of Texas at Austin - Office of Institutional Studies
Comparison to the University of Texas at Austin	Ohio State University	Total enrollment Minority enrollment	Not provided
Hopwood v Texas	Louisiana State University	Total enrollment Minority enrollment	Louisiana State University – Office of Budget and Planning
Comparison to Louisiana State University	Iowa State University	Total enrollment Minority enrollment	Iowa State University – Office of the Registrar
Hopwood v Texas	The University of Georgia	Total enrollment Minority enrollment	The University of Georgia – Office of the Registrar/Student Affairs
Comparison to the University of Georgia	The University of Florida at Tallahassee	Total enrollment Minority enrollment	Not provided
Proposition 209	The University of California at Berkeley	Total enrollment Minority enrollment	The University of California at Berkeley – Office of Student Research
Comparison to the University of California at Berkeley	The University of Florida at Tallahassee	Total enrollment Minority enrollment	Not provided

1. Total enrollment equals the total number of students enrolled at the university.
2. Minority enrollment equals the total number of African-American and Mexican-American, including those of Hispanic descent, enrolled at the university.

instead of control groups, Descriptive statistics/comparison group analysis was used to determine the impact of *Hopwood* and Proposition 209 on minority enrollment at the respective universities over time (1990-1997).

◆ Strengths and Weaknesses

Research models with data collected at more points are "superior" to models with data collected at fewer points. Therefore, researchers generally try to collect data at as many points before and after the treatment. However, since the data available for this study were limited to the post-affirmative action period 1997, only one post-treatment (anti-affirmative action) period was available for this study.

A weakness in this study was the lack of comparison group data. Unfortunately, the most of comparison groups failed to provide data for this study. Nonetheless, all conclusions are based on **interrupted** time series analysis and on comparison groups wherever possible.

Presentation of Results

The post-affirmative action period minority student populations were compared to the affirmative action period minority student populations. If significant changes were observed, the changes were noted in the results chapter. Additionally, the conclusions are presented in narrative form with charts and graphs generated by SPSS for ease of reading. However, since both mandates are relatively new, the results of this project are tentative at best. And, since the mandates are relatively new and the data limited, conclusions about trends in enrollment, rather than trends in minority enrollment, are presented in the results chapter. Note, however, the full effects of *Hopwood* and Proposition 209 may not be evident until each mandate has been in effect for approximately four (4) years since many current students were admitted prior to the mandates taking effect. Thus, the focus of this study now shifts to the results of the empirical inquiry.

Chapter Summary

This chapter explained how the empirical inquiry was conducted and how the variables were operationalized. Also, this chapter explained the fact that the focus of this study shifted from minority enrollment to enrollment trends. Thus, the focus shifts to the results of the empirical inquiry.

Chapter VI:

Results and Summaries

Chapter Introduction

As stated *at* in the previous chapter, and throughout this study, the results presented herein are tentative *at* best. Specifically, **anti-affirmative** action mandates were enacted in 1996 and took effect in higher education for the incoming students during the Fall 1997 semester. Thus, the results presented here **represent** trends in enrollment for the Fall 1997 semester. Furthermore, the data selected for this study encompass the periods **between** the Fall 1990 semester through the Fall 1997 semester.

Results and Summaries

The University of Texas at Austin – The first study sample used was the University of Texas *at* Austin. Texas, as mentioned, falls within the bailiwick of the 5 Circuit Court of *appeals*. Therefore, the University of Texas is obligated to abide by the edicts of the *Hopwood* ruling. Figure 6-1 outlines minority, non-minority, and total student enrollment at the University of Texas at Austin **from** 1990-1997. And, Figure 6-2 provides the percentage of enrollment of minorities and non-minorities *at* the University of ~~Texas~~ *at* Austin.

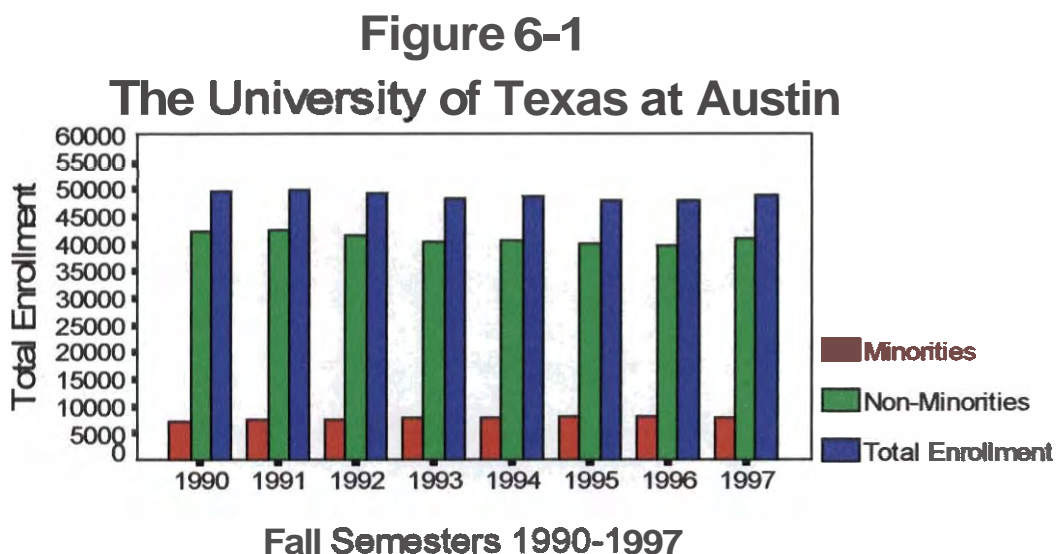
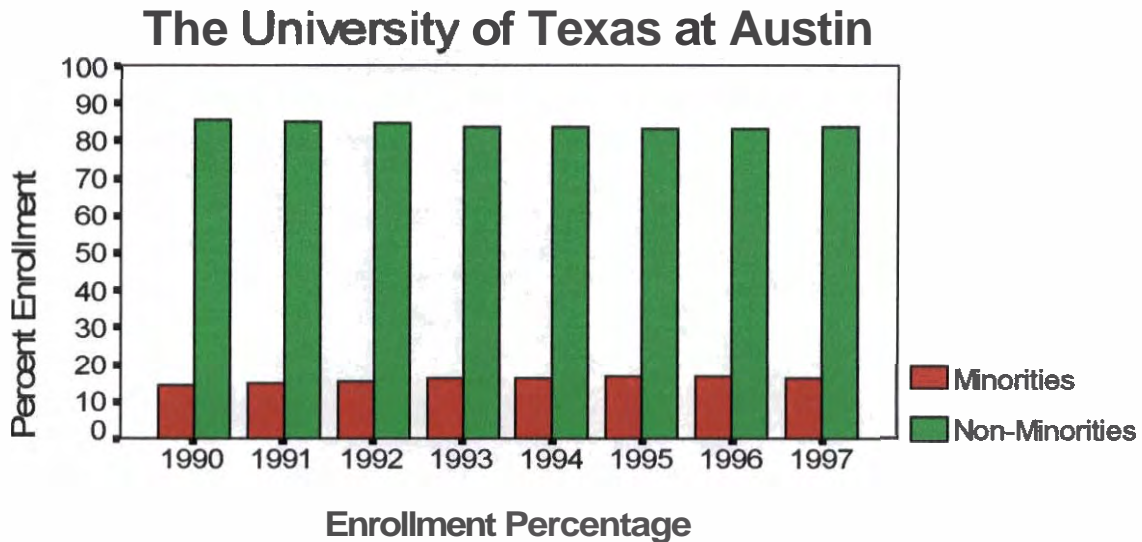


Figure 6-2



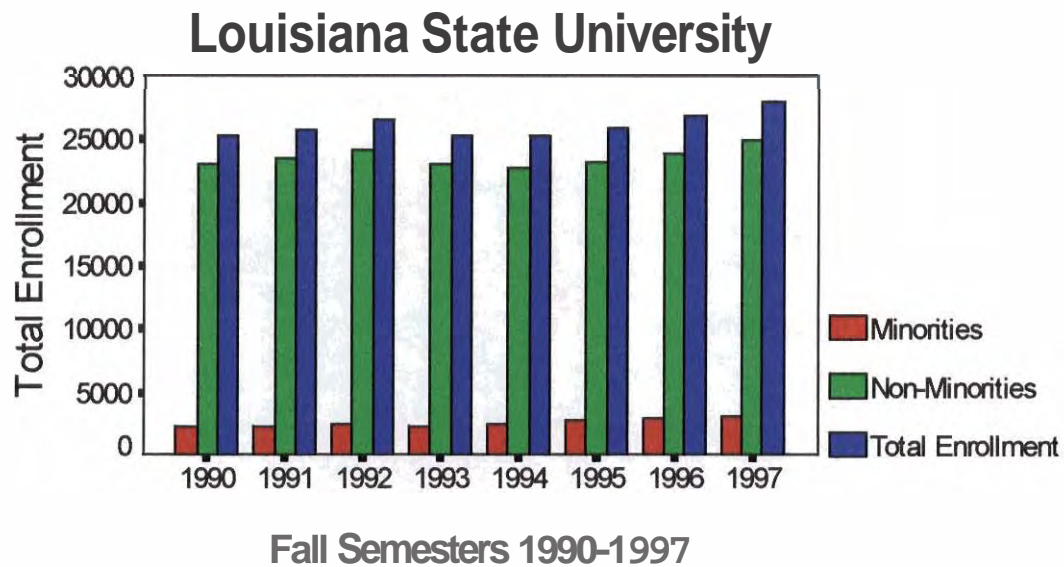
Referring to Figure 6-1, one conclusion is minority enrollment at the University of Texas has remained constant over time (high of 8118 in **1996**, and low of 7185 in 1990). At the same time, non-minority enrollment declined in the mid-1990s and increased slightly in 1997 (high of 42,538 in 1991, and low of 39,890 in 1996). Finally, total enrollment declined slightly and increased in 1997 (high of 49,970 in 1991, and low of 47,905 in 1995). Therefore, as of the Fall 1997 semester, the effects **of Hopwood are** not yet apparent at the University of **Texas** at Austin.

Ohio State University – Ohio State University was the intended comparison group to the University of Texas at Austin. **Unfortunately**, Ohio State University did not respond to the inquiry for enrollment data.

Louisiana State University – The second sample in this study was Louisiana State University. Like **Texas**, Louisiana is **subject** to the edicts of the 5th Circuit Court of Appeals. Figure 6-3 provides the enrollment data for Louisiana State University. According to the figure, minority enrollment at Louisiana State University has increased steadily over the eight-year period. Furthermore, non-minority enrollment declined in the mid-1990s and increased slightly in 1997. This trend mirrored non-minority and total student enrollment at the university.

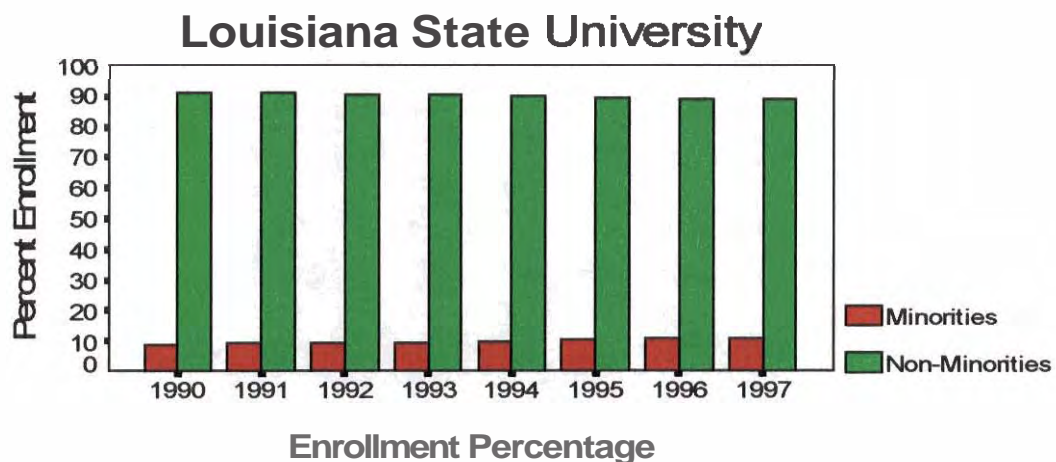
Figure 6-4, however, paints a different picture. That figure indicates minority enrollment, as a percentage of the total student enrollment, increased slightly during the study period.

Figure 6-3



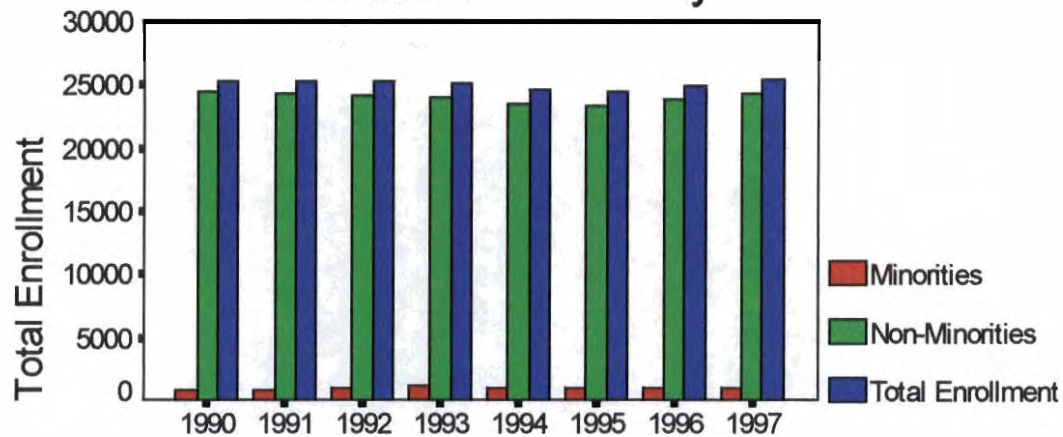
Conversely, non-minority enrollment as a percentage of the total student population declined during the study period. That **decline** continued for the Fall **1997** semester. In fact, minority enrollment peaked in **1997** at **3121** and was lowest in **1990** at **2250**. Furthermore, non-minority **enrollment** was highest in **1997** at **24,956** and lowest in **1994** at **22,768**. Finally, total student enrollment was highest in **1997** at **28,077** and lowest in **1990** at **25,307**

Figure 6 4



Iowa State University – Iowa State University was used as a comparison group. Iowa State University was compared to Louisiana **State** University. The data for Iowa State University are presented in Figure **6-5** and the percentages are presented in Figure **6-6**. According to Figure **6-5**, Iowa State University has a relatively small minority student

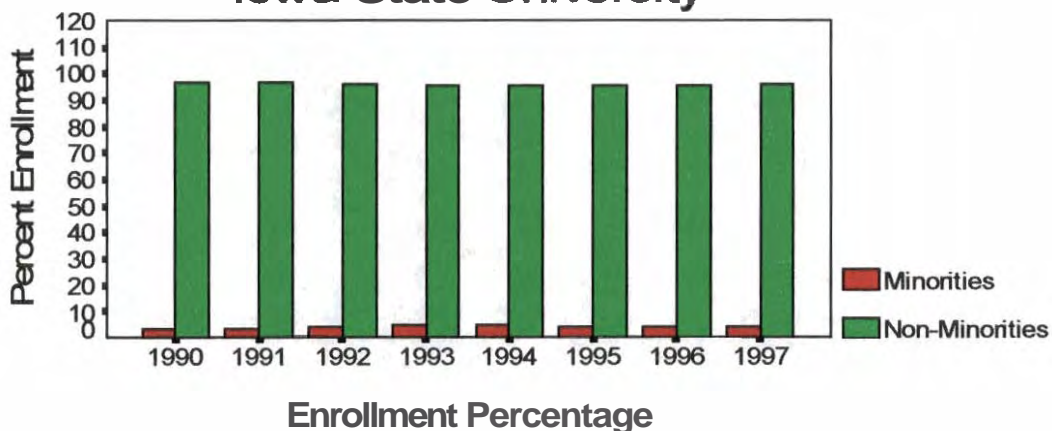
Figure 6-5
Iowa State University



Fall Semesters 1990-1997

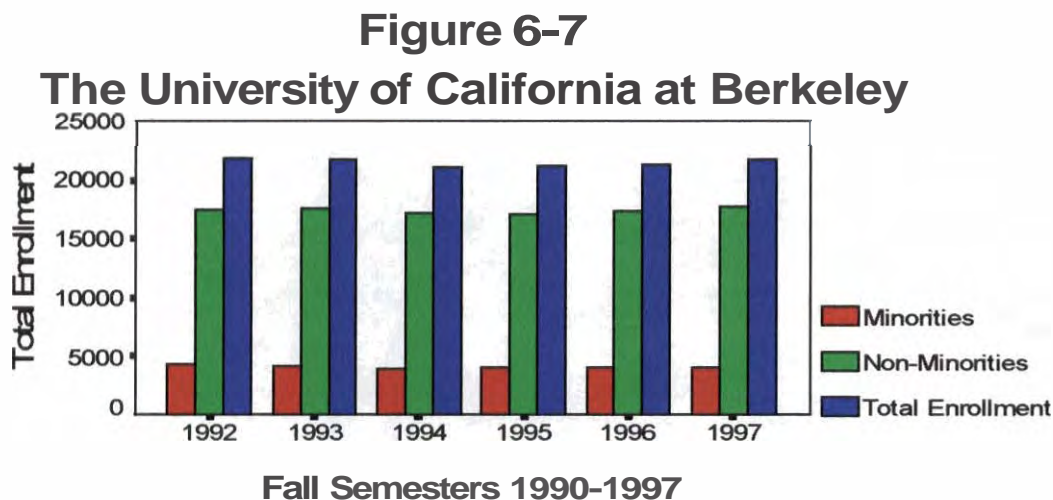
population. However, that population has remained relatively constant during the eight-year period (high of **2256** in **1993** and low of **846** in **1990**). The **total** student population and the non-minority student population at Iowa State University declined slightly in the **mid-1990s**, but they both **increased** slightly in **1997** (non-minorities: high of **24,493** in **1990** and low of **23,386** in **1995**; total: high of **25,384** in **1997** and low of **24,431** in **1995**). This trend mirrors trends at the University of Texas at Austin and Louisiana State University.

Figure 6-6
Iowa State University

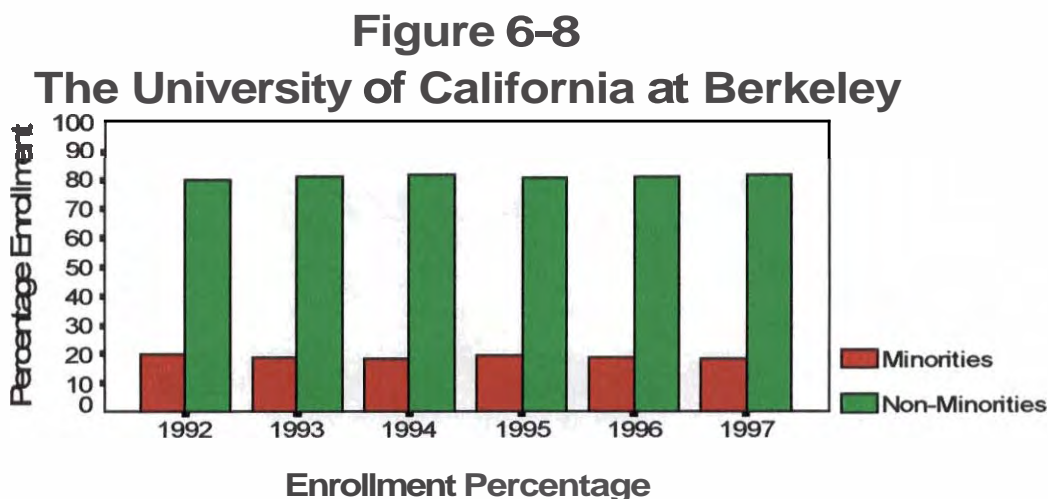


The University of California at Berkeley – The University of California at Berkeley was the next sample university for this study. This university is subject to Proposition **209** much the same as other institutions in California are. Unfortunately, the enrollment data for **1990** and

1991 were not available from the University of California at Berkeley, but the data for 1992-1997 were. Thus, the conclusions drawn here are based only on those years.



Thus, based on Figure 6-7, minority enrollment remained constant at the University of California at Berkeley while non-minority enrollment fluctuated slightly during the six-year period. Figure 6-8 supports this conclusion. In fact, the highest minority population was reported at 4368 in 1992 and the lowest was 3927 in 1994. And, the highest non-minority population was reported at 17,697 in 1995, while the lowest was 17,113. Finally, the highest total student population was reported in 1992 at 21,841 and the lowest level was reported at 21,138 in 1994.



The University of Florida at Tallahassee – The University of Florida at Tallahassee was the intended comparison group to the University of California at Berkeley. Unfortunately the University of Florida at Tallahassee did not respond to the inquiry for enrollment data.

The ***University of Georgia at Athens*** – The final sample in this study was the University of Georgia at Athens. As previously noted, Georgia is not within the bailiwick of the 5th Circuit Court of Appeals; however, since the Attorney General of Georgia has mandated compliance with ***Hopwood***, the University of Georgia was included in this study to determine the effects of ***Hopwood*** on minority enrollment at colleges and universities in Georgia.

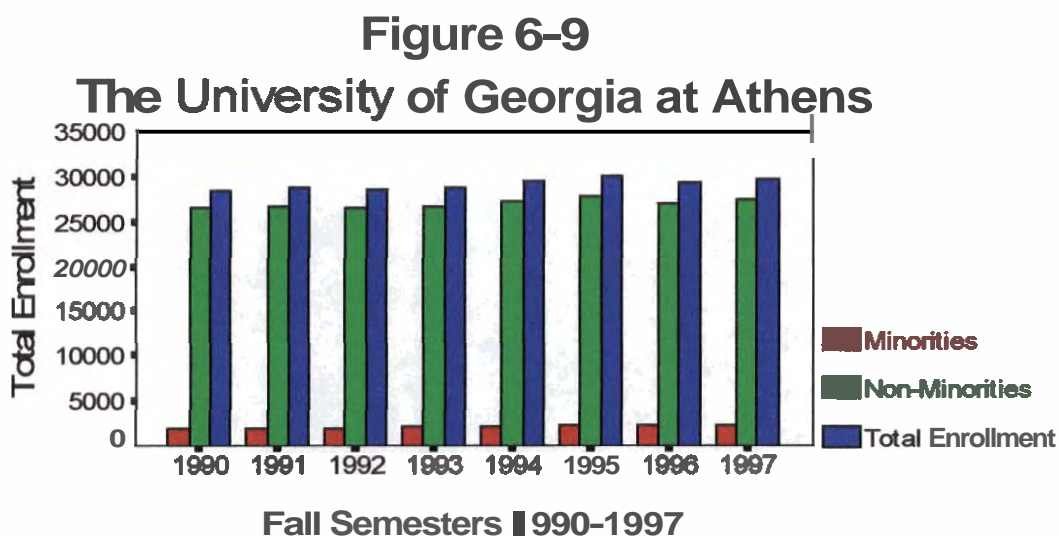
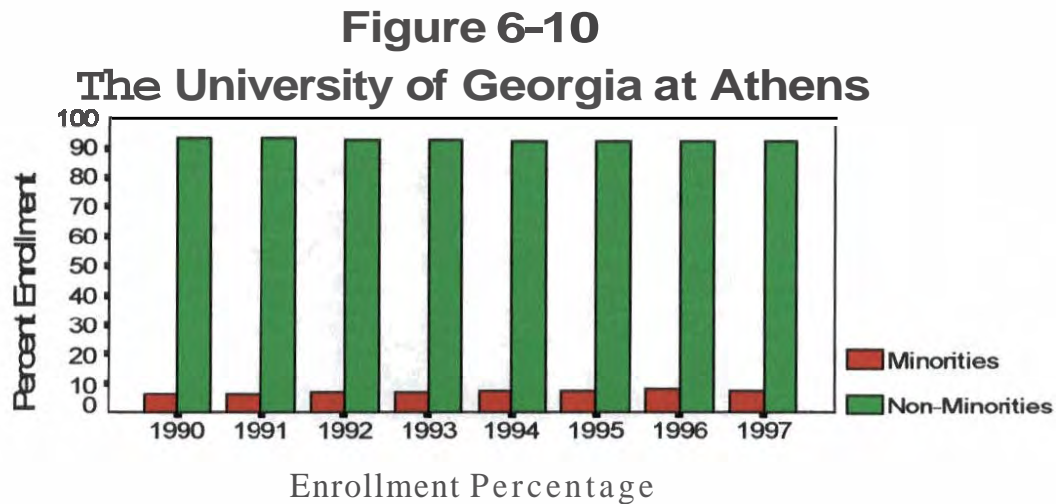


Figure 6-9 contains minority, non-minority, and total student enrollment at the University of Georgia at Athens. Based on that figure, minority, non-minority, and total enrollment all fluctuated during the eight-year period (minority: high 2398 in 1995, low 1882 in 1990; non-minority: high 27,751 in 1995, low 26,475 in 1992; total: high 30,149 in 1995, low 28,395 in 1990). That conclusion is supported by the percentages in Figure 6-10. Thus, ***Hopwood*** has had no measurable effects on minority enrollment at the University of Georgia.



The University of Florida at Tallahassee – The University of Florida at Tallahassee was the intended comparison group to the University of Georgia at Athens. Unfortunately, as previously stated, the University of Florida at Tallahassee did not respond to the inquiry for enrollment data.

Chapter Summary

In this chapter, the empirical results were presented. As mentioned throughout this study, the results presented herein are preliminary at best. Although the original purpose of this study was to examine the effects of Hopwood and Proposition 209 on minority enrollment at colleges and universities in Texas, Louisiana, Georgia, and California, the focus shifted to enrollment trends at these universities. That is, the empirical data represent trends in student enrollment from Fall 1990 through Fall 1997. Finally, as mentioned, further studies are needed before any intelligent conclusions can be extrapolated from the data suggesting any effects on enrollment in Texas, Louisiana, Georgia, or California as a result of the mandates. In the following chapter, the conclusions of this study are presented.

Chapter VII

Conclusion

Conclusion

As mentioned in the previous chapter, the conclusions of this study are presented in this chapter. This study was concerned with the effects of anti-affirmative action mandates on minority enrollment at colleges and universities in Texas, Louisiana, California and Georgia. Four universities were selected as sample universities for this study (the University of Texas at Austin, Louisiana State University, the University of California at Berkeley, and the University of Georgia at Athens). Based on the empirical results, the anti-affirmative action mandates have not had any measurable negative effects on minority enrollment at any of the study universities.

The study began by providing a commentary on the deplorable conditions present in American society of the past and explaining why the study of affirmative action in higher education is important to public administration. Next, a review of the literature was undertaken. Following the review of the literature, a review of court cases and a legislative mandate was completed. Third, correspondence from the Office for Civil Rights were discussed. Fourth, the conceptual framework and methodology were discussed. Finally, the results of the study were presented.

Nonetheless, this study is admittedly limited. For example, even though descriptive statistics/comparison group analysis was used, data for only one *post-Hopwood* and one *post-Proposition 209* period, 1997, was available. Thus, further studies are needed as more data periods become available. Also, studies of minority student populations at professional schools (i.e., medical, law, and graduate schools, etc.) and in elite programs (i.e., engineering, physical science, computer programming, physical therapy, legal assistant, etc.) are also needed.

The question of whether or not **affirmative** action is still needed at America's colleges and universities remains unanswered. Based on the results of this study, one cannot accurately conclude that minorities are adequately or inadequately represented in the halls of colleges and

universities throughout the United States. Referring once again to Dromgoole and Frederickson, today's generations have obligations to future generations to ensure equality and justice for all. And "all" must refer to every citizen and legal alien of the United States regardless of skin color, religious belief, gender, sexual orientation, or other classifications. Until and unless the United States becomes a race-blind and gender-blind society, the premise that "all [people are] created equal" will maintain its fantasy status.

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Appendix One:

Written statement by University of Texas law
Professor Lino Graglia in response to public reaction
to comments he made at a press conference

Written statement by University of Texas law professor Lino Graglia in response to public reaction to comments he made at a press conference

"My comments at a press conference last week in support of the *Hopwood* decision and in opposition to racial preferences have given rise to misunderstandings and inaccurate statements. The university and law school are rightly concerned that this reaction may impede their efforts to make clear that their commitment to equal opportunity for all Texans is unchanged. While I stand by my opposition to racial preferences, which necessarily imply differences in academic competitiveness, I fully support the university and law school's efforts and wish to do what I can to assist them.

"My opposition to racial preferences does not, of course, constitute opposition to equal access and opportunity at the university for all Texans. On the contrary, my opposition is based precisely on an insistence on equal access and opportunity for all, in fact as well as name. I am and always have been opposed to all forms of racial or ethnic discrimination. Further, I strongly advocate that the state and university do all they can to ensure that no applicant is denied access because of financial disadvantage. As the beneficiary of a **free** college (and to a large extent, law school) education that I could not have financed, I find the value of such a policy very clear.

"Nor do I disagree that there is value in seeking a student body with individuals from all racial and ethnic (and religious and other) groups. The American ideal, in accordance with the democratic and egalitarian principles of the Declaration of Independence, is the proportionate representation of all groups in all official activities and institutions. This ideal situation naturally occurs, however, very rarely. The issue, therefore, is what can properly and usefully be done to further it.

"What can and must be done, at a minimum, by a university is to take positive steps to ensure that notice of opportunities is equally available to all groups. It is also necessary to make clear, should there be any reason for doubt, as there is or was in the case of blacks who were excluded by law until the 1950s, that everyone is now welcome. I believe that the university and law school have long met their obligation of demonstrating their commitment to equal treatment by actively encouraging and facilitating black and Mexican American enrollment, efforts that I fully endorse. Indeed, they have gone far beyond this obligation, in my view, by granting preferential admission to members of these groups for nearly 30 years. Whatever the other effects of this policy, it has surely established beyond doubt the extraordinary commitment of the university and law school to the enrollment of blacks and Mexican Americans.

"That racial preferences have necessarily now been terminated pursuant to *Hopwood* in no way detracts from the university and law school's demonstrated commitment to equal opportunity. There is no basis, therefore, for any claim that the university and law school may now reasonably be perceived as inhospitable to blacks and Mexican Americans, or reason to doubt that they remain more than welcome. I, for one, receive gratification **from** the success of any of our students, but in a little extra measure when it's a black or Mexican American, if only because it serves to show, what I'd like to believe, that our country is on its way to being well.

"It is often pointed out in response to my criticism of racially preferential admission to the law school that the specially admitted students are nonetheless generally able to do the work, graduate and pass the bar. This is entirely correct. Indeed, as noted in 'Hopwood,' in recent years the median LSAT score for racially preferred students has been at or a little over the 75th percentile. That is a very good score, indicating a high degree of competence to study and practice law; it would be sufficient to gain automatic admission to over two-thirds of the nation's

law schools. It is no surprise, therefore, that many of our black and Mexican American graduates have achieved positions of prominence and leadership in the legal profession and elsewhere. It is nonetheless my view that for several reasons racially preferred students would be better served if encouraged to enroll in the best educational institution for which they meet the ordinary admission criteria.

"The statement attributed to me to the effect that blacks and Mexican Americans may come from cultures where 'failure is not considered a disaster' has been taken out of context and misunderstood. I realize now, especially after being called by some cordial Mexican American and black parents, that it was carelessly put, and I regret it. Nothing is more important in discussing racial or ethnic group differences (which the use of preferences, unfortunately, makes necessary) than to make clear that differences within each group are much larger than differences between them. The statement, however, came out of an effort that was meant to be helpful. A reporter at the press conference asked me what I thought was the cause of the performance gap on standard tests. I replied, as I always do to this question, that I do not know, that I claim no expertise on issues of educational outcomes. He persisted by asking whether I thought the cause was 'genetic or cultural.' Prudence might have indicated repeating my first answer, but adopting his term, I said I thought it was 'cultural.'

"Apparently there is no non-objectionable answer to that question, however, because another reporter then asked whether I was saying that some cultures were inferior to others. It seems well-established that the children of different groups or sub-groups -- whether or not for 'cultural' reasons -- differ in the amount of time they spend on average in school or doing school work and that the better performers are those who spend more time. It seems entirely plausible to me that this might explain much of the performance gap. That is all I meant to say and should

have said. I elaborated, however, by saying something to the effect that perhaps less academically successful groups put less emphasis on academic achievement and do not necessarily consider 'failure (of a course) a disaster.' This accords with my personal experience in a Sicilian culture where, it seems fair to say, academic achievement was often given less emphasis than it seemed to be by, for example, the many Jewish people I knew. I, at least, had to repeatedly explain to skeptical relatives during my college years why I was not yet in gainful employment.

"I do not know and did not mean to say, as I apologetically explained to several callers, that black and Mexican American 'cultures' do not place a high value on academic achievement. It does appear, however, that there are some group, sub-group, or class differences, for whatever reason, in the amount of time children typically spend at school or on schoolwork. I thought it useful to mention this, as I often do, not to be provocative or raise another controversial issue, but because I consider it the most benign, hopeful, and optimistic explanation I know of the **performance** gap. It is no wonder some kids learn less in school if they spend less time at schoolwork. And this would seem to be something we could take effective steps to correct, beginning with better enforcement of the now often under-enforced truancy laws.

"I meant to participate in a reasoned dialogue on the *Hopwood* decision, but some of the media may have different interests. I regret that the result has been an emotional confrontation."

Appendix Two:

Proposition 209: Text of Proposed Law

Proposition 209: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure expressly amends the Constitution by adding a section thereto; therefore, new provisions proposed to be added are printed in italic type to indicate that they are new.

PROPOSED AMENDMENT TO ARTICLE I

Section 31 is added to Article I of the California Constitution as follows:

SEC. 31.

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.
