FROM *BAKKE*, TO THE UC REGENTS' VOTE, TO THE CALIFORNIA CIVIL RIGHTS INITIATIVE AND *HOPWOOD*

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I. INTRODUCTION

Twenty-six years to the day after man first walked on the moon, the Regents of the University of California (Regents) took an equally historic step. On July 20, 1995, they elected to end racial preferences in admissions.[1] While the vote applied solely to the multi-campus University of California (UC) system, and can be reversed by the Regents anytime, it came in the midst of debate over a more sweeping measure: The proposed California Civil Rights Initiative (CCRI). Passage of the CCRI will enshrine the elimination of race and gender preferences in California's State Constitution and extend the elimination of the preferences to all state hiring and contracting.[2]

However, there is nothing in the resolution passed by the Regents, or in the CCRI, that will prohibit applicants of any race from providing evidence that their grades and test scores are not accurate indicators of their true potential. There is no serious opposition to an admissions policy that allows for such evidence.

But as the controversy and closeness of the vote demonstrated, there is

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The author wishes to express his gratitude to Michael Lynch for introducing him to the Magavern Report.

1. Amy Wallace & Dave Lesher, *UC Regents In Historic Vote Wipe Out Affirmative Action*, L.A. TIMES, July 21, 1995, at A1. The policy change required a majority vote of the 26 Regents. The vote was 14-10, the minimum needed to pass the resolution. *Id.*

2. Section (a) of the California Civil Rights Initiative states:

> 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.

CALIFORNIA CITIZENS AGAINST DISCRIMINATION AND PREFERENCES, CALIFORNIA CIVIL RIGHTS INITIATIVE (1995).

serious opposition to the elimination of racial and gender preferences, raising questions whether UC administrators and faculty will realistically cease using race as a factor in admissions. Larry Vanderhoef, Chancellor of the UC Davis campus, said, "I am not yet ready to concede that we will not be able to pursue diversity, even with these new rules."[3] Another UC official, who requested anonymity, said that admission officers were sure to figure out a way to "wriggle around" the new rules.[4] Cornelius Hopper, UC Vice President for Health Affairs said, "[w]e have very creative faculties. I am hopeful that they will be able to find ways to achieve diversity. This can result in a student body that will be substantially the same as it is today."[5] A *New York Times* reporter added that "many in the academic community appeared to be convinced that they could merely do an end run around the Regent's mandate."[6]

According to the *Los Angeles Times*, UC President Jack W. Paltason "stressed that the board's actions," which he opposed, "had to do 'with means, not with goals.'" "The university," he said, "continues to value diversity and will work hard to develop new procedures and criteria that will ensure that UC's student body mirrors California's population."[7]

Such statements, combined with UC's nearly thirty year history of voluntarily granting racial preferences, clearly establish reasonable cause for doubting whether UC personnel will comply with the new policy in good faith.

Additional reason for such doubt arises from the fact that during the many years that UC has been granting racial preferences, it has been representing to potential applicants in its catalogues and application materials that it does not discriminate on the basis of race in admissions. This falsehood resulted in a public interest lawsuit against the Regents alleging consumer fraud that seeks publication of admissions data that can be used to monitor UC personnel's compliance with the Regents' new policy of racial nondiscrimination.[8]

II. THE HISTORY OF UCLA SCHOOL OF LAW'S RACIAL ADMISSIONS POLICY

Naturally, the best means to measure how well UC personnel might

3. B. Drummond Ayres, Jr., *Obstacles Arise to Switch By California on Diversity*, N.Y. TIMES, July 24, 1995, at A1.

4. *Id*.

5. *Id*.

6. *Id*.

7. David G. Savage & Amy Wallace, *U.S. Backs Away From Threatened UC Funding Cuts*, L.A. TIMES, July 25, 1995, at A1.

8. *See* text accompanying notes 98-99 *infra*.

adjust to this policy change is to study their adjustment from the last time they made a similar change. Unfortunately, the evidence of a similar change involving UCLA School of Law (UCLA Law) is not encouraging.

The evidence includes documents showing that some members of the 1978 faculty of UCLA Law deliberately created its present admission program in order to achieve the same racial results as its pre-1978 unconstitutional racial quota program.[9]

The documents on file at the UCLA's Law library include an unpublished student paper by Sam Magavern.[10] Magavern's paper cited references that included personal interviews he conducted with several UCLA Law professors and other school officials.[11] The documents on file also include a report dated November 21, 1978, from the Admissions Task Force 1978-79 (Task Force Report), to the faculty.[12] According to Magavern this Task Force Report was written by its Chairman, Professor Kenneth Karst.[13] A letter from Dean Prager to the students dated April 13, 1987, and a memo from Professor Alleyne to his faculty colleagues dated June 1, 1978, are also documents on file that show UCLA Law's intent to maintain the same racial results.

The Task Force Report was prepared in response to the United States Supreme Court's decision in *Regents of the Univ. of Cal. v. Bakke*.[14] *Bakke* held that UC Davis School of Medicine's racial admissions quota was illegal.[15] Prior to *Bakke*, UCLA Law was operating under a similar racial admissions quota that violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[16]

A. THE EARLY YEARS

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9. *See* notes 10-13 *infra*.

10. Sam Magavern, From Reform to Institution: The History of UCLA Law School's Affirmative Action Admissions Procedure (Dec. 19, 1988) (unpublished manuscript, on file with the UCLA Law Library) [hereinafter Magavern Report]. Magavern stated he was a UCLA law student at the time he wrote his report. Telephone Interview with Sam Magavern (June 12, 1995).

11. Personal interviews with law professors included Jonathan Varat, Stephen Yeazell, Reginald Alleyne, Kenneth Graham, Kenneth Karst and Leon Letwin. Personal interviews also included present Dean Susan Prager, present Dean of Admissions Michael Rappaport, and former Deans Murray Schwartz and William Warren. Magavern stated that his description of the interviews were checked for accuracy by the interviewees before his paper became final. *Id.*

12. ADMISSIONS TASK FORCE 1978-79, REPORT TO FACULTY (1978) (unpublished manuscript, on file with the UCLA Law Library) [hereinafter Task Force Report].

13. Magavern Report, *supra* note 10, at 23.

14. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (*Bakke*).

15. *Id*.

16. *See* text accompanying notes 20-25 *infra*; Muratsuchi, *Race, Class and UCLA School of Law Admissions, 1967-1994,* 16 CHICANO-LATINO L. REV. 90, 106 (1995) (citing Magavern Report, *supra* note 10).

To understand UCLA Law's response to *Bakke*, it is necessary to examine the 1967 genesis of UCLA Law's racial quota admissions program as described by Magavern. In recounting interviews with Professor Graham, Professor Letwin, and Dean Schwartz, Magavern noted that:

> In remembering the decision to create the program, many professors cite the Watts riots in the summer of 1965 as creating a feeling of urgency about issues of race relations and discrimination [citations]. The faculty felt both an ethical and a practical imperative to do their part in defusing a crisis situation.[17]

In addition to concern about a possible future riot, it was apparent that a partial sacrifice of the highest academic standards in favor of racial standards arose in part from a belief that requiring non-Whites to achieve the highest academic standards was not appropriate; such a requirement was a product of "White values." Magavern noted that several years into the quota program lowering grade and test score standards for non-Whites, the program's driving force, Professor Letwin, wrote that it was "indefensible that the [admissions] decision should reflect solely the values of White academics."[18]

Professor Letwin's belief was supported by some students. Magavern wrote about a 1975 Admissions Committee meeting where position papers were presented by the minority student associations. Magavern stated that:

> In their position papers the groups argued that the PI index ("Predictability Index," comprised of grades and test scores) measured nothing but "how removed the Third World applicants are from their own racial and cultural group" and "the degree of exposure to predominant white culture and values in the United States."[19]

The Magavern Report shows that Professor Letwin's willingness to release minority applicants from "White academic standards" was evident in the early days of the quota program. Magavern stated that "in a speech to the Conference of California Law Schools in Fall of 1968, Letwin advocated a goal of minority enrollment approximating the minority population in California, which was then about 20-25%."[20] To achieve this

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17. Magavern Report, *supra* note 10, at 5; Muratsuchi, *supra* note 16, at 91.

18. Leon Letwin, *Some Perspectives on Minority Access to Legal Education,* 2 EXPERIMENT AND INNOVATION 1, 16 (1969) *quoted in* Magavern Report, *supra* note 10, at 9.

19. Magavern Report, *supra* note 10, at 20 (quoting NATIONAL LAWYER'S GUILD, UCLA CHAPTER, HOSTILE WITNESS 1, 5 (1975); Muratsuchi, *supra* note 16, at 103 (citing NATIONAL LAWYER'S GUILD, UCLA CHAPTER, HOSTILE WITNESS 1 (1975)).

20. Magavern Report, *supra* note 10, at 10 (citing Jim Birmingham, *Prof. Letwin Calls for Goal of 25% Minority Student Enrollment*, UCLA DOCKET, Nov. 25, 1968, at 1.

"goal," Professor Letwin must have believed it was necessary to lower grade and test score standards for non-Whites, since this is what he did. When this goal of racial proportionalism conflicted with the goal of maintaining the highest academic standards, the standards were reduced.

There is no doubt that UCLA Law's pre-*Bakke* admission program used racial quotas to achieve Professor Letwin's "goal." One writer cited a UCLA Law pre-*Bakke* policy of a "32-student quota for Chicanos."[21] Magavern wrote that after the first few years, the minority "quotas remained intact from 1971 to 1978."[22] The existence of the quota was made more explicit in Professor Alleyne's pre-*Bakke* memo to the faculty wherein he referred to "the generally fixed number of slots we have managed to fill the last few years,"[23] "the quota,"[24] and "the present quota."[25]

The quota clearly sacrificed the highest academic standards in favor of racial considerations. Even Professor Letwin told the faculty that the quota program sought admission of individuals who "have the ability to successfully complete law school careers but who do not qualify under our present extremely high (and rising) standards."[26] Citing his interview with Professor Alleyne, Magavern wrote that the "consensus among the faculty was that it was accepting about as many applicants as had the minimum qualifications to make it through the school and the bar."[27]

III. THE RESPONSE TO *BAKKE* AND JUSTICE POWELL'S DIVERSITY

Magavern wrote that the *Bakke* decision prompted the creation of a new task force to revise UCLA Law's admissions policy "which most of the faculty thought made UCLA's use of numerical quotas clearly unconstitutional."[28] Professor Karst wrote in the post-*Bakke* Task Force Report that "on any view of the [*Bakke*] decision our Law School's admissions system must be revised if it is to pass the test of legality."[29]

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21. Muratsuchi, *supra* note 16, at 110.

22. Magavern Report, *supra* note 10, at 15.

23. Memorandum from Professor Reginald Alleyne to Faculty 2 (June 1, 1978) (on file with UCLA Law Library).

24. *Id*. at 3.

25. *Id*.

26. Muratsuchi, *supra* note 16, at 94 (quoting Memorandum from the Admissions and Standards Committee to the Faculty 6-7 (Oct. 18, 1966) (on file with the UCLA School of Law, La Raza Law Students Association)).

27. Magavern Report, *supra* note 10, at 15.

28. *Id*. at 22.

29. Task Force Report, *supra* note 12, at 2.

Referring to his interviews with Professors Karst and Warren, Magavern wrote that UCLA Law "took the constitutional issue very seriously, in part because at least one organization, the B'nai Brith Anti-Defamation League, had intimated that it was considering a lawsuit."[30]

According to Magavern, Professor Karst "talked informally with most of the faculty while preparing" the post-*Bakke* Task Force Report.[31] Magavern wrote:

> The consensus was broad that the school wanted to preserve its minority enrollment at current levels while remaining safe from litigation, and that the best way to do so would be to follow what Karst calls the "how-to-do-it manual" of Justice [Lewis] Powell's opinion, which gave a seal of approval to the "diversity" approach used by Harvard College . . . .[32]

Thus, based on this consensus, it appears the faculty decided to maintain the current level of minority enrollment while claiming the numbers were required for "diversity," rather than refrain from using a predetermined quota, assess all applicants in good faith under Justice Powell's guidelines, with the resulting possibility that the level of minority enrollment might be significantly lower or higher than present levels.

Although not explained in detail by Magavern, Justice Lewis F. Powell's opinion in *Bakke* has been widely misinterpreted. Four of the Justices in *Bakke* found that UC Davis Medical School's racial quota did not violate statutory or constitutional law.[33] Four others found that it violated Title VI of the 1964 Civil Rights Act,[34] thus making it unnecessary to reach the constitutional issue.[35] Justice Powell found that the quota violated the United States Constitution but held that "competitive consideration of race and ethnic origin" can be legal.[36]

Understanding what Justice Powell had in mind has eluded most practitioners of racial preferences. There is misunderstanding partly because Justice Powell's conclusion rests on a major error and partly because the practitioners ignore much of what Justice Powell stated. For example, many of these practitioners probably will be surprised to learn that Justice Powell noted that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.

30. Magavern Report, *supra* note 10, at 22-23.
31. *Id*. at 23.
32. *Id*. (emphasis added); Muratsuchi, *supra* note 16, at 106.
33. *Bakke*, 438 U.S. at 324-79.
34. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(m) (1993).
35. *Bakke*, 438 U.S. at 408-21.
36. *Id*. at 320.

This the Constitution forbids."[37]

Although Justice Powell's opinion is widely cited for its approval of *racial* diversity as a legitimate goal in school admissions,[38] this view of Justice Powell's opinion is superficial. Upon closer examination it is clear that the diversity that Justice Powell sanctioned was "not an interest in simple ethnic diversity," [39] but rather, a diversity that promotes an "atmosphere of speculation, experiment and creation."[40] According to Justice Powell, the value of diversity lies in its ability to foster *learning* by the students.[41]

Justice Powell's idea of diversity was that a university should be "accorded the right to select those students *who will contribute the most to the robust exchange of ideas*."[42] Justice Powell stated that a student may bring to a professional school "experiences, outlooks, and ideas that enrich the training of its student body . . . ."[43] *He made it clear that value lies in ideological and intellectual diversity, not a simple ethnic diversity.* Justice Powell concluded that in achieving this ideological and intellectual diversity, race and ethnicity may be "simply one element to be weighed *fairly* against other elements in the selection process."[44]

Justice Powell never stated that all individuals of a particular race or ethnicity think alike. Nor did he identify any of those particular "outlooks and ideas," to which he generally referred, that an individual is more likely to have by virtue of his or her race. In fact, Justice Powell failed to cite any evidence linking one's race with one's moral perspective, ideology, or intellectual ability. Nevertheless, racial preference programs for school admissions are premised on the assumption that there is such a link and that it is significant enough to justify a reduction in academic standards.

The practitioners of racial preferences believe in an unproved

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37. *Id.* at 307.

38. Shortly after the *Bakke* opinion, the Office for Civil Rights of the Department of Health, Education and Welfare published its own guideline for university officials that was sent to the presidents of 3000 colleges. *See* DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS; TITLE VI OF THE CIVIL RIGHTS ACT OF 1964; POLICY INTERPRETATION (1979). The guidelines allowed an educational institution to "[e]stablish and pursue numerical goals to achieve the racial and ethnic composition of the student body it seeks." *Id. See also* Dershowitz & Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L.REV. 379, 381 n.8 (1979).

39. *Bakke*, 438 U.S. at 315.

40. *Id.* at 312.

41. *Id*. at 312 n.48.

42. *Id*. at 313 (emphasis added).

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

44. *Id*. at 318 (emphasis added).

stereotype of minority students as having some "outlooks and ideas" that do not occur to significant numbers of White students. This unproved stereotype is at the heart of their support for *racial* diversity as a proxy for Justice Powell's *ideological* and *intellectual* diversity.

If Justice Powell endorsed this stereotype by mentioning race as an element that may be "weighed fairly against other elements," he did so without citing any proof. This point must be stressed: *Justice Powell's conclusion that race could be given some consideration is based on an unsupported assumption that race could be used as a proxy for certain under-represented "outlooks and ideas.*" Reliance on this unsupported assumption was Justice Powell's major error.

This unsupported assumption was also evident in the statement of Harvard University's undergraduate admissions policy, which Justice Powell appended to his opinion.[45] However, this was not the only weakness in the Harvard statement. In one paragraph the statement stated the following:

> In Harvard College admissions the Committee has not set target-quotas for the number of blacks . . . . 10 or 20 black students [out of 1,100] could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States . . . . Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks . . . who are to be admitted.[46]

Harvard's statement that there are no "target-quotas for the number of blacks" and that it does not set "a minimum number of blacks" conflicts with its statement that "20 black students could not begin" to bring Black "points of view" to the student body and that as few as twenty Black students "might also create a sense of isolation among the black students themselves . . . ."[47]

The Harvard statement appears to contradict itself. Unless Harvard

45. *Id.* at 321.
46. *Id*. at 323.
47. *Bakke*, 438 U.S. at 321.

was admitting less Blacks than it believed necessary to bring Black "points of view" to the student body and prevent a "sense of isolation," and despite its awareness that "there is some relationship between numbers and achieving" these benefits; *then Harvard clearly had a "target-quota" and "minimum number" for Blacks in excess of twenty*. Quite simply, the Harvard statement is deceptive on this point.

Also, the Harvard statement was indefinite as to the "sense of isolation" which the statement represented "might" be created from having too few Blacks. In the absence of any evidence for the proposition in Harvard∗s statement, the proposition appears to be speculative. Moreover, given the lowering of academic standards for Black applicants, nothing in the statement proves that such a "sense of isolation," if it materialized, would be caused by race.

However, despite Justice Powell's citation to the intellectually muddled Harvard statement, he did conclude that "the assignment of a fixed number of places to a minority group is not a necessary means toward" achieving "educational diversity."[48] Justice Powell only said that race could be given consideration as one of several factors.[49]

The issue of whether race could be given consideration leads directly to the issue of the *extent* to which race could be given consideration. This is addressed by the most ignored part of Justice Powell's opinion; that race may be "weighed *fairly* against other elements."[50] The practitioners of racial preferences ignore his use of the word "fairly."

Under Justice Powell's opinion, race was only permitted as an admissions factor to the extent it was a proxy for under-represented "outlooks and ideas" that would enhance the education of fellow students. In the absence of evidence that race is such a proxy, Justice Powell's opinion does not sanction its use.[51]

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48. *Id.* at 316.

49. *Id*. at 318.

50. *Id*. at 323 (emphasis added).

51. The 1975 admissions program at the University of California at Davis School of Law survived a challenge in DeRonde v. Regents of Univ. of Cal., 28 Cal.3d 875 (1981). The California Supreme Court held that Justice Powell's *Bakke* opinion allowed for racial preferences in order to achieve racial diversity "assuring an academically beneficial diversity among the student body . . . ." *DeRonde,* 28 Cal.3d at 886-87. The court never cited any evidence showing that race was linked with any under-represented "outlooks and ideas" that would enhance the education of students. *Id*. (Mosk, J., dissenting).

In his dissent, Justice Mosk stated that "even if diversity were a significant factor in enhancing the educational process--which is dubious--it would not follow that race adds to that diversity." *Id*. at 897.

Compare Justice Powell's use of racial diversity as a proxy for intellectual and ideological diversity with Justice Sandra Day O'Connor's dissenting opinion in Metro Broadcasting, Inc. v.

The weakness of Justice Powell's opinion is that given the true nature of his meaning of "diversity" as being "educational," i.e., *intellectual* and *ideological* rather than *racial*, and the absence of any evidence justifying the use of race as a proxy for certain under-represented "outlooks and ideas," a "fair" weighing of the racial element should result in it being given no weight, especially when compared with other elements like a significantly higher level of demonstrated intellectual achievement as represented by grades and test scores, and other nonracial factors that are important in making better students and professionals.

IV. AFTER *BAKKE*: THE CONTINUATION OF RACIAL PREFERENCES

Nevertheless, the post-*Bakke* Task Force Report stated that "racial/ethnic diversity" brought "ideas and perspectives [sic] to class discussions that were largely ignored in the years before our former special

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F.C.C., 497 U.S. 547, 618-21 (1990) (citations omitted) (overruled by Adarand Constr., Inc. v. Pena, 115 S. Ct. 2097 (1995)), where she disapproved of the F.C.C.'s use of racial preferences in granting broadcasting licenses:

> The F.C.C. claims to advance its asserted interest in diverse viewpoints by singling out race and ethnicity as peculiarly linked to distinct views that require enhancement. The F.C.C.'s choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because "likely to provide [that] distinct perspective." . . . The policies directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition of securing the preference. The F.C.C.'s chosen means rest on the "premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. [T]hat premise is utterly irrational and repugnant to the principles of a free and democratic society." . . . The policies impermissibly value individuals because they presume that persons think in a manner associated with their race.
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> Our Equal Protection doctrine governing intermediate review indicates that the Government may not use race and ethnicity as "a 'proxy for other, more germane bases of classification.'" . . . The F.C.C. has used race as a proxy for whatever views it believes to be under-represented in the broadcasting spectrum. This reflexive or unthinking use of a suspect classification is the hallmark of an unconstitutional policy. . . . The ill fit of means to ends is manifest. The policy is over-inclusive: Many members of a particular racial or ethnic group will have no interest in advancing the views the F.C.C. believes to be under-represented, or will find them utterly foreign. The policy is under-inclusive: it awards no preference to disfavored individuals who may be particularly well versed in and committed to presenting those views.

Id. (citations omitted).

admissions program was adopted."[52] However, the post-*Bakke* Task Force Report did *not* give any specific examples of such "ideas and perspectives" or demonstrate how such "ideas and perspectives" improved the education of any students to a degree that would justify the lowering of academic standards.

This leads one to wonder what "ideas and perspectives" were so lacking that it became worth accepting otherwise academically under-qualified applicants to the exclusion of academically better qualified applicants. One might guess that support for the 1960 Civil Rights movement was one of the "ideas and perspectives" that was lacking in UCLA Law's classroom discussions. However, it appears that this was not the case since that perspective was already prevelant among UCLA Law students before any racial preferences and quotas were used.

According to the Magavern Report, Professor Graham stated that prior to the school's affirmative action program, UCLA Law's students "were mostly Jewish students from the west side of Los Angeles who were generally liberal on civil rights issues."[53] Citing the school newspaper, the *UCLA Docket*, Magavern wrote that "[t]hree students had spent the summer of 1965 on a fact-finding tour of the South with the Students Civil Rights Research Council, and a chapter of the Council had formed on campus that fall."[54]

Therefore, given the post-*Bakke* Task Force Report's failure to provide evidence that "racial/ethnic diversity" brought "ideas and perspectives [sic] to class discussions that were largely ignored in the years before our former special admissions program was adopted,"[55] and evidence that support for civil rights was present in the classroom, the post-*Bakke* Task Force Report appears to equate *racial* diversity with *intellectual or ideological* diversity--a proposition that is not factually supported in the post-*Bakke* Task Force Report or in Justice Powell's opinion.

Also, there is no discussion in the post-*Bakke* Task Force Report about the consequences of a policy that virtually ensures a significant intellectual mismatch (as measured by Grade Point Average (GPA) and Law School Admission Test (LSAT) score) between significant numbers of White and Asian law students and significant numbers of Black, Latino, and Native American law students. For example, under such a policy, White and Asian students have a significantly higher percentage of their population composed of individuals who have met the highest academic standards as

52. Task Force Report, *supra* note 12, at 5.
53. Magavern Report, *supra* note 10, at 9.
54. *Id*.
55. Task Force Report, *supra* note 12, at 5.

compared with the percentage of the Black, Latino, and Native American student populations that have met the same standards. This is not the result of any racial difference. Rather, it results from a policy that generally fails to admit White and Asian applicants who do not achieve the highest academic standards; yet does admit a significant percentage of Black, Latino, and Native American applicants who do not achieve these standards. Therefore, the policy virtually ensures that when a White or Asian UCLA Law student meets a Black, Latino, or Native American student, the White or Asian student is meeting an individual who has a lesser degree of academic achievement (as measured by GPA and LSAT score); while the Black, Latino, or Native American student is meeting an individual who has a higher degree of academic achievement (as similarly measured). If a racial bigot wanted to teach students that Whites and Asians were generally intellectually superior to Blacks, Latinos, and Native Americans, could there be a better way to do it? I suspect the Klu Klux Klan would be proud to have devised such a plan.

The Task Force recommended that 60% of the entering class be selected largely on the basis of GPA and LSAT scores and up to 40% of the entering class be reserved for "diversity" applicants, meaning those who would be assessed on the basis of multiple factors, including race and ethnicity in addition to grades and LSAT scores.[56] Magavern asked: "Given that minority enrollment was running about 20-25% under LEOP [Legal Educational Opportunity Program, the pre-*Bakke* program], why did the Task Force choose such a high figure?"[57] Citing his interview with Karst, Magavern wrote: "The answer, according to Prof. Karst, was 'pure litigation strategy.'"[58] According to Magavern:

> The Task Force, being cautious litigators and liberal policy makers, felt that the diversity enrollment would have to be 35-40% to fend off any claims that it was simply the LEOP system in disguise. In other words, 10-20% non-minority students would be enrolled as a kind of litigation buffer.[59]

However, as noted by Magavern, there was a danger of switching from an approximate 25% minority quota program to a 40% diversity program[60] that included White diversity students. Under the pre-*Bakke* racial quota,

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56. *Id*. at 17-18.

57. Magavern Report, *supra* note 10, at 23.

58. *Id*.

59. *Id.*

60. A "diversity" program allows for admission of applicants on the basis of factors other than GPA and LSAT score, with one such factor being race. *See supra* note 55 and accompanying text.

the number of students who would be most likely to fail the bar exam and reduce the school's overall bar passage rate was primarily related to the numbers admitted under the quota. Magavern wrote that, "bar passage problems were nothing new for the LEOP/diversity program."[61]

In contrast, the post-*Bakke* 40% diversity program's need for White "litigation buffers" meant that academically unprepared Whites also might be admitted, thus significantly increasing the number of students who fail the bar exam and thereby decreasing the school's prestige without the benefit of adding to the numbers of minority students.[62]

According to Magavern, some faculty members, like Prof. Karst, were willing to accept White diversity applicants with relatively low grades and LSAT scores as long as they were still "interesting," while other faculty members viewed the White diversity students "as mere litigation shields" who should show the best academic promise.[63]

Citing his interview with Dean Prager, Magavern wrote that Dean Prager believed:

> [D]iversity White students should have qualifications very close to those of the automatic admittees. She feels relatively little commitment to the kind of diversity Karst envisioned; for her, the admission of White diversity students is less an important end in itself than a way to preserve minority enrollment after *Bakke*.[64]

Magavern further indicated that Dean Prager's philosophy was "shared by many other faculty members as well."[65] Citing his interview with Dean Rappaport, Dean of Admissions, Magavern wrote:

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61. Magavern Report, *supra* note 10, at 35.

62. *Id*. at 35-37. Magavern wrote that "the switch to diversity had doubled the number of lower-scoring students, and the downward pull on the school's overall bar passage rate was twice as strong." *Id*. at 36.

63. *Id*. at 25.

64. *Id*. at 40; Muratsuchi, *supra* note 16, at 120 (citing Magavern Report, *supra* note 10).

65. Magavern Report, *supra* note 10, at 40.

> Rappaport states that while attempting to keep minority enrollment at current levels he is decreasing the quantity and increasing the academic qualifications of the White diversity students. For example, he states that at this point [1988] a low income or blue collar background [sic] will add little to a White student's chances unless the poverty is fairly extreme.[66]

Magavern wrote that "the Task Force made it clear that the core of LEOP [Legal Educational Opportunity Program], the numerical level of minority enrollment, would remain basically constant."[67] The post-*Bakke* Task Force Report stated:

> The educational benefits of a diversified student body cannot be achieved by the selection of just a handful of applicants from a particular racial/ethnic group . . . . In the language of the Harvard College statement quoted in the appendix to Justice Powell's *Bakke* opinion, the "truly heterogeneous environment" sought for educational purposes "cannot be provided without some attention to numbers." We have not recommended any specific numerical goals or targets for the admission of applicants who will help to diversify our student body. Nonetheless, members of this Faculty know from their experience that small numbers of students of a particular distinctive background, such as members of a racial/ethnic minority, may in fact have their education impaired if they feel isolated in the Law School. In the early days of the LEOP program, for example, when the number of minority students in the school was very small, we saw the negative influence of such a sense of isolation on the education of the few blacks and Chicanos then in the student body.[68]

The post-*Bakke* Task Force Report then made clear that the pre-*Bakke* enrollment level of minorities must continue under the post-*Bakke* admission program by noting that:

> [T]here is such a thing as a "critical mass" of students with a particular sort of background that is necessary to avoid the sense of isolation and to make such students feel comfortable in speaking in the classroom and otherwise participating actively in the education process . . . . Our recent levels of minority representation have enabled us to reap the rewards of this part of "educational pluralism." . . . Thus, while we do not propose any specific numerical goals for admission of students

66. *Id*. at 40; Muratsuchi, *supra* note 16, at 120-21 (citing the Magavern Report, *supra* note 10).

67. Magavern Report, *supra* note 10, at 24.

68. Task Force Report, *supra* note 12, at 5-6 (quoting *Bakke*, 438 U.S. at 321).

> with various characteristics in the interest of student diversity, *we think that any very substantial decreases in the number of racial/ethnic minority students . . . would impair the Law School's efforts to achieve the benefits of a diverse student body.*[69]

The post-*Bakke* Task Force Report is as internally contradictory and deceptive as the Harvard statement cited by Justice Powell.[70] The Report states that "[w]e have not recommended any specific numerical goals or targets for the admission of applicants who will help to diversify our student body."[71] It also states that, "we do not propose any specific numerical goals for admission of students with various characteristics in the interest of student diversity . . . ."[72]

Nevertheless, the Report also states that the "chief reason for recommending a 'diversity' approach to admissions, however, is that we believe it is important (a) to assure a substantial minority presence among our students, and (b) to be honest about adopting a race-conscious program."[73] Therefore, unless the program is not going to fulfill its "chief reason" for existing, there is a quota for minority admissions that the program seeks to "assure," i.e., "a substantial minority presence."

Apparently, according to the post-*Bakke* Task Force, failure to define "substantial" with a specific number prevents UCLA Law's post-*Bakke* admissions program from being an illegal racial quota. However, law professors must recognize that to the academically superior applicant who is rejected in favor of an academically inferior, yet racially preferred, applicant, it does not matter whether the university describes its racial quota as being a specific amount like sixteen or twenty-two or whatever, or merely describes it as a "substantial" amount; the selection process and the results are identical.[74]

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69. *Id*. at 6-7 (emphasis added).

70. *See* text accompanying notes 44-47.

71. Task Force Report, *supra* note 12, at 5.

72. *Id*. at 6.

73. *Id*. at 3. Although the Task Force expresses a desire "to be honest about adopting a race-conscious program," UCLA Law and all other UC schools state in their advertising that they do not discriminate on the basis of race in admissions. *Id. See also* text accompanying notes 98-100 *infra*.

74. Justice Mosk stated the following:

> [N]o matter what we call it--a preference, a quota, a quest for diversity--weighing, say, blackness affirmatively necessarily means that others are going to be denied the opportunities in question because they were not born black.
>
> [A]ny affirmative action plan that counts blackness affirmatively, even in the context of numerous other factors, necessarily results in the rejection of some applicants who would not be rejected were they black, and in that sense

Magavern concluded that the Task Force's stated goals of achieving educational benefits from racial diversity "were designed to mimic Justice Powell's opinion and to fend off litigation . . . ."[75] Citing his interview with Task Force member Prof. Alleyne, Magavern wrote that Alleyne "felt that talk of the 'educational benefits of diversity' was more romantic than realistic and [Alleyne] did not take it particularly seriously."[76]

The Task Force based its call for a "critical mass" of minority students largely on the "sense of isolation" supposedly felt by the minority students in the early days of the racial quota program. The Task Force appears to have assumed that this "sense of isolation" was caused by racial differences and not by the intellectual mismatch between the students admitted under the racial quota program as compared with the other students. As reported by Magavern, of the seventeen students enrolled under the racial quotas in 1967, only ten students successfully made it to the bar exam and only two of the ten passed.[77] Of the twenty-six enrolled in 1968, only 35% of those who took the bar exam passed on their first attempt, while only 65% passed after multiple attempts.[78] Of the forty-seven enrolled in 1969, only 15% of those who took the exam passed on their first attempt.[79] There is no discussion in the Task Force Report about the possibility that the "sense of isolation" felt by these minority students might have been caused by their intellectual mismatch with the nonminority students and that the "sense of isolation" also would have been felt by White students who had been so mismatched.

Nor is there discussion in the post-*Bakke* Task Force Report about the effects of an admissions policy that allows for individuals to be identified by appearance or surname as those who probably owe their admission to the lowering of intellectual standards. There is no discussion in the Task Force Report about whether such students might feel stigmatized and whether any such stigma might contribute to a "sense of isolation." There is no discussion in the Task Force Report about whether an individual who would have been admitted without the standards being lowered, but who is easily identified as being eligible for a racial admission preference, may be unfairly stigmatized as somebody who would not have been admitted without the racial preference.

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are being turned away "only" because they are not black.

DeRonde, 28 Cal.3d at 904 (Mosk, J., *dissenting*) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 170 (1980)).

75. Magavern Report, *supra* note 10, at 24.

76. *Id*. at 25.

77. *Id*. at 16, appendix.

78. *Id*.

79. Magavern Report, *supra* note 10, at 16 , appendix.

As noted by Magavern, after implementation of the post-*Bakke* 40% solution, "*minority enrollment did not fall under the diversity program.*"[80] Citing his interview with Rappaport, Magavern wrote that Rappaport's "method is to require additional diversity factors to be present for each subgroup to the extent that they are being admitted automatically."[81] Therefore, if enough members of a race qualify for admission on academic grounds, without receiving any preference for race, there is no reason to give racial preferences to members of that race. Thus, by definition, except for the token Whites and Asians who act as "litigation buffers," the "diversity" students are members of races who do not qualify on academic grounds in numbers sufficient to attain the "critical mass" or quota deemed desirable by UCLA Law.

The UCLA School of Law admits academically less qualified Black, Latino and Native American applicants, to the exclusion of academically more qualified White and Asian applicants, in order to expose White and Asian students to "outlooks and ideas" to which they would not otherwise be exposed, although neither Justice Powell or the post-*Bakke* Task Force Report specified any of these particular "outlooks and ideas."

Additionally, this is done in sufficient numbers to keep the Black, Latino and Native American students from feeling "isolated" when that isolation appears more likely to be caused by the intellectual mismatch with their classmates rather than by any racial differences.

Consequently, the admission of applicants with lower academic qualifications (the "diversity" students) has resulted in special remedial classes and support programs designed primarily for such students.[82]

The UCLA School of Law's rationale for its 40% solution made the issue of Asian applicants especially troublesome. Magavern wrote that in 1981-82, some faculty members found it inappropriate to continue to admit Asians under the diversity program because increasingly they were able to be admitted without help from a racial preference.[83]

Magavern stated this led to an incident that Dean Rappaport recalled where one of the admissions committee's three reading teams decided not to admit any Asian students. According to Magavern, "this may have been 1985, when under diversity only 19 Asian students were admitted and nine enrolled--compared to 44 admittees and 25 enrollees in 1986."[84] Clearly, by denying consideration to those Asian applicants because of race, this

80. *Id*. at 29 (emphasis added).
81. *Id*. at 40.
82. Muratsuchi, *supra* note 16, at 113-14.
83. Magavern Report, *supra* note 10, at 30-31.
84. *Id*. at 31.

reading team violated the rights of those Asians under the state and federal Constitutions and the Civil Rights Act of 1964.[85]

Despite the post-*Bakke* Task Force Report's statements that the faculty wanted to follow the law,[86] it is clear that the documents, including Magavern's description of this interviews with Prof. Karst, Dean Prager, Dean Rappaport and Prof. Alleyne, and the post-*Bakke* Task Force Report itself, show that UCLA Law's present post-*Bakke* diversity admissions program is a subterfuge for maintaining the racial quotas that *Bakke* held were illegal.

Writing about *Bakke* in a 1981 law review article, Prof. Alleyne repeated the errors of the post-*Bakke* Task Force Report and said, "the end result of *Bakke* is to permit admissions officers and faculties with pre-*Bakke* commitments to special minority admissions policies to achieve pre-*Bakke* results with the use of different and *Bakke*-approved admissions procedures"[87] "[s]o long as the numbers involved are not predetermined, fixed and *per se* exclusionary . . . ."[88]

Stated another way, a pre-*Bakke* racial quota can be maintained under the guise of *racial* diversity masquerading as *intellectual and ideological* diversity, as long as no one expressly says there is a fixed number of spaces reserved for the preferred minorities.

In the same article, Prof. Alleyne continued the elevation of racial standards at the expense of the highest academic standards by stating, "at the heart of minority admissions needs"[89] is "the resulting effect on minority admissions capability"[90] from the "large numbers of the most academically gifted"[91] applicants who are driving the average entering GPAs and LSAT

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85. Even Justice Powell purported to condemn an admissions program that automatically excludes applicants from competitive consideration for available seats simply because of their race. *Bakke*, 438 U.S. at 315-19.

The 14th Amendment to the U.S. Constitution states, in part, "No State shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

Article 1, Section 7 of the California Constitution states, in part, "A person may not be . . . denied equal protection of the laws . . . ." CAL. CONST. art. I, § 7.

Section 601 of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d) (1994).

86. Task Force Report, *supra* note 12, at 3.

87. Reginald Alleyne, *Regents v. Bakke: Implementing Pre-Bakke Admissions Policies With Post-Bakke Admissions Procedures*, 7 BLACK L.J. 290, 291 (1981).

88. *Id*. at 293-94.

89. *Id*. at 294.

90. *Id*.

91. Alleyne, *supra* note 86, at 294.

scores "far above what is required to produce a good lawyer."[92]

In other words, there is pressure to reject less "academically gifted" minority applicants in favor of nonminority applicants *who have more than what is necessary to be "good" lawyers*. In Prof. Alleyne's view, UCLA Law should not use all its class space to produce the *best lawyers* it can if it can produce lawyers who are merely "good."[93]

Dean Prager's 1987 letter to the students stated: "[T]he basic post-*Bakke* admissions policy, articulated in the 1978 Report of the Task Force on Admissions, will continue to be the admissions policy of the school."[94]

Continuation of such an admissions policy was one of Justice Powell's concerns. He raised the possibility that a university operating his diversity program "would operate it as a cover for the functional equivalent of a quota system."[95] Justice Harry Blackmun's pro-quota *Bakke* opinion noted that the "cynical" may say that under a diversity program "one may accomplish covertly what Davis concedes it does openly."[96] The UCLA Law documents show that the concerns of Justice Powell and Blackmun were legitimate and that the "cynical" were right.

V. ENSURING THAT UC PERSONNEL ELIMINATE RACIAL PREFERENCES

Although only the Regents can say whether they knew all the facts about the history of UCLA Law's racial admissions policy before they voted to end racial preferences, at least one Regent became aware of various UC racial preference policies and chose to do something about it. A letter dated June 30, 1995, from Regent Ward Connerly to fellow Regent, Clair W. Burgener, described Regent Connerly's investigation of UC professional school and undergraduate admissions as revealing "noncompliance with *Bakke*" and a "picture . . . of an institution which has de facto racial quotas, which refuses to acknowledge the true extent to which race is used in its admission activities, and which refuses to acknowledge the true extent to which race is used in its admission activities, and which is determined to maintain the status quo."[97]

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92. *Id*.

93. *Id*.

94. Letter from Dean Susan Prager to the UCLA Student Body 2 (Apr. 13, 1987) (on file with the UCLA Law Library).

95. *Bakke*, 438 U.S. at 318 n.19.

96. *Id*. at 406.

97. Letter from Ward Connerly to Clair W. Burgener 2 (June 30, 1995) (on file with the Regents of the University of California).

Regent Connerly continued:

> I came to the conclusion that we are breaking the law. There is no other way to put it. WE ARE BREAKING THE LAW!!! . . . [T]here is absolutely no empirical evidence to support the contention that racial diversity translates into greater quality . . . . [I]t is very important that you understand the extent to which the university is currently basing many of its faculty and admissions decisions on race. We are breaking the law and we are a prime target for a major class action suit, if there is anyone out there who is willing to spend the time to gather the necessary data to prove the case.[98]

Given the history of UC's compliance with *Bakke,* the only way to ensure that UC law and medical school personnel eliminate race as an admission factor is to force them to publish their own data in a grid/table format showing numbers of applicants who applied and who were offered admission, categorized by GPA, test score percentile and race.

I received raw admissions data from UC law and medical schools in 1994 and 1995 only after filing lawsuits against the Regents under the California Public Records Act.[99] On June 5, 1995, on behalf of the general public, I filed a lawsuit in Los Angeles Superior Court against the Regents of the University of California alleging consumer fraud in connection with their race-based law and medical school admissions.[100]

The lawsuit focuses on UC's statement to prospective applicants (consumers who pay application fees) that it does not discriminate on the basis of race in its law and medical school admissions, while simultaneously telling these applicants that race is one of many other factors considered in

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98. *Id*. at 2, 3, 7 (emphasis added).

99. CAL. GOV. CODE §§ 6250-6268 (West 1995). This statute is similar to the federal Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (West 1996).

For a discussion of the first Public Records Act request *see* Allan J. Favish, *Race Matters at UCLA*, L.A. DAILY J., Jan. 10, 1995, at 6; *Dialogue on Diversity*, L.A. DAILY J., Jan. 27, 1995, at 6 (Letters to the Editor); *Merit and Wealth in Law School Admissions*, L.A. DAILY J., Feb. 7, 1995, at 7 (Letters to the Editor); Allan J. Favish, *Letter to the Editor*, L.A. DAILY J., Mar. 10, 1995, at 7.

100. Favish v. Regents of the Univ. of Cal., No. BC129082 (Superior Court of California, County of Los Angeles, Central District, filed June 5, 1995). The suit was filed pursuant to CAL. BUS. & PROF. CODE § 17200 (West 1995). This case is currently before the California Court of Appeal in Los Angeles (Case No. B095392). The complaint in this case, including the admissions data exhibits, can be downloaded from CompuServe's Hot Topic Library in the Legal Forum (upload date of June 12, 1995) and from America Online's Legal Information Network's Software Library in the General Information section (upload date of June 30, 1995). Additionally, the lawsuit, data exhibits, transcript of the demurrer hearing, and appellate briefs can all be downloaded from http://pwa.acusd.edu/~e_cook/ from the Internet's World Wide Web.

making admission decisions. The suit alleges that the nondiscrimination statement is false and that the statement that "race is one of many other factors" is misleading without disclosure of the *extent* to which an applicant's chance for admission is affected by his or her race.

The lawsuit does not challenge UC's alleged right to discriminate on the basis of race in admissions, but merely alleges that UC must tell consumers the truth about what it is doing.

The lawsuit seeks an injunction forcing UC to eliminate its nondiscrimination statement as long as it continues to discriminate and to publish the disclosure tables described above in its application materials so that consumers can decide for themselves whether the time and cost of applying is justified by their chances for admission.[101]

When such tables are regularly published in UC application materials, applicants will know the truth about their chances for admission and the public will know the truth about whether UC personnel are using race as an admissions factor in contravention of the Regents' mandate and the CCRI.

Great universities are supposed to encourage a search for truth. What is the harm in telling the truth?[102]

VI. *HOPWOOD'S* REJECTION OF JUSTICE POWELL'S *BAKKE* OPINION

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101. Such tables, based on raw admissions data from UC Law and Medical Schools, are attached as exhibits to the complaint filed in *Favish* (No. BC129082).

102. *See* Allan J. Favish, *A Diverse History*, L.A. DAILY J., July 27, 1995, at 6 (describing how UCLA Law adjusted its racial admissions program in response to *Bakke*). *See also* Sam Magavern, *For One White Male, Diversity Made the Difference*, L.A. DAILY J., Sept. 13, 1995, at 6. In response to Magavern's article, I wrote a letter to the editor, which stated:

> Magavern now writes of the "large numbers of white students" that "have been admitted because of diversity factors." But in his 1988 paper [Magavern Report] he wrote that after the *Bakke* opinion UCLA Law "wanted to preserve its minority enrollment at current levels" and used "white diversity students" as "a kind of litigation buffer" to "fend off any claims that it was simply the LEOP [pre-*Bakke* racial quota] system in disguise."
>
> Magavern now writes that UCLA Law's diversity program "ensures that the school enrolls the smartest, best qualified applicants possible. Standards are not lowered; they are raised."
>
> However, as I reported in a letter to the Daily Journal (March 10), the nationwide attrition rate (for academic reasons) in ABA accredited law schools is over three times higher for blacks and Hispanics than it is for whites. Also, the July 1994 California bar passage rates for first time takers are significantly lower for blacks and Hispanics. I don't believe this has anything to do with race. Whites and Asians would perform just as poorly if the same percentage of their ranks were filled with "B" and "C" students, rather than "A" students.

Allan J. Favish, *Letter to the Editor*, L.A. DAILY J., Oct. 17, 1995, at 7 (quoting portions of Sam Magavern, *For One White Male, Diversity Made the Difference*, L.A. DAILY J., Sept. 13, 1995, at 6).

The UC Regents' decision to eliminate racial preferences in admissions has given it an important head start over other colleges that may have to do so on shorter notice. In *Hopwood v. State of Texas*,[103] the University of Texas School of Law's racially preferential admissions practice was held to be a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Applying the strict scrutiny analysis mandated by *Adarand,*[104] and noting that Justice Powell was the only Justice in *Bakke* to hold that his "diversity" rationale is sufficient to survive strict scrutiny, the Fifth Circuit held that the use of race "as a proxy" for "diverse experiences, outlooks and ideas" "simply replicates the very harm that the Fourteenth Amendment was designed to eliminate."[105]

The Fifth Circuit stated:

> [T]he assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group. This assumption, however, does not withstand scrutiny. 'The use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America.'[106]
>
> To believe that a person's race controls his point of view is to stereotype him. The Supreme Court, however, "has remarked a number of times, in slightly different contexts that it is incorrect and legally inappropriate to impute to women and minorities 'a different attitude about such issues as the federal budget, school prayer, voting, and foreign relations.'"[107]

The Fifth Circuit also stated that racial preference practices impose a stigma of inferiority on the supposed beneficiaries of the practice: "One prominent constitutional commentator specifically has noted that where programs involve lower and separate standards of selection, `a new badge of implied inferiority, assigned as an incident of governmental noblesse oblige' results."[108]

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

104. *Adarand*, 115 S. Ct. at 2097.

105. *Hopwood*, 78 F.3d at 946 n.29 & accompanying text.

106. *Hopwood*, 78 F.3d at 946 (quoting Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 12 (1974)).

107. Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1000 (1993) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 627-28 (1984)), *quoted in Hopwood*, 78 F.3d at 946.

108. *Hopwood*, 78 F.3d at 947 n.34.

> Explicit in state, local, or federal plans using separate and *lower* standards by races is a statement by government that certain persons identified by race are in fact being placed in positions they may be presumed not likely to hold but for their race (because they are presumed to be unable to meet standards the government itself requires to be met). The message from government is written very large when these plans proliferate: a double (and softer) standard for admission, a double (and softer) standard for hiring, a double (and softer) standard for promotion, a double (and softer) standard for competitive bidding, and so on. Without question, this is a systematic racial tagging by government, a communication to others that the race of the individual they deal with bespeaks a race-related probability, created solely by the government itself, of lesser qualification than others holding equivalent positions.[109]

A federal circuit court of appeals decision is not binding on federal courts outside of the circuit.[110] So only those colleges and universities in the Fifth Circuit--Texas, Louisiana and Mississippi--are now forced to immediately implement a truly nonracial admissions practice. Therefore, absent a stay of the Fifth Circuit's order, these states will beat California by approximately nine months.

The issue is not whether racial admissions practices will end. The issue is *when* they will end and how much time the colleges and universities will give themselves to prepare for that day. More enlightened colleges will choose the softer landing undertaken by the UC Regents, rather than be shot out of the sky by a federal court.

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109. *Id.* (quoting William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 787 n.38 (1979)).

110. *See United States v. Glasser*, 14 F.3d 1213, 1216 (7th Cir. 1994).