OPERATIONAL NEED, POLITICAL REALITY, AND LIBERAL DEMOCRACY: TWO SUGGESTED AMENDMENTS TO PROPOSITION 209-BASED REFORMS

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I. INTRODUCTION

In California, Proposition 209[1] is the law. This measure invalidates affirmative action in certain forms and contexts by state institutions. Subdivision (a), the central focus of the Proposition 209 controversy, provides that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[2]

Although Proposition 209 was challenged on equal protection grounds, the Ninth Circuit Court of Appeals upheld this state ballot initiative[3] and the United States Supreme Court refused to disturb that ruling.[4] Washington State has now followed California's lead[5] and efforts to replicate Proposition 209 have been launched in several other states, including Arizona, Georgia, Nevada, Ohio, Michigan, Colorado, and Oregon.[6] Yet, these efforts, as well as those to

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[1] *See* CAL. CONST. art. I, § 31(a) (1998).

[2] *Id.*

[3] *See* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1438 (9th Cir. 1997).

[4] *See* Coalition for Econ. Equity v. Wilson, 118 S. Ct. 397 (1997) (denying *certiorari*).

[5] *See* Sam H. Verhovek & B. Drummond Ayres, *Voters Back End to State Preferences*, N.Y. TIMES, Nov. 4, 1998, at B2.

[6] *See* Paul Healy & Peter Schmidt, *Public Colleges Seek Major Increases From Legis-*

enact reform at the federal level, have been blocked.[7]

The mixed success of attempts to roll back public affirmative action is not surprising. Beyond election year politics, Americans are ambivalent about such programs. On the one hand, we generally support "affirmative action" as the term was understood initially during the 1960's: vigorous enforcement of antidiscrimination law.[8] Indeed, a recent New York Times/CBS poll found that "[b]oth blacks and whites seemed to agree on some core principles, among them that laws are still needed to protect racial minorities from discrimination, that racial diversity is an important aim, [and] that special efforts and 'outreach programs' to help minorities advance are acceptable and even laudable . . . ."[9]

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latures in 1998 Sessions, CHRON. OF HIGHER EDUC., Jan. 9, 1998, at A34; Peter Schmidt, *Legislatures Show Little Enthusiasm for Measures to End Racial Preferences*, CHRON. OF HIGHER EDUC., Mar. 13, 1998, at A44; Rochelle Sharpe & George Zachary, *Houston's Support of Affirmative Action May Slow Opposition Efforts Elsewhere*, WALL ST. J., Nov. 6, 1997, at A24; David Wood & John Mason, *Efforts to Dismantle Affirmative Action Will Roll On*, CHRISTIAN SCI. MONITOR, Nov. 6, 1997, at 18. Last November, Houston voters rejected Proposition A, which would have eliminated "affirmative action" in city operations. *See* Jesse Katz, *Houston Thinks Globally in OK of Preferences*, L.A. TIMES, Nov. 6, 1997, at A1, A14. Texas state Judge Sharolyn Wood, however, has ruled that such wording was misleading and ordered a new election for reasons we shall consider below. *See Clarity in Houston*, WALL ST. J., June 30, 1998, at A18.

[7] *See* John Miller, *No Initiative: CCRI's Short Coattails*, THE NEW REPUBLIC, July 14, 1997, at 13. Efforts to enact legislation or submit measures to voters based on Proposition 209 have been defeated in Arizona, South Dakota, and Georgia and face an uncertain future in South Carolina. *See* Schmidt, *supra* note 6, at A44. In Washington State, the Governor has urged the legislature to place an alternative amendment, one which would preserve affirmative action, before the voters. *See id.* Even in California, a bill intended to carry Proposition 209's mandate into effect through statutory termination of existing affirmative action programs was recently rejected by a Senate committee. *See Bill to End Affirmative Action Fails in State*, SAN FRANCISCO EXAMINER, Apr. 29, 1998, at A2. A second bill was introduced in the House, but it was defeated. *See* Mark Helm, *Affirmative Action Survives House Vote*, SAN FRANCISCO EXAMINER, May 7, 1998, at A10. For a discussion on federal efforts, see Janet Holland, *Affirmative Action Ban Shelved by Panel Vote*, SAN FRANCISCO EXAMINER, Nov. 6, 1997, at A1.

[8] *See* Carl Cohen, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 22; Norman Podhoretz, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 45-46; Sam H. Verhovek, *Poll Finds Ambivalence Over Racial Preference*, SAN FRANCISCO EXAMINER, Dec. 14, 1997, at A12. As Nicolaus Mills has noted, this was the thrust of both Title VII and President Kennedy's Executive Order 10925. *See* DEBATING AFFIRMATIVE ACTION 5-6 (Nicolaus Mills ed., 1994).

[9] Verhovek, *supra* note 8, at A12; *see also* Tamar Jacoby, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 33-34; Deval Patrick, *Standing in the Right Place*, *in* THE AFFIRMATIVE ACTION DEBATE 141-42 (George

On the other hand, "a majority of Americans . . . oppose the idea of making hiring and admissions decisions based on race."[10]

A. THE ENDS, MEANS, AND CONTEXTS OF AFFIRMATIVE ACTION

As these observations suggest, any meaningful discussion of affirmative action demands some clarification of its ends, means, and contexts. The *ends* or goals of affirmative action, commonly advanced by states to justify their programs, are "remedying discrimination" and "promoting diversity."[11] While considering these rationales at some length, this article will focus on two different, more recently advanced justifications for affirmative action.

The *means* of affirmative action are the practices and procedures that institutions employ to advance the ends of affirmative action. The spectrum of means for affirmative action includes, from weakest to strongest: 1) strict enforcement of antidiscrimination laws, 2) outreach and aggressive recruiting programs, 3) race and gender preferences, and 4) quotas.[12]

Outreach and aggressive recruiting efforts are categorized as weaker forms of affirmative action because they are generally used at the *preselection* stages of the distribution of public benefits, including preadmission, prehiring, and prebidding.[13] When employed in this manner, these efforts often improve the qualifications of applicants and insure the receipt of applications from members

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E. Curry ed., 1996). As to gender preferences, "With some minor exceptions, the poll showed that respondents generally described their views about affirmative action programs intended to help women in the same way that they described programs based on race." Verhovek, *supra* note 8, at A12.

[10] Verhovek, *supra* note 8, at A1; *see also* Linda Williams, *The Politics of Affirmative Action*, *in* THE AFFIRMATIVE ACTION DEBATE 253 (George E. Curry ed., 1996); Alan Wolfe, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 56. This split in the public mind seems reflected in the tension between the University of California's mission of educating the top 12.5% of state high school graduates and resolutions adopted by the State Assembly that direct the University of California to ensure "diversity" in its student body. *See* Michael Lynch, *Affirmative Action at the University of California*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139, 143 (1997).

[11] While it is sometimes claimed that affirmative action serves a compensatory function, this argument disintegrates upon analysis. *See, e.g.*, Lino Graglia, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 31; Michael Sandel, *Picking Winners*, THE NEW REPUBLIC, Dec. 1, 1997, at 13.

[12] *See generally* David Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 926-33 (1996).

[13] *See id.* at 931.

of targeted groups that might be best qualified for the benefits.[14] As such, they merit a presumption of being fair, reasonable ways to accommodate the various interests and principles at stake in the affirmative action debate.[15]

When preferences are used, the race, ethnicity, or gender of an applicant is treated as a "plus factor," and therefore a basis for preference in the allocation of public benefits.[16] While they are but one form of affirmative action, preferences are at the center of the current debate, and will be the focus of this article for two reasons. First, preferences constitute a middle ground between outreach/aggressive recruiting on the one hand and quotas on the other.[17] Accordingly, there are forceful arguments both for and against preferences.[18]

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[14] *See* Nat Hentoff, *A Different Sort of Affirmative Action*, WASHINGTON POST, Feb. 8, 1997, at A21.

[15] Accordingly, the California courts, interpreting Proposition 209, will probably allow most of these programs to stand. *See* Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1351-53 (1997). Some programs that are labeled outreach and aggressive recruiting, however, function like race and gender preferences, and this will not be lost on the courts. *See, e.g.*, Carol Morello, *Opponents Chip Away at Prop. 209*, USA TODAY, Nov. 17, 1997, at 1A; Annie Nakao, *Bay Area is 209 Battleground*, SAN FRANCISCO EXAMINER, Nov. 4, 1997, at A14; Richard Salladay, *San Jose Suit Tests How 209 Affects Cities*, SAN FRANCISCO EXAMINER, Sept. 10, 1997, at A12.

[16] *See* Oppenheimer, *supra* note 12, at 927.

[17] *See* Appendix One. Unlike preferences, which are flexible at least in theory, quotas allocate fixed percentages of benefits, such as public contracting funds or university seats based on race or gender. Quotas are generally unpopular, even among affirmative action proponents and have long been unconstitutional. *See* Verhovek, *supra* note 8, at A12; Patrick, *supra* note 9, at 141; *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316-20 (1978).

Two intertwined forms of affirmative action which straddle the boundary between means and ends are 1) "goals and timetables" and 2) "proportional representation" of women and racial minorities in prominent positions based on their percentages of the general population. As goals, I concede, neither of these is objectionable in itself. It is not, for example, obviously wrong for a governmental agency to set the goal of achieving a 10% black and 50% female workforce within five years. The crucial question is what *means* are used to achieve that goal. If outreach/aggressive recruiting is used, there is probably no difficulty; but if quotas or preferences are employed, then the entire project, including such a noble goal, is almost certainly unjust and unconstitutional. *See* Morris Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1320 (1986).

[18] As noted by Professor Oppenheimer, "Preferences are properly at the center of the current debate. To proponents of affirmative action, they are a necessary remedy for continuing discrimination. To opponents, they are everything that is wrong with affirmative action." Oppenheimer, *supra* note 12, at 927.

Second, preferences, unlike outreach/aggressive recruiting or quotas, are explicitly banned by Proposition 209.[19]

Finally, as for the *contexts* within which the means of affirmative action are employed, Proposition 209 makes distinctions among three broad arenas: public university admissions, public employment, and public contracting.[20] Certain subsets of these contexts, including public university undergraduate admissions, will figure prominently in this article. In situating the crux of the contemporary debate, the means and contexts of affirmative action can efficiently be cross-referenced. (See Appendix One).

Since preferences are at the center of the current debate, it is worth considering at the outset why Americans generally reject their use in allocating public benefits. Many people reject preferences because of their practical effect. Whatever benefits public preferences have yielded,[21] it has become widely known that they entail substantial costs at many levels. In public employment and contracting, for example, race and gender preferences, as well as set-asides, have resulted in significant waste, inefficiency, fraud, and hypocrisy.[22]

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[19] *See* Verhovek & Ayres, *supra* note 5, at B2. Since preferences are but one form of affirmative action, Judge Wood's ruling in the Houston case is on solid analytical ground: the City Council's substitution of "affirmative action" for "preferences" in the measure's text obscured rather than clarified its meaning. *See id.*

[20] Public contracting will not be a focus of this article's discussion.

[21] As Justice Thomas has noted, "[E]very racial classification helps, in a narrow sense, some races and not others." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring). As Professor Lynch added, "Diversity management and its half parent, affirmative action, have had some positive, practical consequences. The policies have forced many institutions to reexamine formal and informal rules and procedures." FRED LYNCH, THE DIVERSITY MACHINE 324 (1997); *see also* Arch Puddington, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 48.

[22] *See, e.g.*, BOB ZELNICK, BACKFIRE: A REPORTER'S LOOK AT AFFIRMATIVE ACTION 107-18 (1996) (documenting the expensive, multiple revisions of police exams required in response to lawsuits and consent decrees in various U.S. cities when low proportions of racial minorities pass the exams originally in use); Robert Woodson, *Personal Responsibility*, *in* THE AFFIRMATIVE ACTION DEBATE 113-15 (George E. Curry ed., 1996) (noting the fraudulent representation of women and racial minorities as the owners of contracting businesses in order to qualify for set-asides); Peter Brimelow & Leslie Spencer, *When Quotas Replace Merit, Everybody Suffers*, FORBES, Feb. 15, 1993, at 82 (estimating the total direct and indirect compliance costs of racial preferences at about $120 billion annually); Puddington, *supra* note 21, at 47-48 (describing the rampant corruption, waste, and inefficiency involved in the awarding of social services contracts in a large Midwestern state); *see also* STEPHEN & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 451 (1997); Gerard Bradley, *A Case for Proposition 209*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 97, 104 (1997); Glenn Loury, *Absolute California*, THE NEW

Further, such practices as the "two pile method"[23] have transformed race and gender from minor, secondary factors to major, primary factors in the hiring process.[24] In public university admissions, this practice has led to the widespread mismatch of students with institutions, thereby setting up minority students for failure, high attrition rates, and the self-segregation that mocks the diversity rationale used to justify the preferences in the first place.[25] As Pro-

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REPUBLIC, Nov. 18, 1996, at 18; *Useful Distinctions*, WALL ST. J., Jan. 24, 1997, at A14. As one prominent preference advocate conceded, "One does not create an entrepreneurial class by granting contracts to those who cannot otherwise compete; on the contrary, one invites fraud and corruption." Nathan Glazer, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 30.

[23] Under the two pile procedure, applications for "public employment" positions are sorted at the outset of the selection process into a favored pile for women and racial minorities and a disfavored pile, to be denied serious consideration, for white males. This practice is so widely used in public university faculty hiring that it is openly discussed in the scholarly journals. *See* Richard Delgado, *Five Months Later (The Trial Court Opinion)*, 71 TEX. L. REV. 1011, 1016 (1993); George Kindrow, *The Candidate: Inside One Affirmative Action Search*, *in* DEBATING AFFIRMATIVE ACTION 144 (Nicolaus Mills ed., 1994); Michael Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 995 (1993). When this procedure is used in public school and university hiring, this article will show it is a blatant violation of the Fourteenth Amendment in an area in which taxpayers and students, the *demos* in public education, are footing the bill.

[24] Analogous to "mission creep" in military operations, in which a project's ends and/or means migrate from an original conception to something quite different, I shall call this "factor creep."

[25] *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 134-46 (1992); ZELNICK, *supra* note 22, at 173-81; Linda Chavez, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 21; Joseph Epstein, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 28; Oscar Patterson, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 44. As Professor Graglia has commented, "Admitting large numbers of blacks to selective institutions of higher education . . . does not involve the use of race merely to break ties or 'tip the balance' in close cases, as is usually asserted by affirmative action proponents. It involves, instead, ignoring very substantial differences in academic credentials." Graglia, *supra* note 11, at 32; *see also* Carl Cohen, *Race, Lies and* "Hopwood," COMMENTARY, June 1, 1996, at 40-41.

For a comparative perspective, see Thomas Sowell, *"Affirmative Action:" A Worldwide Disaster*, *in* COMMENTARY, Dec. 1989, at 21. As Zelnick summed up Professor Sowell's findings,

[T]emporary targeted race preferences (used in other countries) invariably expand to

fessor Carl Cohen has stated:

> When persons are appointed, or admitted, or promoted because of their racial group, it is inevitable that the members of that group will, in the institution giving such preference, perform less well on average. Membership in the minority group most certainly does not imply inferiority; that is a canard—but that stereotype is *reinforced* by preferences. Since the standards for the selection of minorities are inevitably lower when diluted by considerations of color, sex, or nationality, it is a certainty that, overall, the average performance of those in the preferred group will be weaker—not because of their ethnicity, of course, but because many among them were selected on grounds having no bearing on the work or study to be pursued. Preference thus *creates a link* between the minority preferred and the inferior performance.[26]

Therefore, while Americans generally support affirmative action's purported goals, they have good reasons for rejecting preferences as a means to achieve those goals. Consequently, this article will assume that the enactment of replicated Proposition 209 bans on public preferences in other states is a valid, desirable goal. Since most Americans genuinely want to achieve the goals of affirmative action, however, preference critics are obliged to articulate a defensible compromise or alternative to the practices banned by Proposition 209.[27] Thus, when efforts to enact Proposition 209-based measures resume after the November 1998 elections, I propose the consideration of two amendments to the basic reforms.

> other groups or other fields such as employment, university admissions, government contracts, and political representation. The beneficiaries are invariably already comfortably ensconced in the middle or upper middle classes. Fraudulent claims for benefits multiply. Societal polarization is accentuated, producing consequences from political backlash to civil war. In the end, the so-called remedy helps nothing.

ZELNICK, *supra* note 22, at 18.

[26] Cohen, *supra* note 8, at 22 (emphasis in original). Professor Cohen argued that three other groups—the white applicants denied benefits because of their color, the institutions using the preferences, and society at large—also pay a big price for the use of preferences. *See id.* at 23; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 512 (1989) (Stevens, J., concurring).

[27] *See* Pete Wilson, *The Minority-Majority Society*, *in* THE AFFIRMATIVE ACTION DEBATE 170-71 (George E. Curry ed., 1996).

The first amendment I propose is a temporary allowance for race[28] preferences within a narrow sector of public employment, namely law enforcement and corrections hiring and promotions. This exception would respond to the most *valid* objection to a ban on preferences in the distribution of public benefits. The second exception would allow race preferences for a limited time in undergraduate public university admissions. This exception would address the most *persistent* objection to a ban on preferences in the distribution of public benefits. These exceptions fit into Appendix One as illustrated in Appendix Two. (See Appendix Two).

If enacted, these exceptions would inevitably affect the interests of many individuals in substantial and adverse ways. Since the exceptions would likely be challenged on constitutional grounds, much of what follows will be constitutional analysis. In addition, the feasibility of enacting such exceptions to a preference ban into state law will be a function of complex and variable factors, which may differ according to the state. Thus, these amendments and this article's analysis should be a starting point for discussions attempting to locate that elusive middleground among the constitutional law and politics surrounding affirmative action.

II. THE AMENDMENTS

A. THE LAW ENFORCEMENT/CORRECTIONS EXCEPTION

Proportional representation is among the goals advanced by preference advocates.[29] This proposition provides that racial minorities and women should hold prominent public positions in approximate proportion to their percentages in the general population.[30] This social vision has some legitimacy. For example, I have long thought that there should be more women in public office, and I have voted accordingly. Merely because a goal is a valid one, however, does not justify its realization by any means or in any context. Much of what

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[28] Except where otherwise distinguished, this article shall hereinafter refer to "race" as shorthand for "race" or "ethnicity."

[29] *See supra* note 17.

[30] *See, e.g.*, ANNE PHILLIPS, ENGENDERING DEMOCRACY 156 (1991); I. M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 183-91 (1990); Abram, *supra* note 17, at 1313; Marcia Greenberger, *Women Need Affirmative Action*, *in* AT ISSUE: AFFIRMATIVE ACTION 17 (Andrew E. Sadler ed., 1996); Jesse Jackson, *People of Color Need Affirmative Action*, *in* AT ISSUE: AFFIRMATIVE ACTION 11 (Andrew E. Sadler ed., 1996); Interview with Bonnie Erbe (C-Span2 television broadcast, Aug. 14, 1998).

legitimates the goal of proportional representation in public elective office is that the benefit, public employment, is dispensed through relatively democratic means, namely, popular vote. In non-elective public employment, by contrast, this is frequently not the case. In that context, public jobs are bestowed by bureaucrats or academics in an effectively secret process,[31] yielding practices like the "two pile method."[32] These officials are neither popularly elected nor publicly accountable for their hiring decisions. Therefore, it is difficult to square this process with principles of democracy.

As a constitutional matter, the high risk of such abuse has led the Supreme Court to reject most of the arguments for race or gender preferences in government positions for the past twenty years.[33] Of course, much of what explains this is that the Court now subjects even "benign" racial classifications, including the two we shall consider, to strict scrutiny upon an equal protection challenge.[34] Therefore, classifications must be narrowly tailored to advance a compelling state interest.[35]

In Professor Kmiec's view, "There remains disagreement among the justices with regard to what, if any, interests are compelling enough to justify the public use of race."[36] Nonetheless, the Court has consistently validated the remedial rationale.[37] The Court has recognized as compelling the state interest in remedying discrimination and its effects.[38] At the same time, the Court has made clear that government's mere recitation of "general societal discrimina-

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[31] A key component of Justice Powell's rationale for striking down the quota system in *Bakke* was that medical professors are neither equipped nor authorized to dispense racial justice on behalf of the people of California. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-10 (1978); James Q. Wilson, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 55-56.

[32] *See supra* note 23.

[33] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986); *Bakke*, 438 U.S. at 307-11.

[34] *See, e.g.*, Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997).

[35] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 467, 497 (1989); *Wygant*, 476 U.S. at 276; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1972).

[36] Douglas Kmiec, *The Abolition of Public Racial Preference—An Invitation to Private Racial Sensitivity*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 6 (1997).

[37] *See Croson*, 488 U.S. at 509; *Wygant*, 476 U.S. at 274.

[38] *See Croson*, 488 U.S. at 509; *Wygant*, 476 U.S. at 274.

tion" is insufficient to save a race-based classification.[39]

The Court has, therefore, established a principled middleground in this area. The Court takes the word *remedy* seriously by insisting that "remedial" preferences be a response to a situation that truly requires a remedy and that can be redressed.[40] Thus, the Court demands proof of *identified discrimination*, such as legislative, administrative, or judicial findings of discrimination within any public agency proposing to use remedial preferences.[41]

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[39] *Croson*, 488 U.S. at 509; *Wygant*, 476 U.S. at 276.

[40] *See Croson*, 488 U.S. at 496-97; *Wygant*, 476 U.S. at 276-78; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309 (1978).

[41] *See Croson*, 488 U.S. at 496-97; *Wygant*, 476 U.S. at 276-78; *Bakke*, 438 U.S. at 309. Justice O'Connor was the key vote on the constitutionality of affirmative action. *See* Akhil Reed Amar & Neal Kumar Katyal, Bakke*'s Fate*, 43 UCLA L. REV. 1745, 1754 (1996); *see also* Ronald Dworkin, *Is Affirmative Action Doomed?*, N.Y. REVIEW OF BOOKS, Nov. 5, 1998, at 56. In *City of Richmond v. Croson*, Justice O'Connor stated, "Proper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." 488 U.S. at 510. Further, in *Hopwood v. Texas*, which the Court recently upheld, "identified" discrimination was defined as that within a specific public agency rather than, for example, a state's entire educational system. *See* Hopwood v. Texas, 78 F.3d 932, 951 n.43 (5th Cir. 1996). As the Fifth Circuit stated, "The Supreme Court . . . has limited the remedial interest to the harm wrought by a specific governmental unit." *Id.*; *see also Croson*, 488 U.S. at 485.

The rule of identified discrimination is based on an insight to which a majority of the current Court is sensitive. Related to the doubts that race based classifications can ever be benign, *see, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995); *Croson*, 488 U.S. at 493, the Court has been skeptical of the claim that race preferences typically remedy discrimination more than they exacerbate it. In reference to the set-aside in *Croson*, for example, Justice Kennedy remarked that "it is not a remedy but . . . a preference which will cause the same corrosive animosities that the Constitution forbids." *Croson*, 488 U.S. at 520 (Kennedy, J., concurring). As Justice Scalia has noted, "[T]hose who believe that racial preferences can 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still." *Id.* at 527-28 (Scalia, J., concurring). Justice Thomas added, "[Racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring). Even the *Bakke* opinion emphasized the importance of a close fit between the asserted problem and proposed solution. *See Bakke*, 438 U.S at 291. Justice Stevens, the last sitting member of the *Bakke* plurality, conceded that "a *remedial* justification for race-based legislation will almost certainly sweep too broadly." *Croson*, 488 U.S. at 512 n.1 (Stevens, J., concurring) (emphasis in original); *see also* Metro Broad., Inc. v. Federal Communications Comm'n, 497 U.S. 547, 607 (1990) (O'Connor, J., dissenting); Linda Chavez, *Promoting Racial Harmony*, *in* THE AFFIRMATIVE ACTION DEBATE 322-25 (George E. Curry ed., 1996); Glenn C. Loury, *Performing Without a Net*, *in* THE AFFIRMATIVE ACTION DEBATE 53-56 (George E. Curry ed., 1996); Podhoretz, *supra* note 8, at 47; Jim Sleeper, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 51; Todd S. Welch, *The Su-*

Therefore, if challenged on equal protection grounds, this rationale is unlikely to save a provision for race preferences in *any* public employment practices, including policing and corrections. The Court has "left the door open," but *City of Richmond v. J.A. Croson Co.*,[42] in particular, has set a high standard. Without proof of identified discrimination within a particular agency, a state is unable to show a compelling remedial need for preferences.

Commentators of various political stripes, however, have advanced a strong case for race preferences in the law enforcement and corrections contexts.[43] James Q. Wilson, for example, emphasized the role of representation within certain memberships. After distinguishing organizations like the National Basketball Association or a symphony orchestra, in which excellence is the sole legitimate criterion for membership, from those organizations whose functions combine excellence and representation, Wilson asserted that

> police departments . . . straddle the boundary between public agencies dominated by excellence and public agencies that require representation . . . . The government is in part legitimate if it appears to its citizens to embody people with whom they can identify . . . . I am not suggesting that there is a black or a white . . . way to . . . issue traffic tickets, intervene in family quarrels, or enforce welfare laws. I only mean that people viewing the entirety of an agency that serves the public in a personal and important way want to feel comfortable that significant parts of the community that is served participate in that agency . . . . Some forms of government hiring must be shaped in part by a desire to ensure that the public-serving part of the bureaucracy, as viewed by its citizens, serves, within limits, a reasonable representative function.[44]

Another scholar, Wade Henderson, has commented on the consequences of ignoring such caution, and has stated:

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preme Court Ruled Correctly in Adarand, *in* THE AFFIRMATIVE ACTION DEBATE 161 (George E. Curry ed., 1996); Woodson, *supra* note 22, at 115-16.

[42] 488 U.S. 467 (1989).

[43] *See, e.g.*, Terry Eastland, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 26; Loury, *supra* note 22, at 18; John O'Sullivan, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 42; Steven Proffitt, L.A. TIMES, Feb. 1, 1998, at M3 (interview with Ramona Ripston).

[44] Wilson, *supra* note 31, at 54.

> In almost every major urban rebellion of the last three decades, police action directed against African-Americans was a precipitating cause of civil disorder . . . . Evidence gathered over thirty years of review confirms that the exclusion of African-Americans from police forces greatly contributes to the tension and violence in police-community relations. Almost all of the police officials who testified at the NAACP's 1991 hearings on police misconduct against African-Americans expressed the nearly universal view that diversity in police ranks was a key to bettering police-community relations and stopping police brutality.[45]

Thus, the first exception this author proposes to a Proposition 209-based reform might specifically provide that

> this prohibition may be waived for a period not to exceed "X" years in law enforcement or corrections employment practices upon clear and convincing proof that preferences based on race or ethnicity are necessary for the effective policing of specific neighborhoods, or, the effective administration of specific correctional facilities.

Benign purposes notwithstanding, such an explicit racial classification would be subject to strict scrutiny upon equal protection challenge.[46] Assuming the remedial argument is unavailable, a state defending the exception might try the diversity rationale, as Henderson suggested.[47] In *Regents of the University of California v. Bakke*,[48] the Court held that the promotion of diversity is a compelling state interest,[49] and as James Traub has explained, "The diversity argument has rapidly eclipsed the past-discrimination argument, because it is so much rosier and more consensual. It's hard to dispute the notion that institutions benefit from 'diverse points' of view."[50] Nonetheless, there would be at

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[45] Wade Henderson, *The Color Line and the "Thin Blue Line," in* THE AFFIRMATIVE ACTION DEBATE 222, 225 (George E. Curry ed., 1996).

[46] *See Bakke*, 438 U.S. at 287.

[47] *See* Henderson, *supra* note 45.

[48] 438 U.S. 265 (1978).

[49] *See id.* at 311-12.

[50] James Traub, *Testing Texas*, THE NEW REPUBLIC, Apr. 6, 1998, at 21; *see also* JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 228 (1996); Eastland, *supra* note 43, at 25.

least two serious difficulties with the attempt to support the law enforcement/corrections exception on grounds of promoting diversity.

First, *Bakke* offers a slender thread of support for this rationale because it involved university admissions.[51] The diversity at stake in *Bakke* was *intellectual* diversity,[52] which the present Court would hardly recognize as compelling in the law enforcement and corrections contexts. The diversity valued in law enforcement and corrections is *racial* diversity, which is ultimately sought for public relations purposes that do not have the First Amendment underpinnings of intellectual diversity.[53]

Furthermore, four sitting justices, who dissented in *Metro Broadcasting, Inc. v. Federal Communications Commission*,[54] have rejected diversity as a justification for race preferences. Specifically, the justices in *Metro Broadcasting* stated:

> [T]he Constitution provides that the government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think . . . . Modern equal protection doctrine has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.[55]

Justice Thomas, who joined the Supreme Court after the *Metro Broadcasting* decision, would almost certainly agree with the dissent in that case.[56] Therefore, the *Metro Broadcasting* dissent now commands a majority of the Court, and the diversity justification for the law enforcement/corrections exception is not promising.

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[51] *See Bakke*, 438 U.S. at 265.

[52] *See id.* at 312-13.

[53] *See id.* at 312.

[54] 497 U.S. 547 (1989).

[55] *Id.* at 602, 612 (O'Connor, J., dissenting). Justice O'Connor was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. *See id.* at 602 (O'Connor, J., dissenting).

[56] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., dissenting).

While neither the remedial nor diversity rationales would likely save the law enforcement/corrections exception from an equal protection challenge, some federal courts have been persuaded to allow race preferences in law enforcement and corrections employment practices under another theory.[57] In *Barhold v. Rodriguez*,[58] the Second Circuit upheld a parole officer transfer and reassignment policy based partly on race and gender against an equal protection challenge.[59] In support of this ruling, the court cited the *operational need* doctrine, which is defined as "a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, able to communicate with the public, and respected by the community it serves."[60] In *Detroit Police Officers' Association v. Young*,[61] similarly, in an effort to increase the number of minority officers in its upper ranks, the police department adopted a promotion policy under which black candidates were advanced over white candidates with higher test scores.[62] In upholding the policy, the Sixth Circuit cited several studies for the proposition that

> the relationship between government and citizens is seldom more visible, personal, and important than in police-citizen contact . . . . [E]ffective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's *perception* of law enforcement officials and institutions.[63]

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[57] *See* Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988); *see also* Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979).

[58] 863 F.2d 233 (2d Cir. 1988).

[59] *See id.* at 238.

[60] *Id.*; *see also* Metro Broad., Inc. v. Federal Communications Comm'n, 497 U.S. 547, 601-02 (1989) (Stevens, J., concurring); Wygant v. Jackson Bd. of Educ., 467 U.S. 265, 314 (1986) (Stevens, J., dissenting).

[61] 608 F.2d 671 (6th Cir. 1979).

[62] *See id.* at 680-81.

[63] *Id.* at 695-96 (emphasis added); *see also* Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981) (upholding the promotion of a black police captain against an equal protection challenge where a white police captain had scored higher on the promotional exam).

In *Wittmer v. Peters*,[64] a more recent case, the State of Illinois conceded that promotions among corrections officers at the Greene County boot camp for young offenders had been made on the basis of race despite significantly disparate test results.[65] Nonetheless, Judge Posner was satisfied by expert testimony that

> [t]he black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp . . . . [Defendant's experts] opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots. For then a security staff of less than 6 percent black (4 out of 71), with no male black supervisor, would be administering a program for a prison population almost 70 percent black . . . .[66]

The Seventh Circuit concluded that "the law-enforcement and correctional settings [provide] the very *clearest* examples of cases in which departures from racial neutrality are permissible."[67]

As distilled from these cases, the "operational need" argument proceeds in three steps. First, the government cites an undesirable *perception* of authority on the part of the racial minority group being policed or guarded. Second, the government underscores the concrete *consequences* of this perception. These consequences are rendered in terms of the relations between supervisors and the supervised; at stake are such state interests as public support, cooperation, and above all, respect for public authority. Thus, if the perception and its impact on the groups' relations are not heeded, the basic goals of policing,

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[64] 87 F.3d 916 (7th Cir. 1996).

[65] *See id.* at 917.

[66] *Id.* at 920.

[67] *Id.* at 919 (emphasis in original). Consistent with Justice Stevens' concurrence in *Croson*, the operational need doctrine "may produce tangible and fully justified future benefits." City of Richmond v. J.A. Croson Co., 488 U.S. 467, 511 n.1 (1989) (Stevens, J. concurring). Even Justice Scalia has conceded that corrections provides a context in which race might constitutionally be used as a basis for treatment, albeit only under exceptionally urgent circumstances like the need to segregate prisoners in response to a prison race riot. *See id.* at 521 (Scalia, J. concurring).

namely crime detection and prevention,[68] and of corrections, namely rehabilitation and deterrence, will be unsatisfactorily realized. Therefore, the proposed remedy for the negative perception and its consequences is an exception to the general rule that absent a compelling remedial justification, race based public employment practices are unconstitutional.

It may be argued that the law enforcement/corrections exception could not be contained in any principled way. If only minorities can police or guard minorities, then it could be argued that they should enjoy preferences for other public employment. Like police officers and prison guards, for example, firefighters and schoolteachers are entrusted with significant responsibility for public safety. As Nathan Glazer added,

> [O]ne recalls that there was a time when white firemen were harassed when they entered black residential areas. Similarly, we need black teachers and administrators in our schools. Whatever the abstract force of the argument that the quality of the teacher is more important than his race or ethnicity, the degree of racial self consciousness among African Americans is so strong that, except under special circumstances, an educational system that does not take account of race and ethnicity will not succeed.[69]

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[68] To illustrate a concrete situation in which even the most able white police officer would be ineffective, the Sixth Circuit noted the need for "more black officers to perform specialized tasks such as surveillance." Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979). This need was also illustrated by the Justice Department's relatively high rate of Latino recruitment as border patrol agents and undercover operatives. *See* Harry Pachon, *Invisible Latinos: Excluded From Discussions of Inclusion*, *in* THE AFFIRMATIVE ACTION DEBATE 185-86 (George E. Curry ed., 1996). As Zelnick noted, however,

> Experts differ on the contribution proportional representation of minorities on police forces could make to fighting crime and making inner cities safer. The weight of opinion is that as long as there are enough minority police to serve as ambassadors to the minority communities and to work as undercover agents, training, experience, intelligence, integrity, and good judgment are far more important than skin pigmentation.

ZELNICK, *supra* note 22, at 117-18.

[69] Glazer, *supra* note 22, at 30. As San Francisco Fire Chief Robert Demmons observed last year, reflecting on a recent increase in the percentage of women and minorities in his department, "[f]or all communities, whether Asian or Latino, African American or women, Irish or gay, there are people in the department whom the can identify with." *An End to Preferences*, SAN FRANCISCO EXAMINER, Sept. 23, 1997, at A16.

While Glazer's argument is not without merit, it does not prevail. In an observation also true of prison guards, Professor Wilson has noted that "[police officers] *have a monopoly on the legitimate use of force* . . . ."[70] Firefighters and teachers, by contrast, lack the kind and degree of coercive authority held by the police and prison guards. They are entrusted neither with investigating crime nor physically constraining or disciplining those suspected or convicted of crime. Thus, a workable line could be drawn between law enforcement/corrections officers and other public employees.[71]

Therefore, its eery vagueness notwithstanding,[72] the "operational need" argument stands a better chance than the remedial or diversity rationales for supporting the law enforcement/corrections exception against an equal protection challenge. As for the ends prong of strict scrutiny, the moderately conservative Rehnquist Court would be sympathetic to the claim that state and local governments have a compelling interest in securing public safety against the violence that can result from poor police-community relations in majority-minority neighborhoods and guard-inmate relations in prison.[73] This is evident from the fact that authority to provide for public safety has long been understood to be within the police power of the states under the Tenth Amendment.[74]

As for the means prong of strict scrutiny, the law enforcement/corrections exception is arguably narrowly tailored to advance the government's operational need for two reasons. First, the need for a higher percentage of minority police officers or prison guards within a particular institution must be clear and convincing in order to permit the preference.[75] Second, the preference could

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[70] Wilson, *supra* note 31, at 54 (emphasis added).

[71] As Jeffrey Rosen responded to Fire Chief Demmons, "It's not clear that a fire department should be designed to 'reflect [a city's] demographics and cultural diversity . . .' rather than simply to put out fires." Jeffrey Rosen, *Damage Control*, THE NEW YORKER, Feb. 23, 1998 & Mar. 2, 1998, at 67.

[72] *See* Eastland, *supra* note 43, at 26.

[73] Professor Randall Kennedy has argued that the benefit is not limited to residents of minority neighborhoods. *See* Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986).

[74] *See, e.g.*, U.S. v. Lopez, 514 U.S. 549 (1995); Hammer v. Dagenhart, 247 U.S. 251 (1918). With rare exception, immutable traits are a valid basis for differential treatment by government only where police power concerns, such as public safety, are seriously implicated. The denial of driver's licenses to the blind, for example, poses no constitutional difficulty.

[75] As Judge Posner noted, "[T]he concern and response . . . must be substantiated and

only be used for a limited period of time. This is crucial because, as almost everyone has agreed, "affirmative action must have an endpoint."[76]

It could be argued that the law enforcement/corrections exception gives into false appearances, mob rule, and nondemocratic practices. The law enforcement/corrections area, however, represents the edge of civil society, the border of the Hobbesian state of nature.[77] The problems to be addressed are by definition of a criminal, rather than civil nature. Thus, the Machiavellian principle of adherence to "effectual truth" and its corresponding nondemocratic methods[78] have greater legitimacy in this sphere than in most areas of public policy. On these bases, the Court would have ample grounds to uphold the law enforcement/corrections exception to a ban on public preferences against an equal protection challenge.

B. THE UNIVERSITY ADMISSIONS EXCEPTION

Of all the contexts in which race preferences are employed, they are most deeply entrenched in university admissions.[79] From one perspective, this is understandable and even appropriate. By contrast to a nonminority applicant for public employment, a nonminority denied admission to his first choice academic program because of race preferences is not completely barred from the benefit he or she seeks: he or she can simply attend a less prominent school.[80]

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not merely asserted." Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 467, 494-95 (1989); Wygant v. Jackson Bd. of Educ., 467 U.S. 265, 276-78 (1986)). Thus, this requirement is analogous, although not identical, to the necessity of proof of identified discrimination for the success of the remedial rationale. *See supra* text accompanying notes 40-41. By contrast to the focus on remedying discrimination within a specific public agency, the emphasis here is on the unit's effectiveness in its relations with the population for and to which it is responsible.

[76] Brief of Charles Alan Wright, Douglas Laycock, and Samuel Issacharoff as *Amici Curiae* in Support of Respondent at 19, Piscataway Township Bd. of Educ. v. Taxman, (No. 96-679), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.).

[77] *See* THOMAS HOBBES, LEVIATHAN 183-201 (C.B. MacPherson ed., 1968).

[78] *See generally* NICOLO MACHIAVELLI, THE PRINCE 51-54 (Quentin Skinner & Russell Price eds., 1988).

[79] *See* Chavez, *supra* note 25, at 21; Lynch, *supra* note 10, at 154.

[80] As Jeffrey Rosen has written, "[N]onremedial racial preferences may be permissible in very limited circumstances, such as public university admissions . . . *where the burdens are diffuse* . . . ." Jeffrey Rosen, *Lee's Way*, THE NEW REPUBLIC, Dec. 1, 1997, at 53 (emphasis added); *see also Amici Curiae* Brief at 21, *Taxman* (No. 96-679); David Bryden, *The False Promise of Compromise*, THE PUBLIC INTEREST, No. 130 Winter, 1998, at 50, 52. In

Furthermore, the stalled efforts to duplicate Proposition 209-based reforms suggest that mere tinkering with outreach, mentoring, and other aspects of the preadmisson process will not provide the political tradeoff necessary for the enactment of such reforms.[81]

Thus, the question is not *whether* the university admissions exception should involve preferences in public university admissions, but *what form* they should take. Some states have instituted such preferences based on socioeconomic class,[82] and able critics notwithstanding,[83] this practice is to be commended. For instance, class-based preferences enjoy greater public support than do race-based preferences.[84] Further, the Court has indicated that such race-neutral efforts by states to remedy discrimination would not be subject to strict scrutiny.[85] Finally, a class-based rather than race-based approach is more narrowly

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public employment, by contrast, there is by no means always another slightly inferior job opening in the field of a nonminority denied a position he would have had but for race or gender. To the non-minority, the cost of preferences in public hiring is not simply a slightly lower quality of the benefit for which he competes, it is no benefit at all. This is particularly likely in an era of widespread corporate downsizing, and one in which private industry is employing race and gender preferences as much as ever. *See* THERNSTROM, *supra* note 22, at 452-53. As one labor market observer recently noted, "1998 will be the worst year ever for white men. As pressures to diversify the work force increase, hiring and downsizing policies will disproportionately hurt them." Marty Nemko, *Women and Democrats Could Prosper This Year*, SAN FRANCISCO EXAMINER, Jan. 11, 1998, at J2. Thus, in contrast to the admissions context, it is no response to claim that a white male can simply secure other employment.

[81] *See supra* note 7 and accompanying text.

[82] *See, e.g.*, Lynch, *supra* note 10, at 149; Michelle Locke, *Adversity Replaces Race in Student Selection Process*, SAN FRANCISCO EXAMINER, May 18, 1998, at A6.

[83] *See, e.g.*, Charles Moskos, *Affirmative Action in the Army: Why it Works*, *in* THE AFFIRMATIVE ACTION DEBATE 237 (George E. Curry ed., 1996); Abigail Thernstrom, *A Class Backwards Idea*, WASHINGTON POST, June 11, 1995, at C1.

[84] As Verhovek stated,

> Even as they criticized preferences based on race and gender, . . . Americans seemed eager to support affirmative action based on economic class. Majorities of both blacks and whites said they favored policies that give specific preferential treatment in college admissions and employment to people from poor families over those from middle-class or rich families.

Verhovek, *supra* note 8, at A1-A12.

[85] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 278 (1995). Unlike race

tailored to advance a legitimate interest.[86]

Nonetheless, class-based preferences in public university admissions would not likely provide the political tradeoff necessary for enactment of Proposition 209-based reforms. Foremost, they have not yielded a significant increase in racial minority enrollment at prominent public universities.[87] Additionally, many critics of Proposition 209 place nearly exclusive emphasis on the importance of race-based preferences in public university admissions.[88] Thus, any

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preferences, class-based preferences do not involve a suspect classification, *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18-28 (1973), and so would be subject only to rational basis scrutiny. Even Justice Scalia has indicated his openness to such approaches. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 467, 526 (1989) (Scalia, J., concurring).

[86] For example, a class-based approach does not extend preferences to the middle class racial minorities who currently benefit most from them yet for whom there is no remedial or compensatory justification. *See* Robert Harwood, *Opportunity and the New Diversity*, WASHINGTON POST, July 21, 1997, at A21; Richard Kahlenberg, *Class, Not Race*, THE NEW REPUBLIC, Apr. 3, 1995, at 21; Richard Rodriguez, *Affirmative Action is Dead: Let's Address the Demerits of Social Class*, L.A. TIMES, Nov. 7, 1997, at B9; Sandel, *supra* note 11, at 16. More importantly, a class-based approach recognizes crucial distinctions often ignored by preference advocates. Although preference advocates like to stress "concrete life experiences," they seem to dismiss those of many white males. *See, e.g.*, Delgado, *supra* note 23, at 1016; Yxta Murray, *Merit-Teaching*, 23 HASTINGS CONST. L.Q. 1073, 1087 (1996). From this angle, there is no real difference between a white male whose parents never completed high school and who divorced when he was a child and one whose parents are well connected Harvard Law graduates who have been married for forty years. For a discussion of the "all and only white males are rich" fallacy, see, e.g., Ronald Takaki, *Set Up a Lottery for UC's Top Applicants*, L.A. TIMES, Apr. 2, 1998, at B9; *see also* John Larew, *Why are Droves of Unqualified, Unprepared Kids Getting Into our Top Colleges*, WASHINGTON MONTHLY, June 1991, at 10 (suggesting that race preferences are justified in University of California admissions because there are legacy preferences at Harvard).

[87] The difficulty, Justice Scalia's optimism notwithstanding, is that most applicants who can show such a disadvantage are white. *See, e.g., Croson*, 488 U.S. at 528 (Scalia, J., concurring); Brief of Charles Alan Wright, Douglas Laycock, and Samuel Issacharoff as *Amici Curiae* in Support of Respondent at 12, Piscataway Township Bd. of Educ. v. Taxman, (No. 96-679), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.); Lynch, *supra* note 10, at 149-50.

[88] *See, e.g.*, Rose Bird, *A Brutal Education Legacy*, SAN FRANCISCO EXAMINER, June 29, 1997, at D7; Bill Clinton, *Mend it Don't End it*, *in* THE AFFIRMATIVE ACTION DEBATE 258-76 (George E. Curry ed., 1996); Nathan Glazer, *In Defense of Preference*, THE NEW REPUBLIC, Apr. 6, 1998, at 18; Eva Paterson, *Proposition 209 and Resegregation*, SAN FRANCISCO EXAMINER, May 23, 1997, at A23; Rosen, *supra* note 71, at 58-64. It is precisely this focus on race and university admissions that renders such criticisms of Proposition 209 ineffective. The measure bans both gender and race preferences, and in public employment and contracting as well as in education. The arguments for race preferences in admissions do not support preferences in these other forms and contexts.

plausible admissions exception to a Proposition 209-based reform would inevitably seem to be race-based.[89] Consequently, the university admissions exception might provide that

> modest preferences based on race or ethnicity in undergraduate admissions to state colleges and universities are permissible. This exception shall not, however, extend more than fifteen years from the time of its enactment.[90]

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[89] There are three questions that must be addressed. First, which races/ethnicities are to be favored? Second, why are gender preferences excluded? Third, why is public employment excluded?

As for the racial groups to be favored, the answer is that this cannot be specified in advance since it depends largely on the politics and demographics of a given state. Glazer would extend preferences only to blacks, but Bryden noted that Native Americans seem just as deserving and are, on average, poorer than blacks. *See* Bryden, *supra* note 80, at 59; Glazer, *supra* note 88, at 24; *see also* PETER NABOKOV, NATIVE AMERICAN TESTIMONY 256-74 (1992). In states along the Mexican border, however, it would seem unthinkable to exclude Mexican-Americans. For a contrary view, see ZELNICK, *supra* note 22, at 364. For inclusion of groups beyond these, Professor Patterson finds no compelling justification. *See* Patterson, *supra* note 25, at 45. While the scope of the racial inclusion would thus be flexible, its precise scope makes little difference as a legal matter, since the exception will be subject to strict scrutiny as a racial classification. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978).

Gender preferences are generally only used in hiring and contracting, so there is little need to justify denying them in admissions. As Glazer noted, "[W]hen it comes to women, there is simply no issue today when it comes to qualifying in equal numbers for selective institutions of higher and professional education." Glazer, *supra* note 88, at 20-21; *see also* Louis Katzner, *Is the Favoring of Women and Blacks in Employment and Educational Opportunities Justified, in* JOEL FEINBERG & HYMAN GROSS, PHILOSOPHY OF LAW 468 (4th ed. 1991). As Dean Herma Hill Kay noted, "[B]etween 1965 and 1985, the proportion of women students in ABA-approved law schools increased from four percent to forty percent." Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 11 (1991); *see also* Faye Weldon, *Where Women are Women and So are Men*, HARPER'S, May 1998, at 66-67.

Finally, as for public employment, it has already been recognized that by contrast to university admissions, the burdens of preferences in this context are not diffuse, but completely borne by a few individuals. *See supra* note 80. Beyond this, the public is entitled, absent a compelling interest such as operational need, to have the *best* qualified applicants selected for public employment. Such qualifications rarely, if ever, reduce to race or gender.

[90] The *Taxman* Brief defines "modest" as no more than one standard deviation. *See Amici Curiae* Brief at 17, *Taxman* (No. 96-679). For a discussion regarding the fifteen year

period, see Patterson, *supra* note 25, at 44-45.

The exclusion of graduate/professional school admissions is perhaps the most controversial aspect of the admissions exception. Although the Piscataway Brief qualifies the scope of the remedy sought in other sensible ways, for example, it insists that public graduate admissions be continued. *See Amici Curiae* Brief at 17, *Taxman* (No. 96-679). This is concededly valid in that even if the word "opportunity" does not properly apply to employment, it plausibly applies to graduate as well as undergraduate admissions. While this author does not quite agree that the case for preferences is nonexistent in the graduate context, it is submitted that our admissions exception would, for several reasons, properly stand less a chance of surviving constitutional challenge if it included graduate admissions. *See* Wilson, *supra* note 31, at 55.

First, the application of the word "opportunity" is more problematic at the graduate level than at the undergraduate level. While admission to a major law school or medical school may fairly be called an opportunity, it is just as plausible to say that individuals at that level have had their opportunity, four or more years worth as an undergraduate, to show what they can do. To the extent that admission to a major graduate or professional program is an opportunity, further, nonminority individuals also have a keen interest in attaining it. The use of race preferences at that level, after all, will often constitute the second time that such individuals have preferences used against them. In the admissions context, it must be kept in mind, the nonminorities forced to attend their second or third choice program may not be responsible for the achievement disparity between the races. Consequently, there must be some fair, reasonable limit on the sacrifices expected of them.

Second, the argument from diffuse burdens that supports preferences in undergraduate admissions but not in employment works in two directions. In the graduate context, those minorities denied admission to major programs due to a ban on race preferences are hardly being barred from becoming doctors or economists either—they too can just as well attend their second choice programs. One of the reasons why the need for minorities to serve underserved communities was properly rejected by the Court is because you need not attend UT Law or UCSF Medical School to serve in these areas. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310-11 (1978).

Third, the limitation of preferences to undergraduates could reasonably be expected to have some degree of "trickle up effect" on graduate schools. For example, an undergraduate student who has benefited from a race preference but who knows that it will be unavailable in the public graduate admissions and employment processes has both the incentive and the chance to "get up to speed" as an undergraduate. This is the student's opportunity. Thus, drawing the line at graduate admissions would help address the problem that the two track admissions system becomes a self-fulfilling prophecy, reducing blacks' incentives for developing needed skills. *See* Loury, *supra* note 41, at 55-56.

Finally, though the stigma argument is downplayed by preference proponents, it is effectively neutralized at the graduate level when race preferences are limited to the undergraduate level. Racial minorities admitted to top graduate programs that do not use preferences will not face the stigma of an "affirmative action admit," since not even a bigot will have grounds to assume that such an individual would not be there but for his race. As Glazer stated, "Those [minorities] who gain entry [to selective and elite student bodies with-

1. CONSTITUTIONAL ANALYSIS OF THE ADMISSIONS EXCEPTION

Assuming that a Proposition 209-based ban as amended by the university admissions exception is enacted into law in at least one state, would it withstand an equal protection challenge? In spite of its narrow focus, the exception employs an explicit race-based classification. It would, thus, be subject to strict scrutiny and have to be narrowly tailored to serve a compelling state interest.[91] As we know, "[I]nstitutions of higher education usually proffer two justifications for their race-based admissions preferences: remedying the present effects of past discrimination and creating a diverse student body."[92] Accordingly, these justifications will be addressed as applied to the university admissions exception.

For the remedial rationale to succeed, race preferences must be a response to identified discrimination within the specific governmental unit proposing to use the preferences.[93] To justify its preferences as a remedy for present effects of past discrimination, thus, a state must show a record of discrimination *against* racial minorities within the specific governmental unit proposing to use the preferences.[94] It is commonly known, however, that American universities have long employed admissions preferences *favoring* racial minorities.[95] The required proof would, thus, generally be unavailable, and the remedial rationale would not support the university admissions exception.

As for the diversity rationale, the Court in *Bakke* recognized the promotion of intellectual diversity as a compelling state interest to justify race-based preferences in public university admissions.[96] The diversity argument, thus, seems

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out preferences] will know that they are properly qualified for entry, that they have been selected without discrimination, and their classmates will know it too." Glazer, *supra* note 88, at 21; *see also* Loury, *supra* note 41, at 54.

[91] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986); *Bakke*, 438 U.S. at 305-20.

[92] Michelle Inouye, *The Diversity Justification for Affirmative Action in Higher Education: Is* Hopwood v. Texas *Right?*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 385, 387 (1997).

[93] *See supra* text accompanying notes 39-41.

[94] *See supra* text accompanying notes 39-41.

[95] *See, e.g., Bakke*, 438 U.S. at 265; Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Gratz v. Bollinger, 183 F.R.D. 209 (E.D. Mich. 1998)); *see also supra* note 25.

[96] *See Bakke*, 438 U.S. at 311-14.

to stand a better chance of supporting the university admissions exception than it does the law enforcement/corrections exception. Most of the present Court, however, is strongly disinclined to recognize the interest of promoting diversity *in any form* as sufficiently compelling to justify an explicit racial classification.[97] Even within the university context, the Court recently affirmed the Fifth Circuit's decision in *Hopwood v. Texas*,[98] which found that intellectual diversity is an inadequate compelling interest to justify race preferences in public university admissions.[99] Despite the rhetorical appeal that the promotion of diversity has in the context of higher education, therefore, it would likely not satisfy the ends prong of strict scrutiny before the present Court.[100] Conse-

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[97] *See supra* text accompanying notes 52-53.

[98] 78 F.3d 932 (5th Cir. 1996).

[99] As the Fifth Circuit wrote, "Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals." *Id.* at 945. This undercuts Professor Sandel's claim that "the moral force of the diversity argument is that it detaches admissions from individual claims and connects them to considerations of the common good." Sandel, *supra* note 11, at 16. As it will be demonstrated, detaching the distribution of public benefits from individual claims is a moral *weakness* within the liberal constitutional framework to which we are committed, not a moral strength. Thus, even if diversity were a compelling state interest, it would have to be so not because it detaches admissions from individual claims, but in spite of that fact.

A state might advance other forms of diversity as the goal to be served by race preferences. The interest in promoting cultural diversity, for example, seems plausible. *See, e.g.*, Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862-63 (1995). Not only would this approach uproot the diversity rationale from its thin basis of authority in *Bakke*, however, the state would need a convincing definition of "culture" that coincides with race, which would be difficult. It is not clear, for example, that a middle class American Black will always add more cultural diversity to a student body than will a working class white immigrant from Eastern Europe. Conversely, a rationale justifying preferences for a recent immigrant over those who, like their ancestors, have lived here their whole lives, would be highly suspect.

Nonetheless, if the state simply asserted that its goal is racial diversity for its own sake, race-based preferences would of course be narrowly tailored to advance their goal. As already suggested, however, the present Supreme Court would never recognize the promotion of racial diversity for its own sake as a compelling state interest. Unlike intellectual diversity, such a goal has no link to First Amendment values. Further, it is not clear that the benefits of mere racial diversity outweigh the costs to individuals denied admission to their first choice school solely because of their race.

[100] Further, even putting this problem aside, race preferences are not narrowly tailored to advance intellectual diversity, and so the university admission exception would fail the means prong as well. Here we come to one of preference advocates' most basic, yet weakest, assumptions, that diversity of race (or gender) significantly promotes diversity of

thought. *See, e.g.*, LYNCH, *supra* note 21, at 304; Judith Lichtman, et al., *Why Women Need Affirmative Action*, *in* THE AFFIRMATIVE ACTION DEBATE 181 (George E. Curry ed., 1996); Barry Rand, *Diversity in Corporate America*, *in* THE AFFIRMATIVE ACTION DEBATE 65-76 (George E. Curry ed., 1996); *Proposition 209 Lands on UC*, L.A. TIMES, Apr. 1, 1998, at B6. Leading preference proponents downplay this difficulty. *See, e.g.*, Brief of Charles Alan Wright, Douglas Laycock, and Samuel Issacharoff as *Amici Curiae* in Support of Respondent at 9, Piscataway Township Bd. of Educ. v. Taxman, (No. 96-679), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.). As Professor Bryden has stated, however,

> In my experience, students of color generally express the same sorts of ideas as whites. In over 20 years of teaching racially diverse law-school classes, in controversial public-law fields like constitutional law and criminal law, as well as private-law fields like contracts and torts, I can recall only one class comment by a member of a racial minority that was noticeably different from what one might expect from a white student of the same ability and political orientation. [Further, t]here is no "black perspective" on bills of lading, just as there is no "Hispanic approach" to pancreatic cancer or "Asian insight" into the Articles of Confederation.

Bryden, *supra* note 80, at 54.

The Court is, thus, skeptical. In Justice O'Connor's words, "[T]he Constitution provides that the government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think . . . . [T]he interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior." Metro Broad., Inc. v. Federal Communications Comm'n, 497 US. 547, 602, 615 (1989) (O'Connor, J., dissenting); *see also* Fullilove v. Klutznick, 448 U.S. 448, 533-35 (1980) (Stevens, J. dissenting).

Even assuming that race preferences significantly advance intellectual diversity, it is not clear that this benefit is not outweighed by the cost that preferences pose to the openness of a university's intellectual atmosphere. As Bryden wrote,

> [T]he net effect of affirmative action is not to promote robust classroom debates but, rather, to strengthen the dominance of politically correct orthodoxies . . . . [W]ithin the major universities, where the culture is already dominated by the Left, blacks simply reinforce white-liberal orthodoxies concerning race. Not only that: The constant threat of accusations of "racism" inhibits most white students and professors from expressing alternative or conservative views abut racial issues.

Bryden, *supra* note 80, at 53; *see also* LYNCH, *supra* note 21, at 317; Shelby Steele, *A Negative Vote on Affirmative Action*, *in* DEBATING AFFIRMATIVE ACTION 40 (Nicolaus Mills ed., 1994); Cohen, *supra* note 25, at 40; Glazer, *supra* note 88, at 24; James Q. Wilson, *The Meaning of Fewer Minorities at UC, UCLA*, L.A. TIMES, Apr. 5, 1998, at M6. As Justice O'Connor stated, "[U]nless [race classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial

quently, the Court would be unlikely to uphold the university admissions exception against an equal protection challenge.

2. THE "POLITICAL REALITY" RATIONALE

The standard justifications of remedying the effects of discrimination and promoting diversity, thus, seem unlikely to save the university admissions exception against equal protection challenge. As with the law enforcement/corrections exception, some other rationale would be required to support it. An alternative justification for preferences in public university admissions has emerged, and it resembles the operational need doctrine. Nathan Glazer provides a useful guide into this argument, which may be aptly called the political reality rationale. Glazer has observed that

> opponents of affirmative action say, "Let standards prevail whatever the result." So what if black students are reduced to two percent of our selective and elite student bodies? . . . The result will actually be improved race relations and a continuance of the improvements we have seen in black performance in recent decades. Fifteen years from now, perhaps three or four percent of students in the top schools will be black. Until then, blacks can go to less competitive institutions of higher education, perhaps gaining greater advantage from their education in so doing.[101]

In response to these opponents, Glazer has stated that

> we can not be so cavalier about the impact on public opinion—black and white—of a radical reduction in the number of black students at the Harvards, the Berkeleys, and the Amhersts. These institutions have become, for better or worse, the gateways to prominence, privilege,

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hostility." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring); *Metro Broad.*, 497 U.S. at 613 (O'Connor, J., dissenting); Chavez, *supra* note 41, at 325.

Even assuming that race preferences advance more than they impede intellectual diversity, this diversity will not be lost by ending race preferences. As Chavez noted, the minorities thus displaced will simply attend second or third tier schools, adding diversity there. *See* Chavez, *supra* note 25, at 21; Lynch, *supra* note 10, at 153. To the extent that racial diversity advances intellectual diversity, thus, the latter can be achieved through less discriminatory means than race preferences in admissions.

[101] Glazer, *supra* note 88, at 21.

> wealth, and power in American society. To admit blacks under affirmative action no doubt undermines the American meritocracy, but *to exclude blacks from them by abolishing affirmative action would undermine the legitimacy of American democracy.*[102]

The first part of the political reality rationale, like the operational need doctrine, emphasizes racial minorities' perception of authority. In the admissions context, the perception is that by ending race preferences, top public universities are deliberately excluding racial minorities, thus, reinforcing white oligarchy.[103] Like the operational need rationale, the political reality argument proceeds to emphasize the predicted *consequences* of the minority perception. In his defense of preferences, University of California at Berkeley Chancellor Chang-Lin Tien has alluded to such consequences. In his view,

> [N]o matter how educators respond to the sociodemographic transformation, universities will diversify sooner or later. If we fail to take the lead, elected politicians are sure to take over. *That is a political reality.* . . . [M]inority or not, all lawmakers in a *democracy* understand the basic political rule of survival: Keep your constituency happy. With their increased political clout, minority Californians can—*and should*—demand that colleges and universities serve them.[104]

The *Amici Curiae* Brief submitted by Charles Alan Wright, Douglas Lay-

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[102] *Id.* at 21, 24 (emphasis added). As the *Taxman* Brief asserted, "A large public institution that serves the whole state cannot maintain its *legitimacy* if it is perceived to exclude minority citizens." *Amici Curiae* Brief at 14, *Taxman* (No. 96-679). Professor Randall Kennedy suggested that "race selective and gender selective affirmative action is the best available way to continue the process of *deepening our democracy.*" Randall Kennedy, SYMPOSIUM, *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 35 (emphasis added). As Inouye added, "[A]n appreciation of diversity helps avert . . . any idea that white supremacy governs our social institutions." Inouye, *supra* note 92, at 410; *see also* Tom Mauro, *Report: Minorities Not Reaching Top Legal Levels*, USA TODAY, Aug. 5, 1998, at 3A; William Raspberry, *A Shot in the Foot for Texas*, WASHINGTON POST, Nov. 3, 1997, at A21.

[103] As Glazer wrote, "Applying strict meritocratic principles . . . would deliver a terrible message to blacks . . . ." Glazer, *supra* note 22, at 30.

[104] Chang-Lin Tien, *Diversity and Excellence in Higher Education*, *in* DEBATING AFFIRMATIVE ACTION 241-42 (Nicolaus Mills ed., 1994) (emphasis added). Let us not miss Chancellor Tien's apparent assumption that the only way to serve racial minorities is through race preferences, nor how smoothly he moves from an empirical observation to a normative conclusion without addressing the principles at stake in such a move.

cock, and Samuel Issacharoff in *Piscataway Township Board of Education v. Taxman*,[105] is more specific about the consequences of negative minority perception.[106] It states that

> [i]f affirmative action is ended, inevitable political, economic, and legal forces will pressure the great public universities to lower admissions standards as far as necessary to avoid re-segregation. Barring a miraculous improvement in elementary and secondary education for minority students, *color blind admissions will soon produce either public universities without competitive admissions, without adequate funds, or both.*[107]

Therefore, the predicted consequences of a ban on race-based admissions preferences include decreased funding and lower admissions standards at major public universities. To illustrate how funds might dwindle, Texas State Assemblyman Ron Wilson has threatened that if the University of Texas cannot counteract the effect of *Hopwood* on minority admissions to the University of Texas Law School, "We're going to move the money to follow the students to historically black colleges, if necessary."[108] As for the specter of less competitive admissions, the Texas legislature has already introduced two bills in response to *Hopwood*.[109] One bill guarantees University of Texas admission to any Texas high school student graduating in the top ten percent of his class, and the other requires Texas universities to use the same minimum grade point average for all applicants, including scholarship athletes.[110] As an author of the *Taxman* Brief commented on these developments, "We're in the middle of a full-blown attack on every means we have to measure merit and on the very idea of merit, and it's mostly driven by the issue of race."[111] Under an implicit

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[106] *See Amici Curiae* Brief at 14, *Taxman* (No. 96-679).

[107] *Id.* (emphasis added).

[108] Traub, *supra* note 50, at 21 (quoting Texas Assemblyman Ron Wilson).

[109] *See* TEX. EDUC. CODE ANN. §§ 51.803, 51.9245 (West 1998).

[110] *See* Traub, *supra* note 50, at 20.

[111] Traub, *supra* note 50, at 21 (quoting Professor Douglas Laycock of University of Texas Law School). For Traub, this means that "in a straightforward battle between the old meritocratic principle on which conservatives make their stand and the new ideals of diversity and inclusion, meritocracy is likely to lose." *Id.*

cost/benefit analysis then, the political reality argument urges that the benefits of a ban on public admissions preferences are outweighed by its costs: if racial minorities' perceptions are not taken seriously, *there will be hell to pay*.

Therefore, like the operational need rationale, the political reality argument seeks an exception to the Fourteenth Amendment's strong presumption against public race preferences absent a compelling remedial need. Just as the Sixth Circuit spoke of "the social-political reality that required a higher percentage of black officers to be made a part of the [Detroit Police] Department,"[112] this reality also requires more minorities in top public universities than would be achieved without race preferences. Adherence to minority perceptions and their consequences, namely the deterioration of the public universities that the constitutional founders knew to be crucial to the success of popular government,[113] is thus a compelling state interest. Since the university admissions exception is narrowly tailored to advance this interest,[114] the argument would conclude then, as long as the preferences are used within an open, judicially reviewable[115] and, thus, publicly accountable process, it should survive an equal protection challenge.

This argument is not without merit. The question, however, is whether it would prevail over the considerations that support a ban on all public race preferences, and there are significant hurdles to that outcome in this context.

As for perception, appearances concededly sometimes matter. So long as we call ourselves a democracy, which in all its forms is presumptive rule by the many, some account must be taken of popular perception of the legitimacy of public authority. At the same time, such perception can clearly be no routine basis for constitutional interpretation. In 1954, a majority of the Kansas

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[112] Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979).

[113] *See, e.g.*, John Adams, *Dissertation on the Canon and Feudal Law*, *in* THE JOHN ADAMS PAPERS 17 (Frank Donovan ed., 1965); Thomas Jefferson, *Report of the Commissioners Appointed to Fix the Site of the University of Virginia, August 1, 1818*, *in* JAMES B. CONANT, THOMAS JEFFERSON AND THE DEVELOPMENT OF AMERICAN PUBLIC EDUCATION 128-29 (1962); James Madison, *Letter to Samuel S. Lewis, February 16, 1829*, *in* LETTERS AND OTHER WRITINGS OF JAMES MADISON 30-31 (Frank Rives & Louis Fendall eds., 1884); George Washington, *First Annual Message, August 1, 1790*, in THE WRITINGS OF GEORGE WASHINGTON 493 (Lawrence Fitzpatrick ed., 1931-1940).

[114] Again, it allows only "modest" preferences, for race, for undergraduate admissions, and for a limited time.

[115] *See* Brief of Charles Alan Wright, Douglas Laycock, and Samuel Issacharoff as *Amici Curiae* in Support of Respondent at 16-21, Piscataway Township Bd. of Educ. v. Taxman (No. 96-679), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.).

legislature and public apparently thought that an individual's educational opportunity properly depended on his or her race.[116] Chief Justice Earl Warren was nonetheless "cavalier" about that perception, so those who advance the political reality argument today seem committed to the position that *Brown v. Board of Education* was wrongly decided.[117] Thus, while democracy necessarily embodies presumptive rule by a majority, it is far more than mob rule.[118]

As with the law enforcement/corrections exception, however, the consequences of the minority perception are at least as important as the perception itself in determining the permissibility of public race preferences. Therefore, I

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[116] *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

[117] *See id.*; *see also* Palmore v. Sidoti, 466 U.S. 429 (1984). In *Palmore*, the Court ruled that public perception of a black stepfather for a white child was not dispositive in allocating the constitutional rights of the parties involved. *See Palmore*, 466 U.S. at 433. The point can also be made through a symmetric application of an argument in *favor* of race preferences by Professor Kennedy. *See* Kennedy, *supra* note 73, at 1330. In response to the claim that such preferences should not be used because they exacerbate racial resentments, he asserted that "[g]iven the apparent inevitability of white resistance . . . proponents of racial justice should be wary of allowing fear of white backlash to limit the range of reforms pursued." *Id.* As a general matter, of course, Kennedy has a point: if you are sure you are advancing the cause of justice, forge ahead. If you believe, however, that justice consists in ending rather than continuing the allocation of public benefits based on race, then the threat of backlash by those who disagree should not be a deterrent to pursuing the goal. Moreover, to the extent that minority perception is a valid consideration, the Court's allowance of the law enforcement/corrections exception would mollify it to some degree.

[118] *See, e.g.*, Ramona Ripston, *ACLU Files Suit Against Prop. 209: Why We Don't Live in a "Mob-ocracy,"* ACLU OPEN FORUM, Jan. 1997, at A1. If majority will as expressed through the vote on Proposition 209 was insufficient to place that measure beyond the reach of strict scrutiny, then alleged minority perceptions of democratic illegitimacy can hardly be allowed to dictate the constitutionality of a facially race-based classification. On this point, the *Taxman* Brief's claims about the pervasiveness of negative minority perception in Texas would have more credibility had a measure like Proposition 209 been placed on the ballot there but defeated. *See Amici Curiae* Brief at 14, *Taxman* (No. 96-679). Claims of the magnitude of that perception, thus, seem speculative.

Popular perception, further, is a multifaceted phenomenon. It, thus, seems fair to ask about the significance of the common view, in Terry Eastland's words, that "'minority' plus 'affirmative action' equals 'lower standards.'" Eastland, *supra* note 43, at 26.

Finally, and perhaps most critically, the *Taxman* Brief concedes that the minority perception that discrimination is always at work, even where race preferences in admissions are banned, is mistaken. *See Amici Curiae* Brief at 14, *Taxman* (No. 96-679). That a mistaken minority viewpoint should be sufficient to support an exception to the long-standing impermissibility of public racial classifications absent a compelling remedial interest seems a difficult thesis to sustain.

will assess the consequences of the Court's refusal to uphold the admissions exception and whether avoiding these consequences is a compelling state interest which is permissibly advanced by the exception.

First, a distinction must be made between violent and nonviolent consequences. As for the former, University of Texas Law Professor Russell Weintraub warns that

> [i]f the majority of people in this state are going to be Mexican-American and African American, and they are going to assume many of the leadership roles in the state, then it's going to be big trouble if the law school doesn't admit many minority students—it's going to be a bomb ready to explode.[119]

Such an image suggests the serious threats to public safety caused by things such as riots, which justify employing race preferences in the law enforcement/corrections context. This specter, the political reality argument might proceed, also justifies partial resort to Machiavellian methods in the public admissions context.[120]

The prospect of violent consequences, however, does not require much consideration. A regime in which threats of organized violence determine the constitutionality of public policy hardly embodies the "democratic legitimacy" that so concerns preference advocates.[121] A necessary condition for any semblance

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[119] Traub, *supra* note 50, at 20 (quoting Vermont Law School Professor Russell Weintraub). As Jeremy Raskin added, we must retain preferences "unless we want to descend to the level of tribal conflict and competition seen in Bosnia or Lebanon." Jeremy Raskin, *Society Needs Affirmative Action*, *in* AT ISSUE: AFFIRMATIVE ACTION 34 (Andrew E. Sadler ed., 1996); *see also* Manning Marable, *Staying on the Path to Racial Equality*, *in* THE AFFIRMATIVE ACTION DEBATE 15 (George E. Curry ed., 1996).

[120] *See supra* notes 77-78 and accompanying text. The idea is that the goal is so important that it may properly be advanced by any means necessary, whether or not consistent with democratic principles.

[121] In contrast to the spontaneous, disorganized riots stemming from perceptions of race-based police misconduct, thus, the violent protest of a Court decision invalidating the admissions exception would involve a deliberate *choice* to descend from the civil to the criminal realm. Though the political reality argument seems to advance a practical, "least bad," solution to the problem of minority under-representation at top public universities, such choices cannot, as a practical matter, routinely drive constitutional interpretation. In the admissions context, acquiescence to threats of violence would send the message that such threats are both necessary and sufficient for those groups that could prevail neither at the ballot box nor in constitutional court to achieve their policy goals. This, in turn, would justify those who are disfavored by race preferences to react with their own violence. Far from promoting democracy, we are thereby abandoning it in arguably the last place where Machiavellian rather than democratic principles should control, namely higher education.

of constitutional democracy is an independent judiciary that cannot be intimidated by such threats.[122]

Thus, in assessing whether the political reality argument should prevail, we may limit ourselves to consideration of the predicted *nonviolent* consequences of a ruling against the admissions exception.[123] Upon analysis, however, even these prospects would provide little support for the university admissions exception.

We must recall that the justification for race preferences in the law enforcement and corrections contexts is not present in the case of firefighters and schoolteachers.[124] The same is true of race preferences in undergraduate admissions. Compared to the number of minorities who confront predominantly white police forces or even fire departments in their neighborhoods, relatively few minorities are directly confronted with racial disparities at public universities. Even for those minorities who are so confronted, whites and Asians hardly have a monopoly on the legitimate use of force in the university environment. Therefore, the admissions context simply does not pose the urgency underlying the operational need rationale.

Further, when the focus is on the nonviolent consequences of a ruling against the admissions exception, the ultimate justification for race preferences in the law enforcement/corrections context is unavailable. We are no longer in the criminal realm, at the threshold of the Hobbesian state of nature, where we must take our bearings primarily from human fear, ignorance, and greed.

Paraphrasing Professor Laycock in another context, those who propose that the constitutionality of state or federal policy can properly be influenced by threats of force "deny one of the fundamental premises of the polity, and consequently make themselves irrelevant." Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 773-74 (1987).

[122] *See* Cooper v. Aaron, 358 U.S. 1, 15-16 (1958). The *Taxman* Brief, it should be noted, cited *Wittmer v. Peters* in support of its conclusion insofar as preferences in both cases are supported by the "product enhancement" theory. *See Amici Curiae* Brief at 20, *Taxman* (No. 96-679) (citing Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996)). Yet, the *Taxman* Brief does not elaborate the meaning of this theory. *See id. Wittmer*, further, is a narrow ruling cautiously limited to its facts. *See Wittmer*, 87 F.3d at 920. As Ashutosh Bhagwat thus noted, Judge Posner provided little guidance on the contours of the operational need doctrine for other cases. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 342-43 (1997). Application of the operational need doctrine to the admissions context thus requires a showing that public institutions like state universities may properly be treated on principles applicable to prisons.

[123] These consequences include lower funding and admissions standards at top public universities. *See supra* notes 108-111 and accompanying text.

[124] *See supra* notes 69-71 and accompanying text.

Rather, since we are within the domain of "democratic legitimacy," we may rely on the human capacities for reason, compromise, and adherence to the rule of law—democratic citizenship.[125] Those who do not prevail in court but who profess allegiance to democracy may be expected to limit themselves to civil forms of resistance.[126]

As reasonable a compromise as the university admissions exception embodies, thus, the Court would find that allowing such race preferences in the admissions context would place affirmative action on a slippery slope that barely supports the operational need argument. Accepting the political reality justification would mean sliding down the slope. Even beyond the judicial tendency to allow legal change only incrementally, the Court would have ample grounds to draw the line of permissibility between the law enforcement/corrections exception and the university admissions exception. At oral argument, accordingly, the Court would challenge the state's assessment of the dangers as well as its democratic rhetoric. The Court might say to a state Attorney General,

> You come here and declare, "there is a gun to our heads, and the Court must allow this exception or our great public universities will deteriorate." You thus act as though this is all beyond your control, but it looks to us like the gun is basically in your own hands, that you're the ones holding yourselves hostage with predictions of decreased funds and standards. Well, we're inclined to call your bluff, to strike down this explicit racial classification, and to see how your great state responds in the exercise of self government. You say you value democracy? You've got it.[127]

The Court's doubts that public universities would deteriorate if admissions

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[125] As Professor Walzer reminds us, "[D]emocratic government is not the direct rule of mobilized citizens. Mobilization stops well short of decisionmaking . . . . [D]eliberation should be the determining factor—that is, public debate and negotiation. Democracy depends on a culture of argument and compromise in which ideals and interests are defended intellectually and then bargained politically." Michael Walzer, *Crass Demos*, THE NEW REPUBLIC, June 8, 1998, at 11.

[126] Once again, immutable traits are generally a permissible basis for differential treatment by government only where core police power concerns like public health and safety are implicated.

[127] The political reality argument also would not do well before this Court since, as Professor Bhagwat noted, the Court has come in recent years to focus more closely on the ends of government, on the purpose prong of strict scrutiny. *See* Bhagwat, *supra* note 122, at 301.

preferences were not allowed would be well founded. First, powerful groups such as faculty and alumni would likely oppose the deliberate abandonment of high admissions standards.[128] Further, the "dual mission" argument, which urges that top public universities cannot effectively pursue excellence unless they also provide service to all major racial groups within the state,[129] is speculative and not obviously true. This claim, in fact, seems like a thinly veiled attempt to smuggle in the "excellence only if racial diversity" argument, which we have seen the Court previously reject.[130] Further, while the numbers of minority students at top public universities would temporarily decrease if the race preferences were not allowed, they would increase at the lower tier public universities, thereby promoting racial diversity in those schools.[131] Therefore, the claim that a ban on race preferences "bars the schoolhouse door for minorities"[132] is without merit.

Moreover, even beyond these considerations, there is a much deeper flaw in the political reality argument. That argument conceives justice primarily in terms of social group relations, which amounts to a doctrine of *group rights*. At the core of liberal democracy, however, is the principle that the *individual* is the locus of civil rights such as equal protection.[133] Although the individual-

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[128] As Eugene Volokh noted, "Most U.C. professors don't want to teach at a community college." Rosen, *supra* note 71, at 62 (quoting Eugene Volokh); *see also* Puddington, *supra* note 21, at 49.

[129] *See* Brief of Charles Alan Wright, Douglas Laycock, and Samuel Issacharoff as *Amici Curiae* in Support of Respondent at 10-13, Piscataway Township Bd. of Educ. v. Taxman (No. 96-679), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.). As Professor John Yoo of Boalt Hall commented on the pragmatic nature of this link, "I didn't realize until Proposition 209 went into effect that affirmative action, as it was applied by the schools, allowed you to have some racial diversity and at the same time to maintain intellectual standards for the majority of your institutions . . . . It was a form of limiting the damage." Rosen, *supra* note 71, at 64 (quoting Professor John Yoo).

[130] *See supra* text accompanying notes 97 & 99; *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

[131] *See* Chavez, *supra* note 25, at 21; Graglia, *supra* note 11, at 32.

[132] Remarks of the Reverend Jesse Jackson on the Ronn Owens Program (KGO radio San Francisco, Sept. 11, 1997). This confusion of the elimination of race preferences with the deliberate exclusion of minorities based on race is a common fallacy of the affirmative action establishment. A variation is the reference to the effect of Proposition 209 as "re-segregation." *See, e.g.*, Paterson, *supra* note 88, at A23. This is misleading since "segregation" implies deliberate separation of the races by law, not lower numbers of minorities at prominent institutions as a byproduct of a race-neutral admissions policy.

[133] The individualist principle is key to both classical and modern liberalism, *see* David

ist principle would likely not prevail in relation to the law enforcement/corrections exception, it would properly prevail in the Court's assessment of the admissions exception.

The text of the Fourteenth Amendment specifically provides that "no State shall deny *any person* . . . equal protection of the laws."[134] Whatever preference advocates may insinuate about the framers' intent to provide less protection for specific groups, the constitutional text plainly provides that the individual human being, regardless of race or gender, is the locus of Fourteenth Amendment rights.[135] Consequently, the Supreme Court's case law has con-

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Smith, *Liberalism*, *in* 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 280 (1968), and the United States Constitution plainly embodies a regime of liberal democracy, *see, e.g.*, U.S. CONST. art. I, § 10 (freedom of contract); *id.* art. I, § 8, cl. 3 (a market economy); *id.* amend. I (religious toleration). As Dean Brest wrote, "If a society can be said to have an underlying political theory, ours has not been a theory of organic groups but of liberalism, focusing on the rights of individuals . . . ." Paul Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 49 (1976).

The Constitution also contains elements of republicanism, of course, but modern republicanism is essentially representative democracy. Preference advocates who rely in their work on Aristotle, the fount of classical republicanism, might, thus, think to advance his theory of distributive justice in support of preferences. *See, e.g.*, Murray, *supra* note 86, at 1081-82. At first glance, this seems plausible. Aristotle wrote that while the goal of democracy is liberty, its conception of justice is equality. *See* Aristotle, *Politics*, *in* THE COMPLETE WORKS OF ARISTOTLE 2091 (Jonathan Barnes ed., 1995). He further distinguished retributive justice, a judicial function, which demands arithmetic equality of treatment of individuals (i.e., among all litigants in civil court or among all defendants in criminal court) from distributive justice, a legislative function, which involves proportional equality of treatment. *See* Aristotle, *Nichomachean Ethics*, *in* THE COMPLETE WORKS OF ARISTOTLE 1783-87 (Jonathan Barnes ed., 1995). Under proportional equality, government may treat individuals differently based on differences in their contribution to the state. Modern examples include bestowal of the Congressional Medal of Honor on distinguished individuals and special tax breaks for charitable organizations. Since the enactment of a Proposition 209-based reform, whether by statute or ballot initiative, is a legislative rather than judicial act, preference advocates might claim that distributive justice allows preferences for members of certain groups in the distribution of public benefits. Given our discussion of the diversity rationale, however, I submit that preference advocates cannot show that differences in contribution to the state are ever, with rare exceptions like the law enforcement and corrections contexts, a function of race or gender. Such an assumption, in fact, is, in principle, indistinguishable from the thinking which underlay Jim Crow laws, in which an individual's worth, and thus his treatment by government, were determined in the first instance by reference to his immutable traits.

[134] U.S. CONST. amend. XIV (emphasis added). Since we are in the era of the new property, in which public benefits have assumed the status historically accorded to common law property rights, *see* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964), equal protection means equal consideration of each individual applicant for those benefits.

sistently stressed the individual focus of equal protection.[136]

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[135] The equal protection clause has, thus, been called "the single most important concept in the Constitution for the protection of *individual rights*." JOHN NOWAK & RICHARD ROTUNDA, CONSTITUTIONAL LAW 568 (1991) (emphasis added). Nonetheless, Galloway and Bird have written that "[p]rotecting whites was certainly not the core purpose of the equal protection clause." ROBERT GALLOWAY & ROSE BIRD, A STUDENT'S GUIDE TO BASIC CONSTITUTIONAL ANALYSIS 167 (1996). While this is valid as stated, it obscures rather than clarifies matters. The Framers' core purpose, as indicated by the language they chose to carry it into effect, was to protect "any person," that is, *everyone*, from improper discrimination by government. Had they intended more or less protection for specific groups, as Professor Erler notes, the Framers could certainly have found the words to do so. *See* Edward Erler, *Affirmative Action Redidivus*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 15, 36 (1997). Even putting aside the text, and assuming that protecting Blacks was a "core purpose" of the Fourteenth Amendment, this premise establishes special protection neither for women, *see* Ruth Bader Ginsberg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161-63 (1979), nor for other racial minorities.

The genius and moral authority of the Fourteenth Amendment, thus, lie precisely in the fact that it forces government to consider its actions from the perspective of the individual. The individual, after all, almost always has less power than does the group, and it is the individual human being that suffers the impact of state action on his vital interests. As Professor Rawls has thus argued, rational, civic minded individuals in the original position would not, in establishing the principles by which they would be governed, agree to sacrifice the individual against his will. *See* JOHN RAWLS, A THEORY OF JUSTICE 184-89 (1971). Moreover, the sacrifice is not being asked during a temporary emergency, but for several years if not indefinitely, so that entire careers are to be sacrificed based solely on immutable traits. For a compelling elaboration of this point, see Bradley, *supra* note 22, at 104; Epstein, *supra* note 25, at 28.

Some preference advocates nonetheless seem to assume that the founders' concerns and the meaning of constitutional democracy are exhausted by the "Madisonian dilemma" of majority rule versus minority rights. *See, e.g.*, David Oppenheimer, *King's "Letter From Birmingham Jail" and Affirmative Action*, SAN FRANCISCO EXAMINER, Apr. 10, 1998, at A21. In fact, Madison argued that the biggest threat to liberty is faction, *whether majority or minority*. *See* THE FEDERALIST NO. 10, at 82-84 (James Madison) (Clinton Rossiter ed., 1961). Preferences based on immutable traits, thus, embody both types of threat to the individual: in combination with women, racial *minorities* constitute a *majority* faction. This is not to say that minority group *interests* are entitled to no consideration in a democratic regime. The two poles that anchor modern democracy, however, are majority rule and individual rights, which necessarily implicate each other: the legitimacy of majority rule derives largely from the political equality among individual citizens. *See* LAWRENCE HERSON, THE POLITICS OF IDEAS 46 (1984). Group rights, by contrast, are simply too amorphous, free floating, and unhinged to ground democracy. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298-99 (1978). To place group interests above majority rule or individual rights (here, the right to equal protection of the laws) is thus to turn democracy on its head, into fascism. *See infra* notes 137-140 and accompanying text.

[136] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); City of

The Court's precedents, however, are supported by far more than constitutional text. As an historical matter, doctrines of group rights are at the core of discredited modern collectivist regimes. As Martin Riff once wrote, "[F]ascist regimes . . . placed great emphasis on their ability to provide for the interests of special groups in society."[137] Hans Kohn added that Twentieth Century European fascism "represented in all its forms a total repudiation of the liberal ideas of the seventeenth- and eighteenth-century revolutions and of the rights of the individual."[138] Further, Dean Brest has observed that "[most] societies in which power is formally allocated among racial and national groups are strikingly oppressive, unequal, and unstable."[139] This is not surprising, for claims of group rights are claims of inequality, not equality, and therefore, they are a

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Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 265, 281 n.8 (1986); *Bakke*, 438 U.S. at 289; Shelley v. Kraemer, 334 U.S. 1, 22 (1948). One of the most basic judicial functions, after all, is the protection of the rights of unpopular individuals from the reach of the mob. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting). As Justice Powell, thus, observed in *Bakke*, "there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making." *Bakke*, 438 U.S. at 298. Even Justice Brennan, writing for the wing of the Court which would have upheld the U.C. Davis quota system, conceded that "legal burdens should bear some relationship to individual responsibility or wrongdoing." *Id.* at 360-61 (Brennan, J., concurring) (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)).

Richard Kahlenberg claims that it is difficult to know what it is to treat people as individuals since, for example, allocating university seats based on SAT scores is to treat individuals based on the group they fall into. *See* Kahlenberg, *supra* note 86, at 27. This is an intriguing objection, but it does not prevail. The individualist principle requires that benefits be dispensed based on the accomplishments and abilities, in a word, the merit, of the individual applicant. Unlike membership in groups determined by immutable traits, an SAT score largely reflects the efforts and abilities of the individual, things over which he has significant control. Even granting that the SAT is not a perfect measure of these factors, this premise provides no support for the claim that race and gender are better or even equivalent bases for allocating university seats. On the question of standardized tests as measures of merit, see Glazer, *supra* note 88, at 19; Wilson, *supra* note 100, at M6; Adrian Woolridge, *A True Test*, THE NEW REPUBLIC, June 15, 1998, at 18. For a response to the claim that objective merit is an unqualified illusion, see Midge Decter, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 25.

[137] Antony Polonsky, *Fascism*, *in* DICTIONARY OF MODERN POLITICAL IDEOLOGIES 103 (Martin Riff ed., 1987).

[138] Hans Kohn, *Nationalism*, in 3 DICTIONARY OF THE HISTORY OF IDEAS 331 (1973); *see also* ZEEV STERNHELL, THE BIRTH OF FASCIST IDEOLOGY 6 (1994); Abram, *supra* note 17, at 1322.

[139] Brest, *supra* note 133, at 50.

source of division, not unity.[140]

As a further illustration of the collectivist basis of the political reality argument's emphasis on group rights, we shall consider the phrase "equality of opportunity." Preference advocates use this phrase as a mantra,[141] and understandably so, because everyone supports equality of opportunity. This ideal is among the core, market-related values of classical liberalism.[142] Liberalism, however, also disdains the arbitrary treatment of individuals.[143] Thus, equal opportunity on a liberal understanding exists within the *process* by which it is decided who shall receive scarce public benefits. This process must be as free as possible from the influence of arbitrary factors such as race and gender, for with rare exceptions such as policing or corrections, these traits are irrelevant to one's ability to perform the work expected of the successful applicant for public benefits.[144]

For many preference advocates, however, "equality of opportunity" exists not in the *means* by which benefits are distributed, but in the *goal* of proportional representation.[145] Only once women and minorities have received bene-

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[140] *See* Leslie Lenkowsky, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 37. As Professor Bickel wrote, "The history of the racial quota is a history of subjugation, not beneficence . . . . [It is] a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975). Though he refers to quotas, Bickel's comments apply to preferences as well insofar as the effect of either is the same for the individual denied a public benefit as a result of its use.

[141] *See, e.g.*, Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1493, 1496-97 (N.D. Cal. 1996); Greenberger, *supra* note 30, at 14, 19; Lyndon B. Johnson, *To Fulfill These Rights*, *in* THE AFFIRMATIVE ACTION DEBATE 18 (George E. Curry ed., 1996); Lichtman, *supra* note 100, at 175.

[142] *See, e.g.*, EDWARD GREENBERG, THE AMERICAN POLITICAL SYSTEM: A RADICAL APPROACH 42-46 (1997); Smith, *supra* note 133, at 278. Disagreement with those who claim to seek nothing more than equality of opportunity for women and minorities can thus be portrayed as sexism or racism.

[143] *See* Smith, *supra* note 133, at 276.

[144] As conceded above, efforts like aggressive outreach to members of targeted groups in the *preselection* process of soliciting applications for public benefits usually pose no Fourteenth Amendment difficulties. Such efforts properly seek to ensure that, regardless of race and gender, any individual who might be best qualified for a scarce, valuable benefit knows about and has the opportunity to apply and be fairly considered for it.

[145] *See* CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE 139-40 (1996).

fits in rough proportion to their percentages of the population, do they have the opportunity to show that they can do the job.[146] Since the goal is so urgent, it becomes unimportant whether the means by which it is achieved complies with the Fourteenth Amendment. Therefore, far from *advancing* equality of opportunity, race and gender preferences in the process of deciding which applicants shall receive scarce public benefits directly *undermine* equal opportunity for those individuals with the wrong immutable traits.

Proportional representation as secured by race or gender preferences embodies equality of *result*, not equality of opportunity.[147] This is radical equality, characteristic of socialism, not liberal democracy,[148] and group preferences have yielded the concrete symptoms of modern collectivist regimes. Many commentators have noted that the simultaneous enforcement and denial of race and gender preferences demanded by the current system entails lying and hypocrisy on the part of public institutions.[149] Such practices are inconsistent with and are, in fact, a threat to the open society for which liberal democratic safeguards such as the First Amendment provide.[150] As Dean Brest has stated, "[I]t seems reasonable to place the burden on proponents of a theory of group racial justice to show that it is morally tenable and consistent with other values that we cherish."[151]

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[146] *See id.*

[147] *See* Lenkowsky, *supra* note 140, at 36; GEORGE EDWARDS ET AL., GOVERNMENT IN AMERICA 133 (8th ed. 1998). President Johnson explicitly called for equality of result in his 1965 Howard University commencement speech. *See* Johnson, *supra* note 141, at 17-18.

[148] *See* GREENBERG, *supra* note 142, at 23; Abram, *supra* note 17, at 1312-13; Brest & Oshige, *supra* note 99, at 2.

[149] *See, e.g.*, THERNSTROM, *supra* note 22, at 52; William Bennett, SYMPOSIUM: *Is Affirmative Action on the Way Out? Should it be?*, *in* COMMENTARY, Mar. 1998, at 20; Cohen, *supra* note 8, at 23; Podhoretz, *supra* note 8, at 46.

[150] As John O'Sullivan observed, "[D]emanding assent to the lie . . . has been a feature of totalitarian rather than democratic societies." O'Sullivan, *supra* note 43, at 42. Speaking of closed societies, Paul Roberts and Lawrence Stratton have noted that race and gender preferences reestablish the status-based privileges of *feudalism*, the static, oppressive form of social, economic and political organization to which classical liberalism was largely a response. *See* PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY 127-32 (1995).

[151] Brest, *supra* note 133, at 50. Though we have focused on the textual, precedential and historical problems with group rights, they present practical difficulties as well. For example, the demand for proportional representation implies the possibility of *overrepresentation* of particular races. *See* Nathan Glazer, *Diversity Dilemma*, THE NEW REPUBLIC, June 22, 1998, at 11. Since Asians and Jews attend top public universities in higher per-

In its embrace of group rights, the political reality argument emphasizes superficial appearances in pursuit of the seeming interests of some members of some groups.[152] While such a focus is a perennial feature of democratic *poli-*

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centages than their share of the general population, preference advocates seem inescapably committed to the use of race preferences against them in the admissions context, yet such advocates do not seem to have owned up to this implication. Further, as Robert Harwood observed, Blacks are over-represented as public school teachers in predominantly Hispanic areas of Los Angeles, *see* Harwood, *supra* note 86, at A21, and, thus, those who insist on proportional representation must favor terminating many of these teachers based solely on their race. Similarly as Professor Graglia noted, Jews are represented on public university and professional school faculties well beyond their proportion of the general population. *See* Graglia, *supra* note 11, at 32. To be consistent, then, group rights advocates must also support sorting applications by Jews for such positions into the disfavored pile based solely on ethnicity. It is such practical difficulties that lead Terry Eastland to argue that "precisely because race has proved so difficult and dangerous, it should be made off limits . . . ." Eastland, *supra* note 43, at 26-27.

For a discussion of other practical as well as logical difficulties with the attempt to read group rights into the equal protection clause, see Martin Carcieri, *A Progressive Reply to the ACLU on Proposition 209*, 39 SANTA CLARA L. REV. 141 (1998).

[152] As Shelby Steele has written,

> [D]iversity is a term that applies democratic principles to races and cultures rather than to citizens, despite the fact that there is nothing to indicate that real diversity is the same thing as proportionate representation. Too often the result of this, on campuses, for example, has been a *democracy of colors rather than of people, an artificial diversity that gives the appearance of an educational parity between black and white students that has not yet been achieved in reality*.

Steele, *supra* note 100, at 40 (emphasis added).

It is also noteworthy that whatever their other views, commentators on affirmative action from all points of the political constellation acknowledge that affirmative action is a band-aid, a cosmetic substitute for the real work it would take to close the gap between the achievement of racial groups. *See, e.g.*, Drew Days, III, *Civil Rights at the Crossroads*, *in* DEBATING AFFIRMATIVE ACTION 276-77 (Nicolaus Mills ed., 1994); William Reynolds, *An Experiment Gone Awry*, *in* THE AFFIRMATIVE ACTION DEBATE 136 (George. E. Curry ed., 1996); Tamar Jacoby, *The Next Reconstruction*, THE NEW REPUBLIC, June 22, 1998, at 19-20; Patterson, *supra* note 25, at 43. As Traub sums it up in a representative statement, "Affirmative action is, at bottom, a dodge. It allows us to put off the far harder work: ending the isolation of young black people and closing the academic gap that separates black students—even middle-class black students—from whites." Traub, *supra* note 50, at 21. Even if race and gender preferences actually remedied discrimination rather than perpetuated it, they would serve the apparent interests only of a few privileged members of the favored groups.

tics, it is now clear that it contradicts democratic *principle*. The individualist principle at the heart of the Fourteenth Amendment carries such textual, precedential, historical, and practical authority that it may only be overridden for the most compelling and urgent of reasons. The public university admissions context, as we have seen, does not present such considerations. Not only are we within the democratic sphere of nonviolent consequences, but the minority perception, which has not been shown to command an electoral majority, is concededly mistaken.[153] It might be said that the enforcement of proportional representation through race preferences consciously surrenders to the worst of democracy rather than the best, but even this is not accurate. This is not a conflict between democratic principles, but rather between liberal democratic principles and collectivist, anti-democratic politics. Thus, like the remedial and diversity rationales, the "political reality" argument would not save the university admissions exception.[154]

This presents a genuine irony. In the 1960's and 1970's, liberals in the civil rights and feminist movements held the high moral ground.[155] They fought for the individual and for the idea that no one should be denied an equal chance for scarce, valuable resources based on his or her race or gender.[156] These traits, they properly insisted, say *nothing* about that individual's accomplishments, abilities, or character. Now that it seems to suit the interests of some members of the groups they favor, however, many of those pioneers *abandon* the individual.[157] Thus, like many revolutions, the civil rights and feminist movements largely betrayed their founding principles and now do exactly what their oppressors have done: advocate the second class treatment by government of those individuals with the wrong immutable traits,[158] thereby

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[153] *See* Brief of Charles Alan Wright, Douglas Laycock, and Samuel Issacharoff as *Amici Curiae* in Support of Respondent at 14, Piscataway Township Bd. of Educ. v. Taxman (No. 96-679), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.).

[154] Though we have not focused on preferences in public contracting, our analysis suggests that if they were appended as an exception to a Proposition 209-based reform, even limited to certain races for a fixed period of time, the Court would also have ample grounds for invalidating them.

[155] *See* Gregory Rodriguez, *Has the Civil Rights Movement Become too Inclusive?*, L.A. TIMES, Mar. 1, 1998, at M2.

[156] *See* Abram, *supra* note 17, at 1312-13; Podhoretz, *supra* note 8, at 46.

[157] *See* Abram, *supra* note 17, at 1325.

[158] Tragically, this is often the way in human history: a regime that is forged in opposition based on principles of justice corrupts due to hubris, greed, and loss of historical per-

creating enemies in those progressives who should be their natural allies. As the Greek historian Thucydides observed over 2400 years ago,

Men too often take upon themselves in the prosecution of their revenge to set the example of doing away with those general laws to which all alike can look for salvation in adversity, instead of allowing them to subsist against the day of danger when their aid may be required.[159]

III. CONCLUSION

This article commenced by noting the stalled efforts to duplicate Proposition 209-based reforms in several states. Consequently, this article has considered the two most likely and plausible exceptions that might be appended to such reforms in the near future. I have suggested that these exceptions would make the sweeping measures more politically palatable to legislators and citizens, thus giving the basic reforms a greater chance of enactment. Yet, I have also argued that under the liberal democratic principles displayed throughout the Constitution, and in particular the Fourteenth Amendment, the Supreme Court would properly uphold only the law enforcement/corrections exception against an equal protection challenge. In spite of the admission exception's limited scope, I have argued that a line between the two exceptions would establish a reasonable compromise among the interests and principles at stake in the politics and constitutional law of affirmative action.

As for the politics of affirmative action, new possibilities will emerge after the November 1998 elections.[160] The political landscape may be such that the Proposition 209-based reforms can be enacted either by statute or initiative without amendment. Given the intensity of the debate, however, as well as the powerful demographic trends underway, at least some of the efforts may re-

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spective. A good example of this phenomenon is Classical Athens. Against great odds, and with the resolve of free citizens fighting to maintain self-government, the Athenians defeated the vast Persian army which sought to enslave them. Within a few decades, however, Athens became an imperial power which exacted crushing tribute from hundreds of "subject allies." Consequently, Athens' defeat in the Pelopponesian War (and the Sicilian expedition in particular) was widely celebrated as the defeat of an oppressive regime that deserved it. *See* THUCYDIDES, HISTORY OF THE PELOPPONESIAN WAR VII 127-29 (T.E. Wick ed., 1954).

[159] *See id.* at 201; *see also* George Packer, *Sisyphus in the Basement: Reflections of a Lapsed Socialist*, HARPER'S, July 1998, at 67-68.

[160] Arizona Senate Republican Edward J. Cirillo broke ranks to join Senate Democrats in defeating the proposal that would have put a Proposition 209-based reform before voters. *See* Healy & Schmidt, *supra* note 6, at A44. As he commented, "'In an election year, I see no reason to subject ourselves to' [political rivals seeking to tar us as racists or otherwise put us on the defensive]." *Id.* (quoting Senator Edward J. Cirillo).

main stalled.[161] After all, avoiding the issue allows state legislatures, as well as Congress, to continue to dodge the bullet.[162]

In the long run, if reform is not enacted through the political processes, the courts will decide the issue.[163] As we have seen, courts will be standing on strong ground if they employ a heavy presumption against exceptions to bans on race and gender preferences. Yet, it is also known that the present Supreme Court accords great respect and presumptive deference to the law generated by the political processes of American government. This article has been an attempt to grapple with the possibilities of what these processes might provide the courts to work with in the attempt to locate that elusive middleground on this vexing issue.

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[161] As Arch Puddington noted, for example, "[I]n states with substantial minority populations, the chance of reducing affirmative action through the legislative process is increasingly remote." Puddington, *supra* note 21, at 48.

[162] *See* Sam Fulwood, *Affirmative Action Bill Exposes GOP Split*, L.A. TIMES, Nov. 7, 1998, at A23. As Louis Harris noted, leading Republicans, wary of turning "affirmative . . . action into a white woman's issue . . . are advising Republicans to tread lightly on the issue of affirmative action." Louis Harris, *The Future of Affirmative Action*, *in* THE AFFIRMATIVE ACTION DEBATE 331 (George E. Curry ed., 1996).

[163] *See, e.g.*, Glazer, *supra* note 22, at 30-31; Walzer, *supra* note 125, at 12; Ward Connerly, remarks at Harvard University, (broadcast on C-SPAN, Apr. 10, 1998); *see also* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 186-88 (1990). It may be objected that preference advocates have been trying to avoid the Court, as in the *Taxman* settlement, but the courts in our system can only be avoided for so long.

APPENDIX ONE

Weaker <——————————————————> Stronger

MEANS:	Outreach/ Aggressive Recruiting	Preferences	Quotas
CONTEXTS:			
Undergraduate Admissions	Probably permissible under Prop. 209	Impermissible under Prop. 209	Impermissible since *Bakke*
Graduate Admissions	Probably permissible under Prop. 209	Impermissible under Prop. 209	Impermissible since *Bakke*
Employment	Probably permissible under Prop. 209	Impermissible under Prop. 209	Impermissible since *Bakke*
Contracting	Probably permissible under Prop. 209	Impermissible under Prop. 209	Impermissible since *Bakke*

APPENDIX TWO

Weaker <——————————————————> Stronger

MEANS:	Outreach/ Aggressive Recruiting	Preferences	Quotas
CONTEXTS:			
Undergraduate Admissions	Probably permissible under Prop. 209	*Only for race*	Impermissible since *Bakke*
Graduate Admissions	Probably permissible under Prop. 209	No	Impermissible since *Bakke*
Employment	Probably permissible under Prop. 209	*Only for race, only in law enforcement/ corrections employment practices*	Impermissible since *Bakke*
Contracting	Probably permissible under Prop. 209	No	Impermissible since *Bakke*