LIFE AFTER *BAKKE* WHERE WHITES AND BLACKS AGREE: PUBLIC SUPPORT FOR FAIRNESS IN EDUCATIONAL OPPORTUNITIES

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INTRODUCTION

The future viability of racial preferences in higher education admissions is uncertain at best, given the judicial trend to restrict the range of constitutionally permissible affirmative action programs. A number of recent cases have questioned whether the government's interest in obtaining diversity in educational settings may justify the use of racial preferences in admissions decisions. The "diversity rationale" employed by Justice Powell in his celebrated 1978 opinion in *Regents of the University of California v. Bakke*[1] and used to justify the consideration of race as one "plus" factor among many in the admissions process has received little explicit or implicit support in subsequent Supreme Court cases, and the Fifth Circuit in *Hopwood v. Texas*[2] discarded it outright as not controlling precedent.

In *Hopwood*, the Fifth Circuit ruled that the University of Texas School of Law's consideration of race for the purpose of achieving a diverse student body violated the Equal Protection Clause. The *Hopwood* court based its decision on a detailed review of the evolution of Supreme Court holdings on affirmative action. These holdings from *Croson*[3] to *Adarand*[4] arguably stand for the proposition that racial classifications may only be employed to remedy the present effects of past racial discrimination. In-

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1. 438 U.S. 265 (1978).
2. 78 F.3d 932 (5th Cir. 1996), *reh'g en banc denied*, 84 F.3d 720 (1996), *cert. denied*, 518 U.S. 1033 (1996).
3. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
4. Adarand Constructors v. Pena, 515 U.S. 200 (1995).

deed, the Supreme Court, with its current membership, is quite likely to reject the diversity rationale when it has occasion to revisit the issue of racial preferences in higher education.

The courts' increasing hostility toward racial preferences has moved the judicial branch of government into closer alignment with public opinion on this contentious issue—a phenomenon well documented by scholars of judicial politics with regard to an array of public policy issues.[5] Although numerous factors affect who gets admitted to colleges and universities, the dominant perception among the public is that racial preferences are responsible for lowered chances of admissions for white students and the downward cascading that results in persons ending up on the campuses of universities that they consider inferior.

The public's negative reaction to affirmative action in higher education is, in part, fueled by demographic changes that are making it harder and harder for white applicants to gain admission to the colleges and universities of their choice. Not only is competition for admission to selective colleges and universities already intense, but it is expected to grow worse over the next decade as the demand for freshman seats exceeds the supply. For example, Tufts University received 13,500 applications for the 1200 slots in its freshman class of 1999, and it was forced to deny admission to one-third of the valedictorians who applied and many applicants with perfect standardized achievement test scores (SAT).[6]

Rejected white applicants often blame racial preferences in college admissions for their lack of success.[7] William Bowen and Derek Bok, the former presidents of Princeton University and Harvard University, respectively, have countered this point of view and argued passionately in favor of the continued use of racial preferences.[8] Examining data collected from five selective colleges and universities, they found that the elimination of racial preferences would only modestly increase the chances of admission for the average white applicant; their probability of admission would move from 25% to 26.5%.[9] Bowen and Bok analogize the situation of the disappointed white applicants to that of non-disabled drivers who, upon seeing a parking space reserved for the disabled, falsely assume that

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5. A substantial body of scholarly work makes clear that the courts generally do not stray far from the established beliefs and norms of society due to institutional constraints. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Robert Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279, 285 (1957) ("The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently, it would be unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority."). *See also infra* Part II.A.
6. *See, e.g.*, Ethan Bronner, *College Applicants of '99 are Facing Stiffest Competition*, N.Y. TIMES, June 12, 1999, at A1.
7. *See* Ethan Bronner, *Conservatives Open Drive Against Affirmative Action*, N.Y. TIMES, Jan. 26, 1999, at A5.
8. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONGTERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998). *But see* Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA. L. REV. 1583 (1999).
9. *See* BOWEN & BOK, *supra* note 8, at 36.

they would be parked were it not for the reserved nature of the space.[10] Despite the logic of this argument, public opinion is not in favor of racial preferences in higher education.[11]

The Supreme Court and the public seem to be moving in lockstep on the issue of affirmative action. Thus, it appears that the current admissions regime based on Justice Powell's opinion in *Bakke* may be reaching the end of its days. The key to identifying viable alternatives to foster diversity on college campuses in the wake of *Bakke*'s demise lies in the analysis of public opinion. It is crucial that advocates of diversity begin to look beyond racial preferences and find alternative policies that the public will support with at least some enthusiasm.

This Article examines data on public opinion to determine what criteria the public favors in making difficult admissions decisions. Obviously, notions of merit[12] are central to resolving this complicated issue. The data from a national survey vignette designed by the lead author of this Article confirms that neither whites nor blacks believe that an applicant's race alone is a sufficient sign of merit to be used as a tie-breaker between two similarly advantaged applicants competing for admission to a state university. This may not be surprising given that determinations of merit usually involve an examination of an individual's past actions and behaviors, which can be used to assess his or her worthiness for future rewards.

Jeremy Waldron has further refined our conception of merit by distinguishing two types. According to Waldron, backwards-looking merit takes into consideration a person's past acts and achievements, whereas forward-looking merit focuses more on what one might become in the future.[13] In the context of admissions, these two conceptions of merit may lead to the selection of different students. In this Article, we argue that the American public has a more expansive notion of merit than the leading protagonists in the affirmative action debate.

The first Part of this Article presents a synopsis of the increasingly critical judicial treatment of affirmative action programs from *Bakke* to *Hopwood*. This Part also details the issues involved in the two currently pending cases that challenge the University of Michigan's admissions policy. It is widely believed that these cases will provide the vehicle for the Supreme Court to review the constitutionality of the current admissions policy regime. Part II focuses on the importance of public opinion and examines the existing body of survey data on affirmative action. While conventional wisdom holds that blacks and whites are quite po-

10. *See id.* at 36–37.
11. *See infra* Part II.B. The clearest evidence of the public's disfavor of affirmative action has come from the passage of two state referenda prohibiting the state from discriminating or granting preferences on the basis of race, sex, color, ethnicity, or national origin. Prop 209, the California Civil Rights Initiative, was approved by a vote of 54% to 46% in November 1996, and the voters of Washington passed a similar referendum by a vote of 59% to 41% in November 1998.
12. The notion of merit comes from the Greek word *axia*, which refers "to any quality or value that is the basis for differential behavior, such as praise, rewards, and income." WHAT DO WE DESERVE?: A READER ON JUSTICE AND DESERT 6–7 (Louis P. Pojman & Owen McLeod eds., 1999).
13. *See* Jeremy Waldron, *The Wisdom of the Multitude*, 23 POL. THEORY 563, 563–84 (1995).

larized in their views on affirmative action, surveys reveal substantial agreement between the races on many important issues. Part III describes the findings of a vignette embedded in a national survey that probes what Americans think should happen when two applicants from different social classes compete for the same freshman slot. This experimental research provides insight into the conceptions of merit held by the American public as well as the types of diversity-enhancing programs that the public may be willing to support. Assuming, as many observers do, that race-conscious affirmative action is doomed to extinction, the fourth section provides a discussion of African Americans' educational prospects after *Bakke.*

I. FROM *BAKKE* TO *HOPWOOD* AND BEYOND: A SYNOPSIS OF AFFIRMATIVE ACTION JURISPRUDENCE

Beginning in the late 1960s many universities and professional schools began admitting minority students, particularly African Americans and Hispanics, who had substantially lower grades and scores on standardized tests than white applicants who were denied admission. In reaction to this practice, some non-admitted white students have charged these institutions with committing "reverse discrimination," and a few have brought suit in federal court claiming that racial preferences violate Title VI of the 1964 Civil Rights Act as well as the equal protection provisions of the Constitution. The lawsuit of one such plaintiff, Alan Bakke, made its way up to the Supreme Court in 1977 and laid the foundation for all the subsequent debate on racial preferences in higher education.

A. A Fractured Supreme Court Decides *Bakke*

In *Regents of the University of California v. Bakke,*[14] the Supreme Court considered the question of whether a state medical school's set-aside of a certain number of seats for minority students constituted "reverse discrimination" in violation of the civil rights laws and the Equal Protection Clause of the Constitution. As is often the case with affirmative action decisions, the justices were not able to produce a majority opinion—no more than four justices agreed in their reasoning and six separate opinions emerged. Four justices (Stevens, Burger, Stewart, and Rehnquist) found that the quota system violated the clear language of Title VI of the 1964 Civil Rights Act.[15] Another four justices (Brennan, White, Marshall, and Blackmun) held that Title VI applies the same standard as the Fourteenth Amendment[16] and that the Davis plan passed constitutional muster under an intermediate level of scrutiny.[17]

With four justices on either side of the issue, Justice Powell was able to decide the case and write the opinion announcing the judgment of the

14. 438 U.S. 265 (1978).
15. *See id.* at 421. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1999).
16. *See Bakke,* 438 U.S. at 340.
17. *See id.* at 369, 373–74.

Court. He is widely credited for crafting an opinion in the form of a Solomonic compromise with something good for each side of the dispute.[18] Justice Powell first agreed with Justice Brennan et al. that Title VI applied a constitutional standard,[19] but then disagreed with Justice Brennan's asserted standard of review. Justice Powell ruled that *any* racial or ethnic classification, even ones for allegedly benign purposes, called for strict judicial scrutiny.[20] To survive strict scrutiny, the classification must involve a compelling state interest that is not amenable to fulfillment by other means.[21] Justice Powell held that the educational benefits that flow from an ethnically diverse student body is a constitutionally permissible state interest grounded in the First Amendment,[22] but that a quota system is not a necessary means to that end.[23] He stated:

> [T]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.[24]

Justice Powell concluded that while quotas and processes involving separate consideration were unconstitutional, the race of an applicant could be used as one "plus" factor out of many in the admissions process.[25]

Thus, Justice Powell joined with Justice Stevens et al. in holding that the Davis quota system violated the law, but at the same time he also joined with Justice Brennan et al. in holding that race may be considered in the admissions process. In short, for the past twenty-plus years, the *Bakke* case has stood for the proposition that colleges and universities may not set aside any seats for minorities or use race as the dominant factor in admissions decisions, but they may consider race as one "plus" factor among many in deciding whether to admit or reject a given applicant.

B. *Bakke* Through the Years: The Admissions Regime and the Law Evolve

Although *Bakke* may have caused some institutions to become more circumspect about using race in the selection of their student bodies, by the 1990s race at most elite institutions had become more than a simple

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18. *See, e.g.*, Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 983 (1999).
19. *See Bakke*, 438 U.S. at 287.
20. *See id.* at 291 ("The guarantee of equal protection cannot be one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.").
21. *See id.* at 305 ("to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest") (internal quotations omitted).
22. *See id.* at 311–12 ("the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education").
23. *See id.* at 316.
24. *Id.* at 315 (emphasis in original).
25. *See id.* at 318.

"plus" factor tipping the scales in favor of minority candidates who were equally qualified (or nearly equally qualified) with non-minority candidates.[26] At the University of Michigan, for instance, if a non-minority student did B-minus work in high school (2.8 to 2.99 grade point average) and her test scores fell in the upper middle range (1100–1190 on the SAT and 27–28 on the ACT), her chances of being admitted to the university were small—only about eleven percent during the 1994-95 academic year. But if a student with the same average and score was a member of an "underrepresented minority," defined as black, Latino, or Native American, the chances of admission were excellent. In fact, they were reported to be 100% in 1994-95.[27] Widely publicized stories of such racial disparities in grades, test scores, and the admissions rates of minorities have led affirmative action's opponents to renew their arguments that colleges and universities are violating the civil rights laws and the Constitution, and a few rejected applicants have brought a new wave of cases challenging the current admissions regime.[28]

Opponents of racial preferences in higher education are likely to find a more receptive audience for their arguments sitting on the Supreme Court today than Alan Bakke did twenty-two years ago. The membership of the Supreme Court has changed through the intervening years, resulting in a more conservative court.[29] Indeed, none of the justices who concluded in *Bakke* that race may be considered in the admissions process remain on the court.

Moreover, the court has taken a number of occasions to elaborate on the acceptable parameters of affirmative action programs and, in so doing, has restricted the range of constitutionally permissible affirmative action programs. Two important changes in the law of affirmative action have emerged from these decisions.

First, it is now well established that *all* forms of racial classification, no matter which race is benefited or burdened, are subject to strict judicial scrutiny under the Fifth and Fourteenth Amendments.[30] The Supreme Court has made clear that constitutional guarantees make all racial classifications inherently suspect, regardless of any alleged benign or re-

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26. *See, e.g.*, STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE (1997); DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991).
27. *See* George Cantor, *Would Policies at U. of Mich. Make the Perfect Test Case on Affirmative Action?*, GANNETT NEWS SERV., July 13, 1996, *available in* 1996 WL 4381052.
28. Affirmative action's opponents argue that college admissions decisions should be made primarily on the basis of academic achievement as measured by indicators such as grades, test scores, and class rank. *See, e.g.*, Thernstrom & Thernstrom, *supra* note 8.
29. The lower federal courts have also become more conservative with the majority of judges owing their appointments to Presidents Reagan and Bush. *See Affirmative Action in the Courts: Here's Some Reasons Why That's a Bad Place for Blacks to Be*, 25 J. BLACKS IN HIGHER EDUC. 40–41 (1999).
30. *See* Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J., plurality opinion); *id.* at 520 (Scalia, J., concurring) ("I agree ... with Justice O'Connor's conclusion that strict scrutiny must be applied to all government classification by race ...."). *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (Powell, J., plurality opinion).

medial motivation for the classification. Writing for a plurality of the Court in *Croson*, Justice O'Connor explained the need for strict scrutiny of affirmative action programs:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[31]

Justice O'Connor echoed this concern in writing for a majority of the Court in *Adarand*. She acknowledged "the surface appeal of holding 'benign' racial classifications to a lower standard," but expressed the fear that "it may not always be clear that a so-called benign preference is in fact benign."[32] This apprehension led her to state that "[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system."[33]

Strict judicial scrutiny underscores the presumptive unconstitutionality of racial classifications—indeed many commentators have observed that the use of strict scrutiny in reviewing a government action marks its death knell. To survive strict judicial scrutiny, a racial classification must (1) serve a compelling state interest and (2) be narrowly tailored to achieve that interest.[34] Although the Court has stated its "wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'"[35] this assumption retains strength because of the limited set of circumstances under which a reviewing court using the strict scrutiny standard will find a program constitutional. As the Court stated in *Adarand*, "By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which *'so seldom* provide[s] a relevant basis for disparate treatment,' is legitimate, before permitting unequal treatment based on race to proceed."[36]

The second and perhaps more important reason that opponents of racial preferences are likely to be in a better position today than Alan Bakke

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31. *Croson*, 488 U.S. at 493 (O'Connor, J., plurality opinion).
32. *Adarand*, 515 U.S. at 226.
33. *Id.* (quoting Drew S. Days III, *Fullilove*, 96 YALE L.J. 453, 485 (1987)).
34. *See id.* at 227 ("[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."); *see also* University of California v. Bakke, 438 U.S. 286, 305 (1978) ("[T]o justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification 'is necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.").
35. *Adarand*, 515 U.S. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).
36. *Id.* at 228 (quoting Fullilove, 448 U.S. at 534 (Stevens, J., dissenting)) (emphasis added) (citation omitted).

was twenty-two years ago lies in the increasing judicial hostility towards racial diversity as a legitimate goal of state action. In *Bakke*, Justice Powell reasoned that racial preferences in admissions programs may be constitutional because obtaining the educational benefits that flow from an ethnically diverse student body is a compelling state interest.[37] He wrote:

> An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.[38]

While Justice Powell gave life to the idea that diversity is a compelling state interest, his opinion in *Bakke* was not joined by a single other justice. Moreover, a majority of the Supreme Court has never accepted the diversity rationale as a *compelling* state interest to satisfy *strict* judicial scrutiny. The one case after *Bakke* in which the Supreme Court used diversity as a justification for a racial classification, *Metro Broadcasting*,[39] was decided under intermediate scrutiny, a level of scrutiny that the Supreme Court explicitly overruled in *Adarand*.[40] Thus, the Supreme Court has not given its imprimatur to the diversity rationale. As the Fifth Circuit noted in *Hopwood*:

> In short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not.[41]

Furthermore, it appears that the Supreme Court may be moving towards allowing a governmental unit to use racial classifications only for the narrow purpose of remedying the present effects of its own past discrimination.[42] Remedial intent has long been the cornerstone of Supreme

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37. *Bakke*, 438 U.S. at 311–12.
38. *Id.* at 314.
39. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). The Court held that "[j]ust as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 568 (quoting *Bakke*, 438 U.S. at 311–13 (opinion of Powell, J.)).
40. 515 U.S. at 227 ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.").
41. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996).
42. Such a restriction conforms to the notion that affirmative action must be a temporary tool for careful use in paving the way to the constitutional ideal of a color-blind society. This would explain the Supreme Court's concern for ensuring that affirmative action programs have "logical stopping points." *See Croson*, 488 U.S. at 498 (past so-

Court support for affirmative action programs. It is interesting to note that the justices most sympathetic to affirmative action did not base their decision in *Bakke* on the value of diversity, but rather they highlighted the remedial intent and effect of the race-conscious admissions program.[43] Justice Brennan began his opinion, which was joined by Justices White, Marshall, and Blackmun, by pronouncing that "the central meaning of today's opinion [is that] Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence in this area."[44] In a footnote, Justice Brennan continued, "We also agree with Mr. Justice Powell that a plan like the `Harvard' plan is constitutional under our approach, at least as long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."[45] While the Brennan group accepted remediation of the effects of past *societal* discrimination to be a sufficiently important governmental interest to justify the use of race-conscious admissions programs—an interest deemed too broad under current law[46]—it is clear that remedial intent was at the core of their reasoning.

Although Justice O'Connor expressed openness to the diversity rationale in *Wygant*,[47] she firmly adopted the emphasis on remediation three years later in her plurality opinion in *Croson*: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[48] The following year in her dissent in *Metro Broadcasting*, Justice O'Connor (joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) reiterated this restrictive approach:

> Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such 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. The Court does not claim otherwise. Rather, it em-

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cietal discrimination does not justify state minority set-aside); *Wygant*, 476 U.S. at 275 (role model theory does not justify affirmative action layoff plan).

43. *See Bakke*, 438 U.S. at 325 (Brennan, J., concurring in part and dissenting in part).
44. *Id.*
45. *Id.* at 326 n.1 (citation omitted).
46. *See Croson*, 488 U.S. at 505; *Wygant*, 476 U.S. at 277.
47. Justice O'Connor implied that promoting racial diversity among the faculty in a public school may justify an affirmative action plan in which race trumped seniority under certain circumstances in a layoff situation. *See Wygant*, 476 U.S. at 289. In her concurrence, she gave a nod to Justice Powell's opinion in *Bakke* by noting that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Id.* at 286.
48. *Croson*, 488 U.S. at 493.

> ploys its novel standard and claims that this asserted interest need only be, and is, "important." This conclusion . . . too casually extends the justifications that might support racial classifications, beyond that of remedying past discrimination.[49]

While Justice O'Connor's opinion in *Metro Broadcasting* was written in dissent, it must be noted that the dissent was vindicated in part by the Court's subsequent overturning of *Metro Broadcasting* in *Adarand*. The dissenters in *Metro Broadcasting* (all of whom remain on the Court) were joined by Justice Thomas[50] in *Adarand*, and held that all racial classifications must be subjected to strict scrutiny. Of the five justices in the majority in *Metro Broadcasting*, only Justice Stevens still sits on the Court. He along with Justice Ginsburg are alone among the current members of the Court in their expressed support for the diversity rationale,[51] while a majority of five justices have repeatedly placed a heavy emphasis on the apparent exclusivity of the remedial justification.

The Fifth Circuit has interpreted this evolution of Supreme Court precedent as undermining the continued vitality of the diversity rationale. In *Hopwood*, the court, employing strict scrutiny, found no compelling state interest to justify the University of Texas School of Law's consideration of race in its admission program. The court warned against the stereotyping inherent in assuming that a person possesses certain characteristics by virtue of being a member of a particular racial group, and accordingly disparaged the university's "resort[ ] to the dangerous proxy of race" in its efforts to foster diversity.[52] The court explicitly held that the diversity rationale as espoused by Justice Powell is not controlling precedent.[53] Rather, the court held that the only compelling state interest which satisfies strict judicial scrutiny is the remediation of past discrimination.[54] The court concluded that the law school could not establish the requisite "present effects of past discrimination" on its part, which would warrant the law school's remedial use of racial classifications in its admissions process.[55]

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49. Metro Broadcasting, Inc., v. FCC, 497 U.S. 547, 612–13 (1990).
50. Justice Thomas has expressed adamant opposition to racial preferences. *See Adarand*, 515 U.S. at 240 ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.") (footnote omitted).
51. In Justice Stevens's dissent in *Adarand*, which was joined only by Justice Ginsburg but not the two other dissenters (Justices Souter and Breyer), he clearly expressed his opinion that the Court did not specifically address the question of whether "diversity of broadcast viewpoints" is a compelling state interest. *Adarand*, 515 U.S. at 258–59 (Stevens, J., dissenting) ("[T]he question is not remotely presented in this case. . . .").
52. Hopwood v. Texas, 78 F.3d 932, 946–47 (5th Cir. 1996).
53. *See id.* at 944 ("Justice Powell's view in *Bakke* is not binding precedent on this issue.").
54. *See id.* at 951 ("Strict scrutiny is meant to ensure that the purpose of a racial preference is remedial.").
55. *Id.* at 955. The court held that "past discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions" and reported that "[t]he district court squarely found that '[i]n recent history, there is no evidence of overt officially sanctioned discrimination at the University of Texas.'" *Id.* at 954.

While no other court of appeals has reached the same dramatic conclusion regarding racial preferences in higher education admissions, a couple have rebuffed the diversity rationale in other contexts and others have questioned its continuing vitality in the educational context. With regard to affirmative action in employment, the Court of Appeals for the District of Columbia has traversed a path parallel to the Fifth Circuit in *Hopwood*. In *Lutheran Church-Missouri Synod v. FCC*,[56] the court confronted a challenge to the FCC's equal employment opportunity regulations, which obliged broadcasters to aspire to, if not obtain, proportional representation on their workforces. The court held that the FCC's proffered justification, the desire to foster diverse programming content, was not sufficiently compelling to justify the use of race-conscious regulations: "We do not think diversity can be elevated to the 'compelling' level, particularly when the [Supreme] Court has given every indication of wanting to cut back *Metro Broadcasting*."[57] Similarly, the Third Circuit has indicated that diversity among the faculty in public schools did not justify the use of race in termination decisions in a nonremedial situation under Title VII.[58]

The First and Fourth Circuits, when confronted with recent challenges to race-conscious practices in educational contexts, have explicitly stated that whether diversity is a compelling state interest is an open question.[59] The Fourth Circuit, after noting that the Supreme Court had not decided the issue, stated:

> We have interpreted *Bakke* as holding that the state is not absolutely barred from giving any consideration to race in a nonremedial context. Although no other Justice joined the diversity portion of Powell's concurrence, nothing in *Bakke* or subsequent Supreme Court decisions clearly forecloses the possibility that diversity may be a compelling interest. Until the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest.[60]

The First Circuit has similarly acknowledged that "[t]he question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled" and has also assumed without holding that diversity is a compelling state interest.[61] Of note, however, the First Circuit in the same case warned that any apparent consensus

56. 141 F.3d 344, 351–52 (D.C. Cir. 1998).
57. *Id.* at 354.
58. *See* Taxman v. Board of Educ., 91 F.3d 1547, 1563–64 (3d Cir. 1996) (school board's interest in faculty diversity could not justify dismissal of white teacher and retention of black teacher where there was no showing of past discrimination or minority underrepresentation).
59. *See* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 189 F.3d 431, 438 (4th Cir. 1999); Wessman v. Gittens, 160 F.3d 790, 795 (1st Cir. 1998); *see also* Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228, 289–90 (W.D.N.C. 1999) (court dissolved the decades-old desegregation order—by which the Supreme Court gave its imprimatur to busing—and held magnet school admissions policy which explicitly considered race to be unconstitutional).
60. *Tuttle*, 189 F.3d at 439.
61. *Wessman*, 160 F.3d at 795.

that the diversity rationale no longer retains validity is "more apparent than real."[62] Other circuits have had less to say directly on the issue.[63]

The Sixth Circuit will likely be faced with deciding the future of racial preferences in its jurisdiction when two cases challenging the constitutionality of the University of Michigan's admissions process, which are currently pending in federal district court, are appealed. One case challenges the University of Michigan's undergraduate admissions process, and the other challenges its law school admissions process.[64] Plaintiffs in both attack the university's use of racial preferences using two separate and independent legal grounds.[65] First, the plaintiffs assume *arguendo* that Justice Powell's opinion in *Bakke* is valid precedent and then argue that the university's admissions program exceeds the limits of acceptability delineated under that standard. Second, the plaintiffs reject this assumption and argue that Justice Powell's position in *Bakke* did not constitute the holding of the Court in that case and that, even if it did, the holding does not retain vitality. Plaintiffs go on to claim that the university's admissions program violates the Equal Protection Clause and Title VI of the civil rights laws.[66]

The University of Michigan's legal position rests on the argument that Justice Powell's opinion in *Bakke* is controlling on the law and that the university's admissions program complies with that standard.[67] Re-

62. *Id.* The court further stated, "It may be that the *Hopwood* panel is correct and that, were the Court to address the question today, it would hold that diversity is not a sufficiently compelling interest to justify a race-based classification. It has not done so yet, however, and we are not prepared to make such a declaration in the absence of a clear signal that we should. This seems especially prudent because the Court and various individual Justices from time to time have written approvingly of ethnic diversity in comparable settings." *Id.* at 796 (citations omitted).

63. The Seventh Circuit has recently commented that "one justification that passes muster under this demanding standard is that the favored treatment is necessary to remedy unlawful discrimination in the past by the entity conferring the favor. Whether other justifications are possible is unsettled." McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998) (citation omitted). *But see* Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996) (court acknowledged dicta to the effect that a governmental body's use of racial classifications will only survive strict scrutiny when they are employed to remedy past discrimination of the same body, but held that the exigencies of a prison setting justified affirmative plan). *See also* Hunter v. The Regents of the University of California, 190 F.3d 1061, 1070 (9th Cir. 1999) (Beezer, J., dissenting) ("six of our sister circuits have ... definitively held that racial classifications may only be used for the purpose of remedying racial discrimination").

64. Gratz v. Bollinger, Civ. Action No. 97-75231 (E.D. Mich. filed Oct. 14, 1997) (undergraduate case); Grutter v. Bollinger, Civ. Action No. 97-75928 (E.D. Mich. filed Dec. 3, 1997) (law school case). Legal documents from both these cases are available from the University of Michigan's Web page:
<http://www.umich.edu/ ~urel/admissions/index.html>.

65. *See* Pl.s' Mem. of Law in Supp. of Mot. for Partial Summ. J. on Liability, *Gratz* (No. 97-75231); Pl.s' Mem. of Law in Supp. of Mot. for Partial Summ. J. on Liability, *Grutter* (No. 97-75928).

66. *See* Pl.s' Mem. of Law in Supp. of Mot. for Partial Summ. J. on Liability, *Gratz* (No. 97-75231); Pl.s' Mem. of Law in Supp. of Mot. for Partial Summ. J. on Liability, *Grutter* (No. 97-75928).

67. *See* Def.s' Opp'n to Pl.s' Mot. for Partial Summ. J. and Mem. in Supp. of Def.s' Cross-Mot. for Summ. J., *Gratz*, (No. 97-75231); Def.s' Opp'n to Pl.s' Mot. for Partial Summ. J. and Mem. in Supp. of Def.s' Cross-Mot. for Summ. J., *Grutter* (No. 97-75928).

sponding to the two lawsuits against his institution, President Lee Bollinger of the University of Michigan stated that the critical factors influencing admission decisions go beyond grades and academic achievement. "Throughout our history," he proclaimed, "we have included students from diverse geographical, racial, ethnic and socioeconomic backgrounds. For almost 200 years, public universities have unlocked the doors to social and economic opportunity to students from many different backgrounds, and we believe that it is absolutely essential that they continue to do so."[68] Whether the University of Michigan may continue to use its current admissions process to meet this noble mission remains to be seen.

II. INTERPRETING PUBLIC OPINION DATA ON AFFIRMATIVE ACTION AND WHY IT MATTERS

Over the next few years, courts will have to decide the constitutionality of the current university admissions regime. As the above review illustrates, the law on affirmative action in higher education is not well-settled, but appears to be evolving away from acceptance of racial preferences for purposes of enriching diversity, at least in those situations where no direct evidence of the continuing effects of past discriminatory practices can be found. While precedent has informed this evolution of judicial opinion, it is clear that courts have freely moved more in line with popular conceptions of public opinion on affirmative action. The first part of this Section of the Article argues that this phenomenon is not atypical, but rather is quite understandable given the institutional constraints of the judicial branch. Acceptance of this argument obliges acknowledgement of the imminent demise of the current *Bakke*-inspired admissions regime and compels the need to understand public opinion on affirmative action in order to grasp the viability of various post-*Bakke* policy alternatives that may have the effect of increasing diversity in higher education. Therefore, the second part of this Section examines the existing body of survey data on affirmative action.

A. The Interplay Between Public Opinion and Judicial Decisions

In *Bakke*, Justice Powell supported the diversity rationale by touting Harvard's admissions process. However, Justice Brennan stated that he found no sensible distinction between the Harvard plan, which added points to the evaluation of minority applicants with the expectation of increasing minority enrollment to desired levels, and the Davis plan, which employed explicit quotas to obtain the desired minority enrollment. Both have the same purpose, i.e., "ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students."[69] And both have the same results, i.e., "the admission of

68. News release, President Lee Bollinger's reaction to a lawsuit regarding admissions practices at the University of Michigan, October 14, 1997.
69. Regents of the University of California v. Bakke, 438 U.S. 265, 325 (1978) (Brennan, J., concurring in part and dissenting in part).

an approximately determined number of qualified minority applicants."[70] The only difference discernible to Justice Brennan was their public acceptability, and he believed that no constitutional distinction could or should be made just because one was more in line with public opinion. He wrote:

> It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." . . . But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.[71]

While Justice Brennan openly disparaged judicial observance of public opinion, many public law scholars in the realist school have commented upon the tendency of courts to stay in line with public opinion.[72] It is often pointed out that the courts are constrained by their institutional structure and their relation with the other branches of government.[73] As far back as the founding of the nation, commentators have emphasized the limits of the judiciary. Alexander Hamilton wrote in Federalist 78 that "the judiciary, from the nature of its functions, will always be the least dangerous [branch of government]."[74] He continued:

> The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[75]

That Chief Justice John Marshall was acutely aware of the limits of his power is evidenced by his careful crafting of his opinion in *Marbury v. Madison*,[76] and the possibly apocryphal statement attributed to President Andrew Jackson in the wake of the Court's decision in *Worcester v. Georgia*:[77] "John Marshall has made his law, now let him enforce it." The institutional limitations of the courts were made apparent more recently by southern officials' disregard of federal court orders during the civil rights movement of the 1950s and 1960s. Such institutional constraints compel judges to tailor their decisions to what they believe is politically expedient despite the insulation provided by their offices. Moreover, judges are first members of the

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70. *Id.* at 378.
71. *Id.*
72. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).
73. *See, e.g.*, ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 105–12 (1956) (noting, in particular, the winnowing effects that the judicial appointment and confirmation process has on the range of judicial viewpoints); Robert Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279, 285 (1957).
74. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).
75. *Id.*
76. 5 U.S. (1 Cranch) 137 (1803). For a discussion of Justice Marshall's opinion in *Marbury* see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).
77. 31 U.S. (6 Pet.) 515 (1832).

public who have their own points of view. If the public at large overwhelmingly holds one position, it is likely that many judges do also. It would be rather idealistic to believe that upon donning their black robes, judges lose their own points of view on important issues of public policy. Thus, it is apparent that public opinion weighs heavily on judicial opinion.

B. The Truth About Public Opinion on Affirmative Action

Reports of survey data on affirmative action often convey the message of racial division and polarization that at times may appear intractable. White Americans are portrayed as though they are a monolith in their opposition to affirmative action policies, whereas African Americans are shown to be staunch supporters.[78] Racial division and polarization, however, do not tell the whole story. Once we move beyond much of the ambiguity surrounding the use of the concept "affirmative action" in survey research, we find agreement even on some normally controversial issues. Most surveys, unfortunately, are not designed in a manner that will allow them to detect interracial consensus. Frequently, their language is too emotionally charged, pointed or ambiguous to yield interpretable results about what Americans really believe about fairness.[79]

Public opinion scholars have come to recognize that much of the survey data on issues of affirmative action are problematic because people's answers to survey questions are highly sensitive to the ambiguities surrounding what affirmative action entails. As a result, a respondent's answers to direct questions about his or her support or opposition to "affirmative action programs" may tell us very little about the types of public policies he or she actually endorses. In fact, one researcher observed that respondents who say that they oppose affirmative action may actually support more types of affirmative action programs than people who identify themselves as affirmative action supporters.[80] Greater awareness of the definitional problems faced by affirmative action questions has led some researchers to conclude that validity of survey results could be greatly improved if survey designers abandoned the phrase "affirmative action," as well as such imprecise terms as "preference" and "preferential treatment," and instead describe the content of specific policies.[81]

A great deal of research has demonstrated that how a person responds to survey questions on affirmative action issues depends to a large degree

78. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992); DONALD R. KINDER & LYNN SANDERS, DIVIDED BY COLOR (1996).

79. *See* Carol M. Swain, *Affirmative Action: Areas of Consensus and Agreement Among Americans, in* AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES (Neil Smelser et al. eds., 2000).

80. *See* Jim Norman, *America's Verdict on Affirmative Action is Decidedly Mixed*, 6 PUB. PERSPECTIVE 49 (1995).

81. *See* Ricshawn Adkins, *Affirmative Action and Public Opinion Polls, in* RACE VERSUS CLASS: THE NEW AFFIRMATIVE ACTION DEBATE (Carol Swain ed., 1996); Charlotte Steeh & Maria Krysan, *Poll Trends: Affirmative Action and the Public, 1971–1995*, 60 PUB. OPINION Q. 128 (1996).

on how the question is framed and the context of the question.[82] The framing of questions includes the wording of the questions and the answer choices given to respondents. For example, one researcher has shown that American attitudes towards equal opportunity questions are influenced by whether the questions are framed with a negative or positive bias, the specific concepts used, and the nature of alternative policies.[83] Using data from the 1986 National Election Study, the same researcher analyzed several questions and found that responses were affected by whether the question stated that preferential treatment is wrong because it discriminates against whites or wrong because it gives blacks advantages that they have not earned. Those who oppose preferential treatment are more likely to state that they oppose the policy because it discriminates against whites.[84]

The context of a question includes the reason given to respondents as to why the program was adopted, as well as the location of the question in the survey and the questions and instructions which preceded it. Laura Stoker has argued that survey questions that generalize across or ignore the context in which affirmative action programs are implemented greatly misrepresent public opinion on the issue.[85] Stoker used a series of affirmative action experiments in which respondents were given three different contexts to justify the implementation of racial quotas—no context, under-representation of minorities, and proven discrimination by a given company. She found that affirmative action for purposes of enriching diversity garnered the least amount of support among white Americans.[86] Despite this finding that a majority of white Americans do not place much stock in the diversity rationale, advocates of affirmative action—including the University of Michigan—often rely on the need for greater diversity as their primary justification for implementing or expanding racial preferences. On the other hand, Stoker found considerable public support for compensatory measures for cases of proven discrimination, which, as she notes, is the only time that the Supreme Court in recent years has endorsed the use of quotas.[87]

After analyzing the universe of affirmative action-related questions from polls taken between 1977 and 1995, Charlotte Steeh and Maria Krysan concluded that the structure of public attitudes on the subject defines

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82. *See* Adkins, *supra* note 81; WILLIAM A. GAMSON & ANDRE MODIGLIANI, TALKING POLITICS (1987); KINDER & SANDERS, *supra* note 78; HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA (1997); LEE SIGELMAN & SUSAN WELCH, BLACK AMERICANS' VIEWS OF INEQUALITY: THE DREAM DEFERRED 144 (1991); Steeh & Krystan, *supra* note 81; Laura Stoker, *Understanding Whites' Resistance to Affirmative Action: The Role of Principled Commitments and Racial Prejudice, in* PERCEPTION AND PREJUDICE: RACE AND POLITICS IN THE UNITED STATES (Jon Hurwitz & Mark Peffley eds., 1997); Donald R. Kinder & Lynn Sanders, *Mimicking Political Debate with Survey Questions: The Case of Affirmative Action for Blacks*, 8 SOC. COGNITION 73 (1990).

83. *See* Terri Fine, *The Impact of Issue Framing on Public Opinion Toward Affirmative Action Programs*, 29 SOCIAL SCI. J. 3 (1992).

84. *See id.*

85. *See* Stoker, *supra* note 82.

86. *See id.* Stoker's data suggest that advocates of affirmative action, in their attempts to garner greater public support, should develop and employ a more compelling reason to justify preferential treatment than the underrepresentation of minorities.

87. *See id.*

acceptable affirmative action policy as falling somewhere between color-blindness and preferences.[88] Outreach programs to locate qualified minorities for employment opportunities, a form of "soft" affirmative action, is widely supported by an overwhelming majority of Americans, while other forms of preferential treatment of minorities, including the use of quota programs and set-asides, garner much less support. Programs geared specifically for African Americans are the least popular among white Americans, while those that benefit women are more popular. Similarly, Americans are more supportive of governmental assistance for the disadvantaged when the programs are not targeted specifically for minorities.[89]

Our review of public opinion on affirmative action reveals that white Americans and black Americans are not as polarized on the subject of affirmative action as is commonly believed, and in some policy areas they seem to be moving more towards consensus.[90] Survey data show that African Americans are by no means enthusiastic supporters of racial preferences; many endorse self-help initiatives and certain aspects of the Horatio Alger philosophy. For example, 48% of blacks agreed with 53% of whites when a 1997 Joint Center for Political and Economic Studies (JCPS) survey asked a random sample of the U.S. population the following question: "Blacks who can't get ahead in the U.S. are mostly responsible for their own condition."[91] Further breakdowns of the answers to this question showed that 59% of black Republicans and 57% of African Americans making over $60,000 a year agreed with the 53% of whites who believed that blacks were mostly responsible for their own condition.[92] The same survey asked a related question: "We should make every possible effort to improve the position of blacks even if it means giving them preferential treatment."[93] Almost a majority of African Americans (49% to 45%) joined with the overwhelming majority of white Americans (83% to 15%) to oppose preferential treatment of blacks as a means of improving the group's societal position.[94] A further demographic breakdown on that question showed that a majority of black baby boomers, black men, college-educated blacks, and blacks earning greater than $15,000 per year opposed preferential treatment.[95]

The belief in equal treatment of all people regardless of race, along with other principled reasons, may explain much opposition to the preferential treatment of racial minorities—although white racism certainly remains a factor.[96] Americans generally are quite supportive of job training and equal opportunity programs that offer preferences to non-racially defined classes of disadvantaged citizens.[97] A 1997 NYT/CBS Poll asked respondents the following question: "In general, in hiring, promotions,

88. *See* Steeh & Krysan, *supra* note 81, at 128.
89. *See id.*
90. *See* Swain, *supra* note 79.
91. *See* DAVID A. BOSITIS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, NATIONAL OPINION POLL ON RACE RELATIONS (1997).
92. *See id.*
93. *Id.*
94. *See id.*
95. *See id.*
96. *See* PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE (1993).
97. *See* Steeh & Krysan, *supra* note 81, at 128.

and college admissions, do you think that it is a good idea or a poor idea to select a person from a poor family over a person from a middle class or rich family if the person from the poor family and the rich family are equally qualified?" Fifty-three percent of whites and 65% of blacks said that it was a good idea to select the person from the poor family.

Agreement between races on this issue has important implications for constructing public policies that can garner broad appeal. These data suggest that to the extent that the public is willing to offer a break to anyone, it will be on the basis of socioeconomic status rather than race. Even then, the break offered will only be slight since in the above example the persons are described as equally qualified, which is unlikely to be the case in most competitive situations and certainly has not been the case in the college admissions debate. Nevertheless, knowledge of America's unease with racial preference programs has led some scholars to call for race-neutral public policies under the assumption that consensus exists for such programs and where absent it can be constructed.[98] In addition to their relative popularity, race-neutral programs are attractive because they are not as vulnerable to judicial attacks under the Fourteenth Amendment's Equal Protection Clause.

Indeed, conservatives such as Justice Scalia have expressed support for means-tested programs designed to assist disadvantaged Americans on a race-neutral basis:

> It may well be that many, or even most, of those benefited by such programs would be members of minority races that the existing [affirmative action] programs exclusively favor. I would not care if *all* of them were. The unacceptable vice is simply selecting or rejecting them *on the basis of their race.*[99]

Even affirmative action opponents Charles Murray and the late Richard Herrnstein professed support for admissions policies in colleges and universities that favor the disadvantaged. What *The Bell Curve* authors claimed to find most disturbing was the fact that the low-scoring offspring of privileged blacks are allowed to displace higher-scoring poor whites from places like Appalachia.[100]

Race-neutral public policies have not been embraced by the liberal elite because of fears that such policies will not lead to the kind of diversified workforces and college campuses that many people desire.[101] Amy Gutmann, for example, refers to the pursuit of class-based social

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98. *See* RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996); WILLIAM J. WILSON, THE DECLINING SIGNIFICANCE OF RACE (2d ed. 1980); WILLIAM J. WILSON, THE TRULY DISADVANTAGED (1987); WILLIAM J. WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037 (1996).

99. Antonin Scalia, *The Disease as a Cure*, *in* RACIAL PREFERENCES AND RACIAL JUSTICE 221 (Russell Nieli ed., 1991) (emphasis in original).

100. *See* RICHARD HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994).

101. *See* ANTHONY K. APPIAH & AMY GUTMANN, COLOR CONSCIOUSNESS: THE POLITICAL MORALITY OF RACE (1996); BOK & BOWEN, *supra* note 8; Nathan Glazer, *Race, Not Class*, WALL ST. J., Apr. 5, 1995, at A12.

welfare policies as a hot idea that is only "half-baked" because they do not address racial injustice or overcome the low standardized achievement scores (SAT) that middle-class African Americans receive relative to impoverished whites.[102] Consequently, Gutmann advocates a combination of class- and race-conscious public policies much akin to those currently being challenged in university admissions lawsuits.[103] It is Gutmann's hope that moral argument, political leadership, and deliberative democracy will operate together to bring public opinion and racial consciousness more in line with her moral views about social justice. As her cause for optimism, she cites a study by Paul Sniderman and Thomas Piazza, who found that some Americans can be persuaded by counter-argument to change their positions on certain types of public policy issues. Affirmative action, however, was the one area where Sniderman and Piazza found Americans least amenable to change. Of those white respondents presented with a strong counter-argument in favor of the racial preferences in higher education that they had originally opposed, 20% changed their minds. This percentage can be contrasted with the 44% of whites in the same survey who were persuaded to shift their opinions favorably on a social welfare question asking about more government spending for blacks. Sniderman and Piazza concluded from those data that "[t]he positions white Americans take on affirmative action are markedly firmer, less malleable than the positions they take on more traditional forms of government assistance for the disadvantaged."[104]

In short, the current political climate surrounding race-conscious affirmative action in higher education indicates a situation where the majority of Americans are unhappy with the status quo. Some courts and states have begun to follow public opinion by making decisions to end racial preferences in state-supported programs and institutions. Given a common set of facts, can Americans agree on criteria for admission to state-supported colleges and universities? We explore the answer to this question by reporting the results of a vignette embedded in a national survey that was designed for this Article to probe more accurately the opinion of the American people.

III. SEARCHING FOR INTERRACIAL CONSENSUS ON ADMISSIONS DECISIONS

Since it is the case that most surveys are not designed to tap agreement between whites and blacks or explore issues as complex as those involved in admissions decisions, we commissioned a survey in which respondents were presented with a vignette that is far more detailed than the typical survey question giving them more context with which to fully express their opinions.

The vignette allows us to approach the following questions: What do Americans believe about college and university admissions criteria and outcomes in competitive situations? Do Americans believe that institu-

102. *See* APPIAH & GUTMANN, *supra* note 101, at 111.
103. *See id.* at 140.
104. SNIDERMAN & PIAZZA, *supra* note 96, at 145.

tions should always select the applicants with the highest test scores and grades? Who should get rejected when two applicants with unequal levels of preparation compete for the same freshman seat? Should the least academically talented student lose in a zero-sum admissions situation?

Consider what the answers to the above questions might mean if they are contrary to our expectations. If the answers indicate that Americans believe that criteria other than grades and test scores should sometimes outweigh these factors, then perhaps the majority of Americans are tacitly giving admissions committees authority to do what many colleges and universities claim to do already, namely weigh a host of factors other than academic performance when they select their student bodies.

A. The College Admissions Vignette

The national survey we commissioned included a single questionnaire that was designed to detect hidden racism and determine attitudes about affirmative action policies, discrimination, and race.[105] The first part of the questionnaire consisted of core questions that were asked of all respondents. The second part, which focused on affirmative action issues, was administered to approximately half the sample, randomly chosen, while the third part, which dealt with other race-related issues, was asked of the remaining half of the sample. The survey was designed to minimize framing effects of question wording, order, and context. Respondents were asked general questions before coming across vignettes designed to elicit information about their attitudes towards criteria for college admissions criteria and job promotions.

To probe American support for affirmative action in undergraduate admissions, we presented half our sample with vignettes profiling two high school seniors with different backgrounds and qualifications applying for the last admissions slot at a state university. The vignettes were designed to test the hypothesis that whites and blacks, given a similar set of circumstances, can agree on what is fair in the allocation of educational opportunities. The vignettes presented two hypothetical students competing for the last slot at a state university in order to capture the zero-sum nature inherent in some affirmative action situations. With the assistance of computer technology, the races and genders of the hypothetical students were randomly varied so that the sixteen possible combinations of race and gender were presented to equal numbers of respondents randomly assigned to answer the question. It was possible, therefore, to remove race from consideration in some of the scenarios to see how respondents would react to two white students or two black students competing for the last slot. Similarly, we were able to compare reactions to

105. Response Analysis Corporation (RAC), a highly regarded public polling firm based in Princeton, N.J., conducted the national telephone survey of 1,875 English-speaking adults. RAC used two sampling strategies for the study: one to represent the general population of the continental United States as a whole and a second to collect data on an over-sample of African Americans. The survey included a nationwide random digit sample of 1070 adults, and a second sample of 805 African Americans. Overall, the sample combined 920 whites with 900 blacks and 55 members of other races. Pretests of the questionnaire were conducted in March and April of 1996. Interviewing took place during the summer and early fall of 1996.

male and female students, as well as mixed race and ex combinations. From this design, we were also able to assess whether respondents would be more likely to lean towards a member of their own racial group.

In creating the student profiles, we tried to present respondents with information similar to what an admissions committee might encounter. Our question is worded as follows: "Please suppose that a state university is deciding between two high school seniors who have applied for admission. I will read you a brief description of these two students. Then I will ask you to decide, if the college has space for only one more student, which of these do you think they should admit?" The interviewer then explains that:

> The first student attends a local public high school where [he or she] has maintained a 'B' average. [He or she] is a [black or white] student from a low-income family and has held a job throughout high school to help support [his or her] family. [He or she] scored slightly below average on [his or her] college admission tests. The second student attends a well-respected private schol, where [he or she] has been an 'A' student. [He or she] comes from a prominent [white or black] family and has spent two summers studying abroad. [He or she] scored well on [his or her] college admission tests.

The interviewer next asks, "Based on what I have told you about these two students, which one do you think the college should admit?" After respondents have given their answer, they are asked, "Regardless of who you think should be admitted, which student do you think the college would probably admit?"

The vignette is deliberately complex to mirror the complexity of the real world, but the basic structure of the question remains constant. Whatever specific race and gender combination is assigned, the vignette always describes one individual as a hardworking "B" student from a low-income family, with *slightly* below average college admissions scores, whereas the other student is always an "A" student from an affluent family who scored well on the college admissions test. The vignette combines the indicators of social class and academic merit so that the low-income student is always depicted as less academically prepared. The question asking respondents which student they think the college should admit is followed by an additional question that asks which student they think the college would actually admit.

Because the indicators of academic preparation (grades and test scores) and social class are always combined in the same way it is not possible to disentangle the two. For our purposes, however, there is no need to do so, since our goal is to determine if whites and blacks, given a similar set of circumstances, can reach agreement on principles of fairness in admissions decisions. We specifically chose a state university rather than a private college because state universities are supported by the tax dollars of their residents and are usually thought to be more constrained in their choice of student bodies than private institutions. Similarly, we avoided a sharp contrast in the qualifications of the students because we believe that this mirrors more closely the real life situation. In pitting a poor applicant against a rich applicant for admission to a state institution,

it is likely that a given respondent's perception of the opportunities available to the respective students will factor into their final selection of which applicant is the more deserving of the educational opportunity in this zero-sum situation. No doubt some respondents are using a forward-looking conceptualization of merit which could easily cause them to decide that the affluent student has more opportunities in the marketplace and can go elsewhere to fulfill them.

B. Findings from the College Admissions Vignette

Overall, the respondents are almost equally divided over which student the college should admit, with a small majority (450 of the 850 expressing a view) favoring the admission of the "B" student over the more academically prepared "A" student. This proportion is not significantly different from 50%.[106]

The interesting question for the purposes of our analysis is: How is the proportion in favor of admitting the "B" student affected by the particular vignette or by the characteristics of the respondent? An analysis of deviance reported in detail in the Appendix shows that the most significant effect ($p=0.0003$) is the combination of races assigned to the hypothetical students in the vignette. The age of respondents is also a significant factor ($p=0.012$). Younger respondents, especially those under twenty, generally have less sympathy for the "B" student than do their older counterparts.[107] However, a statistical analysis of the results shows that the gender of the hypothetical students is not significant.[108] Nor are the respondent's race, gender, income, or educational background (considered as main effects) significant factors. It is remarkable that none of these characteristics of the respondents, especially race, has any significant effect on the proportion favoring the "B" student. Interactions

106. The questions about college admission each have a binary response, i.e., the choice of which student should or would be admitted. Therefore we used linear logistic modeling to assess the effects of the various factors; within this standard generalized linear model framework, the significance of any particular effect can then be assessed by an analysis of deviance. This plays the same role in the linear logistic modeling of a binary response as an analysis of variance does in the linear modeling of a continuous response. *See, e.g.*, P. MCCULLAGH & J. A. NELDER, GENERALIZED LINEAR MODELS (2d ed. 1989). Only the 850 respondents who expressed a definite response (over 90% of those who were interviewed in detail on this topic) were considered in the analysis.

107. It is interesting that these respondents, those closest in age to those affected by college admission policies, exhibit opinions that are apparently based more on examination performance. Nonetheless, the pattern of dependence on the races attributed to the hypothetical students is similar to that in the older population, but in every case more skewed towards preference for the "A" student.

108. The genders of the students have no effect comparable to that of race, and the preference pattern holds constant for each of the gender combinations. Respondents' attitudes are not affected whether the hypothetical students are two females, two males, or either mixed-gender allocation. There is no mixed-gender effect comparable to what we observed in the mixed-race scenario. There is no significant interaction between the effect of the gender allocation and that of the race allocation (after main effects have been fitted, the deviance due to the interaction of the two factors is 10.95 on 9 df, which is clearly insignificant), or any characteristic of the respondents. Therefore we drop the gender allocation from the subsequent analysis.

between the races assigned to the hypothetical students and the characteristics of the respondents were also considered, and the only significant interaction ($p=0.012$) that was found is with respondent's income. (See the Appendix for more statistical information.)

Figure 1: Which student should the college admit? Preferences broken down by the races of the hypothetical students and the race of the respondent

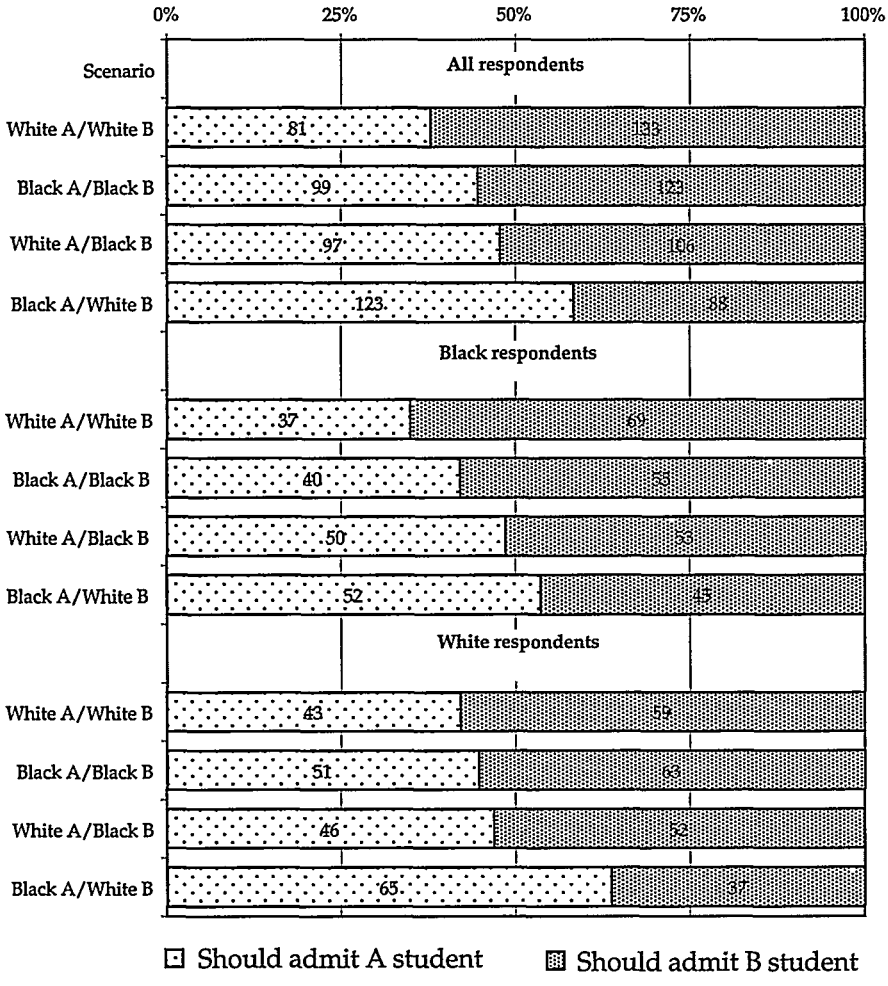


Figure 1 presents the results broken down by the races of the hypothetical students, showing for each combination whether respondents believe that the college should admit the disadvantaged "B" student or the more affluent "A" student. The figure shows that the strongest support for the "B" student is in the case when both students are white. If both students are black, then the "B" student also receives majority support, but by a narrower margin. In the "mixed-race" scenarios, support for the

"B" student drops; indeed, a majority of respondents select the black "A" student over the disadvantaged white "B" student.

Because of the pivotal role that race plays in the study, we also broke down the choice of student by the respondent's race in Figure 1. The same general pattern remains for each of the scenarios. As already noted, the difference in pattern of support is not significantly different; not only is the effect of respondent's race insignificant as a main effect, but there is no significant interaction in the response between the respondent's race and the races assigned to the students. A slightly larger proportion of whites than of blacks think that the college should admit the black "A" student over the economically disadvantaged white "B" student, but this is not statistically significant. Thus, not only do black and white respondents show the same overall preference pattern, but also their response to the individual vignettes shows no significant difference.

Why would respondents (particularly those over age thirty) prefer the "B" student to the "A" student? Strictly speaking, we cannot say whether they are reacting to the students' grades or indicators of social class. However, it is clear that many respondents are reacting to the individualizing factors, which have encouraged them to champion the "underdog." No doubt a few people may favor the "B" student over the "A" student simply because they believe the "B" student will get more value from the opportunity. Moreover, some respondents may have a broader definition of merit than that held by the principal actors (both opponents and proponents) in the affirmative action debate. Their definition of merit allows them to see the "B" student as being the more meritorious of the two. The "B" student has done relatively well academically while holding down a part-time job. Likewise, respondents could be reacting to beliefs that the "B" student has a more limited set of options that the "A" student, and that public institutions have a special obligation to create opportunities for disadvantaged state residents. The "A" student can go elsewhere, perhaps to a private institution. The notion that a state institution might have a special obligation to open doors is reflected in President Bollinger's mission statement, quoted earlier. Accordingly, respondents may be reflecting their belief that universities and colleges should try to "help their students transcend whatever subculture they are born and raised in, and move them out into a slightly more cosmopolitan world ... giving young people with a yen for mobility the diplomatic passport they need to cross the borders of their racial, religious, economic, sexual or generational parish."[109]

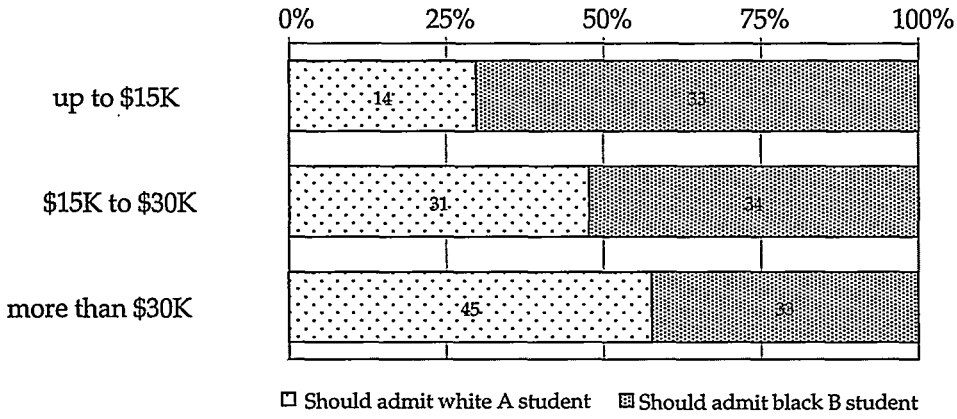
C. Considering the Race Scenarios Individually

As mentioned above, income is the only characteristic of the respondents that affects the response in a way that interacts significantly with the allocation of races to the hypothetical students. To probe further, we carried out individual analyses for each of the allocations separately, testing for significant effects of all five individual respondent variables: income, race, education, age, and gender. In the same-race scenarios, i.e.,

109. CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION 26 (1968).

whenever there were two white students or two black students, none of the characteristics of the respondents had a significant impact on choice. In the case where the "A" student is white and the "B" student is black, income was highly significant (p=0.002),[110] but no other variables were significant. In the other mixed-race scenario, where the "A" student is black and the "B" student is white, income is not significant, but respondent's education is just barely significant at the five percent level.[111]

Figure 2: Preferred choice between white A student and black B student, broken down by respondent's income



In the case of a white "A" student competing with a black "B" student, the breakdown by respondent's income is presented in Figure 2. By far the greatest support for the disadvantaged "B" student comes from people earning less than $15,000 per year. Although our low-income category includes more minorities than whites, and relatively more women than men, these demographic variables have no significant effect or interaction with income on the response in this case. Higher-income people favor the affluent "A" student, and their choice of the "A" is irrespective of their race. Likewise, low-income respondents tend to favor the black "B" student, regardless of their own race or gender. To further identify this pattern we fitted a logistic regression model that predicts the probability of preferring the "B" student, giving

log[Prob(prefer B)/Prob(prefer A)] = 0.95–0.027 × (income in $000).

Our estimate predicts that a high-income respondent (income=$50K) would have probability 0.4 of preferring the "B" student, while a low-

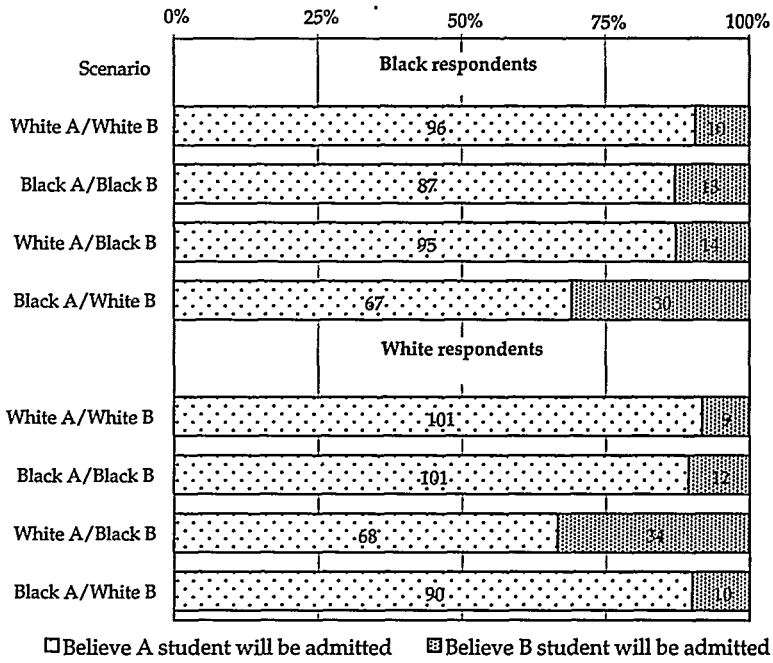
110. Given that the effect of five factors in each of the four scenarios was assessed, a conservative approach to multiple comparisons would multiply this value by 20. It remains significant, but not overwhelmingly so.

111. This conclusion should be treated with some care because of the large number of tests carried out, but it will be investigated further below.

income respondent (income= $10K) would support the "B" student with probability 0.66.[112]

The scenario in which a black "A" student competes against a white "B" student is the one in which most respondents support the "A" student. As noted above, respondent's education has a significant main effect. Furthermore, noticeable differences between respondents appear

Figure 3: Preferred choice between black A student and white B student, broken down by race and education of respondent



once we control for education, and in particular there is a very significant interaction between education and race in this scenario (p=0.008 on an analysis of deviance based on a linear logistic model). Figure 3 presents the results broken down by race and educational level of the respondents. Less educated and highly educated blacks now prefer a black "A" student to a white "B" student, but not by much. Their preference for the black "A" student is mild, and educational level has little effect among black respondents; the variations are not statistically significant. Among white respondents, however, educational level has a strong and highly significant effect. Whites with a high school education or less prefer the "B" student by a margin of 21 to 16 (57%), which is similar to the general population's preferences in the same-race scenarios. On the other hand, 81% of white college graduates (29 out of 36) select a black "A" student over a white "B" student. The behavior for moderately educated whites is

112. The coefficient of income in this equation has standard error 0.009, and so has a highly significant t-value.

intermediate.[113] It is particularly interesting that white college graduates are much more supportive of the black "A" student in this case than their black counterparts.

Why should white college graduates show such a strong preference for the black "A" student in this case? We may simply be witnessing class solidarity for one of their own in a situation where both students are perceived as being disadvantaged. However, other explanations may be relevant here. Some whites may regard all black students as disadvantaged even if they come from privileged backgrounds. Moreover, the black "A" student has defied the stereotype of the academically challenged black student and, therefore, has earned admission to the institution based on high achievement and broad experience. Thus, the disadvantaged white student loses out to the affluent high-achieving black student. It is only in competition with a more affluent white student that the disadvantaged white student would get a break from most highly educated whites.

This discussion shows that blacks are more consistent in their support of the hardworking "B" student from the underprivileged background *even when the "B" student is white.* When preference is shown for the black "A" student as opposed to the white "B" student, our data shows that it is strongly affected by the interactive effects of race and education of the respondents. The black student's strongest supporters are highly educated *whites.*[114] Considering the racial polarization that is supposed to exist on the affirmative action issue, and the tendency of groups to prefer one of their own, this is truly an astounding finding. However, it becomes slightly less so once we analyze these findings in light of other surveys.

The highly educated whites that strongly favor a black "A" student over a white "B" student are acting in accordance with their general disdain for racial preferences in higher education. For decades social science studies have documented that well-educated Americans are more tolerant of diversity, more accepting of broad democratic values than the poorly educated, and more racially liberal.[115] However recent studies show well educated whites to be especially disapproving of minority preferences in college and university admissions.[116] In fact, James Glaser found them more opposed than poorly educated whites, even though they are more liberal on issues such as minority representation in legislatures, hiring for

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113. The chi-square cross-tabulation of preference against respondent's race and a three-level education variable is 21.6 on 2df (p=0.00002).

114. Indeed, if we pool across all four scenarios, black college graduates are significantly more sympathetic to the "B" student (61% support) than are white college graduates (only 45%). For non-graduates, on the other hand, there are no significant differences between races.

115. *See* ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1960); V.O. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY (1961); PAUL M. SNIDERMAN ET AL., REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY (1991); Mary R. Jackman & Michael J. Muha, *Education and Intergroup Attitudes: Moral Enlightenment, Superficial Democratic Commitment, or Ideological Refinement?*, 49 AM. SOC. REV. 751–69 (1984); Herbert McClosky, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361–82 (1964).

116. *See* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (1997).

public works jobs, and set-asides in public contracting.[117] Using the theory of group conflict to explain his counter-intuitive findings, Glaser postulates that well-educated whites are sensitive to context and especially racial preferences on their own turf, which in this instance is higher education. It is their preferences for more traditionally defined merit-based criteria that leads them to support the higher achieving student irrespective of student race. Admissions criteria and practices directly affect this group, since the limited number of freshman seats at first, second, and third tier institutions have meant the downward cascading of thousands of middle-class and affluent white students who have been prepared since preschool to matriculate at elite institutions.

D. Which Student Will the Institution Actually Admit?

We now turn to the respondents' expectations of the way the college will actually behave. The results displayed in Figure 4 demonstrate that the vast majority of respondents (around 90% in the same-race scenarios and 80% in the mixed-race scenarios) believe that the college will admit the "A" student. Although over half the respondents think that the institution should admit the low-income "B" student, respondents nonetheless expect the opposite to occur. They overwhelmingly expect the institution to use traditional indicators of academic merit and exclude the lower-achieving student.

The overall pattern is very similar among whites and blacks, but there is an interesting effect in the mixed-race scenarios.[118] In the "white A/black B" case, the majority of whites that believe that the "A" student will be admitted goes down from around 90% to around 70%. Exactly the converse happens in the "black A/white B" case among black respondents! This finding suggests that there is a fairly small proportion (around 20% of each race) who think that the college will normally select on academic merit, but will choose a "B" student of the other race against an "A" student of their own race.[119] When phrased in this way, even this finding can be seen as an example of an area where whites and blacks still agree—although this agreement exists only in a perverse sense. In any case, both groups expect the institution to place far more emphasis on grades than they themselves would.

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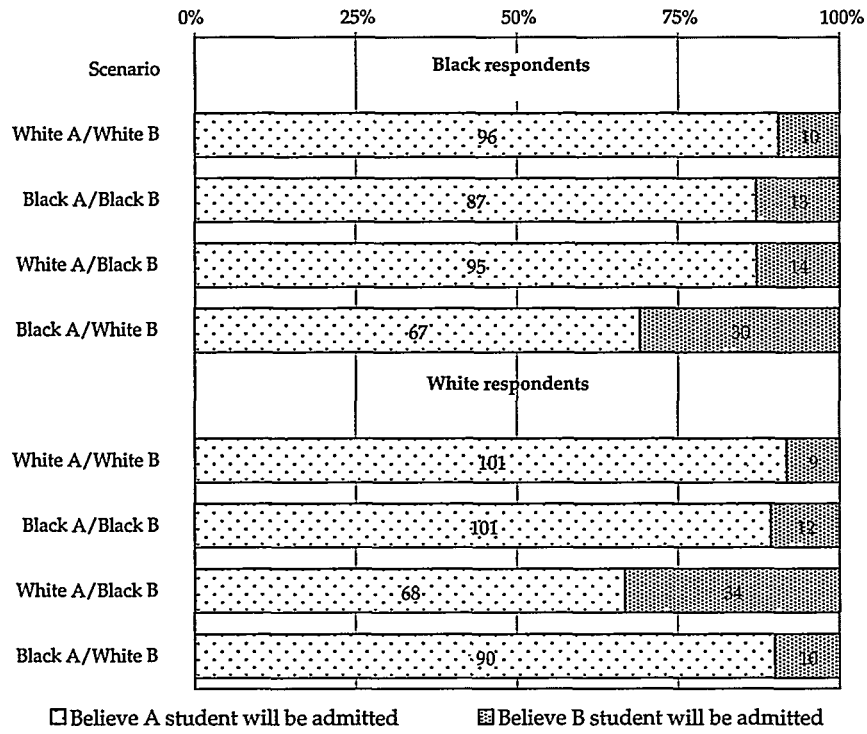
117. *See* James M. Glaser, A Quota on Quotas: Educational Differences in Attitudes Towards Minority Preferences (1999) (unpublished manuscript) (on file with the political science department, Tufts University).

118. Just as in the case of the respondents' own preferences, the genders of the hypothetical students have no effect comparable to that of their races. A female "B" student in the mixed-sex allocation "male A/female B" is given the same likelihood of admission as a male in the "male A/male B" combination. Insofar as the pattern observed in Figure 4 is a perception of the college's preference for the other race, there is no corresponding effect for gender. Respondents do not believe nowadays that gender is regarded by the institution as a relevant issue in a college admissions slot in a zero-sum situation.

119. The fact that whites give a black "B" student a much greater likelihood of admission than blacks do could be influenced by their perceptions of how affirmative action preferences might operate in higher education. Likewise, the beliefs that blacks hold about the pervasiveness of discrimination may lower their expectation of the black "A" student's chances of gaining admission.

The vast majority believe that the "A" student will be admitted, regardless of their own view as to which student should be admitted. How are the perceptions of individuals about the institution's likely behavior related to their own preferences for what it ought to do? There is a fairly small, but significant, negative interaction ($p < 0.005$ on a chi-square test) between the two; the belief that the "A" student will be admitted over the "B" student is even more overwhelming among the supporters of the "B"

Figure 4: Expectations of institutional behavior, broken down by race of respondent



student. The majority of respondents do not expect that the institution will operate in the way they consider just. Again, whites and blacks both agree on these matters. Although a substantial number of Americans would admit the "B" student, they do not believe that the institution will. Instead, the majority of respondents expect the institution to reward past performance by giving greater weight to the traditional indicators of academic merit, i.e., grades and test scores. And, as we have seen, this expectation fits the preferences of the more highly educated white respondents who thus far seem unpersuaded by the arguments of intellectuals like Bowen and Bok who strongly advocate racial preferences for African Americans.[120]

120. *See* BOWEN & BOK, *supra* note 8.

E. Holding Everything Constant Except Race: Evidence from Other Surveys

The college admissions vignette stacked the deck so that the students were unequal in grades and social class. The depiction of the applicants perhaps elicited greater sympathy for the "underdog." In many situations, however, colleges and universities are confronted with two middle-class students with similar backgrounds. Should race then be a decisive factor? Who should get admitted to a predominantly white institution when decision-makers are confronted with two well-prepared students from different races, but similar backgrounds? Do most respondents believe that an institution should favor a black "A" student over a white "A" student if only one can be admitted to an institution that has few minorities?

The NYT/CBS polling data allow us to approach this question. In December 1997, the survey asked a random sample of the U.S. population the following question:

> Suppose a white student and a black student are equally qualified, but a college can admit only one of them. Do you think the college should admit the black student in order to achieve more racial balance in the college, or do you think racial balance should not be a factor?

By similar margins, blacks and whites decisively reject the use of race as a tiebreaker between two equally qualified students competing for a single slot. Of those expressing a view, 77% of white respondents (644 out of 831) and 72% of black respondents (119 out of 156) said that the race of the student should not be a factor. Clearly, these people felt that the institution should find some other way to choose. For them, perhaps, flipping a coin would be better.

These results are surprising for blacks, but not for white Americans. Laura Stoker has shown that white Americans consider diversity enhancement a poor justification for giving preference to one racial group over another.[121] Nonetheless, we obtained a similar result with the following random assignment question asked on the 1996 RAC survey:

> Suppose that a company that has few (female / minority/ black) employees was choosing between two people who applied for a job. If both people were equally qualified for the job and one was (a woman/ a minority person/ a black person), and the other (a man/ was not a minority person/ white) do you think the company should hire the (woman/ minority person/ black person), hire the (man/ other person/ white person), or should they find some other way to choose?

Eighty-two percent of whites and 71% of blacks said the company should find some other way to choose. Only 20% of blacks and 12% of whites said that an underrepresented minority person should be selected. Such agreement between whites and blacks that race should not be a factor in

121. *See* Stoker, *supra* note 82.

college admissions and hiring decisions shows that whites are not the only Americans uncomfortable with affirmative action that uses race as a tie-breaker.

A second NYT/CBS question asking about unequal college applicants in an interracial scenario met with a similar response. Using a decision rule that seems to favor objectivity, a majority of both races preferred the admission of the most academically talented student even when it meant less racial diversity for the college. The question provided:

> Suppose there is a white student who has an A average and a black student who has a B average, but a college can admit only one of them. Do you think the college should admit the black student in order to achieve more racial balance, or do you think that racial balance should not be a factor?

A very decisive majority of both races say that the "A" student should be admitted over the "B" student. Among those expressing an opinion, the proportion expressing the view that racial balance should not be a factor is over 75% for black respondents (95 out of 126) and over 90% for whites (718 out of 793). These additional results suggest that respondents in the College Admissions Vignette are indeed reacting to individualizing characteristics of the two students that extended beyond their gender and race. In the above example, however, a representative sample of Americans presented with two students, portrayed as equal in every respect except race, agreed that the higher-achieving student was the one who deserved admission in the zero-sum situation described.

F. Implications of the Public Opinion Data and the College Admissions Vignette

These data show that the majority of Americans oppose the use of race as a tiebreaker between two similarly advantaged students. However, a substantial proportion—if anything a majority—of Americans are committed to principles that allow for a substantially broader definition of merit than that held by the leading protagonists whose views seem to dominate the affirmative action debate. The general public's broader and more forward-looking conceptualization of merit includes consideration of the obstacles and hurdles that a given person has had to overcome to achieve whatever record is presented to the admissions committee. But, as we have also seen, highly educated whites favor a backwards-looking system of merit, which protects their vast accumulation of social and economic capital and their ability to transmit advantages to their offspring.

Competition for admission to elite institutions is not expected to decline over the next decade; instead it is expected grow even more intense.[122] How should admissions decisions be made in such an increasingly competitive milieu? Decision-makers could institute a computer selection system that would randomly choose among the exceptionally qualified, they could operate in accordance with their mission statements by factoring in variables that go beyond grades and test scores, or they

122. *See* Bonner, *supra* note 6.

could continue the present system of racial preferences. A computer program would remove some human subjectivity from the selection process, but the more mechanical process would come at the expense of the well-rounded student bodies that experienced admissions directors can assemble by actively poring over essays and letters of recommendation in search of those rare diamonds in the rough. Given the data we have examined, it is not too idealistic to think that a substantial percentage of Americans would favor some flexibility. Admissions based solely on grades and test scores would seem to be anathema to the widely held Horatio Alger vision of American society. Clearly, the public's general dissatisfaction with racial preferences should not be interpreted as a desire to award admission to the highest scoring applicants without consideration of other factors. Indeed, Americans do not seem to have any problems accepting bonus points granted on a nonracial basis to alumni children, athletes, persons with special talents, and those applicants from distant places.

The real debate, therefore, is not about Americans clamoring for a mass move towards a meritorious system that favors numbers to the exclusion of all else. If anything, the American people are asking institutions to practice what they purport to do in their lofty mission statements—that is, create opportunities for students of widely different backgrounds. However, the available data show that this is not what many of the nation's premier universities and colleges have done with their admissions policies. The vast majority of the nation's elite institutions have dual admissions systems providing blanket preferences to certain minority groups while disadvantaging large numbers of whites and Asians who are not positioned well enough in society to exploit other sources of preference.

In short, our nation has reached a crossroads where a majority of Americans, a majority of Supreme Court members, and a majority of socioeconomically advantaged whites are saying enough is enough: no more racial preferences in higher education, if it means that the low-achieving offspring of the minority elite is going to be elevated above others who seem more deserving. Surveys conducted by the Educational Testing Service found that "people don't want to give the rich daughter of an African American lawyer special treatment. But the poor African American woman from the wrong part of town and the poor school is a different story."[123] Our data suggests that, in the latter case, Americans want to only reward those disadvantaged persons that seem meritorious in either a backwards- or forward-looking way.

The case for retention of racial preferences is confounded because the proponents have framed the issue around an argument for the value of diversity as a necessary component of the educational experience without fully explaining their use of the concept.[124] The recent challenges to affirmative action in higher education have come from model white

123. Amy Dockser Marcus, *Education: New Weights Can Alter SAT Scores*, WALL ST. J., Aug. 31, 1999, at B1 (quoting Anthony Carnevale, Vice-President of Educational Testing Service).

124. *See* Thernstrom & Thernstrom, *supra* note 8, at 1623–26.

plaintiffs of rather modest means—such as Cheryl Hopwood and Jennifer Gratz—who would certainly bring diversity to the institutions where they sought admission. Under a class-conscious admissions system, these women might have gained meritorious entrance over some racial minorities as well as over other, higher-scoring white applicants.

Searching for a middle ground, the Educational Testing Service (ETS) has sought to identify students that it labels as "Strivers" and has offered this information to colleges and universities on either a race-neutral or race-conscious basis. The experimental ETS formula uses fourteen characteristics of student background to compare a student's actual SAT score with the score that a student of this type would be expected to earn given his or her socioeconomic background and the quality of the high school attended. Any student who scores 200 points above what would be expected from someone with that background is identified as a "Striver." Consequently, a Striver with an actual SAT score of 1200 would be given a Striver's score of 1400 which takes into account the background handicap.[125] Although the Striver's Index would seem to comport with the type of class-based system that the majority of Americans approve, it has come under heavy criticisms because of fears that it is or will become an effort to advantage racial minorities at the expense of whites and Asians. However, the Striver's Index equally disadvantages mediocre African American students with well-to-do backgrounds, and it has a general race-neutral bias against the offspring of elite Americans who benefit from traditional measures of merit and existing admission preferences.

Now we turn our attention to African Americans in an imagined post-*Bakke* world, where conservative justices buoyed by public opinion have abolished racial preferences in higher education and where class-based affirmative action programs such as the Striver's Index have been derailed by detractors and institutional forces geared at maintaining the status quo. Will elite campuses become lily-white or has the impact of abolishing racial preferences in higher education been somewhat exaggerated?

IV. WHAT HAPPENS FOR AFRICAN AMERICANS AFTER *BAKKE*?

The abolition of race-conscious admissions policies at elite institutions will have only a minor ripple effect on the participation of African Americans in higher education. This is because only a small percentage of institutions are involved and because of the determination and resiliency of those African Americans who value education at elite institutions enough to respond proactively to changes in the incentive structure.

Despite the public attention racial preferences attract, the overwhelming majority of the college-bound African American population is not now—and has never been—a significant percentage of the student body at institutions that use racial preferences. African Americans have, however, attended elite, predominately white institutions since the Reconstruction era. African Americans have somehow managed to maintain a toehold in these institutions despite overwhelming societal discrimina-

125. *See* Marcus, *supra* note 123.

tion during a time when the black middle class was less than 10% of the population.[126] During this period, less than 2% of blacks applying to college met the normal merit-based criteria since there were no preferences or recruitment efforts targeted towards them.[127]

Today, however, the pool of middle-class and affluent African Americans that can meet merit-based criteria has grown substantially. Since the early 1960s, African Americans have benefited from the Civil Rights Movement and affirmative action policies, which have greatly increased the size of the black middle class and the percentage of African Americans in colleges and universities. Bowen and Bok cite one study that reported that the percentage of blacks enrolled in Ivy League schools grew from 2.3% in 1967 to 6.3% by 1976, and that the percentage in other prestigious schools had increased from 1.7% to 4.8%.[128] At least two generations of African Americans have offspring that can claim alumni privileges at Princeton and Harvard.[129] By conservative estimates the black middle and upper classes range anywhere from 35% to 44% of the total black population.

The offspring of today's African American middle class should be more competitive applicants than their parents and grandparents were, and although a substantial gap exists between white and black SAT scores, remedies are available to reduce the gap.[130] The SAT gap can be traced to behaviors and choices that can be changed in response to changes in the structure of incentives provided to high school students. The *Journal of Blacks in Higher Education* cites the following reasons for lagging black scores:

> [B]lack students who take the SAT have not followed the same academic track as white students ... white SAT test takers are more likely than black SAT takers to have completed courses in geometry. In higher level mathematics such as trigonometry and calculus, whites hold a large lead. In 1999, 52 percent of white SAT takers had taken trigonometry in high school compared to 40 percent of black test takers. A full one-quarter of white test takers had taken calculus in high school. Only 13 percent, about half as many, of black students had taken calculus.[131]

Similar discrepancies were found in the preparation for the verbal part of the SAT, where black students took fewer literature courses and honors writing courses. Moreover, far fewer blacks chose to invest in test coach-

126. *See* LAWRENCE OTIS GRAHAM, OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS (1999); BURT LANDRY, THE NEW BLACK MIDDLE CLASS 30-36 (1987).
127. *See* S.A. Kendrick, *The Coming Segregation of Our Selective Colleges*, C. BOARD REV. 66 (1967-68).
128. *See* BOWEN & BOK, *supra* note 8, at 7.
129. *See* ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S RACIAL CLIMATE 22 (1997); THERNSTROM & THERNSTROM, *supra* note 26, at 200.
130. *See* C. JENCKS & M. PHILLIPS, THE BLACK-WHITE TEST GAP (1998).
131. *This Wasn't Supposed to Happen: The Black-White SAT Gap Is Actually Growing Larger*, 25 J. BLACKS IN HIGHER EDUC. 96, 98 (1999).

ing courses such as Kaplan and the Princeton Review, which can raise scores by 100 points or more.[132]

Clearly, these are areas where blacks who hope to matriculate at elite institutions can improve their preparation, and advocates of diversity can monitor black students and schools more closely to make sure that these opportunities are provided. Foundations such as the Gates Foundation, which contributed $1 billion to create the Gates Millennium Scholarship, can also fund test preparation courses for financially disadvantaged minorities.[133] Before the sustained attacks on race-conscious admissions policies, little incentive existed to identify the problems responsible for the black-white test gap.

Whatever happens in the courts will not greatly affect African Americans because the vast majority of American college students are not matriculating at elite institutions. Bowen and Bok cite a study by Thomas Kane showing that few four-year institutions use a "marked" degree of racial preference (the top 20%), the next quintile uses only a limited degree, and the remaining 60% of U.S. institutions use no preferences at all.[134] Stephan Thernstrom and Abigail Thernstrom remind us all that the "[d]ecisions made in admissions offices at places like Princeton, Wellesley, Oberlin . . . do little to shape the overall structure of opportunity in higher education."[135] This is certainly the case for African Americans whose choices of institutions include over one hundred historically black colleges and universities, including elite institutions such as Howard, Morehouse, and Spelman, which can lay genuine claim to having produced the backbone of the African American middle and upper classes. African Americans are a resilient people that have survived slavery, Jim Crow segregation, and the attacks of the Reagan-Bush era. The African American communities will survive and flourish, whatever tack the American people and courts ultimately take on racial preferences in higher education.

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132. The *Journal of Blacks in Higher Education* reports that in 1999, 119,394 African Americans took the SAT. Of these, 716 scored 700 or more on the math section, while 909 scored 700 or above on the verbal portion. Blacks are 1% of the students scoring 700 or above on the math test, and 1.6% of the verbal. *See id.* at 99.
133. *See* Theodore Cross, *Bill Gates' Gift to Racial Preferences in Higher Education*, 25 J. BLACKS IN HIGHER EDUC. 6–7 (1999).
134. *See* BOWEN & BOK, *supra* note 8, at 15.
135. *See* Thernstrom & Thernstrom, *supra* note 8, at 1614–20.

Appendix: Statistical Analysis of for the College Admissions Vignette

Table 1: Analysis of deviance for all cases. The notation scenario: race refers to interactions between the scenario and the race of the respondent, and similarly for the other factors depending on characteristics of the respondent.

Factor	df	Deviance	p value
scenario (race of students)	3	18.77	0.0003
sex of students	3	0.48	0.92
race of respondent	1	2.10	0.15
income of respondent	1	1.41	0.23
education of respondent	1	0.01	0.92
sex of respondent	1	1.43	0.23
age of respondent	1	6.27	0.012
scenario:race	3	2.71	0.44
scenario:income	3	11.86	0.008
scenario:education	3	7.31	0.06
scenario:sex	3	1.15	0.77
scenario:age	3	0.96	0.82

The data on which student the respondents thought should be admitted were treated as binary responses. The analyses reported in this appendix are all based on linear logistic models for the probability of preferring the B student. An analysis of deviance, shown in Table 1, was carried out to test for the significance of main effects, and of interactions between attributes of the respondents and the races attributed to the two hypothetical students. The model was fitted in the Splus statistical language, with terms added sequentially. The linear dependence of predictor on education was on a 3-point scale with 1=high school or less, 2=some post-high school or trade school education, 3=four-year college degree or higher. Income was coded in thousands of dollars to the accuracy available from the questionnaires.

The total degrees of freedom in this table is 781, because the few cases where some relevant feature of the respondents was unknown were omitted. The factor "scenario" refers to the races attributed to the hypothetical students in the study. It can be seen that the scenario has a highly significant effect, and the age of the respondent has a significant effect. The only factor that has a significant interaction with scenario is the income of the respondent, but education has an effect approaching significance at the 5% level. The interaction of age with scenario is remarkable for its low deviance value.

Table 2: Analyses of deviance carried out on subsets of the original data, broken down according to the races of the hypothetical students. The factors are all characteristics of the respondents, with : denoting two-factor interactions.

Scenario	Factor	df	Deviance	p value
both students white	income		0.39	0.53
	education		2.03	0.15
	race		1.75	0.19
	income:education		0.55	0.46
	income:race		2.33	0.13
	education:race		0.01	0.93
both students black	income		1.21	0.22
	education		0.24	0.62
	race		0.13	0.72
	income:education		0.39	0.53
	income:race		0.15	0.70
	education:race		0.48	0.49
white A student, black B student	income		9.78	0.002
	education		0.06	0.81
	race		0.64	0.43
	income:education		0.31	0.58
	income:race		0.34	0.56
	education:race		1.33	0.25
black A student, white B student	income		0.72	0.40
	education		5.20	0.02
	race		2.96	0.09
	income:education		1.43	0.23
	income:race		0.06	0.81
	education:race		4.97	0.03

In order to investigate further the effect of scenario, separate analyses of deviance were carried out for the four possible allocations of race to the hypothetical students. In each case reported here, income and education were considered as main effects because of their significant or near-significant interaction with scenario in Table 3. Respondent's race was also included because of its pivotal role in this study. The interaction of age and sex with scenario was also investigated in separate tests not reported here; no significant effects were found. It can be seen from Table 4 that the only significant effects are those of income in the "white A/black B" scenario and of education and the education/race interaction in the

"white B/black A" scenario. Both of these were discussed in more detail (and tested by analysis of contingency tables, which are sensitive to nonlinear effects) in the main text. In the "black A/white B" scenario, education and race together account for a deviance of 13.13 on 3 degrees of freedom, a value significant beyond the p=0.005 level.

We now turn to logistic regression models based on the effects found to be significant in the analysis above. In each case, let p(B) be the probability of preferring the B student. The logistic regression model fits a linear model to the logit of p(B), i.e., log(p(B)/ (1–p(B)), the log odds of preferring the B student. The logistic regression models fit to the data were as follows. For the "white A/black B" scenario, based on a sample of size 189, the model is logit P(B) = 0.95–0.027 I, where I is the income in thousands of dollars, over the range from $5,000 to $60,000. The standard error in the slope coefficient is 0.009.

In the "black A/white B" scenario, let E be the education level measured on a three-point scale, and let Wh and Bl be dummy variables for the race of the respondent (so that Wh = 1 – Bl). A logistic regression allowing for interactions between education and race gives

$$\text{logit } p(B) = 0.22\ Wh + 0.11\ (Bl \times E) - 0.86\ (Wh \times E).$$