

NOTE

Affirmative Action for the Poor: A Proposal for Affirmative Action in Higher Education Based on Economics, Not Race.

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Introduction

Nearly thirty years ago, Congress passed the Civil Rights Act of 1964 in an effort to provide women and minorities with “equal opportunity” in education and employment.¹ President Lyndon B. Johnson issued Executive Order No. 11246 encouraging affirmative action programs for women and minorities.² Organizations instituted “temporary” preferential treatment plans aimed at achieving the goals of the Civil Rights Act.³ The creators of these programs did not envision that the preferential programs would be permanent.⁴ They believed that affirmative action programs would provide education and employment access for people who had been historically underrepresented and that racial and gender inequality would be remedied. It is time to evaluate the progress of current programs in order to reshape them or adopt new ones.

Although many opportunities have opened up for minorities and women over the past thirty years, racial or gender equality has yet to be

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1. The Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2(a)(2), mandated an obligation to provide equal opportunity.

2. See DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1340-43 (1991).

3. “Affirmative action, as envisioned by President Johnson in his famous Howard University speech in 1965 where he first put forward the idea, was a transition program. It was not a permanent program. There is always a question of how long does that last.” Steven A. Holmes, *The Nation; Mulling the Idea of Affirmative Action for Poor Whites*, N.Y. TIMES, Aug. 18, 1991, at 3.

4. *Id.*

achieved. The current affirmative action programs seem less "temporary" than first intended.⁵ In order to understand why these "temporary" programs are still entrenched, it is necessary to examine the progress of the initial programs and assess the problems of American society in the 1990s.

Statistics show that the percentage of Americans living in poverty continues to grow.⁶ In 1990, 13.5% of Americans lived in poverty, up from 12.8% in 1989.⁷ This increase translates into an additional 2.1 million people who fell below the poverty level in 1990.⁸ Timothy Smeeding believes we are facing a permanent proportional decline of the middle class.⁹ This belief is supported by the University of Michigan's Panel Study of Income Dynamics, which reveals a decline in the middle class into the "ranks of the poor."¹⁰ The gap between high and low wage earners widened in the 1980s¹¹ as some of the middle class slid into lower class status. It is time to create programs that will meet current demands rather than maintaining programs that were aimed at the problems of the 1960s.

Recent studies show that affirmative action programs have helped to establish a black middle class.¹² Certainly there is still progress to be made with race-based affirmative action programs, but the current programs benefit middle-class blacks and largely ignore economically disadvantaged blacks who, because of their economic conditions, are the least likely to succeed.¹³ In 1978, William J. Wilson predicted a "transition

5. The label "affirmative action" has been used to describe several different types of programs with varied goals, most of which are based on the idea of preferential admissions or hiring treatment for women and minorities. See Paul Brest, *Affirmative Action and the Constitution: Three Theories*, 72 IOWA L. REV. 281 (1987). Although preferential treatment programs have involved both women and minorities, this Note is limited to affirmative action programs dealing with racial preferences.

6. *The War on Poverty: Administrative Policy and Alternative Strategies, Hearings Before the Joint Economic Committee*, 102nd Cong., 1st Sess. 305 (1991) (Statement of Stephen L. Solarz, Representative).

7. *Id.*

8. *Id.*

9. Richard Morin, *America's Middle Class Meltdown; While Few Escaped Poverty, More Fell into It—and It's Getting Worse*, WASH. POST, Dec. 1, 1991, at C1 (reporting on Professor Smeeding's analysis of income data collected by the University of Michigan Panel Study on Income Dynamics).

10. *Id.*

11. *Id.*

12. See Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 646 (1992).

13. See *America's Wasted Blacks*, ECONOMIST, Mar. 30, 1991; see also Judges, *supra* note 12, at 645-47. Judges suggests that affirmative action has contributed to the problems of the economic underclass because the political focus remains on affirmative action rather than the problems of the inner-city poor. *Id.*

from racial inequalities to class inequalities.”¹⁴ Since the early 1980s, our society has become increasingly segregated along economic lines.¹⁵ Commentators argue that the problems of the disadvantaged black community are more a function of class than of race, and the present affirmative action programs, which provide preferential treatment based on race, fail to address the problems of class inequality.¹⁶ While there is still progress to be made toward racial equality, commentators question whether we should continue to provide preferential treatment to the sons and daughters of people who were helped and have advanced because of affirmative action.¹⁷ Several commentators have suggested affirmative action programs based on economic or class distinctions.¹⁸ Such programs would reach out to help those living in disadvantaged communities with less emphasis on race-specific remedies.¹⁹

This Note focuses on the goals and development of affirmative action programs in higher education.²⁰ Part I compares the social and demographic problems of the 1960s with the social demographics of the 1990s. This part also reviews the commentaries on affirmative action programs, evaluates the effectiveness of such programs, and discusses the criticisms of affirmative action programs in higher education. Part II examines the Equal Protection Clause and its implications for affirmative action. The analysis focuses on Supreme Court decisions regarding affirmative action in the 1970s and 1980s. Part III is a proposal for federal legislation that would mandate affirmative action programs based on eco-

14. WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 3 (1978).

15. Ronald J. Ostrow, *New Report Echoes 'Two Societies' Warning of 1968 Kerner Commission*, L.A. TIMES, Feb. 28, 1993, at A23. Ostrow quotes the recent findings of the Milton S. Eisenhower foundation: “We conclude that the famous prophesy of the Kerner Commission, of two societies, one black, one white—separate and unequal—is more relevant today than in 1968, and more complex, with the emergence of multiracial disparities and growing income segregation.” *Id.*

16. WILSON, *supra* note 14 at 150-51. Wilson contrasts the problems of inner city blacks: poor job training, limited educational opportunity, and increased welfare dependency with the improved situation for the members of the black middle class who are better educated and enjoy greater employment opportunity.

17. See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* 111 (1990); see also Holmes, *supra* note 3, at 3.

18. Commentators suggesting that affirmative action should be based on economic criteria include: Shelby Steele, William J. Wilson, Donald P. Judges, and Robert Greenstein.

19. Some commentators believe such a program will disproportionately target minorities. See, e.g., William Raspberry, *The Black Underclass—Two Strategies*, WASH. POST, Aug. 5, 1991, at A9.

20. The nature of affirmative action in the workplace requires different remedies and is often aimed at different goals. Although the constitutional analysis requires an examination of the case law dealing with affirmative action in the workplace, this Note proposes legislation limited to affirmative action programs for higher education.

conomic criteria. Finally, Part IV analyzes the constitutionality of such legislation.

I. History of Affirmative Action

The affirmative action programs instituted in the 1960s provided more opportunities to minorities in the workplace and in education.²¹ But while affirmative action programs have contributed to the rise of the African-American middle class, the percentage of African-American families living in poverty has also increased dramatically.²²

Critics of affirmative action in education have blamed the race-based programs for creating "reverse discrimination" and for preferring "less qualified" students.²³ They contend that the social costs of affirmative action have been borne by "innocent victims," primarily white men.²⁴ Others feel the programs have created another form of discrimination against African Americans, since preferential treatment has imposed a stigma of questionable competence on African-American applicants.²⁵ Race-based affirmative action programs have become a divisive topic between liberals and conservatives and between African Americans and whites.

Shelby Steele argues that the goals of affirmative action programs should be two-pronged.²⁶ One goal should be the economic development of disadvantaged people, the second goal should be the eradication of

21. See Judges, *supra* note 12, at 645-46; Ronald Brownstein, *Beyond Quotas: A New Generation of Scholars is Stressing Class, Not Race, in an Effort to Break the Civil Rights Impasse*, L.A. TIMES MAG., July 28, 1991, at 18. See generally STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1992).

22. See Judges, *supra* note 12, at 646.

[T]he proportion of black families with incomes over \$35,000 grew from 15.7 percent to 21.2 percent between 1970 and 1986 while the number of black families with incomes of more than \$50,000 increased from 3.7 to 8.8 percent. During the same period, the proportion of black families with incomes of less than \$10,000 also grew substantially from 28.8 percent to a staggering 30.2 percent.

Id. at 646 n.206 (citing Derek T. Dingle, *An Agenda for the Black Middle Class*, BLACK ENTER., Nov. 1989, at 53, 55).

23. Institutions continue to measure their entrance criteria on standardized tests that have been proven to discriminate on the basis of race and economic class. An analysis of the tests or standards for admission to higher education is beyond the scope of this Note. But for commentary on the subjectiveness and discriminatory nature of the objective entrance criteria, see Brian Mikulak, *Classism and Equal Opportunity: A Proposal for Affirmative Action in Education Based on Economic Choice*, 33 HOW. L.J. 113 (1990).

24. See David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 793 n.8. *But cf.* JOHN H. ELY, DEMOCRACY AND DISTRUST 148 (1980).

25. See STEELE, *supra* note 17, at 120.

26. *Id.* at 124.

discrimination. Steele urges that racial preferences meet neither of these goals, and that preferences for disadvantaged applicants be granted regardless of race.²⁷

The concept of affirmative action programs based on economic conditions is appealing to both liberals and conservatives.²⁸ Problems of the inner city are becoming a political focus—people are ready to look at possible solutions. The need to remedy the plight of all disadvantaged Americans makes the time right for a shift in the goals and policies of affirmative action.

II. Equal Protection and Affirmative Action

The Equal Protection Clause of the Fourteenth Amendment guarantees that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²⁹ But “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”³⁰ State and federal legislatures have broad discretion to create classifications of persons under the law, as long as the classification bears a reasonable relation to a legitimate state interest.³¹ This is the “rational relation” test, the least strict level of judicial scrutiny. Most stated government interests will suffice. Where a classification is based on alienage, nationality or race, however, the classification is considered “suspect.” These “suspect classes” are examples of “discrete and insular minorities,”³² and such legislation will be subject to strict judicial review.³³ In addition, any legislation which impinges on the exercise of a fundamental right will also be strictly scrutinized.³⁴

27. Steele writes:

Preferences [based on race] are inexpensive and carry the glamour of good intentions—change the numbers and the good deed is done. To be against them is unkind. But I think the unkindest cut is to bestow on children like my own an undeserved advantage while neglecting the development of those disadvantaged children on the East Side of my city who will never be in a position to benefit from a preference. Give my children fairness; give disadvantaged children a better shot at development—better elementary and secondary schools, job training, safer neighborhoods, better financial assistance for college, and so on.

Id.

28. See Holmes, *supra* note 3, at 3.

29. U.S. CONST. amend. XIV, § 1.

30. Plyler v. Doe, 457 U.S. 202, 216 (1982) (citing Tigner v. Texas, 310 U.S. 141, 147 (1940)).

31. Graham v. Richardson, 403 U.S. 365, 371 (1971).

32. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

33. Graham v. Richardson, 403 U.S. 365, 372 (1970) (alienage); Loving v. Virginia, 388 U.S. 1, 9 (1967) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (nationality).

34. Plyler, 457 U.S. at 216-17 n.15. (“In determining whether a . . . denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitu-

In *Plyler v. Doe*,³⁵ the Supreme Court enumerated a third “intermediate” level of judicial review that is between the “rational basis” and “strict scrutiny” tests and has been applied to classifications involving gender and illegitimacy.³⁶

[W]e have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the state.³⁷

This level of judicial review, known as the intermediate level of scrutiny, requires the state action be substantially related to an important government interest.³⁸

The germinal case on affirmative action in higher education is *Regents of the University of California v. Bakke*.³⁹ The Court in *Bakke* was split four to four with no other justice joining Justice Powell’s decision for the Court. A plurality in *Bakke* stated that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”⁴⁰ This has been called the “exacting scrutiny” test, and is narrowly tailored to higher education.⁴¹

The claim in *Bakke* was one of reverse discrimination and the Court struck down the University of California’s affirmative action program. Plaintiff Allan Bakke, a white male, sued the Medical School of the University of California at Davis and claimed that the school’s special admis-

tion to see if the right infringed has its source, explicitly or implicitly, therein.”). This Note will not deal with judicial review of legislation that infringes on a constitutionally enumerated fundamental right. Although the Court agrees that education is a very important right, the Court rejected the idea that education was a fundamental right in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

35. 457 U.S. 202, 217-18 (1982).

36. See Jesse H. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classification: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255, 257 (1987). Choper categorizes the different perspectives of the justices and writes that Justices Brennan, Marshall, and Blackmun consistently adhered to the “near strict scrutiny” requirement that the legislation be “substantially related to an important state interest.” *Id.* at 260. The current makeup of the Court may be less inclined to use an intermediate level of scrutiny. See ELY, *supra* note 24, and accompanying text.

37. *Plyler*, 457 U.S. at 217-18.

38. *Id.* at 224.

39. 438 U.S. 265 (1978). The first affirmative action case involving higher education to be heard by the Supreme Court was *DeFunis v. Odegaard*, 416 U.S. 312 (1974). By the time the case went to the Supreme Court, however, DeFunis had finished law school and no longer had standing.

40. *Bakke*, 438 U.S. at 291.

41. See O’BRIEN, *supra* note 2, at 1343.

sions program had wrongfully discriminated against him when they denied him admission to the medical school.⁴² Bakke argued that the program, which reserved sixteen of the one hundred openings in the class for qualified "disadvantaged" minority students, excluded him from the school solely because of his race and violated his equal protection rights.⁴³ The Court held that the special admission program created racial distinctions and therefore was subject to strict judicial scrutiny.⁴⁴ The Court rejected the University's argument that strict scrutiny should not be applied in a claim of reverse discrimination since a white male is not a member of a "discrete and insular minority"⁴⁵ and does not require protection from the political process. The Court stated that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."⁴⁶ The plurality concluded that the reservation of a specific number of positions was not necessary to meet the state interest.⁴⁷ In what has been hailed as "the most important part of the decision for affirmative action programs in higher education,"⁴⁸ Justice Powell wrote that while the "set-aside" violated equal protection, race could be considered as a factor in the admissions process.⁴⁹ Brennan, White, Marshall, and Blackmun wrote separately to stress the "central meaning" of the opinion: "Government may take race into account when it acts . . . to remedy disadvantages cast on minorities by past racial prejudice."⁵⁰

The *Bakke* court found that "attainment of a diverse student body" was clearly a "constitutionally permissible goal for an institution of higher education."⁵¹ A university could take race into account during the admissions process, but could not reserve a specific number of seats without violating equal protection.⁵² Justice Powell pointed to the Harvard College admissions program which sought to admit a "diverse" body of students;⁵³ Harvard's definition of diversity included "students

42. *Bakke*, 438 U.S. at 275-78.

43. *Id.* at 277-78.

44. *Id.* at 291.

45. *Id.* at 290.

46. *Id.* at 291.

47. *Id.* at 319-20.

48. See Choper, *supra* note 36, at 257. The separate opinion by Justices Brennan, White, Marshall, and Blackmun, although not a majority, has been characterized as the test of intermediate scrutiny.

49. *Bakke*, 438 U.S. at 320.

50. *Id.* at 325. This standard is different for education than for employment. See discussion of notes 56-66, and accompanying text.

51. *Bakke*, 438 U.S. at 311-12.

52. *Id.*

53. *Id.* at 317.

from disadvantaged economic, racial and ethnic groups.”⁵⁴ Powell stated that race could be considered a “plus” when it was considered in light of all of the applicants qualifications,⁵⁵ but a program that reserved a specific number of positions for minority students showed a facial intent to discriminate,⁵⁶ and imposed burdens on individuals because of their race.

Although the Court has not heard a case dealing with racial classifications in higher education since *Bakke*, the Court recently restated the strict scrutiny standard for state and local affirmative action programs based on racial classifications in *City of Richmond v. J.A. Croson Co.*⁵⁷ The program in the *Croson* case was a city plan requiring prime contractors to subcontract at least thirty percent of the contracts⁵⁸ to “Minority Business Enterprises.” In a 6-3 decision, the Supreme Court applied heightened scrutiny and struck down the plan. Writing for the majority, Justice O’Connor said that in the absence of proof of past discrimination⁵⁹ in the City’s construction industry, the City failed to demonstrate a compelling interest justifying the plan.⁶⁰ Absent a “compelling interest,” the City could not use racial classifications.⁶¹ The Court held that any plan aimed at remedying past discrimination had to be “narrowly tailored” to its goal.⁶² O’Connor noted that the City had instituted a rigid race-based quota⁶³ without first attempting to use any race-neutral means to increase minority business involvement.⁶⁴

O’Connor also compared the difference between the Court’s deference to a federal legislative scheme, such as the Minority Business Enterprise (MBE) provision in the Public Works Employment Act of 1977,

54. *Id.* at 322.

55. *Id.* at 317-18.

56. *Id.*

57. 488 U.S. 469 (1989).

58. Specifically, 30% of the dollar amounts of the contracts were to be awarded to Minority Business Enterprises. *Id.* at 469.

59. The stated absence of proof has been questioned by commentators. Although there was no specific finding of discrimination, only two-thirds of one percent of municipal contracts had been awarded to minority-owned businesses before the city’s program was instituted. Patricia Williams, *Legal Storytelling: The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

60. *Croson*, 488 U.S. at 505.

61. *Id.*

62. *Id.* at 507.

63. *Id.* at 505.

64. *Id.* at 509-10. O’Connor suggested that the City could provide financial assistance and training, relax the bonding requirements, and simplify the bidding process in an effort to provide race-neutral measures to open up the contracting market and remedy past societal discrimination.

and the Court's review of a city government plan.⁶⁵ In *Fullilove v. Klutznik*,⁶⁶ the Supreme Court upheld a provision in the Public Works Employment Act of 1977 which set aside ten percent of all federal funds granted for public works projects to be paid to businesses owned or controlled by statutorily identified minorities. Although Justice Burger wrote in *Fullilove* that "it 'is not to say that we "defer" to the judgement of Congress . . . on a constitutional question,' " Burger acknowledged the difference between a plan made by "a single judge or school board" and "a considered decision of the Congress and the President."⁶⁷ More recently, in *Metro Broadcasting, Inc. v. FCC*, the Court held that federal law using racial classifications would not be subject to strict judicial scrutiny and the Court applied the intermediate level of scrutiny.⁶⁸ Thus, the Court has acknowledged the difference between its review of local or state plans and its review of legislative programs passed by Congress.

III. Proposal for Affirmative Action Programs Based on Economic or Class Distinctions

Based on the assumption that the problems of African Americans and other minorities are "more a function of class than race"⁶⁹ and will not be solved by "race-specific" affirmative action programs,⁷⁰ a growing number of commentators are proposing an affirmative action program

65. *Id.* at 487.

66. 448 U.S. 448 (1980).

67. *Id.* at 473.

68. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

69. Brownstein, *supra* note 21, at 18. Brownstein credits a group of scholars and political analysts, that he calls the "Synthesis School" thinkers, with the idea that whites and minorities must coalesce to solve the problems of race relations. Brownstein's Synthesis School includes both liberals and conservatives, professors, and writers. Brownstein includes conservative San Jose State English professor Shelby Steele; liberal University of Chicago sociologist William J. Wilson; *Washington Post* columnist William Raspberry; and Robert Greenstein, director of the Center on Budget and Policy Priorities, in this group. *Id.*

Brownstein contrasts the Synthesis School ideas with the African-American conservative philosophy; as an example he points specifically to Clarence Thomas, who supports minimal government assistance to help the poor. In comparison, the Synthesis School thinkers support a total government commitment toward the disadvantaged, without regard to race. *Id.*

The Synthesis School approach is fashioned on two basic assumptions. The first is that the problems of minorities today are more a function of class than of race. To combat these problems, William J. Wilson proposes "race-neutral programs such as full employment strategies, job-skills training, comprehensive health care, reforms in the public schools, child care legislation and prevention of crime and drug abuse." *Id.*

The second premise of the Synthesis School is that to elect a political coalition capable of instituting broad reform, liberals must be able to attract both the minority vote and middle and low-income white votes. *Id.*

70. Race-specific programs are those that provide preferential treatment to applicants solely on the basis of race. See generally WILLIAM J. WILSON, THE TRULY DISADVANTAGED

that would be "race-neutral."⁷¹ A program based on race-neutral criteria would be aimed at providing opportunity to economically disadvantaged applicants. "Race-neutral" or "condition-oriented" programs could target social conditions such as undereducation and joblessness⁷² that are common to inner-city poverty. Factors to be considered for admission would include the applicant's income, the family's socioeconomic status, and the parents' level of educational attainment. Critics of race-neutral programs contend that such programs are an attempt to "retreat from . . . remedying racial discrimination."⁷³ By contrast, critics of current affirmative action programs argue that such programs help middle-income African-Americans, but are less likely to help applicants who most need the help—the inner-city poor.⁷⁴

Commentators fear that "the growing concentration of Americans in the high and low income ranges threatens to further exacerbate class and racial animosities."⁷⁵ As the disparity widens between the "haves and have nots," the correlation between economics and opportunity is easier to see.⁷⁶ Recent studies show a relationship between socioeconomic status and educational attainment.⁷⁷ An upper-middle income student is far more likely to attend college if the student's parents attended college and she has financial support.⁷⁸ In comparison, a low-income student is less likely to apply to college if neither of her parents have gone to school and there is little family support.⁷⁹

Furthermore, an affirmative action program based on race-neutral criteria could achieve cultural and economic diversity better than a program aimed only at creating racial diversity. Clyde Summers laments

(1987) (arguing that race-specific policies do little to help disadvantaged African Americans and as a result ignore the issues of racial dominance).

71. See Brownstein, *supra* note 21, at 18.

72. Raspberry, *supra* note 19, at A9.

73. Holmes, *supra* note 3, at 3.

74. See Judges, *supra* note 12, at 645.

75. WILSON, *supra* note 14, at 21.

76. See generally Mikulak, *supra* note 23.

77. Compare *id.* at 117 with Christopher Jencks, *Is the American Underclass Growing?*, in THE URBAN UNDERCLASS 69 (Christopher Jencks & Paul Peterson eds., (1991)) (finding that parental education mattered less among African-American students. "Among teenagers who finished high school during the 1970s or early 1980s an extra year of parental education had only two-thirds as much effect on blacks as on whites. . . . The declining effect of family background on black educational attainment is precisely the opposite of what the underclass hypothesis predicts.").

78. In fact, an applicant may receive preferential admissions treatment if he or she is a child of an alumnus. See Mikulak, *supra* note 23, at 120. A study of Princeton University acceptance rates revealed an acceptance rate of 48% for children of alumni compared to the overall acceptance rate of 17%. *Id.* at 120 n.28.

79. *Id.*

the lack of economic diversity in his law school classes at the University of Pennsylvania: "I have almost no students whose parents are union members and very few students who come from what you would call the blue-collar working class What that means is that no one has any idea what life is like on the other side of the tracks."⁸⁰ William J. Wilson argues that the departure of middle-class African Americans from the cities to the suburbs has left the urban underclass isolated from role models of economic opportunity.⁸¹ Unlike communities where there is economic integration, inner-city ghettos are isolated from economic opportunities. Such isolation makes it difficult for low-income African Americans to improve their situation. A study conducted by James Rosenbaum and Susan Popkin confirms Wilson's argument of the importance of role models that encourage work and social institutions, such as schools, churches, stores, and recreational facilities.⁸² The study involved a group of people from the inner city who moved to the suburbs.⁸³ The group in the suburbs was compared with a group remaining in the inner city, and the study compared the effects of residential integration. Factors such as job-availability and safety contributed to the increase in work hours among the new suburban residents.⁸⁴ The results of the study suggest that economically integrated communities provide more meaningful economic opportunities than isolated urban ghettos to low-income individuals. Rosenbaum's study has resulted in a Chicago program which provides rent subsidies to encourage low-income families in the inner city to move into Chicago's suburbs.⁸⁵ In addition, affirmative action programs based on socioeconomic factors might help to erode the class animosities by providing exposure to people of different economic and cultural backgrounds.

The concept of an affirmative action program that classifies applicants on the basis of economic status has been discussed by many commentators,⁸⁶ but has yet to be put in practice. This Note proposes one application of an economic-based affirmative action program: federal

80. Holmes, *supra* note 3, at 3 (quoting Clyde Summers). Summers further notes "[t]hat [uniformity of the student body] leads to a very sterile discussion when it comes to labor law." *Id.*

81. See WILSON, *supra* note 14, at 138.

82. James E. Rosenbaum & Susan J. Popkin, *Employment and Earnings of Low Income Blacks Who Move to Middle-Class Suburbs*, in THE URBAN UNDERCLASS, *supra* note 77, at 355.

83. *Id.* at 347.

84. *Id.* at 352.

85. Louis Freedberg, *Urban Blacks Find New Hope, and Pain, in Suburbs*, S.F. CHRON., Feb. 22, 1993, at A1.

86. See Brownstein, *supra* note 21, at 18.

legislation that would require all public universities to change their affirmative action programs to focus on providing educational opportunities to the economically disadvantaged.

A race-based affirmative action program without more can only offset the effects of facial discrimination. But if students grew up in an economically disadvantaged neighborhood where the schools did not offer the same opportunities or training as an economically advantaged neighborhood, the students will still be at a disadvantage when they are expected to compete with the students from the advantaged schools. Often students from the inner-city schools will not have had the same resources as the students who attended school in a more advantaged area. Rather than providing preferential treatment based on race, an affirmative action program based on socioeconomic factors would evaluate the relative need of each applicant. A program aimed at assisting the economically disadvantaged might disproportionately target minority applicants,⁸⁷ but such a program would more effectively address the needs of the economic underclass, specifically undereducation and joblessness.⁸⁸ In addition, such programs may be more likely to garner support from critics of race-based affirmative action programs since they would not discriminate on the basis of race.

Although Justice Powell argued in *San Antonio Independent School District v. Rodriguez* that it was difficult to identify a distinct class of "poor,"⁸⁹ it is possible to identify an economically disadvantaged applicant using a variety of factors. Colleges and universities are comfortable analyzing such information since they gather it to determine financial aid.⁹⁰ In addition to considering an applicant's income or family income, a program should also look to the level of educational attainment by family members of the applicant.

Current race-based admissions programs often do very little to actually provide "equal opportunity" to students. An applicant who is admitted on the basis of his or her race may be given the "opportunity" of admittance. If the applicant has not had an elementary and high school education equal to that of the average applicant, however, the student will need additional assistance in order to have a meaningful opportunity

87. See Judges, *supra* note 12, at 684.

88. In order to most effectively improve the academic opportunities for inner-city children, changes are needed at the elementary school level. For a discussion of educational finance remedies see Judges, *supra* note 12, at 689-714.

89. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 19 (1973).

90. See Mikulak, *supra* note 23, at 124-25.

to compete.⁹¹ Affirmative action programs offering preferential treatment to those from disadvantaged backgrounds would necessarily have to provide some remedial assistance. If the school can supplement the curriculum to provide some of the training that "advantaged" students received earlier in their education, the student may be able to better compete with the other students. In the best-case scenario, the school can provide students with the necessary tools to develop skills. As a result, they could be given an "equal opportunity" to compete.

IV. Constitutional Analysis of Legislation Mandating Preferential Treatment Based on Economic Criteria

Critics of an affirmative action program based on economic criteria will argue that such a program is merely a proxy for a program based on racial preferences. While the analysis of the underclass is inconclusive as to its ethnic composition, commentators believe it is disproportionately made up of minorities.⁹² Even if a condition-oriented program were to provide preferential treatment predominately to minority applicants, such a program would be aimed at remedying problems such as joblessness and undereducation which are certainly within the government's interest to pursue.

In *Washington v. Davis*, the Supreme Court held that a law that is "neutral on its face and serving ends otherwise within the power of the government to pursue" is not invalid simply because it affects a greater proportion of one race than another.⁹³ The *Washington* Court was faced with a qualifying test for police officers in the District of Columbia. Plaintiffs argued that the written test discriminated against African Americans since the test excluded a disproportionate number of African-American applicants. The Court cited *Yick Wo v. Hopkins*⁹⁴ for the proposition that a facially neutral statute cannot be applied to invidiously discriminate on the basis of race.⁹⁵ Disproportionate impact alone, however, does not mean that the Court must apply strict scrutiny in its review of the law. The Court noted that the differential racial effect of the policy warranted further inquiry, but felt that the test was sufficiently

91. As Professor Michel Rosenfeld notes, "[e]quality of opportunity for any given member of a designated class often depends on something besides the removal of the obstacles faced by all members of that class." Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687, 1689 (1986).

92. Judges, *supra* note 12, at 684.

93. 426 U.S. 229, 242 (1976).

94. 188 U.S. 356 (1886) (invalidating discriminatory city licensing requirements aimed at Chinese-owned laundries).

95. *Washington*, 426 U.S. at 242.

related to the training program to negate an inference of racial discrimination.⁹⁶

An affirmative action program based on economic criteria would be aimed at chronic problems that plague the inner-city poor, such as undereducation, joblessness, and insufficient job training. Despite a possible disproportionate effect on minority applicants, the Court would likely find that the economic preferences are sufficiently aimed at remedying the stated goals to negate the inference of racial discrimination.

If the Court were to find that a program based on economic criteria was a proxy for a race-based program, an economic program would likely survive strict scrutiny. Justice Powell indicated in *Bakke* that it is often appropriate to judge an applicant on non-traditional standards.⁹⁷ The institution can then examine a wide array of factors, including race, to determine an applicant's eligibility. In the interest of admitting a diverse student body,⁹⁸ the college can recruit students who have the ability to succeed, but would seem underqualified based only on traditional admissions criteria. So long as an affirmative action program based on economic criteria did not designate a certain number of seats that would be filled only by affirmative action applicants, the Court would likely find that such a program met the requirements set forth in *Bakke*.

Although it is often suggested that the underclass constitutes an identifiable class and should be considered a suspect class for purposes of judicial scrutiny,⁹⁹ the Supreme Court rejected this argument in *San Antonio Independent School District v. Rodriguez*.¹⁰⁰ In *Rodriguez*, the plaintiffs brought a class action on behalf of elementary school children from poor families.¹⁰¹ They claimed that the state's reliance on local property taxation for school funding violated the poor children's equal protection interests because of the disparity in the funds that were provided to the local schools from the local property taxes. While the district court considered poverty to be a "suspect classification" and education to be a fundamental right,¹⁰² the court held that the funding system would be upheld only upon a showing of a compelling state

96. *Id.* at 247.

97. *Bakke*, 438 U.S. at 318.

98. Attainment of a diverse student body is a "constitutionally permissible goal for an institution of higher education." *Id.* at 312-13.

99. See Judges, *supra* note 12, at 620-23.

100. 411 U.S. 1, 18 (1973).

101. *Id.* at 5.

102. The Court rejected the argument that education was a fundamental right in *Brown v. Board of Education*, 347 U.S. 483 (1954). See *supra* note 34 for a discussion of fundamental rights and equal protection.

interest.¹⁰³

The Supreme Court overturned the district court in an opinion by Justice Powell and rejected the district court's determination of wealth as a suspect class.¹⁰⁴ Justice Powell noted that under the facts there was no "definitive description" or "delineation of the disfavored class."¹⁰⁵ The cases in which wealth was treated as a suspect class involved the rights of indigents in criminal trials. In the limited situations where the Court has considered wealth a suspect class,¹⁰⁶ the benefit that an individual was deprived of was, typically, a fundamental right.¹⁰⁷

In *Rodriguez*, the Court found "[an] absence of any evidence that the financing system discriminates against any definable category of 'poor' ".¹⁰⁸ The Court pointed to the lack of characteristics of a clearly definable class, and the lack of immutability of conditions when it denied suspect class status.¹⁰⁹ It is unlikely that the current Court would find that an admissions process that treated people differently because of their relative wealth created a suspect class requiring strict scrutiny. The trend on the Rehnquist Court has been to limit suspect classifications to race and nationality.¹¹⁰ In his book *Democracy and Distrust*, Professor John Hart Ely notes that "the once glittering crusade to extend special constitutional protection to the poor has turned into a rout."¹¹¹

Ely argues that the Court's role should be to protect groups of peo-

103. *Rodriguez*, 411 U.S. at 18.

104. *Id.*

105. *Id.*

106. See generally *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

107. Where the Court has considered wealth a suspect class it has pointed to two distinct requirements: (1) because of her impecuniness the individual was completely unable to pay for some desired benefit, and (2) as a result, the loss of the benefit resulted in an absolute deprivation of the individual's interest. Specifically, in *Griffin v. Illinois*, 351 U.S. 12 (1956), the "benefit" was the ability to acquire a court transcript for use during the appellate process. The lack of the use of the transcript was held to interfere with the appellant's right to a fair trial.

108. *Rodriguez*, 411 U.S. at 25.

109. *Id.*

110. ELY, *supra* note 24, at 148.

111. *Id.* Ely notes that poverty is "theoretically" an escapable condition. See *id.* at 150. Ely argues that a child who grows up in near poverty has very little chance to change his or her opportunities until long after the damage has been done. If a child is never entitled to choose to go somewhere other than the inner-city schools, she may never be exposed to higher levels of academic material. The applicant may have excelled at her high school, but the qualifications may still be well below those of applicants from more competitive high schools. Children of more economically privileged backgrounds generally receive more material help from their parents. In addition, parents, friends, and siblings may provide role models which better reflect those individuals who make up the economically privileged class. See Mikulak, *supra* note 23, at 123-24, for statistics and scores from applicants of varied socioeconomic backgrounds.

ple that cannot protect themselves politically.¹¹² He believes the Court need not protect against "reverse discrimination," since the majority will adequately protect its own interests. Rather, the role of the Court should be to protect the "discrete and insular minorities" whose political representation is inadequate.¹¹³ Very few economically disadvantaged people are part of our government's power structure. As a result, the rights of the poor may easily be subjugated to the interests of the economically advantaged majority.

Commentators argue that the Court should consider the poor a suspect class and apply an intermediate level of scrutiny.¹¹⁴ If the Court were to apply an intermediate level of scrutiny to a program classifying applicants based on their economic standing, the program would be upheld upon the finding of a substantial state interest. The Court would likely find a substantial state interest in the need to remedy the problems of the economically disadvantaged. A program aimed at providing equal educational opportunity to disadvantaged individuals would serve the state interest in remedying joblessness, undereducation, and drug abuse. The Court would likely find that the state has a substantial interest in such goals.

However, if the Court was to reverse its holding in *Rodriguez* and hold that the conditions of the underclass warrant suspect status, it is likely that the Court would be faced with the familiar claims of reverse discrimination. An applicant would argue that a program based on economic conditions would discriminate against other applicants solely on the basis of their wealth. If the underclass was considered a suspect class, a court would be required to apply a higher level of scrutiny to such a program. Where the Court has applied heightened levels of scrutiny, the scrutiny has been applied alike for men and women, and for whites and blacks. The Court has rejected Ely's argument that the role of the Court is to protect countermajoritarian interests. Those who argue that the poor should be considered a suspect class should be aware that the Court's symmetrical application of heightened scrutiny could result in the protection of a wealthy applicant who claims to be discriminated against by the program. While it seems unlikely that a court would apply intermediate scrutiny and invalidate such a program to protect advantaged applicants, the Court would be departing from its cur-

112. ELY, *supra* note 24, at 152-53. This argument is based on the famous *Carolene Products* footnote four, which discusses "discrete and insular minorities." *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938).

113. *Id.* at 150.

114. *See* Judges, *supra* note 12, at 620-23.

rent course if it did not apply the intermediate scrutiny equally to claims from wealthy applicants and poor applicants.

If the Court were to follow its current course, the lowest level of judicial review would be applied to legislation that classifies people on the basis of economic criteria. If the Court applied the "rational relation" test, it would undoubtedly find that Congress has a legitimate government interest in remedying the problems of the underclass and that legislation designed to provide educational opportunities to the economically disadvantaged was rationally related to such an interest.

Conclusion

Critics of affirmative action programs contend that preferential treatment programs have created a stigma that minority applicants are less qualified and admitted only because of their race.¹¹⁵ Ideally, a race-neutral program would reduce the stigma that has attached to affirmative action programs. Many people of color have had to tolerate assumptions that all minority students in higher education have been admitted through "special admissions" programs based on lower standards. In reality, only a portion of minority applicants apply through affirmative admissions programs.¹¹⁶

While proponents of an economically based program believe that such a program would not carry the same stigma as those programs that are based solely on race,¹¹⁷ others disagree. Janice Austin, Director of Admissions for Hastings College of the Law, questions whether or not a program based on race-neutral policies would truly reduce the stigma.¹¹⁸ If the program was largely made up of people of color, Austin believes that the same generalizations and resulting stigma may occur.¹¹⁹

A program based on economic factors would do a better job recruiting able applicants from less advantaged backgrounds. The "truly disadvantaged" include the inner-city poor and as commentators suggest, they are disproportionately African American.¹²⁰ As a result, an affirmative

115. See, e.g., RICHARD RODRIGUEZ, *HUNGER OF MEMORY* ch. 5 (1982).

116. The facts of *Regents of University of California v. Bakke* show that over a four year period from 1971 to 1974, 63 minority students were admitted to University of California at Davis Medical School through the special admissions process, while 44 minority students were admitted to the medical school through the regular admissions process. *Bakke*, 438 U.S. at 276.

117. See Raspberry, *supra* note 19, at A9.

118. Interview with Janice Austin, Director of Admissions, Hastings College of the Law, in San Francisco, Cal. (January 23, 1992).

119. *Id.*

120. See Raspberry, *supra* note 19, at A9.

action program based on economic factors may ultimately target minority applicants. An empirical study is warranted to examine whether a program based on economic criteria would disproportionately affect minorities.

Regardless, a program based on economics is likely to garner both multi-racial and bipartisan congressional support.¹²¹ Whites and African Americans alike would have the same opportunity to receive preferential treatment given the same disadvantaged status. As a result, affirmative action might become a less divisive issue between African Americans and whites.

An affirmative action program will have a discriminatory impact on some people, and those people can be expected to challenge the program. An affirmative action program based on socioeconomic criteria, however, is likely to escape strict scrutiny by the Court. An affirmative action program aimed at providing more opportunities to individuals of lower socioeconomic status will be more likely to help remedy the problems of the inner-city poor—joblessness, drug abuse, and undereducation—and would be better suited to meet the current needs of American society in the 1990's.

While the ideal program will reach out to disadvantaged applicants without regard to race, there is still enough evidence of racial inequality and interracial animosity to support the proposition that race should not be totally excluded as a factor. According to Ken Lloyd, Dean of Admissions at the University of San Francisco, such a program is not a new idea for law school admissions.¹²² In 1969, the American Bar Association mandated that law school admissions offices establish a program to recruit applicants from underrepresented backgrounds to better prepare lawyers to serve underrepresented communities.¹²³

An example of a working program of this type is the Legal Equal Opportunity Program (LEOP) at Hastings College of the Law. The LEOP program is self-nominating.¹²⁴ An applicant decides if she has been disadvantaged due to race, prior education, gender, economics, or any other factors. The applicant must write a separate essay for the application that explains her disadvantage, and the application will be read by Hastings LEOP students. A minority student who does not nominate

121. Paul Gardner, *Democrats Must Shift to Policies Helping All Needy Americans*, CHRISTIAN SCI. MONITOR, Sept. 3, 1991, at 18.

122. Interview with Ken Lloyd, Dean of Admissions, University of San Francisco, in San Francisco, Cal. (Mar. 9, 1992).

123. *Id.*

124. Interview with Hilda Taylor, former Director of the Hastings LEOP Program, in San Francisco, Cal. (Nov. 8, 1991).

herself for consideration by the LEOP program will be considered in the general admissions program. The LEOP program includes a wide range of students of both white and minority backgrounds. The disadvantaged circumstances of those in the program include economic disadvantages, physical abuse, learning disabilities, and race. If race is one of several factors included in the criteria for consideration, then critics of the program should not see a change in affirmative action as a "retreat from remedying discrimination."¹²⁵ The benefit of this program is that it targets all applicants who have been disadvantaged in any way. The goals of the program are two-fold: to recruit a diverse student body and to give an applicant who has the ability to compete in higher education the necessary tools to compete.¹²⁶ The LEOP program shows that these kinds of factors are not too difficult to consider.

Although the American Bar Association mandate has encouraged law schools to alter their admissions criteria, similar types of programs should be instituted in higher education admissions. The ABA's effort to open opportunities in the legal profession to underrepresented communities applies equally to undergraduate universities and other graduate programs. Individuals from disadvantaged or underrepresented communities that are given better opportunities in education could provide role models in their communities and may be more likely to assist and serve their communities.

125. See Holmes, *supra* note 3, at 3.

126. Taylor, *supra* note 124.

