

HOPWOOD v. TEXAS: A BACKWARD LOOK AT AFFIRMATIVE ACTION IN EDUCATION

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The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.¹

Sweatt v. Painter, U.S. Supreme Court, 1950

[I]n the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.²

Brown v. Board of Education, U.S. Supreme Court, 1954

The atmosphere of “speculation, experiment and creation”—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.³

*Regents of the University of California v. Bakke,
U.S. Supreme Court, 1978*

[A]ny consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.⁴

Hopwood v. Texas, Fifth Circuit, 1996

INTRODUCTION

In 1992 the University of Texas Law School (Law School) rejected the applications of Cheryl Hopwood, Douglas Carvell, Kenneth

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¹ *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

² *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.).

⁴ *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

Elliott, and David Rogers.⁵ These four applicants, who are white, subsequently filed suit against the State of Texas and the University of Texas, alleging that both the State and the Law School discriminated against them by using an affirmative action⁶ admissions process that placed black and Mexican American applicants in a separate admissions pool and consequently accepted members of those groups over nonminority students who had comparable grades and test scores.⁷ The plaintiffs argued that any use of race in the admissions process unconstitutionally infringed on their Fourteenth Amendment right to equal protection.⁸

In *Hopwood v. Texas*,⁹ the United States District Court for the Western District of Texas applied strict scrutiny¹⁰ to the Law School's

⁵ See *Hopwood v. Texas*, 861 F. Supp. 551, 566-67 (W.D. Tex. 1994), rev'd, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996) [hereinafter *Hopwood I*].

⁶ The phrase "affirmative action" is most often used to refer to policies that provide certain professional and educational opportunities for underrepresented and/or traditionally subjugated groups. See *The Oxford Companion to the Supreme Court of the United States* 18 (Kirit L. Hall ed., 1992). This Note adopts this definition. For further discussion of the evolving meaning of affirmative action, see generally Nicolaus Mills, Introduction: To Look Like America, in *Debating Affirmative Action: Race, Gender, Ethnicity, and the Politics of Inclusion* 1, 5-17 (Nicolaus Mills ed., 1994) [hereinafter *Debating Affirmative Action*].

⁷ This Note generally uses the terms "black" and "Mexican American" because those are the terms used in the *Hopwood* decisions. The Law School's admissions program referred to all applicants that were not black or Mexican American as nonminorities for purposes of its affirmative action program. See *infra* Part II.B. For purposes of accuracy, however, other terms, such as "Hispanic," "Chicano," "Latino," and "African American" are used in this Note when the cited source identifies the group discussed as such.

⁸ See *Hopwood I*, 861 F. Supp. at 553. The *Hopwood* plaintiffs are part of a growing number of plaintiffs who argue that the Fourteenth Amendment prohibits the use of race-conscious affirmative action policies in business and in higher education. For examples of cases challenging affirmative action in the business context, see, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (challenging set-asides for minority-owned businesses); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (challenging FCC's diversity policy); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (challenging set-asides for minority-owned businesses); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1985) (challenging teachers' collective bargaining agreement that provided greater protection for minorities in case of layoffs); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (challenging set-asides for minority-owned businesses); *Back v. Carter*, 933 F. Supp. 738 (N.D. Ind. 1996) (challenging race and gender quotas on Lake County Judicial Nominating Commission); *Koski v. Gainer*, No. 92C3293, 1995 WL 599052 (N.D. Ill. Oct. 5, 1995) (challenging affirmative action hiring practices of Illinois State Police). For examples in the higher education context, see, e.g., *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (challenging merit scholarship available only to blacks), cert. denied, 115 S. Ct. 2001 (1995); *Davis v. Halpern*, 768 F. Supp. 968 (E.D.N.Y. 1991) (challenging law school admissions policy).

⁹ 861 F. Supp. 551 (W.D. Tex. 1994), rev'd, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

¹⁰ Subsequent to the district court's decision in *Hopwood*, the Supreme Court, in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), held that all race-based classifications must be analyzed using a strict scrutiny standard. See *id.* at 2113; see also discus-

program and found that efforts to remedy “the long history of pervasive racial discrimination in our society”¹¹ and to obtain a diverse student body represented compelling state interests that justified the use of race or ethnicity in the admissions process.¹² Indeed, the district court explicitly declined the plaintiffs’ invitation to declare race-conscious affirmative action programs unconstitutional per se.¹³ Nevertheless, the district court struck down the bifurcated admissions process used by the Law School on the ground that it was not narrowly tailored to remedy the effects of past discrimination because it “fail[ed] to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant’s own race.”¹⁴

On appeal, however, the United States Court of Appeals for the Fifth Circuit reversed the decision of the district court, holding that “the law school may not use race as a factor in law school admissions.”¹⁵ In support of its holding, the appellate court determined that “any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”¹⁶ In addition, although the court accepted that remedying past discrimination represented a compelling state interest, it held that the Law School was not in a position to implement a remedial plan because it had not discriminated against the benefited groups in the recent past.¹⁷

Because the Supreme Court denied certiorari on *Hopwood* for jurisdictional reasons,¹⁸ the opinion of the appellate court is arguably now the law of the Fifth Circuit.¹⁹ This decision, however, stands at

sion infra Part I.B. A full discussion of whether strict scrutiny is the appropriate level of scrutiny to apply is beyond the scope of this Note.

¹¹ *Hopwood I*, 861 F. Supp. at 553.

¹² See *id.* at 573.

¹³ See *id.* at 553-54.

¹⁴ *Id.* at 579.

¹⁵ *Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996) [hereinafter *Hopwood II*].

¹⁶ *Id.* at 944.

¹⁷ See *id.* at 948-55.

¹⁸ See *Texas v. Hopwood*, 116 S. Ct. 2581, 2581-82 (1996). Justice Ginsburg, joined by Justice Souter, wrote an opinion respecting the denial of certiorari that explained that the Law School’s discontinuance of the challenged admissions policy rendered its claims moot. Justice Ginsburg nonetheless noted that

[w]hether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance. . . . [W]e must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.

Id. (Ginsburg, J.).

¹⁹ Some argue that the decision in *Hopwood II* should be limited to that case because the court lacked the authority to overrule the holding in *Regents of the University of Cali-*

odds with Supreme Court precedent and therefore unjustifiably weakens the already embattled status of affirmative action in higher education.²⁰

While recent Supreme Court decisions have narrowed the scope of acceptable affirmative action programs outside the educational setting,²¹ the Court has not directly addressed race-based admissions policies in higher education since the 1978 landmark case *Regents of the University of California v. Bakke*.²² This Note contends that, notwithstanding the Fifth Circuit's decision in *Hopwood*, *Bakke's* affirmance of the use of race in admissions programs remains the law, at least in the context of higher education.²³ Moreover, both remedial goals and

fornia v. Bakke, 438 U.S. 276 (1978), that diversity is a compelling state interest in the higher education context. See generally Barbara Bader Aldave, *Hopwood v. Texas: Much Ado About Nothing?*, Remarks Delivered at the *Hopwood* Conferences of The Society of American Law Teachers (Sept. 20, 1996) and at The Hispanic Association of Colleges and Universities (Sept. 24, 1996) (transcript on file with the *New York University Law Review*).

²⁰ For a sampling of the vigorous ongoing debate among legal and social scholars, see, e.g., *Affirmative Action and the University: A Philosophical Inquiry* (Steven M. Cahn ed., 1993) (collected essays offering differing viewpoints on affirmative action); *The Affirmative Action Debate* (George E. Curry ed., 1996) (same); *Debating Affirmative Action*, supra note 6 (collected essays expressing conflicting viewpoints on affirmative action); John E. Fleming et al., *The Case for Affirmative Action for Blacks in Higher Education* (1978) (defending affirmative action); Darien A. McWhirter, *The End of Affirmative Action: Where Do We Go from Here?* (1996) (criticizing affirmative action); Paul Craig Roberts & Lawrence M. Stratton, *The New Color Line: How Quotas and Privilege Destroy Democracy* (1995) (criticizing affirmative action); Kathryn Swanson, *Affirmative Action and Preferential Admissions in Higher Education* (1981) (surveying differing views on affirmative action); Symposium, *Affirmative Action: Promise and Problems in the Search for Equality*, 43 *UCLA L. Rev.* 1731 (1996) (articles and essays debating constitutionality, effectiveness, and use of affirmative action); Symposium, *Comments and Papers from a Symposium on Affirmative Action and the Law*, 1995 *Ann. Surv. Am. L.* 359 (remarks and discussion by scholars with differing viewpoints on affirmative action).

²¹ See discussion *infra* Part I.B.

²² 438 U.S. 265 (1978). For a full discussion of *Bakke*, see *infra* Part I.A.

²³ Judge Wiener, in his concurrence to the Fifth Circuit opinion, makes a similar point: [The Fifth Circuit's] position remains an extension of the law—one that, in my opinion, is both overly broad and unnecessary to the disposition of this case. . . .

. . . [I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.

Hopwood II, 78 F.3d 932, 963 (5th Cir.) (Wiener, J., concurring), cert. denied, 116 S. Ct. 2581 (1996). In addition, seven members of the Fifth Circuit, including Wiener, dissented from that court's denial of a rehearing en banc:

Justice Powell's opinion in *Bakke* made the Supreme Court's disposition prece-dential. . . . Consequently, even if the members of the panel majority were convinced that the Supreme Court is certain to overrule *Bakke*, in the absence of an express overruling, they had no option but to grin, follow *Bakke*, bear it, and patiently await the Supreme Court's reconsideration.

Hopwood v. Texas, 84 F.3d 720, 723-24 (5th Cir. 1996) (Politz, C.J., King, Wiener, Benavides, Stewart, Parker, Dennis, JJ., dissenting from failure to grant rehearing en banc), cert. denied, 116 S. Ct. 2581 (1996); see also Akhil Reed Amar & Neal Kumar

the pursuit of diversity are compelling state interests that justify such programs. This Note further argues that the Law School's 1992 admissions procedure was narrowly tailored to achieve these interests, but that the *Hopwood* district court endorsed a race-conscious admissions process that would lack accountability and allow student body selection to be determined by a process with no clearly articulated principles.

Part I briefly examines the existing law on affirmative action, beginning with a discussion of the Supreme Court's decision in *Bakke*. It next addresses the Supreme Court's recent clarification that the "strict scrutiny" standard must be applied to all racial classifications made by governmental actors. Part II sets the stage for the *Hopwood* case by discussing the history of racial discrimination in Texas. It traces Texas's educational history from the momentous case of *Sweatt v. Painter*²⁴ to the admissions process in use at the Law School in 1992. It then briefly discusses the specific factual background of *Hopwood* and presents the holdings of both the district and appellate courts. Parts III and IV provide a critique of both *Hopwood* opinions. Part III considers the compelling state interest test and contends that the State of Texas, not the Law School alone, is the relevant discriminatory actor for purposes of remedial affirmative action in higher education in Texas. It then argues that, contrary to the *Hopwood* appellate court's holding, diversity in higher education is a compelling governmental interest. Finally, Part IV argues that the *Hopwood* district court failed to apply the narrow-tailoring prong of the strict scrutiny analysis correctly. It maintains that the Law School's 1992 admissions process was in fact narrowly tailored and therefore constitutional under existing law, but suggests that a better policy would have included full disclosure about the extent and purpose of the Law School's affirmative action program, along with a candid statement in the application packet explaining the school's selection criteria.

Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1768 (1996) ("The Court . . . nowhere explicitly overruled *Bakke*, and so, under well established general principles, it clearly remains binding precedent for all lower courts, state and federal.").

Moreover, the Supreme Court has explicitly admonished lower courts on this issue: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

²⁴ 339 U.S. 629 (1950).

I

THE CURRENT LEGAL STATUS OF AFFIRMATIVE ACTION

The Supreme Court has not specifically addressed affirmative action in higher education since *Regents of the University of California v. Bakke*.²⁵ In its more recent decisions with respect to affirmative action in noneducational settings, however, the Court has retreated from earlier decisions favoring affirmative action and has created some uncertainty with respect to affirmative action in school admissions. As the following discussion will demonstrate, however, these decisions do not support the Fifth Circuit's wholesale rejection of affirmative action in higher education admissions programs.

A. *Affirmative Action in Education*

Bakke involved a challenge to the University of California at Davis Medical School's (Davis Medical School) special admissions program.²⁶ Prior to 1973, Davis Medical School had split its admissions program into two parts—the regular admissions program and the special admissions program—in order to improve minority representation.²⁷ Of the one hundred places in the class, Davis Medical School filled eighty-four through the regular admissions process and sixteen through the special admissions program.²⁸ Between 1971 and 1974, the regular admissions program admitted forty-four minority students and the special admissions program admitted sixty-three.²⁹

²⁵ 438 U.S. 265 (1978).

²⁶ See id. at 269-70 (opinion of Powell, J.). Allan Bakke, a 32-year-old, white, male student with grades and test scores that were above average for the class admitted in 1974 and comparable to those of the class admitted in 1973, argued that his rejection from Davis Medical School violated the Equal Protection Clause of the Fourteenth Amendment. See id. at 276-78 (opinion of Powell, J.).

²⁷ See id. at 272-76 (opinion of Powell, J.). The special admissions program reviewed the applications of those candidates who identified themselves as "economically and/or educationally disadvantaged" in 1973 or as members of a "minority group" in 1974. See id. at 274-75 (opinion of Powell, J.). The school considered "'Blacks,' 'Chicanos,' 'Asians,' and 'American Indians'" to be members of minority groups. See id. at 274 (opinion of Powell, J.).

²⁸ See id. at 275 (opinion of Powell, J.). As a first step, the regular admissions procedure required rejection without further review of applications from students with grade-point averages below 2.5 on a 4.0 scale. See id. at 273 (opinion of Powell, J.). In contrast, the special admissions program did not require automatic rejection of such applicants. See id. at 275 (opinion of Powell, J.). Instead, the members of the special admissions committee reviewed applications, interviewed candidates, and made recommendations to the admissions committee as a whole. They continued to make recommendations until the program filled the 16 set-aside places. See id.

²⁹ See id. at 275-76, 276 n.6 (opinion of Powell, J.). The special admissions program admitted "21 black students, 30 Mexican-Americans, and 12 Asians" between 1971 and 1974. Id. at 275 (opinion of Powell, J.).

A badly splintered Court decided three main issues and produced five separate opinions in *Bakke*. Justice Powell, writing an opinion announcing the judgment of the Court, upheld the California Supreme Court's finding that the admissions program was unlawful.³⁰ The Court, however, reversed the state court's finding that *any* use of racial criteria in the admissions process was unconstitutional, with five Justices agreeing that race-conscious admissions policies were constitutionally permissible.³¹

First, basing his opinion on constitutional grounds,³² Justice Powell read the Equal Protection Clause of the Fourteenth Amendment to require strict scrutiny of all classifications made on the basis of race and to apply to all groups equally.³³ He noted several major problems with programs that employ racial classifications,³⁴ and further argued that the use of a quota, which "totally foreclosed" nonminority applicants from competition for the sixteen special admissions seats, was inherently suspect.³⁵

Second, Justice Powell analyzed the program to determine whether or not it would survive strict scrutiny review.³⁶ He concluded that the only constitutionally permissible goal advanced by Davis

³⁰ See *id.* at 271 (opinion of Powell, J.). Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens concurred in this portion of the Court's judgment. They did not reach the issue of constitutionality, however, and instead based their decision on statutory language. See *id.* at 411-12 (Stevens, J., concurring in the judgment in part and dissenting in part). Justice Stevens noted "that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate." *Id.* at 411 (Stevens, J., concurring in the judgment in part and dissenting in part).

³¹ See *id.* at 272 (opinion of Powell, J.). Justices Brennan, White, Marshall, and Blackmun joined this portion of the Court's judgment but also argued that the program at issue was in fact constitutional. See *id.* at 379 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

³² See *id.* at 287-305 (opinion of Powell, J.). After discussing the applicability of Title VI, see *id.* at 281-87 (opinion of Powell, J.), Justice Powell concluded that Title VI "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287 (opinion of Powell, J.).

³³ See *id.* at 295-97 (opinion of Powell, J.).

³⁴ Justice Powell stated:

[T]here are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. . . . Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

Id. at 298 (opinion of Powell, J.) (citation omitted).

³⁵ *Id.* at 305 (opinion of Powell, J.).

³⁶ See *id.* at 299 (opinion of Powell, J.) (stating that strict scrutiny requires that program be "precisely tailored to serve a compelling governmental interest").

Medical School as a justification for its program was its interest in diversity, stating that:

[Achieving a diverse student body] clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.³⁷

In his discussion of diversity, Justice Powell recalled the Court's earlier discussion of this diversity interest in *Sweatt v. Painter*³⁸ and emphasized that "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."³⁹

Third, having found a compelling state interest in diversity, Justice Powell considered whether the separate admissions program was necessary to achieve this goal.⁴⁰ He determined that the use of a quota was not essential to achieving diversity and compared Davis Medical School's program to the process used by Harvard,⁴¹ maintaining that the use of race as a "plus" in the admissions process was acceptable so long as it did not "insulate the individual from comparison with all other candidates for the available seats."⁴²

In weighing *Bakke* as precedent it is important to remember that Justice Powell's opinion was not fully joined by any other Justice.⁴³ Nevertheless, no Justice argued that the use of race was wholly inappropriate in Davis Medical School's admissions process. In fact, Justice Powell stated that in certain circumstances both the Constitution

³⁷ Id. at 311-12 (opinion of Powell, J.). Davis advanced three other rationales for the special admissions program: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession"; (2) "countering the effects of societal discrimination"; and (3) "increasing the number of physicians who will practice in communities currently underserved." Id. at 306 (opinion of Powell, J.). The Court rejected all of these rationales under the compelling state interest prong of the strict scrutiny test. See id. at 307, 309, 311 (opinion of Powell, J.).

³⁸ 339 U.S. 629, 634 (1950); see also discussion of *Sweatt* infra Part II.A.1.

³⁹ *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweatt*, 339 U.S. at 634).

⁴⁰ See id. at 314-15 (opinion of Powell, J.).

⁴¹ See id. at 315-16 (opinion of Powell, J.) (discussing process used by Harvard and finding it exemplary of permissible use of race); see also id. app. at 321-24 (opinion of Powell, J.) (discussing Harvard admissions program).

⁴² Id. at 317 (opinion of Powell, J.).

⁴³ At the same time, Justice Powell's opinion did serve as the basis for the plurality decision and must have included compromise language reflecting some consensus within the Court. See supra notes 30-31 and accompanying text; see also Bernard Schwartz, Decision: How the Supreme Court Decides Cases 7, 164 (1996) (discussing large number of memos that flow back and forth as decisions are made and noting that Justice Brennan suggested *Bakke* compromise).

and the Civil Rights Act permitted race-conscious admissions policies adopted to remedy proven past discrimination.⁴⁴ Moreover, Justice Powell declared that race was a legitimate factor that could be considered in a university's admissions policy if it advanced student body diversity.⁴⁵

More recently, in *United States v. Fordice*,⁴⁶ the Court considered a case dealing with a state's failure to remove vestiges of its system of de jure segregation in higher education. In *Fordice*, the petitioners, joined by the United States Government, challenged the State of Mississippi's university system, arguing that it had failed to remove policies that caused segregation.⁴⁷ The Court held that Mississippi must take affirmative actions to dismantle the vestiges of its prior segregation that went beyond mere removal of the outwardly segregating rules.⁴⁸ In its discussion, the Court highlighted several areas of special concern, most notably the difference in the American College Test (ACT) scores required by the various schools in the state university system.⁴⁹ The historically white campuses uniformly required higher minimum scores than the historically black ones, and the Court recognized evidence presented to the district court which indicated that "[b]lack students on the average score somewhat lower" on the ACT.⁵⁰ The Court noted that the use of a threshold based on a standardized test that produced racially biased results was an impermissible impediment to the desegregation of Mississippi's higher education system.⁵¹ Thus, *Fordice* demonstrates that when the Supreme Court has considered education, it has upheld the consideration of race

⁴⁴ See *Bakke*, 438 U.S. at 307-10 (opinion of Powell, J.) (noting that remedial racial classifications require judicial, legislative, or administrative findings demonstrating necessity of such classifications). In a similar vein, Justices Brennan, White, Marshall, and Blackmun explained that "[g]overnment may take race into account when it acts . . . 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 to act in this area." *Id.* at 325 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part). Justice Powell noted the lack of such findings in the *Bakke* case. See *id.* at 309 (opinion of Powell, J.).

⁴⁵ See *id.* at 311-12 (opinion of Powell, J.). Thus, in *Bakke*, five Justices (Brennan, White, Marshall, Blackmun, and Powell) agreed that race-conscious admissions policies were constitutionally permissible, and four Justices simply did not reach the issue.

⁴⁶ 505 U.S. 717 (1992).

⁴⁷ See *id.* at 724.

⁴⁸ See *id.* at 742-43.

⁴⁹ See *id.* at 734-35.

⁵⁰ *Id.* at 737 n.10 (alteration in original) (quoting district court opinion).

⁵¹ See *id.* at 734-36.

when designed to rectify the effects of past discrimination or to increase student body diversity.⁵²

B. *The Strict Scrutiny Test for Racial Classifications*

In the last fifteen years, a majority of the Court has gradually come to adopt Justice Powell's position requiring a strict scrutiny analysis of all racial classifications—benign and invidious—made pursuant to both federal and state governmental programs.⁵³ What remains unclear, however, is whether this strict scrutiny test is truly “strict in

⁵² The lower courts, however, have not been so receptive to such programs. The United States Court of Appeals for the Fourth Circuit recently addressed the issue of minority scholarships in *Podberesky v. Kirwan*, 38 F.3d 147, 152 (4th Cir. 1994), cert. denied, 115 S. Ct. 2001 (1995). In *Podberesky*, a Hispanic student challenged the validity of a merit scholarship program open only to black students. The Fourth Circuit held the scholarship program unconstitutional under the strict scrutiny standard of review. See *id.* at 161. The university had presented four present effects of past discrimination to demonstrate a compelling state interest in maintaining the program. These included (1) the poor reputation of the University of Maryland among black students, (2) the underrepresentation of black students in the school, (3) the low retention and graduation rates of black students who do enroll, and (4) the perception that the campus atmosphere is hostile towards black students. See *id.* at 152. The appellate court rejected all of these arguments. See *id.* at 155, 157. In addition, the court found that the program was not narrowly tailored because it awarded scholarships only to high-achieving black students and because it included students who were not residents of Maryland. See *id.* at 158-59.

⁵³ Nevertheless, the Justices continue to vigorously debate the issue of what level of scrutiny should be applied to benign racial classifications. Compare *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (O'Connor, J.) (applying strict scrutiny) with *id.* at 2120 n.1 (Stevens, J., dissenting) (arguing that court should differentiate between “invidious” and “benign” discrimination and apply different levels of scrutiny); compare *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-66 (1990) (Brennan, J.) (applying intermediate level of scrutiny to race-based classification designed to promote diversity) with *id.* at 603 (O'Connor, J., dissenting) (arguing that “strict scrutiny” should be applied); compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (O'Connor, J.) (applying “strict scrutiny” to minority set-aside provision) with *id.* at 535 (Marshall, J., dissenting) (arguing for lower level of scrutiny); compare also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.) (applying “exacting judicial examination”) with *id.* at 361-62 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part) (applying lower level of scrutiny).

Recently, the Court even affirmed quotas that were explicitly race conscious. See, e.g., *United States v. Paradise*, 480 U.S. 149, 166-70 (1987) (approving 50% affirmative action promotion quota); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 516 (1986) (approving affirmative action promotion quotas); *Local 28 Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 448-51 (1986) (approving 29% quota to achieve affirmative action membership goal).

Moreover, scholars do not agree that strict scrutiny should apply to benign classifications. See, e.g., John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 (1974) (arguing that “special scrutiny” is inappropriate when whites favor blacks at their own expense because “it is not ‘suspect’ in a constitutional sense for a majority, any majority, to discriminate against itself”).

theory, but fatal in fact,”⁵⁴ and, consequently, whether any race-conscious admissions program in higher education is constitutionally permissible.

In *Adarand Constructors, Inc. v. Peña*⁵⁵ a divided Court held five to four that strict scrutiny applied to all federal race-based affirmative action programs.⁵⁶ Although Justice O’Connor, writing for the Court,⁵⁷ applied strict scrutiny and reiterated that it is the applicable standard when reviewing any racial classification, she made a point of stating that the test is *not* always “‘strict in theory, but fatal in fact.’”⁵⁸ Justice O’Connor explained her position by discussing *United States v. Paradise*,⁵⁹ a case in which an affirmative action program survived strict scrutiny.⁶⁰

⁵⁴ *Adarand*, 115 S. Ct. at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)).

⁵⁵ 115 S. Ct. 2097 (1995).

⁵⁶ See *id.* at 2113.

⁵⁷ Justice O’Connor’s opinion was for the Court except to the extent that Justice Scalia’s concurrence departed from it. See *id.* at 2100.

⁵⁸ *Id.* at 2117 (quoting *Fullilove*, 448 U.S. at 519 (1980) (Marshall, J., concurring in the judgment)). In *Adarand*, the Court revisited the issue of minority set-asides in construction contracts. The Court produced six separate opinions, see *id.* at 2101 (O’Connor, J.); *id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 2120 (Stevens, J., dissenting); *id.* at 2131 (Souter, J., dissenting); *id.* at 2134 (Ginsburg, J., dissenting), and engaged in a general debate about affirmative action, splitting on the issue of how to scrutinize remedial race-based classifications. Justice O’Connor interpreted the Court’s previous decisions with respect to racial classifications as stating three general propositions that she argued should be applied to all cases in which the government classifies people by race. First, the prior decisions established what she described as judicial “skepticism,” which meant that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.” *Id.* at 2111 (quoting *Fullilove*, 448 U.S. at 491 (opinion of Burger, C.J.)). Second, she maintained that prior decisions demonstrated “consistency”—that “all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.” *Id.* Third, she argued for “congruence” between the standards applicable to federal and state racial classifications, asserting that under the Due Process Clause of the Fifth Amendment, the federal government should be held to the same standards that are applicable to the state governments under the Equal Protection Clause of the Fourteenth Amendment. See *id.* Justice O’Connor then stated that the combined effect of the three propositions led to “the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.” *Id.*

⁵⁹ 480 U.S. 149 (1987).

⁶⁰ In *Paradise*, the Supreme Court applied strict scrutiny and affirmed a district court order requiring an affirmative action promotion scheme in the Alabama Department of Public Safety. See *id.* at 163-67, 188. The Court upheld the program despite the order’s requirement of a one-to-one ratio in promotions—one black officer promoted for every white officer promoted—that effectively created a 50% quota. See *id.* at 163. The Court found that the program was necessary to remedy a “blatant and continuous pattern and practice of discrimination in hiring in the Alabama Department of Public Safety, both as to troopers and supporting personnel.” *Id.* at 154. In fact, prior to the institution of the

In contrast, Justices Scalia and Thomas, who concurred with Justice O'Connor in part and concurred in the judgment, wrote separate opinions arguing that no governmental interest can ever justify the use of a racial classification.⁶¹ Justices Stevens, Souter, and Ginsburg dissented.⁶² Despite the limited nature of its actual holding and the continued existence of disagreement within the Court, *Adarand* makes clear that a majority of the Supreme Court will apply strict scrutiny to all race-based classifications—regardless of whether they can be labeled as invidious or benign.⁶³

The above discussion demonstrates the uncertainty surrounding the state of race-conscious programs. What little guidance the cases do provide suggests that remedial affirmative action in higher education is permissible when: (1) the admissions remedy is limited to groups against whom discrimination by the governmental actor can be proven (especially where there have been appropriate findings by a competent authority), (2) the admissions remedy does not employ a strict quota, and (3) the remedy does not remove nonminority applicants from competition for a seat or benefit. Although the fate of programs that rely upon diversity as a compelling governmental interest is less clear, recent Supreme Court precedent suggests that such programs are permissible when the second and third of the foregoing factors are met.⁶⁴

court-ordered quota, no black trooper had ever reached or exceeded the rank of corporal. See *id.* at 159.

⁶¹ See *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment). Justice Scalia stated that the "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction," *id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment), and Justice Thomas asserted that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice," *id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment).

⁶² See *id.* at 2120 (Stevens, J., dissenting); *id.* at 2131 (Souter, J., dissenting); *id.* at 2134 (Ginsburg, J., dissenting). In his dissent, Justice Stevens stated that "[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. . . . Remedial race-based preferences reflect the . . . desire to foster equality in society." *Id.* at 2120 (Stevens, J., dissenting). He responded to Justice O'Connor by arguing that the principle of consistency was misplaced because it would lead the Court to "disregard the difference between a 'No Trespassing' sign and a welcome mat." *Id.* at 2121 (Stevens, J., dissenting).

⁶³ See *id.* at 2113 ("[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."); see also *Bush v. Vera*, 116 S. Ct. 1941, 1951-52 (1996) (applying strict scrutiny to redistricting plan that used race as "predominant factor").

⁶⁴ See discussion *infra* Part III.B; see also *Adarand*, 115 S. Ct. at 2127 (Stevens, J., dissenting); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566 (1990); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

II

DISCRIMINATION AND DIVERSITY IN TEXAS: FROM *SWEATT* TO *HOPWOOD*

In order to complete an inquiry into the application of strict scrutiny in *Hopwood*, an examination of the historical background that surrounds the issue of affirmative action in Texas is necessary. Without such an understanding, it is impossible to grasp either the diversity of the peoples within Texas or the state's history of discrimination against minorities.

A. *Texas's History of Discrimination in Education*

Texas has a long history of discrimination against its black and Mexican American citizens in all areas of public life, including de jure⁶⁵ and de facto⁶⁶ segregation in public education.⁶⁷

1. *Sweatt v. Painter*

Until 1969, the Texas Constitution required that "separate schools . . . for the white and colored children" be maintained at all levels.⁶⁸ In the case of higher education, the Supreme Court overturned this provision in the landmark case of *Sweatt v. Painter*.⁶⁹ In *Sweatt*, which was decided four years before *Brown v. Board of Education*,⁷⁰ the Court held that the state's refusal to admit blacks to the

⁶⁵ "De jure segregation" is defined as:

[S]egregation directly intended or mandated by law or otherwise issuing from an official racial classification or in other words . . . segregation which has or had the sanction of law. [The t]erm comprehends any situation in which the activities of school authorities have had a racially discriminatory impact contributing to the establishment or continuation of a dual system of schools.

Black's Law Dictionary 425 (6th ed. 1990).

⁶⁶ "De facto segregation" is defined as: "Segregation which is inadvertent and without assistance of school authorities and not caused by any state action, but rather by social, economic and other determinates." *Id.* at 416.

⁶⁷ See *Hopwood I*, 861 F. Supp. 551, 572 & n.63 (W.D. Tex. 1994), rev'd, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996); see also Comment, Project Report: De Jure Segregation of Chicanos in Texas Schools, 7 Harv. C.R.-C.L. L. Rev. 307 (1972) (tracing history of segregation of Chicanos in Texas schools).

⁶⁸ Tex. Const. art. VII, § 7 (repealed 1969); see also Tex. Rev. Civ. Stat. Ann. art. 2719 (Gammell 1925) (commanding counties to maintain "schools of two kinds; those for white children and those for colored children"), *id.* art. 2900 (directing that "[n]o white children shall attend schools supported for colored children, nor shall colored children attend schools supported for white children"); Tex. Rev. Civ. Stat. Ann. art. 2643b (Vernon 1965) (appropriating funds for separate university facilities for black students), invalidated by *Sweatt v. Painter*, 339 U.S. 629 (1950).

⁶⁹ 339 U.S. 629 (1950).

⁷⁰ 347 U.S. 483 (1954).

Law School violated the Equal Protection Clause of the Fourteenth Amendment.⁷¹

In upholding the segregated system, the Texas Court of Appeals admitted that Law School applicant Heman Marion Sweatt “possessed every essential qualification for admission, except that of race, upon which ground alone his application was denied.”⁷² Faced with defending a lawsuit before the United States Supreme Court, Texas hurriedly opened a makeshift law school⁷³ in an attempt to invoke the Court’s “separate but equal” doctrine from *Plessy v. Ferguson*.⁷⁴ The state court found that the new law school offered Heman Sweatt “privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to the white students at the University of Texas.”⁷⁵

The United States Supreme Court reversed, concluding that it could not find “substantial equality in the educational *opportunities* offered white and Negro law students by the State.”⁷⁶ In deciding *Sweatt*, the Court opened the door for the demise of the “separate but equal” doctrine, at least in the field of education.⁷⁷ It also addressed another issue that remains at the heart of the *Hopwood* case—the need for a diverse student body in law schools:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other offi-

⁷¹ See *Sweatt*, 339 U.S. at 636. For an in-depth discussion of the history leading to the *Sweatt* case, its facts, the disposition at the trial court level, and its effects on legal education for blacks, see generally Douglas L. Jones, *The Sweatt Case and the Development of Legal Education for Negroes in Texas*, 47 *Tex. L. Rev.* 677 (1969).

⁷² *Sweatt v. Painter*, 210 S.W.2d 442, 443 (Tex. Civ. App. 1948), rev’d, 339 U.S. 629 (1950).

⁷³ See Jones, *supra* note 71, at 683. A permanent facility was opened by the time *Sweatt* reached the Supreme Court. See *id.* at 687.

⁷⁴ 163 U.S. 537 (1896).

⁷⁵ *Sweatt*, 210 S.W.2d at 446. In fact, the State argued that the new black law school surpassed the Law School in faculty-to-student ratios, class size, library access, and physical facilities. See *id.* app. at 448-51.

⁷⁶ *Sweatt*, 339 U.S. at 633 (emphasis added).

⁷⁷ See *id.* at 635-36 (holding that *Sweatt* must be admitted to Law School but refusing to address *Plessy* doctrine because there was no equivalent separate school for blacks).

cial with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar.⁷⁸

Four years later in *Brown v. Board of Education*,⁷⁹ the Court finally directly overturned the *Plessy* Court's "separate but equal" doctrine.⁸⁰

2. *The Continuing Struggle*

In Texas, the decisions in *Sweatt* and *Brown* marked only the beginning of a long struggle for equal educational opportunities for all citizens. State officials resisted the integration of public schools as mandated by *Brown* and were equally reluctant to fully integrate state universities and professional schools.⁸¹

In an attempt to keep blacks out of the University of Texas and other law schools, the state created the School of Law of the Texas State University for Negroes (TSU).⁸² This strategy has been remarkably successful despite the affirmative action programs in place at other state schools: in 1974, there were only ten blacks among the 1600 students at the Law School, and in 1992 about fifty percent of all minority law students in Texas attended TSU.⁸³

Most importantly, however, the state continued to perpetuate segregated public schools long after *Brown*. Austin, the state capital and the home of the Law School, provides an example. Prior to the *Brown* decision, the Austin Independent School District (AISD) established separate "Mexican" schools and "black" schools.⁸⁴ When

⁷⁸ *Id.* at 634.

⁷⁹ 347 U.S. 483 (1954).

⁸⁰ See *id.* at 495. *Brown* addressed public education generally, while *Sweatt* may be limited to graduate schools or may even be read so narrowly as to address law schools only. See, e.g., Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 *J. Legal Educ.* 103, 112 (1992) (discussing unsuccessful attempts by some southern states to argue that *Brown* applied to primary and secondary schools only).

⁸¹ See *Hopwood I*, 861 F. Supp. 551, 554 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). Even after the University of Texas was forced to admit minorities, most University of Texas organizations allowed neither black nor Mexican American students to participate, and both groups were housed separately from white students throughout the 1950s and 1960s. See *id.* at 555.

⁸² See Jones, *supra* note 71, at 683. The descendant of this school still exists at Texas Southern University, see *Hopwood I*, 861 F. Supp. at 555 n.4, and is now known as the Thurgood Marshall School of Law, see Law Sch. Admission Council, *The Official Guide to U.S. Law Schools* 49 (1996 ed. 1995).

⁸³ See *Hopwood I*, 861 F. Supp. at 573 n.66.

⁸⁴ See *United States v. Texas Educ. Agency*, 564 F.2d 162, 171 (5th Cir. 1977). The Texas Education Agency is an agency of the State of Texas. See *Tex. Educ. Code Ann.* § 7.002 (West 1996) (delineating composition and purpose of Texas Education Agency). The court in *Texas Education Agency* noted that:

[T]he Mexican schools had all Mexican-American enrollments; few Mexican-Americans were assigned to Anglo schools. The AISD maintained the segregated identity of the schools through the use of dual-overlapping attendance

desegregation began after *Brown*, AISD transferred black students into Mexican American schools—the white schools were exempted.⁸⁵ The AISD litigated for seven years and twice appealed to the United States Supreme Court in its attempts to avoid desegregation.⁸⁶ The United States Court of Appeals for the Fifth Circuit found that “[t]he evidence clearly showed the school board’s intent to segregate Mexican-American students”⁸⁷ and that the segregation in Austin was “pervasive and intentional.”⁸⁸ As a consequence of this prolonged court battle, desegregation of the AISD did not begin until the fall of 1979, a quarter of a century after *Brown*.⁸⁹

Today, Texas still wrestles with the problem of de facto school segregation and maintains inferior public schools in those school districts populated primarily by minorities. In 1994, over forty Texas school districts faced pending desegregation lawsuits despite the fact that the public school population in Texas is fifty percent white and

zones, student assignment policies, teacher assignment policies, school site selection, and gerrymandering. . . . In dual-overlapping zones Anglos attended Anglo schools; Mexican-Americans attended Mexican schools. The AISD built new schools deep inside Mexican-American neighborhoods, with a capacity keyed to serving only the Mexican-Americans.

Texas Educ. Agency, 564 F.2d at 171-72.

⁸⁵ See *Texas Educ. Agency*, 564 F.2d at 174.

⁸⁶ See, e.g., *United States v. Texas Educ. Agency*, 467 F.2d 848, 865-66 (5th Cir. 1972) (holding that AISD “caused and perpetuated” segregation of Mexican Americans); *United States v. Texas Educ. Agency*, 532 F.2d 380, 390 (5th Cir.) (finding that AISD intended to maintain segregated schools), judgment vacated by 429 U.S. 990 (1976); *United States v. Texas Educ. Agency*, 579 F.2d 910, 916 (5th Cir. 1978) (denying AISD’s petition for rehearing and commanding it to desegregate black and Mexican American school children), cert. denied, 443 U.S. 915 (1979).

⁸⁷ *Texas Educ. Agency*, 564 F.2d at 171.

⁸⁸ *Id.* at 174.

⁸⁹ In 1979, the school district lost its final chance for an appeal to the Supreme Court, but only after the 14 active judges on the Fifth Circuit had already “unanimously agreed that the school board had intentionally discriminated against both blacks and Mexican-Americans.” *Texas Educ. Agency*, 579 F.2d at 911.

Austin was certainly not unique in its resistance to desegregation. See, e.g., *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 226-27 (5th Cir. 1983) (noting that in 1983 “70% of the black students in [the Houston Independent School District] still attend[ed] schools that [we]re 90% or more minority, including as minorities black and Hispanic students”); Testimony of Derek Adame, Record, vol. 15 at 11, *Hopwood I*, 861 F. Supp. 551 (W.D. Tex. 1994) (No. A-92-CA-563-SS) (on file with the *New York University Law Review*) (testimony of 1992 Law School student) (noting that bussing did not start in El Paso until he was in third grade); see also Caspar W. Weinberger, *Some Thoughts on the Twentieth Anniversary of Brown v. Board of Education*, in *From Brown to Bradley: School Desegregation 1954-1974*, at 33, 33 (R. Stephen Browning ed., 1975) (noting that most integration following *Brown* took place after 1968 and that as of 1974 more than 70% of black students in 20 United States cities still attended segregated schools).

fifty percent minority.⁹⁰ Moreover, the results of discrimination in education are reflected in the ethnic makeup of the Texas bar: in 1992, the year the *Hopwood* plaintiffs were rejected by the Law School, Texas's population was 11.9% black and 25.3% Hispanic, while the membership in the state bar association was only 3.1% black and 7.6% Hispanic.⁹¹

B. Overcoming the Past: History and Content of the 1992 Law School Admissions Procedure

In an effort to address the continuing segregation of minority students and their underrepresentation at state universities, in 1977 the Office for Civil Rights (OCR), a division of the United States Department of Health, Education, and Welfare, began a federal district court-ordered investigation of Texas's system of public higher education.⁹² In 1980, the OCR reported that Texas had failed to remove remnants of its former de jure racial segregation from its public education system.⁹³ Texas spent the 1980s negotiating with the OCR over the appropriate measures to improve the status of minorities in state institutions of higher education. By 1982, Texas submitted the *Texas Plan* to remedy the inequality in educational opportunities for blacks and Mexican Americans.⁹⁴ The *Texas Plan* did not satisfy the OCR because its enrollment goals for blacks and Mexican Americans would not enroll minority students in proportion to the number of minorities graduating from undergraduate institutions statewide.⁹⁵

By 1983, with no settlement reached, the United States District Court for the District of Columbia ordered that enforcement against the state begin unless Texas submitted a plan that complied with Title

⁹⁰ See *Hopwood I*, 861 F. Supp. at 554. In *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989), the Supreme Court of Texas declared that Texas's school financing system violated the Texas Constitution because of the disparity in school financing between rich and poor school districts. See *id.* at 397. The court noted a 700 to 1 ratio of property wealth per student between the wealthiest and poorest school districts. See *id.* at 392. This disparity resulted in a wide variation among districts in spending per student: \$19,333 per student was spent in the wealthiest district while only \$2112 per student was available in the poorest. See *id.*

⁹¹ Brief of Appellees at 6, *Hopwood II*, 78 F.3d 932 (5th Cir.) (No. 94-50664), cert. denied, 116 S. Ct. 2581 (1996) (on file with the *New York University Law Review*).

⁹² See *Hopwood I*, 861 F. Supp. at 555-56.

⁹³ See *id.* at 556.

⁹⁴ See *id.*

⁹⁵ See *id.* The OCR's position on remedial affirmative action had the express approval of Justice Clarence Thomas (then Assistant Secretary of Education at the Department of Health, Education, and Welfare). In fact, it was Thomas who informed Texas's governor that the *Texas Plan* was inadequate. See *id.*

VI⁹⁶ within forty-five days.⁹⁷ OCR provided Texas with a list of thirty-seven steps that would improve the plan, including the consideration of an applicant's complete record in admission decisions and the selection of "[minority] students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements."⁹⁸ Under the threat of a court-imposed affirmative action program, Texas amended its plan to accommodate the changes suggested by OCR.⁹⁹ As of January 1994, OCR continued to oversee Texas's attempts to eliminate the remains of its dual system.¹⁰⁰

By 1992, the Law School had developed a complex admissions process that included affirmative action measures designed to remedy past discrimination and to enroll a diverse student body.¹⁰¹ This plan included a minority subcommittee of the admissions committee that reviewed the applications of all minority applicants who possessed certain minimum qualifications.¹⁰² The Law School did not maintain maximum or minimum quotas for the number of black and Mexican American students to be admitted.¹⁰³

Admissions personnel color-coded the file of every applicant to reflect their race or ethnicity¹⁰⁴ and residency¹⁰⁵ status. They then divided the candidates into groups based on their Texas Index (TI)¹⁰⁶ and placed them in one of three categories: presumptive admission,

⁹⁶ Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (1994). Section 2000d prohibits discrimination "in any program or activity receiving Federal financial assistance." *Id.*

⁹⁷ See *Hopwood I*, 861 F. Supp. at 556.

⁹⁸ *Id.*

⁹⁹ See Testimony of Kenneth Ashworth, Record, vol. 12 at 25, *Hopwood I* (No. A-92-CA-563-SS) (on file with the *New York University Law Review*). In fact, the OCR's plan specified that the increase in minority enrollment must include an increase at Texas's traditionally "white" universities. See *id.* at 15-17, 24.

¹⁰⁰ See *Hopwood I*, 861 F. Supp. at 557.

¹⁰¹ See *id.* at 560. Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers, the eventual plaintiffs in *Hopwood*, all applied to the Law School for admission to the 1992 entering class. See *id.* at 564.

¹⁰² See *id.* at 562.

¹⁰³ See *id.* at 563. It did, however, try to enroll an entering class that was 5% black and 10% Mexican American in accordance with the OCR goals in the amended version of the *Texas Plan*. See *id.* ("These numbers reflect an effort to achieve an entering class with levels of minority enrollment generally consistent with the percentages of black and Mexican American college graduates.")

¹⁰⁴ See *id.* at 560. The application asked each candidate to select one of the following ethnic classifications: "Black/African American, Native American, Asian American, Mexican American, Other Hispanic, White, or Other." *Id.*

¹⁰⁵ See *id.* Texas law provides that nonresidents can make up no more than 15% of the entering class and that each class must contain at least 500 students. See *id.* at 563.

¹⁰⁶ See *id.* at 551. The Texas Index consisted of a weighted combination of an applicant's undergraduate grade-point average (adjusted for the academic strength of the applicant's undergraduate school) and the applicant's LSAT score. See *id.* at 557 n.9.

discretionary admission, and presumptive denial.¹⁰⁷ The determination of an applicant's category differed markedly according to the applicant's race and residency: the presumptive denial score for nonminorities was higher than the presumptive admission scores for blacks and Mexican Americans.¹⁰⁸ In March of 1992, the presumptive admission score for resident nonminorities was 199/87 and their presumptive denial score was 192/80.¹⁰⁹ For blacks and Mexican Americans, the presumptive admission score was 189/78 and the presumptive denial score was 179/69.¹¹⁰ One or two members of the admissions committee reviewed all files in the presumptive denial zone before rejecting applicants therein.¹¹¹

Depending on the applicant's race, the admissions committee¹¹² followed different procedures for applicants who fell into the discretionary zone. Because of the substantially larger pool of nonminority applicants, admissions officers divided nonminority discretionary zone applicants' files into groups of thirty based on their Texas Index scores and residency, and each of three admissions committee members examined each file.¹¹³ The three members then voted on the applicants—each committee member having a maximum number of votes for admission for each group.¹¹⁴ Applicants receiving two or three votes were admitted, those receiving one vote were placed on the waiting list, and those receiving no votes were denied admission.¹¹⁵

The minority subcommittee reviewed the files of applicants in the discretionary zone who identified themselves as black or Mexican

¹⁰⁷ See *id.* at 561. The admissions officers did not interview candidates, so admissions decisions were based entirely on the information in the applicant's file. See *id.* at 563. The file consisted of the application form, LSDAS material (LSAT score and undergraduate and graduate grade-point average), letters of recommendation (optional), and a personal statement from the applicant (optional). See *id.* at 557 n.9, 563.

¹⁰⁸ See *id.* at 561-62. The committee set threshold scores for nonresidents uniformly higher than those for residents, but they differentiated them similarly based on the race of the applicant. See *id.*

¹⁰⁹ See *id.* The two numbers reflect the two different LSAT grading scales that were in use at the time. See *id.* at 561 n.25.

¹¹⁰ See *id.* at 561-62.

¹¹¹ See *id.* at 561.

¹¹² The admissions committee consisted of nine law professors, two assistant deans, and four students. See *id.* at 560. The minority subcommittee of the admissions committee consisted of Professor Johanson (who is white), Dean Aleman (who is Mexican American), and Dean Hamilton (who is black). See *id.* at 560 n.20. Student members of the subcommittee attended meetings but did not vote. See *id.* at 562 n.30.

¹¹³ See *id.* at 562.

¹¹⁴ See *id.*

¹¹⁵ See *id.* Before being rejected, however, all applications were reviewed by at least one member of the admissions committee. See *id.* at 561.

American.¹¹⁶ The subcommittee then presented its recommendations to the full admissions committee in the form of summaries of the files of applicants who the subcommittee believed to be good candidates for admission.¹¹⁷ There was no set number of applicants that could be recommended at a given meeting.¹¹⁸

C. *The District Court's Decision: A Step Backward*

Reviewing the admissions procedure under a strict scrutiny standard and relying on the Supreme Court's decision in *Bakke*,¹¹⁹ the district court held the Law School's use of separate admissions pools unconstitutional because the procedure allowed an applicant's race to "insulate the individual from comparison with all other candidates for the available seats."¹²⁰ The court did find a compelling governmental interest in the Law School's commitment to increasing diversity, however, and held that a program of affirmative action was necessary in order to "overcome the legacy of the past and to achieve the diversity necessary for a first-class university."¹²¹ It also upheld the use of race as a "plus" factor, even under a strict scrutiny analy-

¹¹⁶ See *id.* The district court found that in theory each member of the admissions committee reviewed more than one set of nonminority files and that the minority subcommittee reviewed all of the minority files. See *id.* at 562 & n.27. The court also found, however, that no single admissions committee member reviewed all of the files in the discretionary zone. See *id.* at 562 n.27.

¹¹⁷ See *id.* at 562. The trial court found that, in practice, these recommendations were "virtually final." *Id.* at 563.

¹¹⁸ See *id.*

¹¹⁹ See discussion *supra* Part I.A.

¹²⁰ *Hopwood I*, 861 F. Supp. at 577 (quoting *Regents of the Univ. of Cal. v. Bakke*, 483 U.S. 265, 317 (1978) (opinion of Powell, J.)). The court explained that the program "fail[ed] to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race." *Id.* at 579. Judge Sparks reasoned that:

[T]he failure to provide comparative evaluation among *all* individual applicants in determining which were the best qualified to comprise the class, including appropriate consideration of a "plus" factor, created a procedure in which admission of the best qualified was not assured in 1992. Under the 1992 procedure, the possibility existed that the law school could select a minority, who, even with a "plus" factor, was not as qualified to be a part of the entering class as a nonminority denied admission. Thus, the admission of the nonminority candidate would be solely on the basis of race or ethnicity and not based on individual comparison and evaluation. This is the aspect of the procedure that is flawed and must be eliminated.

Id. at 578-79.

¹²¹ *Id.* at 573-74. The court further found that without affirmative action the Law School would likely return to its former status as a virtually all-white school. See *id.* at 573-74 & 573 n.66.

sis.¹²² Although the court struck down the 1992 procedure, it concluded that the process did not effectively create an illegal quota.¹²³

The district court granted declaratory relief by entering a judgment that the "use of the separate evaluative processes for minority and nonminority applicants in the discretionary zone violated the Fourteenth Amendment."¹²⁴ Nevertheless, the court refused to grant the injunctive relief the plaintiffs requested because prior to trial the Law School had voluntarily eliminated the minority subcommittee and the presumptive admission and denial scores.¹²⁵ In addition, the court found that the plaintiffs were unable to prove that they would have been admitted under a constitutional admissions program.¹²⁶ Consequently, the court granted the plaintiffs the right to reapply to the Law School free of charge, awarded them only one dollar each in nominal damages, and refused to award them punitive damages.¹²⁷

D. The Fifth Circuit's Decision: Two Steps Backward

Applying strict scrutiny, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision. In overruling the lower court, the appellate court held that academic diversity was not a compelling state interest under the Fourteenth Amendment, and therefore that racial classifications could not be used in trying to enroll a diverse student body.¹²⁸ The court did note, however, that other characteristics such as talents, alumni connections, and economic class could be considered in attempting to achieve diversity.¹²⁹

¹²² See *id.* at 578. For a description of the use of "plus" factors, see *Bakke*, 438 U.S. at app. at 316-17 (opinion of Powell, J.) (discussing Harvard's use of race in its admissions process).

¹²³ See *Hopwood I*, 861 F. Supp. at 574.

¹²⁴ *Id.* at 582.

¹²⁵ See *id.* at 582 & n.87. The plaintiffs sought an injunction barring the Law School from using the 1992 admissions process and requiring their admission to the school. See *id.* at 582.

¹²⁶ See *id.* at 582. In 1992, the trial court found that 10 candidates denied admission had higher Texas Indexes than Hopwood, 19 candidates denied admission had higher Texas Indexes than the other three plaintiffs, 109 nonminority candidates admitted had Texas Indexes lower than Hopwood, and 67 nonminority candidates admitted had Texas Indexes lower than the other plaintiffs. See *id.* at 580-81.

¹²⁷ See *id.* at 583. The court refused to award monetary damages because it found that "[t]he defendants acted in good faith and made sincere efforts to follow federal guidelines and to redress past discrimination." *Id.*

¹²⁸ See *Hopwood II*, 78 F.3d 932, 944 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

¹²⁹ See *id.* at 946. The appellate court admonished the Law School for its rejection of Cheryl Hopwood, arguing that her life experience (which included raising a handicapped child and supporting herself during college) was an example of the type of "diversity" that the Law School should consider. See *id.* at 946-47. Notably, the court failed to mention the undisputed evidence that Hopwood neglected to submit application materials (such as

The court next addressed the use of remedial affirmative action, noting that the state may only use a remedial racial classification to remedy the specific harm caused by a given state actor.¹³⁰ The Law School had argued that the State of Texas was the relevant discriminating actor and therefore that discrimination throughout the entire Texas public school system must be considered in evaluating the need for remedial measures.¹³¹ The appellate court, however, found that the focus of the inquiry must be limited to the Law School: “[P]ast discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions.”¹³² The appellate court then held that the Law School had not presented a compelling state interest in using affirmative action for remedial purposes, thus finding it unnecessary to reach the narrow-tailoring prong of the strict scrutiny analysis.¹³³

The following two sections of this Note critique the decisions of both the district court and the Fifth Circuit. Part III examines the first prong of the strict scrutiny analysis—the compelling state interest test—focusing on the appellate court’s decision. Part IV discusses the second prong of the test—narrow tailoring—and examines the district court’s comparison of the Law School’s 1992 admissions process to the Harvard example advanced by Justice Powell in *Bakke*.

III

STRICT SCRUTINY PART I:

FINDING A COMPELLING STATE INTEREST

This Part examines the Fifth Circuit’s decision that the Law School’s 1992 admissions process did not satisfy the compelling state interest test and argues that, in light of the existing Supreme Court precedent,¹³⁴ the court’s reasoning was flawed and its decision incorrect.

While proponents of affirmative action have advanced many justifications in support of race-based admissions programs,¹³⁵ as previously discussed, only two of those argued before the Court remain viable today—remediating past discrimination and achieving diversity. These two justifications are somewhat similar and their goals overlap:

recommendation letters and a personal statement) that would have apprised the university of her unique situation. See *Hopwood I*, 861 F. Supp. at 564-65.

¹³⁰ See *Hopwood II*, 78 F.3d at 949; see also discussion *infra* Part III.A.1.

¹³¹ See *Hopwood II*, 78 F.3d at 951 n.43.

¹³² *Id.* at 954.

¹³³ See *id.* at 955.

¹³⁴ See discussion *supra* Part I.

¹³⁵ See, e.g., *supra* note 37.

each seeks to improve the representation of groups that have been systematically underrepresented in particular segments of the work force or in certain institutions of higher education. Nevertheless, they are not identical.

The educational goal of diversity is not closely connected to the traditional purpose of remedial admissions policies. Instead, it is rooted in the First Amendment interest in academic freedom to select a student body, and its aim is to create a learning environment that will enrich the education of all students by providing for a robust exchange of ideas.¹³⁶ Moreover, diversity includes a civic component: the interest in producing educated individuals, including future business and political leaders, who have been exposed to a wide variety of viewpoints and who are diverse in experience and viewpoint. Diversity as an educational goal cannot be achieved, however, without a fair and reasonable representation of all viewpoints among the student body, and the viewpoints of groups that have been the victims of discrimination are unlikely, in the absence of affirmative action, to be fully represented in certain educational programs and institutions.

The remedial objective of affirmative action, in contrast, is comparatively narrow in scope. It has as its primary goal remedying the effects of past discrimination by giving an admissions preference to qualified members of those groups that have been specifically burdened by egregious racial discrimination at the hands of the government. Thus, the nexus of these two goals is that they both require that universities and professional schools consider race in their admissions processes.

A. *Remedying Discrimination*

Perhaps the most compelling reason for race-based affirmative action measures is the need to remedy past discrimination and root out its many remaining effects.¹³⁷ Affirmative action as a remedial program encompasses both compensatory and distributive justice goals and is focused on aiding groups that have suffered acute injustice and continue to suffer from the effects of that wrong. The *Hopwood* appellate court limited the "use of remedial racial classifi-

¹³⁶ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-13 (1978) (opinion of Powell, J.).

¹³⁷ Some argue that affirmative action is justified by the Thirteenth Amendment and the need to eliminate the remaining "badges and incidents" of slavery. See, e.g., *Williams v. City of New Orleans*, 729 F.2d 1554, 1577 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part). See generally Douglas L. Colbert, *Affirming the Thirteenth Amendment*, 1995 *Ann. Surv. Am. L.* 403 (discussing underutilization of Thirteenth Amendment by proponents of affirmative action).

cations . . . to the harm caused by a specific state actor."¹³⁸ Despite strong evidence that the State of Texas continues to perpetuate a de facto segregated school system, the appellate court concluded that the relevant state actor was the Law School alone and not the State of Texas.¹³⁹ The circuit court panel therefore held that affirmative action at the Law School was only appropriate where the Law School itself was responsible for the harm that the applicant had suffered, and that in order to justify its affirmative action program, the Law School "must, at a minimum, prove that the effect it proffers is caused by the past discrimination [of the Law School] and that the effect is of sufficient magnitude to justify the program."¹⁴⁰ This section argues that these holdings are erroneous and, if followed, effectively outlaw the use of affirmative action programs in public institutions in the three states bound by the decision: Texas, Louisiana, and Mississippi.

1. *The Relevant Governmental Actor*

Although the *Hopwood* appellate court found that remedying past discrimination was a compelling governmental interest, as noted above, it took issue with the district court's finding that the system of education within the entire State of Texas, and not the Law School alone, was the relevant governmental unit to consider.¹⁴¹ The court concluded that treating the State of Texas as the relevant governmental actor was inconsistent with the Supreme Court's decisions in *Wygant v. Jackson Board of Education*¹⁴² and *City of Richmond v. J.A. Croson Co.*¹⁴³ and would lead to "boundless 'remedies.'"¹⁴⁴ The *Hopwood* court explained that a "remedy reaching all education within a state addresses a putative injury that is vague and amorphous."¹⁴⁵

By relying on *Wygant* and *Croson*, both of which deal with affirmative action in employment, the *Hopwood* appellate court failed to appreciate important distinctions between higher education and employment. In *Wygant*, nonminority teachers challenged a provision in their collective bargaining agreement that provided for greater protection for minorities in the case of layoffs.¹⁴⁶ The defendant argued

¹³⁸ *Hopwood II*, 78 F.3d 932, 950 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

¹³⁹ See id. at 952.

¹⁴⁰ Id. (quoting *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), cert. denied, 115 S. Ct. 2001 (1995)).

¹⁴¹ See id. at 951-52.

¹⁴² 476 U.S. 267 (1986).

¹⁴³ 488 U.S. 469 (1989).

¹⁴⁴ *Hopwood II*, 78 F.3d at 951.

¹⁴⁵ Id. at 950.

¹⁴⁶ See *Wygant*, 476 U.S. at 269-73.

that minority teachers were necessary to provide role models for minority students and that the program served a remedial purpose.¹⁴⁷ Applying strict scrutiny, the Court held that supplying minority role models to alleviate societal discrimination was not a compelling governmental interest.¹⁴⁸ The Court also rejected the defendant's remedial argument, holding that the layoff provision was not narrowly tailored because the burden imposed on innocent individuals was too large.¹⁴⁹ Thus, the Court's decision was not based on relevant governmental actor concerns but on the inadequate fit between the actual means and ends of the program.

Croson concerned a challenge to Richmond, Virginia's thirty-percent minority set-aside for city construction contracts.¹⁵⁰ The Court held that the plan constituted an unconstitutional quota based on "a generalized assertion that there has been past discrimination in an entire industry [that] provide[d] no guidance for a legislative body to determine the precise scope of the injury it [sought] to remedy."¹⁵¹ In order to tie these employment cases to the education context, the *Hopwood* court quoted language from *Croson* analogizing the quota at issue in that case to the quota at issue in *Bakke*: "Like claims that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding quota."¹⁵² Although this quote clearly indicates the Supreme Court's hostility to quotas in all contexts, it does not follow that the Court would, or should, consider employment and education to be identical for the purpose of determining the relevant governmental actor. Specifically, while it may make sense to limit affirmative action programs by a government employer to remedying harm done by that specific actor, the same logic does not apply in the education context.

The *Hopwood* appellate court's state actor analysis is flawed because the court ignored key differences between a system of public education and the amorphous injury at issue in *Croson*. First, in Texas there is some level of statewide management of the public education system—state officials have general supervisory duties and are in

¹⁴⁷ See *id.* at 274-78.

¹⁴⁸ See *id.* at 276.

¹⁴⁹ See *id.* at 282-84. In reaching this decision, the Court explicitly distinguished the burden imposed by hiring goals from that imposed by the layoffs at issue in the case. See *id.*

¹⁵⁰ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989).

¹⁵¹ *Id.* at 498.

¹⁵² *Hopwood II*, 78 F.3d 932, 950 (5th Cir.) (quoting *Croson*, 488 U.S. at 499), cert. denied, 116 S. Ct. 2581 (1996).

charge of both formulating and implementing policies.¹⁵³ Although such action is ultimately subject to legislative control, “[t]he State Board of Education . . . often carries out its planning function without explicit legislative directive.”¹⁵⁴ Second, education, unlike employment, is a process in which the treatment a student receives at each level has a continuing impact: “Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted they ordinarily must have been students for sixteen years.”¹⁵⁵ In fact, in the 1970s, when most of today’s law students were beginning their educational careers, many areas of Texas were still segregated, and even today de facto housing and educational segregation persists in many parts of the state.¹⁵⁶ The lack of minority representation in the Law School today is not due to the present effects of the Law School’s past discrimination against minorities. The harm is much more invidious, and it occurs much earlier in the lives of prospective law students.¹⁵⁷

Because the Supreme Court has determined that “societal discrimination” is not a compelling state interest,¹⁵⁸ the suggestion that affirmative action is also only appropriate on the part of the actor who discriminated directly against the beneficiary of the remedial program is a thinly veiled argument for having no affirmative action at all. Under the *Hopwood* appellate court’s formulation, affirmative action would only be permitted where the Law School’s practice of discrimination *directly* harmed the applicant by previously refusing that same applicant admission based on her race.¹⁵⁹ It is inconceivable that educational affirmative action was intended to help only individuals who actually suffered discrimination at the hands of the institution employing the affirmative action policy. A policy of that sort is not affirmative action; it is a remedy exactly like that which was afforded Heman

¹⁵³ See Comment, *supra* note 67, at 312-13; see also *supra* note 84.

¹⁵⁴ Comment, *supra* note 67, at 312.

¹⁵⁵ *Geier v. Alexander*, 801 F.2d 799, 809 (6th Cir. 1986).

¹⁵⁶ See *supra* notes 84-90 and accompanying text; see also *Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138, 1142-43 (W.D. Tex. 1972) (finding that housing developments remained segregated). Moreover, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the United States Supreme Court noted that in San Antonio, Texas, the richest school district remained “only 18% Mexican-American and less than 1% [black],” *id.* at 12-13, while the poorest district was “approximately 90% . . . Mexican-American and over 6% [black],” *id.* at 12; see also *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 391-93 (Tex. 1989) (discussing disparate school funding in Texas).

¹⁵⁷ For a discussion of existing effects of educational discrimination, see *supra* note 91 and accompanying text and *infra* Part III.A.2.

¹⁵⁸ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497 (1989) (“[S]ocietal discrimination’ . . . is an inadequate basis for race-conscious classifications . . .”).

¹⁵⁹ Such a program might also benefit an applicant whose parent had been denied admission based on race, but it is unclear whether the *Hopwood* appellate court would have found such discrimination to be an injury direct enough to justify affirmative action.

Sweatt in 1950.¹⁶⁰ Just as the Supreme Court ordered Sweatt admitted to the Law School after he was rejected in violation of the Fourteenth Amendment, under the appellate court's decision in *Hopwood*, only applicants who were previously rejected on the basis of race could be admitted through an affirmative action plan. In order for such a plan to have any practical application whatsoever, the institution employing the affirmative action plan would have to continue, in blatant violation of the law, to discriminate against the groups that it also intended to benefit through its plan.¹⁶¹

2. *Past and Present Discrimination*

The *Hopwood* appellate court opined in dicta that even if the state as a whole had been the relevant actor, the Law School's program nevertheless would have been unconstitutional because the remaining effects of past discrimination are not enough to warrant affirmative action.¹⁶² Minorities in this country, and in Texas specifically, have been subjected to two centuries of discrimination in public education, both before and after *Brown v. Board of Education*.¹⁶³ In Texas, blacks and Mexican Americans were the primary targets of that discrimination:

The State of Texas engaged in overt discrimination against blacks until the practices were forcibly dismantled in the relatively recent past. Discrimination in education was at the center of official discrimination against black Texans. . . .

Similarly, the State has subjected Mexican Americans to discriminatory practices in the education area as reflected in the findings of unlawful *de jure* discrimination in the numerous desegregation lawsuits.¹⁶⁴

Many argue that such findings alone are enough to warrant race-based remedial action as long as statistical disparities persist and scholastic improvement remains slow.¹⁶⁵ Moreover, persuasive evidence dem-

¹⁶⁰ See *Sweatt v. Painter*, 339 U.S. 629 (1950).

¹⁶¹ For example, in order for the Law School to be able to admit an applicant pursuant to such an affirmative action plan, that same applicant must previously have been denied admission to the Law School on the basis of her race. Such a person is unlikely to exist because the Law School has not been discriminating on the basis of race in the recent past. Any other state-sponsored discrimination that the applicant faced, even at the hands of other public educational institutions within Texas, would not be relevant.

¹⁶² See *Hopwood II*, 78 F.3d 932, 953-54 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

¹⁶³ 347 U.S. 483 (1954); see Olivas, *supra* note 80, at 110-13 (discussing many attempts made by schools in Texas and elsewhere to exclude blacks).

¹⁶⁴ *Hopwood I*, 861 F. Supp. 551, 572 (W.D. Tex. 1994), rev'd, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

¹⁶⁵ See Olivas, *supra* note 80, at 113 (discussing decrease in number of Mexican Americans enrolled in law school even as their overall population in United States increases);

onstrates that “[t]he denial of these opportunities to the generation of minority parents bears a causal connection to the diminished educational attainment of the present generation.”¹⁶⁶

Minorities, however, are plagued not only by the remains of past discrimination; racism is insidious and persists throughout our system of public education. Today’s law students were not untouched by discrimination in Texas’s public school systems.¹⁶⁷ One example of ongoing educational racial discrimination is “tracking.” Consider the experience of Tracy Davis, a black woman in the 1992 Law School class to which the *Hopwood* plaintiffs were denied admission.¹⁶⁸ In her predominantly white Texas high school, black students (even the eventual valedictorian) were routinely placed into remedial classes, and her white classmates often wore T-shirts bearing the confederate flag.¹⁶⁹ In addition, a study conducted in California secondary schools found that race had an important impact on class placement:

[W]e found substantial evidence that all parties perceived ethnicity as relevant to school performance, and more often than not there was a perception that Latino students are less capable. . . . [W]ith few exceptions, teachers hold low expectations toward Latino students, and . . . these low expectations influence the placement of students into low ability classes.¹⁷⁰

Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. Marshall L. Rev. 359, 360-66 (1987) (comparing rapid increase in representation of women in law school to sluggish increase in number of blacks).

¹⁶⁶ *Hopwood I*, 861 F. Supp. at 573; see also *Washington Legal Found. v. Alexander*, 778 F. Supp. 67, 71 (D.D.C. 1991) (finding that lack of educational opportunities for one generation disadvantages future generations), *aff’d*, 984 F.2d 483 (D.C. Cir. 1993); R. Kent Greenawalt, *Commission on Undergraduate Educ. in Law & the Humanities of the Am. Bar Ass’n, Discrimination and Reverse Discrimination: Essay and Materials in Law and Philosophy* 69-71 (1979) (arguing that if discrimination made success impossible for previous generations, it will necessarily be difficult for current generation to overcome same obstacle); Comment, *supra* note 67, at 310 (noting that in 1972, Chicano dropout rate was 89% and median education for Chicanos 25 years and over was 4.8 years).

¹⁶⁷ See Comment, *supra* note 67, at 310-11, 319-33 (discussing 10-month study in 1972 finding that there was still pattern of de jure segregation of Mexican Americans in public schools in Texas). It is important to note that even the youngest in-state 1992 applicants to the Law School would have entered Texas’s educational system beginning no later than the mid-1970s. Cf. *supra* notes 84-89, 155 and accompanying text.

¹⁶⁸ See William M. Adler, *Evening the Score: Affirmative Action Cracks Open the Great Divide*, *Rolling Stone*, Aug. 10, 1995, at 35, 37-38.

¹⁶⁹ See *id.* at 38.

¹⁷⁰ Pedro A. Noguera, *Educational Rights and Latinos: Tracking as a Form of Second Generation Discrimination*, 8 *La Raza L.J.* 25, 39 (1995); see also Kenneth S. Tollett, *Affirmative Action in Law Schools: The Declining Concern for the Interest of Blacks and Other Disadvantaged Groups* 18-22 (First Draft 1983) (paper written for the Law School Admission Council’s National Invitational Conference on Law School Admissions, 1984-2001: *Selecting Lawyers for the Twenty-First Century*, held in Sarasota, Florida on Novem-

Finally, at the Law School itself, “[s]ome minority students continue to perceive a hostile racial environment on the campus, which they assert is reflected in insensitive comments by fellow students and faculty.”¹⁷¹ Despite such strong evidence that, at the very least, present effects of discrimination remain widespread, the *Hopwood* appellate court considered this problem irrelevant, arguing that the Law School was not the appropriate actor to engage in remedying such harm.¹⁷² Prohibiting institutions of higher education from taking account of past and ongoing racial discrimination when selecting among qualified applicants will stymie this country’s slow but deliberate movement towards true equality.

B. *The Goal of Diversity*

The *Hopwood* appellate court also held that diversity was not a compelling state interest that justified the use of race-based measures. The court noted, however, that diversity interests could be taken into account in the following manner:

A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant’s home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant’s parents attended college or the applicant’s economic and social background.¹⁷³

ber 3-6, 1983) (discussing pervasive views in past that blacks were inferior to whites and continuing effect of such ideas).

¹⁷¹ *Hopwood I*, 861 F. Supp. 551, 573 (W.D. Tex. 1994), rev’d, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). In fact, several students testified at trial about the hostile atmosphere at the Law School. See, e.g., Testimony of Christopher Bell, Record, vol. 14 at 30-31, *Hopwood I* (No. A-92-CA-563-SS) (on file with the *New York University Law Review*) (noting racial incidents involving both students and professors); Testimony of Sylvia Yvonne Escobedo, Record, vol. 14 at 43-45, *Hopwood I* (No. A-92-CA-563-SS) (on file with the *New York University Law Review*) (noting that one professor at Law School is known to make racial slurs and discussing same professor’s low expectations of minority students).

¹⁷² See *Hopwood II*, 78 F.3d 932, 951 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). The appellate court noted that:

[O]ne justification for limiting the remedial powers of a state actor is that the specific agency involved is best able to measure the harm of its past discrimination.

Here, however, the law school has no comparative advantage in measuring the present effects of discrimination in primary and secondary schools in Texas.

Id.

¹⁷³ Id. at 946.

1. *The Rationales for Diversity*

Diversity in America's education systems is essential in today's increasingly multicultural society. While adding racial diversity alone may not create a completely heterogeneous educational environment, it is an essential part of fostering an atmosphere in which many different viewpoints are expressed freely.

The primary purpose of diversity in university admissions, moreover, is not the achievement of abstract goals, or an attempt to compensate for patterns of past societal discrimination. It represents . . . positive educational values that are fundamental to the basic mission of colleges and universities. It is also extremely important to the development of civic virtues—and of future leaders—vital to the health and effective functioning of our democracy.¹⁷⁴

a. Academic Freedom and the First Amendment. The *Bakke* Court embraced student body diversity as a means to achieve legitimate and essential civic and educational objectives, and it acknowledged that the First Amendment guarantee of academic freedom accords universities the right to select their student bodies free from governmental interference except when clearly required in the public interest.¹⁷⁵ The Court accepted the proposition that a heterogeneous student body was “a goal that is of paramount importance in the fulfillment of [a university's educational] mission.”¹⁷⁶ It concluded that state-supported colleges and universities have “a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic ori-

¹⁷⁴ Neil L. Rudenstine, *The Uses of Diversity*, *Harv. Mag.*, Mar./Apr. 1996, at 49, 60.

¹⁷⁵ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.); see also *id.* at 319 n.53 (opinion of Powell, J.) (“Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process.”); Amar & Katyal, *supra* note 23, at 1753 (arguing that partial concurrence by Brennan, White, Marshall, and Blackmun also approved diversity rationale and was even more permissive than Justice Powell's opinion in allowing use of race to achieve diversity); Carnegie Council on Policy Studies in Higher Educ., Part One: Public Policy and Academic Policy, in *Selective Admissions in Higher Education* 3, 16 (Carnegie Council on Policy Studies in Higher Educ. ed., 1977) (recommending that schools “be given maximum latitude in exercising their judgments about the admission of individual students” and that “courts, legislators, or government officials . . . not replace professional judgment except when clearly in the public interest”); Winton H. Manning, Part Two: The Pursuit of Fairness in Admissions to Higher Education, in *Selective Admissions in Higher Education*, *supra*, at 20, 26 (noting that courts should “intrude no further into [the admissions] process than is necessary in order to safeguard essential human rights and legal principles”).

¹⁷⁶ *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

gin" if it promotes student body diversity.¹⁷⁷ More recent Supreme Court decisions have avoided this issue, but still suggest that racial classifications that serve to advance diversity are constitutionally permissible.¹⁷⁸

The academic desire for student and faculty diversity in higher education is rooted in academic freedom—a special First Amendment concern. Colleges and other institutions of higher education build their academic communities through admissions decisions and, as a result, the student body reflects the identity of the institution:

This diversity offers prospective students a wide range of choices, provides society with graduates with a broad range of types of training and academic experiences, gives wide latitude for experimentation among colleges to see what works best, affords the individual college a special sense of concern for the students it selected on its own, attracts the attachment of alumni and friends, gives the communities in which the colleges are located special flavors, and reflects the pluralism of American society.¹⁷⁹

Indeed, the freedom to teach without censorship, the freedom to select a faculty, and the freedom to select a student body all have been explicitly recognized by the Supreme Court.¹⁸⁰ The Court spoke to the special relationship between diversity, academic freedom, and the First Amendment in *Keyishian v. Board of Regents*:¹⁸¹

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas

¹⁷⁷ *Id.* at 320 (opinion of Powell, J.).

¹⁷⁸ See discussion *supra* Part I.B; cf. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 579-80 (1990) (upholding program designed to increase minority ownership in radio broadcasting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (noting that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education").

¹⁷⁹ See Carnegie Council on Policy Studies in Higher Educ., *supra* note 175, at 8.

¹⁸⁰ See *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). Quoting Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), Justice Powell stated:

Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

Bakke, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in result)).

¹⁸¹ 385 U.S. 589 (1967).

which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."¹⁸²

Student body diversity is a vital pedagogic teaching component in both colleges and professional schools—it is the catalyst in a learning environment that enriches both the quality and breadth of the education of all students. Students of both genders and from a wide range of socioeconomic, geographic, religious, and ethnic backgrounds taught together in an atmosphere of free inquiry and mutual respect bring vitality to the nature, quality, and scope of a college, graduate, or professional education. While the "robust exchange of ideas"¹⁸³ intended to provoke and stimulate learning normally takes place in the classroom, equally important informal learning through exposure to diverse viewpoints and life experiences occurs in student exchanges outside the classroom.¹⁸⁴ Indeed, educators argue that "students benefit in countless ways from the opportunity to live and learn among peers whose perspectives and experiences differ from their own"¹⁸⁵ and that this multiethnic experience is as much an integral part of a university education as the school's curriculum.¹⁸⁶

b. Civic Virtues. A diverse student body also serves essential civic purposes. In *Bakke*, Justice Powell wrote that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."¹⁸⁷ An educational institution with a diverse student body and faculty provides a laboratory, a learning model, which imparts to its students basic democratic values and ideals. The model strives to be inclusive by overcoming ignorance and prejudice, promoting tolerance and understanding, and reducing fragmentation, religious intolerance, racial hatred, and conflict between disparate groups.¹⁸⁸ As one educator has explained:

¹⁸² *Id.* at 603 (alteration in original) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

¹⁸³ *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

¹⁸⁴ See *id.* at 312 n.48 (opinion of Powell, J.) (citing Princeton University President's discussion of benefits of diverse student body in William G. Bowen, *Admissions and the Relevance of Race*, *Princeton Alumni Wkly.*, Sept. 26, 1977, at 7, 9).

¹⁸⁵ Neil L. Rudenstine, *Why a Diverse Student Body Is So Important*, *Chron. Higher Educ.*, Apr. 19, 1996, at B1.

¹⁸⁶ See *id.*

¹⁸⁷ *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

¹⁸⁸ See Amar & Katyal, *supra* note 23, at 1773-74 (arguing that diversity aids educational goal of teaching "students how to be sovereign, responsible, and informed citizens in a heterogeneous democracy").

[Diversity] is the substance from which much human learning, understanding, and wisdom derive. It offers one of the most powerful ways of creating the intellectual energy and robustness that lead to greater knowledge, as well as the tolerance and mutual respect that are so essential to the maintenance of our civic society.

In our world today, it is not enough for us and our students to acknowledge, in an abstract sense, that other kinds of people, with other modes of thought and feeling and action, exist somewhere—unseen, unheard, unvisited, and unknown. . . . [L]ittle if anything can substitute for the experience of continued association with others who are different from ourselves, and who challenge us—even as we challenge them.¹⁸⁹

Interaction with diverse groups teaches students the leadership skills essential for governing a heterogeneous society while it instills a genuine understanding of and appreciation for the variety of human beings with whom and for whom they will work and serve. Diversity is a national asset allowing “[a]ble persons from all groups [to] be given opportunities to contribute to the progress of society and . . . to its ‘domestic tranquility’ and its ‘general welfare.’”¹⁹⁰

2. *Using Race-Conscious Measures to Achieve Diversity*

a. Applying Supreme Court Precedent. Achieving a diverse student body depends on two discrete but overlapping sets of contributors. One set brings diversity of viewpoints and beliefs, while the other brings diversity of experience. Without taking account of race, representation of this second group cannot be ensured. Indeed, when the Supreme Court has spoken of student body diversity it has spoken both of students who bring to the institution a diversity of robust ideas and views and of a heterogeneous collection of peoples who contribute to diversity exclusive of any particular distinct viewpoints they might bring to the classroom.

In *Sweatt*, the Court specifically noted that the new law school created for blacks “exclude[d] from its student body members of the *racial groups*” who Sweatt would “inevitably be dealing with when he [became] a member of the Texas bar,”¹⁹¹ implying that racial integration was essential to Sweatt’s legal career. In *Bakke*, Justice Powell quoted the president of Princeton University who described a diverse

¹⁸⁹ Neil L. Rudenstine, Harvard Univ., The President’s Report 53 (1993-1995) (on file with the *New York University Law Review*).

¹⁹⁰ Carnegie Council on Policy Studies in Higher Educ., *supra* note 175, at 7.

¹⁹¹ *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (emphasis added). Presumably, for the same reasons, integration would also benefit whites and all other groups. Implicitly, therefore, at the very least all professional schools would benefit from a racially diverse mix of students who are representative of the community served by the school.

student body as “students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives.”¹⁹²

Justice Powell also cited the policy of Harvard College with respect to the admission of students who were economically, racially, and/or ethnically disadvantaged as an example.¹⁹³ Harvard admitted that race was a factor within its definition of diversity: “A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot.”¹⁹⁴ While Harvard did not establish specific quotas for the admission of blacks, it did recognize the need to avoid making only a superficial effort to accept minorities, and it acknowledged the necessity of enrolling a critical mass of each class of underrepresented students.¹⁹⁵

The Supreme Court’s most recent discussion of diversity occurred in *Metro Broadcasting, Inc. v. FCC*.¹⁹⁶ In that case, the Court, in a five-to-four decision, upheld two FCC policies providing for minority preferences in broadcast licensing.¹⁹⁷ Although in *Metro Broadcast-*

¹⁹² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 n.48 (1978) (opinion of Powell, J.) (emphasis added). In the portion of the *Bakke* judgment in which he stated that “the State has a substantial interest that legitimately may be served by a properly devised admissions program involving competitive consideration of race and ethnic origin,” id. at 320 (opinion of Powell, J.), Justice Powell was joined by Justices Brennan, White, Marshall, and Blackmun, see id. at 296 n.36 (opinion of Powell, J.); id. at 326 (opinion of Brennan, White, Marshall, and Blackmun, J.), concurring in the judgment in part and dissenting in part).

¹⁹³ See id. at 316 (opinion of Powell, J.).

¹⁹⁴ Id. (quoting Appendix to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as amici curiae).

¹⁹⁵ See id. As the Court has recognized, however, racial diversity alone is not enough to create a diverse student body: “Ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” Id. at 314 (opinion of Powell, J.).

¹⁹⁶ 497 U.S. 547 (1990).

¹⁹⁷ See id. at 566. Relying on *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Brennan reviewed the congressional scheme under intermediate scrutiny because of its benign motivation. See *Metro Broadcasting*, 497 U.S. at 564-65. He noted the important governmental interest in increasing broadcast diversity:

[W]e conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective . . . Just 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 567-68 (citation omitted) (quoting *Bakke*, 438 U.S. at 311-13 (opinion of Powell, J.)). In their dissenting opinions, both Justices O’Connor and Kennedy argued that strict scrutiny was the appropriate test and that a racial classification was an appropriate remedy

ing the Court was not addressing race-based admissions practices in universities but rather diversity in broadcast licensing, it continued to highlight the importance of racial diversity. The Court noted:

The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. . . . Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. . . . To be sure, there is no ironclad guarantee that each minority owner will contribute to diversity. But neither was there an assurance in *Bakke* that minority students would interact with nonminority students or that the particular minority students admitted would have typical or distinct "minority" viewpoints.¹⁹⁸

Moreover, where the Supreme Court has struck down affirmative action programs in contexts other than education, it has consistently emphasized that diversity has not been at issue.¹⁹⁹ In her *Adarand* opinion, Justice O'Connor asserted that *Metro Broadcasting* was overruled "[t]o the extent that [it] is inconsistent with [*Adarand's*] holding" and that strict scrutiny must be applied to all racial classifications.²⁰⁰ Moreover, Justice O'Connor herself has acknowledged that "although [diversity's] 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."²⁰¹ Thus, as the Supreme Court has determined, the consideration of race in a properly devised admissions program does not rest on impermissible stereotyping but rather on a belief that minority applicants will

only in the case of identifiable past discrimination. See *id.* at 603 (O'Connor, J., dissenting); *id.* at 633-34 (Kennedy, J., dissenting).

¹⁹⁸ *Metro Broadcasting*, 497 U.S. at 579-80.

¹⁹⁹ See Amar & Katyal, *supra* note 23, at 1754-58, 1767-72 (reconciling Supreme Court's decisions in *Wygant*, *Croson*, and *Adarand* with *Bakke's* vision of diversity); *cf. id.* at 1758-67 (arguing that Justice O'Connor's *Metro Broadcasting* dissent is not applicable to education).

²⁰⁰ *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995). It is important to note that this appears to be an explicit limitation of the extent to which *Metro Broadcasting* was overruled. See *id.* at 2127 (Stevens, J., dissenting) (noting that *Adarand* "overrules *Metro Broadcasting* only insofar as it is 'inconsistent with [the] holding' that strict scrutiny applies to 'benign' racial classifications promulgated by the Federal Government" (alteration in original) (quoting *id.* at 2113 (O'Connor, J.))).

²⁰¹ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (citing *Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.)).

themselves bring diverse views to the classroom and that expanded enrollment of racial minorities will, "in the aggregate," result in greater diversity of viewpoints in and out of the classroom.²⁰² The goal of a diverse student body is not assimilation but the creation of opportunities for the direct exchange of ideas so as to foster learning, understanding, and tolerance.

b. Debating the Relevance of Race. Critics of affirmative action contend that diversity of viewpoints is not achieved by bolstering admissions of members of minority groups.²⁰³ Moreover, both Justice Thomas and Justice Scalia argue that race is never an appropriate governmental classification.²⁰⁴ The *Hopwood* appellate court similarly argued that racial diversity is only sought as a "proxy for other characteristics" and that the "assumption . . . that a certain individual possesses characteristics by virtue of being a member of a certain racial group . . . ' . . . exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America.'"²⁰⁵ While it may be true that the best methods of determining diversity take account of both race and other factors such as education and background, it is not true that race can be completely eliminated from the equation and that diversity can still be achieved.

It is a fact, unfortunate perhaps, that race is in our society a substantial determinate of one's experience. Black students may have different perspectives on particular legal issues or the provision of health services for the community. Were white students to miss these perspectives because few blacks were admitted to professional school their own education would be that far impoverished.²⁰⁶

On this account, groups that are systematically underrepresented should be made the beneficiaries of programs directed towards in-

²⁰² See *Metro Broadcasting*, 497 U.S. at 579 (discussing basis for link between expanded minority ownership and broadcast diversity).

²⁰³ For example, Lino Graglia, a professor at the Law School, argues that "[r]ace is obviously neither an accurate nor a suitable proxy for an applicant's perspective; the economic and educational background of the applicant's family, for example, would undoubtedly be a better proxy." Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. Legal Educ. 97, 101 (1992).

²⁰⁴ See *supra* note 61.

²⁰⁵ *Hopwood II*, 78 F.3d 932, 946 (5th Cir.) (quoting Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 12), cert. denied, 116 S. Ct. 2581 (1996).

²⁰⁶ Greenawalt, *supra* note 166, at 75.

creasing their numbers in order to improve the quality of education for all students.²⁰⁷

In a slightly different vein, Professor Richard Epstein argues that affirmative action goals for each educational institution should be unique to that school:

Although to the outside world all law schools, like all lawyers, may seem pretty much alike, when we move closer we realize the wide range of differences that exist among institutions. Some have national influence; others are regional or statewide; and still others exist to serve local markets. . . . Some universities receive public funding; others are private; and still others have a religious orientation.²⁰⁸

This theory requires consideration of both the relevant applicant pool and the community or market served by the institution. For example, Professor Epstein's theory seemingly would support a race-conscious admissions policy directed at blacks and Mexican Americans at the Law School along with consideration of race as one element of diversity for other groups. The Law School has a national reputation²⁰⁹ and values the diversity represented by a national applicant pool, but it also is part of a state university system established for the purpose of serving the needs of the people of Texas. It therefore gives some preference to candidates for admission who have, in some important way, lived a life that is foreign to the majority of the students from Texas, while at the same time serving the needs of a multiracial state.²¹⁰

3. *Barriers to Achieving Racial Diversity*

As the preceding discussion establishes, institutions of higher education need racial diversity. Achievement of such diversity requires the use of race-based methods in the admissions process. One reason that race-based methods are needed to satisfy diversity goals is that some minority groups tend to score lower on traditional criteria—such

²⁰⁷ See Chang-Lin Tien, *Diversity and Excellence in Higher Education*, in *Debating Affirmative Action*, supra note 6, at 237, 240 ("Women and minorities stimulate new directions and advances in research. People of diverse backgrounds tend to shape different questions and apply different methods to find the answers.").

²⁰⁸ Richard A. Epstein, *Affirmative Action in Law Schools: The Uneasy Truce*, Kan. J.L. & Pub. Pol'y, Spring 1992, at 33, 36-37.

²⁰⁹ In 1996, the Law School ranked 18th among the 174 law schools considered by U.S. News & World Report. See Ted Gest, *America's Best Graduate Schools*, U.S. News & World Rep., Mar. 18, 1996, at 79, 82 (survey).

²¹⁰ See Brief of Appellees at 25, *Hopwood II*, 78 F.3d 932 (5th Cir.) (No. 94-50664), cert. denied, 116 S. Ct. 2581 (1996) (on file with the *New York University Law Review*) ("The record is clear that the Law School does give consideration to other racial and ethnic minorities, as well as to applicants' other attributes contributing to diversity.").

as the Law School Admission Test (LSAT)—used to make admissions decisions at institutions of higher education.²¹¹ The LSAT is purported to be the best predictor of the applicant's potential for success in the first year of law school.²¹² However, the validity of both LSAT scores and grade-point averages as predictors of success in the legal field is debatable. Indeed, the Supreme Court explicitly recognized the discriminatory effect of standardized tests in *United States v. Fordice*.²¹³ Nevertheless, as the number of applicants continues to exceed the enrollment capacity of colleges and graduate schools, reliance on these "objective" measures continues.²¹⁴ This is especially true of law school admissions, perhaps more than in any other arena.

The LSAT is required for admission to virtually all American Bar Association-approved law schools.²¹⁵ The test was originally developed as a tool to weed out those applicants unlikely to succeed in law school.²¹⁶ Today it is used not just to determine who will be unable to complete law school, but to choose the "best" applicants from the pool.²¹⁷ Despite the confidence that many schools have in this test, a substantial body of research suggests that the LSAT is not a very good predictor of a candidate's overall success in law school.²¹⁸ Some crit-

²¹¹ See Olivas, *supra* note 80, at 113-16 (discussing problems with using objective standards to predict law school success).

²¹² See *id.*

²¹³ 505 U.S. 717, 734-35 (1992) (finding evidence that use of ACT had disparate negative impact on black students); see *supra* text accompanying notes 46-51. Outside the educational context, other so-called "objective" criteria also have been shown to have a negative, disparate impact on minorities. See, e.g., *Washington v. Davis*, 426 U.S. 229, 245-48 (1976) (finding that disproportionately large number of blacks failed written test required for police force, but failing to find intent to discriminate).

²¹⁴ See, e.g., Allan P. Sindler, *Bakke, DeFunis, and Minority Admissions: The Quest for Equal Opportunity* 28-31 (1978) (chronicling history and results of rising numbers of law school applications).

²¹⁵ See *id.* at 30.

²¹⁶ See Tollett, *supra* note 170, at 23-24. Even up to the late 1970s, virtually any applicant could gain admission to some law school, but gradually, as applications rose, all schools began using the LSAT as a selection tool. See *id.* at 23.

²¹⁷ See *id.* Some scholars think that there is too much reliance on the LSAT today:

Regardless of how well students do in college, poor scores on the LSAT "could exclude them from the legal profession." It has been said of the LSAT program that "[a]s a kind of best-possible-case example of the application of selective aptitude testing, and as an influence of an entire professional community, the program is of particular interest."

Simien, *supra* note 165, at 371 (footnotes omitted) (quoting A. Nairn, *The Reign of ETS: The Corporation that Makes Up Minds* 220, 234 (1980)).

²¹⁸ See Olivas, *supra* note 80, at 114 & nn.60, 62 (discussing various studies examining predictive value of LSAT); see also U.S. Comm'n on Civil Rights, *Clearinghouse Publication 55, Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* 42, 63-64 (1978) (noting that undergraduate grade-point averages are better predictor of law school grades than LSAT scores and identifying factors

ics believe that the test is in fact discriminatory and perpetuates de facto discrimination.²¹⁹ Research indicates that the LSAT's lack of accuracy as a predictor of success is more pronounced for minorities, particularly with respect to law school grades in the second and third years.²²⁰ In addition to their inaccuracies as a predictor of law school grades, both the LSAT and undergraduate grades fail to account for many important lawyering skills: "For example, they may not accurately assess such critical factors as motivation, maturity, commitment to client or community interests, business savvy, or counseling and negotiating skills."²²¹ Schools may thus be compensating for these inac-

such as leadership experience, community service, and self-image as even more accurate determinants of minority success in law school).

²¹⁹ These critics argue "that standardized tests are biased against minorities; that the tests are not accurate measures of intelligence; that higher scores may be achieved through coaching (which is generally not available to lower income students); and that higher scores are symptoms of social advantage." Simien, *supra* note 165, at 383; see also Tollett, *supra* note 170, at 24 (noting presence of cultural bias in LSAT); cf. *DeFunis v. Odegaard*, 416 U.S. 312, 328-31 (1974) (Douglas, J., dissenting) (arguing that important qualifications of some applicants cannot be measured by standard methods used by schools). Moreover, research conducted by the Law School Data Assembly Service concludes that abandoning the use of race as a criterion in law school admissions in favor of using only objective criteria will result in a large drop in the number of minority law students nationwide. See generally Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1 (forthcoming Apr. 1997).

²²⁰ See Jomills Henry Braddock II & William T. Trent, *Correlates of Academic Performance Among Black Graduate and Professional Students, in College in Black and White: African American Students in Predominantly White and in Historically Black Public Universities* 161, 173 (Walter R. Allen et al. eds., 1991) [hereinafter *College in Black and White*] ("For Black professional students, grade performance is explained by a more diverse set of factors including social background factors such as sex and age, major-field competitiveness, interaction with white faculty, and the presence and role of Black faculty in the students' programs."); Westina Matthews & Kenneth W. Jackson, *Determinants of Success for Black Males and Females in Graduate and Professional Schools, in College in Black and White, supra*, at 197, 204-06 (finding that traditional criteria used to predict professional school success do poor job in predicting grades of black women and even worse for black men).

Some scholars also argue that the LSAT, if useful at all, is only a good predictor of the first-year grades of nonminority candidates. See Olivas, *supra* note 80, at 114 ("Careful studies of predictive validity consistently show that scores from standardized tests are less predictive of Hispanic students' first-year grade-point averages (both under-predicting and over-predicting) than are those of Anglo students."); see also Albert Y. Muratsuchi, *Race, Class, and UCLA School of Law Admissions, 1967-1994*, 16 *Chicano-Latino L. Rev.* 90, 123 n.181 (1995) (citing Law School Admissions Council-sponsored study showing little correlation between LSAT scores and grades); Simien, *supra* note 165, at 382-84 (discussing studies critical of LSAT's predictive value). But see Graglia, *supra* note 203, at 99 n.10 (noting that "[o]n average, test scores overpredict the later performance of blacks compared to whites'" (alteration in original) (quoting Robert Klitgaard, *Choosing Elites* 161 (1985))).

²²¹ Muratsuchi, *supra* note 220, at 126-27; see also Tollett, *supra* note 170, at 24 (noting skills such as "motivation, perservance [sic], interpersonal sensitivity, articulateness, char-

curacies through consideration of other factors, such as race, in admissions decisions. As Justice Powell observed in *Bakke*: "To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all."²²²

As a final matter, regardless of the actual predictive value of measures such as undergraduate grades and the LSAT, no law school bases its decisions solely on objective measures. It is thus difficult to sustain an argument that race-based measures are any less justified than any other subjective preference.²²³

4. *Applying the Diversity Rationale: The Hopwood Case*

Despite Supreme Court precedent to the contrary, the *Hopwood* appellate court concluded that diversity was not a compelling state interest and, therefore, that the use of race to achieve diversity violated the Equal Protection Clause of the Fourteenth Amendment.²²⁴ The court reasoned that "recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny."²²⁵ The court failed to cite any direct precedent for this assertion, relying solely on the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, which dealt with employment, not education,²²⁶ and on several dissenting and concurring opinions²²⁷ which, it argued, were "vindicated"

acter, integrity, civic and social responsibility" that LSAT does not test); Simien, *supra* note 165, at 381 ("[I]f our legal history teaches us anything, it is that purely intellectual acumen has never been the full measure of the great lawyers of the past and is not likely to be so for the future." (quoting C. Woodard, *The American Law School and Anglo-American Legal Tradition 27-28* (1983))).

²²² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978) (opinion of Powell, J.).

²²³ See Greenawalt, *supra* note 166, at 83 (comparing class-based and veterans benefits to racial benefits and noting that all are equally susceptible to criticism that they reduce overall quality of students).

In addition, preferences are often given to children of alumni and important donors. On a purely meritocratic theory, these considerations are indefensible. See John Larew, *Who's the Real Affirmative Action Profiteer?*, in *Debating Affirmative Action*, *supra* note 6, at 247 (comparing race-based affirmative action to legacy preference, especially at Harvard); U.S. Comm'n on Civil Rights, *supra* note 218, at 49-52 (discussing "special interest" admissions such as staff and alumni children, children from wealthy families, and applicants receiving strong recommendations from politicians); *supra* text accompanying note 173.

²²⁴ See *Hopwood II*, 78 F.3d 932, 944 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

²²⁵ *Id.*

²²⁶ See *id.* at 944-45 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 496 (1989)).

²²⁷ See *id.* at 945 & n.26. The court referred to (1) Justice O'Connor's dissent in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting); (2) *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.), cert. denied, 500 U.S. 954 (1991), in which the Seventh Circuit argued that *Croson* rejects any use of diversity; and

by the Court's recent decision in *Adarand Constructors, Inc. v. Peña*.²²⁸ By determining that diversity was not a compelling state interest, the appellate court avoided the issue of whether race was a valid proxy for diversity.

C. *The Alternative: Class-Based Affirmative Action*

Many who oppose race-based affirmative action, including the *Hopwood* appellate court, contend that programs based on less suspect factors, such as class or economic status, are acceptable.²²⁹ They reason that race-conscious methods often benefit middle-class minority families that are not actually in need of assistance and that directing affirmative action towards the poor of all races would better reach the actual victims of societal injustice. For example, one proponent of class-based affirmative action, Justice Antonin Scalia, has said that he is "in favor of according the poor inner-city child, who happens to be black, advantages and preferences not given [his] own children because they don't need them."²³⁰ On the other hand, he strongly opposes a race-conscious policy operating in favor of "the son of a prosperous and well-educated black doctor or lawyer—solely because of his race—[over] the son of a recent refugee from Eastern Europe who is working as a manual laborer to get his family ahead."²³¹ Justice Scalia's argument ignores that the original purpose of remedial affirmative action programs was "to redress the effects of past and present discrimination, not to combat indigence."²³² Class-

(3) Justice Scalia's concurrence in *Croson*, which argued that racial classifications are an inappropriate method of remedying the remaining effects of past discrimination, *Croson*, 488 U.S. at 520 (Scalia, J., dissenting).

At the very least, reliance on Justice O'Connor's *Metro Broadcasting* dissent is misplaced. See Amar & Katyal, *supra* note 23, at 1770-71 ("Although [Justice O'Connor's] *Metro Broadcasting* dissent contains some sharp language, in *Adarand* she went out of her way to reassure readers with words that—though not invoking *Bakke* by name—left the door open for a reaffirmance of Justice Powell's approach . . .").

²²⁸ See *Hopwood II*, 78 F.3d at 945.

²²⁹ See *id.* at 946 ("Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background.").

²³⁰ Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 Wash. U. L.Q. 147, 153.

²³¹ *Id.* at 153-54. But see Joe R. Feagin & Melvin P. Sikes, *Living with Racism: The Black Middle-Class Experience* 78-134 (1994) (arguing that racism makes getting good education difficult for all blacks, regardless of economic class); Ian Ayres, *Narrow Tailoring*, 43 UCLA L. Rev. 1781, 1798 n.57 (1996) (citing several black scholars chronicling their encounters with race discrimination today); Mary Frances Barry, *Affirmative Action: Why We Need It, Why It Is Under Attack*, in *The Affirmative Action Debate*, *supra* note 20, at 299, 306-08 (discussing continuing race-conscious discrimination and arguing that race discrimination and lack of economic opportunity should be addressed separately).

²³² Frederick A. Morton, Jr., *Note, Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 Rutgers L. Rev. 1089, 1129 (1993).

and race-based affirmative action differ inherently in the reasons for their inceptions, and one is not an adequate substitute for the other.²³³ As long as the goal is to redress the effects of past and present discrimination, the only remedial measures that can address that challenge are those that consider groups against whom there was and is discrimination.²³⁴

Opponents of race-based affirmative action often argue that “innocent victims” are forced to bear a disproportionately large share of the burden of such programs.²³⁵ A class-based program, however, will not eliminate that problem. In fact, as one author has argued, class-based programs face the same “innocent victim” criticism:

Shifting the emphasis of affirmative action from race to class will have little impact on minimizing the effect of affirmative action on so-called “innocent victims.” Under any redistributive scheme, some group will undoubtedly claim “innocent victim” status. Furthermore, it seems unlikely that an “innocent victim” will be any more tolerant of someone achieving a perceived benefit based on class, as opposed to race.²³⁶

Further, as a class-based program presumably would not be subjected to strict scrutiny (because it would not implicate either a fundamental right or a traditionally suspect class), it might actually afford less protection to those potential innocent victims.²³⁷

In addition, significant advantages can be gained from race-based measures—both remedial and diversity based—that are not possible with a purely class-based curative program. For example, increasing minority membership in the legal profession will have the effect of creating role models for members of the minority community to emulate.²³⁸ Second, a fair representation of minorities as attorneys in a

²³³ See *id.* at 1134-35 (noting that different affirmative action programs have different justifications and target different groups).

²³⁴ See Barry, *supra* note 231, at 306-07.

²³⁵ See Morton, *supra* note 232, at 1132-34. Professor Derrick Bell argues in response that whites gain as much or more than blacks from racial remedies, including those that increase the number of minority professionals. See Derrick A. Bell, Jr., *Bakke*, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 Cal. L. Rev. 3, 14-17 (1979).

²³⁶ Morton, *supra* note 232, at 1134.

²³⁷ Professor Ian Ayres, however, argues that any program established for the purpose of aiding racial minorities should be subjected to strict scrutiny regardless of the means used to implement the purpose. See Ayres, *supra* note 231, at 1787. Professor Ayres further argues that such race-neutral programs would fail strict scrutiny because they would necessarily be overinclusive and thus could not be considered narrowly tailored. See *id.* at 1784, 1787 (explaining inherent tension in desire for remedies that are both race-neutral and narrowly tailored).

²³⁸ See Simien, *supra* note 165, at 369; see also U.S. Comm'n on Civil Rights, *supra* note 218, at 21-26 (arguing that affirmative action is necessary to provide minority communities with adequate and effective medical and legal services and with leaders and role models).

community will lead to a corresponding increase in the faith that minorities have in the "law as an institution" and in the legal system.²³⁹ Third, providing minorities with a college, graduate, or professional education is one of the soundest methods of reducing the economic disparity that exists between whites and minorities in America and of achieving the ultimate goal of eliminating the need for remedial affirmative action.²⁴⁰ Fourth, minority professionals are needed to serve minority communities.²⁴¹ Finally, especially in the case of public law schools, the decision of who to admit is invariably a public policy determination about how to best meet societal needs with a limited amount of resources.²⁴² One scholar made this argument about California's law schools:

"The decision of who to admit to a public law school should be related to the reasons that justify the existence of publicly-funded legal education in a state that already has an abundance of non-public law schools and no shortage of lawyers. Given the fact that anyone who can pay for it can obtain a legal education in California, our admissions decisions are less a question of who can be a lawyer in California and more a question of which lawyers shall have their legal education subsidized by California taxpayers."²⁴³

Arguably, the same holds true for Texas, which has a total of nine accredited law schools.²⁴⁴ Moreover, we must recognize that because entry into a profession is now contingent on receiving a degree from a professional school, those who are not accepted to public schools and are unable to pay the higher fees that private schools charge are barred from entering the profession.²⁴⁵ Therefore, once public

²³⁹ See Simien, *supra* note 165, at 369.

²⁴⁰ See *id.* at 377-78.

²⁴¹ See U.S. Comm'n on Civil Rights, *supra* note 218, at 21-24, 78-79 (arguing that minority professionals are more likely to choose careers that serve minority communities).

²⁴² See Louis Henkin, *What of the Right to Practice a Profession?*, 67 Cal. L. Rev. 131, 136-41 (1979) (arguing that states should have right to select students for professional schools taking into account societal policies and professional needs).

²⁴³ Muratsuchi, *supra* note 220, at 122 (quoting interview with Kenneth Graham, Professor at the UCLA School of Law, in Los Angeles, Cal. (May 16, 1994)).

²⁴⁴ See *A Review of Legal Education in the United States*, 1995 A.B.A. Sec. of Legal Educ. and Admissions to the Bar 55-58. The four public schools are: University of Houston Law School, University of Texas Law School, Texas Southern University—Thurgood Marshall Law School, and Texas Tech University Law School. See *id.* The five private schools are: Baylor University Law School, St. Mary's University Law School, South Texas College of Law, Southern Methodist University Law School, and Texas Wesleyan University Law School. See *id.* Texas Wesleyan University Law School received provisional accreditation in 1994, see *id.* at 58, but the other eight law schools were accredited at the time that the *Hopwood* plaintiffs applied, see *A Review of Legal Education in the United States*, 1993 A.B.A. Sec. of Legal Educ. and Admissions to the Bar 55-57.

²⁴⁵ For example, Texas's four public law schools charge Texas residents tuition fees that are, on average, \$8000 less per year than the fees charged by its five private schools. See *A*

schools have restricted themselves to a pool of qualified applicants, there should be less importance placed on comparative merit and more emphasis on the needs of the community served by the profession.²⁴⁶

In summary, affirmative action programs justified on remedial and/or diversity grounds have related goals. Remedial programs mainly seek to provide an equal opportunity of success to those systematically denied opportunities even after the removal of directly discriminatory barriers. As such, they increase the diversity of the student body, both ethnically and experientially. Diversity programs, on the other hand, seek to improve both the educational experience of all students and to ensure that the leadership of our communities, government, and businesses reflects America's rich and diverse population. The *Hopwood* appellate court decision directly undermines current efforts to achieve both goals.

IV

STRICT SCRUTINY PART II: NARROW TAILORING AND THE DISTRICT COURT'S DECISION IN *HOPWOOD*

In addition to fulfilling a compelling state interest, in order to survive strict scrutiny review a race-based program must be narrowly tailored to achieve that state interest. In *Hopwood*, the Fifth Circuit did not reach the issue of narrow tailoring because it invalidated the Law School's program on the compelling state interest prong of the test. In the relevant affirmative action cases, however, the Supreme Court has found remedial affirmative action and/or diversity to be compelling state interests. At the heart of the examination in these cases was the issue of narrow tailoring—the part of the test that many affirmative action plans have failed.²⁴⁷ Because this Note argues that

Review of Legal Education in the United States, 1995 A.B.A. Sec. of Legal Educ. and Admissions to the Bar 55-58.

²⁴⁶ See Henkin, *supra* note 242, at 136-41 (discussing permissible limits on right to enter profession).

²⁴⁷ See discussion *supra* Part I. Although the Supreme Court had not yet rendered a decision in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), when the *Hopwood* district court reached its decision, that case should not have affected the outcome. The opinion by Justice O'Connor in *Adarand* allowed room for affirmative action to survive strict scrutiny review. First, Justice O'Connor did not expressly discuss affirmative action in education. Second, she pointed to *United States v. Paradise*, 480 U.S. 149 (1987), as an illustration of a racial classification satisfying the strict scrutiny test. See *Adarand*, 115 S. Ct. at 2117.

The Law School's 1992 program was actually more narrowly tailored than the employment promotion program approved in *Paradise*. First, the affirmative action program in *Paradise* used a quota, see *Paradise*, 480 U.S. at 163, while the district court found that the

both diversity and remedying the effects of discrimination are compelling state interests that the Law School was entitled to pursue, it is important to address the *Hopwood* district court decision, which was based on this second prong of the strict scrutiny analysis.

The decision of the district court in *Hopwood* was flawed in two important respects. First, the court mistakenly treated the *Bakke* case as if it were factually identical to the situation in *Hopwood*. Second, the court applied the narrowly tailored prong of the strict scrutiny standard of review incorrectly. Had the court not made these errors, it would have found that the Law School's admissions policy was valid under all existing precedent.

A. *Factual Disparities: Hopwood and Bakke*

The factual situation in *Bakke* was strikingly different from that presented to the district court in *Hopwood*. The clearest holding in *Bakke* is that the use of race-based quotas as a remedial measure is illegal when there is no evidence of past discrimination by the relevant state actor against the groups to be benefited by the quota.²⁴⁸

Much of Justice Powell's opinion in *Bakke* was directed at explaining why the use of a quota was unlawful where there was no evidence of prior or ongoing government-sponsored discrimination against the groups benefited by the plan.²⁴⁹ As the district court in

program in *Hopwood* was definitely not a quota, see *Hopwood I*, 861 F. Supp. 551, 574 (W.D. Tex. 1994), rev'd, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). In the Supreme Court's decisions from *Bakke* to *Adarand*, it is clear that the Court regards quotas with even more skepticism than other types of affirmative action remedies. Second, in *Paradise*, the 25% goal and the 50% quota used to reach that goal exceeded the percentage of blacks in the relevant applicant pool (the entire trooper force). See *Paradise*, 480 U.S. at 198-99 (O'Connor, J., dissenting). In contrast, the Law School's admissions plan sought to enroll an entering class that was 5% black and 10% Mexican American. See *Hopwood I*, 861 F. Supp. at 563. The makeup of the relevant applicant pool (the percentage of graduates of Texas colleges who are members of the two groups) was 6.2% black and 12.8% Mexican American in 1992. See Brief of Appellees at 6, *Hopwood II*, 78 F.3d 932 (5th Cir.) (No. 94-50664), cert. denied, 116 S. Ct. 2581 (1996) (on file with the *New York University Law Review*).

²⁴⁸ Justice Powell himself distinguished *Bakke* from cases where remedial affirmative action was appropriate due to identified prior discrimination. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 300-05 (1978) (opinion of Powell, J.). In addition, because no five-justice majority applied strict scrutiny to the program, it is unclear exactly what precedential strength *Bakke* carries on the issue of narrow tailoring. See discussion supra Part I.A. But see Vincent Blasi, *Bakke* as Precedent: Does Mr. Justice Powell Have a Theory? 67 Cal. L. Rev. 21, 23-24 (1979) (arguing that opinions of Justices Powell and Stevens should carry precedential weight).

²⁴⁹ See *Bakke*, 438 U.S. at 307-09 (opinion of Powell, J.). Justice Powell also noted that Davis Medical School made no findings of prior constitutional violations and that the school could not explain why certain minority groups were considered favorably and others were not. See *id.* at 309 & n.45 (opinion of Powell, J.).

Hopwood acknowledged, the admissions program used by the Law School was not a quota, and there was clear evidence of discrimination against the groups benefited by the plan.²⁵⁰ Therefore, the quota discussion in Justice Powell's opinion is in some measure inapposite to the *Hopwood* case. The *Hopwood* district court failed to acknowledge the important structural difference between the use of a quota, which by its very nature does not allow for *any* competition between nonminority and minority applicants for the set-aside places, and the use of a system in which those admissions officers reading the minority applications do not often read nonminority applications. In *Bakke*, the Davis Medical School program, with its sixteen set-aside places, was without question a quota.²⁵¹ In contrast, the Law School's program bears a greater resemblance to the Harvard program praised by Justice Powell in his *Bakke* opinion.²⁵²

Indeed, it is difficult to distinguish meaningfully between a system like the one used by Harvard, where minority applicants are essentially given a vague "plus," and a system like the one used by the Law

In *Hopwood*, on the other hand, the district court made extensive findings of fact on the issue of segregation. See general discussion *supra* Part II.A.

²⁵⁰ See *Hopwood I*, 861 F. Supp. at 572, 574. Nevertheless, a strong argument can be made that the Law School could use a quota:

The Constitution is race-conscious. Under the thirteenth amendment, the Constitution contemplates, and the equal protection clause of the fourteenth amendment does not prohibit, race-conscious, class-based, prospective relief in a unit of state government in the appropriate case. The appropriate case is one in which discrimination in a state governmental unit is system-wide, institutional, and the product of a long history of discrimination against blacks as a group to continue what amounts to a caste system.

Williams v. City of New Orleans, 729 F.2d 1554, 1572-73 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part).

²⁵¹ See discussion *supra* notes 27-29 and accompanying text. Although a full discussion of the question is beyond the scope of this Note, the lack of any dispute as to the existence of a quota in the Davis program should not be taken to imply that there is no dispute as to the appropriateness of the use of quotas in affirmative action. While the Supreme Court's decisions in *Bakke*, *Crosby*, and *Adarand* disallow the use of quotas, scholars do not agree on this issue. See, e.g., Ayres, *supra* note 231, at 1800-17 (arguing that quotas are not necessarily more problematic than other means of implementing affirmative action programs); Blasi, *supra* note 248, at 52 (discussing Dworkinian notion that nonminorities suffer no more harm from quota system than from Harvard-type system); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. Ill. L. Rev. 1043, 1044 (arguing that use of quotas to remedy underrepresentation of traditionally subordinated groups is acceptable unless no qualified individuals are eligible); see also Symposium, *Affirmative Action and the Law*, Panel One: Definitions, Division and the Arc of Narrative, 1995 Ann. Surv. Am. L. 359 (four-part discussion in which quotas were both condemned and lauded as tools for affirmative action). Professor Peggy Cooper Davis has noted that she believes that quotas are needed because quantitative measures such as the LSAT are poorly understood and contain many unconscious presumptions. See *id.* at 393.

²⁵² See *Bakke*, 438 U.S. at app. at 321-24 (opinion of Powell, J.).

School in 1992, where the minority applicants were reviewed on a different scale.²⁵³ Both Harvard and the Law School acknowledged that a first-rate education requires a truly heterogeneous environment that reflects the rich diversity of the United States. Moreover, each used race as a factor in making admissions decisions and set minimum goals for the number of students of a particular race that they would like to matriculate in a given year, noting that to be successful, a minority admissions program must admit more than a token number of minority candidates.²⁵⁴ Overall, the only apparent major difference between the two programs was that the Law School's program used a more systematic, less discretionary approach.²⁵⁵

B. *Direct Comparison of Applicants: Narrow Tailoring*

In addition to the *Hopwood* district court's misunderstanding of the factual setting of the *Bakke* case, it misapplied the strict scrutiny standard. The district court correctly found that diversity is a compelling state interest, thus satisfying the first prong of the strict scrutiny

²⁵³ In practice, both the use of a "plus" factor and the use of "separate pools" may resemble a quota in certain respects. Both seek to enroll a target number of minority students, and both allow the admissions officers to admit minority students that have grades and test scores lower than or equivalent to those of nonminority candidates who are denied admission.

Moreover, the differences between these two types of affirmative action programs are slight. One system adds a generic "plus" to all applicants from the relevant group, while the other effectively accomplishes the same result by lowering the threshold LSAT scores and grade-point averages for those groups to account for historic and ongoing discrimination against them. In fact, separate thresholds are, at least in one important respect, more narrowly tailored than a "plus" system—they aid only those minority applicants whose scores on the objective criteria are actually lower than the nonminority threshold score. See *supra* notes 218-22 and accompanying text. For example, in 1992, a minority student with a Texas Index of over 199 (the 1992 nonminority presumptive admission threshold) would get no other formal benefit from her minority status. In contrast, under a "plus" system, all minority students are given an edge, regardless of their performance on objective criteria.

²⁵⁴ See *Bakke*, 438 U.S. at app. at 323 (opinion of Powell, J.) (noting that "some relationship [exists] between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted"); Defendants' First Supplemental Response to Interrogatory Numbers 6-10, *Hopwood I* (No. A-92-CA-563-SS) (on file with the *New York University Law Review*) (noting need for "critical mass" of minority students in order to provide variety of backgrounds and viewpoints that minority admissions seek to achieve).

²⁵⁵ The Law School's approach gave full discretion to set the threshold scores to Professor Johanson, the chair of the admissions committee. See *Hopwood I*, 861 F. Supp. at 560-61. In contrast, the Harvard system presumably left the determination of how much weight to give the "plus" up to the individual admissions officer as she reviewed an applicant's file. See *Bakke*, 438 U.S. at app. at 321-24 (opinion of Powell, J.) (noting Harvard's failure to indicate precisely how applicant's minority status taken into account).

analysis,²⁵⁶ but the court erred in finding that the program was not narrowly tailored to address this compelling interest. The *Hopwood* district court characterized the minority subcommittee's exclusive review of the minority candidates and the failure of any one admissions committee member to review the entire pool of 4494 applicants²⁵⁷ as a failure to meet the direct comparison requirement of *Bakke*.²⁵⁸ In the *Bakke* opinion, Justice Powell described the necessary candidate comparison as (1) treating each applicant on an "individualized, case-by-case basis"²⁵⁹ and (2) weighing the applicant's combined qualifications, including nonobjective factors, fairly and competitively so that "[t]he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color."²⁶⁰ In other words, Justice Powell thought that an acceptable process must "assure[] a measure of competition among all applicants."²⁶¹ Under the Law School's 1992 program, there was never a "last seat" for which an applicant's race was the deciding factor.²⁶² Moreover, direct comparison of minority and nonminority candidates took place at the margins of the admissions categories, where the decisions were the most difficult and least exact and where the review was the most critical.²⁶³

²⁵⁶ See *Hopwood I*, 861 F. Supp. at 570-71 ("Absent an explicit statement from the Supreme Court overruling *Bakke*, this Court finds, in the context of the law school's admissions process, obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications.").

²⁵⁷ See id. at 563 n.32 (describing 1992 applicant pool).

²⁵⁸ See id. at 577-79; see also supra Part II.B for a full discussion of the Law School's 1992 admissions process.

²⁵⁹ *Bakke*, 438 U.S. at 319 n.53 (opinion of Powell, J.).

²⁶⁰ Id. at 318 (opinion of Powell, J.).

²⁶¹ Id. at 319 n.53 (opinion of Powell, J.). No other Justice joined this section of Justice Powell's opinion. See id. at 272 (opinion of Powell, J.). Indeed, the *Hopwood* district court was not bound to follow Justice Powell's opinion as to what constitutes a constitutional minority admissions program over the joint opinion of Justices Brennan, White, Marshall, and Blackmun, see id. at 324 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part), which made no mention of the necessity of direct comparison of all applicants.

²⁶² See *Hopwood I*, 861 F. Supp. 551, 574 (W.D. Tex. 1994) ("No evidence was presented at trial that the law school granted a set-aside for any particular group or that competition for any specific seat in the class was closed to some students because of race or ethnicity."), rev'd, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). Dean Yudof testified: "There is no seat for which a white student can't compete . . ." Testimony of Mark G. Yudof, Record, vol. 21 at 76, *Hopwood I* (No. A-92-CA-563-SS) (on file with the *New York University Law Review*).

²⁶³ See *Hopwood I*, 861 F. Supp. at 561-62. In discussing the discretionary zone, the district court noted that: "[It] was comprised of those applicants whose TIs fell between the presumptive denial line and the presumptive admission line, those applicants who

Despite these safeguards in the 1992 admissions process, the *Hopwood* district court relied on Justice Powell's statement in *Bakke* that race "should not insulate the individual from comparison with all other candidates for the available seats."²⁶⁴ The court determined that this language required a one-to-one comparison among candidates²⁶⁵ and that the "bifurcated process" in use in 1992 failed to afford "each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race."²⁶⁶ *Bakke*, however, does not stand for the proposition that candidates must be compared one-to-one with the entire pool, but for the idea that each candidate must be treated as an individual and that the applicant's combined qualifications must be reviewed on a case-by-case basis, with a measure of competition among all applicants, and without the facial infirmity of a fixed racial quota. The district court's findings leave no doubt that each plaintiff's application file received an individualized review by the admissions committee.²⁶⁷

In addition, Justice Powell cautioned in *Bakke* that if facial intent to discriminate was not evident by a fixed quota system,

a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases.²⁶⁸

Johanson had moved down from the presumptive admission category, and those applicants who reviewers had moved up from the presumptive denial category." *Id.* at 561. As the court noted, "Johanson reviewed minority and nonminority files together as a group during the preliminary review process." *Id.* at 561 n.23 (citing Testimony of Stanley Morris Johanson, Record, vol. 6 at 55, *Hopwood I* (No. A-92-CA-563-SS) (on file with the *New York University Law Review*)). Even the applications of candidates who fell into the presumptive denial pool were reviewed by one or two admissions committee members "to determine if the TI adequately reflected the applicant's likelihood of success in law school or competitive standing relative to the entire applicant pool." *Id.* at 561.

²⁶⁴ *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

²⁶⁵ The strict interpretation of making a one-to-one comparison of all 4494 applicants would require 10,095,771 applicant comparisons. See *Hopwood I*, 861 F. Supp. at 563 n.32 (indicating number of applications received by Law School for Fall 1992 admission). The number of necessary applicant comparisons is the result of having 4494 possible choices for the "primary subject" and 4493 possible students for the "comparison subject." Requiring direct comparison between the nonminority and minority applicants would thus make it impossible for the Law School to continue to maintain an affirmative action policy.

²⁶⁶ *Id.* at 579.

²⁶⁷ See *id.* at 564-67 (describing review and disposition of each plaintiff's application). Indeed, the court noted that "the law school did not rely solely on the TI as the basis for admissions decisions but instead used it to create presumptions that could be overcome upon individual review of the files." *Id.* at 563; see also *supra* note 263.

²⁶⁸ *Bakke*, 438 U.S. at 318-19 (opinion of Powell, J.).

The *Hopwood* district court, after conducting its own one-on-one comparison between the plaintiffs' files and the discretionary pool, found

no disparities in the applications of the admitted minorities when compared to those of the plaintiffs "so apparent as virtually to jump off the page and slap [the Court] in the face." Without such a disparity, the Court cannot and will not substitute its views for those of admission committee members with years of experience and expertise in evaluating the law school applications.²⁶⁹

The court therefore concluded that the plaintiffs had failed to prove that they would have been admitted under a constitutionally permissible admissions process and that the Law School had acted in good faith, making sincere efforts to follow federal guidelines and to redress past discrimination. Thus, according to the court's own findings, the 1992 admissions procedure at the Law School actually met the *Bakke* test. In fact the members of the Law School's admissions committee testified without contradiction "that this procedure more tightly controlled the weight given to race in the admissions process and better protected the interests of nonminorities than the alternative of leaving the decision to the silent discretion of faculty members reviewing mixed stacks of minority and nonminority files."²⁷⁰ Indeed, the admissions process in use at the Law School in 1992 most likely afforded nonminorities *more protection* than the Harvard process which Justice Powell praised.²⁷¹

C. A Better System

This is not to say, however, that the Law School's program was ideal. A better program would include a more explicit disclosure statement that would be included in the application for admission.²⁷² Such a disclosure statement might include the following:

²⁶⁹ *Hopwood I*, 861 F. Supp. at 581 (alteration in original) (citation omitted) (quoting *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993)).

²⁷⁰ Brief of Appellees at 7, *Hopwood II*, 78 F.3d 932 (5th Cir.) (No. 94-50664), cert. denied, 116 S. Ct. 2581 (1996) (on file with the *New York University Law Review*).

²⁷¹ The only apparent difference between the Law School and Harvard programs is that in the Law School program many of those who reviewed the nonminority applications did not read many minority students' applications. This is an *apparent* difference because the information provided by Harvard does not indicate which admissions officers read which files. In addition, the best objectively qualified minorities are more likely to be offered admission if they are all compared against each other (i.e., read by the same officers).

²⁷² The Law School's 1996 admissions brochure contains the following statement: Because so many applicants present undergraduate records and LSAT scores that demonstrate a strong potential for law study, the Admissions Committee takes into account a number of additional factors in order to obtain a talented and diverse student body. Among these factors are exceptional personal tal-

(1) *The Law School's Goal of Diversity*

With the goal of enriching the classroom environment and providing our society with leaders for tomorrow, the Law School seeks each year to enroll an entering class of students who represent a diversity of viewpoints and life experiences. Therefore, in making admissions decisions the Law School considers personal characteristics and achievements beyond those that are typically reflected by undergraduate grades and test scores. Characteristics that the Law School feels contribute to diversity include, but are in no way limited to, the following: racial,²⁷³ ethnic, or religious background, sex, sexual orientation, disability, socioeconomic status, nationality, marital and/or parental status, previous work or volunteer experience, and undergraduate or graduate course of study.

(2) *Affirmative Action Program*

The Law School recognizes that the objective criteria used in law school admissions are considered by many to be less accurate at predicting success in law school for some groups than for others. In addition, the Law School acknowledges that in the past, the State of Texas, the University of Texas, and the Law School all practiced overt discrimination against black and Mexican American applicants and students in all levels of the educational system. Finally, the Law School is aware that the public education system in Texas continues to suffer from the vestiges of segregation. In an effort to begin to remedy this situation and ensure that it enrolls a diverse and representative student body, the Law School practices affirmative action with respect to the admission of black and Mexican American students. Those groups continue to bear the brunt of the segregation problems that existed in the past and continue today, and as a result they are systematically underrepresented at the Law School—both in relation to their numbers in the overall State population and in relation to the number of college graduates in those groups.

The purpose of a full disclosure statement such as this one is to increase understanding and remove the negative speculation and distrust of affirmative action policies in general.²⁷⁴

ents, unique work or service experience, rigor of the undergraduate course of study as reflected by the applicant's college transcripts, graduate study, leadership potential, a history of overcoming disadvantage, ability to communicate, ethnic background, race, economic disadvantage, maturity, disability, geography, and other factors.

University of Tex. at Austin Sch. of Law, 1996 Application and Bulletin 9 (1996).

²⁷³ As described in Paragraph (2), the Law School also practices affirmative action with respect to blacks and Mexican Americans. In addition to the traditional remedial goals associated with such programs, this program seeks to ensure that these two groups are represented in the diverse student body sought by the Law School. As discussed below, that is not yet possible without affirmative action.

²⁷⁴ Cf. Louis Harris, *The Future of Affirmative Action*, in *The Affirmative Action*

CONCLUSION

At first glance, the *Hopwood* case appears to sound the death knell for affirmative action in education.²⁷⁵ Regardless of what two members of the Fifth Circuit have argued, however, *Bakke* remains the law of the land, and diversity in higher education remains a compelling governmental interest. Moreover, the Fifth Circuit's decision is fundamentally flawed in its analysis of the relevant state actor. Following the court's reasoning to its logical end effectively bars all remedial affirmative action. Even following the direction of the *Hopwood* district court would encourage and validate the use of vague policies such as the Harvard program—an obscure and elusive affirmative action policy that gives no guidelines with respect to procedure and implementation and fails to fully and clearly articulate a standard for lawyers, judges, and school administrators to follow.

Taken together, the two decisions serve only to confuse the issues and will breed contempt for affirmative action and for those who benefit from it. For example, one anti-affirmative action newsletter has already commented that the Law School's 1992 policy "violated the central holding of *Bakke*, which is that schools are supposed to lie about what they're doing with respect to minority admissions."²⁷⁶ The same newsletter commented on the new policy that was to be used at the Law School after the *Hopwood* district court ruling: "[The Law School will] dismantle differential cut-off scores but retain its 'diversity' commitment—in other words, keep the quotas but erase the paper trail."²⁷⁷ A clearly articulated policy and procedure serves the

Debate, *supra* note 20, at 326, 327 (discussing the need to define affirmative action clearly and arguing that perceived negative sentiment towards affirmative action is result of misunderstandings created by use of term "preferential treatment" instead of "affirmative action").

²⁷⁵ If followed, the Fifth Circuit decision will at the very least cause all public institutions of higher education in Texas, Louisiana, and Mississippi to curtail their affirmative action programs. For a discussion of the pursuit of diversity in admissions at private universities, see generally Tanya Y. Murphy, Note, An Argument for Diversity Based Affirmative Action in Higher Education, 1995 Ann. Surv. Am. L. 515. In addition, it is likely that institutions in other circuits will follow suit in order to avoid litigation.

²⁷⁶ Texas Anti-Climax: *Hopwood*, et al., v. State of Texas, et al., Docket Rep. (Center for Individual Rights, Washington, D.C.), Third Quarter, 1994, at 2.

²⁷⁷ *Id.* In fact, that is exactly what the Law School, and the entire University of Texas system, has done.

We believe a multitude of personal factors may properly be considered in determining individual merit, including an applicant's age, gender, family history, hometown, employment history, military service, race, ethnicity, socio-economic history, financial situation, personal talents, leadership potential, public service, etc. Race and ethnicity should play *no determinative role* in this process. If considered at all, it should be considered as only one of numerous

public interest by minimizing the number of attacks on affirmative action programs and their beneficiaries.

Any discussion of affirmative action must at all times keep in mind the long-term goals of such programs. Some of these are obvious, but some are less clear without serious reflection on the problem. In its most basic form, the purpose of remedial affirmative action is to put a true end to all de facto and de jure discrimination and to destroy all remaining vestiges of segregation by abolishing, once and for all, the caste system based on race that still exists in this country. Supporting this notion of remedy are the following ideas: first, the belief in a national commitment to the advancement of those persons harmed by de facto and de jure discrimination; second, the understanding that the public policy of this nation must promote racial integration²⁷⁸ and that "[n]ational policy should focus on the inclusion of minorities who have been harmed by purposeful discrimination without devaluing the inherent worth or dignity of any individual";²⁷⁹ third, the goal of civic harmony among the races, which is best reached by dismantling the barriers that segregation has erected so that the economic and social status of minorities can improve;²⁸⁰ fourth, the understanding of the need for more role models in the minority community in order to assist this progress;²⁸¹ and finally, the need to promote confidence in our public institutions within the minority community.²⁸²

In comparison, diversity-based affirmative action strives to create a learning environment that will produce a robust exchange of ideas and expose students to the widely varied experiences and viewpoints that are represented in this country. The two goals of affirmative action are not entirely distinct. Because some groups still suffer from the past and continuing effects of state-sponsored discrimination, they must be afforded remedies in the form of affirmative action or else their voices may continue to be silenced and our educational institu-

personal factors unique to the applicant, which a law school may evaluate when determining the best composition of its incoming class.

Statement by Texas Attorney General Dan Morales (Apr. 30, 1996) (on file with the *New York University Law Review*).

²⁷⁸ See Constance Horner, *Reclaiming the Vision: What Should We Do After Affirmative Action?*, *Brookings Rev.*, Summer 1995, at 6, 11.

²⁷⁹ Ken Feagins, *Wanted—Diversity: White Heterosexual Males Need Not Apply*, 4 *Widener J. Pub. L.* 1, 30 (1994).

²⁸⁰ See Horner, *supra* note 278, at 7.

²⁸¹ See Simien, *supra* note 165, at 369 (noting that minority attorneys may better serve the needs of minority clients).

²⁸² See *id.* (citing J. Clay Smith, Jr., *The Role of Primary and Secondary School Teachers in the Motivation of Black Youth to Become Lawyers*, 52 *J. Negro Educ.* 302, 304 (1983)).

tions and political leaders will not reflect the needs of our diverse society.

The determination of whether affirmative action is the best method of eradicating the racial problems in American society is a complex one that is best left to the political process. Nevertheless, a public institution of higher education's use of a narrowly tailored affirmative action plan should remain constitutionally permissible. Under existing Supreme Court precedent, the University of Texas Law School's 1992 admissions program was such a plan.