Golden Gate University Law Review

Volume 27
Issue 3 *Notes and Comments*

Article 9

January 1997

The Erosion of Affirmative Action: The Fifth Circuit Contradicts the Supreme Court on the Issue of Diversity

Emily V. Pastorius

NOTE

THE EROSION OF AFFIRMATIVE ACTION: THE FIFTH CIRCUIT CONTRADICTS THE SUPREME COURT ON THE ISSUE OF DIVERSITY

I. INTRODUCTION

The issue of affirmative action in higher education is controversial and of great public interest.[1] The Supreme Court dealt with the issue in the landmark case of *Regents of the University of California v. Bakke*.[2] In 1978, the Bakke Court held that while the use of racial quotas in University admissions decisions was impermissible, race may be considered as a factor in admissions in order to establish classroom diversity.[3] The Court stipulated however, that race may never be the sole factor in considering an applicant.[4]

In *Hopwood et. al. v. State of Texas et. al.*,[5] the Fifth Circuit openly criticized and contradicted *Bakke*.[6] Contrary to *Bakke*, the Fifth Circuit held that race may never be used as a factor in admissions decisions.[7] The *Hopwood* court declared

1. Carol Ness, *Business Dodging Debate on Prop. 209*, S.F. EXAMINER, September 29, 1996, at C-1; Edward W. Lempinen, *Protesters, Police Skirmish as Duke Debates CCRI*, S.F. CHRON., September 26, 1996, at A1.; Edward W. Lempinen, *Cash Drought in CCRI Camps*, S.F. CHRON., October 1, 1996, at A17.
2. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
3. *Id.* at 314-15.
4. *Id.* at 315.
5. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
6. *Id.* at 948.
7. *Id.* at 962.

that diversity based on racial factors does not facilitate the goals of equal protection.[8] Consequently, the Fifth Circuit denounced the particular race-based admissions program at issue, as well as all affirmative action plans used for diversity purposes in higher education admissions.[9]

Hopwood involved four white applicants who applied for admission to the University of Texas School of Law (hereinafter "the Law School") in 1992.[10] At that time, the Law School had a special affirmative action admissions program[11] similar to that in *Bakke*. Under this special admissions program, a certain percentage of entering class seats were reserved for African American and Mexican American applicants.[12]

The Law School denied admission to the four white applicants,[13] while accepting African American and Mexican American candidates with lower grade point averages and test scores under the Law School's special admissions program.[14] The four white applicants sued the State and the Law School for using an affirmative action admissions program.[15] The plaintiffs' alleged the Law School's affirmative action plan subjected them to unconstitutional racial discrimination.[16]

In applying strict scrutiny to the race-based admissions policy, the district court ruled that the Law School's special admissions practice violated the U.S. Constitution.[17] The Fifth Circuit exceeded the district court's holding by declaring impermissible all race-based affirmative action plans used by the Law School to establish classroom diversity in higher education.[18]

This Comment will begin by examining the facts and pro-

8. *Id.* at 944.
9. *Id.*
10. *Hopwood*, 78 F.3d at 938.
11. *Id.* at 936-37.
12. *Id.* at 937.
13. *Id.* at 938.
14. *Id.* at 937 n.7.
15. *Hopwood*, 78 F.3d at 938.
16. *Id.* at 940.
17. *Id.* at 938.
18. *Id.* at 962.

cedural history of the *Hopwood* case. It will discuss background information relevant to understanding affirmative action and the precedent used by the Fifth Circuit, most notably the *Bakke* decision. This Comment will also examine the application of affirmative action in higher education admissions policies. It will evaluate the Fifth Circuit's reasoning for contradicting *Bakke* when the Fifth Circuit concluded that racial considerations are impermissible in admission plans in higher education.[19] Finally, this Comment proposes that the Fifth Circuit was hasty in rendering its conclusion.

II. FACTS AND PROCEDURAL HISTORY

In 1992, Cheryl Hopwood, Douglas Carvell, Kenneth Elliot, and David Rogers applied for admission as first year law students to the University of Texas School of Law,[20] one of the nations top 20 law schools.[21] At that time, the Law School's affirmative action program reserved approximately 10% of its entering class seats for Mexican Americans and 5% for African Americans.[22]

Due to the large volume of applications received annually by the Law School, the school employed a decision-making method called the Texas Index number or "TI."[23] The admissions committee calculated the TI number using an applicant's undergraduate grade point average (GPA) and his or her Law School Admissions Test (LSAT) score.[24] While not the only

---

19. *Id.* at 947-48.

20. Hopwood v. Texas,. 78 F.3d 932, 938 (5th Cir. 1996).

21. *Id.* at 935.

22. *Id.* at 937. The purpose of this program was to increase the enrollment of these particular minority groups. "The stated purpose of this lowering of standards was to meet an 'aspiration' of admitting a class consisting of 10% Mexican Americans and 5% blacks, proportions roughly comparable to the percentages of those races graduating from Texas colleges." *Id.* There was no special admissions program given to any other minority group. *Id.* at 936 n.4.

23. *Hopwood,* 78 F.3d at 935.

24. *Id.* The formula was created by the Law School Data Assembly Service according to a prediction of success of first year law students. To arrive at an ultimate TI, 60% of the weight was given to an applicant's LSAT score and 40% was given to the GPA. LSAT scores are calculated using three numbers. The range of the score is between 120 and 180, with 120 being the lowest score a test-taker can receive and 180 being the highest, or the 100th percentile. The formula for an applicant with a three number LSAT and GPA was calculated as follows:

factor used in determining whether to admit an applicant, the Law School relied heavily on the TI in the admissions process.[25] Using the TI, the Law School sorted applicants into presumption categories.[26] The Law School used three categories for placing candidates, based on their TI:[27] presumptive admit, discretionary zone, and presumptive deny.[28]

The Law School offered admission to almost all candidates in the presumptive admit category and refused admission to almost all candidates in the presumptive deny category.[29] Applicants falling into the discretionary zone received the most thorough review.[30]

As part of the Law School's affirmative action admissions program, African Americans and Mexican Americans with lower TI scores than non-minorities were placed in the presumptive admit and discretionary zone categories.[31] In addition, the Law School conducted an application evaluation process based on race and maintained segregated waiting lists.[32] Mexican American and African American applications were reviewed by a three member subcommittee rather than the

---

LSAT (10) (GPA) = TI. *Id.* at 935 n.1.

25. *Id.* at 935. Other factors considered by the Law School included an applicant's undergraduate performance, the applicant's undergraduate major, downward/upward grade trends and grade inflation. The admissions committee also looked at the individual applicant's personal perspective and life experiences. Texas residents were given significant additional consideration. Therefore, residency also played a strong role in an applicant's chance for admission. *Id.*

26. *Hopwood*, 78 F.3d at 935; Hopwood v. Texas, 861 F. Supp. 551, 563 (W.D. Tex. 1994).

27. *Hopwood*, 78 F.3d at 935.

28. *Id.* To be presumptively admitted, the TI number for non-minorities was 199, whereas the TI for African Americans and Mexican Americans was 189. The TI too low for acceptance for non-minorities was 192, while the TI number for African Americans and Mexican Americans was 179. Therefore, a minority candidate with a TI of 189 or above almost certainly was admitted, even though this score was 3 points below the TI score a non-minority applicant receives for a Presumptive Deny. *Id.* at 936.

29. *Id.* at 935-36.

30. *Id.* at 936.

31. *Hopwood* F.3d at 936-37. As the *Hopwood* court pointed out, a TI score of 189 was a presumptive denial of admission for non-minority applicants, whereas the same TI score constituted a presumptive admit for African American and Mexican American candidates. *Id.* at 937.

32. *Id.* at 937-38. The school color-coded applications according to race. *Id.* at 937.

general admissions committee used to evaluate all other applications.[33] In 1992, the three member subcommittee consisted of one African American male, a Mexican American male and a white male.[34]

Hopwood, Carvell, Elliot, and Rogers had respective TI scores of 199 (presumptive admit),[35] 197, 197, and 197 (discretionary zone).[36] None received review under the affirmative action admissions program.[37] The Law School denied admission to all four of these applicants.[38]

These four applicants sued the Law School and the State of Texas in the U.S. District Court for the Western District of Texas.[39] The plaintiffs based their claims on a violation of the Equal Protection Clause under the Fourteenth Amendment to the U.S. Constitution, statutory violations of 42 U.S.C. §§ 1981, 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[40] The plaintiffs sought injunctive and declaratory relief, as well as compensatory and punitive damages.[41]

The district court applied strict scrutiny,[42] the most elevated standard of review, to the Law School admission policy because the policy used race as a primary factor in considering applicants.[43] Under strict scrutiny review, the district court required the state to show that its use of race as a basis for admissions furthered a compelling government interest and that its admissions policy was the most narrowly tailored means of achieving that interest.[44]

---

33. *Id.* at 937. The decisions of the three member sub-committee were considered "virtually final." *Hopwood,* 78 F.3d at 937.

34. *Hopwood*, 861 F. Supp. at 560 n.20.

35. *Hopwood*, 78 F.3d at 938. Cheryl Hopwood was subsequently downgraded to the discretionary zone for resident whites because a member of the admissions committee felt her "educational background overstated the strength of her GPA." *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Hopwood*, 861 F. Supp. at 551.

40. *Hopwood*, 78 F.3d at 938.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

In attempting to meet the standard of strict scrutiny, the State of Texas and the Law School claimed that one of the primary purposes of the affirmative action admissions program was to promote diversity at the Law School.[45] The Supreme Court in *Bakke* held this goal to be a compelling governmental interest, a fact undisputed by the *Hopwood* plaintiffs and upheld by the district court.[46] The Law School maintained that African Americans and Mexican Americans had been traditionally under-represented at the school and the affirmative action admissions program sought to increase minority representation in the classroom.[47] The Law School wanted to provide students with a diverse classroom atmosphere to "prepare students for real world functioning of the law in our diverse nation."[48] Despite recognition of the *Bakke* holding, plaintiffs argued that Supreme Court precedent after *Bakke* indicates that affirmative action programs will only be permissible if the program is implemented to remedy the present effects of past discrimination.[49] Therefore, the plaintiffs alleged, diversity is no longer considered a compelling governmental interest.

The Law School also claimed that Texas had a history of discrimination in education.[50] The effects of this discrimination continued at the Law School, both in the Law School's reputation and in the level of education attained by the usual minority applicant.[51] Therefore, the Law School argued, the affirmative action admissions program also constituted remedial action.[52]

The district court agreed with the Law School and found

45. *Hopwood*, 861 F. Supp. at 570.

46. Regents of the University of California v. Bakke, 438 U.S. 265 (1978); *Hopwood*, 861 F. Supp. at 570.

47. *Hopwood*, 78 F.3d at 948.

48. *Hopwood*, 861 F. Supp. at 570.

49. *Hopwood*, 78 F.3d at 944.

50. *Id.* at 948.

51. *Id.* At the trial level, the district court found that the evidence presented at trial indicates those effects include the law school's lingering reputation in the minority community, particularly with prospective students, as a 'white school'; an under representation of minorities in the student body; and some perception that the law school is a hostile environment for minorities. *Hopwood*, 861 F. Supp. at 572.

52. *Hopwood*, 861 F. Supp. at 570.

that the State of Texas and the University of Texas had a history of discrimination against minorities.[53] Specifically, the district court found that at the primary and secondary school levels, minority students in Texas attended academically inferior minority schools compared with schools attended by, and comprised of, primarily all white students.[54] The district court recognized that as of May, 1994, over 40 Texas school districts were defending desegregation lawsuits.[55]

Additionally, the district court conceded that it was not until 1969 that the Texas Constitutional provision mandating separate schools for whites and minorities in higher education was repealed.[56] The district court further found that this segregation policy resulted in the establishment of higher education minority schools that were inferior to those available to whites.[57] The district court looked to the results of an investigation, held from 1978 to 1980, by the Office for Civil Rights (hereinafter "OCR") which revealed that Texas had failed to abolish segregation of African Americans and whites in public higher education.[58] The OCR investigation also found that Hispanics were "significantly underrepresented in state institutions."[59]

Within the Law School itself, the district court noted that, aside from segregation, the most blatant example of discrimination occurred in *Sweatt v. Painter*.[60] In *Sweatt*, the Supreme Court held that the State of Texas and the Law School violated the Equal Protection clause by denying admission to Heman Sweatt, an African American male.[61] The Supreme Court ordered that Sweatt be admitted to the Law School.[62]

---

53. *Id.* at 575.

54. *Id.* at 554.

55. *Id.*

56. *Id. See also*, TEX. CONST. art. VII, §7 (1925, repealed 1969).

57. *Hopwood*, 861 F. Supp. at 555. *See also* Commentary, TEX. CONST. art. VII, §14 (West 1993).

58. *Hopwood*, 861 F. Supp. at 556.

59. *Id.*

60. *Id.* at 555; Sweatt v. Painter, 339 U.S. 629 (1950).

61. *Sweatt*, 339 U.S. at 636.

62. *Id.* Sweatt failed to graduate when he prematurely left the Law School in 1951 "after being subjected to racial slurs from students and professors, cross burning, and tire slashing. *Hopwood*, 861 F. Supp. at 555.

In addition to *Sweatt*, the district court found that throughout the 1950's and 1960's the University of Texas regularly engaged in discriminatory practices against African Americans and Mexican Americans.[63]

Despite the above findings by the district court, the plaintiffs in *Hopwood* alleged that the State failed to show any tangible present effects of past discrimination.[64] The plaintiffs claimed that the Law School was relying on the occurrences of past discrimination in primary and secondary schools, instead of particular instances of discrimination within the Law School.[65]

The district court held that the Law School violated the plaintiffs' rights to Equal Protection under the U.S. Constitution.[66] This was not because the Law School failed to prove a compelling governmental interest, however, but because the Law School's affirmative action plan was not narrowly tailored to achieve true diversity or remedy past discrimination.[67] Accordingly, the district court ordered that the Law School allow the plaintiffs to reapply at no cost.[68] However, the district court did not enjoin the Law School from considering race in admissions.[69] It awarded the plaintiffs $1.00 in nominal damages and granted no compensatory or punitive damages.[70] Both the Law School and the plaintiffs appealed the district court decision.[71]

---

63. *Hopwood*, 861 F. Supp. at 555. Specifically, the trial court noted that Mexican American students were placed in separate on campus residences known as "barracks" in addition to being "excluded from membership in most university-sponsored organizations." Moreover African American students were forbidden from living and even visiting white residence halls. *Id.*

64. *Hopwood*, 78 F.3d at 948.

65. *Id.*

66. *Hopwood*, 861 F. Supp. at 579.

67. *Id.*

68. *Id.* at 583.

69. *Id.* at 582. The district court did not find injunctive relief appropriate since the Law School voluntarily changed its special admissions plan by abandoning the use of separate admissions committees for whites and minorities. *Id.*; *See also Hopwood*, 78 F.3d at 958.

70. *Hopwood,* 861 F. Supp. at 583-85. The plaintiffs requested compensatory damages based on their projected earnings as law school graduates. *Id.* at 583 n.90.

71. *Hopwood*, 78 F.3d at 932.

On March 18, 1996, the U.S. Court of Appeals for the Fifth Circuit returned a decision in which the majority reversed in part and remanded in part the district court's decision.[72] In its opinion, the majority examined and openly criticized *Bakke*.[73] Although the Law School in *Hopwood* had articulated diversity as one of its goals in implementing the affirmative action program, the Fifth Circuit rejected this goal and held, contrary to Supreme Court precedent, that diversity can never be a compelling governmental interest in a public graduate school.[74] The Fifth Circuit held that the Law School's admissions practice discriminated in favor of minority applicants and had therefore violated the Equal Protection rights of non-minority applicants.[75] Additionally, the Fifth Circuit stated that the Law School should be limited to showing evidence of only those instances of discrimination occurring within the Law School, not at the primary and secondary school levels.[76] As a result, the Fifth Circuit agreed with the plaintiffs and held that the Law School had not sufficiently shown the existence of the effects of past discrimination against African Americans and Mexican Americans.[77]

Moreover, the Fifth Circuit held that the lower court had erred in denying plaintiffs' request for compensatory damages because the lower court failed to shift the burden of proof to the defendants once the plaintiffs had established a violation of their constitutional rights.[78] Therefore, the court remanded the case to the district court for rehearing on the question of damages.[79]

The Law School and the plaintiffs appealed the Fifth Cir-

---

72. *Id.* at 962.

73. *Id.* at 944.

74. *Id.* In the sole concurring opinion, Justice Wiener argued that while he agreed with the majority opinion's conclusion in the instant case, he disagreed with the court's holding that diversity can never be a compelling governmental interest in higher education. *Id.* at 962. Justice Wiener stated that if "*Bakke* is to be declared dead, the Supreme Court, not a three judge-panel of a circuit court, should make that pronouncement." *Hopwood,* 78 F.3d at 965.

75. *Id.* at 962.

76. *Hopwood* 78 F.3d at 953-54.

77. *Id.* at 955.

78. *Id.* at 956-57.

79. *Hopwood*, 78 F.3d at 962.

cuit decision to the Supreme Court. The Supreme Court denied certiorari in August of 1996.[80]

III. BACKGROUND

According to the Equal Protection Clause of the Fourteenth Amendment, all persons shall receive equal protection of the law, regardless of race.[81] The Equal Protection Clause provides two guarantees.[82] First, people similarly situated must be treated the same.[83] Second, people not similarly situated must be treated differently.[84] The *Hopwood* plaintiffs argued that because the Law School's secondary admissions policy reserved a certain percentage of incoming class seats solely for minorities, it denied non-minorities equal protection because it treated them differently.[85]

A. EQUAL PROTECTION

The original purpose of the Equal Protection Clause of the Fourteenth Amendment was to ensure that newly freed slaves received equal treatment from state law.[86] Throughout its 130 year history, the Equal Protection Clause has been the subject of varying interpretations.[87]

---

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

81. *See* U.S. CONST. amend. XIV, § 1. Specifically, the Fourteenth Amendment to the United States Constitution states in part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

82. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1438 (Foundation Press, 2d ed. 1988).

83. *Id.*

84. *Id.*

85. Hopwood v. Texas, 78 F.3d 932, 938 (5th Cir. 1996).

86. Plessy v. Ferguson, 163 U.S. 537, 542, 544 (1896).

87. *See* Plessy v. Ferguson, 163 U.S. 537 (1896); *See also*, Brown v. Board of Educ., 347 U.S. 483 (1954).

B. CASE LAW INTERPRETING THE EQUAL PROTECTION CLAUSE

1. *Plessy v. Ferguson*

One of the first and most notable cases interpreting the scope of the Equal Protection clause occurred in the landmark case, Plessy v. Ferguson.[88] In *Plessy,* the Supreme Court held that a statute mandating separate train cars for blacks and whites did not violate the Equal Protection Clause provided that the train cars had equal facilities for both races.[89] The *Plessy* Court created the infamous doctrine of "separate but equal" in holding that so long as the separate facilities for both whites and blacks were equal, they were constitutionally permissible.[90] The plaintiff in Plessy argued that train cars for blacks were substandard to those train cars reserved for whites.[91] The plaintiff also argued that being forced to ride in separate train cars caused psychological injury to blacks because of the implication that blacks were inferior to whites.[92] The Supreme Court, however, found both races were treated equally under the statute.[93] The Court stated that any psychological effects suffered by the black population were not a result of the law, but were the result of a choice by blacks to feel inferior.[94]

2. *Brown v. Board of Education*

In reality, after the Supreme Court's decision in *Plessy,* separate facilities for white and blacks were usually far from equal.[95] The most notable disparity occurred in the school systems, where schools for blacks were often grossly inferior to schools for whites.[96] Despite this evident inequality, the Supreme Court did not reconsider the constitutionality of the separate but equal doctrine in public education until *Brown v.*

88. Plessy v. Ferguson, 163 U.S. 537 (1896).
89. *Id.* at 548-51.
90. *Id.* at 551.
91. *Id.*
92. *Id.*
93. *Plessy,* 163 U.S. at 537-38, 551-52.
94. *Id.* at 551.
95. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).
96. *Id.*

Board of Education, fifty-eight years after *Plessy*.[97]

In 1954, due to a changing society, the inherent inequities of the separate but equal doctrine, and the importance of education,[98] the Supreme Court essentially overruled *Plessy*.[99] In *Brown*, the Court held that the separate but equal doctrine was unacceptable with regard to public education because it denied African Americans the opportunity of a comparable non-minority education.[100] Therefore, it held the separate but equal doctrine violated the Equal Protection Clause.[101] The Court added that segregation in education did create notions of inferiority among black children and rejected any contrary language in *Plessy*.[102]

The following year in *Brown II*,[103] the Supreme Court declared that the desegregation of the public schools should occur "with all deliberate speed,"[104] but the Court failed to articulate a specific process for desegregation.[105] Rather, the Court allowed the states and local school boards to determine their own processes for desegregation.[106] As a result, desegregation did not begin to occur until a subsequent series of cases.[107] A notable example of the failure to follow the *Brown* ruling oc-

---

97. *Id.* at 491-92.

98. *Id.* at 493.

99. *Id.* at 495. Although the Supreme Court did not explicitly overrule *Plessy* in its decision, *Brown* is considered to have effectively overruled *Plessy*. The Supreme Court held "[w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown*, 347 U.S. at 495.

100. *Brown*, 347 U.S. at 495.

101. *Id.*

102. *Id.* at 494-95.

103. Brown v. Board of Educ., 349 U.S. 294 (1955).

104. *Id.* at 301.

105. *See* Brown v. Board of Educ., 349 U.S. 294 (1955).

106. *Id.* at 300-01.

107. *See e.g.*, Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 1968) ("Freedom of Choice" plan struck down as discriminatory); Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (county ordered schools closed rather than comply with a desegregation order); Goss v. Board of Educ., 373 U.S. 683 (1963) (striking down school transfer plan that promoted discrimination as invalid). Many states were reluctant to abolish segregation due to the racially hostile environment of the time. It was feared and desegregation was known to cause, violent outbursts from anti-desegregation groups. *See generally* Brown v. Board of Educ., 349 U.S. 294 (1955).

curred at the University of Texas.[108]

In 1954, the state of Texas required the maintenance of segregated schools.[109] Despite the *Brown* rulings, this policy was not repealed until 1969.[110] Moreover, throughout the 1950's and 1960's the University of Texas consistently engaged in discriminatory practices against African American and Mexican American students.[111]

In 1968, the Supreme Court in *Green v. County School Board* forced the school boards to comply with *Brown* and ordered the immediate desegregation of schools.[112] The Court declared that the time for deliberate speed had passed and held that any continued segregation would not be tolerated.[113]

C. THE EVOLUTION OF AFFIRMATIVE ACTION

Several years after *Brown* and its progeny, universities and colleges attempted to remedy past and/or continuing discrimination in the school systems by implementing "affirmative action" programs for women and minorities.[114] Affirmative action programs were meant to increase and encourage minority participation in higher education.[115] Examples of such programs have included outreach plans, in which minorities are specifically targeted by schools for recruitment, magnet schools designed to desegregate school districts, and special math and science programs for women and minorities.[116]

---

108. *Hopwood*, 861 F. Supp. at 555.
109. *Id.*
110. *Id.*
111. *Id.*
112. Green v. County Sch. Bd of New Kent County, 391 U.S. 430 (1968).
113. *Id.* at 438.
114. GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 751-819 (Foundation Press, 12th ed. 1991) [hereinafter GUNTHER]. BLACK'S LAW DICTIONARY states these programs are considered "positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination. These affirmative action plans are commonly based on population percentages of minority groups in a particular area." BLACK'S LAW DICTIONARY 38 (6th ed. 1991).
115. *See generally* GUNTHER, *supra* note 114.
116. David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23

Due to the lasting and very negative effects of continued discrimination against minorities, schools and businesses initiated affirmative action plans to help remedy the racial disparity that discrimination has caused.[117] The Supreme Court has generally permitted such programs for diversity purposes and/or to remedy past discrimination.[118] However, the Supreme Court has set certain guidelines and constitutional limits on these programs to decrease potential abuse.[119] Such limits include subjecting race-based affirmative action programs to strict scrutiny and prohibiting the use of inflexible quotas, since such a practice uses race as the only factor for placement.[120]

1. Diversity in Education is a Compelling Governmental Interest

The Supreme Court has held that race can be considered a factor in school admissions in order to further classroom diversity.[121] In *Regents of the University of California v. Bakke*, the Supreme Court held that racial diversity in public education may be a compelling governmental interest, but race may not be the only factor used to establish diversity.[122] Accordingly, the Supreme Court found that the UC-Davis Medical School's (hereinafter "Medical School") admissions plan violated the U.S. Constitution because the plan used race as the only factor in deciding to accept certain applicants.[123]

Analogous to the applicants in *Hopwood*, the Medical

HASTINGS CONST. L.Q. 921, 931-932 (Summer 1996) [hereinafter Oppenheimer].

117. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (April 1986).

118. *See e.g.*, Regents of the University of California v. Bakke, 438 U.S. 265 (holding that diversity is a compelling governmental interest); Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097 (1995) (holding that remedial action can be a compelling governmental interest where strong evidence of past discrimination exists).

119. Oppenheimer, *supra* note 116, at 935.

120. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct 2097 (1996); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Board of Educ., 476 U.S. 267 (1986).

121. *Bakke,* 438 U.S. at 311-19.

122. *Id.*

123. *Id.* at 315.

School denied Bakke admission on two separate occasions, despite a higher undergraduate grade point average and entrance exam score than other applicants who were accepted under the Medical School's affirmative action admissions policy.[124] At the time Bakke applied, the Medical School used two separate admissions standards, one being a regular admissions program and the other a "special" admissions program.[125] The special admissions committee consisted primarily of members of minority groups.[126] The purpose of the "special" admissions program was to provide applicants from economically or educationally disadvantaged backgrounds the opportunity to be admitted when they otherwise would not because their applications did not meet traditional academic requirements.[127] The Medical School reserved 16 of the 100 seats exclusively for those applicants accepted under this program.[128] Applicants checked a box on their applications stating that they wanted consideration under the special admissions program.[129] The Medical School admissions committee did not automatically reject prospective students scrutinized under the special admissions program due to a low grade point average, nor did they rank them against those applicants in the regular admissions pool.[130]

Although many disadvantaged white applicants requested consideration under the special admissions standards, none were ever admitted under that program.[131] The admissions committee did not consider Bakke under the special admissions program in either year he applied to the Medical School, since the admissions committee did not consider him economically or educationally disadvantaged.[132]

---

124. *Id.* at 276-77.

125. *Id.* at 272-73. Under the "regular" or standard admissions program, the Medical School granted interviews to applicants with grade point averages of 2.5 or above on a 4.0 scale. Upon completion of the interview, the school awarded the applicant an overall score based on the interview ranking, the applicant's grade point average, and other considerations. *Bakke*, 438 U.S. at 273-74.

126. *Id.* at 274.

127. *Id.* at 272-73. The Medical School conceded that its purpose in formulating the plan was to increase minority enrollment. *Id.* at 280 n.14.

128. *Id.* at 289.

129. *Bakke*, 438 U.S. at 274.

130. *Id.* at 275.

131. *Id.* at 276.

132. *Id.* When Bakke applied in 1973, four of the special admissions seats re-

Bakke sued UC-Davis Medical School, claiming it excluded him from consideration under the special admissions program based solely on his race.[133] Furthermore, he claimed that the special admissions program violated his constitutional rights under the Equal Protection Clause of the Fourteenth Amendment, as well as Title VI of the Civil Rights Act of 1964.[134]

The Supreme Court held that the special admissions program discriminated on the basis of race.[135] Since the Court considered race a suspect classification, it analyzed the special admissions program using the standard of strict scrutiny.[136] The Medical School argued four compelling governmental interests to justify the racial classification in its special admissions program: 1) increasing minority representation in medical schools and in the medical profession; 2) remedying the effects of discrimination; 3) increasing the number of practicing physicians in under-served communities; and 4) attaining a diverse student body.[137]

The Supreme Court found that the Medical School's desire to have and maintain a diverse student body was the only constitutionally permissible and compelling reason for the

---

mained open and even more were open when he again applied in 1974. *Id.* at 276-77.

133. *Bakke*, 438 U.S. at 277-78.

134. *Id.* The Fourteenth Amendment states in part that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2.; Title VI of the 1964 Civil Rights Act states in part that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI of the 1964 Civil Rights Act.

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

136. *Id.* at 289-91. There are three types of scrutiny depending on the classifier. The court will use strict scrutiny, the most elevated level of review, for classifiers based on race and nationality. Here, the government must show a compelling interest in the classifier coupled with the least discriminatory method and narrowly tailored means of accomplishing that interest. Classifiers based on illegitimacy and gender will receive a middle level of review, known as intermediate scrutiny. Here, the government must demonstrate that the classification is substantially related to an important governmental interest. For all other classifiers, the court will apply minimal scrutiny. In those instances, the classification must relate to a permissible governmental interest, and cannot be arbitrary. *See* Gunther, *supra* note 114.

137. *Bakke*, 438 U.S. at 305-06.

affirmative action program.[138] However, the "fatal flaw"[139] of the Medical School's special admission plan was that it considered only African Americans, Asians,[140] or Hispanics for the 16 reserved seats.[141] The Court held this was impermissible because race was the only factor used to decide who would obtain placement among those 16 seats.[142] The Court also found objectionable the idea that minority applicants received consideration under both the special and regular admissions programs,[143] while non-minority applicants received consideration under only the regular admissions.[144] The Court stipulated that it did not reject the consideration of race as a basis for establishing diversity.[145] It did hold however, that race could not be used as the sole factor for admission.[146]

2. Remedying Past Discrimination

The Supreme Court has permitted affirmative action programs to remedy the effects of past discrimination in addition to diversity.[147] In *City of Richmond v. J.A. Croson Co.*,[148] the Court held that remedying past discrimination also constitutes a compelling governmental interest sufficient to support an affirmative action plan.[149] Consequently, preferences for members of ethnic and minority groups are permissible, provided the government adequately demonstrates the present

---

138. *Id.* at 307-12.

139. *Id.* at. 320

140. *Id.* at 275-76. It is difficult to see how Asians were underrepresented at the Medical School prior and during the adoption of the Medical School's special admissions plan. The Medical School admitted several Asians annually through the regular admissions procedure. *Id.* at 276 n.6.

141. *Bakke*, 438 U.S. at 319-20.

142. *Id.*

143. *Id.* In his opinion, Justice Powell states, "No matter how strong their (non-minority applicants) qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class." *Id.*

144. *Id.* at 319.

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

146. *Id.*

147. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989).

148. 488 U.S. 469 (1989).

149. *Id.* at 493-94.

effects of past discrimination.[150] According to the Court, strict scrutiny is met when the government shows strong evidence of past discrimination[151] and a purpose to overcome or remedy that particular past discrimination.[152] However, the Court specified that the government may not use a race-based plan in cases where merely past general or societal discrimination has been shown.[153]

3. Strong Basis in Evidence of Past Discrimination

In order for remedial past discrimination to pass the strict scrutiny test, there must be strong evidence of past discrimination.[154] In *Wygant v. Jackson Board of Education*,[155] the Supreme Court stated that while official findings of past discrimination are not required, strong evidentiary support must be present to conclude that remedial action is necessary.[156] In *Wygant*, the Supreme Court struck down a Mississippi school board's lay-off policy favoring recently hired black teachers over white teachers with seniority.[157] The Court held the lay-offs unconstitutional since the school board had not shown any specific prior discrimination against black teachers which would justify such a policy.[158] The Court held that the fact that society had historically discriminated against African Americans was insufficient to show a compelling governmental

150. *Id.* at 509.

151. Wygant v. Jackson Board of Educ., 476 U.S. 267, 277 (plurality opinion) (1986).

152. *Croson*, 488 U.S. at. 475.

153. *Id.* at 505-06. "To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group." *Id.*

154. *Wygant*, 476 U.S. at 277.

155. 476 U.S. 267 (1986).

156. *Id.* at 277. The Jackson, Mississippi school system had a majority of white teachers and relatively few black teachers. To remedy this, the Board of Education took affirmative steps to raise the number of black teachers. Due to economic problems, teacher lay-offs subsequently became necessary. Accordingly, The Board of Education modified their lay-off policy so that the same percentage of black and white teachers would be laid off, regardless of seniority. Consequently, white teachers who were laid off and who had more seniority than other black teachers who were retained, claimed Equal Protection violations. *See generally* Wygant v. Jackson Board of Educ., 476 U.S. 267 (1986).

157. *Id.* at 283-84.

158. *Id.*

interest in the remedy.[159]

a. Numerical Set-Asides Permissible

Like quota systems which establish a definite number of spots for minorities,[160] set-aside programs consist of fixed percentages "set aside" for minority placement within an organization or a school.[161] Although generally disfavored, the Supreme Court has indicated that numerical set-asides for minorities would be permitted in cases showing clear evidence of past and/or ongoing discrimination against minorities.[162]

In *United States v. Paradise*,[163] the Court upheld a court order mandating the State of Alabama to hire one black state trooper for every white state trooper hired.[164] The Supreme Court did so based on a judicial finding that the State demonstrated past and continuous discrimination against blacks in hiring Alabama state troopers.[165] The Court later specified that flexible numerical set-asides could be used to remedy past discrimination, provided they are used for a limited duration, are based on pertinent racial percentages in the relevant population, impose relatively light burdens on non-minorities, and apply only when no other effective "race-neutral" remedies are available.[166]

b. Strict Scrutiny Required

In *Adarand Constructors, Inc. v. Pena*,[167] the Supreme

159. *Id.* at 276.
160. *Bakke*, 438 U.S. at 288-89, p.289 n.26.
161. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
162. Wygant v. Jackson Board of Educ., 476 U.S. 267 (1986).
163. United States v. Paradise, 480 U.S. 149 (1987).
164. *Id.* at 185-86.
165. *Id.*
166. Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC, 478 U.S. 421, 482-83 (1986) (Five-Justice majority upheld court order mandating a 'hiring goal' of 29% minority membership in a private union that had a history of discrimination).
167. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

Court ruled that courts must apply strict scrutiny whenever the government uses race as a basis for its affirmative action plans.[168] The majority in *Adarand* held that application of the more permissive intermediate review to governmental actions undermined the "basic principle that the Fifth and Fourteenth Amendments . . . protect persons, not groups."[169]

Under strict scrutiny review, courts must hold the affirmative action program impermissible if: 1) the state fails to show that its purpose or interest in the affirmative action program is both constitutionally permissible and compelling; 2) its use of the classification is necessary and narrowly tailored to achieve that purpose;[170] and 3) the state's method in protecting its interest is the least discriminatory method available.[171] Furthermore, the Supreme Court in *Adarand* explicitly stated that a government's affirmative action plan could survive strict scrutiny if it is in response to "the lingering effects of racial discrimination" against certain minorities, and its race-conscious method was narrowly tailored.[172]

IV. THE COURT'S ANALYSIS

The Fifth Circuit in *Hopwood* began its analysis by stating that the overriding purpose of the Equal Protection Clause is "ultimately to render the issue of race irrelevant in governmental decision-making"[173] and eliminate governmentally mandated discrimination.[174] The Fifth Circuit in *Hopwood* held that any program employing racial classifications was subject to strict scrutiny to "smoke out"[175] improper racial considerations by ensuring that governmental interest is great enough

168. *Id.* at 2113. In doing so, the Court overruled *Metro Broadcasting Inc. v. FCC*, which held that the appropriate level of review in these instances was intermediate scrutiny. The Supreme Court explained that *Metro* had significantly departed from the continuing trend of using strict scrutiny to review affirmative action plans. *Id.* at 2112-13.

169. *Id.* at 2112-13.

170. *Id.* at 2117.

171. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

172. *Id.* at 2117-18.

173. Hopwood v. Texas, 78 F.3d 932, 939-940 (5th Cir. 1996).

174. *Id.* at 939-40.

175. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

to warrant this highly suspect classification.[176] Additionally, the use of strict scrutiny requires that the means chosen is narrowly tailored to a compelling state goal so that little or no possibility remains that the motive for the racial classification is impermissible.[177] The court pointed out that arguments conferring benefits on individuals based solely on race or ethnicity had been consistently rejected by the Supreme Court.[178]

A. MAJORITY

1. No Compelling Governmental Interest

The majority opinion in *Hopwood* held that the government may never consider race as a factor in college admissions decisions because that violates the Equal Protection Clause.[179] The court further held diversity is never a compelling governmental interest,[180] and, therefore, does not survive the standard of strict scrutiny in college affirmative action admissions programs.[181]

The Fifth Circuit found that the Law School had an interest identical to that held permissible and compelling in *Bakke,*[182] but stated that the Supreme Court has never reaffirmed diversity as a compelling governmental interest since *Bakke.*[183] In addition, the *Hopwood* court found *Bakke* inconclusive in determining whether racial considerations are constitutional in school admissions programs because six Justices in *Bakke* filed separate opinions.[184] The *Bakke* Court did not reach a consensus on a justification for its decision, and only Justice Powell had articulated that diversity was a compelling

176. *Hopwood,* 78 F.3d at 940.
177. *Id.*
178. *Id.* at 941.
179. *Id.* at 944, 948.
180. *Id.* at 948.
181. *Hopwood,* 78 F.3d at 948.
182. *Id.* at 943. The *Hopwood* court noted that because the Law School argued one of the purposes of the affirmative action program was to promote classroom diversity, it had invoked a countervailing constitutional interest to that expressed in *Bakke. Id.*
183. *Id.* at 944.
184. *Id.*

governmental interest.[185]

The Fifth Circuit stated that Justice Powell's holding in *Bakke* was not a majority opinion and never fully embraced by the majority of the Court.[186] In fact, the *Hopwood* court pointed out, even the four dissenting Justices in *Bakke* who would have upheld the Medical School's admissions program under intermediate scrutiny rejected Justice Powell's position that diversity is a compelling governmental interest.[187] The *Hopwood* majority also stated that later Supreme Court decisions held state interests that are not remedial will never justify racial preferences in higher education.[188] The majority in *Hopwood* further commented that recent Supreme Court precedent indicates that diversity will not satisfy strict scrutiny.[189] Moreover, the Fifth Circuit noted that diversity takes many forms and that racial considerations do not necessarily create classroom diversity.[190] Accordingly, the majority in *Hopwood* held that diversity, the goal enunciated by the Law School and upheld in *Bakke*, is not a compelling governmental interest.[191]

a. Race Based Preferences Exacerbate the Goals of Equal Protection

The *Hopwood* majority ultimately held that racial considerations for diversity purposes in higher education actually contradict the goals of equal protection.[192] In advancing the argument elaborated in *Croson*, the majority concluded that preferences based on race exacerbate rather than facilitate the goals of equal protection by treating minorities as a group and not as individuals.[193]

---

185. *Hopwood*, 78 F.3d at 944.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Hopwood*, 78 F.3d at 947, 933 n.3.
191. *Id.* at 948.
192. *Id.* at 945, 947-48; *See also Croson*, 488 U.S. at 493.
193. *Hopwood*, 78 F.3d at 945.

b. Remedy to Past Discrimination

The Fifth Circuit next turned to the district court's finding that the Law School's affirmative action plan was remedial.[194] Contrary to the district court, the Fifth Circuit held that the Law School had not demonstrated a sufficient compelling state interest in remedying the present effects of past discrimination.[195] Relying on *Wygant* and *Croson*, the Fifth Circuit held that in order to implement a remedial program based on race, strong evidence must indicate that the remedial action was necessary.[196] The Fifth Circuit acknowledged that affirmative action plans based on race could be used to remedy the effects of past discrimination.[197] The *Hopwood* court also recognized however, that the Supreme Court explicitly rejected broad state programs adopted to remedy general societal discrimination, the only type of discrimination the Fifth Circuit determined the Law School had demonstrated.[198]

Consequently, the Fifth Circuit held that a state institution of higher learning may not remedy the past effects of discrimination occurring at primary and secondary schools.[199] The court ruled that the district court erred in holding that the Law School had sufficiently proven past discrimination by demonstrating the occurrence of discrimination at the primary and secondary levels of education.[200] The Fifth Circuit stated that such a relationship is too remote and goes "beyond any

194. Hopwood v. Texas, 861 F. Supp. 551, 573 (W.D. Tex. 1994).
195. *Hopwood*, 78 F.3d at 955.
196. *Id.* at 948-49.
197. *Id.* at 949.
198. *Id.* at 949-50.
199. *Id.* at 953-54.
200. *Hopwood*, 78 F.3d at 954. The majority stated that while the law school did engage in prior discrimination against blacks, "any other discrimination by the law school ended in the 1960's". *Id.* at 953. "By the late 1960's, the school had implemented its first program designed to recruit minorities, and it now engages in an extensive minority recruiting program that includes a significant amount of scholarship money. The vast majority of the faculty, staff, and students at the law school had absolutely nothing to do with any discrimination that the law school practiced in the past. In such a case, one cannot conclude that a hostile environment is the present effect of past discrimination." *Id.*

reasonable limits."[201] The majority explained that in *Croson* the Supreme Court specifically rejected remedial measures such as those utilized by the Law School, holding that claims of discrimination in primary and secondary schools were "amorphous"[202] and without merit.[203] Therefore, the Fifth Circuit held that the Law School could not use race as a factor to eliminate any present effects of prior discrimination by persons other than the Law School.[204]

c. Poor Reputation in the Minority Community and Hostile Environment

The Fifth Circuit also ruled that the Law School could not take race into account in order to alter its poor reputation in the minority community.[205] Due to its unfavorable history of discrimination, the Law School claimed, and the district court agreed, it had a poor reputation among minorities and was viewed as a "white institution."[206] As a result, the Law School had a difficult time attracting and recruiting qualified and/or exceptional minorities to the Law School.[207] The district court found that recent incidents at the Law School such as those occurring in *Sweatt*, contributed to the perception of a hostile environment to minorities.[208] Therefore, without affirmative action programs, the Law School would have an extremely low minority student body.[209] The Fifth Circuit rejected these findings and noted that minority students who benefited from the Law School's racial preferences had already made the decision to apply, regardless of the Law School's reputation.[210] Moreover, while knowledge that a minority applicant will receive special consideration may make a minority more likely to apply, this inducement in itself does not change an alleged hos-

201. *Id.* at 951.
202. *Croson*, 488 U.S. at 499.
203. *Id.* at 950.
204. *Hopwood*, 78 F.3d at 954 n.46.
205. *Id.* at 953.
206. *Hopwood*, 861 F. Supp. at 572.
207. *Id.*
208. *Id.*
209. *Id.* at 573 n.66.
210. *Hopwood*, 78 F.3d at 953.

tile environment.[211] Consequently, the Fifth Circuit held that the Law School could not use race as a factor in order to alleviate the Law School's flawed reputation or to combat the perceived effects of a hostile environment among minorities.[212]

2. Insufficient Narrow Tailoring to Achieve a Compelling Interest

To satisfy strict scrutiny, the government must demonstrate that the method used to achieve its compelling interest is narrowly tailored.[213] Because the Fifth Circuit determined that diversity is never a compelling governmental interest and that the Law School failed to show any lingering effects of past discrimination, the court found it unnecessary to address whether the Law School's admissions program was narrowly tailored to fit the impermissible interest.[214]

3. Violation Not Harmless

The Fifth Circuit held that because the Law School admissions program did not survive strict scrutiny, the Law School violated the plaintiffs' constitutional rights.[215] In order for the plaintiffs to collect monetary damages, they needed to show injury as a result of the constitutional violation.[216] However, the Fifth Circuit declared that once the plaintiffs established a constitutional violation, the burden shifted to the Law School to show that they would not have been accepted absent the affirmative action admissions program.[217]

The Fifth Circuit found that the district court failed to shift the burden to the defendant to prove the plaintiffs had

---

211. *Id.*

212. *Id.*

213. See *supra* note 44; *See also Hopwood*, 78 F.3d at 938. (for a brief discussion of strict scrutiny).

214. *Hopwood,* 78 F.3d at 955.

215. *Id.* at 962.

216. *Id.* at 956.

217. *Id.* at 955-57. *See* Mount Healthy City School Dist. Bd of Educ. v. Doyle, 429 U.S. 274 (1977) and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (Fifth Circuit in *Hopwood* relying on *Mount Healthy and Arlington Heights* for analysis regarding shifting of burden).

not suffered any harm.[218] If the Law School could show that the plaintiffs would not have been accepted absent the secondary admissions program, the violation would be held harmless and the plaintiffs would not collect compensatory damages.[219] However, because the Law School's use of race violated plaintiff's constitutional rights, the appellate court held that they had to be allowed to reapply under a new admissions program under which race was not a consideration.[220] The court remanded the case to the district court to reconsider the issue of damages.[221]

B. CONCLUSION

The Fifth Circuit ultimately rejected the four justifications advanced by the Law School in support of the school's affirmative action admissions program. First, and in direct conflict with Supreme Court precedent, the Fifth Circuit held that diversity is not a compelling governmental interest, and that the Law School may not use race as a factor in admissions decisions to achieve diversity.[222] Second, the *Hopwood* court ruled that the Law School failed to demonstrate its admissions plan was remedial because the Law School provided insufficient evidence that it previously discriminated against minorities.[223] The Fifth Circuit held that the Law School's contention that it had a poor reputation among minority communities did not demonstrate past discrimination.[224] Finally, the *Hopwood* court stated that perceptions of a hostile environment do not justify the use of racial considerations in admitting applicants.[225] In this instance, the court noted that the use of race as a consideration may be particularly detrimental

218. *Hopwood*, 78 F.3d at 957.
219. *Id.*
220. *Id.* at 962.
221. *Id.*
222. *Id.* The Fifth Circuit went on to state that the University of Texas School of Law could not use race as a factor "to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school." *Hopwood*, 78 F.3d at 962.
223. See *supra* notes 76-77, 194-203 and accompanying text.
224. See *supra* notes 204-211 and accompanying text.
225. See *supra* notes 204-211 and accompanying text.

because such consideration facilitates racial hostility.[226] Therefore, because the Law School's use of race violated plaintiffs' constitutional rights, the Law School was ordered to allow the plaintiffs to reapply under a new non-racially based admissions program.[227] Finally, the Fifth Circuit remanded the case to the district court on the issue of compensatory damages.[228]

C. SPECIAL CONCURRENCE

In a special concurring opinion, Judge Wiener agreed with the majority's final ruling, but stipulated that the court's opinion should apply only to the case at bar.[229] Judge Wiener also disagreed with the majority's analysis.[230]

1. Diversity

While Judge Wiener agreed with the majority's final decision that the Law School's admissions plan was unconstitutional, he stated that the violation was due to insufficient narrow tailoring, not an impermissible governmental interest.[231] Judge Wiener disagreed with the majority's holding that diversity in public education can never constitute a compelling interest sufficient to withstand strict scrutiny.[232] He stated that such a holding is in clear conflict with *Bakke*.[233] Judge Wiener declared that if well-established Supreme Court precedent is to be overruled, it should be done by the Supreme Court, not the Fifth Circuit.[234] Judge Wiener conceded that *Bakke* was the only opinion in which the Supreme Court declared diversity a compelling government interest.[235] Judge Wiener stated however, that Justice Powell's singularity is precisely why he

226. *Hopwood*, 78 F.3d at 953.
227. *Id.* at 962.
228. *Id.*
229. *Id.*
230. *Id.* at 963-64.
231. *Hopwood*, 78 F.3d at 962, 965-66.
232. *Id.*
233. *Id.* at 963.
234. *Id.*
235. *Id.* at 964 n.18.

found *Bakke* the most relevant Supreme Court statement on the issue of diversity.[236] In Judge Wiener's opinion, Justice Powell's sole comment on the issue, without contrary commentary by a majority of the Court, further establishes *Bakke* as current law.[237] Judge Wiener stated that if the issue of diversity comes up before the Supreme Court the Justices will have no choice but to thoroughly examine Justice Powell's opinion in *Bakke*.[238] Judge Wiener remarked that in holding that diversity is not a compelling governmental interest, the majority's implication is that a remedial interest is the only interest deemed compelling.[239]

2. Narrow Tailoring Insufficient

Judge Wiener stated that the Fifth Circuit should not have invalidated the affirmative action plan based on an impermissible government interest, but rather should have analyzed whether the means used by the Law School was narrowly tailored.[240] Under a narrow tailoring test, Judge Wiener argued that the Law School's affirmative action admissions program would have failed.[241] He stated that African Americans and Mexican Americans are only two ethnic groups out of many.[242] Therefore, selecting only these two groups in granting special admissions treatment would not create classroom diversity.[243] Consequently, the Law School's admissions program resembled a quota system rather than a narrowly tailored program to establish genuine diversity.[244] Moreover, Judge Wiener alleged that the diversity of which Justice Powell spoke in *Bakke* "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[245] Therefore, in scrutinizing the Law School's admission plan under

236. *Hopwood*, 78 F.3d at 964 n.18.
237. *Id.*
238. *Id.*
239. *Id.* at 964.
240. *Id.* at 962.
241. *Hopwood*, 78 F.3d at 966.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 965 (citing *Bakke*, 438 U.S. at 316).

Justice Powell's expansive concept of diversity, the affirmative action admissions program still falls short.[246]

V. CRITIQUE

The Fifth Circuit's opinion is flawed for several reasons. Not only did the Fifth Circuit exceed its limited role of appellate review by disregarding Supreme Court precedent,[247] but it seriously undervalued the important role affirmative action plays in higher education.

A. THE LIMITS OF FEDERAL APPELLATE JURISDICTION

In holding that diversity is never a compelling governmental interest in higher education, the Fifth Circuit contradicts Supreme Court precedent established almost twenty years ago in *Bakke*.[248] Such a ruling by a federal court of appeals exceeds the permissible scope of appellate jurisdiction.[249] The U.S. Constitution proscribes that the ultimate judicial power of the United States resides in a single Supreme Court.[250] Pursuant to Title 28 of the United States Code Annotated Section 2072(a), "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts and courts of appeals."[251] Moreover, Title 28 mandates that the jurisdiction of the federal courts of appeals is limited to final decisions rendered in lower

246. *Hopwood,* 78 F.3d. at 966. Judge Wiener states: "[T]he law school created its own Catch-22 by advancing two putative compelling interests that ultimately proved to produce so much internal tension as to damage if not fatally wound each other. Under the banner of prior discrimination, Texas had no choice but to single out blacks and Mexican-Americans, for those two racial groups were the only ones of which there is any evidence whatsoever of defacto or dejure racial discrimination by the State of Texas in the history of its educational system. But, by favoring just those two groups and doing so with a virtual quota system for affirmative action in admissions, the law school estops itself from proving that its plan to achieve diversity is ingenuous, much less narrowly tailored." *Id.* at 966 n.24.

247. 28 U.S.C.A. § 1291 (West 1993).

248. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

249. 28 U.S.C.A. § 1291 (West 1993).

250. U.S. CONST. art. III, §1.

251. 28 U.S.C.A. § 2072(a) (West 1994).

federal district courts.[252] In *Hopwood* however, the Fifth Circuit surpassed its authority by declaring diversity in the classroom impermissible, in the absence of specific Supreme Court concurrence on that issue. Consequently, the ruling of the Fifth Circuit announcing that classroom diversity no longer constitutes a compelling governmental interest to satisfy strict scrutiny is erroneous and not binding.[253] To obey the Fifth Circuit ruling in *Hopwood* would be to deny the law of the Supreme Court as the ultimate authority.

Not only did the Fifth Circuit exceed the bounds of its jurisdiction, but it did so without adequate justification. In response to the district court's ruling and prior to the Fifth Circuit holding, the Law School abandoned the affirmative action admissions program in effect at the time the plaintiffs applied.[254] Moreover, as Judge Wiener noted in his concurring opinion, the Fifth Circuit could have avoided contradicting the *Bakke* issue of diversity by holding that the Law School's admissions plan was not narrowly tailored.[255] In striking down the Law School admissions plan on this basis, the Fifth Circuit would not have exceeded its permissible scope of jurisdiction.

B. REMEDIAL ACTION ADDRESSED INSTEAD OF DIVERSITY

Relying heavily on the holdings of *Croson* and *Adarand*, the *Hopwood* majority reasoned that diversity is never a compelling governmental interest, but that discrimination for remedial purposes is permissible.[256] However, neither *Croson* nor *Adarand* articulate this bright line conclusion, nor do these cases deal with diversity in higher education.[257]

252. 28 U.S.C.A. § 1291 (West 1993).
253. 28 U.S.C.A. § 1291 (West 1993).
254. Hopwood v. Texas, 861 F. Supp. 551, 582, 582 n.87 (W.D. Tex. 1994).
255. See *supra* notes 230, 239-245 and accompanying text.
256. *See* Hopwood v. Texas, 78 F.3d 932 (1996).
257. *See generally* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). *See also* Adarand Constructors, Inc. v. Pena, 115 S. Ct 2097 (1996).

1. *Croson*

In *Croson*, the majority addressed the dangers of racial classifications, the stigmatism attached to such classifications,[258] and the need for strict scrutiny.[259] However, the *Croson* court focused on the governmental interest of remedial action in the employment context rather than diversity in higher education.[260] The Court stated that it was skeptical of the City's claim that the purpose in enacting racial preferences in construction contracts was to remedy the effects of past discrimination.[261] The City failed to identify any specific discrimination against minorities in the construction industry,[262] and the City's plan was based more on notions of societal discrimination against African Americans than on particularized instances of discrimination.[263] The Court held that remedial measures based solely on general societal discrimination is impermissible.[264] Moreover, the Court found the City of Richmond's plan over inclusive since it randomly included all minority groups, many of whom may not have suffered discrimination in Richmond.[265]

Hopwood is similar to *Croson* in that the Law School argued its actions were remedial.[266] However, the Law School also argued that its purpose in using race as a factor in admissions decisions was to create classroom diversity,[267] an interest held to be compelling by the Supreme Court.[268] In fact, in *Croson*, Justice Stevens refused to limit the use of race solely

---

258. *Croson*, 488 U.S. at 493. The majority states "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility." *Id.*

259. *Id.*

260. *Id.* at 511 (holding that remedial action is a permissible and compelling governmental interest in the context of employment).

261. *Id.* at 510-11.

262. *Croson,* 488 U.S. at 510-11.

263. *Id.*

264. *Id.* at 505-06.

265. *Id.* at 506.

266. See *supra* notes 50-52 and accompanying text.

267. See *supra* note 45 and accompanying text.

268. *Hopwood*, 861 F. Supp. at 561.

for the purpose of remedial action.[269] In referencing recognized compelling governmental interests aside from remedial action, Justice Stevens specifically cites to Justice Powell's opinion in *Bakke*.[270] Therefore, Croson did not sufficiently support a finding that the Court would not continue to hold diversity as a compelling governmental interest.

Moreover, the district court noted that in *United States v. Fordice*,[271] the Supreme Court appeared to limit the rejection of societal discrimination for remedial action to the context of employment and not higher education.[272]

2. *Adarand*

In its application of *Adarand*, the Fifth Circuit appears to have focused more on the concurring opinions of Justices Thomas and Scalia, than on Justice O'Conner's majority opinion.[273] The *Adarand* Court overruled intermediate scrutiny as the proper level of review for racial classifications and announced that all racial classifications must withstand strict scrutiny.[274] As in *Croson*, the *Adarand* Court focused on notions of remedial action, rather than diversity.[275] Nevertheless, although the *Adarand* Court questions the *Bakke* decision, it does not overrule it.[276] This evidences the Supreme Court's choice to leave *Bakke* as binding precedent when presented with an opportunity to render *Bakke* invalid.

The *Hopwood* court focused and relied primarily on claims of remedial state action in situations other than higher education.[277] This focus was too limited since the issue of diversity

269. *Croson*, 488 U.S. at 493 n.1, 511-12.
270. *Id.*
271. United States v. Fordice, 505 U.S. 717 (1992).
272. *Hopwood*, 861 F. Supp. at 571.
273. Adarand Constructors Inc. v. Pena, 115 S. Ct 2097 (1992).
274. *Id.* at 2112-13.
275. Adarand Constructors Inc, v. Pena, 115 S. Ct. 2097 (1995).
276. *Hopwood*, 78 F.3d at 96. The Court in *Adarand* states, "The [Supreme] Court's failure to produce a majority opinion in *Bakke, Fullilove, and Wygant* left unresolved the proper analysis for remedial race based governmental action." *Adarand*, 115 S. Ct. at 3002.
277. *Hopwood*, 78 F.3d at 948-55.

was not wholly addressed in *Croson* and *Adarand*. Rather than dismiss diversity as impermissible, the Fifth Circuit should have focused on the role diversity plays in the classroom and whether the Law School's admissions program achieved diversity.

Until the Supreme Court takes a contrary position regarding the compelling nature of diversity in higher education, *Bakke* is the law and classroom diversity is constitutionally permissible.[278] Ironically, the Fifth Circuit states that to hold diversity as a constitutionally permissible goal would be to contradict the Supreme Court, which it admits it is "not authorized to challenge."[279]

3. Importance of Diversity

The Fifth Circuit severely underestimates the importance of diversity and the role it plays in the classroom.[280] The Law School provided ample evidence to the district court as to the substantial benefits derived from a diverse student body.[281] In addition, several law school professors testified on behalf of the Law School concerning the positive impact diversity has on education, such as differing life experiences, overall outlook and varying perspectives on similar issues.[282] The Fifth Circuit rejected this evidence and claimed that it was not color that furthers diverse viewpoints, but "individuals, with their own conceptions of life."[283] The Fifth Circuit fails to acknowledge however, that conceptions and perceptions come from different life experiences. Clearly a minority, simply by virtue of being a minority and enduring the daily struggles of life as a minority, will have a different conception of life than the white majority.

The district court found that the Law School could not

278. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
279. *Hopwood*, 78 F.3d at 945-46.
280. *Id.* at 932.
281. *Hopwood*, 861 F. Supp. at 570-72.
282. *Id.* at 571.
283. *Hopwood*, 78 F.3d at 946.

obtain diversity without an affirmative action plan.[284] Moreover, relying solely on the TI score, minorities in the Law School would be significantly underrepresented.[285] As the trial court noted, such a "meager representation" did not seem appropriate in a state school funded in part by all Texas residents.[286] Consistent with these findings, the Fifth Circuit was therefore hasty in discounting diversity as a compelling state interest.

4. Evidence of Past Discrimination Satisfied

As found by the district court in *Hopwood*, the state of Texas has a history of unequal educational opportunities for African Americans and Mexican Americans compared to educational opportunities for whites.[287] The Fifth Circuit itself acknowledged that Texas has a "history of racial discrimination in education."[288] According to the findings of the district court, this educational disparity is apparent as early as the primary and secondary schooling levels, and extends to higher education.[289] As recently as 1989, a study indicated that the amount of spending allotted to San Antonio school children, with a large Hispanic school population, was $2,800 per child.[290] In the neighboring predominately white town of Alamo Heights however, the school system allotted each child $4,600.[291]

The Fifth Circuit rejected arguments that discrimination

---

284. *Hopwood,* 861 F. Supp. at 571.

285. *Id.* "Had the Law School based its 1992 admissions solely on the applicants' TI without regard to race or ethnicity, the entering class would have included, at most, nine blacks and eighteen Mexican Americans." *Id.*

286. *Id.* at 571 n.60.

287. See *supra* notes 53-59 and accompanying text.

288. *Hopwood*, 78 F.3d at 954. The Fifth Circuit stated "No one disputes that Texas has a history of racial discrimination in education." *Id.* Present effects include the fact that some minorities enrolled in the Law School feel isolated, are reluctant to participate in class discussions, and some continue to feel a hostile racial environment at the Law School. *Hopwood*, 861 F. Supp. at 573.

289. See *supra* notes 54-59 and accompanying text.

290. JONATHAN KOZOL, SAVAGE INEQUALITIES, 224 (1992); Oppenheimer, *supra* note 116, at 962.

291. *Id.*

occurring at the primary and secondary levels was sufficient to justify a remedial plan or to establish diversity at the Law School.[292] Yet, the Law School takes residency into account when determining whether to admit an applicant.[293] In order to obtain federal and state funding as a public institution, the Law School must accept a substantial majority of in-state applicants.[294]

Statistical data indicates that African Americans, Mexican Americans, and other minorities residing in Texas receive substandard education as opposed to resident whites.[295] It is difficult to see how this would not be relevant to the Law School's admittance process. Such substandard educational opportunities may have a domino effect. For example, inferior education will result in lower test scores and grades for minorities, which in turn may effect college admittance and/or lower academic achievement in college. As evidenced by Cheryl Hopwood's demotion from a presumptive admit to the discretionary zone, the Law School does take into account the academic quality of the applicant's undergraduate college.[296]

Therefore, it would appear that discrimination in Texas at the primary and secondary school levels is an important consideration, at least where resident minority applicants are competing for entrance with white resident applicants. Rather than completely abolish race as a consideration in admissions decisions, the Fifth Circuit could have adopted a far narrower approach by limiting racial considerations to minority Texas residents, whom the district court found receive inferior educational opportunities in Texas Schools.

---

292. See *supra* notes 199-203 and accompanying text.

293. *Hopwood*, 861 F. Supp. at 572.

294. *Id.* The Fifth Circuit recognized the important role residency played in admitting applicants. Specifically, the Fifth Circuit majority stated "residency also had a strong, if not determinate effect [in admissions]. Under Texas law in 1992, the law school was limited to [accepting no more than] 15% non-residents." *Hopwood*, 78 F.3d at 935 n.2.

295. See *supra* notes 53-55 and accompanying text.

296. *Hopwood*, 861 F. Supp. at 560.

Moreover, the Fifth Circuit erred in determining that the Law School failed to adequately prove discrimination within the University of Texas. The district court listed ample evidence of the occurrence of past discrimination within the law school and the remaining effects of prior discrimination lingering within the law school both in its reputation in the community and in the perception of the Law School as a hostile environment.[297]

5. No Disadvantage

It is difficult to see how the four plaintiffs in *Hopwood* were disadvantaged by the Law School's affirmative action admissions plan.[298] The four plaintiffs were denied admission for reasons other than their race.[299] For example, although Cheryl Hopwood had a high grade point average, she attended community colleges which the admissions committee deemed as non-competitive schools.[300] Moreover, Hopwood's application contained no letters of recommendation, she failed to respond to the application questions with any detail, she failed to describe her background or any unique skills she possessed, and she provided no personal statement with her application.[301]

Plaintiff Kenneth Elliott had a grade point average of 2.98, well below the mean grade point average of not only non-minority applicants, but also of minority applicants accepted under the affirmative action admissions plan.[302] Plaintiff Douglas Carvell had a low LSAT score, and ranked only 98th

297. See *supra* notes 53-63 and accompanying text.

298. *See* Hopwood v. Texas, 861 F. Supp. 551 (W.D. Tex. 1994).

299. *Id.* at 580.

300. *Id.* at 564. Hopwood subsequently testified that the reason she attended community colleges was "because she had to pay for her own education and had to work her way through school." Therefore, she could not afford to attend more prestigious schools. Hopwood did not provide this explanation in her application even though the application requested that such information be provided if the applicant "believe[d] [it] will help the Admissions Committee in evaluating [his or her] application. *Id.* at 564 n.40.

301. *Id.* at 564.

302. *Hopwood*, 861 F. Supp. at 565-66. *See also* the mean ranges of accepted applicants in *Hopwood*, 78 F.3d at 936-37, 937 n.7.

in his undergraduate class of 247.[303] Furthermore, a letter of recommendation Carvell submitted to the Law School from a previous professor described Carvell's academic performance as "uneven, disappointing, and mediocre."[304] Although Plaintiff David Rogers had a respectable grade point average, he flunked out of the University of Texas as an undergraduate.[305] Like Hopwood, Rogers provided no letters of recommendation.[306] Finally, plaintiffs' counsel conceded that they could not prove that each of the plaintiffs were denied admission as a result of the Law School's affirmative action plan.[307]

VI. CONCLUSION

The consequences of this decision are far reaching because of the binding effects on courts within the Fifth Circuit's jurisdiction, and because it stands out for other courts to see. As the district court stated in its opinion, affirmative action programs are needed in our society due to its "lengthy history of pervasive racism."[308] The Fifth Circuit's decision clearly attempts to undermine these needed affirmative action plans.

It is likely however, that the Law School's admissions program would have failed the strict scrutiny test if the Fifth Circuit had chosen to address this issue.[309] As Judge Wiener surmised in his concurring opinion, many minority communities exist which also contribute to diversity in the classroom aside from African Americans and Mexican Americans.[310] The Law School did not satisfactorily prove that other minority groups were adequately represented at the Law School while African and Mexican Americans were underrepresented. Therefore, it cannot stand to reason that the Law School's secondary admissions program was narrowly tailored to achieve true classroom diversity.

---

303. *Hopwood,* 861 F. Supp. at 566.
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 582 n.86.
308. *Hopwood*, 861 F.3d at 583.
309. *See Hopwood*, 861 F.3d at 551; *see Hopwood*, 78 F.3d at 968.
310. *Hopwood*, 78 F.3d at 968.

Unfortunately, the *Hopwood* court refused to discuss the issue of narrowly tailoring the affirmative action admissions plan and instead denounced diversity altogether as a permissible and compelling governmental interest sufficient to satisfy strict scrutiny. This seems to be a dramatic and unnecessary leap for a three judge appellate panel lacking the legal authority to render precedent law invalid.

Emily V. Pastorius[*]

---

* Santa Clara University School of Law, Class of 1998. I would like to thank Anne Roche, Monique Olivier, Kara Buchner and Karleen Murphy for their advice, editorial suggestions, and constant words of encouragement. I could not have done it without their help. I also want to thank my incredible husband, Scott, for putting up with me through this whole ordeal.