The Wisdom and Constitutionality of Race-Based Decision-Making in Higher Education Admission Programs: A Critical Look at Hopwood v. Texas

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INTRODUCTION

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary, and is, in truth, only a relic of the past. . . . At some time, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.¹

Unfortunately, the United States has not yet reached the "stage of maturity" Justice Blackmun earnestly hoped for, forcing legislatures and courts to struggle with the wisdom and constitutionality of using race as a factor in federal and state decision-making. Recently, the Fifth Circuit in the highly publicized case, Hopwood v. Texas,² confronted this issue and severely restricted the ability of higher educational institutions to consider race a pertinent factor in admissions decisions. Consequently, the number of minority students entering the University of Texas Law School in the fall has dropped significantly in comparison to past years when the Law School's affirmative action program was utilized.³ If other lower

² 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996).
³ Before Hopwood, the University of Texas Law School admitted a class that was 5.9% black and 6.3% Hispanic. See Ellis Cose, The Color Bind, NEWSWEEK, May 12,
courts follow *Hopwood* and eliminate affirmative action programs in institutions of higher education, minority enrollment will also decrease dramatically. The district court opinion in *Hopwood* noted that without the affirmative action program used by the Law School, only nine African-Americans and eighteen Mexican-Americans would have been admitted in 1993. A broader study of the effects of affirmative action in law school admissions found that of the 3,435 blacks accepted by at least one law school in 1990-91, only 687 would have been accepted on grades and LSAT scores alone.

This Note argues that, due to the unique nature of education, affirmative action needs to be retained in the educational setting. This Note also urges courts reviewing admissions programs not to blindly follow *Hopwood*'s misinterpretation of Supreme Court precedent. Instead, courts should continue to follow Supreme Court mandates which envision permissible circumstances for the use of race in admissions decisions.

Part I of this Note reviews Supreme Court and lower federal court cases dealing with affirmative action and *Hopwood*, the most recent court of appeals treatment of the use of race as a factor in admissions programs. Part II exposes the major flaws in *Hopwood*'s analysis of the present state of affirmative action jurisprudence and argues there are several compelling reasons for al-
lowing educational institutions to consider a person’s race for admissions purposes.

I. BACKGROUND

This section first includes a detailed description of Hopwood, the case at issue in this Note. Next, a discussion of Regents of University of California v. Bakke, the Court’s only opinion specifically addressing the constitutionality of race-based affirmative action policies in admissions programs, is helpful for understanding this Note’s later analyses of the mistakes made in Hopwood. Third, United States v. Fordice, the Supreme Court’s most recent articulation of its position concerning desegregation in higher education, is useful in determining whether Hopwood is consistent with Supreme Court mandates. Fourth, Podberesky v. Kirwan provides an interesting comparison to Hopwood in its treatment of affirmative action in the educational context at a university plagued by continuing effects of past de jure discrimination similar to those in Texas. Finally, in order to understand the Court’s current constitutional construction of affirmative action under the Equal Protection Clause, an analysis of Adarand Constructors v. Pena, the latest Supreme Court decision on affirmative action, is necessary.

A. Hopwood v. Texas

The Hopwood case began when four white law school applicants sued the University of Texas Law School, claiming that their denial of admission constituted a violation of the Equal Protection Clause. They based this assertion on the fact that they had achieved higher LSAT scores and GPA scores than several African-American and Mexican-American students offered admission. In the spring of 1992, the year the plaintiffs were denied admission, the University of Texas Law School employed a two-tiered admissions system with separate admissions standards for (1)

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10 38 F.3d 147 (4th Cir. 1994).
12 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996).
13 The University of Texas Law School will hereinafter be referred to as “the Law School.”
14 See 78 F.3d at 934.
15 See id. The Law School stipulated that all of the plaintiffs in this case would have been admitted in the African-American and Mexican-American system. See id. at 936-38.
African- and Mexican-Americans, and (2) whites and other minorities.

The Law School defended its admissions program on the grounds that (1) prior discrimination by the State of Texas in primary, secondary, and undergraduate institutions directly affected the educational achievement of the pool of minority applicants; and (2) the current law school admissions program was implemented to discharge the school's duty of eliminating the vestiges of past segregation. Therefore, the Law School argued, it had a compelling justification for using race as a factor in admissions decisions. Furthermore, the Law School asserted its interest in a racially diverse student body was protected by the First Amendment guarantee of academic freedom and was sufficiently compelling to withstand an Equal Protection challenge.

The district court, following Adarand, applied strict scrutiny to the admissions process, which required a compelling objective narrowly tailored toward achieving its goals. Both the Law School's goal of remedying the effects of past discrimination in the State's educational system as a whole and the desire to have a diverse student body were found to be compelling objectives. In its discussion of the remedial goal, the district court held that because the State of Texas' institutions of higher education are inextricably linked to the primary and secondary schools in the system, Texas' long history of facially discriminatory practices in those schools presently affected the Law School's minority population. The district court found evidence similar to that relied upon in Podberesky v. Kirwan to determine that the present effects of past discrimination were sufficiently severe to cause the remedial objective to be compelling. That evidence included: (1) a reputation for an atmosphere of racial hostility; (2) a significantly low percentage of minority students enrolled in the school;
and (3) a general feeling of isolation among minority students. The court further noted that "were the [District] Court to limit its review to the University of Texas, [it] would still find a 'strong evidentiary basis for concluding that remedial action is necessary.'"

Upon consideration of the diversity objective, the court found that "[a]bsent an explicit statement from the Supreme Court overruling Bakke, ... in the context of the Law School's admission 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." A close examination of the minority applicants who would have been admitted without the affirmative action plan revealed that a race-neutral plan would not produce significant numbers of African-American or Mexican-American students. Furthermore, the court found the problem so egregious that other methods, including minority scholarships and recruitment, would not yield a racially diverse student body. Finally, the court noted that important safeguards existed to combat abuse of this system, including its flexible nature, regular reviews by the admissions committee, and the rational relationship between the target population of minorities in the student body and those in the population of high school graduates in the State of Texas. Despite these findings, however, the district court held that the two-track admissions program was unconstitutional under Bakke since minority and non-minority candidates were precluded from competing in the same system. Consequently, the program was not narrowly tailored to achieving the objectives it sought.

In affirming the trial court's finding that the Law School's system was unlawful, the Fifth Circuit issued a sweeping indictment of affirmative action, holding that it would be lawful only under very narrow circumstances. The court began its analysis of the remedial objective of the admissions program by stating that

24 See id. at 573.
25 Id. at 572.
26 Id. at 570-71.
27 See id. at 571 (stressing the lack of diversity in schools without affirmative action programs).
28 See id. at 573-74.
29 See id. at 574-75.
30 See id. at 579.
31 See id.
prior precedent permits racial classifications when strong evidence exists that remedial action is necessary.\textsuperscript{32} The court held in order for past discrimination to justify a race-based program, the entity seeking to remedy the discrimination must be the perpetrator of the past discrimination.\textsuperscript{33} Therefore, the Law School, not the State of Texas’ educational system or even the University of Texas system as a whole, is the only state actor whose discrimination can be used to validate such an admissions program.\textsuperscript{34} According to the court, “the use of racial remedies must be carefully limited, and a remedy reaching all education within a state addresses a putative injury that is vague and amorphous . . . [and has] no logical stopping point.”\textsuperscript{35}

Furthermore, the court severely limited the types of present effects of past discrimination sufficient to demonstrate that, for a specific actor, a remedial plan would be justified. For example, the court found the Law School’s lingering bad reputation in the minority community\textsuperscript{36} and the perception that the Law School was a hostile environment for minorities\textsuperscript{37} were insufficient evidence of the requisite past discrimination. According to the court, these conditions were the effects of societal discrimination for which the Law School could not be held accountable.\textsuperscript{38} Moreover, the court found the Law School’s admitted and documented past \textit{de jure} discrimination against African- and Mexican-Americans as recent as the 1960s was irrelevant to the problem at hand in 1996.\textsuperscript{39} According to the court, “any racial tension at the law school is most certainly the result of present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions.”\textsuperscript{40} This fact rendered the plan unconstitutional according to the court’s interpretation of \textit{Bakke} and its progeny.\textsuperscript{41}

\textsuperscript{32} See Hopwood v. Texas, 78 F.3d 932, 942 (5th Cir. 1996), \textit{cert. denied}, 116 S. Ct. 2581 (1996) (stating that the racial classifications were only narrowly permitted).
\textsuperscript{33} See id. at 950.
\textsuperscript{34} See id.
\textsuperscript{35} \textit{Id}.
\textsuperscript{36} See id. at 952 (discussing the general climate of relations for the school).
\textsuperscript{37} See id.
\textsuperscript{38} See id. at 953.
\textsuperscript{39} See id. at 954 (stating that the court did not wish to view the past as a present justification for the Law School’s alleged policy after the Law School argued their policy was a result of past procedure).
\textsuperscript{40} \textit{Id} at 953.
\textsuperscript{41} See id. at 954-55.
Next, the Fifth Circuit turned to a discussion of the Law School’s desire to achieve a racially diverse student body. The court acknowledged that *Bakke* stood for the proposition that “[t]he attainment of a diverse student body clearly is a constitutionally permissible goal for an institution of higher education.” Nevertheless, the court interpreted intervening Supreme Court cases to require a finding 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.” Consequently, the court held race can never be used by an educational institution to determine a person’s contribution to a diverse student body. According to the court, an institution “may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory . . . [or on the basis of] his home state or relationship to school alumni.” Furthermore, the Law School can look at factors such as unusual or substantial extracurricular activities in college, whether an applicant’s parents attended the law school, or the applicant’s economic and social background. However, the court reasoned that the minority experience is no different from the collective American experience, so the use of race as a proxy for diverse backgrounds would not yield the truly diverse student body the Law School claimed to be seeking.

In sum, the *Hopwood* court decided: (1) race can only be a factor in admissions decisions where there is evidence of present effects of recent, identifiable racial discrimination by the specific school seeking to remedy the discrimination; and (2) the school must remedy the discrimination by allowing only the person previously discriminated against to use that person’s race as a mild “plus” in the next admissions procedure.

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42. *Id.* at 943 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311 (1978)). In *Bakke*, Justice Powell found the strict racial quota system used by the University of California at Davis was not sufficiently narrowly tailored to satisfy strict scrutiny since it made race the determinative factor for a specific number of seats in the entering class. However, Justice Powell clearly held race could be a factor in admissions decisions, when used in combination with other factors, to achieve diversity.

43. 78 F.3d at 944 (discussing permissible compelling interests).

44. *Id.* at 946.

45. See *id.* (discussing other factors potentially considered for admission).

46. See *id.*

47. See *id.* at 954.
B. Regents of the University of California v. Bakke

At issue in *Bakke* was the use of a medical school admissions program that reserved 16 seats in each entering class of 100 for disadvantaged minority students. Bakke, a white male who was denied admission, sued the University of California at Davis alleging the admissions program violated the Equal Protection Clause of the United States Constitution and Title VI of the Civil Rights Act of 1964 ("Title VI").

Three main opinions were written, one by Justice Powell, who was the swing vote on all of the issues and the author of the Court’s opinion; one by Justice Brennan (joined by Justices White, Marshall, and Blackmun), who found the Davis plan constitutional, and one by Justice Stevens (joined by Justices Burger, Stewart, and Rehnquist), who did not reach the constitutional issue and instead found the program unlawful under Title VI, which expressly bars racial discrimination by any federally-assisted institution.

Justice Powell began his analysis of the constitutionality of Davis' admission program with a determination that any racial classification must pass strict scrutiny in order to be constitutional. To withstand this rigorous test, the racial classification of an admissions program must be narrowly tailored to accomplish a "compelling" objective. Davis asserted four objectives of the admissions program: (1) to reduce the historic deficit of traditionally disfavored minorities in medical schools and the medical profession; (2) to counter the effects of societal discrimination; (3) to increase the number of physicians who will practice in communities currently under-served; and (4) to obtain the educational benefits that flow from an ethnically diverse student body.

Justice Powell categorized the first objective as a naked racial preference which was "discrimination for its own sake," and thus facially invalid. The second objective, that of remedying the ef-

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44. See *id.* at 275. Admissions officers closely examined applications for evidence of educational or economic hardship in order to determine disadvantage.
45. See *id.* Only African-Americans, Chicanos, and Asian-Americans could compete for these seats.
46. *Bakke* based this assertion on the fact that his MCAT scores and GPA were higher than some of the minorities' scores who were admitted. See *id.*
47. See *438 U.S.* at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").
48. See *id.* at 306.
49. *Id.* at 307.
fects of societal discrimination, was also found not to satisfy strict scrutiny. However, Justice Powell held that a state has a compelling interest in remedying the effects of particular, identifiable cases of discrimination.

According to Justice Powell, affirmative action can be used in cases where explicit judicial, legislative, or administrative findings establish the entity's program seeks to redress specific constitutional or statutory violations perpetrated by the entity itself. In other words, if an authoritative agency had found Davis' admissions programs had discriminated against African-Americans, Chicanos, and Asian-Americans in the past, and the present program was an attempt to remedy this past discrimination, Davis' affirmative action plan might satisfy strict scrutiny. However, Davis had not sought to cure a particular past discriminatory event but only societal discrimination, which Justice Powell determined was not a compelling objective.

The third goal of the Davis program, increasing the number of physicians in presently under-served communities, was dismissed by Justice Powell due to the lack of evidence that minorities were more likely to practice in these communities. Justice Powell quoted the Supreme Court of California's holding:

[a]n applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage.

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55. See id. This objective failed strict scrutiny because it was not sufficiently narrowly tailored to benefit only those harmed and burden only those responsible for the previous harm. See id.

56. Justice Powell emphasized thatDavis itself was not capable of making the requisite findings. "Petitioner [Davis] . . . is in no position to make such findings. Isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria." Id. at 309.

57. See id. at 307-09. A later interpretation of this standard, in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), held the public entity enacting the affirmative action plan need not be found to have itself discriminated if it can show there has been clear and severe discrimination by an industry as a whole which can only be remedied by a race-conscious plan.

58. See 438 U.S. at 307.

59. See id. at 310.

60. Id. at 311 (quoting Bakke v. Regents of Univ. of Cal., 553 P.2d 1152, 1167 (Cal. 1976)).
Finally, Justice Powell recognized the desire to attain a diverse student body is a compelling interest and "clearly... a constitutionally permissible goal for an institution of higher education" as long as the university chooses means narrowly tailored to achieve that goal.\textsuperscript{61} According to Powell, the means used by Davis, a strict quota system, were not narrowly tailored to produce a racially mixed medical school class.\textsuperscript{62} However, he found it permissible to use race as one factor among others to achieve the goal of diversity in accordance with a university's First Amendment right to academic freedom.\textsuperscript{63} Consequently, as long as a specific number of seats are not reserved exclusively for minorities, and other factors are combined with race to determine an individual's capacity to contribute to diversity, a university admissions program that uses race as a factor will withstand strict scrutiny under Bakke.\textsuperscript{64}

Because it characterized the Davis admissions program as a benign race-based classification, the Brennan opinion used intermediate scrutiny to test the constitutionality of the program, requiring it serve "important" governmental objectives and be "substantially related" to the achievement of those objectives.\textsuperscript{65} According to Justice Brennan, the Davis plan's quota system survived intermediate scrutiny, because:

the purpose of remedying the effects of societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.\textsuperscript{66}

The Brennan opinion reasoned that under Title VI, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination.\textsuperscript{67} This may be done without finding past intentional discrimination by those offer-
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...ing preferential treatment or through a case-by-case determination that those to be benefitted suffered from discrimination. It thus follows that states may also adopt race-conscious programs designed to overcome substantial minority underrepresentation where there is reason to believe the evil addressed is a product of past racial discrimination. The Brennan opinion claimed a colorblind solution did not exist and was not required to rectify the past effects of societal discrimination. Furthermore, Brennan's opinion asserted the use of race does not stigmatize any group as inferior; rather, "it compensates applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of state-fostered discrimination." The Brennan opinion emphasized that once admitted, these students would be required to satisfy the same criteria as all other students in order to graduate; they would be taught by the same faculty and subjected to the same examinations.

The third main opinion, written by the Stevens group, did not reach the constitutional issue of an Equal Protection violation. Instead, the Stevens group found the program to be unlawful under Title VI, which prohibits the use of race as a basis for excluding anyone from participation in a federally funded program. By agreeing that the program violated Title VI, Justice Powell added the fifth vote which sounded the death knell for Davis' admissions plan.

Despite the fact that the Davis plan was found to be untenable, one very important idea emerged from Bakke: Justices

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68. See id.
69. See id.
70. See id. at 376.
71. See id. at 355-56. According to the Brennan opinion, the idea that our Constitution is colorblind "has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions." Id.
72. Id. at 374-76.
73. See id. at 376.
74. See id. at 412-13.
75. See id. at 284-87. No opinion garnered the support of five justices on the subject of the constitutionality of the Davis plan. Justice Powell agreed with Justices Brennan et al. that Title VI was only violated if the Constitution had also been violated, so both of those opinions analyzed the constitutional issues. However, the opinions came down in opposite directions. Because the Stevens group did not look at the constitutional issues, only Justice Powell's opinion holds the Davis plan to be invalid on constitutional grounds.
76. The Brennan group did not address the issue of whether the goal of achieving diversity satisfied intermediate scrutiny. However, it is reasonable to assume they would
Powell, Brennan, White, Marshall, and Blackmun agreed that race could be a factor in admissions decisions at the professional school level, provided other factors such as geographic region, community activities, and athletic participation were also used.77

C. United States v. Fordice78

In 1954, the Supreme Court held public education must be fully integrated, rejecting the notion of “separate but equal” found in Brown v. Board of Education.79 A year later, the Court required the end of segregated public education “with all deliberate speed.”80 In Fordice, the Court had the opportunity to decide when a public university, as opposed to a public elementary or secondary school, has discharged its obligation to dismantle its prior de jure segregated educational system.81

Mississippi’s educational institutions claimed they had met their obligation to promote integration by removing all legal barriers to minority enrollment in state-supported institutions.82 The institutions asserted that, because students had the freedom to choose which university to attend, the fact that the universities remained largely segregated was the effect of societal forces rather than institutional discrimination.83 However, the Court held a state has an affirmative duty not only to implement race-neutral policies, but also to actively dismantle all vestiges of segregation policy.84 According to the Court:

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has

have found it to be an important state interest, given their expansive views on when race can constitutionally be a factor in a decision. See id. at 362-69.

77. See id. at 320, 325.
81. See 505 U.S. at 721.
82. See id. at 725.
83. See id.
84. See id. at 729.
not satisfied its burden of proving that it has dismantled its prior system.85

The Court was careful to establish that the university or the state need not intend to perpetuate prior discrimination in order to be in violation of the Constitution.86 The Court admonished the court of appeals for ignoring the undisturbed factual findings of the district court that there remained several surviving aspects of Mississippi's prior dual system that were constitutionally suspect, for even though such policies were facially race neutral, they substantially restricted a person's choice of which institution to enter and contributed to the racial identifiability of the eight public universities.87

One of the main policies the Court found to perpetuate racial segregation was the admissions policy. The State of Mississippi's university system had five historically white universities and three historically black universities. According to the admissions policies of the schools, any applicant who had an ACT88 score of 15 or higher qualified for automatic admission to any of the five historically white institutions, while any applicant with an ACT score of 13 or higher qualified for automatic admission to any of the historically black universities. These standards were originally adopted for the purpose of maintaining racially segregated institutions.89 However, when challenged, the State responded that the policies were currently used to redress the problems of student unpreparedness,90 grade inflation, and lack of comparability in grading practices and course offerings among high schools.91 The Court did not accept this justification since the policy was traceable to the de jure system and had present discriminatory effects, given that, at the time of this litigation, the average ACT score for white students was 18 and the average score for blacks was 7.92 Furthermore, 72 percent of Mississippi's white high school seniors achieved an ACT composite score of 15 or better (the necessary

85 Id. at 731.
86 See id. at 733 n.8.
87 See id. at 732-33.
88 "ACT" refers to the American College Testing Program, which provides standardized tests for college admission. Every Mississippi resident under 21 years of age seeking admission to the university system was required to take the test. See id. at 734.
89 See id.
90 See id. at 737.
91 See id. at 734.
92 See id. at 735.
minimum for automatic admission to any of the five historically white schools), while less than 30 percent of black high school seniors earned that score. This disparity maintained the segregated nature of the universities for the obvious reason that many blacks would be denied admission because their scores did not meet university standards; it also caused blacks to choose not to apply to those schools if they failed to achieve the advertised minimum scores.

Furthermore, the Court noted another constitutionally problematic aspect of the State’s exclusive use of ACT scores: it provided an incomplete picture of the applicant’s ability to perform adequately in college. If the University had used high school grades in addition to ACT scores, it would have had both a more accurate idea of the student’s potential college performance, and a much more diverse student body. The disparity between black and white students’ high school grades was much narrower.

Ultimately, the Court found the justifications asserted by the University for the ACT requirement were inadequate, since they were originally adopted for discriminatory purposes and were currently traceable to those purposes. In addition, the ACT requirement continued to have segregative effects, and the State failed to show the ACT-only admissions standard was not susceptible to elimination without eroding sound educational policy.

D. Podberesky v. Kirwan

A more recent struggle in the lower federal courts over the role of affirmative action in education occurred at the University of Maryland when Daniel Podberesky alleged a violation of Equal Protection due to the University’s use of a scholarship program available only to African-American students. The objective of the scholarship program was to attract African-American students to the University in an effort to combat the lingering effects of decades of well-documented discrimination by the University. The district court found the following four present effects of racial

93. See id. at 737.
94. See id. at 736.
95. See id. at 737.
96. See id. at 738.
97. 38 F.3d 147 (4th Cir. 1994).
98. Hereinafter referred to as “the University.”
99. See 38 F.3d at 152.
discrimination which substantiated the University's claim that the remedying of past discrimination was a compelling objective: (1) the African-American community widely believed that the University of Maryland engaged in discriminatory acts; (2) the racial composition of the University revealed underrepresentation of African-Americans; (3) African-Americans who enrolled in the University suffered an unexplainably high attrition rate; and (4) the University provided a hostile racial environment for African-Americans.\textsuperscript{103} Having found the remedying of these present effects of discrimination to be a compelling objective, the court analyzed the scholarship program to determine whether it was narrowly tailored to achieve this objective.\textsuperscript{101} The court's analysis yielded the following findings which suggested the program would survive strict scrutiny: (1) the race-neutral means used by the University in the past had not produced significant numbers of African-American students;\textsuperscript{102} (2) the program's goals were narrowly tailored to the numbers of African-American high school graduates who anticipated attending college;\textsuperscript{103} and (3) the race-based scholarships did not adversely impact members of other races because many other scholarship opportunities remained for them.\textsuperscript{104} Consequently, the program easily passed strict scrutiny, and the district court found it did not violate the Equal Protection Clause.\textsuperscript{105}

However, on appeal, the Fourth Circuit approached the application of strict scrutiny in a different manner, requiring a showing by the University that the present conditions of racial animosity were caused by past instances of discrimination by the University.\textsuperscript{106} The court ignored an enormous amount of evidence in finding the present racial climate was merely a product of societal discrimination, unattachable to the University itself.\textsuperscript{107} After deciding the "compelling objective" component of strict scrutiny was unsubstantiated, the court concluded many facets of the program were not narrowly tailored to achieving the goals it sought.\textsuperscript{108} As a result, the scholarship program was found unconstitutional.

\textsuperscript{101} See id. at 1094.
\textsuperscript{102} See id. at 1095.
\textsuperscript{103} See id. at 1096.
\textsuperscript{104} See id.
\textsuperscript{105} See id. at 1098.
\textsuperscript{106} See Podberesky v. Kirwan, 38 F.3d 147, 155 (4th Cir. 1994).
\textsuperscript{107} See id. at 155.
\textsuperscript{108} See id. at 157-58.
E. Adarand Constructors v. Pena

Adarand, the most recent case on affirmative action decided by the Supreme Court, severely restricts the use of affirmative action by the federal government. Adarand Constructors, Inc. was a construction firm that bid for a subcontract for a federal highway project. Despite the fact that Adarand’s bid for the job was lowest, the general contractor awarded the job to a minority-owned firm which qualified as a Disadvantaged Business Enterprise (DBE) in order to receive a financial incentive from the federal government. The Court held this program of offering financial incentives violated the Equal Protection Clause of the Fourteenth Amendment as applied to the states and the corresponding component of the Fifth Amendment as applied to the federal government.

One of the most important rules discussed in previous Supreme Court cases but firmly established in Adarand is that strict scrutiny must be applied when reviewing any government (federal or state) policy or practice condoning decision-making based on race. Accordingly, the Court vowed to be “skeptical” of any preference based on racial or ethnic criteria, and “consistent” in applying strict scrutiny to all race-based classifications, regardless of the race of those benefitted or burdened. However, the Adarand Court wanted to ensure that strict scrutiny would not be “strict in theory but fatal in fact.” Accordingly, the Court suggested an institution’s desire to remedy identifiable past discrimination would be a sufficiently compelling objective to satisfy strict scrutiny as long as it was narrowly tailored to the original discriminating entity. Most importantly, in references to Bakke, the majority affirmed Justice Powell’s opinion that strict scrutiny applies to race-based admissions decisions.

The Adarand opinion severely restricts the circumstances that justify affirmative action programs in any context. Clearly, a Con-

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110. Firms owned by ethnic minorities or women were presumed to be DBEs, while white male-owned firms had to prove disadvantage by clear and convincing evidence. See id. at 207-08.
111. See id. at 223.
112. See id.
113. Id. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).
114. See id.
115. See id.
gressional finding of the need to remedy past discrimination would satisfy the "compelling objective" component of strict scrutiny; however, the type of program that would be narrowly tailored with this objective in mind is less clear. In order for such a program to be narrowly tailored, no equally effective race-neutral remedy may be available, and the program must be designed so as not to be overinclusive (including those who do not need help) or underinclusive (failing to include those who need help). Finally, Adarand left unanswered the question of whether the goal of increasing diversity in an educational or similar context is sufficiently compelling to satisfy strict scrutiny. Since Adarand was decided, constitutional scholars have feared many institutions would discontinue their affirmative action plans, further dividing society along racial lines and providing greater educational opportunities to whites than blacks.116 Recently, the Hopwood decision confirmed those scholars' fears by applying the principles of the affirmative action cases from Bakke to Adarand very rigorously and finding the University of Texas Law School's preferential admission program unconstitutional.

II. Hopwood's Fundamental Errors

Unfortunately, the Supreme Court denied certiorari in Hopwood v. Texas, leaving Hopwood standing as precedent in the Fifth Circuit and as a model for other circuits.117 Upon close analysis, however, there are four reasons why other courts faced with similar issues in the educational context should ignore Hopwood and continue to follow Bakke. First, Hopwood's ruling conflicts with two Supreme Court cases that remain binding precedent on every court in this nation.118 Second, the educational context requires a unique legal analysis permitting a distinction between preferences in law school admissions and preferences in the context of state and federal construction contracts dealt with in the cases relied

116 For example, one scholar wrote "by limiting the remedies available to minorities to overcome discrimination and gain equal opportunity, the Court's new constitutional jurisprudence foreshadows increased divisions of society along racial lines between the better educated, richer, politically empowered white 'haves' and the uneducated, poorer, unrepresented minority 'have-nots.'" Frank R. Parker, The Damaging Consequences of the Rehnquist Court's Commitment to Colorblindness Versus Racial Justice, 45 AM. L. REV. 763, 766 (1996).
upon in *Hopwood*. Third, the *Hopwood* court erred in failing to recognize that diversity is an interest sufficiently compelling to satisfy strict scrutiny. Finally, the *Hopwood* court blatantly ignored the present status of race relations and the continuing effects of past discrimination which have yet to be remedied by the University of Texas Law School.

A. *Hopwood* Ignores and Misapplies Supreme Court Precedent

*Bakke* remains binding precedent on all courts in this nation.\(^{119}\) Affirmative action cases decided since *Bakke* which have found the race-based preferences at issue to be unconstitutional have been careful to avoid overturning specific parts of *Bakke*. For example, in *Adarand* the Court discussed the holdings of many prior cases and either upheld or overruled them;\(^{120}\) yet *Bakke*’s assertion that race can be one factor among many used in admissions decisions remained untouched after *Adarand*.\(^{121}\) In fact, the Supreme Court has never suggested that the Constitution is colorblind.\(^{122}\) Rather, the Court has expressly rejected this proposition.\(^{123}\) In many cases, the Supreme Court itself ordered or affirmed race-based decisions or explicitly envisioned circumstances in which race could constitutionally be considered.\(^{124}\) If the Court

\(^{119}\) See *Hopwood v. Texas*, 78 F.3d 932, 954 (5th Cir. 1996), cert. denied, 116 S Ct. 2581 (1996).

\(^{120}\) See 515 U.S. at 213-18.

\(^{121}\) The *Adarand* opinion clearly envisions circumstances in which race can affect government decision-making:

> [W]e wish to dispel the notion that strict scrutiny is “strict in theory, but fatal in fact”. . . . The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety’s “pervasive, systematic, and obstinate discriminatory conduct” justified a narrowly tailored race-based remedy.


\(^{122}\) See 438 U.S. at 336, 355-56.

\(^{123}\) See id. at 356.

\(^{124}\) See, e.g., United Jewish Org. v. Carey, 430 U.S. 144 (1977); North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971); McDaniel v. Barresi, 402 U.S. 39 (1971); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100-01 (1943). In his *Bakke* opinion, Justice Marshall persuasively rejects the idea that the Fourteenth Amendment prohibits consideration of race in an attempt to remedy the cumulative effects of discrimination. “Since the Congress that considered and rejected the objections to the 1866 Freedmen’s Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the
wanted to overrule any part of *Bakke*, *Adarand* was the perfect opportunity to do so since the Court was clearly attempting to settle the law of race-based classifications. However, in refraining from overruling this portion of *Bakke*, *Adarand* gave a silent nod, reaffirming *Bakke*'s holding and permitting the lower courts to continue to experiment with the issue. Moreover, if the Supreme Court had wanted to overturn *Bakke*, *Hopwood* gave it another opportunity to do so because the facts and issues in *Bakke* and *Hopwood* were sufficiently similar. Instead, the Court denied certiorari on the grounds that the issues were moot, the Law School having changed its admissions program.\(^\text{125}\)

Nevertheless, the Fifth Circuit concluded Justice Powell's *Bakke* opinion, which acknowledged the compelling nature of the diversity objective, "garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case."\(^\text{126}\) Consequently, the Fifth Circuit concluded "Justice Powell's view in *Bakke* is not binding precedent on this issue."\(^\text{127}\)

After deciding *Bakke* has no precedential value on this issue, the Fifth Circuit held "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."

This position is an overly broad extension of the law that was unnecessary to the disposition of the *Hopwood* case.\(^\text{129}\) This creative application of *Bakke* ignores the fact that, while the Supreme Court in *Bakke* disapproved of the means by which Davis sought to achieve its goals, a majority of the Justices affirmed the constitutionality of affirmative action programs that were sufficiently limited.

Due to the controversial nature of *Hopwood*'s holding, a petition for a panel rehearing *en banc* was circulated, but a majority of judges denied the petition. However, a dissent from the denial of the rehearing *en banc* was issued and signed by seven judges from the Fifth Circuit.\(^\text{130}\) The dissenters argued the *Hopwood* majority's
refusal to allow race as a factor in an admissions decision directly defies Bakke.\(^{131}\) Furthermore, the dissent calls the Fifth Circuit’s “judicial activism” “bad” and “wholly unnecessary to the disposition of the matter appealed and thus . . . clearly dictum; yet dictum that is a frontal assault on contrary Supreme Court precedent and thus not the kind of dictum we can ignore.”\(^{132}\) This dictum has infuriated the authors of the dissent from the denial for a rehearing \textit{en banc} because “[t]he Supreme Court has left no doubt that as a constitutionally inferior court, we are compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it.”\(^{133}\) Moreover, “[i]f a precedent of [the Supreme] 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 [the Supreme] Court the prerogative of overruling its own decisions.”\(^{134}\) In conclusion, the dissent from the denial of a rehearing \textit{en banc} asserted that, in deciding that race cannot be a factor in admissions decisions, the \textit{Hopwood} court:

[went] out of its way to break ground that the Supreme Court itself has been careful to avoid and purport[ed] to overrule a Supreme Court decision, [\textit{Bakke}]. The radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation.\(^{135}\)

Similarly, the Fifth Circuit’s decision is glaringly inconsistent with \textit{United States v. Fordice}.\(^{136}\) While the court correctly acknowledged that \textit{Fordice} requires a state to remove policies tied to the past that it currently uses as a vehicle for discrimination, it

\(^{131}\) See id. at 722.

\(^{132}\) Id.


\(^{134}\) 490 U.S. at 484.

\(^{135}\) 84 F.3d at 722.

ignores the central thrust of the *Fordice* opinion that urges states to implement policies that remedy that discrimination "with all deliberate speed." As of April 4, 1996, the University of Texas Law School had not, according to the Department of Education, met its affirmative requirement to eliminate past discrimination to the extent mandated by Title VI and the Fourteenth Amendment. Furthermore, the Law School's hostile racial environment and lingering bad reputation among minorities certainly affects student enrollment in the way *Fordice* urged academic institutions to redress. Nevertheless, the Fifth Circuit concluded "any racial tension at the law school is most certainly the result of present societal discrimination," ignoring a mountain of evidence to the contrary. In so concluding, the court incorrectly asserted that as soon as blacks legally gained admittance to the Law School all racism ended. This assertion ignores the reality expressed in *Fordice* that pervasive racism by an institution does not "end" merely when people of color are admitted. Yet the Fifth Circuit conveniently ignores this evidence and the *Fordice* requirement that:

In light of [a] State's long history of discrimination, and the lost educational and career opportunities and stigmatic harms caused by discriminatory educational systems, ... the courts below must carefully examine [a state's] proffered justifications for maintaining a remnant of *de jure* segregation to ensure that such rationales do not merely mask the perpetuation of discriminatory practices.

Finally, under *Fordice*, the mere adoption of race-neutral admissions policies, without more, is not an adequate remedy for past discrimination if it does not truly open the doors of an institution to those who have been unwelcome. However, this is precisely the remedy *Hopwood* suggests. Due to the extensive and pervasive discriminatory circumstances that prevailed at the time *Hopwood* was filed, the State of Texas was obligated by *Fordice* to act affir-

\[\text{139. Hopwood v. Texas, 78 F.3d 932, 953 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996).}\]
\[\text{140. The court stated: "While the school once did practice de jure discrimination in denying admission to blacks, the Court in Sweatt v. Painter struck down the law school's program. Any other discrimination by the law school ended in the 1960's." Id.}\]
\[\text{141. 505 U.S. at 744 (O'Connor, J., concurring).}\]
matively to eliminate the vestiges of segregation "root and branch." Certainly, the use of some type of affirmative action program by the University of Texas Law School would seem appropriate.

**B. The Educational Context Requires a Unique Legal Analysis**

*Hopwood's* legal analysis is further flawed because the contexts in which the Supreme Court has found affirmative action programs to be unconstitutional are significantly different and distinguishable from the educational context providing the background for the issues in *Hopwood.* The *Hopwood* court concludes this contextual distinction is unimportant, holding that, whatever the context, remedying the past effects of discrimination is the only compelling interest justifying racial classifications. However, several interests unique to the educational setting illustrate the importance of maintaining affirmative action programs in higher education.

To begin, discrimination in education ensures discrimination in every other facet of life. If we do not allow people of all races to be equally educated, we will never have a heterogeneous work force, as discrimination in education is a self-perpetuating cycle. When people of any race are kept out of positions of power and prestige, which they are much more likely to be if they do not achieve a college or graduate school education, racism flourishes. This happens for several reasons.

First, if few minorities are seen in these positions, people who are predisposed to racist beliefs presume that minorities are not capable of achieving positions of power or prestige. Second,
when people of color do not see other minorities succeeding, it is reasonable for them to assume it is useless to try or to blame racism on the part of those in power for the lack of opportunities given minorities. According to those who study discrimination in elementary and secondary education, “people may be taught to modify and restrict their choices.... [C]onditioned already by a lifetime of such lessons, [they] may not even need to have their dreams further restricted. The energy to break out of their isolation may have atrophied already.”

In contrast, when minorities are in positions of decision-making authority, conditions in which decisions are made change in several ways. First, minority decision-makers are acutely sensitive to racism among their coworkers and are better-positioned to ensure its demise. Second, they serve as role models, giving other traditionally oppressed people the feeling that they have a chance at success in a particular field. Third, minority decision-makers realize minorities can succeed, and stereotypes are broken down by education about perceived differences and surprising similarities. Preferential admissions will serve to remove psychological obstacles for minorities who want to enter a traditionally segregated profession, bring diverse viewpoints to the profession, and thus serve to desegregate the profession both for minorities who wish to enter the profession and those who need its services. None of these positive consequences can occur, however, until this country ensures all of its citizens have an equal opportunity to receive an adequate education.

Many scholars have studied the educational opportunities for minorities in this country, and the results are grim. According to one scholar:

Minorities continue to suffer the damaging effects of past and present racial discrimination in education. The National Research Council in its survey of the status of black Americans concluded that despite school desegregation and increased federal financial assistance, “there remain persistent and large gaps in the schooling quality and achievement


146 This phenomenon has been termed “learned helplessness” by psychologists. Continuous denial of rewards in response to effort causes motivation to be extinguished. See generally JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS (1992).

147 Id. at 62.
outcomes of education for blacks and whites." The Council found that "separation and differential treatment of blacks continue to be widespread in elementary and secondary schools and in different forms in institutions of higher learning." The Council also found that "after the 1970's, the college-going chances of black high school graduates have declined, and the proportion of advanced degrees awarded to blacks has decreased."148

This is the inevitable result of several factors. First, a large percentage of this country's minority population attends public, de facto segregated primary and secondary schools in which conditions, opportunities, and funding are unequal to those of white schools, and are rapidly deteriorating.149 Many of these conditions have been linked to the quality of education available, including the teacher-to-student ratio, the quality of books and other supplies, the level of parental involvement in students' learning, and the degree to which the atmosphere is conducive to learning. Some of these schools are devoid of science labs, art and music teachers, and many teach their students from fifteen-year-old textbooks in which Nixon is still the president.150 Other schools ration soap, paper towels, and toilet paper, and have two working bathrooms for over 700 children.151

According to City of Richmond v. J. A. Croson Co., the relevant statistical pool for purposes of demonstrating discriminatory exclusion is the number of minorities qualified to undertake the particular task compared with the number of minorities actually engaging in the task.152 However, this comparison does not adequately reflect the minority experience in the educational setting because there are fewer minorities qualified to enter undergraduate and graduate school by virtue of the inequities of early education programs. For example, a study conducted in eighteen public schools in Chicago yielded some alarming statistics. Of the approx-


149. See generally Kozol, supra note 146.

150. See id.

151. See id.

imately 6,700 children who enter ninth grade in those eighteen schools, only 300 both graduate and read at the national average. Those very few who graduate and go to college rarely read well enough to handle college-level courses. At the city’s community colleges, which receive most of their students from Chicago’s public schools, the noncompletion rate is 97 percent. Furthermore, a 1995 study reported a white high school graduate is far more likely to both attend college and graduate from college than a black or Hispanic high school graduate. Statistics are similar in every major city in the United States. In Texas, a legal challenge to equalize school spending was defeated in 1972. In 1989, the Texas Supreme Court held the huge disparity between school spending in the wealthiest and poorest districts violated the state constitution. However, the remedial plan called for by the court has yet to be implemented. In 1991, school spending in the state of Texas ranged from less than $2,000 per child to almost $19,000 per child. The plight of black and Hispanic students in public schools has been summarized as follows:

They attend largely separate and unequal schools; they are disproportionately tracked into classes for slow learners or the “educable mentally retarded;” their teachers give less to them and expect less of them; they are more likely to be disciplined; and they are more likely to drop out.

Consequently, the Fifth Circuit and other circuits should permit institutions of higher education to look beyond the actions of the specific institution in question to other state agencies, like the public school system, with strong links to the present effects of past discrimination in higher education. Segmenting and compartmentalizing specific state agencies creates a situation where no one can correct the effects of discrimination because no single agency is solely responsible for creating the harm. Schools do not have to

153. See Kozol, supra note 146, at 58-59.
154. See id. at 59.
155. See Oppenheimer, supra note 6, at 964 (quoting AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT, at 12-13 (1995)).
156. See generally id.
157. See Oppenheimer, supra note 6, at 962 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1972)).
158. See id. (citing Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (1989)).
159. See Kozol, supra note 146, at 233.
160. Oppenheimer, supra note 6, at 965-66.
desegregate because the concentrations of minorities in their districts are created by housing patterns and the structuring of school districts. Employers do not have to hire minorities who are not well-educated because the schools are responsible for their unequal preparedness. In this manner, inequalities become everyone’s problem but nobody is forced or enabled to provide the solution. The likely outcome of Hopwood’s holding is that no agency of the state will be responsible or accountable for the disparities in educational achievement, and any discriminatory effect not resulting directly from the Law School will be characterized as societal discrimination which cannot be remedied by the Law School.

At this point in our history, insufficient numbers of minorities are being admitted into undergraduate and graduate institutions. However, the fact that minorities are not being admitted into these programs obviously does not suggest that they would be unable to succeed once admitted if given an adequate educational foundation. Quite to the contrary, studies have shown there are no real differences in graduation and bar passage rates between those minorities who would have been admitted without the help of affirmative action and those admitted because an affirmative action policy was implemented. Justice Brennan’s opinion in Bakke recognized that using race as a factor in admissions decisions requires reliance on an immutable characteristic and is therefore not completely in accord with our nation’s deep belief that advancement should be based on individual achievement. However, the idea that people should gain admission to institutions based on merit is a social philosophy, found nowhere in the United States Constitution. In contrast, equality of opportunity for people of all races is mandated by the Equal Protection Clause of the Constitution and many federal and state statutes. Nevertheless, those who argue that minorities who deserve admittance will gain admittance without affirmative action urge that the social philosophy should trump the mandate of the Constitution. Those who favor the illusion of meritocracy ignore the history and context of race-relations in America.

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161. See Wightman, supra note 5.
162. This argument is reminiscent of Justice Holmes’ dissent in Lochner v. New York, 198 U.S. 45 (1905), in which he reminded us that cases are not decided on the basis of the majority’s personal convictions or prejudices. Rather, a constitution “is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel, and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution.” Id. at 76.
163. A belief in meritocracy requires faith in the idea that merit can be measured by
Education occupies a unique position in American society, causing the Supreme Court to recognize the vital role education plays:

[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.\textsuperscript{164}

\textbf{C. Diversity is a Compelling State Interest}

The judiciary has long recognized the significantly unique interests inherent in higher education and has maintained a “hands-off” policy on issues better suited for the judgment of academia.\textsuperscript{165} The main rationale behind this policy is that judges are not equipped to second-guess the substance of academic decisions because such decisions require “expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making.”\textsuperscript{166} As a result, in cases like \textit{Bakke}, justices have given deference to “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.”\textsuperscript{167}

If we as a society value these essential freedoms, we must listen to one of the country’s leading educators’ thoughts on racial diversity on college campuses. Harvard University’s President, Neil Rudenstine, wrote:

The range of undergraduate “interests, talents, backgrounds and career goals affects importantly the educational experi-


\textsuperscript{165} The Supreme Court has adhered to the notion that academic decisions are subject only to a “narrow avenue of judicial review.” Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 227 (1985).

\textsuperscript{166} Id. at 226 (quoting Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 89-90 (1978)).

ence of our students,” because “a diverse student body is
an educational resource of coordinate importance with our
faculty and our library, laboratory and housing arrange-
ments.” . . . “Such diversity is not an end in itself, or a
pleasant but dispensable accessory. It 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. . . .” Therefore, affirmative action admissions
policies contribute to educational values at the core of the
mission of higher education.168

Despite such conclusions regarding the value of racial diversity
in education and the need for affirmative action to produce this
diversity, the Hopwood court chose to ignore academia’s experience
and declared a university’s desire to achieve a diverse student body
is not a compelling interest.169 According to Hopwood, “the use
of race, in and of itself, to choose students simply achieves a
student body that looks different. Such criterion is no more rational
on its own terms than would be choices based upon the physical
size or blood type of applicants.”170

Such a narrowly drawn assertion ignores the systematic oppres-
sion of minorities which results in real differences in minorities’
life experiences and struggles. These unique experiences make
diversity on campus much more meaningful than merely a sea of
black, brown, red, yellow, and white faces.171 For example, stu-

168. NEIL L. RUDENSTINE, HARVARD UNIV., THE PRESIDENT’S REPORT 1993-1995: DI-
2581 (1996).
170. Id. at 945.
171. See Winton W. Manning, The Pursuit of Fairness in Admissions to Higher Educa-
tion, in THE CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION: A SUM-
MARY OF REPORTS AND RECOMMENDATIONS 381, 383 (1980) (“Race is relevant in admis-
sions because it represents not mere skin color, but the consequences of the minority
racial experience in America.”); see also, T. Alexander Aleinikoff, A Case for Race-Con-
To sustain the claim that a race-based investigation is intellectually unwarranted,
one would have to show that there is no reason to believe that the experiences
of members of racial minorities in this nation have not, to some extent, di-
verged from the experiences of whites. I simply find this an implausible sugges-
tion, given a three hundred year social history of having so much turn on
one’s racial identification.
dents of different backgrounds\textsuperscript{172} can offer very different perspectives to class discussions, which may cause others to question the foundations of their beliefs and which may challenge them to see problems from a different point of view.\textsuperscript{173} A diverse student body better prepares its members to live in a racially diverse country, where they will encounter people of various ethnicities and viewpoints.\textsuperscript{174} Furthermore, education on college campuses does not begin and end in the classroom. Most educational institutions foster a community of students who interact socially, athletically, and in their living situations. These extracurricular interactions often prove to be extremely rewarding, especially when they involve individuals from myriad backgrounds.\textsuperscript{175}

Since Justice Powell wrote “the interest of diversity is compelling in the context of a university’s admission program,”\textsuperscript{176} legal institutions have continued to recognize diversity as a compelling state interest. For example, in Wygant v. Jackson Bd. of Education, Justice O’Connor noted “a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the

\textsuperscript{172} Certainly there are many factors other than race that contribute to diversity, including: socioeconomic status, marital status, disability, age, parental status, past work and travel experience, rural or urban childhood, volunteer experience, marital status of parents, number of times family moved while a child, etc. My emphasis on race and its contribution to diversity is not meant to detract from the importance of these other factors.


\textsuperscript{174} Justice Powell wrote in Bakke:

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

\textsuperscript{175} See Derek Bok, Beyond the Ivory Tower: Social Responsibilities of the Modern University 97 (1982), quoted in Note, An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, 109 Harv. L. Rev. 1357 (1996) (“Surveys of graduating seniors have repeatedly shown that seniors believe that they have benefitted as much from contact with one another as they have from their readings and lectures.”).

\textsuperscript{176} 438 U.S. at 314.
context of higher education [in Bakke], to support the use of racial considerations in furthering that interest.” Accordingly, the dissent for the denial of rehearing en banc in Hopwood asserted, “until the Supreme Court expressly overrules Bakke, student body diversity is a compelling governmental interest for the purposes of strict scrutiny.” Furthermore, soon after Adarand was decided, the Office of Legal Counsel of the United States Department of Justice circulated a memorandum to the general counsels of all federal agencies providing guidance as to how to narrowly tailor their programs in accordance with constitutional mandates. This memo interpreted the post-Bakke decisions to support the objective of diversity in the academic context.

Finally, the Hopwood court committed an egregious error in considering the constitutionality of the diversity issue since it was not an issue asserted on appeal. The Supreme Court has frequently reiterated that courts should “decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions should be drawn as narrowly as possible.” Unfortunately, the Hopwood court “displayed no such discipline, instead taking the unauthorized liberty of deciding the appropriateness of diversity as an admissions criterion, not just the merits of the instant admissions policy.” The Hopwood court’s broad ruling is an ironic display of impudence; the case in which the Supreme Court originally admonished this type of judicial activism was one concerning racism at the University of Texas Law School. The Hopwood court was adamant about preventing preferential treatment on the basis of race, yet failed to see it has perpetuated its own dualistic treatment of the law. In 1950, the Supreme Court refused to “paint with a broad brush and eliminate the very regime which denied civil rights” to blacks. However,

180. See id.
Hopwood recently borrowed the broad brush the Supreme Court refused to use and ensured the University of Texas Law School will continue to struggle in its quest for a diversified student body.

D. The Hopwood Court Ignores the Reality of the Present Effects of Past Discrimination and the Continuing Need to Remedy Them

The court in Hopwood mistakenly determined the University of Texas Law School had "failed to show a compelling state interest in remedying the present effects of past discrimination sufficient to maintain the use of race in its admissions system." The court arrived at this conclusion after making several assumptions. First, it stated there must be a showing of prior discrimination by the government actor involved before racial classifications can be used to remedy the discrimination. Second, the government actor must prove present effects of past discrimination impede minority matriculation. Both of these assumptions are well settled in law. However, the Hopwood court ignored the reality of the effects of racism at the University of Texas Law School in applying these principles to the facts of the case.


When the Hopwood case was decided in the Fifth Circuit in March, 1996, it was not the first time the University of Texas Law School was a party to litigation concerning impermissible racial classifications. Several decades ago, Heman Marion Sweatt, an African-American, challenged the Law School's rejection of his application, which the Law School stipulated occurred "solely because he is a Negro." At that time, no law school in the state of Texas would admit black students based on state law. As a
result of Sweatt's challenge, the State of Texas was forced to open a law school at the Texas State University for Negroes which lacked accreditation, had a very small library, only five faculty members, and one alumnus who was a member of the Texas Bar.\textsuperscript{191} The University of Texas Law School, in contrast, was fully accredited, had nineteen distinguished faculty members, an enormous library housing over 65,000 volumes, a law review journal, moot court facilities, scholarship funds, and Order of the Coif affiliation.\textsuperscript{192} Furthermore, its alumni "occup[ied] the most distinguished positions in the private practice of the law and in the public life of the State."\textsuperscript{193} Despite these differences, the court of civil appeals affirmed a lower court ruling that the Texas State University for Negroes offered Sweatt "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas."\textsuperscript{194} This ruling prompted the Supreme Court to grant certiorari\textsuperscript{195} to determine the constitutionality of distinguishing between students of different races in professional and graduate education.\textsuperscript{196}

After an examination of the facilities available to whites and "Negroes," the Court held they could not "find substantial equality in the educational opportunities offered white and Negro law students by the State."\textsuperscript{197} Consequently, the Court concluded the only remedy available was to require Sweatt to be admitted to the University of Texas Law School in order for him to "claim his full constitutional right: legal education equivalent to that offered by the State to students of other races."\textsuperscript{198} Unfortunately, a year after Sweatt entered the Law School, he left "without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings."\textsuperscript{199}

Although this case occurred over forty years ago, the effects of Texas' explicit, statutorily mandated refusal to admit African-Amer-

\begin{itemize}
\item \textsuperscript{191} See 339 U.S. at 633.
\item \textsuperscript{192} See id. at 632-33.
\item \textsuperscript{193} Id. at 633.
\item \textsuperscript{194} Sweatt v. Painter, 210 S.W.2d 442 (Tex. Civ. App. 1948).
\item \textsuperscript{195} See Sweatt v. Painter, 338 U.S. 865 (1949).
\item \textsuperscript{196} See 339 U.S. at 631.
\item \textsuperscript{197} Id. at 633.
\item \textsuperscript{198} Id. at 635.
\item \textsuperscript{199} Hopwood v. Texas, 861 F. Supp. 551, 555 (W.D. Tex. 1994).
\end{itemize}
icans to its state law school continue to be felt today. For example, “during the 1950s and into the 1960s, the University of Texas continued to implement discriminatory policies against both African-American and Mexican-American students.”

It was not until 1983 that Texas even agreed, after years of threats of federal action, to an acceptable plan to desegregate its higher education system. In 1987 and again in 1994, the Department of Education instructed Texas to maintain its plan. To this day, Texas’ higher education system has not yet been declared in compliance with Title VI and the Fourteenth Amendment.

Surely these facts satisfy the Supreme Court’s requirement that a government actor have “a strong basis in evidence for its conclusion that remedial action is necessary.” Usually, it is very difficult to prove intentional racial discrimination since it is easily masked. However, in this case, there is direct evidence of state statutes requiring this specific state body to intentionally discriminate on the basis of race. This evidence easily satisfies even the most rigorous application of the test articulated in Hopwood.

2. When Fashioning Solutions to Racial Discrimination, a Court Should Not Ignore the Victim’s Perspective in Ensuring the Remedy is Realistic in Achieving its Goals

The Hopwood court fails to acknowledge the victim’s perspective by minimizing the effect of a racially hostile university environment on a person’s decision to attend that particular institution. Certainly, one major consideration in a prospective college freshman’s choice of colleges is the atmosphere of the campus. For instance, if a student is politically inclined, he or she might

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200 Id.
201 Hopwood v. Texas, 84 F.3d 720, 725 (5th Cir. 1996).
204 Often, a large distinction can be drawn between the African-American experience, on the whole, and the white majority experience. The majority perspective delimits the effects of discrimination on its victims in order to serve its own agenda of denying the existence of the problem. However, an honest examination of the consequences of conscious or subconscious ‘racism for minorities in America reveals the overwhelming significance of the effect it has on their daily lives and their chances for success. See generally Oppenheimer, supra note 6.
205 See Ware, supra note 163, at 63.
seek a university which has an atmosphere conducive to debate and public awareness. If a student is a member of a minority group, that student will have to consider the extent to which the university fosters an atmosphere of acceptance. If a university has a reputation of racial isolation or hostility, association with that university by the prospective freshman may be avoided at all costs. Such an environment is likely to interfere in a person’s efforts to pursue his or her studies, make friends, and take advantage of the varied experiences and educational opportunities available outside the classroom.\textsuperscript{206}

The Law School at issue in \textit{Hopwood} has presented well-documented evidence of the fact minorities still find the atmosphere at the Law School to be hostile and racist.\textsuperscript{207} Nevertheless, the court attributes the Law School’s lingering bad reputation with minorities to be a result of present societal discrimination, wholly untouched by the \textit{de jure} discrimination of recent years.\textsuperscript{208} This finding, too, ignores reality. A child growing up in America today is not ignorant of the racial tensions lingering in our society. If that child’s father had been denied admission to an academic institution because of his race, his child would probably feel animus towards the institution that discriminated against him. If so, that tension would be predicated on the school’s past discriminatory actions rather than the present state of racism in society. The \textit{Hopwood} court shamelessly disregards this fact in asserting that the effects of purposeful discrimination have been forgotten or forgiven by the present generation. Racism follows a repetitious pattern: it is passed down by generations, unless and until the barriers to achieving equal opportunity in education are removed.

Second, the Fifth Circuit failed to view the remedy for past

\textsuperscript{206} See id. See also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978): 10 or 20 black students [in a class of 1,100] could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential.

Minority applications for the fall of 1997 class at the University of Texas Law School dropped 38\% for blacks and 14\% for Hispanics. Eighty-three percent fewer blacks and fifty-one percent fewer Hispanics were admitted in this class. See Michelle Locke, \textit{Black Law Students Hurt By Affirmative Action Ban}, \textit{The Denver Post}, Jul. 12, 1997, at A4.


discrimination from the perspective of the victim in choosing the representative attributes it suggests contribute to diversity. The court said that an institution "may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory... [or on the basis of his] home state or relationship to school alumni." Furthermore, the law school can look at factors such as "unusual or substantial extracurricular activities in college[,]... whether an applicant's parents attended the law school, or the applicant's economic and social background." These proffered examples illustrate another instance of the court failing to provide a viable solution for the minority victim because these unique qualities are not as easily attainable for the average African-American student. For example, the average black student in a public school in Texas is probably not offered nor could afford the luxury of learning to play the cello. Moreover, his elementary and secondary education could be, on the average, so poor that he did not receive an adequate educational foundation to learn chaos theory. Texas statutes closing the doors of superior institutions to blacks as recently as the 1950s preclude many applicants from having a parent who is an alumnus. An applicant may not have any other significant ties to important alumni for the same reason. Therefore, the characteristics the Fifth Circuit asserts promote diversity in reality produce an intellectually diverse group of economically secure white students rather than a colorful melting pot. If the Law School seeks true diversity, they must attach some significance to a person's race. Consequently, the court's rejection of race as a proxy for other characteristics that contribute to diversity is not grounded in reality.

Finally, the Hopwood court failed to consider the African-American experience in fashioning a remedy for discrimination by its exclusive reliance on white scholars to bolster its opinion. "Never have white judges relying exclusively on the work of white scholars spoken so authoritatively about the black experience in America." This perpetrator's perspective ignores a plethora of scholarly legal works illustrating the duality of the African-Ameri-

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209 Id. at 946.
210 Id.
212 See Ware, supra note 163, at 77-78.
213 Id. at 78.
can and white experience in America, providing additional and stunning examples of how the *Hopwood* court ignored the minority perspective in attempting to design a remedy for past discrimination.

3. The Fifth Circuit’s Fear that Allowing Affirmative Action in Higher Education Will Lead to the Use of Affirmative Action in Any Context Which Can Be Linked to a Person’s Educational Attainment is Unfounded

Another argument the Fifth Circuit advances to justify its sweeping defeat of affirmative action is if the courts allow affirmative action in higher education to remedy inequities in primary and secondary education, the state would be unable to deny a state body the right to use affirmative action to remedy any inequity perceived to be linked to a person’s educational attainment. For example, the court claims the likely result of allowing a race-based “plus” for graduate school admission would lead to “broad based preferences in hiring, government contracts, licensing, and any other state activity that in some way is affected by the educational attainment of the applicants.” This argument is not grounded in reality for several reasons.

First, states could easily restrict affirmative action programs to the educational context, as there are many justifications for these programs specific to the education context that do not apply elsewhere. Further, there is a much stronger and more direct link between a person’s primary and secondary education and his or her ability to pursue education beyond the secondary level than the link between a person’s primary and secondary education and his or her employment status or ability to attract a government contract. If a person lacks basic reading and writing skills initially learned in primary school and necessary to progress successfully through high school, he or she will be less likely to achieve the standardized test scores required to attend college and graduate school. There is a natural progression from adequate education at

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215 *See* 78 F.3d at 950.
216 *Id.*
217 *See* supra Part III B.
the primary level to success in higher learning. If this continuum is interrupted, the next step will lack the stability to support the demands the student will encounter. In contrast, a direct path between a person’s early educational years and their ability to receive a government contract or license cannot be so easily drawn. Many factors intervene, such as the laborer’s reputation for quality work, ability to obtain raw materials at a low price, and access to effective marketing. Opportunities for success in these contexts do not depend as directly on the adequacy of a person’s educational foundation. Consequently, the Fifth Circuit’s prediction rings hollow.

4. The “Psychology of Discrimination” in America Ensures that Race Will Affect Decision-Making to the Disadvantage of Minorities

A final example of how the Hopwood court ignores reality by asserting that colorblind acts follow from colorblind laws lies in the “psychology of discrimination.”\(^\text{218}\) Relying on several studies of racial attitudes and beliefs of white adults,\(^\text{219}\) David Oppenheimer asserts that discriminatory attitudes are often motivated by unconscious stereotypes that cause significant harm to minorities.\(^\text{220}\) These studies show that while overt racism has “lost favor socially, . . . racist attitudes lie close beneath the surface of our society.”\(^\text{221}\) For example, a 1990 study asked white subjects to rate various ethnic groups on character traits including level of intelligence and whether they were hard-working or lazy.\(^\text{222}\) The results are shocking. On the question of intelligence, 53.2% of whites rated blacks as less intelligent than whites, and 53.5% of whites rated Hispanics as less intelligent than whites.\(^\text{223}\) Furthermore, on the question of hard-working as opposed to lazy, 62.2% of whites rated blacks to be lazier than whites, and 54.1% of whites rated Hispanics to be lazier than whites.\(^\text{224}\) Consider the

\(^{218}\) Oppenheimer, supra note 6, at 946.


\(^{220}\) See Oppenheimer, supra note 6, at 946.

\(^{221}\) Id. at 947.

\(^{222}\) See id. at 950.

\(^{223}\) See id. at 951.

\(^{224}\) See id.
significance of these underlying beliefs in the context of educational and employment discrimination. Certainly, decision-makers seek candidates who they perceive to be intelligent and hard-working, yet they are far more likely to consciously or unconsciously consider the black or Hispanic applicant to be less intelligent and hard-working than the white applicant with similar qualifications. Consequently, the Hopwood court’s assertion that discrimination has ended with the removal of all legal barriers to an equal education is not supported by the reality of life in America in 1997 any more than the Supreme Court Justices’ admonition that “separate” meant “equal” in 1894.

III. CONCLUSION

There is no more appropriate analogy than that used by Donna Thompson-Schneider in her analysis of affirmative action after Adarand: “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “You are free to compete with all the others,” and still justly believe that you have been completely fair.” The United States has a history of inequality of opportunity for minorities in many facets of life. Nevertheless, because we now recognize this inequality and have taken steps to prevent its recurrence in the future, some people believe we have discharged our duty to rectify the mistakes of the past. However, we cannot truly ameliorate future conditions of race relations without realistically dealing with those in the present who were harmed by past discrimination. The critics of affirmative action would benefit

225. See id. at 952.


227. Justice Marshall vividly illustrated this point in his Bakke opinion:

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro. In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

from reading and truly attempting to understand the words of Justice Stevens in his dissent in *Adarand*:

There 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. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially" should ignore this distinction.

While the Clinton administration has urged universities that *Bakke* remains the "law of the land" despite *Hopwood*, leaders of some elite institutions like Harvard and Yale continue to support affirmative action, many other institutions are changing their policies to insulate themselves against potential lawsuits. These schools are attempting to substitute race-based affirmative action with a colorblind, class-based standard to increase racial diversity on campus. However, recent studies show that class-based programs will cause the numbers of blacks and Hispanics admitted to institutions of higher education to drop dramatically. Consequently, those concerned with the numbers of minorities on college campuses will have an almost insurmountable challenge to discover a colorblind system that will ensure minority presence. The colorblindness required by strict scrutiny has been transformed from a mechanism that was used to strike down segregation to a vehicle which will inhibit integration. Consequently, in order to preserve the many advancements America has seen in race relations and further ameliorate the present status of equal opportunity,

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228. 515 U.S. at 243 (citation omitted).
230. See id. at 27. States currently reforming their university admissions programs include Arkansas, Michigan, Wisconsin, Washington, Arizona, Florida, Colorado, and Georgia. See id.
231. See id. at 28. At the University of California Boalt Hall Law School, not one black has enrolled to enter in the fall of 1997's incoming class of 270 students, which is the first group admitted since the University of California ended affirmative action. Past classes enrolled as many as 31 black students. Michelle Locke, *Black Law Students Hurt by Affirmative Action Ban*, THE DENVER POST, Jul. 12, 1997, at A4.
232. Ware, *supra* note 163, at 89.
affirmative action in admissions programs must be retained. Justice Blackmun's admonition remains true today: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."  

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