St. Mary's Law Journal

Volume 28 | Number 1 Article 3

1-1-1996

Hopwood v. Texas: A Victory for Equality That Denies Reality Recent Development.

Robert A. Lauer

RECENT DEVELOPMENT

HOPWOOD v. TEXAS: A VICTORY FOR "EQUALITY" THAT DENIES REALITY

ROBERT A. LAUER

"The use of race, in and of itself, to choose students simply achieves a student body that looks different."[1]

I. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides 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."[2] Government-sponsored affirmative action seeks to remedy past injustices inflicted upon racial minority groups.[3] Affirmative action programs purport to accomplish this goal by giving minorities preferential treatment in, *inter alia*, the granting of various government jobs and contracts, as well as in college admissions programs.[4] Because this preferential treatment seems to be at odds with the language of the Equal Protection Clause,[5] the use of affirmative action programs has resulted in considerable debate over the constitutionality and propriety of such programs.[6] Proponents of affirmative action reason

---

1. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

2. U.S. CONST. amend. XIV, § 1; *see* Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993) (stating that Equal Protection Clause of Fourteenth Amendment is designed "to prevent the States from purposefully discriminating between individuals on the basis of race").

3. *See* Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1308–10 (1991) (discussing origin of equal protection and its relation to legalized racial injustice in America); *see also* Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 5, 7–10 (1995) (describing affirmative action as "the race-conscious allocation of resources motivated by an intent to benefit racial minorities" because of presence of racial discrimination present since founding of nation).

4. *See* Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 105 n.1 (stating that affirmative action is "broader principle whereby race is affirmatively taken into account in decision making" in variety of areas); Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 821 (1995) (defining affirmative action as public or private programs or actions that furnish opportunities to individuals on basis of membership in particular group) (citing James E. Jones, *The Rise and Fall of Affirmative Action*, *in* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 345, 347 (Herbert Hill & James E. Jones eds., 1993)).

5. *See* U.S. CONST. amend. XIV, § 1 (calling for equal protection of the laws for *all* persons).

6. *See* Barbara Bader Aldave, *Affirmative Action: Reminiscences, Reflections, and Ruminations*, 23 S.U. L. REV. 121, 126 (1996) (arguing that various forms of affirmative action enjoy widespread support, while other kinds are extremely controversial); Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 79 (1994) (calling Equal Protection Clause "most infuriating provision" of Constitution because of its seemingly simple language which is difficult to apply); Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L.

that the United States's reprehensible history of racial discrimination must be redressed by counteractive, preferential policies that provide minorities greater access to opportunities routinely denied to these groups in the past.[7] On the other hand, critics of affirmative action argue that these programs create discrimination in reverse and subvert our nation's Puritan, merit-based work ethos, which holds that achievement shall prevail over birthright.[8]

REV. 815, 816 (1995) (declaring that "[a]ffirmative action is one of today's most debated and divisive issues" and that "[s]imply mentioning the phrase creates tension"); Rosa A. Eberly, *Joining the Debate Can Affect the Outcome on Affirmative Action*, AUSTIN AMERICAN-STATESMAN, July 15, 1996, at A7 (analyzing public-opinion poll in Texas, where 80% of those polled opposed affirmative action); Marya Smith, *The Real Winners and Losers in Affirmative Action*, CHI. TRIB., July 14, 1996, at 1 (noting that affirmative action is issue that "taps deep into core values and principles" of what Americans perceive to be fair).

7. *See* Phillip J. Closius, *Social Justice and the Myth of Fairness: A Communal Defense of Affirmative Action*, 74 NEB. L. REV. 569, 569–70 (1995) (detailing proponents' view that affirmative action promotes social justice and fairness in society where minorities have routinely fallen victim to culturally sanctioned discrimination); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 9–10 (1995) (noting that "[p]roponents of affirmative action contend that the only way to compensate for the historical disadvantage of racial minorities is through the prospective race-conscious allocation of educational, employment, and political resources to minorities"); Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1630 (1990) (opining that affirmative action is necessary to overcome status quo of segregation and to achieve nondiscriminatory society); *Affirming Affirmative Action*, ST. LOUIS POST-DISPATCH, Apr. 12, 1996, at 16C (contending that "[a]ffirmative action has unlocked the doors of the American dream for millions of blacks, Hispanics and women").

8. *See* John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 314 (1994) (providing laundry list of arguments against affirmative action); Terry Eastland, *It's Time to End Affirmative Action*, NEWSDAY, Mar. 28, 1996, at A55 (arguing that "only race-blind admissions procedures can ensure fairness"); Clark Kent Ervin, *Court's Ruling Is a Triumph of Merit over Race*, HOUS. CHRON., July 7, 1996, at 1 (opining that affirmative action has become system of minority entitlements in derogation of right to be judged on merit); Adolph Reed, Jr., *Assault on Affirmative Action*, PROGRESSIVE, June 1995, at 18 (reporting critics' fundamental belief that affirmative action "makes tradeoffs between quotas and merit"). *But see* William T. Coleman, Jr., *Equality—Not Yet*, N.Y. TIMES, July 13, 1981, at A15 (arguing that critics' belief that affirmative action is "inconsistent with the American 'tradition' of colorblindness and individual merit" fails because "there has never been such a tradition for black Americans"). Other critics of race-based affirmative action believe that preferences should be determined by class, not race. *See* Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721, 724 (1996) (arguing for class-based affirmative action). *But see* Frank H. Wu, *A Call for Class Action: The Remedy by Richard D. Kahlenberg*, LEGAL TIMES, June 24, 1996, at 78 (book review) (criticizing Kahlenberg's premise that affirmative action should be based on class, not race).

In *Hopwood v. Texas*,[9] the United States Court of Appeals for the Fifth Circuit seemed to side with the critics' view.[10] In *Hopwood*, the court reviewed the constitutionality of the 1992 admissions program at the University of Texas School of Law.[11] This program made an applicant's race a crucial factor in determining whether to admit the applicant to the school.[12] The admissions staff used an affirmative-action based review process, whereby African-American and Mexican-American applicants were set apart from the rest of the applicant pool and their applications scrutinized by a separate minority admissions committee.[13] The minority admissions committee used a numerical threshold for accepting African-American and Mexican-American students that was lower than the threshold used by the regular admissions committee for other students.[14] Believing that this procedure unconstitutionally denied them admission

---

9. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996). In *Hopwood*, four residents of Texas—Cheryl Hopwood, Douglas Carvell, Kenneth Elliott and David Rogers—applied separately for admission to the University of Texas School of Law, and all four were rejected. *Id.* at 938. Although the four applicants had varied backgrounds, they shared two similar, crucial characteristics that combined to deny them admission to the law school: they all had high enough grade point averages and LSAT scores to gain admission to the school and they were all white. *Id.*

10. *See Hopwood*, 78 F.3d at 945 (stating that use of race as factor in admission policy contradicts equal protection goals).

11. *Id.* at 934. The court also reviewed a secondary issue, the ability of the Thurgood Marshall Legal Society and the Black Pre-Law Society to intervene in the case. *Id.* at 595. The proposed intervenors argued that the law school "would not effectively protect their interests in continuing racial preferences at the law school." *Id.* The district court denied the intervention, stating that the proposed intervenors shared the same objective as the law school, namely to preserve the status quo. *Id.* The intervenors filed an expedited appeal in the United States Court of Appeals for the Fifth Circuit, but that court affirmed the denial. *See* Hopwood v. Texas, 21 F.3d 603, 604–06 (5th Cir. 1994) (denying intervention based on lack of differing interest). Thus, the case went to trial without the proposed intervenors as official parties to the case. Nevertheless, these interested parties remained active throughout the case as amici curiae. *Hopwood*, 78 F.3d at 959. After offering several defenses based on Title VI, the proposed intervenors sought intervention once more, claiming the law school had not adequately presented their interests at trial. *Id.* at 959–60. The district court again ruled against intervention and, on appeal, the Fifth Circuit dismissed for want of jurisdiction, claiming that the district court had already ruled on the issue of intervention before trial. *Id.* at 960–62.

12. *Id.* at 935–38; *see* Hopwood v. Texas, 861 F. Supp. 551, 557–63 (W.D. Tex. 1994) (providing in-depth historical analysis of law school's admission process), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

13. *Hopwood*, 78 F.3d at 937.

14. *Id.* at 935–38. Thus, some applicants who were not African-American or Mexican-American were denied admission to the law school, while certain African-American and/or Mexican-American individuals with lower grades and lower LSAT scores were admitted in part because of their race. *Id.* at 937. Race was the apparent distinguishing factor. *Id.* at 934.

to the law school on the basis of their race,[15] Cheryl Hopwood and three other nonminority applicants brought suit in the United States District Court for the Western District of Texas, claiming that the law school's preferential, race-based admissions process violated the Equal Protection Clause of the Fourteenth Amendment.[16]

Relying on the strict scrutiny equal protection analysis for action by state governments set forth in *City of Richmond v. J.A. Croson*,[17] the district court found that while the law school's separate goals of remedying present effects of past discrimination and providing a diverse student body were compelling interests that justified discrimination on the basis of race, the law school had violated the equal protection rights of the plaintiffs because its use of separate admissions committees was not narrowly tailored to further the school's goals.[18] The plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit, which reversed, holding that neither diversity in higher education nor the present effects of past discrimination were compelling interests that justified race-based discrimination in the law school's admission process.[19] Recently, the United States Supreme Court denied certiorari in this case, leaving intact an appellate ruling that many believe will alter the face of public education in America.[20]

---

15. *See* Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 92 (1994) (intimating that "affirmative action programs routinely are understood as depriving white applicants of seats in a class—seats to which whites feel they are entitled").

16. *Hopwood*, 861 F. Supp. at 553. Plaintiffs also sued under 42 U.S.C. § 1981, 42 U.S.C. § 1983, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 2000d. *Id.* These provisions prohibit discrimination on the basis of race. *Id.*

17. 488 U.S. 469 (1989) (plurality opinion). *Croson* dictated that a state actor must present a compelling governmental interest that is narrowly tailored to remedy the effects of past discrimination. *Id.* at 493.

18. *Hopwood*, 861 F. Supp. at 574, 579. The plaintiffs' victory was mostly hollow, however, because the district court refrained from enjoining the law school's use of race in the admissions process and granted only nominal damages to each plaintiff. *Id.* at 582–83. Still, the district court did grant declaratory relief by allowing the plaintiffs to reapply for admission without paying the application fee. *Id.*

19. *Hopwood*, 78 F.3d at 962. The Fifth Circuit disagreed with the district court's ruling that the appropriate governmental entity for reviewing present effects of past discrimination was all Texas primary and secondary schools; instead, the court held that the appropriate entity for measuring the effect of past discrimination was the law school itself. *Id.* at 950–52. Although the Fifth Circuit remanded the case to the district court for reconsideration of damages, it did not grant injunctive relief beyond allowing the plaintiffs to reapply under a race-blind admissions program, choosing instead to allow the law school to accommodate the mandates of the opinion on its own. *Id.* at 958–59.

20. Hopwood v. Texas, 116 S. Ct. 2581 (1996); *see* David Cole, *Affirmative Action Under Attack, Again*, CONN. L. TRIB., Apr. 8, 1996, at 27 (stating, before Supreme Court's ruling, that "[t]he significance of this case can hardly be overstated—if upheld, it will mark

This Recent Development analyzes the Fifth Circuit's holding in *Hopwood* and warns that the court ignored reality in holding that racial diversity is not a compelling interest in the realm of higher education. Part II of this Recent Development examines the history of racial discrimination in America and provides the societal background for present-day affirmative action. Part III explores the Supreme Court's failure to consistently analyze affirmative action programs. Part IV summarizes the racial evolution of the University of Texas School of Law from its tradition of racial discrimination in admissions to its earnest attempts to correct that history through affirmative-action recruitment, and discusses how the *Hopwood* decision seemingly outlaws the use of race in admissions. Part V evaluates the opinion of Judge Smith in *Hopwood* and suggests that the decision contradicts notions of judicial restraint and stare decisis, and lacks a fundamental basis in reality because it rejects the necessity of racial diversity in higher education.

II. Racial Discrimination and the Birth of Affirmative Action in American Society

While the cornerstone of the Declaration of Independence is the proposition that all men are created equal,[21] American society has long struggled to define, implement, and achieve equality for all its citizens.[22] Nowhere has this struggle been more evident than in the history of race relations in America, a nation where individuals have been classified and overtly discriminated against because of their race for hundreds of

---

the end of affirmative action in higher education"); David Jackson, *Justices Let Admissions Ruling Stand: Effect on Affirmative Action Debated*, Dallas Morning News, July 2, 1996, at 1A (reporting reactions and repercussions of Supreme Court denial of certiorari). Harvard Law Professor Laurence Tribe, who had agreed to argue the case on a pro bono basis in the event certiorari was granted and was already working on the appeal, said of the decision: "The [C]ourt's denial does not in any sense signal an agreement by any member of the [C]ourt—let alone a majority—with the 5th Circuit's radical decision on affirmative action." *Id.*

21. The Declaration of Independence para. 1 (U.S. 1776).

22. *See* George S. Gray, *Benign Preference as a Course to Equality: Its Morality, Efficacy and Constitutionality*, 30 How. L.J. 515, 517 (1987) (discussing call for equality in Declaration of Independence and noting that "[a] glaring contradiction existed between Americans' belief in freedom and equality on the one hand and the practice of enslaving and discriminating against Blacks on the other"); *see also* Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 Am. U. L. Rev. 721, 726 (1996) (intimating that racial discrimination lingers as persisting tragedy in American society); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 Iowa L. Rev. 313, 319 (1994) (noting multiple views on what constitutes racial equality).

years.[23] The fight for racial equality has seen many battlefields, from Gettysburg and Antietam to Birmingham and Little Rock, yet much of the fight has revolved around "soldiers" in black robes, whose weapon—both sword and shield—has been the law.[24] The wielder of this weapon, the United States Supreme Court, is charged with reviewing the nation's ever-evolving idea of "equality." In doing so, the Court has long struggled to delineate not only the substantive definition of "equality,"[25] but also the proper procedural analysis with which to reconcile a myriad of conflicting political agendas and sociological viewpoints.[26] As a result,

---

23. *See* Koteles Alexander, Adarand: *Brute Political Force Concealed As a Constitutional Colorblind Principle*, 39 How. L.J. 367, 371–73 (1995) (detailing progression of Supreme Court decisions regarding racial discrimination); George S. Gray, *Benign Preference as a Course to Equality: Its Morality, Efficacy and Constitutionality*, 30 How. L.J. 515, 517–21 (1987) (discussing history of racial discrimination against African Americans, from slavery through "separate-but-equal" to today); Katheryn K. Russell, *Affirmative (Re)Action: Anything but Race*, 45 Am. U.L. Rev. 803, 805 (1996) (stating that "[t]he Black versus White racial schism is part of the core that defines the United States"); Tanya Lovell Banks, *A Nation Divided; Injustice: One Hundred Years Ago This Week, The Supreme Court Put the Law of the Land Behind Racial Segregation*, Baltimore Sun, May 12, 1996, at 1F (marking anniversary of *Plessy v. Ferguson* by opining on past and future of race relations in America); Anthony Lewis, *Court's Recent Rulings on Race Ignore History*, Charleston Gazette, July 6, 1996, at 4A (reviewing recent Supreme Court attempts to derail affirmative action despite history of discrimination and exclusion).

24. *See* Conference, *Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 Am. U.L. Rev. 567, 568 (1996) (statement of Jamin B. Raskin) (declaring that Supreme Court is central actor in America's battle with racism, which is "America's original sin"); David Kairys, *Unexplainable on Grounds Other Than Race*, 45 Am. U. L. Rev. 729, 729 (1996) (stressing that "[e]ach new pronouncement by the Supreme Court on the American dilemma—race—creates a hailstorm of analysis and turns the attention of the legal community and the community at large, to basic questions about justice and the meaning of American freedom, democracy, and equality"); Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 Am. U. L. Rev. 1307, 1312–13 (1991) (opining that Supreme Court has avoided confronting racial injustice in its opinions and has taken stance of denial and evasion in equal protection jurisprudence).

25. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 494–95 (1954) (overruling *Plessy v. Ferguson* by declaring "separate-but-equal" doctrine inherently unequal in realm of public education); Korematsu v. United States, 323 U.S. 214, 219 (1944) (declaring that segregation and imprisonment of Japanese Americans during World War II was constitutionally permissible); Plessy v. Ferguson, 163 U.S. 537, 550 (1896) (deciding that equality can be achieved through separate-but-equal facilities segregated by race).

26. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (mandating use of strict scrutiny for all affirmative action programs); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion) (declaring that all state affirmative action programs must pass strict scrutiny); Metro Broadcasting v. Federal Communications Comm'n, 497 U.S. 547, 565 (1990) (upholding federal affirmative action plan); Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (plurality opinion) (failing to come to consensus on applicable scrutiny level for federal affirmative action programs); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291, 359, 421 (1978) (plurality opinion) (manifesting Supreme

the Court has established standards for permitting society to remedy discrimination against certain groups by arguably allowing discrimination against other groups.

Affirmative action, an example of this "benign racism," has thus been tolerated by the Supreme Court in certain circumstances.[27] Today, government-sponsored affirmative action programs permeate society, affecting relations between individuals in a variety of public and private matters.[28] Although these programs can be traced back to 1866 and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, modern-day, government-initiated affirmative action arose out of the passage of the Civil Rights Act of 1964[29] and President Kennedy's Executive Order No. 10,925, which encouraged, but did not mandate, affirmative action through aggressive recruitment of minorities in government contracting.[30] The first mandatory affirmative action program in government contracting, ordered by President Johnson's Executive Order 11,246, soon followed.[31] Johnson's order not only proscribed discrimination on the basis of race, color, religion, national origin,

---

Court's inability to agree on appropriate scrutiny level for state-based affirmative action); Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 821 (1995) (discussing Supreme Court's inability to fashion concrete level of scrutiny for affirmative action).

27. *See* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1060 (1991) (discussing past Supreme Court consensus that some form of affirmative action is warranted); George S. Gray, *Benign Preference As a Course to Equality: Its Morality, Efficacy and Constitutionality*, 30 How. L.J. 515, 523–27, 530–33 (1987) (discussing uncertain notion of "constitutionality" of "benign" preferences afforded minorities in areas of employment and education and indicating relative acceptance of affirmative action in America); Marcia Stepanek, *Affirmative Action Debate Seen As Too Hot for Campaign*, SAN ANTONIO EXPRESS-NEWS, Sept. 22, 1996, at 21A (discussing how both sides in 1996 presidential campaign were wary of raising issue of affirmative action for fear of alienating those who were either strongly for or against such programs).

28. *See* Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 34 (1992) (describing affirmative action as "a way of life throughout the public sector and in many parts of the private sector"); David Cole, *Affirmative Action Under Attack, Again*, CONN. L. TRIB., Apr. 8, 1996, at 27 (asserting that affirmative action has "changed the world"); *see also* Terrence Stutz, *UT Case May Have Big Impact: Bias Suit Likely to Alter Employment, Contracts*, DALLAS MORNING NEWS, June 4, 1996, at 1A (remarking that affirmative action programs apply to over 95,000 companies that employ over 27 million people and handle over $200 billion in federal contracts each year).

29. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241, 241–49, 252–66 (codified as amended at 42 U.S.C. §§ 2000a–2000f (1994)).

30. Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963), *superseded by* Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), *reprinted in* 42 U.S.C. § 2000e (1994). Kennedy's order coined the term "affirmative action." *See* Ken Chavez, *Diversity Drive Working—But Is it Fair?*, SACRAMENTO BEE, Sept. 8, 1996, at A1 (discussing origin of affirmative action).

31. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), *reprinted in* 42 U.S.C. § 2000e (1994).

and gender, but it also compelled certain government contractors to make race a factor in employment decisions by establishing minority hiring goals.[32] Thus, affirmative action was born, and America braced itself for the inevitable clash between an ingrained system of racial discrimination and a new policy of express, proactive preferential treatment for minorities.[33] Inevitably, the confrontation between the two found its way to the United States Supreme Court.

III. FROM *BAKKE* TO *ADARAND*: FASHIONING A LEVEL OF CONSTITUTIONAL SCRUTINY FOR AFFIRMATIVE ACTION

From its inception, affirmative action was destined for the Supreme Court. The asymmetrical treatment of minorities vis-á-vis nonminority Americans was understandably controversial. The controversy stemmed not only from the political ramifications of such a program, but also because of the ever-growing use of, and differences between, the equal protection components of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment.[34]

The Supreme Court first applied the Equal Protection Clause of the Fourteenth Amendment to a state affirmative action program in the case of *Regents of the University of California v. Bakke*.[35] In *Bakke*, a white applicant to the University of California at Davis Medical School sued after twice being rejected for admission despite having objective academic credentials superior to many minority admittees.[36] Bakke alleged

---

32. *See id.* (mandating affirmative attempts to ensure employment of minority applicants).

33. *See* Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 33–34 (1992) (discussing proponents' and critics' views on affirmative action and relating how growth of affirmative action has turned it into reverse discrimination in practice); Mary Ann Roser, *Texans Against Race Factor in Admissions, Poll Says*, AUSTIN AMERICAN-STATESMAN, June 29, 1996, at B1 (revealing that polls in Texas show that eight of ten Texans oppose use of race in admissions considerations).

34. *See* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954) (explaining how Fourteenth and Fifth amendments impose similar obligations and duties on state and federal governments); Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 544 (1977) (discussing how Fourteenth Amendment's Equal Protection Clause applies to federal government through Fifth Amendment's Due Process Clause); Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1308–10 (1991) (providing historical overview of Supreme Court's equal protection analysis, discussing disputes over scope of equal protection, and opining that "the equal protection guarantee has become an especially prolific source of litigation"); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–765 (1985) (construing legislative history of Fourteenth Amendment as applied to benign discrimination).

35. 438 U.S. 265, 298–99 (1978) (plurality opinion).

36. *Bakke*, 438 U.S. at 276–77.

that the school's affirmative action admissions program violated the Equal Protection Clause of the Fourteenth Amendment by reserving sixteen percent of the available seats in each class for minority candidates.[37] In analyzing the admissions program in his plurality opinion, Justice Powell applied "strict scrutiny" under the Equal Protection Clause of the Fourteenth Amendment.[38] To survive this analysis, the admissions program had to be necessary to achieve a compelling governmental interest.[39]

The Medical School offered four goals in support of its admissions process: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," (2) "countering the effects of societal discrimination," (3) "increasing the number of physicians who will practice in communities currently underserved," and (4) "obtaining the educational benefits that flow from an ethnically diverse student body."[40] After reviewing these proffered objectives, Justice Powell found that only one of the four objectives—the promotion of racial diversity—satisfied the compelling interest test.[41] However, despite a finding that diversity was a compelling government interest, the Court found that the reservation of sixteen seats in the class was not the least-restrictive means available to foster and promote diversity.[42] Consequently, the Court struck down the admissions program.[43]

Like many affirmative action cases to follow, the *Bakke* decision was reached by a fragmented Court.[44] Although the plurality agreed that the admissions program was unconstitutional, the justices failed to come to a consensus on either the provision violated or the applicable level of scrutiny.[45] While Justice Powell argued for strict scrutiny, Justices Brennan, White, Marshall, and Blackmun, dissented, likening remedial-based racial

---

37. *Id.* at 277–78. Bakke also sought relief under Title VI of the Civil Rights Act of 1964 and Article I, § 21 of the California Constitution. *Id.*

38. *Id.* at 290–91.

39. *Id.* at 290–91, 305.

40. *Bakke*, 438 U.S. at 305–06.

41. *Id.* at 314.

42. *Id.* at 315–20.

43. *Id.* at 320.

44. *Bakke*, 438 U.S. at 325, 387, 402. Plurality opinions have become increasingly common in affirmative-action cases. *See* Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 132–35 (1994) (discussing growth in number of Supreme Court plurality opinions and their effect on stare decisis in affirmative action cases); John E. Richards, *Equal Protection and Racial Quotas: Where Does* Fullilove v. Klutznick *Leave Us?*, 33 BAYLOR L. REV. 601, 601, 615 (1981) (opining that affirmative action programs continue to perplex Court as it fails to reach consensus on appropriate level of scrutiny).

45. *Bakke*, 438 U.S. at 270–71.

discrimination to gender-based discrimination.[46] The dissenting justices opined that, like gender-based discrimination, some level of "intermediate scrutiny" should be applied to race-based discrimination.[47] On the other hand, Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger, concurring, chose to avoid the issue of scrutiny altogether, suggesting that the program violated Title VI of the Civil Rights Act of 1964.[48]

The Supreme Court's fragmentation over affirmative action review continued in *Fullilove v. Klutznick*.[49] While *Bakke* addressed a remedial program instituted by a state government, *Fullilove* addressed a federal program that required ten percent of all federal funds awarded to contractors for state and local building projects to be spent on goods and services supplied by minority business enterprises.[50] Chief Justice Burger's plurality opinion upheld the federal program; however, instead of settling on a level of scrutiny to be applied to all affirmative action cases, the Chief Justice applied both the intermediate and strict scrutiny reviews set forth in *Bakke*, this time under the Fifth Amendment.[51]

The Court's uncertainty over the level of scrutiny to be applied to affirmative action programs surfaced again in *Wygant v. Jackson Board of Education*.[52] In *Wygant*, the Court examined a local school board policy that attempted to preserve the jobs of minority teachers when making necessary layoff decisions.[53] Justice Powell wrote the plurality opinion, this time applying strict scrutiny analysis.[54] Justice Powell found that the school board policy violated the Fourteenth Amendment because the state's proffered purpose for the policy, providing role models for its minority students, was not a compelling governmental interest.[55]

---

46. *Id.* at 356–61 (Brennan, White, Marshall, Blackmun, JJ., dissenting).

47. *Id.* The justices believed that benign or remedial racial discrimination differed from the invidious discrimination that normally triggered strict scrutiny. *Id.*

48. *Id.* at 408–21 (Burger, C.J., Stevens, Stewart, Rehnquist, JJ., concurring in the judgment in part and dissenting in part).

49. 448 U.S. 448 (1980) (plurality opinion).

50. *See Fullilove*, 448 U.S. at 458–75 (providing in-depth summary of Minority Business Enterprise (MBE) provision); *see also* 42 U.S.C. § 6705(f)(2) (1988) (setting forth mandatory percentage of federal funds to support MBEs).

51. *See Fullilove*, 448 U.S. at 472–78 (reasoning that Congress has much broader power than state to remedy present effects of past discrimination). The Court held that Congress need not ensure that federal affirmative action programs be color-blind if the program is narrowly tailored to rectify past discrimination. *Id.* at 490.

52. 476 U.S. 267 (1986) (plurality opinion).

53. *Wygant*, 476 U.S. at 270–71.

54. *Id.* at 274–75.

55. *Id.* Four Justices dissented from Justice Powell's opinion. Three of the dissenters, Justices Marshall, Brennan, and Blackmun, argued that intermediate scrutiny was proper because of the remedial nature of the government-based racial discrimination. *Id.* at 301–02.

The Court's uncertainty regarding an appropriate scrutiny level, at least in regard to state-sponsored affirmative action, was resolved in *City of Richmond v. J.A. Croson Co.*[56] In *Croson*, the Court reviewed a city-run affirmative action program purportedly designed to remedy past discrimination. This program required all contractors working on city projects to subcontract approximately thirty percent of their work to minority business enterprises.[57] A majority of the Court struck down the program after concluding that all state affirmative action programs should be reviewed under a strict scrutiny analysis.[58] Moreover, Justice O'Connor wrote that the implementation of a state-run affirmative action program must be accompanied by a specific finding of past racial discrimination by the body implementing the remedial program.[59]

Despite having established strict scrutiny as the standard of review for state-sponsored remedial programs, the Court remained uncertain about federally-sponsored programs. In *Metro Broadcasting v. Federal Communications Commission*,[60] the Court returned to the more deferential stance it had relied upon, in part, to uphold the federal affirmative action program at issue in *Fullilove*.[61] In *Metro Broadcasting*, the Court reviewed the constitutionality of certain Federal Communications Commission (FCC) regulations that promoted minority ownership of broadcasting stations, and upheld the regulations after determining that intermediate scrutiny[62] should be used when reviewing federal affirmative action programs.[63] Moreover, the Court determined that programming diversity was an important governmental interest and that the FCC regulations were substantially related to attaining the proffered objective.[64]

---

56. 488 U.S. 469 (1989) (plurality opinion).

57. *Croson*, 488 U.S. at 477–80.

58. *Id.* at 494.

59. *Id.* at 498.

60. 497 U.S. 547 (1990).

61. *Metro Broadcasting*, 497 U.S. at 563–65.

62. *Id.* at 552–58. Intermediate scrutiny requires that the government present an important interest in the challenged act and that its chosen means for addressing that interest are closely tailored to it. *Id.*

63. *Id.* at 552–58, 564–65; *see* Kathleen Ann Kirby, Note, *Shouldn't the Constitution Be Color Blind*? Metro Broadcasting, Inc. v. FCC *Transmits a Surprising Message on Racial Preferences*, 40 CATH. U. L. REV. 403, 429–31, 435–38 (1991) (criticizing *Metro Broadcasting* majority's refusal to apply strict scrutiny).

64. *Metro Broadcasting*, 497 U.S. at 567–68; *see* Kathleen Ann Kirby, Note, *Shouldn't the Constitution Be Color Blind*? Metro Broadcasting, Inc. v. FCC *Transmits a Surprising Message on Racial Preferences*, 40 CATH. U. L. REV. 403, 431, 438–40 (1991) (discussing finding of diversity as important governmental interest).

The *Metro Broadcasting* Court's selection of intermediate scrutiny for all federal affirmative action programs appeared to create a divergence between the levels of scrutiny required for state and federal affirmative action programs. However, eight years of Reagan and Bush appointees politically realigned the Court[65] and explained, at least in part, the holding in the recent case, *Adarand Constructors, Inc. v. Pena*,[66] which eliminated that divergence. *Adarand* involved a federal law that required general contractors working on federal highway projects to contract at least ten percent of their overall budget to businesses owned and run by "socially and economically disadvantaged individuals."[67] Perhaps mirroring a conservative shift in U.S. politics and society, the *Adarand* Court held that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."[68]

Justice O'Connor, writing for a majority of the Court, concluded that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[69] Justice O'Connor reasoned that strict scrutiny was necessary to further three general themes underlying governmental racial classifications: (1) skepticism—meaning that preferences based on racial criteria are inherently suspect and must receive a most searching examination, (2) consistency—meaning that equal protection applies to all races and individuals, whether disadvantaged or not, and (3) congruence—meaning that both the Fifth and Fourteenth Amendment should be construed in

---

65. *See* Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1117–18 (1994) (asserting that all five Reagan and Bush Court appointees were more conservative than justices they replaced). The surmisable purpose of these conservative appointments was to "pack the Supreme Court with Justices who would undo the objectionable liberal decisions of the preceding three decades." *Id.*; *see* Conference, *Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U.L. REV. 567, 568–69 (1996) (statement of Jamin B. Raskin) (discussing history and effect of "new activist, conservative racial jurisprudence" in America).

66. 115 S. Ct. 2097 (1995).

67. *Adarand*, 115 S. Ct. at 2103. Adarand Constructors claimed a Fifth Amendment violation after losing a federal guardrail building contract to a minority-owned construction company, despite having submitted the lowest bid. *Id.* at 2101–02. Reviewing the grant of summary judgment for the defendants by the United States District Court for the District of Colorado and an affirmation in the United States Court of Appeals for the Tenth Circuit, the Supreme Court adopted the strict-scrutiny analysis that is now applicable to all state and federal affirmative action programs. *Id.* at 2118.

68. *Id.* at 2117.

69. *Id.* at 2111.

the same manner, thereby subjecting both state and federal affirmative actions programs to the same test.[70]

IV. THE DECISION IN *HOPWOOD V. TEXAS*

Although *Adarand* and its most recent predecessors focused on affirmative action programs in the area of employment, the Supreme Court had, of course, begun its sojourn into racial preferences in the realm of higher education with *Bakke*.[71] With the Fifth Circuit's 1996 decision, *Hopwood v. Texas*, it seemed the Court would return to the area of higher education to decide the fate of affirmative action.[72] Instead, the Supreme Court denied certiorari and thus chose to allow the Fifth Cir-

---

70. *Id.* Thus, O'Connor postulated that no difference should exist between state and federal equal protection analysis. *Id.*

71. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion); *see* Patricia A. Carlson, Recent Development, Adarand Constructors, Inc. v. Pena: *The Lochnerization of Affirmative Action*, 27 ST. MARY'S L.J. 423, 432–33 (1996) (writing that Supreme Court first applied equal protection analysis to affirmative action in *Bakke*). Although *Bakke* was the first case in which equal protection analysis was actually applied, the Court flirted with the equal protection issue in the area of educational admissions in *DeFunis v. Odegaard*. 416 U.S. 312, 314 (1974). *DeFunis* involved a white applicant to the University of Washington Law School, who claimed he had been denied admission on the basis of his race, in violation of the Equal Protection Clause of the Fourteenth Amendment. *DeFunis*, 416 U.S. at 314. Because DeFunis had been admitted to the law school after the trial court had ruled in his favor and because he was near graduation, the Court declared the case moot and refrained from delving into the constitutionality of racial preferences in higher education. *Id.* at 318–20. The Court's actions in *DeFunis* paved the way for *Bakke*. *See id.* at 319 (predicting that ripe case will soon arrive before Court); *see also* William Bradford Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007, 1015–18 (1987) (detailing Justice Douglas's *DeFunis* dissent, which criticized Court's decision to refrain from delving into constitutionality of racial preferences).

72. *See* Carl Cohen, *Race, Lies, and "Hopwood:" Supreme Court Decision in* "Cheryl Hopwood v. State of Texas" *Outlawed All Considerations of Race in College Admissions, Reversing the Effect of 1978 Case* "Regents of the University of California v. Bakke," COMMENTARY, June 1, 1996, at 39 (observing Fifth Circuit's assumption that Supreme Court would review *Hopwood*); Jim Phillips, *Justices Delay* Hopwood *Consideration*, AUSTIN AMERICAN-STATESMAN, June 25, 1996, at A5 (noting that most Court-watchers believed Court would review decision); Terrence Stutz, *School-Admissions Ruling Appealed; Morales Asks High Court to Approve Use of Racial Considerations by State*, DALLAS MORNING NEWS, May 1, 1996, at 22A (stating that many legal experts believe Court will "readily agree" to hear case); Janet Elliot & Gordon Hunter, *Straight to the Supremes? UT Ponders Appeals Options in Hopwood Case*, LEGAL TIMES, Mar. 25, 1996, at 2 (discussing law school's options of requesting rehearing or appealing directly to Supreme Court after Fifth Circuit's decision in *Hopwood*). *But see* Rogers Worthington & Sabrina Miller, *Cloudy Day for Affirmative Action in Colleges: Court Won't Hear Case; Issue Still in Limbo*, CHI. TRIB., July 2, 1996, at 3 (quoting University of Illinois Constitutional Law Professor Ronald Rotunda, who said that he found Law School's program's long and unchallenged existence more surprising than denial of certiorari).

cuit's ruling to stand, thereby postponing the fate of affirmative action to another day.[73] Still, the ramifications of the *Hopwood* case will be felt throughout the nation as society and the legal system struggle to create a harmonious balance between the privilege of education[74] and the right to equal protection.[75] It is ironic, given its racially troubled history, that an affirmative action program at the University of Texas School of Law would place such a stumbling block in the path of affirmative action at the nation's institutions of higher learning. To place *Hopwood* in perspective and to truly grasp its complexities, one must first understand this historical irony.

A. *The Evolution of Admissions Procedures at the University of Texas School of Law and the Impetus for* Hopwood v. Texas

1. From Exclusion to Recruitment: The Role of Race in Admissions at the University of Texas School of Law

In 1946, the University of Texas School of Law denied applicant Heman Sweatt admission because he was an African American.[76] Sweatt brought suit in state court, but instead of winning the right to attend the

---

73. *See* Sanford Levinson, *Public Forum—What They're Saying . . . About the Supreme Court and Hopwood vs. UT Law School: High Court Puts UT at a Disadvantage*, AUSTIN AMERICAN-STATESMAN, July 3, 1996, at A13 (relating statement of Justices Souter and Ginsburg that Court's denial of certiorari was for lack of live controversy since law school had already ceased 1992 admissions process); *see also* Gabriel J. Chin, Bakke *to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 946 (1996) (opining that "for those who wish to save *Bakke*, *Hopwood* is not the case to test *Bakke* on the merits," because law school violated *Bakke* in its admissions program). *But see* David Jackson, *Justices Let Admissions Ruling Stand: Effect on Affirmative Action Debated*, DALLAS MORNING NEWS, July 2, 1996, at 1A (declaring that opponents of affirmative action believe combination of denial of certiorari and string of recent decisions signals end of affirmative action).

74. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) (stating that education is not right granted by Constitution); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18, 35–37 (1973) (emphasizing that education is not fundamental right); Wisconsin v. Yoder, 406 U.S. 205, 213–215 (1972) (balancing privilege of education with right to religious freedom); Lister v. Hoover, 706 F.2d 796, 802 (7th Cir. 1983) (contending that there is no right to higher education); Ramos v. Texas Tech Univ., 441 F. Supp. 1050, 1054 (W.D. Tex. 1977) (opining that students in Texas schools do not have right to gain admittance to graduate school); Davis v. Southeastern Comm. College, 424 F. Supp. 1341, 1344 (E.D.N.C. 1976) (stating that "admission to state community college is a privilege"). *But see* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (suggesting that education is a right).

75. *See* U.S. CONST. amend. V (providing for equal protection in federal action); *id.* amend. XIV, § 1 (providing for "equal protection of the laws").

76. *See Sweatt v. Painter*, 339 U.S. 629, 631 (1950) (stating that Sweatt "was rejected solely because he is a Negro"). The Court found that the law school's discrimination was based on state law. *See id.* at 631 n.1 (revealing that Article VII, §§ 7, 14 of Texas Constitution mandated separate schools).

University of Texas School of Law, he won the right to attend a segregated African-American law school.[77] On appeal, the United States Supreme Court found that the segregated system violated the Fourteenth Amendment under the separate-but-equal doctrine because Texas did not provide *equal* facilities for African Americans. Thus, the Court ordered the law school to admit Sweatt.[78] However, despite the "victory" in *Sweatt*, law school sponsored discrimination against African-American and Mexican-American students continued through the 1960s and 1970s,[79] until pressure from various state and federal civil rights agencies caused the law school to implement a series of programs designed to increase minority enrollment.[80]

As pressure to improve minority enrollment increased, so too did the number and quality of applicants to the law school, thus mandating changes to the admissions process.[81] In the early 1970s, after use of a

---

77. *See Sweatt v. Painter*, 210 S.W.2d 442, 445, 447–48 (Tex. Civ. App.—Austin 1948, writ ref'd) (justifying Sweatt's exclusion under Texas Constitution Art. VII, § 7 and ordering state to establish law school for African Americans). To comply with the judicial order, the State of Texas created Texas State University for Negroes, which "had no permanent staff, no library staff, no facilities, and was not accredited." Hopwood v. Texas, 861 F. Supp. 551, 555 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

78. *See Sweatt*, 339 U.S. at 636 (holding that segregation of University of Texas School of Law violated separate-but-equal doctrine). Sweatt was forced to leave the law school "after being subjected to racial slurs from students and professors, cross burnings, and tire slashings." *Hopwood*, 861 F. Supp. at 555.

79. *Hopwood*, 861 F. Supp. at 555. This school-sponsored discrimination exhibited itself in various forms, including segregated dormitories for Mexican Americans and the exclusion of African Americans from law school organizations. *Id.* Meanwhile, Mexican Americans were also facing state-wide discrimination in the area of education. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 6–17 (1973) (describing fiscal inequity and discrimination against Mexican Americans in Texas educational system); United States v. Texas, 506 F. Supp. 405, 411–16 (E.D. Tex. 1981) (finding that Mexican Americans in Texas were subjected to de jure discrimination in area of education), *rev'd*, 680 F.2d 356 (5th Cir. 1982); Morales v. Shannon, 366 F. Supp. 813, 816–25 (W.D. Tex. 1973) (discussing failure of Texas school district to deal with English-language deficiencies of Mexican-American students).

80. *See Hopwood*, 861 F. Supp. at 555–57. Both the Department of Health, Education, and Welfare (HEW) and the Office for Civil Rights (OCR) initiated investigations into the realm of higher education, with Texas becoming a target in 1977. *Id.* at 556. After finding that Texas was delinquent in addressing the issue of desegregation and that African Americans and Mexican Americans were severely underrepresented in higher education, the OCR initiated the first of several variations of a "Texas Plan" designed to recruit minority applicants to Texas schools of higher education. *Id.* These programs are still in place today. *Id.* at 556–57.

81. *Id.* at 557–60. Although gaining admission to the law school in the early 1960s was not difficult, by the mid-to-late 1960s, an increase in the number of applications caused the law school to invent and implement the Texas Index (TI) system whereby an applicant's

merit-based system increasingly frustrated attempts to expand minority enrollment, the law school implemented a separate admissions committee to review minority and disadvantaged nonminority students.[82] After *Bakke* precluded the use of separate committees, the law school reunited the admissions processes but maintained a minority subcommittee and organized an elaborate system, whereby applicants within the school's discretionary zone of admissions were sorted into "bands" and later discussed before the full committee.[83] This "single" committee system remained in place until 1991, when recommendations were made to form, once again, a separate minority committee that would review and recommend minority candidates with the goal of attaining an entering class that was five percent African-American and ten percent Mexican-American.[84]

2. The 1992 Admissions Program

In 1992, the year in which Cheryl Hopwood applied to the University of Texas School of Law, the law school received 4,494 applications for incoming first-year law students and accepted 936 in order to fill a class of approximately 500.[85] Upon receiving applications for admission that year, the law school immediately classified applicants by residency and race.[86] Thereafter, each candidate was assigned a number based on a calculation of his or her LSAT score and undergraduate grade point average (TI number).[87] Then, presumptive admit and denial levels were determined, also by race.[88] Applicants who fell into the law school's discre-

---

LSAT score and grade point average were weighted, averaged, and then compared against the rest of the applicants for purposes of admittance. *Id.* at 557. During the late 1970s, the TI numbers for the applicants were calculated and sorted into three categories: administrative admission, presumptive denial, and a zone in which admission is at the discretion of the administration. *Id.* at 558.

82. *Id.* at 558–59. Called the "Treece Committee," this separate entity reviewed minority applicants and made evaluations on the basis of whether the student "had a reasonable prospect of passing the first year." *Id.* Early on, this separate committee did not have a major impact on the regular admissions process, as no proffered goals were set in terms of admittees. *Id.*

83. *Id.* at 558–59. Apparently, much of the discussion focused on the minority candidates and their ability to remain in law school. *Id.* at 559–60.

84. *Hopwood*, 861 F. Supp. at 560. This subsequently adopted admissions process "was markedly similar to the pre-*Bakke* procedure of two separate committees." *Id.*

85. *Id.* at 563 n.32. In doing so, the law school denied admission to 668 white applicants before rejecting a single black candidate. Richard Bernstein, *Racial Discrimination or Righting Past Wrongs?*, N.Y. TIMES, July 13, 1994, at B8.

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

87. *Id.* at 561.

88. *Id.* at 561–62. These levels shifted as more applications came in, but the one constant was that the presumptive admittance and denial levels differed by race, with nontargeted applicants having more stringent admit levels than African Americans and

tionary zone were again separated by race and voted upon by different committees, with the specific goal of obtaining an entering class with ten percent Mexican-American and five percent African-American students.[89]

Hopwood, along with Douglas Carvell, Kenneth Elliott and David Rogers, were not admitted to the law school, despite their competitive TI numbers.[90] By the time Hopwood and the others realized they would not gain admittance, Austin attorney Steven Smith had already begun to search for prospective plaintiffs for a class-action lawsuit challenging the validity of the law school's affirmative action program.[91] Eventually, Smith contacted Hopwood, and she, Carvell, Elliott, and Rogers filed suit in September 1992 in the United States District Court for the Western District of Texas.[92]

B. *The Fifth Circuit Declares the Use of Race in Admissions Unconstitutional*

At trial, United States District Court Judge Sam Sparks found that the law school's admissions program was unconstitutional because two of the law school's four justifications for race-based discrimination—combating the perceived effects of a hostile environment and alleviating the school's poor reputation in the minority community—were not compelling interests.[93] Therefore, on appeal, a three-judge panel of the United States Court of Appeals for the Fifth Circuit focused on whether the district

---

Mexican Americans. *Id.* at 560–62. The presumptive admittance range for LSAT scores shifted from 202/90 to 199/87 for nontargeted applicants, from 196/84 to 189/78 for Mexican-American applicants, and from 192/80 to 189/78 for African-American applicants. *Id.* at 561–62. The higher number represents the three-digit LSAT scores used after 1992; the lower number represents the three-digit number used prior to 1992.

89. *Id.* at 562–63. The 1992 entering class had a median GPA of 3.52 and LSAT score of 162 delineated by race: nontargeted applicants, 3.56 and 164; African Americans, 3.30 and 158; and Mexican Americans, 3.24 and 157. *Id.* at 563 n.32.

90. *Hopwood*, 861 F. Supp. at 564–67. Hopwood had a GPA of 3.8, an LSAT of 39 (under the old scoring system), and a TI number of 199 which put her in the presumptive admit category until she was downgraded to the discretionary zone because of a high number of undergraduate hours at a junior college. *Id.* at 564. The other three fell in the discretionary zone; Elliott had a GPA of 2.98, an LSAT of 167, and a TI number of 197; Carvell had a GPA of 3.28, a combined LSAT of 34 (under the old scoring system) and 164, and a TI number of 197; and Rogers had a GPA of 3.13, an LSAT of 166, and a TI number of 197. *Id.* at 565–67 & n.47.

91. *See* Pedro E. Ponce, *Cheryl Hopwood: Affirmative Action's Reluctant New Icon*, TEX. LAW., Apr. 15, 1996, at 6 (providing chronology of events that led to filing of lawsuit).

92. *Id.*

93. *See* Hopwood v. Texas, 861 F. Supp. 551, 553, 570 (W.D. Tex. 1994) (declaring that diversity and righting past wrongs were compelling interests), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

court erred in finding that the school's other two reasons for race-based admissions—diversity in higher education and the eradication of present effects of past educational discrimination in Texas—were compelling governmental interests that justified the use of racial preferences in the admissions process.[94] The court held that the lower court erred in upholding these two reasons, stating:

> [T]he University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, 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.[95]

The panel's decision, written by Judge Jerry E. Smith, began by noting that *Adarand Constructors, Inc. v. Pena* had determined that affirmative action programs were subject to strict scrutiny analysis: "[t]here is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as 'benign' or 'remedial.'"[96] Next, Judge Smith discussed and limited the applicability of Justice Powell's finding in *Bakke* that diversity in higher education is a compelling state interest.[97] Although Justice Powell had found that diversity enriched the learning process by offering minority viewpoints and producing an aura of academic freedom, Judge Smith rejected this view, arguing 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."[98]

Judge Smith asserted that, in fact, racial preferences in the area of higher education may *inhibit* movement toward equality by promoting racial stereotypes and fueling racial hostility.[99] Moreover, Judge Smith declared that while schools may still foster diversity by giving preference

---

94. Hopwood v. Texas, 78 F.3d 932, 938 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

95. *Id.* at 962.

96. *Id.* at 940. Judge Smith emphasized that a reviewing court must ask: "(1) [d]oes the racial classification serve a compelling governmental interest, and (2) is it narrowly tailored to the achievement of that goal?" *Id.*

97. *Id.* at 941–43.

98. *Hopwood*, 78 F.3d at 944. In doing so, Judge Smith declared that Justice Powell's *Bakke* opinion on diversity was not binding precedent because no other member of the Court joined his opinion on that point. *Id.*

99. *Id.* at 944–45; *see* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1091–92 (1991) (criticizing promotion of stereotypes argument while positing that affirmative action actually reduces stigma); Frank H. Wu, *A Call for Class Action: The Remedy by Richard D. Kahlenberg*, LEGAL TIMES, June 24, 1996, at 78 (book

to one applicant over another because of a special ability or relationship, all forms of *racial* classification to achieve diversity in the admissions process violate the Fourteenth Amendment.[100]

While Judge Smith rejected diversity as a compelling interest, he acknowledged that Supreme Court precedent recognized that remedying past discrimination can be a compelling interest.[101] In fact, Judge Smith stated that the goal of remedying past wrongs is the *only* viable compelling state interest that justifies racial classifications.[102] However, Judge Smith rejected the district court's decision to consider the entire public educational system in Texas as the relevant governmental discriminator for determining if the law school had presented such a purpose.[103] After discussing the Supreme Court's tendency in *Wygant* and *Croson* to narrow the analysis of past discrimination to the specific state actor implementing the affirmative action program, Judge Smith declared that the district court had erred in reviewing past discrimination in all Texas public primary and secondary education systems.[104] Judge Smith suggested that a specific discriminatory actor has knowledge and expertise only as to its own personal discrimination.[105] Therefore, the law school was in no position to measure and remedy past discrimination in Texas primary and secondary education.[106]

After declaring the law school itself to be the only relevant past discriminator, Judge Smith focused on whether present effects of past discrimination existed within the law school to justify the race-based admissions program.[107] The law school alleged three present effects of past discrimination: (1) its "lingering reputation in the minority community . . . as a 'white' school," (2) "an underrepresentation of minorities in

---

review) (discussing Kahlenberg's belief that "white resentment is likely to be multiplied" by continued use of race-based affirmative action).

100. *See Hopwood*, 78 F.3d at 946–47 (opining that "[a] university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory" and that university is also able to "consider an applicant's home state or relationship to school alumni," as well as candidates' "unusual or substantial extracurricular activities").

101. *Id.* at 948–49.

102. *Id.* at 945 n.26. In making this proposal, Judge Smith quoted an opinion from the United States Court of Appeals for the Seventh Circuit which interpreted the Supreme Court's decision in *City of Richmond v. J.A. Croson*. *See* Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 422 (7th Cir. 1991) (recognizing that racial discrimination is unconstitutional under *Croson* unless purpose is to remedy effects of past discrimination).

103. *Hopwood*, 78 F.3d at 948–51.

104. *Id.* at 950.

105. *Id.* at 951.

106. *Id.*

107. *Hopwood*, 78 F.3d at 952–55.

the student body," and (3) "some perception that the law school is a hostile environment for minorities."[108] In rejecting the proffered effects of a poor reputation and a hostile environment, Judge Smith relied upon a 1994 circuit court case, *Podberesky v. Kirwan*,[109] that struck down a race-based scholarship program at the University of Maryland by holding that neither a poor reputation nor a perceived hostile environment justified race-based preferential treatment.[110] Accepting this reasoning, Judge Smith found that the University of Texas Law School's poor reputation was based on the historical fact of past discrimination and that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy."[111]

Judge Smith also relied on *Podberesky* to find that the perceived hostile environment at the law school was more a product of present societal discrimination and tension than any past discrimination.[112] He argued that those present at the law school in 1992 had not contributed to the past discrimination, while emphasizing that the present administration was active in recruiting minorities.[113] Judge Smith even went so far as to suggest that the hostile environment may have been caused by the race-based preferential treatment program itself.[114]

In directly addressing the effect of underrepresentation of minorities due to past discrimination, Judge Smith once again acknowledged the history of discrimination in public education in Texas, but reiterated that the law school can only seek to remedy its own discrimination.[115] Thus Judge Smith relied upon the district court's finding that "[i]n recent history, there is no evidence of overt officially sanctioned discrimination at the University of Texas" to hold that, in the absence of such discrimination,

---

108. *Id.* at 952.

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

110. *Podberesky*, 38 F.3d at 161; *see also* Linda Graglia, *Affirmative Action:* Podberesky, Hopwood *and* Adarand: *Twilight for Race-Based Programs*, TEX. LAW., Sept. 25, 1995, at 26 (discussing "havoc" caused by recent conservative opinions on affirmative action by Supreme Court and United States Courts of Appeals); Ken Myers, *Court Denial of Scholarship Case Leaves Some Officials Wondering*, NAT'L L.J., June 12, 1996, at A13 (discussing effect Supreme Court denial of certiorari in *Podberesky* and district court ruling in *Hopwood* will have on affirmative action in law schools).

111. *Hopwood*, 78 F.3d at 952–53 (quoting Podberesky v. Kirwan, 38 F.3d 147, 154) (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995)).

112. *Id.* at 953 (quoting Podberesky v. Kirwan, 38 F.3d 147, 155 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995)).

113. *Id.*

114. *Id.* To illustrate this point, Judge Smith cited the testimony of several minority law students who felt a lack of respect from other students who assumed they had gained admission because of their race, not their ability. *Id.* at 953 n.45.

115. *Hopwood*, 78 F.3d at 954.

the law school lacked a compelling state interest for continuing its admissions program.[116]

After finding that the law school's actions violated the plaintiffs' equal protection rights, Judge Smith focused on determining what type of damages were appropriate for the violation.[117] Judge Smith first addressed the allocation of the burden of persuasion as to proof that the plaintiffs would have been admitted without the preferential system.[118] Judge Smith applied a burden-shifting analysis and found the district court erred in holding that the plaintiffs bore the burden of persuasion.[119] Thus, Judge Smith remanded the damages issue to the district court with the directions that "[i]n the event that the law school is unable to show . . . that a respective plaintiff would not have been admitted to the law school under a constitutional admissions system, the court is to award to that plaintiff any equitable and/or monetary relief it deems appropriate."[120] Although Judge Smith also found error in the district court's ruling that the defendants had not committed intentional discrimination, he concluded that the law school had acted in good faith and that punitive damages were not warranted unless the law school refused to abide by the directives of the opinion in the future.[121]

Judge Smith chose to use the same wait-and-see approach in reviewing the district court's denial of injunctive relief.[122] Because the law school

---

116. *Id.*

117. *Id.* at 955–56.

118. *Id.* The allocation of this burden was at issue because the Supreme Court has, on occasion, switched the burden to the defendant once proof of discrimination is shown. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977) (shifting burden to defendant to show "that it would have reached the same decision").

119. *See Hopwood*, 78 F.3d at 956–57 (concluding that *Mt. Healthy* burden-shifting test should have been applied to present case).

120. *Id.* at 957; *see* Robert Elder, Jr., *Hopwood II: State Immunity Rears Its Head*, TEX. LAW., Aug. 12, 1996, at 1 (discussing possibilities for granting compensatory damages on remand). One interesting development is the possible effect of *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996), a sovereign immunity case decided in March. Many commentators opine that this case gives new "authority to the . . . Eleventh Amendment by shifting the balance of power to the states." *Id.* at 17. The Eleventh Amendment protects states from suits, for money damages by their own citizens or by citizens in other states, in federal court. *Id.* The belief is that *Seminole Tribe* may provide Texas with Eleventh Amendment sovereign-immunity protection from compensatory damages in *Hopwood II*. *Id*; *see* U.S CONST. amend. XI (stating that "[t]he Judicial power . . . shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"). Another issue to be decided on remand is the plaintiffs' request for attorneys' fees in excess of $1 million. Deirdre Shesgreen, *Turning the Page:* Hopwood's *Uncertain Legacy*, LEGAL TIMES, Sept. 2, 1996, at S33.

121. *Hopwood*, 78 F.3d at 957, 959.

122. *Id.* at 958–59.

had already abandoned the admissions program at issue in the case,[123] Judge Smith chose to issue a quasi-injunction requiring the law school to "heed the directives contained in this opinion" and directing the district court to issue an injunction only if necessary.[124] Moreover, Judge Smith ordered the law school to allow the plaintiffs to reapply for admission under a race-neutral admissions program.[125]

---

123. *See* Janet Elliott & Todd Basch, Hopwood *and States' Rights*, TEX. LAW., May 6, 1996, at 1, 16 (summarizing initial reaction of University of Texas in freezing its admissions program for nine days and subsequently adopting race-neutral program). The University also froze race-based scholarships for a short period of time. *Id.* Prior to appealing the Fifth Circuit's decision to the Supreme Court, Texas Attorney General Dan Morales unveiled a "New Texas Plan," whereby race would be taken into consideration "as only one of dozens of personal factors, including age, gender, hometown, employment history, family history, military service, financial situation, personal talents, leadership potential, maturity and public service." *Id.* Many believe that Morales botched the handling of *Hopwood* on appeal to the Supreme Court because he came out against affirmative action in the press conference that unveiled the new admissions program. *See* Janet Elliott & Gordon Hunter, *Morales' Muddy Waters: State's Strategy May Have Soured Justices on* Hopwood, TEX. LAW., July 8, 1996, at 1, 16 (discussing Morales's public statements against affirmative action and State's decision "not to bother arguing the constitutionality of the 1992 program to the Supreme Court"); Stuart Taylor, Jr., *Affirmative Action's Deceitful Advocates*, TEX. LAW., May 20, 1996, at 25, 25 (quoting Texas Attorney General Dan Morales as stating that "[i]t is simply wrong to give one applicant an automatic advantage over another applicant, based solely upon the color of one's skin. . . . Admissions decisions should not be based upon race or ethnicity. Such decisions should be based upon individual merit, individual qualifications and individual preparedness."). These criticisms of Morales may have merit, because Justices Ginsburg and Souter, in explaining that the Court does not review opinions, only *judgments*, found that the State "does not challenge the lower courts' judgments that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional" and that "[i]nstead petitioners challenge the *rationale* relied on by the Court of Appeals." Janet Elliott & Gordon Hunter, *Morales' Muddy Waters: State's Strategy May Have Soured Justices on* Hopwood, TEX. LAW., July 8, 1996, at 1, 16. Thus, Justices Ginsburg and Souter declared that "we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition." *Id.* Soon after the Supreme Court denied certiorari, Morales declared that virtually no Texas college or university "should consider race in admitting students or in granting scholarships or other forms of financial aid." *See Morales: Race Can't Be a Factor*, AUSTIN AMERICAN-STATESMAN, July 3, 1996, at B1 (discussing Morales's decision to abolish racial privileges in light of Supreme Court's denial of certiorari, and quoting University of Texas President Robert Berdahl as stating that "[i]f anybody believes we can sustain the number (of minorities) without taking race into account, I think they are naive. We can't. And I think that's a loss for the university and a loss for the state."); Carlos Guerra, *Dan Morales Jumps Gun on UT's 'Nondecision,'* AUSTIN AMERICAN-STATESMAN, July 6, 1996, at A11 (criticizing Morales's interpretation of Supreme Court's denial of certiorari and decision to enforce race-neutral education policies).

124. *Hopwood*, 78 F.3d at 958–59.

125. *Id.* at 958. Despite this order, and the previous order made by the district court, none of the four plaintiffs has enrolled in the law school as of yet. *See* Janet Elliott et al.,

Judge Wiener wrote separately to specially concur with the majority opinion and warn against the broad-stroke approach taken by Judge Smith.[126] Judge Wiener agreed that the law school could not present a compelling interest as to present effects of past discrimination but disagreed as to the goal of diversity. Judge Wiener found that "diversity can be a compelling interest," but that the law school's admissions program was not narrowly tailored to attain such diversity.[127] Judge Wiener criticized the "overly broad" majority opinion, theorizing that "if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement."[128]

In applying the narrowly-tailored test to the law school's proffered goal of racial diversity, Judge Wiener concluded that the law school's preferential admissions program was more akin to a quota system because it applied to African-American and Mexican-American students to the exclusion of other minorities.[129] Thus, according to Judge Wiener, "a system thus conceived and implemented simply is not narrowly tailored to achieve diversity."[130] Simply put, the program achieved facial diversity, but not true diversity. Judge Wiener also criticized the "de facto injunction" set forth by the majority as being unwarranted commentary that handicapped the district court's ability to fashion its own remedy.[131]

V. ANALYSIS OF *HOPWOOD*: THE RIGHT IDEA, THE WRONG SOLUTION

As Judge Wiener noted, the 1992 admissions program at the University of Texas School of Law was clearly unconstitutional under *Bakke*. *Bakke* said that separate admissions committees were unconstitutional; the law school used separate admissions committees.[132] A simple case, right? Wrong. In deciding *Hopwood*, the three-judge panel of the United States Court of Appeals for the Fifth Circuit took it upon itself to effectively

---

Buying Time After Hopwood*: An En Banc Rehearing Would Stay 5th Circuit's Ruling*, TEX. LAW., Mar. 25, 1996, at 1, 16 (revealing that Elliott reapplied after district court ruling and was rejected again; Carvell went to Southern Methodist University School of Law; Rogers is co-owner of store in Arlington and may reapply; and Hopwood has moved to Maryland). Hopwood hopes to apply to the University of Maryland School of Law or George Washington School of Law. Pedro E. Ponce, *Cheryl Hopwood: Affirmative Action's Reluctant New Icon*, TEX. LAW., Apr. 15, 1996, at 6.

126. *Hopwood*, 78 F.3d at 962 (Wiener, J., concurring).

127. *Id.*

128. *Id.* at 963.

129. *Id.* at 966.

130. *Hopwood*, 78 F.3d at 966.

131. *Id.* at 966–67.

132. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

overrule *Bakke*'s holding that racial diversity is a compelling interest and thus alter the face of education in Texas and the United States. As Judge Wiener, writing separately in *Hopwood*, warned: "[w]e judge best when we judge least, particularly in controversial matters of high public interest."[133]

This notion of judicial restraint is as much a hallmark of American jurisprudence as is the hierarchical system of deference to Supreme Court precedent.[134] Yet in *Hopwood*, Judge Smith blatantly disregarded both these tenets.[135] Moreover, and perhaps more important, Judge Smith failed to comprehend the practical significance of race-neutral admissions programs at the law school, in Texas, and throughout the nation.[136] While many laud Judge Smith's aggressive judicial activism as a positive move toward establishing a true meritocracy in law school admissions,[137] others cringe at the thought of possible resegregation[138] and what

133. *Hopwood*, 78 F.3d at 962 (quoting League of United Latin American Citizens v. Clements, 999 F.2d 831, 931 (5th Cir. 1993) (Wiener, J., dissenting)).

134. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 10 (1994) (stating that "it is almost universally agreed that reliance on prior judicial precedent is a significant aspect" of judicial interpretation); *see also* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 76–78, 83–87 (1991) (discussing use of precedent as "traditional source of constitutional decision-making" and stability via historical and structural functions); William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 1–6 (1993) (reviewing history of "judicial activism" and stating that term acts as "a code word used to induce public disapproval of a court action"); Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 80–81 (1994) (discussing history of adherence to judicial precedent and doctrine of stare decisis). *But see* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1361 (1988) (stating that stare decisis "has become more a rule of thumb than an iron-fisted command" for American courts).

135. *See* Hopwood v. Texas, 84 F.3d 720, 724 (5th Cir. 1996) (Politz, King, Wiener, Benavides, Stewart, Parker, Dennis, JJ., dissenting from denial of en banc hearing) (stating that "judicial restraint was the first casualty" of Judge Smith's opinion).

136. *See* Jeffrey Rosen, *Is Affirmative Action Doomed? How the Law Is Unraveling*, NEW REPUBLIC, Oct. 17, 1994, at 25 (stating that "Texas cannot begin to achieve its goals without adjusting its admissions standards").

137. *See* Steven W. Smith, Hopwood *Decision: The Colorblind Constitution*, TEX. LAW., Apr. 8, 1996, at 22 (discussing "fundamental unfairness" of affirmative action program at law school); *see also* Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 45 (1992) (opining that affirmative action displaces "the philosophy of equal opportunity").

138. *See* S.C. Gwynne et al., *Undoing Diversity: A Bombshell Court Ruling Curtails Affirmative Action*, TIME, Apr. 1, 1996, at 54 (quoting University of Texas President Robert M. Berdahl, who stated that *Hopwood* might lead to "the virtual resegregation of higher education"); Gordon Hunter, *Schools Rethink Race-Based Admissions*, TEX. LAW., May 13, 1996, at 1 (noting that some believe *Hopwood* is "a harbinger of the resegregation of higher education"); *Mr. Clinton's Affirmative Actions*, ST. LOUIS POST-DISPATCH, June

amounts to mass confusion not only in those jurisdictions that must abide by his cryptic opinion[139] but also throughout the rest of the country.[140] Thus, *Hopwood* is a perfect example of the quagmire that can result when policy, law, and reality clash.[141] Specifically, *Hopwood*'s quandary results from (1) the Fifth Circuit's blatant disregard for Supreme Court prece-

---

9, 1996, at 2B (contending that *Hopwood* could resegregate University of Texas School of Law).

139. *See* Tom Morganthau & Ginny Carroll, *The Backlash Wars*, NEWSWEEK, Apr. 1, 1996, at 54 (stating that Fifth Circuit's ruling is binding only in Texas, Louisiana, and Mississippi); *see also* Todd Ackerman, *Supreme Court, Anti-Affirmative Action Ruling Stands: Colleges Act to Change Policies-Again*, HOUS. CHRON., July 2, 1996, at A1 (stating that University of Texas, Texas A&M, Rice, University of Houston, and Baylor all moved to reinstate race-neutral admissions standards after Supreme Court denial of certiorari in *Hopwood*); Chris Payne, *Supreme Court Ruling Concerns UTA Officials: Officials Worry Illusion May Jeopardize Minority Scholarships Programs*, DALLAS MORNING NEWS, July 2, 1996, at 1A (discussing University of Texas at Arlington's fears about future of admissions and scholarships in light of *Hopwood*). As a result of *Hopwood*'s ban on the consideration of race in admissions, Texas schools have intimated they will shift to the use of other factors in order to facilitate some semblance of diversity. *Id.*; Terrence Stutz, *UT, A&M to Drop Race Factor*, DALLAS MORNING NEWS, July 2, 1996, at 1A (discussing plans to switch to consideration of socioeconomic background in admissions decisions).

140. *See, e.g.*, Julian E. Barnes, *Admission Plan at Law School Unconstitutional*, ARK. DEMOCRAT-GAZETTE, July 2, 1996, at 1A (detailing mixed reaction among Arkansas educators to *Hopwood* and its possible effects on their admissions programs); George Cantor, *Has Racial Preference Gone Too Far? Professor Insists U of M Admission Numbers Break Law*, DETROIT NEWS, July 14, 1996, at B5 (suggesting that University of Michigan's admissions program might fail constitutional scrutiny if taken before Supreme Court); Doug Caruso, *Affirmative Action Case Won't Affect Ohio Schools*, COLUMBUS DISPATCH, July 3, 1996, at 2C (relating how Ohio schools will continue to follow *Bakke* and use race in admissions, despite *Hopwood*); Abdon M. Pallaseh, *Law Schools Navigate Court Rulings While Trying To Diversify*, CHI. LAW., May 1996, at 18 (relating confused reactions to *Hopwood* of various Illinois law schools); *Uncertain Note on Affirmative Action*, ST. LOUIS POST-DISPATCH, July 3, 1996, at 8B (commending University of Missouri at Columbia for announcing it would continue "strong programs in favor of diversity"). While others have taken a business-as-usual stance, California, separate and apart from the *Hopwood* case, has begun a movement to eradicate the use of race in all societal activities. *See* Arleen Jacobius, *Affirmative Action on Way Out in California: Law School Student Bodies Will Be Primarily White and Asian, Some Say*, A.B.A. J., Sept. 1995, at 22 (discussing movement in California to eliminate affirmative action); Peter Schrag, *Backing Off* Bakke*: The New Assault on Affirmative Action*, THE NATION, Apr. 22, 1996, at 11 (detailing California's efforts to pass California Civil Rights Initiative, which would "prohibit race and gender preferences in all of California's public-sector activities, from college admissions to minority set-asides in contracting").

141. *See* George S. Gray, *Benign Preference As a Course to Equality: Its Morality, Efficacy and Constitutionality*, 30 HOW. L.J. 515, 516 (1987) (contending that affirmative action forces Americans to scrutinize law, Constitution, and their consciences); Jeffrey Rosen, *Is Affirmative Action Doomed? How the Law Is Unraveling*, NEW REPUBLIC, Oct. 17, 1994, at 25 (suggesting that *Hopwood* "exposes the implausible and increasingly esoteric foundations" of modern affirmative action law).

dent and (2) the clash between those who see racial diversity as a necessity and those who see formal equal protection as a priority.

A. Bakke, *Justice Powell, and Judge Smith: Disregarding Precedent*

Justice Powell stated clearly in *Bakke* that "the interest of diversity is compelling in the context of a university's admissions program" and that "attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."[142] Justice O'Connor reiterated this premise in *Wygant*, stating that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."[143] In direct contradiction to these statements by Supreme Court justices, Judge Smith declared in *Hopwood* that racial diversity can *never* be a compelling interest.[144]

Thus, in *Hopwood*, Judge Smith usurped the power granted to the Supreme Court in Article III of the United States Constitution[145] by speaking for the members of the current Court and declaring how they would, or more aptly, how he believed they *should*, rule on the issue of diversity in higher education.[146] Opinions and inferences about the way

---

142. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12, 314 (1978) (plurality opinion); *see* Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 116–17 (outlining Justice Powell's declaration that diversity is compelling governmental interest). *But see* Gabriel J. Chin, Bakke *to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 890–91 (1996) (discussing weaknesses of Justice Powell's conclusion on diversity).

143. Wyant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part); *see also* Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 117–20 (tracing majority and dissenting views on diversity in *Metro Broadcasting*).

144. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

145. U.S. CONST. art. III, § 1 (vesting "the judicial Power of the United States . . . in one supreme Court"). The United States Supreme Court, as the court of last resort for federal and state judicial systems, is unquestionably "considered to be the oracle that authoritatively divines and articulates the meaning of federal law." Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 16 (1994).

146. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) (holding that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"); Gabriel J. Chin, Bakke *to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 944–45 (1996) (suggesting that *Hopwood* is questionable because it undermines judicial adherence to principles set forth in *Rodriguez de Quijas*); *see also* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking*

the Court will, or should, rule are best left to pundits and commentators who have no decision-making authority, not to the lower courts. This is especially true in areas of high social and political interest, where the Supreme Court has proven to be volatile and unpredictable.[147] *Hopwood* was the perfect case for the practice of lower-court judicial restraint, as it combined two of the most political and controversial areas in society today: affirmative action and education.[148]

Ignoring judicial restraint, Judge Smith set forth comprehensive and compelling arguments for the abolition of the use of race in educational admission programs.[149] Yet a closer look at his reasoning and support reveals that Judge Smith relies, for the most part, on Supreme Court precedent in contexts where the Court has not practiced the judicial restraint it typically reserves for the area of education.[150] This reliance on prece-

---

Aspects of Inferior Court Decisionmaking, 73 TEX. L. REV. 1, 5 (1994) (noting that "the overwhelming consensus reflected by judicial and academic discourse holds that lower courts ought to define the law merely by interpreting existing precedents, without considering what their higher courts would likely do on appeal"); Janet Elliott & Todd Basch, Hopwood *and States' Rights*, TEX. LAW., May 6, 1996, at 1 (stating that "whatever the status of *Bakke*, the issue should be decided by the Court, so that the same rule applies across the country" (quoting state's petition for certiorari to United States Supreme Court)).

147. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 13, 17 (1994) (intimating that "inferior courts have no crystal ball" and that "lower courts are somewhat less constrained by concern for the future effects of today's rulings"); *see also* Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT L. REV. 451, 469–78 (1990) (suggesting that Supreme Court has used two separate definitions of equality in equal-protection analysis and that definition continues to change with time); Michael A. Millemann, Comment, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 155, 156–59 (1987) (surveying intermittent activism and restraint shown by Supreme Court).

148. *See* Gabriel J. Chin, Bakke *to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 944 (1996) (stating that educational affirmative action is sort of issue for which doctrine of adherence to judicial precedent was designed); *cf.* Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT L. REV. 451, 479–80 (1990) (noting how Supreme Court's notion of justice, gained through strict interpretation of equal protection, may conflict with true moral justice in world where Congress still plays role in deciding definition of substantive equality); Stuart Taylor, Jr., *Affirmative Action's Deceitful Advocates*, TEX. LAW., May 20, 1996, at 25 (arguing that *Hopwood* "is a textbook example of judicial activism").

149. *Hopwood*, 78 F.3d at 941–55; *but see* Vincent Blasi, Comment, *The Role of Strategic Reasoning in Constitutional Interpretation: In Defense of the Pathological Perspective*, 1986 DUKE L.J. 696, 696–700 (advocating judicial use of strategic reasoning in court opinions while acknowledging that such use is "the same thing as politics").

150. *See* Hopwood v. Texas, 84 F.3d 720, 722 (5th Cir. 1996) (Politz, King, Wiener, Benavides, Stewart, Parker, Dennis, JJ., dissenting from denial of en banc hearing) (stating, "[b]y tenuously stringing together pieces and shards of recent Supreme Court opinions that have dealt with race in such diverse settings as minority set asides for government

dents unrelated to educational contexts weakens Judge Smith's analysis. It was Judge Smith's subjective decision to rely more heavily on business-related affirmative action precedent rather than on *Bakke*, a case dealing directly with education.[151] However, conservative views on the abolition of preferences in employment may be more tolerable than such views are in education, an area considered sacred by most Americans[152] and one in which diversity may be more important. Thus, Judge Smith should have given more weight and deference to *Bakke* and the premises it set forth, instead of relying on other affirmative action cases dealing with business-related preferences.

Furthermore, while it is true that Justice Powell was the only justice in *Bakke* to hold that diversity is a compelling interest,[153] Judge Smith's absolute dismissal of Justice Powell's conclusions failed to consider that the majority, within the plurality of views expressed in *Bakke*, found that "some uses of race in university admissions are permissible" and that "racial classifications are not *per se* invalid under the Fourteenth Amendment."[154] Instead of reading this statement and others like it as affirmations of the use of race in the admissions process, Judge Smith chose to see it as a condemnation of racial diversity as a compelling interest.[155] Not only is this suspect judicial interpretation, it is also against a great body of evidence that suggests that racial diversity is a necessity in higher education.

---

contractors, broadcast licenses, redistricting, and the like, the panel creates a gossamer chain which it proffers as a justification for overruling *Bakke*").

151. *See* Mark Ballard, *A Fresh Voice Takes the Fifth*, TEX. LAW., July 29, 1996, at 1 (quoting Austin civil rights attorney James C. Harrington as saying that Judge Smith "wants to reach out and impose his views" in his opinions). Ballard's article paints the picture of a very gifted, yet single-minded, conservative judge who actively pursues a right-wing agenda on the bench. *Id.*

152. *Cf.* Gabriel J. Chin, Bakke *to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 890–91 (1996) (acknowledging that "the Supreme Court might well find that in the special context of education, racial diversity is a legitimate criterion, even if that consideration might be impermissible in the context of employment or contracting").

153. *See* David Cole, *Affirmative Action Under Attack, Again*, CONN. L. TRIB., Apr. 8, 1996, at 27 (stating that Justice Powell's *Bakke* opinion was tenuous because its language on diversity as "plus factor" was "technically dicta").

154. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 326, 356 (1978) (plurality opinion).

155. *See* Janet Elliott et al., *Buying Time After* Hopwood*: An En Banc Rehearing Would Stay 5th Circuit's Ruling*, TEX. LAW., May 25, 1996, at 1 (stating that critics of Judge Smith's opinion believe that his "logic that Powell was a lone wolf is ridiculous because the four liberal Justices would have gone even further in promoting diversity efforts").

B. *Reality and the Necessity of Racial Diversity in Higher Education*

1. The Necessity for Racial Diversity in Higher Education

In *Hopwood*, Judge Smith concluded that racial diversity in higher education can never be a compelling government interest.[156] In doing so, Judge Smith implied that a person's race is irrelevant to the educational experience.[157] Judge Smith is not qualified to make this decision; it is arguable that no judge is qualified to make this determination. Education is such a unique and integral part of our society that our court system has routinely refrained from delving into the discretionary provinces of our nation's educators.[158] Although it is next to impossible to make a quantitative measure of the worth of diversity in higher education,[159] racial diversity in education is of paramount importance, not only to the educational process itself but also to the growth of our nation as a whole.[160] Thus, when reviewing the necessity for racial diversity in higher education, courts should defer to and trust in those who know best, our nation's educators and legislators.[161]

---

156. Hopwood v. State, 78 F.3d 932, 962 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

157. *See id.* at 945 (rejecting assumption that any individual possesses certain traits by virtue of membership in particular racial class).

158. *See, e.g.*, Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988) (declaring that judicial intervention in area of academics "should be undertaken only with the greatest reluctance"); Bauza v. Morales Carrion, 578 F.2d 447, 451 (1st Cir. 1978) (holding that "federal Constitution does not authorize courts to undertake the business of school or college admissions by dictating what considerations or methods of selection are to be given priority"); Knight v. Alabama, 787 F. Supp. 1030, 1164 (N.D. Ala. 1991) (stating that "it is not the function of the courts to establish the academic mission for any particular institution" and that "[t]his Court will not usurp the traditional role of the university to establish the standards under which those who wish to enroll are admitted"); Martin v. Helstad, 578 F. Supp. 1473, 1482 (W.D. Wis. 1983) (holding that "academic institutions are accorded great deference in their freedom to determine who may be admitted to study at the institution"). *But see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (stating that "undisputed importance of education will not alone cause this Court to depart from usual standard for reviewing a state's social and economic legislation"). However, higher education was not at issue in *Rodriguez*, but rather public education below college level. *Id.*

159. *See* Note, *An Evidentiary Framework for Diversity As a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1362 (1996) (suggesting that "the benefits of diversity are the result of interpersonal interactions that cannot be quantified or verified by scientific proof" and that "although research demonstrates a positive correlation between diversity and learning, research cannot prove that diversity furthers learning").

160. *See id.* at 1370–71 (arguing that diversity enriches educational experience); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286–94 (1986) (O'Connor, J., concurring) (suggesting state interest in promoting diversity in education is compelling).

161. *See* James A. Washburn, *Beyond* Brown*: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115, 1115 (1994) (declaring that integrated schools will better educate

The phrase "diversity" has multiple connotations in the area of higher education.[162] Diversity can mean anything from student body variety in race, class, gender, culture, physical disability, religion, or age[163] to differences in mindset and experience.[164] While all forms of diversity are beneficial to the educational experience, racial diversity rises to the level of a compelling interest for several reasons. First, racial diversity exposes students to new perspectives, cultures and thoughts, allowing for a "cross-fertilization of ideas" that is a necessity for positive and productive interpersonal relations in our modern, melting-pot society.[165] Second, racial diversity aids in the reduction of the growing disparity in educational achievement between whites and the nation's ever-growing minority population.[166] Third, racial diversity is indivisible from any type of effective remedial affirmative action program or policy.[167] Stated differently, ra-

---

all of America's youth and give minority students wider contacts and greater self-confidence while suppressing possibility of inferiority complex) (citing W.E.B. DuBois, *Does the Negro Need Separate Schools?*, J. NEGRO EDUC. 328, 335 (1935), *reprinted in* W.E.B. DUBOIS: A READER 286 (Meyer Weinberg ed., 1970)).

162. See Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 126 (defining diversity as "'the quality of being different,' 'variety,' or 'an instance or a point of difference'"); Note, *An Evidentiary Framework for Diversity As a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1357 n.5 (1996) (stating that diversity in higher education has four meanings: "inclusion of underepresented minorities; institutional climate and responses to intolerance, including student retention, isolation, and harassment; mission, *i.e.*, educating students for participation in a diverse society and work environment; and transformation, a new understanding of education, teaching, learning, and scholarship informed by the inclusion of diverse populations").

163. Note, *An Evidentiary Framework for Diversity As a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1357 n.5 (1996); *see* Robert A. Destro, *ABA and AALS Accreditation: What's "Religious Diversity" Got to Do With It?*, 78 MARQ. L. REV. 427, 427–28, 454 (1995) (providing discussion on role of religious diversity in law school admissions and accreditation).

164. *See* Frank H. Wu, *A Call for Class Action: The Remedy by Richard D. Kahlenberg*, LEGAL TIMES, June 24, 1996, at 78 (book review) (indicating that diversity of viewpoints is given short shrift in quest for academic diversity).

165. *See* Barbara Bader Aldave, *Affirmative Action: Reminiscences, Reflections, and Ruminations*, 23 S.U. L. REV. 121, 128 (1996) (contending that "those of us who interact with persons of diverse cultures and backgrounds will be largely immune to the stereotyping that can poison our attitudes toward each other and our relationships with each other"); Okechukwu Oko, *Laboring in the Vineyards of Equality: Promoting Diversity In Legal Education Through Affirmative Action*, 23 S.U. L. REV. 189, 205 (1996) (contending that student body diversity is desirable for purpose of exchanging views and sharing ideas).

166. Note, *An Evidentiary Framework for Diversity As a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1359 n.17 (1996).

167. *See* Hopwood v. Texas, 861 F. Supp. 551, 571 (W.D. Tex. 1994) (stating that "without affirmative action, the law school would not be able to achieve . . . diversity"), *rev'd*, 78 F.3d 932, 946 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996); *cf.* Stephanie M.

cial diversity in higher education is a compelling governmental interest because "race, gender, and ethnicity are the most important issues we face as a society,"[168] because student body diversity "has a direct, immediate, and positive . . . impact" on education,[169] and because society cannot afford an uneducated minority population.[170] This last premise—that a society must educate all its citizens—is perhaps the most compelling evidence of the necessity of racial diversity in higher education.

2. The Statistical Reality of Color-Blind Admissions

The statistics are staggering. If the University of Texas School of Law used a race-neutral, merit-based admissions program in 1992, it would have accepted nine African-American students and eighteen Mexican-American students for its class of 514, instead of the forty-one African-American students and fifty-five Mexican-American students it admitted.[171] Only one African-American student of the 280 who applied to the law school would have had a TI number that put him in the category that the admissions office considered to be presumptively admitted.[172] Moreover, of all minority candidates applying to all law schools in the nation, only 289 African Americans and ninety-six Mexican Americans scored high enough to place them in the law school's discretionary zone for white applicants.[173] Furthermore, only eighty-eight African Americans and fifty-two Mexican Americans in the nation scored above the median

---

Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1631–32 (1990) (opining "social privileges are accorded based on race" and that privileges "will continue to be so allocated, unless members of society act affirmatively to change that status quo").

168. Roger Abrams, *The Threat of* Hopwood, N.J. L.J., May 13, 1996, at 31.

169. *Id.*

170. *See* Barbara Bader Aldave & Al Kauffman, *Our Institutions Should Offer Equal Opportunity*, HOUS. CHRON., Mar. 28, 1996, at A41 (addressing consequences of race-neutral admissions in America).

171. Janet Elliott et al., *Buying Time After* Hopwood*: An En Banc Rehearing Would Stay 5th Circuit's Ruling*, TEX. LAW., Mar. 25, 1996, at 1.

172. Jeffrey Rosen, *Is Affirmative Action Doomed? How the Law Is Unraveling*, NEW REPUBLIC, Oct. 17, 1994, at 25 (citing concessions made by University of Texas during *Hopwood* proceedings).

173. *Id.* These numbers are actually an improvement compared to where the country would be had affirmative action never been implemented. *See* David Cole, *Affirmative Action Under Attack, Again*, CONN. L. TRIB., Apr. 8, 1996, at 27 (acknowledging that "the percentage of blacks aged 20 to 24 enrolled in college has jumped from a shocking 5 percent in the 1950s to almost 25 percent today" and that "[i]n 1965, there were only 700 minority students enrolled in the nation's law schools; in 1994, there were more than 24,000").

on the LSAT for white students admitted to the law school.[174] Assuming the court-mandated race-neutral University of Texas School of Law would be competing with Stanford, Harvard, Yale and the rest of our nation's top law schools for those students, as it does for all its students, the law school could end up with only a small number of minority students. The statistics are more drastic in the legal profession itself, where African Americans make up approximately three-and-one-half percent of the attorneys in America, despite constituting about thirteen percent of the population.[175] Moreover, the discrepancies widen when looking at the country's 250 largest law firms; one study revealed that only 210 of 23,195 partners, or less than one percent, were African-American.[176] The problem is not unique to African Americans; Hispanics are also severely underepresented in our nation's legal community.[177]

These types of disparities are unacceptable in any society, and border on the surreal in Texas, where minorities will constitute the majority of citizens in the near future and where huge gaps in employment and education still exist.[178] For example, although minorities constitute over forty percent of the Texas population, they make up only nine-and-a-half percent of the State Bar membership.[179] Of course, if, as Judge Smith suggests in *Hopwood*, race is not a factor in a person's life, then numerical inadequacies should not disturb us. Instead, we should be concerned with other indicia of diversity, such as diversity of thought and experience.[180] When one reads *Hopwood* carefully, one finds that this prem-

---

174. *See* Jeffrey Rosen, *Is Affirmative Action Doomed? How the Law Is Unraveling*, NEW REPUBLIC, Oct. 17, 1994, at 25 (emphasizing paucity of numerically-qualified minority applicants for seats in our nation's most prestigious law schools).

175. Okechukwu Oko, *Laboring in the Vineyards of Equality: Promoting Diversity In Legal Education Through Affirmative Action*, 23 S.U. L. REV. 189, 199–200 (1996).

176. *Id.*.

177. *See* Linda E. Dávila, Note, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403, 1404, 1406–08 (1987) (detailing disproportionately low percentage of Hispanics in field of law, especially in corporate law firms).

178. *See* Terrence Stutz, *UT Minority Enrollment Tested by Suit: Fate of Affirmative Action in Education Is at Issue*, DALLAS MORNING NEWS, Oct. 14, 1995, at 1A (quoting law school's attorney Allan Van Fleet as saying that *Hopwood*'s holding is "utterly unacceptable" in Texas, where minorities will soon outnumber whites); *see also* Barbara Bader Aldave & Al Kauffman, *Our Institutions Should Offer Equal Opportunity*, HOUS. CHRON., Mar. 28, 1996, at A41 (questioning how Texas could tolerate scenario where 40% of population is minority, yet only 1% of those minorities have professional degrees); David Cole, *Affirmative Action Under Attack, Again*, CONN. L. TRIB., Apr. 8, 1996, at 27 (contending that "[i]f affirmative action can't be justified at Texas, it can't be justified anywhere").

179. STATE BAR OF TEXAS, DEPARTMENT OF RESEARCH & ANALYSIS, ANNUAL REPORT ON THE STATUS OF RACIAL/ETHNIC MINORITIES IN THE BAR 2–3 (1996).

180. *See Hopwood*, 78 F.3d at 946–47 (discussing how person need not be minority to bring diversity to higher education).

ise—that race does not matter—is an underlying assumption of Judge Smith's argument. This is the second reason that his opinion denies the reality of American culture.

3. The Cultural Reality of Race in America

Lurking in Judge Smith's conservative, legalistic argument that race should never be a factor in university admissions are several highly suspect conclusions about race that do not reflect the reality experienced by ethnic minorities.[181] First, Judge Smith assails the premise that "a certain individual possesses characteristics by virtue of being a member of a certain racial group."[182] Second, Judge Smith posits that "[t]o believe that a person's race controls his point of view is to stereotype him."[183] Third, Judge Smith stresses that "individuals, with their own conceptions of life, further diversity of viewpoint."[184] When read alone, the first of these statements appears somewhat naive, while the latter two seem almost noble.[185] Yet these statements, when read together and integrated into Judge Smith's opinion, reveal the true essence of the holding: race is not an inherent part of a person's being.[186] Judge Smith's opinion is essen-

---

181. *See id.* at 945 (offering Judge Smith's statement that "[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different").

182. *Id.* at 946; *see* Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 57 (1994) (commenting on underlying thesis of color-blind ideology: race implies nothing more about particular individual than that person's eye color, hair, weight, height, or even nose length).

183. *Hopwood*, 78 F.3d at 946; *see* Frank H. Wu, *A Call for Class Action: The Remedy by Richard D. Kahlenberg*, LEGAL TIMES, June 24, 1996, at 78 (book review) (restating Kahlenberg's belief that "the idea that racial minorities have particular perspectives can be facile and may degenerate into merely equating race with culture").

184. *Hopwood*, 78 F.3d at 946; *see* Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 57–58 (1994) (asserting premise behind color-blind ideology that primary traits such as perseverance, curiosity, and intelligence are not determined by individual's race); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 324–29 (1994) (commenting on nature of individuality as determinate factor in one's life); Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1000 (1993) (stating premise of color-blind ideology as "belief that individuals are not intellectual captives of their skin color").

185. *See* Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721, 721–22 (1996) (indicating that "if 'getting beyond race' means actually getting beyond consciousness of race, the goal is hopelessly naive and fantastical"); Matthew Walton, *A Cruel Blow to Affirmative Action*, DENV. POST, Apr. 26, 1996, at B6 (indicating that "[a]t first glance, there is an attractive nobility to the *Hopwood* court's decision").

186. *See* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1065–69 (1991) (opining that "race matters" because "[r]ace is among the first things that one notices about another individual" and because "[t]o be born black is to know an

tially a clever attempt to justify his own conservative legal conclusions through the guise and advocacy of an absolute, and ostensibly admirable, stance on true *legal* equality.[187]

Unfortunately, we do not live in a utopian society where legal equality equates to, or soon thereafter begets, social equality.[188] While race, as a biological phenomenon, may not truly exist, it operates as a cultural factor, has a high correlation to diverse viewpoints, and cannot be ignored.[189] Thus, because race remains a factor in the lives of most Americans, it must be considered in a university's admissions process

---

unchangeable fact about oneself that matters every day"); Matthew Walton, *A Cruel Blow to Affirmative Action*, DEN. POST, Apr. 26, 1996, at B6 (arguing that *Hopwood* "seems to deny there is any legitimate value to the experience of growing up as a person of color in white America"). *But see* Goss v. Board of Educ., 373 U.S. 683, 687 (1967) (finding that "[r]acial classifications are obviously irrelevant and invidious").

187. *See* Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1313 (1991) (describing modern equal protection analysis as "characterized by sophisticated fictions and glosses"); Mark Ballard, *A Fresh Voice Takes the Fifth*, TEX. LAW., July 29, 1996, at 1 (observing that Judge Smith is known for injecting his own views into his opinions); *see also* Conference, *Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U.L. REV. 567, 573 (1996) (statement of Jeff Rosen) (opining that several conservative Justices who profess to be devoted to original intent doctrines "don't even bother to examine the history"); *cf.* Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 66–67 (1994) (declaring that color-blindness ideology "declares both the irrelevance of race and the inferiority of African Americans" because it "continues to accept doctrines like those allowing private racism"). The inferiority of minorities is a highly controversial issue in academia and society. *See generally* RICHARD J. HERRSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1995); DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991).

188. *See* Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721, 722 (1996) (proposing that "[i]n order to get beyond official race categories . . . one must be willing to assume we are truly beyond the need for tough enforcement of existing antidiscriminatory statutes"); *Affirming Affirmative Action*, ST. LOUIS POST-DISPATCH, Apr. 12, 1996, at 16C (stating that "[i]f affirmative action is to survive, politicians, judges and people will have to see past the facile platitudes about a 'colorblind' society and a 'level-playing field'" because "society isn't colorblind yet, the playing field isn't level yet and the nation can't snap its fingers and make them so"); Harry M. Reasoner & Allan Van Fleet, *Racial Discrimination: Affirmative Action, Still Necessary and Still Undecided*, TEX. LAW., July 29, 1996, at 23 (suggesting that "no one who looks at reality" in Texas can claim state has color-blind society).

189. *See* Katheryn K. Russell, *Affirmative (Re)Action: Anything but Race*, 45 AM. U.L. REV. 803, 805 (1996) (exploring how sociological reality dictates that race matters in America); Luis Angel Toro, *"A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219, 1220 (1995) (theorizing that while term "race" is outgrowing biological or anthropological delineation, race remains viable social construct that influences people's lives).

along with all the other factors that Judge Smith found proper.[190] This was the position that Justice Powell took when he held that race may be a plus factor in admissions and the position Judge Sparks took in the district court.[191] Judge Smith should have adopted this position and upheld the lower court decision, at least with respect to the issue of racial diversity, so that a person's race could continue to be a plus—no more and no less—in the admissions process.[192]

While Judge Smith's rigid adherence to a strict, color-blind equal protection theory may have merit, it directly conflicts with Justices Brennan's, White's, Marshall's, and Blackmun's belief, stated in *Bakke*, that

> claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens.[193]

It is this notion of an interplay between reality and the law that reveals the single greatest flaw in Judge Smith's rather meticulous and otherwise

---

190. *See Hopwood*, 78 F.3d at 946; *Student Diversity Enhances Schools and Society: Fifth Circuit's "Hopwood" Decision Ignores the Value of Law School Applicants Who Have Surmounted Racial Barriers*, DAILY REC., Aug. 15, 1996, at 7 (endorsing premise that "law schools should consider the 'whole person,' including what the applicant contributes to the racial diversity of the classroom and the profession, for admission").

191. *Bakke*, 438 U.S. at 311–14; *see also Hopwood*, 861 F. Supp. at 570–71 (stating that race may be one factor used in making admissions determinations).

192. *See* Gabriel J. Chin, Bakke *to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 930 (1996) (stating that some believe adherence to *Bakke* status quo may be best solution); Paul Burka, *Fight* Bakke, TEX. MONTHLY, May 1996, at 228 (arguing that Judge Smith's opinion is too broad and that Judge Wiener's approach, which would have upheld District Judge Sparks ruling on diversity, was more appropriate). One commentator has argued that a school could rely on racial preferences for admission under *Bakke* as long as such reliance was not overt. Jeffrey Rosen, *Is Affirmative Action Doomed? How the Law Is Unraveling*, NEW REPUBLIC, Oct. 17, 1994, at 25 (opining that "the only practical effect of Bakke, as correctly applied by Judge Sparks, is to punish schools that have the courage to be honest" such that "[t]he court is saying, in effect, that Texas can rely on the same strong racial preferences that it did before, as long as it doesn't overtly adopt separate admissions standards").

193. *Bakke*, 438 U.S. at 327; *see* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062, 1121–25 (1991) (arguing that "we are not currently a color-blind society, and that race has a deep social significance that continues to disadvantage blacks and other Americans of color"); Tanya Lovell Banks, *A Nation Divided*, BALTIMORE SUN, May 12, 1996, at 1F (stating that "[s]imply saying that the United States is a color-blind society does not make it so").

compelling argument: the failure to consider and ultimately factor reality into the decision.[194] Unfortunately, this failure affects Americans as a whole.

VI. CONCLUSION

America is a racial melting pot where individuality and equality are coveted, yet groupthink and inequity abound. Whether consciously or subconsciously, Americans tend to protect "their own" and provide "their own" with certain perks and privileges. This is social reality, and, over time, this "racial nepotism" has produced a white-bred, quasi-caste hierarchy that purports to reward Horatio Alger-esque entrepreneurialism, yet has routinely excluded minorities from gaining access to the very avenues necessary to achieve these rewards. Admitting this biased reality, our representatives implemented affirmative action. Yet, today, when affirmative action is finally *beginning* to level the playing field skewed by our shameful legacy of discrimination, it has come under fire, branded a form of "social engineering" that offends our Darwinistic belief in absolute meritocracy.

This wave of resentment bred *Hopwood* which, under the guise of a color-blind constitution, served notice on educational affirmative action while intimating that one's race is irrelevant to one's being. As a result, *Hopwood* has drawn battlelines between those who espouse a strict, legalistic definition of equality and those who favor a broad, realistic definition.

In advocating the conservative view of equality, Judge Smith's opinion went well beyond what was necessary for the disposition of the case, creating turmoil and tension by effectively overruling *Bakke* in declaring that racial diversity can never be a compelling interest in the area of higher education. This broad pronouncement, when coupled with its limited guidance, guarantees inequality among our nation's universities and ignores the statistical and social realities that fostered the necessity for affirmative action in the first place. Thus, until the Supreme Court resolves the issue of racial diversity once and for all, the country will endure vast inequality stemming from an opinion meant to facilitate true equality. For these reasons, *Hopwood* denies reality.

194. *See* David Cole, *Affirmative Action Under Attack, Again*, CONN. L. TRIB., Apr. 8, 1996, at 27 (opining that affirmative action's only hope is to persuade Supreme Court "that we cannot be blind to reality in the interest of the ideology of 'colorblindness'").