St. Mary's Law Journal

Volume 28 | Number 1 Article 4

1-1-1996

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

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

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Robert A. Lauer, a third-year student at St. Mary's University School of Law and the author of the Recent Development which immediately precedes this Afterword, has done himself proud. His explanation of the deficiencies of the opinion that was issued by a panel of the United States Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*[1] is thorough and thoughtful. I write this Afterword solely to make explicit a point that is implicit in Mr. Lauer's discussion: *Hopwood* is not the law! Although public officials and university administrators in Texas hastily reacted to *Hopwood* by mandating the use of race-blind admissions procedures throughout the State's system of higher education,[2] their ill-considered response was not required by the Fifth Circuit's decision. As a matter of law, that decision means virtually nothing.

The point is a simple one: No court of appeals can overrule a decision of the United States Supreme Court.[3] In *Regents of the University of California v. Bakke*,[4] the Supreme Court held that "the State has a substan-

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* Dean and Professor, St. Mary's University School of Law; B.S., Stanford University; J.D., University of California at Berkeley. For a more complete exposition of the ideas contained in this Afterword, *see* Barbara Bader Aldave, Hopwood v. Texas: *Much Ado About Nothing?*, TEX. LAW., Nov. 11, 1996, at 43.

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

2. *See* Janet Elliott & Todd Basch, Hopwood *and States' Rights*, TEX. LAW., May 6, 1996, at 1, 16 (describing reaction of administrators at University of Texas to *Hopwood* decision); Letter from Dan Morales, Texas Attorney General, to Leonard Rauch, Chairman, Texas Higher Education Coordinating Board 7–9 (Aug. 21, 1996) (providing guidelines for race-neutral admissions policies) (on file with the *St. Mary's Law Journal*).

3. "The doctrine of hierarchical precedent holds that an inferior court must follow precedent established by a court that is superior to it." Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 3 (1994). "As applied in a hierarchical system of courts, the duty of a subordinate court to follow the laws as announced by superior courts is theoretically absolute." 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.401, at I–2 (2d ed. 1993). In particular, a federal court of appeals is bound to respect decisions of the United States Supreme Court on issues of federal law. *See id.* ¶ 0.402[1], at I-10.

4. 438 U.S. 265 (1978).

tial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[5] Nevertheless, in *Hopwood*, two of the three panel members insisted that the Fourteenth Amendment to the United States Constitution bars the University of Texas from "us[ing] race as a factor in law school admissions."[6] Which of the two opinions—the opinion of the United States Supreme Court in *Bakke*, or the directly contradictory opinion of the Fifth Circuit Court of Appeals in *Hopwood*—is authoritative? Which should guide the decision-making of the Texas Attorney General, or a federal or state judge, or the administrators of universities and professional schools within the Fifth Circuit? Upon reflection, the answer to these questions is obvious. The Fifth Circuit Court of Appeals had jurisdiction over the *Hopwood* case, and the authority to settle the rights of the parties *inter se*, but it had neither the right nor the power to repudiate the constitutional holding of *Bakke*.[7]

The point made in this Afterword is not merely pedantic. As Mr. Lauer demonstrates in Part V of his Recent Development, strict adherence to color-blind admissions systems would result in the gross underrepresentation of minority students in our premier educational institutions. Fortunately for all of us, conscientious public officials and university administrators need not follow the bad advice given them in *Hopwood*. Fortunately for all of us, *Bakke* is still the law of our land.

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

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

7. Both the United States Supreme Court and seven members of the Fifth Circuit Court of Appeals have explicitly recognized that an inferior federal court is obliged to respect Supreme Court precedents. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). "Lest there be any doubt, we are firmly convinced that, until the Supreme Court expressly overrules *Bakke*, student body diversity *is* a compelling governmental interest for the purposes of strict scrutiny." Hopwood v. Texas, 84 F.3d 720, 724 n.11 (5th Cir. 1996) (Politz, King, Wiener, Benavides, Stewart, Parker, Dennis, JJ., dissenting from denial of rehearing en banc).