1997

Hopwood v. Texas: Strict in Theory or Fatal in Fact

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I. INTRODUCTION

The recent decisions concerning the University of Texas School of Law's ("UT") 1992 affirmative action admission policy have created concern among post-secondary admissions committees. Until *Hopwood v. Texas*,[1] schools were bound by the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*[2] when creating permissible affirmative action admission policies. However, the recent Fifth Circuit *Hopwood*[3] decision and the Supreme Court's decision to deny certiorari in that case[4] leave unsettled the appropriate remedial measures law schools may adopt in their efforts to balance the tension between the goals of diversity and the legitimate interests of qualified non-minority candidates.

This article will examine the *Hopwood* decisions. Part II will review the factual and legal history behind the case. Part III will discuss the District, Circuit, and Supreme Court decisions. Finally, Part IV will

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1. 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S.Ct. 2581 (1996).
2. 438 U.S. 265 (1978).
3. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S.Ct 2581 (1996).
4. 116 S.Ct. 2581 (1996).

critique these decisions and offer a view into the future for affirmative action admissions policies.[5]

II. HISTORY

A. *The Facts of* Hopwood v. Texas

In 1992, UT used a dual admission policy to ensure its entering class was diverse in, among other things, race and ethnicity.[6] All applicants were reviewed in a similar manner. When rendering their decision, committee members were asked to consider such factors as undergraduate GPA, LSAT score, undergraduate major, race, gender, past work experience, and other relevant characteristics. The chairman of the admissions committee assigned one subcommittee to consider non-minority applicants and another subcommittee to consider minority applicants.[7] Consequently, when reviewing a particular file, a member of the minority subcommittee could not consider a particular application

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5. For a general discussion of the constitutionality of affirmative action admissions policies, see Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J.C. & U.L. 895 (1996).

6. The court noted that the diversity admission policy was not entirely voluntary because UT adopted the policy in response to the Office for Civil Rights (OCR) Texas plan. Nonetheless, the court concluded that under an equal protection analysis, the same level of scrutiny applied to race conscious affirmative action plans adopted pursuant to a consent agreement whether or not such plans were voluntarily adopted. Thus, the court would uphold the policy if it met the Supreme Court's requirement that (1) there was a compelling governmental interest, and (2) the policy was narrowly tailored to achieve the goals of that interest. *Hopwood*, 861 F. Supp. at 569 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *Bakke*, 438 U.S. at 299.

7. UT had two separate reviewing subcommittees. *Hopwood*, 861 F. Supp. at 562. The Chair of the Admissions Committee set a different presumptive admission or denial Texas Index ("TI") number for minorities, who were reviewed by one subcommittee and for non-minorities who were reviewed by a separate subcommittee. *Id.* at 561. The Admissions Committee based acceptance to UT for all applicants on an index number that is a function of each applicant's combined undergraduate grade point average ("UGPA") and LSAT score. *Id.* at 557 n.9. The Chair of the Admissions Committee initially reviewed all applications regardless of the applicant's residency, race or ethnic heritage and then set a number below which students were presumptively denied admission and another number above which students were automatically admitted to the school. *Id.* at 560-61. The subcommittees reviewed applicants with numbers between the automatic admission and the automatic rejection numbers. *Id.* at 561. The admissions office divided non-minority files into groups of thirty. Three members of the non-minority subcommittee reviewed each non-minority applicant on an individual basis. In contrast, the entire minority sub-committee reviewed each minority applicant as a group. In theory, each member of the minority subcommittee was to be part of the subcommittee to review non-minority files, however one member of the minority subcommittee did not review non-minority applications. *Id.* at 562.

with reference to a diverse group since he or she did not consider non-minority applications.

That same year, four individuals, all of them Caucasian,[8] applied to and were rejected from UT.[9] Each applicant had a marginal application so that his or her LSAT and undergraduate grade scores were not sufficient for acceptance under the school's general admissions policy.[10] However, each of these applicant's test scores and grades were superior to many minority candidates accepted to the law school that year.[11]

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8. John C. Brittain, *The Hopwood Decision; Obituary for Affirmative Action?*, TEXAS LAWYER, May 13, 1996 at 30.

9. The denied applicants were all white Texas residents. *Hopwood*, 861 F. Supp. at 564. Cheryl J. Hopwood, had a TI of 199, and Kenneth Elliott, Douglas Carvell, and David Rogers each had a TI of 197. *Id.* at 564-67.

UT contested the ripeness of the claims of Hopwood and Elliott because neither was actually denied admission. *Id.* at 567. Moreover, UT maintained that all four applicants lacked standing because they could not demonstrate that they would have been granted admission absent the challenged admissions policy. *Id.* Because the plaintiffs were not considered for admission in a manner similar to minority students, the court ruled the applicants had standing to bring their claim. *Id.* at 567-568. *See also* Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663-64 (1993).

10. *Hopwood*, 861 F. Supp. at 563-67.

11. *Id.* at 563 n.32. Cheryl Hopwood's UGPA was 3.8 and her LSAT was 39. *Id.* at 564. Her father passed away when she was a young child. While in high school, Hopwood was offered admission into Princeton, Penn State and Temple. She declined admission, however, because she had to pay for her own education and work while attending both high school and college. *Id.* at 564 n.40. At the time of her application, she was married to a military serviceman and had two children, one of whom died at birth and the other who was diagnosed with severe birth defects. Sam Howe Verhovek, *For 4 Whites Who Sued University, Race is the Common Thread*, N.Y. TIMES, March 23, 1996, at A6. Hopwood declined to include any of this information in her application to UT. *Hopwood*, 861 F. Supp. at 564, n.38. She did, however, submit a letter to the law school on January 22, 1992, requesting that if she were admitted, she would only be able to attend the school on a limited basis in her first year, due to the needs of her severely handicapped daughter. *Id.* at 564. Kenneth Elliott's UGPA was 2.98 and his LSAT was 167. He is a certified public accountant, and since receiving his undergraduate degree, Elliott has worked as an auditor or examiner for state agencies. *Id.* at 565. Douglas Carvell's UGPA was 3.28. *Id.* at 566. After taking the LSAT twice, the first score being in the 61st percentile and the second in the 91st, his average score placed him in the 76th percentile. *Id.* at 566 n.47. In a letter of recommendation contained in Carvell's admissions file, a professor from Hendrix College complimented Carvell's intellect, but described his performance as "uneven, disappointing, and mediocre." *Id.* at 566. David Rogers attained a UGPA of 3.13 and an LSAT score of 166. In 1985, Rogers was dismissed from the University of Texas (undergraduate program) due to poor scholastic performance. He then attended the University of Houston-Downtown, where he received his degree in professional writing in 1990. *Id.* at 567.

Following their rejection, a Texas lawyer contacted these and other applicants whom the school had rejected regarding a class-action suit. Plaintiffs agreed and permitted the lawyer to file a lawsuit on their behalf.[12] The applicants challenged UT's 1992 admission policy as violative of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act.[13]

B. Applicable Precedent

1. Regents of the University of California v. Bakke

When the *Hopwood* lawsuit was filed, the only binding authority concerning an affirmative action admissions policy was *Regents of the University of California v. Bakke*.[14] In *Bakke*, the Supreme Court struck down an admissions policy that mandated race-based quotas. In so doing, the Justices wrote about the appropriate standard of review for such challenges and the viability of other race-based affirmative action admission policies.[15]

In 1973 and 1974, Allen Bakke, a white male, was rejected from the University of California at Davis Medical School ("Davis").[16] Each

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12. The lawyer, Steven W. Smith, became familiar with the case following his own investigation into what he perceived to be reverse discrimination. Under the Texas Open Records Act, Smith obtained the names of dozens of applicants with relatively high UGPAs and LSAT scores and mailed them letters requesting them to serve as plaintiffs in this case. Hopwood, Elliott, Carvell and Rogers brought suit with Smith as their lawyer. Verhovek, *supra* note 11, at A6.

13. *Hopwood*, 861 F. Supp. at 553.

14. 438 U.S. 265 (1978). For a general discussion of *Bakke*, see Garfield, *supra* note 5.

15. Justice Powell, in the majority opinion, held that racial and ethnic distinctions are inherently suspect and call for the "most exacting judicial examination." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978). Similarly, Justices Brennan, White, Marshall, and Blackmun, agreed in their concurrence, noting that review under the Fourteenth Amendment must be strict though "not strict in theory and fatal in fact, because it is stigma that causes fatality - but strict and searching nonetheless." *Id.* at 361-362 (quotations omitted) (quoting Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

16. *Bakke*, 438 U.S. at 276. When Davis rejected Bakke in 1973, it had filled all the available seats for applicants from the general admissions pool, but there were still four open seats reserved for applicants from the minority pool. *Id.* In 1973, Mr. Bakke received a benchmark score of 468/500, but his application was late, and after his application was completed, no applicants in the general admission pool were admitted with a score below 470/500. At that time four seats in the special admission program were open, although Mr. Bakke was not considered for these seats. Mr. Bakke wrote to the Associate Dean and Chairman of the Admissions Committee, Dr. George H. Lowrey, to protest the admissions quotas. *Id.* Davis rejected Bakke again in 1974 although the school accepted minority applicants with lower test scores. In 1974, Mr. Bakke applied

year, Bakke was rejected while minority students with less impressive academic credentials were accepted. Following the second rejection, Allen Bakke sued Davis in state court.[17] He challenged the school's 1973 admission policy, adopted in an effort to diversify its entering class, on the grounds that it operated to exclude him from the school on the basis of his race. The admissions policy, Bakke argued, violated the Equal Protection Clause,[18] the California Constitution,[19] and Title VI of the Civil Rights Act of 1964 (Title VI).[20]

Davis' admission policy divided applicants into two groups. One group was comprised of non-minority applicants who had achieved a minimum 2.5 undergraduate GPA. The other was comprised of all minority applicants.[21] The school set aside a certain number of seats

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early, received high marks from a student interviewer, but received low marks from the faculty interviewer, who coincidentally was Dr. Lowrey. Lowrey gave him an 86, the lowest of his six scores, making his total 549/600 (there were six interviewers in 1974, so the total score was 600, while in 1973 there were only five interviewers so the score was out of 500). Under the special admission program, applicants were admitted with significantly lower credentials than Mr. Bakke. *Id.* at 277.

17. Bakke sued for mandatory injunctive and declaratory relief. *Id.* at 277.

18. U.S. CONST. amend. XIV, § 1, reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

19. CAL. CONST. art. I, § 21, *repealed and added* (as amended) to art. 1, § 7, reads:

> No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

20. Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964) (codified at 42 U.S.C. § 2000d)(1989), reads:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

21. *Bakke*, 438 U.S. at 274-75. Those in the non-minority group were evaluated on the basis of their UGPA, MCAT score, and observations made during a personal interview conducted by a member of the Admissions Committee. The Committee automatically rejected non-minority applicants whose UGPA fell below 2.5. *Id.* at 273-74. In contrast, minority student applications were referred to a Special Admissions Committee comprised mainly of members of minority groups. The minority applicants were rated in a manner similar to the applicants in the general applicant pool, except that a 2.5 UGPA did not serve as a ground for summary rejection. Thus, all minority applicants were considered for admission by the Special Admissions Committee,

for applicants in each of the groups.[22] Individuals from the general applicant pool could not fill seats from the minority applicant pool, even if seats were available.[23]

The trial court found that Davis' admission policy was a racial quota and held that it violated the California and Federal Constitutions and Title VI.[24] The California Supreme Court affirmed.[25] The State sought Supreme Court review and certiorari was granted.[26] The Supreme Court, considering both the Equal Protection Clause and Title VI, affirmed the California Supreme Court decision to strike down the Davis admissions policy.[27] However, the Court was sharply divided. Chief Justice Burger, and Justices Stevens, Stewart, and Rehnquist concluded that the program violated Title VI and, therefore found no need to consider the constitutional issue.[28] Justice Powell agreed that the Davis program was invalid since specific goals and quotas are always impermissible to achieve diversity or to dismantle discrimination. Thus, Justice Powell cast the "swing" vote and wrote the plurality opinion.

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regardless of their UGPA. *Id.* at 274-75.

With the exception of the minimum UGPA for non-minorities, students were evaluated for admissions based on the same general criteria. However, each of the two Admissions Committees operated in a vacuum and did not compare its applicants to the other's applicant group. The Special Admissions Committee did not rate or compare minority applicants to the non-minority applicants but could accept or reject applicants based on failure to meet course requirements or other specific deficiencies. The Special Admissions Committee continued to recommend applicants until the number set by faculty vote were admitted. *Id.*

22. *Id.* at 275. In 1968, when the overall class size was 50, the faculty set aside eight seats for minorities. In 1973 and 1974, the overall class size was expanded to 100, and the number of seats set aside for minorities was expanded to 16. *Id.*

23. *Id.* at 275-76.

24. *Id.* at 278-79. In reaching its conclusion, the trial court emphasized that minority applicants in the program were rated only against one another, and 16 places out of the class of 100 were reserved exclusively for minorities. *Id.*

25. Applying strict scrutiny, it concluded that the program violated the Equal Protection Clause because it was not the least intrusive means of achieving the school's compelling goals, and that the program did not pass state constitutional scrutiny or the Title VI challenge. A majority of the Court concluded that an entity is prohibited from considering race in programs that use government funds. *Id.* at 279-80. Thus, Davis was ordered to admit Bakke into its medical school. *Id.* at 280-81.

26. *Id.* at 281.

27. *Id.* at 266. A majority of the Court agreed that Davis must admit Bakke. At the Supreme Court level, UC Davis maintained that there was no private right of action under Title VI. *Id.* at 283. However, although the Court reached its decision based on the Equal Protection argument, it still recognized that a private right of action may exist under Title VI. Because the issue was not argued or decided below, the Court chose not to address "this difficult issue." *Id.* at 283. The Court also did not address the issue of whether private plaintiffs under Title VI must exhaust administrative remedies prior to bringing legal action. *Id.* at 283-84.

28. *See generally id.* at 408-22.

In his plurality decision, however, Justice Powell wrote that some race-based remedial programs are permissible, but the Court must ensure that such programs do not violate the rights of Caucasians. Justices Brennan, White, Marshall, and Blackmun agreed with Justice Powell that there are instances where an affirmative action admission program is permissible and would have found that the Davis program did not violate the Equal Protection Clause.[29]

The proper standard of review for the Davis program was of significant concern to the five Justices who considered the program on constitutional grounds. Since the policy included "a classification based on race and ethnic background," it could only stand if it passed the strict scrutiny test.[30] Thus, the policy was permissible if it was "precisely tailored to serve a compelling governmental interest."[31]

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29. *Id.* at 325-26. These four Justices concluded that affirmative action admission policies enacted in response to Title VI are only valid to the extent that they co-exist with the Fourteenth Amendment. The Justices wrote that Title VI permits federally funded entities to enact programs or policies that assist minority groups to gain equal access to programs more easily available to Caucasians. However, Title VI and the Civil Rights Act do not take precedence over the constitutional protection of the Equal Protection Clause and thus such programs or policies are only valid to the extent that they co-exist with the Fourteenth Amendment. *Id.* at 325.

30. *Id.* at 289. The Court has written that "'benign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable" to correct for general discrimination. Metro Broad., Inc. v. Fed. Communications Comm'n., 497 U.S. 547, 610 (1990), *overruled by* Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097 (1995). For an in-depth discussion of benign racial classifications, see Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323 (1990).

The Petitioners argued that the affirmative action admissions policy should not be subject to strict scrutiny since it was challenged by a white male and not by a member of a historically discriminated class of people. Justice Powell disagreed with this theory, recognizing that although the laws of discrimination are founded on a "two-class" theory of Black and White Americans, the Equal Protection Clause assures all persons the protection of equal laws regardless of the status of their particular racial or ethnic group. *Bakke*, 438 U.S. at 294-95. *See also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). In their concurrence, Justices Brennan, White, Marshall and Blackmun, agreed with Justice Powell, but wrote that the affirmative action admission policy did not mandate strict scrutiny but rather such a program is permissible if the court finds "(i) that there has been some form of discrimination against the preferred minority groups by 'society at large,'" and "(ii) that 'there is reason to believe' that the disparate impact sought to be rectified by the program is the 'product' of such discrimination." *Bakke*, 438 U.S. at 297 n.36.

31. *Bakke*, 438 U.S. at 299. Justice Powell also wrote that "in 'order to justify the use of a suspect classification, a State must show that its purpose or interest is both

Justice Powell found a compelling governmental interest in attaining a diverse student body.[32] He wrote that "[A] diverse student body" contributing to a "robust exchange of ideas" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated.[33] However, although the Constitution does not bar admission policies from introducing race as a factor in the selection process, Powell concluded that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[34] The Davis admission policy, which set aside a specific number of seats for students in identified minority groups, unfairly elevated the interests of a victimized group at the expense of other innocent individuals. For this reason, it violated the Equal Protection Clause.[35] Justice Powell's opinion did not preclude schools from considering race as a factor in instances where a program is free from clear racial preference or goals. Race or ethnic background may be

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constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.'" *Id.* at 305 (quoting *In re* Griffiths, 413 U.S. 717, 721-22 (1973)). *See also* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

32. "[A]ttainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education. . . . The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 311-12.

33. *Id.* Justice Powell noted that educational excellence is widely believed to be promoted by a diverse student body. *Id.* at 312.

34. *Id.* at 307. "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.*

Justices Brennan, White, Marshall, and Blackmun agreed with this, stating that "Title VI clearly establishes that where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by federally funded institutions, race conscious action is required to accomplish the remedial objectives of Title VI. *Id.* at 334. [Title VI] does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment." *Id.* at 328.

35. *Id.* at 307-09. Justice Powell upheld the California decision that the special admissions program was unlawful, and that Mr. Bakke was to be admitted to medical school, but reversed the decision enjoining the medical school from considering race in admissions. *Id.* at 320. Chief Justice Burger, and Justices Stewart, Rehnquist, and Stevens, in a concurring opinion, agreed that the policy was unlawful because it unfairly favored one group over another. *Id.* at 325. Justices Brennan, White, Marshall, and Blackmun concurred in the holding and dissented in part, as they did not feel that Allen Bakke should be admitted to the Medical School and that quotas should be maintained. *Id.* at 379. They joined in Parts I and V-C. *Id.* at 328. Along with Justice Powell, Justices Brennan, White, Marshall, and Blackmun upheld the use of race in the admissions process, while Justices Burger, Stevens, Rehnquist, and Stewart considered the issue irrelevant to this case. Ron Simmons, AFFIRMATIVE ACTION: CONFLICT AND CHANGE IN HIGHER EDUCATION AFTER BAKKE 2 (1982).

considered a "plus" in the admissions process.[36] Thus, although Powell invalidated the program, his opinion made it clear that he would not necessarily invalidate all affirmative action admission programs.[37]

Justice Brennan wrote that the Court has never adopted, as a proper meaning of the Equal Protection Clause, the notion that the Constitution must be color-blind. In his opinion, Congress would not have adopted the Civil Rights Act, which encourages the elimination of discrimination, while at the same time "forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations."[38] The Court has held that under certain circumstances, the remedial use of racial criteria is not only permissible, but is required to eradicate constitutional violations.[39]

The *Bakke* court set valuable precedent for challenges to race-based remedial programs. Under *Bakke*, state affirmative action programs or polices could not be upheld unless they were precisely tailored to serve a compelling governmental interest.[40] Furthermore, states could not use goals or quotas to achieve racial diversity. However, according to five Justices, states may consider race as a factor when constructing affirmative action remedial plans.

2. *Post*-Bakke *Challenges*

Post-*Bakke* race-based remedial programs have been set in the employment arena and, are therefore challenged under Title VII of the

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36. *Bakke*, 438 U.S. at 317. For example, assume two applicants, one minority and one non-minority, have the same UGPA and MCAT scores. Under Justice Powell's opinion, an admissions committee can offer admission to the minority applicant before it offers admission to the non-minority applicant since a diversity viewpoint "plus" UGPA and MCAT score is of more value to the school than a non-diversity viewpoint and the same "objective" test scores.

37. *Id.* at 362.

38. *Id.* at 336.

39. *Id. See* North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971) (invalidating a statute forbidding the assignment of students to school on the basis of race because it would hinder the implementation of remedies necessary to accomplish desegregation in the school). Students with pro-civil rights voices are silenced by professors who speak to the contrary and do not call on them. Students need to hear in the classroom about "law in every day terms and fit to human needs" and not about "law insulated from cultural and intellectual diversity, and law focused on cumbersome sieges to the Constitution rather than on personal accountability and responsible legal administration." Dennis Graham Combs, *Preachers of the Bar*, N.Y. TIMES, June 13, 1993, at E19.

40. *Bakke*, 438 U.S. at 325.

Civil Rights Act and the Equal Protection Clause.[41] Through a series of cases considering the validity of race-based preference programs in the employment context, the Court has extended its *Bakke* ruling, that race-based policies are subject to strict scrutiny, to all federal and state race-based remedial programs. Furthermore, it has articulated a clear definition of the "strict scrutiny" test. A race-based program is constitutionally permissible when a court finds that there is a compelling governmental interest in a particular program or policy and that the disputed program or policy is narrowly tailored to achieve the governmental interest.[42]

The Court has found that a need for diversity may support a compelling governmental interest where education is concerned, but has required proof of present effects of past discrimination for challenged race-based programs in the employment arena.[43] A program or policy is narrowly tailored if the court finds that (1) there is a necessity for the relief and alternative remedies are less efficient;[44] (2) the challenged

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41. Since *Bakke*, courts have rarely heard challenges against schools in which a plaintiff alleges that an affirmative action admission policy violated Title VI and the Equal Protection Clause. This is because a plaintiff did not have standing unless he or she could prove actual harm. The Court recently relaxed the standing requirement. In Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993), the Court had to determine whether a Jacksonville program requiring that ten percent of all construction contracts go to Minority Business Enterprises was constitutional. The challenge was brought by the Northeastern Florida Chapter of the Associated General Contractors of America (Northeastern). The City of Jacksonville argued that Northeastern did not have standing, as they could not show actual harm. *Id.* at 664. The Court held that in cases where the government erected a barrier that made it more difficult for members of one group to obtain a benefit, the members of that group did not have to show an injury in fact. *Id.* at 666. Instead, in order to prove standing, the group only had to demonstrate that it had difficulty in obtaining the benefit. *Id.* Such a showing, was enough to demonstrate a prima facie case of denial of equal treatment because of the program. *Id.* at 669.

42. Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2113 (1995). The purpose of ascertaining whether a compelling governmental interest exists is to "smoke out" the illegitimate uses of race by ensuring that the goal is in fact important. Hopwood v. Texas, 861 F. Supp. 551, 569 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S.Ct. 2581 (1996) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 459, 493 (1989)). The narrowly tailored analysis "ensures that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493.

43. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986); *Croson*, 488 U.S. at 488-89.

44. *See, e.g.*, Guardians Ass'n. v. Civil Service Comm'n. of New York, 463 U.S. 582 (1983) (holding that relief is necessary where a federally funded entity predicates professional advancement on tests that yield a variable achievement rate for different races or ethnicities, even if done so unintentionally).

program is flexible and limited in duration;[45] (3) there is a reasonable relationship between the numerical goals and the relevant labor market;[46] and (4) the relief has a minimal impact on the rights of third parties.[47]

Since *Bakke*, the Court has extended application of the strict scrutiny test to all race-based remedial programs. However, it has never said that a race-based remedial program is impermissible. Thus, under these decisions, any race-based remedial program will be upheld if it is narrowly tailored to meet a compelling governmental interest.

III. THE *HOPWOOD* DECISIONS

A. The District Court Decision

In August, 1994, the United States District Court for the Western District of Texas issued its decision in *Hopwood v. Texas* ("*Hopwood I*"). Applying strict scrutiny analysis, the district court, quoting Justice Powell in *Bakke*, found that a compelling governmental interest existed

45. *See, e.g.*, Croson, 480 U.S. at 171. *See generally Croson*, 488 U.S. at 514 (striking down the Minority Business Enterprise legislation since it did not have either a specific termination date or, at a minimum, a provision for reviewing the legislation).

46. *See e.g., id.* at 514. The *Croson* Court found that Richmond's statistical analysis was not narrowly tailored to its goal of increasing minority participation in contracting. *Id.* at 507-08. The legislation required primary contractors who were awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to Minority Business Enterprises. *Id.* at 477-78. The Richmond legislature chose the numerical goal of 30% based on the percentage of minorities in the general population. *Id.* at 499. The Court found that since the City's goal of 30% minority sub-contractors reflected the general population and not the relevant population of minority contractors in the area, it was not narrowly tailored. *Id.* at 507.

47. United States v. Paradise, 480 U.S. 149, 171 (1987). *Bakke* struck down the Davis admission policy because it impermissibly granted admissions to minority applicants who would not otherwise have the opportunity to enter medical school over white males with higher test scores. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319-21 (1978). Davis' separate admissions committees, which were created to increase the number of minority physicians in the country, led to the medical school's unequal treatment of applicants. *Id.* at 310-11. In contrast, *Paradise* held that the one black to one white hiring requirement did not pose an unacceptable burden on white males because the program did not absolutely bar any non-minority individual's advancement. It merely 'postponed' the white males' advancement. *Paradise*, 480 U.S. at 182-83. The Court noted that under the program 50% of those promoted were non-minority, there were no layoffs, and the basic requirement that black troopers must be qualified still remain. The Court concluded that these provisions safeguarded the program against providing unequal treatment for individuals. *Id.*

in the school's 1992 admissions policy since the school's efforts were limited to "seeking the educational benefits that flow from having a diverse student body and to addressing the present effects of past discriminatory practices."[48] In other words, the compelling governmental interest was supported by both the need to diversify the school's entering class and the present effects of past discrimination. The court concluded that without the diversity admission policy, UT would not have achieved a diverse student body.[49] Recent Office of Civil Rights findings coupled with the State's "long history of discriminating against [B]lacks and Mexican Americans," and UT's history of racial discrimination, were sufficient evidence to establish that the remedial purpose of UT's diversity admission policy constituted a compelling governmental interest.[50]

Although the court concluded that UT had a compelling interest in using a diversity admission policy, the policy failed to pass constitutional muster because it was not narrowly tailored to meet the goals of diversity and reversing past discrimination. The court found that the diversity admission policy met the first three prongs of the narrowly tailored test.[51] First, UT sufficiently demonstrated that the race-based admissions policy was necessary since it was impossible to achieve diversity without an affirmative action admission policy.[52] Second, the program was temporary in nature because the objective of UT was to narrow the gap progressively so that at some point in time UT would no longer need a diversity admission policy.[53] Third, UT's goals for

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48. *Hopwood*, 861 F. Supp. 551, 570 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S.Ct. 2581 (1996) (citing *Bakke*, 438 U.S. at 313 ("environment fostering robust exchange of ideas makes goal of diversity 'of paramount importance in the fulfillment of [a university's] mission'"); Podberesky v. Kirwan, 956 F.2d. 52, 57 (4th Cir. 1992) ("race- related remedy may be used in an attempt to remedy effects of past discrimination").

49. *Hopwood*, 861 F. Supp. at 572. If UT had considered minorities under the 1992 general admissions policy, without regard to race or ethnicity, the admissions committee would have offered seats to 936 students. *Id.* at 563 n.32. Nine of these students were identified as African American and eighteen students identified themselves as Mexican American. *Id.* at 571.

50. *Id.* at 572.

51. *Id.* at 569-78.

52. *Id.* at 573. The court also noted that the ultimate effect of abandoning the diversity admission policy would be to redirect minority students to the historically separate state law school at Texas Southern University, thereby segregating the law school again. *Id.*

53. *Id.* at 575. The court noted that the admissions committee regularly meets to review and to readjust the diversity admission policy to meet the current needs of the school of law with regard to diversity. *Id.*

minority enrollment as a percent of total enrollment bore a reasonable relationship to the percent of minority college graduates in Texas.[54]

Ultimately, the court held that the diversity admission policy violated the Fourteenth Amendment because it failed to afford each individual applicant a comparison with the entire pool of applicants.[55] The court recognized the laudable and imperative goal of diversity in the education system. Moreover, it agreed with Justice Powell that race or ethnicity could be considered a "plus" factor in a school's consideration of a particular applicant.[56] The court noted that when weighing non-traditional factors in the admissions decision, it is permissible for an admissions committee to choose an applicant with a lower LSAT and/or UGPA. Such an applicant may be preferable based on qualifications that include non-objective factors.[57] Thus, the court ruled in a manner consistent with *Bakke*, holding that race can be a factor in considering a candidate's application for admission so long as a school does not use race to meet goals or to set quotas.

The court permitted the law school to reconstitute its admissions policy, allowing it to consider race as a factor in admissions decisions, but requiring the school to review minority and non-minority candidates as a group.[58] It awarded each plaintiff $1.00 in damages and granted plaintiffs the right to reapply to UT, without paying the requisite filing

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54. *Id.*

55. *Id.* at 579.

56. *Id.* at 577 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)). The court also recognized other schools with seemingly similar affirmative action admission policies.

57. *Id.* Justice Powell noted that:

> "[t]he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant."

Id.

58. Weeks before the trial began, UT modified its admissions plan. As of September 1, 1994, the admissions committee has consisted of one full time faculty member and the assistant dean of admissions. Race and ethnicity have continued to be factors, but the law school has removed its "presumptively deny" and "discretionary" categories and has reviewed all candidates that have not automatically been admitted based on their TI number. Janet Elliot, *UT Responds to Suit with Policy Changes*, TEXAS LAWYER, May 23, 1994 at 10.

fees.[59] Following this decision, UT appealed to the United States Court of Appeals for the Fifth Circuit.[60]

B. The Fifth Circuit Decision

A three member panel[61] for the Fifth Circuit decided *Hopwood v. Texas* (*Hopwood II*) on March 18, 1996.[62] The court overturned the lower court decision permitting UT to reconstitute its 1992 admissions policy, and struck down the policy as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[63] A majority of the panel broadly ruled that UT may not use race as a factor in law school admissions, and suggested that every school in its jurisdiction is prohibited from doing the same.[64] The panel also dismissed an appeal requesting intervention in the case by two black student groups for lack of jurisdiction.[65]

Judges Smith and DeMoss[66] rejected Justice Powell's holding in *Bakke*[67] that there is a compelling governmental interest in the attainment of a diverse student body. The judges wrote that Justice Powell's

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59. *Hopwood*, 861 F. Supp. at 583.

60. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S.Ct. 2581 (1996). The appeal for case number 94-50664 was filed on October 3, 1994, by Cheryl Hopwood. The appeal for case number 94-50569 was filed on August 25, 1994, by the Thurgood Marshall Legal Society and the Black Pre-Law Association.

61. The panel's members were Judges Harold R. DeMoss, Jr., Jerry E. Smith, and Jacques L. Weiner, Jr. Judge Smith was a Reagan appointee. Both Judges DeMoss and Weiner were appointed by President Bush. Debbie Graves, *Lawyer Says 4 Whites Wouldn't Make '92 Cut; As 'Marginal' Applicants, UT Says Affirmative Action Didn't Hurt Plaintiffs*, AUSTIN AM. STATESMAN, Aug. 9, 1995, at A1.

62. 78 F.3d 932.

63. *Id.* at 934-35.

64. *Id.* at 944-46, 950.

65. *Id.* at 959. The proposed interveners are two black student groups from the University of Texas at Austin and its law school. The groups sought to intervene because they felt that UT would not effectively protect their interests in continuing racial preferences at the school. The district court denied their motion to intervene on the ground that the two associations and the law school did indeed have the same objective: to maintain the status quo. *Id.* At the close of the trial, but before judgment, the associations sought to intervene, raising two new defenses that were not represented during the course of the trial: 1) that the TI was an unconstitutional basis for admissions under Title VI, and 2) that affirmative action policies at the university were constitutionally required. *Id.* at 960. The associations moved to reopen the record as interveners and introduce evidence supporting their new defenses. The district court, who reviewed the associations' claims de novo and on the merits, denied this motion. *Id.* at 960-61. When a prior panel discusses an issue on the merits, a later panel cannot arrive at an adverse decision based on the preclusive principle of the "law of the case." *Id.* at 960. Consequently, because the law of the case doctrine prevents merit review, the Fifth Circuit affirmed the denial of the intervention motion for lack of jurisdiction. *Id.* at 961.

66. Judges Harold R. DeMoss, Jr. and Jerry E. Smith.

67. 438 U.S. 265 (1978).

opinion in *Bakke* was not binding since it was not the general consensus of the Court.[68] In order to establish a compelling governmental interest, the judges looked to the Supreme Court's definition of a compelling governmental interest in Title VII employment discrimination cases. The judges would only find a compelling governmental interest if there were present effects of past discrimination.[69]

As evidence of the present effects of past discrimination, the lower court relied on the Office of Civil Rights findings of discrimination throughout the law school and the entire UT system. In contrast, the Fifth Circuit majority defined the proper unit for analysis of the effects of discrimination as the law school.[70] At UT, the judges held, there were no recognizable present effects of the law school's past discrimination.[71] The majority concluded that since UT could not show prior discrimination by the law school, it could not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body.

In a concurring opinion, Judge Weiner agreed that the 1992 UT admissions policy did not pass strict scrutiny. The UT policy was not narrowly tailored to achieve diversity since it set one TI range for blacks, a different range for Mexican Americans, and a different range for other races.[72] However, he disagreed with the majority that diversity can never support a compelling governmental interest.[73] He wrote that Supreme Court precedent supports the proposition that achieving diversity in a public graduate or professional school could be

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68. *Hopwood*, 78 F.3d at 944. Similarly, in *Bakke*, the concurring opinion of Justices Brennan, White, Marshall and Blackmun rejected Justice Powell's position that attaining diversity in a student body was a compelling governmental interest. In *Bakke*, the word "diversity" is mentioned nowhere except in Justice Powell's opinion. *Id.* Rather, Powell's four brethren noted that the "use of race to achieve an integrated student body" is constitutional if "necessitated by the lingering effects of past discrimination." *Bakke*, 438 U.S. at 326 n.1. Preferential treatment of racial minorities is permissible, they held, "as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment." *Id.* at 328.

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

70. *Id.*

71. *Id.* at 951. The law school argued that the court should look to "Texas's well-documented history of discrimination in education." *Id.* at 948. The majority, however was unwilling to look at such a broad field.

72. *Id.* at 936.

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

a compelling governmental interest.[74] Ultimately, Judge Weiner wrote that the definition and application of a compelling governmental interest where education is concerned, should be left to constitutional interpretation, and he perceived "no 'compelling' reason to rush in where the Supreme Court fears—or at least declines—to tread."[75]

C. *The Supreme Court Decision*

On July 1, 1996, the Supreme Court denied the state's petition for certiorari,[76] thereby letting the Fifth Circuit decision stand. Although there was no opinion accompanying the decision,[77] Justice Ginsberg wrote a brief concurrence, joined by Justice Souter.[78] Justice Ginsberg denied certiorari because UT had already changed its 1992 admissions policy to reflect the district court decision, making the issue moot.[79] However, Justice Ginsberg suggested that there would be a time in the future when the Court would address "the important question raised in this opinion."[80]

IV. CLARIFICATION AND IMPACT OF THE *HOPWOOD* DECISIONS

A. *The Conflicting Definitions of Diversity*

Hopwood I and *Hopwood II* illustrate the different viewpoints of affirmative action scholars. *Hopwood I* stands for the reaffirmation of Justice Powell's opinion in *Bakke*. Although the *Hopwood I* court ruled out a dual admission policy that "insulated applicants" from review against each other,[81] it recognized the value the Supreme Court placed on diversity and its pronouncement that the need for diversity in education may serve as a compelling governmental interest for the purpose of satisfying the strict scrutiny test.

In contrast, the *Hopwood II* court ruling means that a need for diversity may never support a compelling governmental interest for purposes of satisfying the strict scrutiny test. Under *Hopwood II*,

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74. *Id.* at 964.
75. *Id.* at 965.
76. Texas v. Hopwood, 116 S.Ct 2581 (1996).
77. *Id.* (writing, "[t]he petition for a writ of certiorari is denied.").
78. *Id.*
79. *Id.*
80. *Id.* (stating, "we must await a final judgement on a program genuinely in controversy before addressing the important question raised in this petition.").
81. *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978). With the exception of separately reviewing minority candidates, the admissions committees treated applicants similarly.

race-based programs in the educational setting are subject to the restraints the Court has placed on employment race-based remedial programs. Thus, in the Fifth Circuit, "any consideration of race or ethnicity by [a state school] for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."[82]

Justice Ginsberg's concurrence in the denial of certiori suggests that the definition of a compelling governmental interest remains open for review. The *Hopwood II* decision creates a split in the circuits where education is concerned. The *Hopwood I* decision follows the seemingly applicable precedent set in *Bakke* and that diversity supports a compelling governmental interest in Title VI cases. In contrast, *Hopwood II* held educational race-based policies to the same standard as employment-related remedial programs.

The *Hopwood II* majority was correct that as a general rule, the Supreme Court has been unwilling to permit race-based remedial programs unless the governmental entity can demonstrate present effects of past discrimination.[83] However, it failed to recognize that the Court has carved out an exception where education is concerned. Beginning with *Bakke*, the Court has not required evidence of present effects of past discrimination in upholding educational race-based policies. This is because educational diversity equally benefits all students, regardless of race.[84] Nor has the Court held that Title VI education discrimination cases are subject to the same analysis and requirements as Title VII employment discrimination cases.[85]

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

83. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 488-89 (1989).

84. United States v. Fordice, 505 U.S. 717 (1992); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Hopwood v. Texas, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S.Ct. 2581 (1996). Under the current law, the goal of diversity is sufficient by itself to satisfy a compelling governmental interest. *Hopwood*, 861 F. Supp. at 571. *See* Shurberg Broad. of Hartford, Inc. v. Fed. Communications Comm'n., 876 F.2d 902, 941 (D.C. Cir. 1989), *cert. granted*, Astroline Communications Co. Ltd. Partnership v. Shurberg Broad. of Hartford, Inc., 493 U.S. 1018 (1990), *rev'd*, Metro Broad., Inc. v. Fed. Communications Comm'n., 497 U.S. 547 (1990).

85. *But see* Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2112 (1995) (reversing Metro Broad., Inc. v. Fed. Communications Comm'n., 497 U.S. 547 (1990) (by extending the strict scrutiny test to federal programs)).

In *Hopwood II* the majority concluded that Justice Powell's opinion in *Bakke* was not binding since his opinion was merely a "swing vote" in the Court's plurality decision.[86] In fact, Powell's decision was not a "swing vote" since four other Justices would have gone further than Powell in permitting the use of race for remedial or diversity purposes. In *Bakke*, Justice Brennan, writing for Justices White, Marshall, and Blackmun, wrote that "UC Davis' goals of reversing minority underrepresentation in the medical profession justifies the school's remedial use of race. Thus, the majority reversed the judgment below since it prohibited universities from considering race as a factor in their admissions process."[87] Thus, five Justices endorsed the need for diversity to support a compelling governmental interest, not one Justice, as the Fifth Circuit panel incorrectly concluded.

In *Bakke*, Justice Powell wrote most strongly about the benefits of diversity in education. He noted that these benefits flow two ways, minority students are brought into the classroom while non-minority students benefit from hearing the voices of others.[88] Thus, he wrote that diversity is an essential element of education in undergraduate school and in medical school. Quoting *Sweatt v. Painter*,[89] Justice Powell wrote that legal learning is ineffective "in isolation from the individuals and institutions with which the law interacts."[90]

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

87. *See generally Bakke*, 438 U.S. at 257-62.

88. *Id.* at 313. Justice Powell wrote that "[a]n otherwise qualified medical student with a particular background . . . bring[s] to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body." *Id.* at 314. Diversity better equips graduates "to render with understanding their vital service to humanity." *Id.* An environment fostering robust exchange of ideas makes the goal of diversity of "paramount importance in the fulfillment of [a university's] mission." *Id.* at 313. Justice Powell further wrote that "whether it be ethnic, geographic, culturally advantaged or disadvantaged . . . [students] may bring to a professional school . . . outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Id.* at 314.

89. 339 U.S. 629 (1950).

90. *Bakke*, 438 U.S. at 314 (quoting *Sweatt*, 339 U.S. at 634). Since *Bakke*, various Justices have echoed Justice Powell's opinion. In Metro Broad., Inc. v. Fed. Communications Comm'n, the Court considered the validity of FCC policies granting preferential treatment based on race, Justice Brennan, writing for the majority, wrote that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal.'" *Metro*, 497 U.S. at 568 (quoting *Bakke*, 438 U.S. at 311-13). In Wygant v. Jacksonville Bd. of Educ., the Court reversed a decision upholding a bargaining agreement that limited the number of minority teachers the Board of Education would lay-off in order to preserve the ratio of minority to non-minority faculty. Four Justices recognized the compelling governmental interest in diversifying education. Justice O'Connor in her concurrence wrote that the "state interest in the promotion of racial diversity [in education] has been found sufficiently 'compelling.'" Wygant v. Jacksonville Bd. of Educ., 476 U.S. 267, 286 (1986). Justices Marshall,

The *Hopwood II* majority wrote a seemingly disingenuous opinion. At the outset, the manner in which the court characterized the facts suggest it had its own social or political agenda. At times, the majority used language reminiscent of prohibited civil rights language, for example, it described the admissions waiting list as "segregated."[91] The majority characterized Justice Powell's opinion as both argumentative and speculative. The majority also was sharply critical of the lower court decision. With reference to damages, the majority called the plaintiffs' victory "pyrrhic at best".[92] The majority further criticized the lower court for finding a compelling governmental interest in UT's 1992 admissions policy, and rejected the notion that diversity in education is sufficient to support a compelling governmental interest.

Brennan, and Blackmun in their dissent agreed with Justice O'Connor that the state has a compelling governmental interest in diversifying education. *Id.* at 295, 306.

When considering whether there is a compelling governmental interest in enacting a race-based preference policy, the Court evaluates the intrusion of a particular policy on innocent individuals. Although in an effort to eradicate racial discrimination the Court may uphold policies whereby "innocent persons may be called upon to bear some of the burden," any imposition must be strongly limited. *Id.* at 281. Thus in *Wygant*, a majority of the Court held that a preferential lay-off policy imposed too great a burden on innocent third parties since it translated into loss of an existing job for some innocent third parties. *Id.* at 282-83. Chief Justice Burger, Justices Powell, Rehnquist, O'Connor and White reversed the decision of the sixth circuit. Four Justices suggested that race-based hiring goals might be more acceptable than a lay-off program since such a policy only resulted in denial of future employment opportunity and was therefore not as intrusive as the loss of an existing job. *Id.* at 283.

91. *Hopwood*, 78 F.3d at 938. "Such separate lists apparently helped the law school maintain a pool of potentially acceptable but marginal minority candidates." *Id.* The court noted that UT had a policy of reviewing minority applicants in the discretionary zone "differently from whites," although each reviewing process was identical. *Id.* at 937.

92. *Id.* at 938. Powell argued that diversity of minority viewpoints furthering academic freedom is an interest under the constitution. *Id.* at 943. "Justice Powell speculated that a program in which race or ethnic background may be deemed a 'plus' in a particular applicant's file . . . [might] pass [constitutional] muster." *Id.* (quoting *Bakke*, 438 U.S. at 317). Justice Powell argued that academic freedom, though not a constitutional right, has "'long . . . been viewed as a special concern of the First Amendment.'" *Id.* (quoting *Bakke*, 438 U.S. at 312). "[Justice Powell] intimated that the Constitution would allow schools to continue to use race in a wide-ranging manner." *Id.* at 944. "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case." *Id.* "[T]here has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination." *Id.* at 945.

The Fifth Circuit decision creates a clear split in the circuits. According to majority, race can no longer be considered a factor in the admissions process if the admissions policy is designed to promote diversity. However, in truth, the *Hopwood II* majority is merely a decision of two justices. It is reasonable to believe that this small panel could not effectively overrule 20 years of precedent.

B. A Brief Glimpse into the Future

Affirmative action proponents lament the judiciary's apparent trend toward eliminating affirmative action programs and policies.[93] They disagree with Justice O'Connor's pronouncement in her majority opinion[94] in the 1995 decision of *Adarand Constructors Inc. v. Pena*,[95] that the Court's affirmative action analysis may be "'strict in theory, but [it is not] fatal in fact.'"[96] Instead they read the Fifth Circuit's *Hopwood II* decision as another step toward curtailment of affirmative action polices and programs.[97]

Justice Ginsberg's concurrence in the denial of certiorari suggests that the definition of a compelling governmental interest in educational race-

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93. *See* Joan Biskupic, *Court Toughens Standards for Federal Affirmative Action; Court Toughens U.S. Standard for Affirmative Action*, WASHINGTON POST, June 13, 1995, at A1.

94. Justice O'Connor delivered the majority opinion and was joined by Justice Kennedy. Justice Scalia and Thomas filed opinions concurring in part and concurring in the judgement. Justice Stevens filed a dissenting opinion in which Justice Ginsberg joined. Justice Souter filed a dissenting opinion in which Justices Ginsberg and Breyer joined. Justice Ginsberg filed a dissenting opinion in which Justice Breyer joined.

95. 115 S.Ct. 2097 (1995). *Adarand* considered the constitutionality of a federal statute that granted financial incentives to prime contractors who awarded subcontracts to companies controlled by socially and economically disadvantaged individuals. *Id.* at 2102. Justice O'Connor, writing for the majority, considered the appropriate level of review for assessing whether the Federal program was permissible. She noted that prior to *Adarand*, "benign" federal racial classifications need only satisfy intermediate scrutiny. *See Metro*, 497 U.S. at 564-65 ("benign" federal racial classifications are permissible if they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives). This was in sharp contrast to the Court's requirement that the Equal Protection Clause demands strict scrutiny of "benign" State or local race-based preference policies. A majority of the *Adarand* Court held that the same more stringent standard should apply to all race-based preference policies regardless of who is implementing the policy, since the strict scrutiny test "ensure[s] that the *personal* right to equal protection of the laws has not been infringed." *Adarand*, 115 S. Ct. at 2113.

96. *Id.* at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 519 (1980) (Marshall, J., concurring). *See also supra* note 95 and accompanying text.

97. *See* Brittain, *supra* note 8; Linda Seebach, *Race-Based Programs are on Their Way Out*, ORANGE COUNTY REGISTER, Sept. 3, 1996, at B6; David Jackson, *Justices Let Admissions Ruling Stand; Effect on Affirmative Action Debated*, DALLAS MORNING NEWS, July 2, 1996 at A1; Aaron Epstein, *Schools in 3 States Can't Consider Race*, POST & COURIER, July 2, 1996 at A3.

based programs remains open to Supreme Court consideration. When the Court deems the issue of defining a compelling governmental interest in Title VI cases as ripe, it could choose to overrule Justice Powell's *Bakke* opinion. In that event, a need for diversity could no longer support a compelling governmental interest in Title VI race-based remedial programs. Instead, an educational institution defending its affirmative action admissions policy would need to present proof of present effects of past discrimination in order to maintain such a program.

Requiring proof of present effects of past discrimination in Title VI cases would overrule *Bakke* and would vitiate the reasoning behind the distinction between a compelling governmental interest for purposes of Title VI education cases, and Title VII employment cases. Justice Powell wrote of the benefit of diversity to all individuals in the classroom regardless of race or ethnicity. Both minorities and non-minorities enhance their educational experience with exposure to differing viewpoints. In contrast, race-based remedial programs in the employment sector more directly benefit the minority group they are designed to assist. When eradicating discrimination in the employment sector, "innocent persons may be called upon to bear some of the burden of the remedy."[98]

Because of the burden non-minorities feel in the work place when race-based affirmative action admission policies are employed, the Court held that there must be a clear presentation of the present effects of past discrimination.[99] The Court has held that the need for role models for future minorities is insufficient to support a compelling governmental interest where there is no benefit to non-minorities.[100] The support for requiring proof of present effects of discrimination in the workplace is inconsistent with extending this burdensome requirement to Title VI programs if one is to accept Justice Powell's opinion of the value of diversity in the classroom.

The Court's decision to deny certiorari in *Hopwood* is troublesome since it lets the *Hopwood II* decision stand in the Fifth Circuit. However, Justice Ginsberg's dissent should be read to mean that the Court did not endorse the Fifth Circuit decision, but rather refused to take a case considering the issue was moot. Given the Court's

98. Wygant v. Jacksonville Bd. of Educ., 476 U.S. 267, 281 (1986).
99. United States v. Paradise, 480 U.S. 149, 165 (1987).
100. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497-98 (1989).

reluctance to overrule itself, the latter may be the better view and one could hope that should a justiciable case come before the Court in the future, it will serve as a vehicle to reaffirm Justice Powell's decision in *Bakke*.

V. CONCLUSION

The *Hopwood* decisions leave educational institutions uncertain as to the appropriate measures they may take to ensure diversity in the classroom. The Fifth Circuit prohibits schools from creating race-based admissions policies, and instead forces schools to create admissions policies based primarily on past academic performance. Such narrow requirements will yield an admission pool similar to that of the pre-Civil Rights Act era that initially prompted adoption of race-based remedial programs.

The split created by the Fifth Circuit did not prompt the Supreme Court to clarify whether the Circuit's decision to adopt a Title VII analysis to Title VI cases is legally sound. Instead, the Court has written that it will wait to respond to this issue until a justiciable case comes before it. Until that time, the rest of the country must wait too.