Pace Law Review

Volume 17
Issue 1 *Fall/Winter 1996*

Article 2

September 1996

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Introduction

The showdown that could have decided the fate of affirmative action in higher education has been averted—but only temporarily. The United States Supreme Court's denial of certiorari in *Texas v. Hopwood*[1] renders the legal status of racial admissions preferences in higher education clouded and the meaning behind the landmark decision in *Regents of the University of California v. Bakke*[2] uncertain. By electing not to review the Fifth Circuit Court of Appeals' controversial decision in *Hopwood v. Texas*,[3] the Court has also left institutions of higher education, in the Fifth Circuit at least, without clear direction about the role of race in admissions programs. The only certainty resulting from the legal battle over the University of Texas School of Law's (UT) admissions program is that the continuing debate over affirmative action in admissions to colleges and professional schools has been given new momentum.

Remedying the legacy of racism that pervades our society is a moral imperative that extends to institutions of higher education. Developing a legally consistent and constitutionally sound model for dealing with the immensely complex challenge of creating equality of opportunity has proven to be a daunting task. The juxtaposition of law and social policy as they relate to racial preferences creates a "socio-legal" oxymoron. On the one hand,

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1. 116 S. Ct. 2581 (1996).
2. 438 U.S. 265 (1978).
3. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 258 (1996).

the law has demanded the elimination of the vestiges of over two centuries of legally sanctioned racial discrimination. At the same time, however, the law has been moving toward the postulate that color-blind decisionmaking is the mandated model.[4] To accommodate these conflicting goals, courts have sanctioned the use of race as a consideration in admissions programs but have historically decorated the process with vagaries that seek to comport with a "compelling governmental interest." These vagaries include: remedying present effects of past discrimination and promoting of "diversity" within the student body. Not surprisingly, the Court has struggled to reconcile the fundamental need for affirmative action with the illegality of absolute preferences.

The decision in *Hopwood* highlights the paucity of instructive legal doctrine offered to institutions trying to create a level playing field for groups that have been denied opportunity by historical, sociological and economic conditions. Ironically, the Fifth Circuit's decision may provide an outline of the legal contours by which inclusive affirmative action programs should be guided.

> While the use of race per se is proscribed, state supported schools may reasonably consider a host of factors—some of which may have some correlation with race in making admissions decisions. The federal courts have no warrant to intrude on those executive and legislative judgments unless the distinctions intrude on specific provisions of federal law or the Constitution.[5]

The fact that an admissions policy has a disproportionate effect or benefit for certain groups does not offend the United States Constitution. In order to accommodate the legal admonition to integrate institutions of higher education, while at the same time remaining neutral in the decisionmaking process, colleges and universities should pursue race neutral alternatives in admissions programs that attack the very structure of societal racism. In the process, the legal ambiguities highlighted by *Hopwood* may be best avoided.

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4. "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

5. *Hopwood*, 78 F.3d at 946.

Hopwood

The most recent legal battle over affirmative action began in 1992 when UT rejected four white applicants, who subsequently challenged the UT admissions policy as a violation of the Fourteenth Amendment's Equal Protection Clause.[6] The admissions program used a combination of the applicants' LSAT scores and GPA's, called the Texas Index (TI), to make initial admissions decisions.[7] The law school used more favorable scores to admit and deny African-Americans and Mexican-Americans than the scores used for the rest of the applicant pool.[8]

The admissions system resembled that of the medical school at the University of California which was deemed unconstitutional in *Bakke*.[9] However, the medical school used segregated committees for all the applicants, as opposed to UT, which used segregated committees only for discretionary students. The two programs also diverged in that the medical school program admitted students recommended by the special admissions program[10] until it filled a prescribed quota.[11] The stated purpose of UT's program was to meet a "goal" of minority representation,[12] but without a prescribed quota.

The Supreme Court was split four-to-four in the *Bakke* case, with Justice Powell holding the swing vote.[13] In a concur-

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6. U.S. CONST. amend. XIV, § 5. *See Hopwood*, 78 F.3d at 938.

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

8. *Id.* at 936. In March of 1992, the white applicants needed a TI score of 199 to be presumptively admitted. *Id.* at 936-37. African-American and Mexican-American students needed only a score of 189. *Id.* at 937. The presumptive denial score was 192 for whites and 179 for African-Americans and Mexican-Americans. *Id.* at 936.

9. *Bakke*, 438 U.S. 266-67.

10. *Id.* at 265. Candidates were placed in the special admissions program if they indicated on their application form that they wanted to be considered as "economically and/or educationally disadvantaged" and were members of a minority group. *Id.* The special candidates did not have to meet the grade point cutoff and were not ranked against candidates in the general admissions process. *Id.*

11. *Id.*

12. *Hopwood*, 78 F.3d at 937. The law school's goal was a class consisting of 10% Mexican-American and 5% African-American. *Id.* These percentages were roughly comparable to the percentages of Mexican-Americans and blacks graduating from Texas colleges. *Id.*

13. *Bakke*, 438 U.S. 265. *See Hopwood*, 78 F.3d 932, 942 (noting that Justice Powell was the swing vote in *Bakke*).

ring opinion, Justice Powell applied strict scrutiny and inquired whether using race as a factor in admissions was necessary to accomplish a substantial governmental interest.[14] Justice Powell found remedying discrimination and creating a diverse student body qualified as constitutionally permissible goals for an institution of higher education.[15] Although Justice Powell held that the medical school's program did not meet its burden of proving a substantial governmental interest,[16] he did pronounce that "race or ethnic background may be deemed a 'plus' in a particular applicant's file."[17]

In *Hopwood v. Texas*,[18] the district court interpreted Justice Powell's decision to mean that "[t]he constitutional infirmity of the 1992 law school admissions procedure . . . is not that it gives preferential treatment on the basis of race but that it fails to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race."[19] Although the district court found the 1992 admissions system violated the Equal Protection Clause of the United States Constitution, the Court did not issue a prospective injunction against UT because the law school had already abandoned the system.[20] The new admissions system did not use disparate presumptive admission and denial scores or separate admissions subcommittees.[21] However, the new plan still allowed for the consideration of race in attaining the law school's goal of minority representation.[22]

On appeal, a three judge panel once again found the 1992 admissions program unconstitutional.[23] However, Judge Smith's majority opinion went further, attacking any consideration of race in new law school admissions programs.[24] The Court held that diversity was an impermissible justification for

14. *Bakke,* 438 U.S. at 305-06 (Powell, J., concurring).
15. *Id.* at 311-12.
16. *Id.* at 319.
17. *Id.* at 317.
18. 861 F. Supp. 551 (W.D. Tex. 1994), *aff'd* 78 F.3d 932 (5th Cir.), *cert. denied* 116 S. Ct. 258 (1996).
19. *Id.* at 579.
20. *Id.* at 582.
21. *Hopwood*, 78 F.3d at 958.
22. *Id.*
23. *Id.* at 932.
24. *Id.* at 955.

considering race in admissions programs,[25] and that remedying the "present effects of past discrimination" by the Texas educational system was not a compelling objective.[26] Racial considerations could only be used to correct discrimination for which the law school itself was responsible.[27]

According to an opinion by Justice Ginsburg, that was joined by Justice Souter, the United States Supreme Court declined to hear Texas' appeal because the 1992 admissions program was no longer in use, and therefore no case or controversy was before the Court.[28] Justice Ginsburg noted that the Supreme Court is confined to ruling on actual judgments and not on the lower courts' reasoning.[29] Justice Ginsburg wrote, "we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."[30]

Although the Supreme Court's denial of certiorari was in no way an endorsement of the Fifth Circuit's opinion, it does leave that decision in place for the states of Louisiana, Mississippi, and Texas. The inadequacies and ambiguities festering in the current state of affirmative action jurisprudence remain unresolved. Depending on what qualifies as a remedial purpose and whether diversity is a compelling objective, any consideration of race in higher education admissions procedures may be unconstitutional. Affirmative action jurisprudence is unquestionably in a state of flux. Rather than constantly revising affirmative action doctrine to restrict the circumstances under which race may be considered, universities should experiment with affirmative action programs that do not rely upon immutable characteristics in decisionmaking. Empirical data concerning the individual candidate's background, education, economic circumstances, history and personal skills should be considered.

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25. *Id.* at 941-48.
26. *Id.* at 948-52.
27. *Id.*
28. *Hopwood*, 116 S. Ct. 2581.
29. *Id.*
30. *Id.*

Diversity

Beginning with the rejection of the doctrine of "separate but equal" in *Brown v. Board of Education*,[31] the courts have tried to carve out the permissible boundaries for the use of race in the allocation of benefits. The United States Supreme Court has been increasingly restrictive in permitting the use of racial criteria in affirmative action programs by adopting a stricter view of the circumstances under which a program is narrowly tailored to meet a compelling government interest.

Historically, the Court has wrestled with the function of race in decisionmaking, offering as a justification both the sociological benefits of diversity and our societal obligation to remedy discrimination. Constitutional jurisprudence has acknowledged, albeit tacitly, that the remedy to the malady of discrimination and segregation is to use racial homeopathy.

The Supreme Court first recognized the importance of diversity in quality education when it declared that Texas' system of segregated law schools was unconstitutional.[32] Although the University of California's quota system was not deemed necessary to promote a diverse student body, Justice Powell ruled in *Bakke* that it "clearly is a constitutionally permissible goal."[33]

> It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that encompasses a compelling state interest furthers a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.[34]

Justice Powell stressed the importance of treating each applicant as an individual in the admissions process, but also noted that race could be used as a "plus" in an applicant's file in the interest of diversity.[35]

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31. 347 U.S. 483 (1954).

32. *See* Sweatt v. Painter, 339 U.S. 629, 634 (1950) (Justice Vinson declared, "[f]ew students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.").

33. *Bakke*, 438 U.S. at 311-12.

34. *Id.* at 315.

35. *Id.* at 317.

While Justice Powell sought to constrict the boundaries for the consideration of race,[36] some commentators have suggested that universities have used the ambiguities in Justice Powell's decision to expand the function of race in admissions.[37] The similarities between UT's 1992 admissions program and the admissions program struck down in *Bakke* add support to the proposition that universities are practicing exactly what Justice Powell forbade in *Bakke*. Critics also suggest that universities are acting under the guise of the diversity rationale to pursue objectives that Powell did not have in mind.[38] Although the legitimacy of these criticisms remains controversial, it is clear that the diversity concept is still ambiguous and is subject to widely varying interpretations and abuses.

The Supreme Court's ambiguous precedents covering affirmative action do not consistently support the position that race-based affirmative action should be limited to specific remedial actions. In *City of Richmond v. J.A. Croson Co.*,[39] the Court warned that classification based on race should be strictly reserved for remedial settings.[40] One year later, the Court in *Metro Broadcasting, Inc. v. F.C.C.*[41] upheld the interest of obtaining diversity of viewpoints in broadcasting as an "important" interest under the more lax and now defunct intermediate scrutiny standard.[42] However, the Court overruled some, if not all, of *Metro Broadcasting* in *Adarand Construction, Inc. v. Pena*,[43] leaving the status of the diversity rationale clouded once

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36. *Id.* at 318.

37. *See, e.g.*, CARL COHEN, RACE, LIES AND "HOPWOOD" COMMENTARY 39 (1996).

38. Paul Carrington wrote:

> By borrowing Justice Powell's term for appropriate race consciousness, the [diversity] movement is, not to mince words, a fraud. What Justice Powell approved was the uncoerced race-conscious selection of law students and teachers in the exercise of professional educational judgment to enhance the quality of the intellectual life of institutions of higher learning. What the Diversity ! movement seeks is a payment made by educational institutions, at the expense of individuals seeking admission or employment, to compensate members of groups said to be disadvantaged by historic injustices to their ancestors.

Paul D. Carrington, *Diversity !*, 1992 UTAH L. REV. 1105, 1106 (1992).

39. 488 U.S. 469 (1989).

40. *Id.* at 470.

41. 497 U.S. 547 (1990).

42. *Id.* at 566.

43. 115 S. Ct. 2097 (1995).

again. While not addressing the diversity justification, Justice O'Connor's opinion for the majority in *Adarand* attempted to leave a little room for race-based programs.[44] Specifically, Justice O'Connor noted that the correction of the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country" was an example of a permissible state interest.[45] However, Justice O'Connor's concurrence in *Wygant v. Jackson Board of Education*[46] recognized the legitimacy of the diversity rationale in the context of higher education, while noting that "its precise contours are uncertain."[47]

Despite the subtle inference that diversity may be a permissible rationale upon which to justify the use of race-based considerations, the Supreme Court has voiced a growing parochialism relative to the use of race in decisionmaking. Justice Douglas wrote in *Defunis v. Odegard*,[48] "if discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then Constitutional guarantees acquire an accordion like quality."[49] In *Croson* and *Adarand* the Court applied a standard of strict scrutiny to racial classifications in order "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[50] In *Wygant*, the Court disapproved of giving preferential protection against layoffs to minority teachers in order to provide pupils with role models because the "role model theory . . . has no logical stopping point."[51] The diversity rationale in this context is particularly problematic because it sanctions the continued use of racial criteria indefinitely.

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44. *Id.* at 2117.

45. *Id.*

46. 476 U.S. 267 (1986).

47. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

48. 416 U.S. 312 (1974).

49. *Id.* at 343.

50. *Adarand*, 115 S. Ct. 2097, 2112 (1995) (quoting *J.A. Croson Co.*, 488 U.S. at 493).

51. 476 U.S. at 275.

If the Court is trying to fashion legal doctrine to keep close tabs on the use of race, then allowing the "amorphous"[52] rationale of diversity to satisfy the requirements of strict scrutiny would be fundamentally incompatible. Any systematic consideration of race as a "plus" factor in decisionmaking does not further the interest of diversity. In *Hopwood,* Judge Smith explained, race often is said to be justified in the diversity context, not on its own terms, but as a proxy for other characteristics that institutions of higher education value but that do not raise similar constitutional concerns. Unfortunately, this approach simply replicates the very harm that the Fourteenth Amendment was designed to eliminate.[53]

Using race per se as does not necessarily obtain a variety of viewpoints in the classroom setting. Allowing racial considerations for the purpose of achieving diversity is an underinclusive method because although one's personal views and experiences may be significantly affected by race, a variety of other factors are related as well.

In many instances, religion, socio-economic class, stability of family, community, religion, sexual orientation and even birth order may have as significant an influence on our experience as race.[54] Cheryl Hopwood herself had a unique background because she was the mother of a severely handicapped child.[55] While UT was entitled to determine that Hopwood's personal factors did not enhance the school's diversity, the school should not be allowed to give other applicants an automatic advantage based on immutable characteristics. Membership in a minority group does, of course, profoundly impact one's life experience and may endow an applicant with a unique perspective that an equally qualified non-minority applicant could not provide. However, universities can achieve diversity

52. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 614 (1990) (O'Connor, J., dissenting) (describing the diversity interest as "amorphous").

53. *Hopwood*, 78 F.3d at 946. *See also* Richard Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 SUP. CT. REV. 1, 9 (1974) (arguing that using race as a proxy for other characteristics gives legitimacy to racial discrimination).

54. *See* Carrington, *supra* note 38, at 1142.

55. *Hopwood*, 78 F.3d at 946.

through an application process based on "other, more germane bases of classification."[56]

A study by *The Los Angeles Times* on race-based affirmative action programs in the workplace showed that these programs often caused conflicts, not only between whites and minorities, but also between different minority groups.[57] If the message of the UT 1992 admissions program is that the marginally admitted African-American and Mexican-American applicants are especially qualified because they have overcome a unique experience of racism and disadvantage, value could be assigned to these criteria in the admissions process.

The goal of obtaining a diverse student body should certainly guide UT's admissions practices. However, applying different admissions criteria for different races is not the only solution to ensuring adequate representation of minorities. An assertion that the varying experiences of different races precludes them from being judged by common criteria contradicts the very notion of a universal rule of law.[58] Common standards must be developed that emphasize our common attributes and remove factors that sort applicants by race.

Present Effects of Past Discrimination

The second basis upon which preferential affirmative action programs have been developed is remedial in nature. In accordance with the decisions of the Supreme Court, the Fifth Circuit upheld the use of race conscious affirmative action to remedy the present effects of past discrimination.[59] However, Judge Smith found that UT's plan was still unconstitutional because no present effects of past discrimination at the law school had been identified, and correcting the effects of discrimination in Texas' educational system in general was impermissible.[60] This holding conflicts with other court mandates which command states to desegregate their systems of higher education. None-

56. Mississippi Univ. For Women v. Hogan, 458 U.S. 718, 726 (1982).

57. Rich Connell & Sonia Nazario, *Curbing Job Bias: A Mixed Balance Sheet*, L.A. TIMES, Sept. 10, 1995 at A1, A24.

58. Walter E. Williams, *False Civil Rights Vision and Contempt for the Rule of Law*, 79 GEO. L.J. 1777 (1991).

59. *Hopwood*, 78 F.3d at 949.

60. *Id.* at 955.

theless, the difficulties raised by the Fifth Circuit's decision in *Hopwood* exposed the thorny nature of designing race-based remedial measures to cure discrimination.

While the Supreme Court has dramatically limited the use of race in affirmative action programs, the Court has also recognized that the states have an affirmative duty to wipe out traces of segregation in public schools. In *Green v. County School Board Of New Kent*,[61] Justice Brennan found that a southern school board must do more than merely end *de jure* segregation.[62] More recently, the Court found Justice Brennan's mandate to eliminate racial discrimination "root and branch"[63] extended to systems of higher education.[64] In *United States v. Fordice,* Justice White recognized that "even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the State's prior *de jure* segregation and that continues to foster segregation."[65] States have an affirmative duty to take steps to desegregate their public schools if existing racial imbalance in the system is attributable to the state, and if current policies perpetuate past *de jure* segregation.[66]

Justice White's mandate to take affirmative steps to end the effects of *de jure* segregation may have particular force at UT. The Education Department's Office for Civil Rights is planning to investigate whether Texas has gone far enough in its desegregation efforts in light of *Fordice*.[67] Since *Fordice* relegated the development of desegregation strategies to the states, the court's decision has been read by some to give the nineteen southern states wide latitude in developing remedies to desegregate institutions of higher education.[68] Assuming that *Fordice* affords UT the ability to use race classifications to cor-

61. 391 U.S. 430.

62. *Id.* at 1694. *De jure* segregation is segregation resulting from intentional state action.

63. *Green*, 391 U.S. at 438.

64. *See* United States v. Fordice, 505 U.S. 717 (1992).

65. *Id.* at 729.

66. *Id.* at 727.

67. *See, e.g.,* Patrick Healy, *Conflicting Court Rulings,* CHRON. OF HIGHER EDUC., May 10, 1995, A39.

68. *See, e.g., id.* at A35.

rect the present effects of past discrimination, UT would be caught between two conflicting court rulings.

The Supreme Court has never articulated with the precision of the Fifth Circuit in *Hopwood* exactly what instances of discrimination merit a race-based remedy. In the context of societal discrimination, it seems impossible to develop a legal formula that would properly identify the cause of discrimination in a manner that recognizes the multitude of sources. Both the Supreme Court and the Fifth Circuit intended to encourage state actors, especially universities, to pursue affirmative action programs that do not perpetuate race conscious processes.

Ideally, Constitutional Law sets forth abstract principles that apply equally to everyone, rather than an approach based on policy decisions that yield haphazard results. By focusing on equal and just results for a particular group, instead of an equal and just process for all individuals, the race-conscious admissions procedures create different rules for different people. Even though these programs are motivated by the best of intentions, the principles of the Fourteenth Amendment and Title VII of the Civil Rights Act[69] are compromised based on the particular sociological, economic or political climate. In this scenario, the status of our rights as individuals is contingent on the "ebb and flow of political forces."[70] In addition, the ability of policymakers to work in concert to achieve justice by creating equal results for all groups and subgroups is highly suspect.

The benefit bestowed on one group by considering race translates into a penalty on members of other groups. The 1992 UT admissions program, for example, gave special consideration to African-Americans and Mexican-Americans, but did not create any special system for Native Americans, Asian-Americans or a plethora of other minority groups that have suffered long histories of discrimination and oppression. Are applicants to assume that these groups are undeserving of special treatment or that African-American and Mexican-Americans are especially handicapped in comparison to these other minority groups? Either way, the symbolic message of the admissions program is negative and counterproductive as a means of ending discrimination.

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69. 42 U.S.C. §2000e, *et seq.* (1996).
70. *Bakke,* 438 U.S. at 298.

There are numerous examples of how affirmative action programs benefiting one group have handicapped members of other groups. Early estimates of what will happen when the University of California at Berkeley ceases to use race considerations suggest that Asians more than Whites have been grossly underrepresented due to the school's affirmative action programs.[71] This benign racial classification worked like the quotas that used to limit the number of Jews in universities. In *Podberesky v. Kirwan*,[72] the constitutionality of the University of Maryland at College Park's scholarship exclusively for Black students was challenged by a Hispanic student who had been denied the scholarship.[73] In *United Jewish Organization of Williamsburgh, Inc., v. Carey*, [74] the Supreme Court upheld a redistricting reapportionment plan that drew district lines that increased the representation of Blacks, but also diluted the representation of the Hasidic Jewish community.[75] Using race in admissions criteria often does not cure discrimination, it just reorganizes the victims of discrimination.

There is a need for broader recruitment of, and compensatory training for, individuals who have not had adequate primary and secondary school education. There is also a need to develop university admissions criteria that can determine the true potential of individual applicants. Unfortunately, UT chose to experiment with an admissions program based on race without first considering race-neutral alternatives.

Admissions procedures should directly target applicants with diverse views and disadvantaged backgrounds, rather than using race as a proxy for other characteristics. Alternative admissions procedures could include special provisions to bolster the representation of low-income applicants. A "plus factor" could be given to applicants from economically depressed geographical locations. The diversity of one's experiences can also be ascertained through essay questions. These procedures may not be as administratively convenient as using race,[76] but

71. *See, e.g.*, Peter Shaw, *Counting Asians*, NAT'L REV., Sept. 25, 1995, at 50.
72. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).
73. *Id.* at 152.
74. 430 U.S. 144 (1977).
75. *Id.* at 168.
76. *See* Posner, *supra* note 53, at 9-12 (arguing that administrative convenience is a prominent and unjustifiable cause for using race classifications).

administrative convenience has never been held to be a compelling interest.[77] These alternative procedures avoid the pitfalls of stereotyping applicants and give applicants the benefit of individual consideration.

Putting energy into developing alternative means of affirmative action, as opposed to exerting effort defending problematic race-based affirmative action, may yield better results. Until such an approach is given full effect, race-based methods are not conclusively the most narrowly-tailored means of confronting discrimination and promoting diversity. The court's quandary in defining when race-based measures can be used to achieve these laudable goals suggest that the means are ill-fitted to the ends.

Critics may suggest that there is no meaningful difference between distinctions based on an applicant's race and distinctions based on other characteristics[78] such as alumni relatives, special talents or athleticism. This critique is suspect because it fails to account for the significant difference between talents achieved through personal choice, discipline and hard work versus immutable characteristics over which the individual has no control. While it is true that valuing legacies or nepotism assigns benefit based on immutable characteristics, this flaw does not justify the continued use of immutable characteristics. Universities should actively remove artificial distinctions instead of adding new ones in an attempt to reach equilibrium.

Conclusion

By developing alternative means of affirmative action that include a more fundamental restructuring of how admissions procedures are organized, institutions of higher education can navigate successfully the waters between the Fifth Circuit's restrictions on using race in decision-making and the Supreme Court's mandate to desegregate institutions of higher education. It is possible to account for the effects of discrimination without practicing racial discrimination.

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77. *DeFunis*, 416 U.S. at 341.

78. *See, e.g.*, Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial* Role, 42 U. CHI. L. REV. 653, 670-75 (1975).