

## Hopwood v. Texas: the Fifth Circuit Further Limits Affirmative Action Educational Opportunities

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# Note

## **HOPWOOD v. TEXAS: THE FIFTH CIRCUIT FURTHER LIMITS AFFIRMATIVE ACTION EDUCATIONAL OPPORTUNITIES**

The U.S. Supreme Court recently denied certiorari on a highly controversial affirmative action decision handed down by the Fifth Circuit Court of Appeals.<sup>1</sup> In *Hopwood v. Texas*,<sup>2</sup> the Fifth Circuit held that an affirmative action admissions program at the University of Texas School of Law violated the individual rights of nonminority applicants under the Equal Protection Clause of the Fourteenth Amendment.<sup>3</sup> The court reached this conclusion by rejecting the goal of achieving a diverse student body as a compelling government interest sufficient to justify classification of applicants on the basis of race.<sup>4</sup> In addition, the court limited a state professional school's ability to implement a remedial affirmative action program to those situations in which the school can show the existence of present effects of its own past discrimination.<sup>5</sup> In so holding, the Fifth Circuit extended Supreme Court precedent and placed severe limitations upon affirmative action initiatives of state institutions of higher learning.

### I. THE CASE

Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers were each denied a highly coveted place in the 1992 entering class of the University of Texas School of Law.<sup>6</sup> These four Caucasian applicants brought a constitutional challenge to the law school's affirmative action admissions program, contending that the school's preferential consideration of African-American and Mexican-American applicants violated their right to "the equal protection of the laws"

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

2. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

3. *Id.* at 962.

4. *Id.* at 948.

5. *Id.* at 953-54.

6. *Id.* at 938. The University of Texas School of Law is consistently ranked among the top law schools in the United States. *Id.* at 935 (citing *America's Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 20, 1995, at 84). The school also receives over 4000 applications every year from prospective candidates competing for only 500 places in each entering class. *Id.*

guaranteed by the Fourteenth Amendment to the United States Constitution.<sup>7</sup>

The federal district court found that the law school operated a different admissions process for African-American and Mexican-American applicants than for all other applicants.<sup>8</sup> The dual admissions processes differed in two significant ways.<sup>9</sup> First, the law school used different Texas Index (TI)<sup>10</sup> ranges to assign prospective minority and nonminority students to one of three categories—"presumptive admission," "presumptive denial," or a "discretionary" admission category.<sup>11</sup> The law school adjusted its TI ranges during the admissions process each year to achieve a "goal" of ten percent Mexican-American and five percent African-American students in each entering class.<sup>12</sup>

Second, the district court found race-based differences in the manner in which the law school reviewed "discretionary zone" applicants.<sup>13</sup> The school divided application files for most persons as-

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7. *Id.* at 938. The Fourteenth Amendment provides, in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

8. *Hopwood v. Texas*, 861 F. Supp. 551, 561-62 (W.D. Tex. 1994), *rev'd and remanded in part, and appeal dismissed in part*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

9. *Id.* at 561.

10. The Texas Index (TI) is a composite of an applicant's undergraduate grade point average and Law School Admission Test score. *Id.* The university used an applicant's TI as a rough predictor of success in law school and ranked applicants according to their TIs. *Id.*

11. *Id.* In March 1992, the law school required African-American and Mexican-American applicants to possess a TI score of 189 in order to be assigned to a "presumptive admission" category, which virtually assured the candidate an offer of admission. *Hopwood*, 78 F.3d at 936. In contrast, the school required all applicants who did not identify themselves as either African American or Mexican American to possess a TI of 199 in order to be assigned to the presumptive admission category. *Id.* At the other end of the TI continuum, a score of 192 or less resulted in automatic denial of admission for most nonminority applicants, while members of the preferred minority groups enjoyed a cut-off score of 179. *Id.* Thus, a score between 189 and 192 would place most nonminority applicants in the "presumptive denial" category, but would likely result in automatic admission offers for members of a preferred minority group. *Id.* at 937. The law school placed applicants whose TI scores fell between the presumptive admission and denial cutoffs in a middle category or "discretionary zone." *Hopwood*, 861 F. Supp. at 558.

12. *Hopwood*, 78 F.3d at 937 & n.10. The law school established these goals in the early 1980s as part of a plan submitted by the State of Texas to correct deficiencies in minority representation in state graduate and professional schools, and to eliminate vestiges of *de jure* discrimination against African Americans as identified in an investigation by the U.S. Department of Health, Education and Welfare (HEW) Office for Civil Rights (OCR). *Hopwood*, 861 F. Supp. at 555-56. The 10% and 5% goals were proportionate to the pool of Mexican-American and African-American graduates from undergraduate state institutions. *Id.* at 556 & n.6.

13. *Hopwood*, 861 F. Supp. at 562.

signed to the discretionary zone, including those of the plaintiffs,<sup>14</sup> into groups of thirty, and each member of a three-person admissions subcommittee reviewed them without discussion.<sup>15</sup> For every group of thirty files, each subcommittee member could cast nine affirmative votes for admission.<sup>16</sup> A separate minority subcommittee, however, reviewed the African-American and Mexican-American applications.<sup>17</sup> Unlike the procedure employed for most students in the discretionary range, the minority subcommittee individually reviewed and discussed each African-American and Mexican-American application.<sup>18</sup> This subcommittee recommended minority applicants for admission to the full admissions committee, and the school treated the recommendations as "virtually final."<sup>19</sup> Thus, the law school did not directly compare the qualifications of African-American and Mexican-American students in the discretionary zone with those of other discretionary zone applicants at any time during the admissions process.<sup>20</sup>

The district court applied a strict scrutiny standard of constitutional review to the state's preferential treatment of applicants on the basis of race.<sup>21</sup> In applying this standard, the court asked if the racial classification served "a compelling governmental interest" and whether the race-based process was "narrowly tailored" to further that interest.<sup>22</sup> The court held that two of the law school's justifications for the race-based admissions process constituted compelling government interests.<sup>23</sup> Relying upon Justice Powell's opinion in *Regents of the University of California v. Bakke*,<sup>24</sup> the district court determined that the law school's goal of "seeking the educational benefits

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14. Elliott, Carvell, and Rogers each had a TI of 197. *Id.* at 565-67. The chair of the admissions committee shifted Hopwood, whose TI was 199, from the presumptive admission to the discretionary category on the basis of perceived weaknesses in her academic background, including attendance at less competitive undergraduate institutions. *Id.* at 564 & n.41.

15. *Id.* at 562.

16. *Id.* Applicants who received no votes were automatically denied admission, those who received two or three votes were offered admission, and those who received one vote were wait-listed. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 563.

20. *Id.* at 575-76.

21. *Id.* at 568 ("Affirmative action plans based on race trigger strict judicial scrutiny." (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion))).

22. *Id.* at 569 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion)).

23. *Id.* at 570.

24. 438 U.S. 265 (1978). Justice Powell announced the judgment of the Court and reasoned that selection of students "who will contribute the most to the 'robust exchange of ideas' . . . [is a goal] of paramount importance." *Id.* at 313.

that flow from having a diverse student body" served as a compelling state interest for the purpose of an equal protection analysis.<sup>25</sup> Likewise, the court also found the State's interest in "redressing the decades of educational discrimination to which African Americans and Mexican Americans have been subjected in the public school systems of the State of Texas" sufficiently compelling.<sup>26</sup> Significantly, the court placed no constitutional limitations on the school's use of remedial racial classifications to rectify discriminatory practices by the State's educational system as a whole. Reasoning that "[t]he State's institutions of higher education are inextricably linked to the primary and secondary schools in the system," the district court held that the University of Texas School of Law had a compelling interest in addressing "the present effects . . . of past discriminatory practices" throughout the State's public school system.<sup>27</sup>

Despite its identification of two compelling state interests, the district court determined that the school's admissions program did not satisfy the narrow tailoring requirement of the strict scrutiny standard.<sup>28</sup> The court reasoned that although affording a minority applicant a racial preference, or "'plus' factor,"<sup>29</sup> would be constitutionally permissible, the failure of the law school's admissions process to "afford each individual applicant a comparison with the entire pool of applicants" unnecessarily and impermissibly offended equal protection rights under the Fourteenth Amendment.<sup>30</sup>

The district court awarded the plaintiffs declaratory relief, allowing them to reapply to the law school without incurring additional cost.<sup>31</sup> The court, however, declined to grant an injunction that would have ordered the school to admit the plaintiffs, finding that the plaintiffs had failed to show that they would have been admitted but for the race-based procedures.<sup>32</sup> The court also found it unnecessary to order prospective injunctive relief because the law school had subsequently adopted a new admissions procedure that eliminated the separate minority subcommittee.<sup>33</sup> Finally, the district court limited

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25. *Hopwood*, 861 F. Supp. at 570.

26. *Id.* (citing *United States v. Paradise*, 480 U.S. 149, 167 (1987)).

27. *Id.* at 571, 573.

28. *Id.* at 579.

29. *Id.* at 578 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)).

30. *Id.* at 579.

31. *Id.* at 582-83.

32. *Id.* at 582.

33. *Id.*

compensatory damages to the nominal amount of one dollar.<sup>34</sup> The plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit.<sup>35</sup>

## II. LEGAL BACKGROUND

For over two decades, the Supreme Court has repeatedly addressed the constitutionality of racial classifications that favor minorities. In 1974, in *DeFunis v. Odegaard*,<sup>36</sup> the Court faced a factual scenario closely analogous to that in *Hopwood*.<sup>37</sup> In that case, however, the Court declined to consider whether the Fourteenth Amendment's Equal Protection Clause prohibited a state law school from using admissions procedures that gave preferential treatment to racial and ethnic minorities because that issue was moot.<sup>38</sup>

Four years later, the Court first addressed the constitutionality of preferential admissions standards for minorities in *Regents of the University of California v. Bakke*.<sup>39</sup> In *Bakke*, a plurality of Justices struck down the admissions policy of the University of California at Davis Medical School because it used a quota system to enroll minority ap-

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34. *Id.* at 583.

35. *Hopwood*, 78 F.3d at 932.

36. 416 U.S. 312 (1974) (per curiam).

37. In *DeFunis*, the plaintiff brought suit against various officers, faculty, and members of the Board of Regents of the University of Washington, contending that his denial of admission to the University of Washington Law School was the result of invidious racial discrimination in violation of the Fourteenth Amendment's Equal Protection Clause. *Id.* at 314. The challenged affirmative action admissions program involved a process whereby a separate admissions subcommittee reviewed the applications of select ethnic minority group members and never directly compared these applications with those of nonminority applicants. *Id.* at 323 (Douglas, J., dissenting). In addition, the school gave less weight to an index calculated on the basis of an applicant's Law School Admission Test score and college grades when reviewing minority applications. *Id.* at 321, 324.

38. *DeFunis*, 416 U.S. at 319-20. The plaintiff was guaranteed completion of his final term at law school by the time his case came before the Court. *Id.*

Dissenting, Justice Douglas opined that the only constitutionally permissible preferential admission process would be one that involved decisions based on a comparison of the individual attributes of all applicants, rather than solely on the basis of race. *Id.* at 332 (Douglas, J., dissenting). Perhaps anticipating the Court's 20-year struggle to distinguish between "benign" and "invidious" racial discrimination, Justice Douglas noted that the University of Washington Law School's race-based admissions policy "certainly [was] not benign with respect to nonminority students who are displaced by it." *Id.* at 333 (quoting *DeFunis v. Odegaard*, 507 P.2d. 1169, 1182 (1973)). He contended that "any state-sponsored preference to one race over another . . . is . . . 'invidious' and violative of the Equal Protection Clause." *Id.* at 344.

In a separate dissent, in which Justices Douglas, White, and Marshall concurred, Justice Brennan found "no justification for the Court's straining to rid itself of [the equal protection] dispute" and concluded that the Court "disserv[ed] the public interest" by avoiding the constitutional issue. *Id.* at 349-50 (Brennan, J., dissenting).

39. 438 U.S. 265 (1987).

plicants.<sup>40</sup> In a separate opinion, Justice Stevens, joined by Justices Burger, Stewart, and Rehnquist, concluded that the federally funded medical school's admissions program violated Title VI of the Civil Rights Act of 1964<sup>41</sup> because it excluded Bakke on the basis of race.<sup>42</sup> Therefore, these four Justices declined to reach the federal constitutional issue.<sup>43</sup> Also writing separately, Justices Brennan, White, Marshall, and Blackmun concluded that the medical school's affirmative action admissions program was constitutionally permissible.<sup>44</sup> The Brennan camp reasoned that "[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice . . . ."<sup>45</sup>

In an opinion that no other Justice joined, Justice Powell cast the decisive vote in *Bakke* that struck down the school's affirmative action program.<sup>46</sup> Justice Powell rejected the university's argument that the appropriate level of judicial scrutiny for a racial classification depends on whether the burdened race is a "discrete and insular minority."<sup>47</sup> He asserted that the "'rights established [by the Fourteenth Amendment] are personal rights"<sup>48</sup> and concluded that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."<sup>49</sup>

40. *Id.* at 320 (opinion of Powell, J.). The admissions program at issue reserved 16 of the 100 places in the medical school's entering class for members of minority groups, which included African Americans, Chicanos, Asians, and Native American Indians. *Id.* at 274-75. Allan Bakke, a white male applicant who was denied admission, claimed that the existence of "special admissions slots" for minority students operated as a "racial and ethnic quota." *Id.* at 276. He challenged the school's admissions program under the Equal Protection Clause of the Fourteenth Amendment, as well as under California's Constitution, and section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994). *Bakke*, 438 U.S. at 278.

41. 42 U.S.C. § 2000d.

42. *Bakke*, 438 U.S. at 412 (Stevens, J., concurring in the judgment in part and dissenting in part).

43. *Id.* at 411-12.

44. *Id.* at 379 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). These four Justices concluded that remedial race-based classifications "'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* at 359 (citing *Califano v. Webster*, 430 U.S. 313, 317 (1977) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976))).

45. *Id.* at 325.

46. *Id.* at 320 (opinion of Powell, J.).

47. *Id.* at 287-88 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

48. *Id.* at 288 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)) (alteration in original).

49. *Id.* at 289-90.

Applying a heightened level of judicial scrutiny,<sup>50</sup> Justice Powell concluded that achievement of a diverse student body clearly served "a constitutionally permissible goal."<sup>51</sup> In support of this conclusion, he invoked the First Amendment,<sup>52</sup> suggesting that it affords state universities "the right to select those students who will contribute the most to the 'robust exchange of ideas.'"<sup>53</sup> Despite identifying this legitimate and substantial goal, Justice Powell concluded that the school had failed to narrowly tailor its admissions program so as to permit it to pass constitutional muster.<sup>54</sup> He declared that, while the school could consider race a "plus" factor indicative of one element of diversity, it could not "insulate the individual from comparison with all other candidates for the available seats."<sup>55</sup> Justice Powell determined that insofar as the medical school's admissions program used race as an exclusive indicator of diversity, it unnecessarily violated the constitutional rights of individual applicants.<sup>56</sup>

The Court next addressed the constitutionality of a race-based affirmative action program in the context of a Fifth Amendment equal protection challenge to the federal Public Works Employment Act in *Fullilove v. Klutznick*.<sup>57</sup> A plurality of Justices upheld a provision in the Act that awarded at least ten percent of all federal funding for local public works projects to minority-owned businesses.<sup>58</sup> In an opinion joined only by Justices White and Powell, Chief Justice Burger noted that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees."<sup>59</sup> Chief Justice Burger expressly declined to adopt the equal protection analysis articulated in any of the separate *Bakke* opinions.<sup>60</sup> Instead, he applied a two-part

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50. *Id.* at 305-07.

51. *Id.* at 311-12.

52. U.S. CONST. amend. I. The Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . ." *Id.*

53. *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J.) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). *But see* *Hopwood v. Texas*, 78 F.3d 932, 943 n.25 ("Saying that a university has a First Amendment interest in this context is somewhat troubling. Both the medical school in *Bakke* and, in our case, the law school are state institutions. The First Amendment generally protects citizens from the actions of government, not government from its citizens.").

54. *Bakke*, 438 U.S. at 315 (opinion of Powell, J.).

55. *Id.* at 317.

56. *Id.* at 317-20.

57. 448 U.S. 448 (1980).

58. *Id.* at 492 (opinion of Burger, C.J.).

59. *Id.* at 491.

60. *Id.* at 492.

test that required the Court to determine whether the objectives of the Act were within Congress's power and whether the racial and ethnic classification was a constitutionally permissible means for achieving those objectives.<sup>61</sup>

Six years later, in *Wygant v. Jackson Board of Education*,<sup>62</sup> a plurality of the Court held that the race-based preferences contained in a teacher layoff plan violated the Fourteenth Amendment's guarantee of equal protection.<sup>63</sup> Applying a strict scrutiny standard, the plurality recognized remediation of prior discrimination against minorities as a compelling government interest.<sup>64</sup> However, the Court held that a public employer must ensure that "convincing evidence that remedial action is warranted" exists before implementing an affirmative action program.<sup>65</sup> The plurality held that the school board's layoff plan was "not sufficiently narrowly tailored" to accomplish its purported remedial purpose because "[o]ther less intrusive means of accomplishing similar purposes . . . [were] available."<sup>66</sup>

In *City of Richmond v. J.A. Croson Co.*,<sup>67</sup> the Court reaffirmed the application of strict scrutiny for all race-based classifications imposed by state or local actors.<sup>68</sup> A majority of the Justices agreed that race-based affirmative action plans demand strict judicial scrutiny, regardless of "the race of those burdened or benefited by a particular classification."<sup>69</sup> In support of consistent application of the strict scrutiny

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61. *Id.* at 473.

62. 476 U.S. 267 (1986) (plurality opinion).

63. *Id.* at 284 (opinion of Powell, J.).

64. *Id.* at 277.

65. *Id.*

66. *Id.* at 283-84.

67. 488 U.S. 469 (1989) (plurality opinion). In *Croson*, the Court considered a Fourteenth Amendment equal protection challenge to a program that required prime contractors who were awarded city construction contracts to subcontract 30% of their contracts to minority-owned business. *Id.* at 477. Relying largely upon the Supreme Court's decision in *Fullilove*, in which the Court found a similar federal set-aside program constitutional, *see supra* note 58 and accompanying text, a federal district court and the Fourth Circuit initially upheld the Richmond plan. *Croson*, 488 U.S. at 483-84. The Supreme Court remanded the case for the Fourth Circuit to consider it in light of the Court's intervening decision in *Wygant*. *Id.* at 485; *see supra* notes 62-66 and accompanying text. On remand, the Fourth Circuit applied the strict scrutiny standard articulated in *Wygant* and struck down the plan. *Croson*, 488 U.S. at 483-84. The Supreme Court again granted certiorari upon the city's appeal. *Id.* at 486.

68. *Id.* at 494 (opinion of O'Connor, J.).

69. *Id.* Chief Justice Rehnquist and Justices White and Kennedy joined Justice O'Connor. Justice Scalia wrote a separate, concurring opinion, agreeing with the conclusion that all racial classifications by government actors must be subjected to strict judicial scrutiny, but disagreeing with Justice O'Connor's suggestion that, in some remedial contexts, governmental classifications by race may be constitutionally permissible. *Id.* at 520 (opinion of Scalia, J., concurring in the judgment).

standard, Justice O'Connor reasoned, "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."<sup>70</sup> With respect to Richmond's argument that past discrimination justified the city's plan as a remedial measure, the plurality determined that the City lacked "a strong basis in evidence for its conclusion that remedial action was necessary."<sup>71</sup> The plurality reasoned that, for the plan to serve a genuinely remedial purpose, the City must establish a history of discrimination against the preferred minority groups in the Richmond construction industry, and that a general claim of past discrimination in the construction industry at large would not suffice.<sup>72</sup>

One year after striking down Richmond's minority set-aside program in *Croson*, the Court held, in *Metro Broadcasting, Inc. v. FCC*,<sup>73</sup> that the Federal Communication Commission's (FCC's) policies favoring minority ownership and management of radio and television broadcast stations did not offend the equal protection component of the Fifth Amendment.<sup>74</sup> Applying an intermediate standard of judicial scrutiny to what it called a "benign" racial classification by the federal government, the Court held that the FCC's goal of "promot[ing] programming diversity" was an "important" government objective and that the agency's policies were "substantially related" to the achievement of that objective.<sup>75</sup>

Most recently, however, in *Adarand Constructors, Inc. v. Peña*,<sup>76</sup> the Court expressly overruled *Metro Broadcasting's* application of intermediate scrutiny to federal affirmative action programs.<sup>77</sup> The Court articulated three constitutional principles regarding governmental race-

70. *Id.* at 493 (opinion of O'Connor, J.).

71. *Croson*, 488 U.S. at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

72. *Id.* at 498-501. The Court explained, "Like the claim that discrimination in primary and secondary schools justifies a rigid racial preference in medical school admission, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.* at 499.

73. 497 U.S. 547 (1990).

74. *Id.* at 566. The Fifth Amendment provides, in pertinent part, "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

75. *Metro Broadcasting*, 497 U.S. at 566. Writing for the Court, Justice Brennan emphasized that, in determining the appropriate level of judicial scrutiny to be brought to bear on this federal race-based program, it was "of overriding significance" that the program had been specifically mandated by Congress. *Id.* at 563.

76. 115 S. Ct. 2097 (1995).

77. *Id.* at 2113.

based classifications.<sup>78</sup> First, the Court held that any governmental racial classification must be viewed with skepticism<sup>79</sup> and "must be analyzed . . . under strict scrutiny."<sup>80</sup> Racial classifications, the Court held, "are constitutional only if they are narrowly tailored measures that further compelling governmental interests."<sup>81</sup> Second, the Court announced the principle of consistency, citing *Croson* for the proposition that "'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."<sup>82</sup> Finally, the Court emphasized the requirement of congruence, which means that the standard of review must be the same in an equal protection analysis of racial classifications whether analyzing the actions of the federal government under the Fifth Amendment or of state and local governments under the Fourteenth Amendment.<sup>83</sup> The Court declined to reach the question of whether the challenged federal practice of providing general contractors an incentive to hire socially and economically disadvantaged subcontractors, with race-based presumptions in identifying disadvantaged individuals, satisfied its principles for constitutionality.<sup>84</sup> Instead, the Court remanded the case to the Tenth Circuit to make that determination.<sup>85</sup>

### III. SUMMARY OF THE COURT'S REASONING

In *Hopwood v. Texas*, the Fifth Circuit held that the Fourteenth Amendment prohibits the University of Texas School of Law from discriminating in favor of Mexican Americans and African Americans by affording them preferential consideration in the admissions process.<sup>86</sup> The court began its analysis by establishing that all racial classifications by state actors are highly suspect under the Fourteenth Amendment.<sup>87</sup> Applying the strict scrutiny analysis articulated in *Adarand*, the Fifth Circuit concluded that a constitutionally permissible race-

78. *Id.* at 2111.

79. *Id.*

80. *Id.* at 2113.

81. *Id.*

82. *Id.* at 2111 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)).

83. *Id.*

84. *Id.* at 2118.

85. *Id.*

86. *Hopwood*, 78 F.3d at 934.

87. *Id.* at 940. The Court invoked *Adarand*, *Croson*, and *Wygant* and concluded that "there is now absolutely no doubt" that strict scrutiny is the appropriate standard of judicial review for all racial classifications, regardless of whether the burdened race is a "'group that historically has not been subject to government discrimination.'" *Id.* & n.17.

based classification must “serve a compelling government interest” and be “narrowly tailored to the achievement of that goal.”<sup>88</sup>

Unlike the district court below, the court of appeals found no compelling justification to satisfy the first prong of the strict scrutiny test.<sup>89</sup> The Fifth Circuit rejected the notion that the goal of achieving student body diversity satisfied strict scrutiny standards.<sup>90</sup> The court declined to recognize Justice Powell’s opinion in *Bakke* as controlling precedent on the issue, noting that Powell’s view on the diversity justification had not represented the view of the majority of the Court.<sup>91</sup> Moreover, the Fifth Circuit invoked the plurality opinion in *Croson* for the proposition that “[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”<sup>92</sup>

The Fifth Circuit also disagreed with the district court’s recognition of a compelling state interest in remedying present effects of past discrimination.<sup>93</sup> The Court of Appeals determined that the law school failed to show a relationship between its race-based admissions program and present harm caused by past discriminatory practices by the Texas public school system.<sup>94</sup> Recognizing the underrepresentation of minorities in the student body as the law school’s most persuasive evidence of present effects of past discrimination, the court concluded that the school could justify remedial racial classifications only if the present harm resulted from past discriminatory practices by the law school itself, rather than other “units” within the Texas public

88. *Id.* at 940 (citing *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111, 2117 (1995)).

89. *Id.* at 948, 955.

90. *Id.* at 948.

91. *Id.* at 944. Additionally, the Fifth Circuit observed: “No [Supreme Court] case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis.” *Id.*

92. *Id.* at 944-45 (quoting *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989) (plurality opinion)) (alteration in original).

93. *Id.* at 950.

94. *Id.* at 955. The court rejected the university’s arguments that present effects of past discriminatory state practices included the law school’s reputation in the minority community as a “white” school and the perception that the law school presented a “hostile environment” to minorities. *Id.* at 952-53. Reasoning that the first justification resulted from simple knowledge of historical fact and the second from general societal discrimination, the Fifth Circuit dismissed these claims as analogous to those rejected by the Fourth Circuit in *Podberesky v. Kirwan* in 1994. *Id.* (citing *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995)).

school system.<sup>95</sup> The court found the record devoid of evidence of official racial discrimination by the law school itself.<sup>96</sup>

#### IV. ANALYSIS

In *Hopwood v. Texas*, the Fifth Circuit held that neither the goal of achieving a diverse student body nor the objective of remedying past *de jure* discrimination by the state's public school system constitutes a compelling government interest sufficient to satisfy strict judicial scrutiny in an equal protection challenge to a race-based law school admission system.<sup>97</sup> In doing so, the Fifth Circuit extended Supreme Court precedent and drove "a stake through the heart of affirmative action"<sup>98</sup> in state institutions of higher learning.

##### A. Diversity as a Compelling Government Interest

Although the Fifth Circuit's elimination of diversity as a compelling justification for affirmative action programs is perhaps a logical and inevitable extension of Supreme Court jurisprudence, it is an extension nonetheless.<sup>99</sup> The court justified its departure from *Bakke* by noting that the diversity rationale for race-based admissions programs advanced in Justice Powell's opinion had not garnered support by a majority of the Court and that the Court has not accepted diversity as a compelling state interest under strict scrutiny since Justice Powell's 1978 opinion.<sup>100</sup> However, the Supreme Court has not expressly overruled *Bakke*,<sup>101</sup> and, as Judge Wiener noted in his special concurrence to the Fifth Circuit's opinion, "[I]f *Bakke* is to be declared dead, the Supreme Court . . . should make that pronouncement."<sup>102</sup>

The first strike against diversity as a justification for affirmative action in the educational context comes from its "murky" inception.<sup>103</sup> Justice Powell suggested that "race or ethnic background may

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95. *Id.* at 953-54. The court cited *Crason's* holding that the proper scope of permissible remedial interest in that case was limited to the Richmond construction industry, rather than the construction industry as a whole. *Id.* at 954; see *supra* note 72 and accompanying text.

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

97. *Id.* at 962.

98. *Id.* at 965 n.19 (Wiener, J., specially concurring).

99. *Id.* at 963.

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

101. *Hopwood*, 861 F. Supp. at 570-71.

102. *Hopwood*, 78 F.3d at 963 (Wiener, J., specially concurring).

103. See Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 17-18 (1979) (describing *Bakke's* "murky constitutional requirements" and suggesting that school officials developing affirmative action admissions programs will experience difficulty complying with them).

be deemed a 'plus' in a particular applicant's file," but may not "insulate the individual from comparison with all other candidates."<sup>104</sup> He did not define what a "plus" factor is, nor did he indicate how much weight that factor should be afforded in the admissions process.<sup>105</sup> Justice Powell described a model admissions program as "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."<sup>106</sup> However, this "flexibility" readily gives way to "vagueness,"<sup>107</sup> and affirmative action admissions programs leave themselves wide open to charges of constitutional infirmity.

The second strike against diversity as a compelling governmental objective goes to the heart of the constitutional guarantee of "equal protection of the laws."<sup>108</sup> The Fourteenth Amendment provides equal protection to "any person," not "any group."<sup>109</sup> Racial classifications designed for the purpose of promoting student body diversity use race as a "proxy" for individual characteristics, such as a background of poverty or urban life, direct experience with prejudice, or triumph over adversity, which may be directly relevant to the promotion of a "robust exchange of ideas."<sup>110</sup> In doing so, the governmental actor makes assumptions about the qualities of individuals based upon their ethnic background or the color of their skin.<sup>111</sup> It is precisely these types of generalizations—those based upon "irrelevant" considerations such as race—against which the Fourteenth Amendment protects.<sup>112</sup>

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104. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.).

105. In fact, Justice Powell indicated that the weight assigned to each indicia of diversity "may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Id.* at 317-18.

106. *Id.* at 317.

107. Bell, *supra* note 103, at 19.

108. U.S. CONST. amend. XIV, § 1.

109. *See id.*

110. Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 8-9.

111. *Id.*

112. *Id.* at 10. Posner defines "to be prejudiced" as follows:

ascrib[ing] to the members of a group defined by a racial or similarly arbitrary characteristic attributes typically or frequently possessed by members of the group without pausing to consider whether the individual member in question has that characteristic—sometimes without being willing even to consider evidence that he does not.

*Id.* (footnote omitted); *see also* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not

The final blow against the use of diversity as a compelling justification for racial classifications is one that the Fifth Circuit did not reach, but one that, absent clear Supreme Court guidance, will likely result in the diversity objective's demise. Given the use of race and ethnicity as a surrogate for individual characteristics relevant to the objective of a diverse educational environment, affirmative action programs that purport to advance the diversity objective will almost surely fail to satisfy the "onerous 'narrowly tailored' requirement"<sup>113</sup> of strict scrutiny. Even if diversity in higher education is accepted as a compelling government objective, the vast array of individual characteristics and racial and ethnic backgrounds that could be used as surrogates for those characteristics virtually assures that race-based affirmative action programs justified by diversity will be underinclusive.<sup>114</sup>

*B. Remedial Goals of Affirmative Action as a Compelling Government Interest*

By limiting the constitutional permissibility of remedial affirmative action programs in state institutions of higher learning to situations in which the ameliorator of present effects of past discrimination is also the perpetrator of that discrimination,<sup>115</sup> the Fifth Circuit has strained the bounds of reason and prevailing precedent. The Fifth Circuit relied primarily on the Supreme Court's reasoning in *Wygant* and *Crososon* when it identified the University of Texas School of Law as the relevant "governmental unit" that must show a history of prior

allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.").

113. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 294 (1986) (opinion of O'Connor, J.).

114. Giving birth to the diversity justification, Justice Powell stated:

[T]he United States ha[s] become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups.

*Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 292 (1978) (opinion of Powell, J.) (footnotes omitted). *But see* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 *STAN. L. REV.* 855, 872 (1995) ("It is the disadvantaged or subordinated status of the members of [certain minority] groups . . . that makes their presence especially relevant to the school's educational mission and that also requires affirmative action to ensure their presence."). These commentators argue that, "[i]n deciding whom to include in an affirmative action program, a law school might appropriately consider the salience of the group in contemporary American society or in the geographic region in which its graduates tend to practice." *Id.* at 873. Brest and Oshige suggest that determinants of a group's "salience" might include "its numerical size and the extent to which its culture differs from the dominant culture of students attending the school." *Id.*

115. *Hopwood*, 78 F.3d at 948-52.

discrimination before it can fashion a race-based remedy.<sup>116</sup> By applying the Court's reasoning in government employment contract situations to the facts in *Hopwood*, the Fifth Circuit ignored characteristics unique to the educational context.

The influence of one government actor's discriminatory practices upon a burdened group member's ability to share fully in the benefits offered by another government actor is perhaps nowhere more directly apparent than in public education. As the district court asserted in *Hopwood*, "The State's institutions of higher education are inextricably linked to the primary and secondary schools in the system."<sup>117</sup> State-run educational systems are multi-tiered systems in which, by and large, success at one level, or even arrival at that level, is dependent upon success at a prior level. When an individual applies for admission to a state university or professional school, in all likelihood, he or she has not been the victim of past *de jure* discrimination by that particular component of the educational system. However, as the *Hopwood* district court reasoned, "The denial of . . . opportunities [for higher education] to [a] generation of minority parents bears a causal connection to the diminished educational attainment of the present generation."<sup>118</sup> The district court went on to conclude, "The effects of the State's past *de jure* segregation in the educational system are reflected in the low enrollment of minorities in professional

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116. *Id.* at 949-51. Specifically, the court relied on the *Wygant* Court's rejection of the provision of minority role models as a compelling government interest on the grounds that this goal sought to redress "societal discrimination" and that the remedial classification was not limited to what was necessary to remedy the harm caused by a specific state actor. *Id.* at 949-50 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-77 (1986) (plurality opinion)). The Fifth Circuit also relied on the *Croson* Court's reasoning that "a generalized assertion that there had been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.* at 950 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (plurality opinion)).

117. *Hopwood*, 861 F. Supp. at 571.

118. *Id.* at 573 (citations omitted). Cf. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 726 n.22 (1974). Ely suggests a causal connection between the educational opportunities available to parents and the achievements of their children.

The real hope lies, I think, in the fact that parents seem to make a difference. If we underwrite a generation of Black professionals, even a generation that does not do quite as well in professional school as their White classmates, their children and their children's children may grow up with interests, motivations and aptitudes that are not dissimilar from those the rest of us grew up with, and, consequently, may do as well in school as Whites from similar backgrounds. The case for "reparations" or payments for two hundred years of oppression may be an uneasy one, but those two hundred years cannot but have made a difference.

*Id.* (citations omitted).

schools, including the law school."<sup>119</sup> The Fifth Circuit erred when it dismissed this finding and when the court limited the "relevant governmental entity" to the law school.<sup>120</sup>

## V. CONCLUSION

By eliminating the achievement of a diverse student body as a compelling justification for affirmative action admissions programs, the Fifth Circuit sounded the death knell for a justification of dubious lineage and questionable constitutional viability under the equal protection principles of the Fourteenth Amendment.<sup>121</sup> However, the court dealt a more devastating blow to affirmative action programs in state institutions of higher learning by limiting these opportunities to situations in which a particular entity within a state educational system can demonstrate present effects of its own past discrimination.<sup>122</sup> In a dissent of the Fifth Circuit's denial of rehearing *en banc*, seven of the circuit's judges reflected:

[The *Hopwood*] opinion goes out of its way to break ground that the Supreme Court itself has been careful to avoid and purports to overrule a Supreme Court decision, namely, *Regents of the University of California v. Bakke*. The radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation.<sup>123</sup>

Because the Supreme Court declined to grant certiorari in *Hopwood*,<sup>124</sup> it remains for the Court to determine if strict scrutiny of affirmative action programs in educational settings is indeed "'strict in theory, but fatal in fact."<sup>125</sup>

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119. *Hopwood*, 861 F. Supp. at 572.

120. *Hopwood*, 78 F.3d at 949-51.

121. See *supra* notes 46-53, 100-114 and accompanying text.

122. See *supra* notes 115-120 and accompanying text.

123. *Hopwood v. Texas*, 84 F.3d 720, 722 (5th Cir.) (denying rehearing *en banc*) (Politz, C.J., King, Wiener, Benavides, Stewart, Parker, and Dennis, JJ., dissenting) (citation omitted), *cert. denied*, 116 S. Ct. 2581 (1996).

124. *Hopwood*, 116 S. Ct. at 2581.

125. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).