Oregon Law Review
Summer 2000 - Volume 79, Number 2
(Cite as: 79 Or. L. Rev. 493)

DIVERSITY AS A COMPELLING STATE INTEREST IN HIGHER EDUCATION: DOES BAKKE SURVIVE AFFIRMATIVE ACTION JURISPRUDENCE?

Ryan James Hagemann [FNa1]

Copyright © 2000 University of Oregon; Ryan James Hagemann

In 1999, the National Association for the Advancement of Colored People (NAACP) urged the Supreme Court of the United States to examine the hiring practices for Supreme Court law clerks. Concerned that only roughly eight percent of the 428 clerks hired up to that point were ethnic minorities, NAACP President Kweisi Mfume asked for a meeting with Chief Justice William Rehnquist to develop a strategy to remedy the disparity. [FN1] Rehnquist rebuffed the NAACP question the previous year, sparking a protest on the steps of the U.S. Supreme Court building that led to the arrest of nineteen people, including Mfume and U.S. Representative Gregory Meeks. In response, Meeks stated:

It is truly galling that African-Americans, Hispanics, Asian-Americans, Native Americans and women are not adequately reflected in the very system that is supposed to provide justice and equality for all. I would not be living up to my responsibilities as a member of the legal profession or a member of the House of Representatives if I failed to address the Supreme Court's extraordinary hypocrisy. [FN2]

Rehnquist offered that he did not think the meeting "would serve any useful purpose." [FN3]

The controversy surrounding Supreme Court law clerks, however,***494** represents but a glimpse of the contentious debate regarding the intersection of race and the ordering of American legal and political culture. Throughout the history of the United States, race has frequently defined the character and shape of the country. At the dawn of the republic, American statesmen debated whether slavery would be abolished by the U.S. Constitution. [FN4] At the republic's most profound crisis, the Civil War determined whether the United States would continue to exist, and at the same time, whether it would tolerate the servitude of an entire class of people. The passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution after the Civil War, and the subsequent interpretation of those amendments, has served as a template to examine race and its place on the American landscape. A subject of this Comment is the interpretation of the Fourteenth Amendment to the U.S. Constitution and its relationship to higher education.

Although "[t]he original purpose of the Equal Protection Clause of the Fourteenth Amendment was to guarantee a mode of redress for discrimination against African-Americans '[a]s a class, or on account of their race,"' [FN5] the Court offered a peculiar interpretation of that protection in its 1896 decision Plessy v. Ferguson. [FN6] In Plessy, the Court established the "separate, but equal" doctrine which guided Fourteenth Amendment jurisprudence until the Court's seminal case Brown v. Board of Education. [FN7] As Chief Justice Earl Warren's unanimous opinion in Brown asked, "[d] oes segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" The Court responded: "We believe that it does" [FN8] and dismantled the "separate, but equal" doctrine as the principle used to evaluate the Equal Protection Clause of the Fourteenth Amendment. By abolishing the constitutionality of "separate, but equal" in the context of education, the Warren Court provided the impetus for ***495** massive desegregation and affirmative action efforts in the United States. A subject of this Comment is the applicability, efficacy, and constitutionality of these affirmative action efforts in higher education today.

As efforts to provide opportunity to African-Americans and other minority groups took shape, President Lyndon B. Johnson offered a compelling rationale for programs such as busing, desegregation plans, and affirmative action programs in employment and higher education. He stated:

You do not take a person, who for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates to opportunity. All our citizens must have the ability to

walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result. [FN9]

With this justification, proponents offered two rationales for the necessity of affirmative action. First, "[m]any advocates justify affirmative action from a historical perspective. . . . The concept of fairness dictates that minorities who have been traditionally disadvantaged now be advantaged to remedy the inequities." [FN10] The argument follows that in order to "level the playing field," minorities who were subject to discrimination must now be offered certain advantages in order to remedy the effects of discrimination. Second, "[p]romoting diversity of the student body of a college or university is another prevalent theme among supporters of affirmative action." [FN11] In addition to remedying past discrimination, advocates of affirmative action maintain that the consideration of race in decision-making allows for a diverse classroom or workplace. "The presumption inherent in this argument is that diversity is 'good' and that the educational environment benefits when members of different groups contribute a variety of experiences, outlooks, and values to the ***496** learning process." [FN12]

President Johnson's "next and . . . more profound stage," however, proved overwhelmingly controversial. Affirmative action has met, and continues to meet, substantial opposition. A commentator in 1996 claimed "[a]ffirmative action is on trial in America. Across the nation, private citizens and government bodies are debating its effectiveness, benefits, and fairness, especially in the context of higher education." [FN13] California and Washington State have passed initiatives banning the consideration of race in decisions of higher education. [FN14] Florida Governor Jeb Bush has proposed a similar plan called "One Florida," offering to promote diversity, while eliminating the consideration of race in public decisions. [FN15] Significantly, the critique of affirmative action programs has not been lost on the judiciary. Affirmative action jurisprudence, sparked by Regents of the University of California v. Bakke, [FN16] has evolved and currently presents a narrow opportunity to justify the consideration of race in higher education, an opportunity that at least one court of appeals argues does not exist.

The consideration of race, however, is crucial to the future of higher education in the United States. Despite the increasingly narrow doctrine of the Court regarding the use of race, this Comment argues that the use of race in higher education is constitutional, consistent with the Equal Protection Clause of the Fourteenth Amendment, and survives recent affirmative action jurisprudence. In Hopwood v. Texas, the Fifth Circuit stated: "The question we decide today . . . is whether the Fourteenth Amendment permits the school to discriminate in this way. We hold that it does not. The [University of Texas] law school has presented no compelling justification . . . that allows it to continue ***497** to elevate some races over others . . . ." [FN17] This Comment will maintain, however, that Hopwood ignores Supreme Court precedent in its argument that the Fourteenth Amendment allows no consideration of race in higher education. In arguing that race may still be considered in higher education, Part I of this Comment will outline the Court's decision in Bakke. Part II will survey recent affirmative action jurisprudence, describing the impact that Adarand Constructors, Inc. v. Pena, [FN18] City of Richmond v. J.A. Croson Co., [FN19] Metro Broadcasting, Inc. v. FCC, [FN20] and Wygant v. Jackson Board of Education [FN21] have had on the interpretation of the Fourteenth Amendment. Part III will then turn to the Hopwood decision to illuminate the error of the Fifth Circuit and how it defied Supreme Court precedent. Finally, in Part IV, the illustration of the Hopwood decision will offer the opportunity to examine how, even considering recent jurisprudence, the use of race in higher education may serve a compelling government interest and survive the strict scrutiny of the courts.

I Bakke: Still Good Law?

Any discussion of affirmative action in the context of higher education must start with an analysis of the Supreme Court's decision Regents of the University of California v. Bakke. At issue in Bakke was the permissibility of a "medical school admissions program that reserved sixteen seats in each entering class of 100 for disadvantaged, minority students." [FN22] "[Alan] Bakke, a white male who was denied admission, sued the University of California at Davis alleging the admissions program violated the Equal Protection Clause of the United States Constitution and Title VI of the Civil Rights Act of 1964 . . . ." [FN23] Although Bakke was severely fractured and the Court held that the U.C. Davis admissions program could not survive, an analysis of the opinion ***498** clearly illustrates that race may be used as a factor in the context of higher education.

Three main opinions were written in Bakke, with Justice Powell authoring the Court's opinion and providing the swing vote on all issues. [FN24] The two other opinions were written by Justice Brennan, who was joined by Justices White, Marshall, and Blackmun, and Justice Stevens, who was joined by Justices Burger, Stewart, and Rehnquist. In his opinion, concurring in part and dissenting in part, Brennan stated that the Davis admissions plan was constitutional and did not violate Title VI. Brennan began his opinion with the important distinction that "[g]overnment may take race into account when it actsnot to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." [FN25]

In distinguishing between benign and invidious discrimination, Brennan maintained that the Fourteenth Amendment permitted the consideration of race when the classification was designed to remedy discrimination. Furthermore, "[b]ecause it characterized the Davis admissions program as a benign race-based classification, the Brennan opinion [only] used intermediate scrutiny [as opposed to strict scrutiny] to test the constitutionality of the program . . . ." [FN26] In dispensing with the Title VI claim, Brennan stated:

Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it 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." [FN27]

The "Brennan Four" would have permitted the preferential admissions program at the University of California at Davis Medical School.

The Stevens opinion, on the other hand, did not reach the constitutional issue. "Instead, the Stevens group found the program to be unlawful under Title VI, which prohibits the use of race as a ***499** basis for excluding anyone from participation in a federally funded program." [FN28] Stevens argued:

The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires affirmance of the judgment below. A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted. [FN29]

"Justice Powell [announced the judgment of the Court and] began his analysis of the constitutionality of Davis' admission program with a determination that any racial classification must pass strict scrutiny in order to be constitutional." [FN30] Powell stated that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." [FN31] Rejecting the Brennan distinction between benign and invidious discrimination, Powell analyzed the four justifications that Davis provided for the program under the rubric of strict scrutiny. [FN32] In determining that the program did not survive strict scrutiny, which requires that the racial classification serve a compelling government interest and be narrowly tailored to achieve that interest, Powell did not foreclose the possibility of considering race in higher education. Although Powell held that this admissions program was unconstitutional and violative of Title VI, Part V-C of his opinion remains fundamentally important to the contemplation of affirmative action programs at institutions of higher learning.

In its entirety, Part V-C of Powell's opinion reads:

In enjoining petitioner from ever considering the race of any ***500** applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed. [FN33]

This is of central significance. First, Part V-C of the Powell opinion garnered a majority of the Court. The "Brennan Four," in holding that the admissions program did not violate either the U.S. Constitution or Title VI, joined Powell's statement. Second, "the Supreme Court has not overruled Bakke, nor disavowed its central holding." [FN34] If Bakke contributes anything to the contemporary debate over affirmative action, it is the fact that the narrowly tailored use of race by institutions of higher education has never been overruled by the Court. It is good law. It is with this essential premise that this Comment turns to an examination of recent jurisprudence clarifying the relationship of affirmative action programs to the Fourteenth Amendment.

II The Evolution of Affirmative Action Jurisprudence

Since the Bakke opinion, the Court has considered several cases dealing with racial classifications and affirmative action, although none specifically dealing with higher education. [FN35] A review ***501** and explanation of this jurisprudence is necessary before the Fifth Circuit's decision in Hopwood may be discussed. In order to construct the requisite foundation for an analysis of Adarand Constructors, Inc. v. Pena, [FN36] the Court's most important affirmative action decision since Bakke, this Comment will outline three cases: Wygant v. Jackson Board of Education, [FN37] City of Richmond v. J.A. Croson Co., [FN38] and Metro Broadcasting, Inc. v. FCC. [FN39]

A. Wygant

Although affirmative action was a hotly debated issue, particularly after Bakke, the Wygant decision in 1986 sparked the evolution of affirmative action jurisprudence that culminated in Adarand. In Wygant, "the Court examined a school board's policy of retaining minority teachers over nonminority teachers in layoff decisions." [FN40] The Jackson Board of Education argued, and the district court and court of appeals agreed, that retaining minority teachers over nonminority teachers in a layoff decision was justified because it provided minority students with role models:

The Court of Appeals, relying on the reasoning and language of the District Court's opinion, held that the Board's interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination, was sufficiently important to justify the racial classification embodied in the layoff provision. The court discerned a need for more minority faculty role models by finding that the percentage of minority teachers was less than the percentage of minority students. [FN41]

***502** The plurality opinion by Justice Powell rejected this rationale. Powell argued that the role model theory was not sufficiently related to past societal discrimination to deem it constitutionally permissible. He stated: "Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in Brown v. Board of Education. Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." [FN42] Wygant hinted that racial classifications, even benign classifications designed to remedy past discrimination, were going to be subject to a higher standard of review.

It is important to note, however, that Wygant was only a plurality opinion. Justices O'Connor and Stevens offered curious insights in their concurring and dissenting opinions, respectively. Although O'Connor concurred in the five-to- four decision, she distinguished the role model theory from the goal of achieving diversity among teachers. She stated: "The goal of providing 'role models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity . . . ." [FN43] Citing Powell's opinion in Bakke, O'Connor offered: "[A] state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." [FN44] Despite her support of the argument that diversity could be compelling, O'Connor concurred because the argument was not raised at the lower court level. [FN45]

Stevens eloquently noted the value of diversity in education in his dissenting opinion. He stated:

In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural and ***503** national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process. [FN46]

Wygant, however, was only the beginning of the Court's conversation on the constitutionality of racial classifications and affirmative action programs.

B. Croson

Croson was a defining moment for affirmative action. "[T]he Justices reviewed the constitutionality of Richmond's set-aside plan, which reserved thirty percent of the city's contracts for minority-owned businesses." [FN47] O'Connor, who concurred in Wygant, shared her insight: "[W]e confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society." [FN48] She examined this tension by first applying strict scrutiny to the set-aside program. O'Connor stressed the importance of using strict scrutiny:

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. Indeed, the purpose of strict scrutiny is 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. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. [FN49]

Using this standard, O'Connor determined that the set-aside program, providing minority contractors with thirty percent of the city contracts, was not designed to remedy past discrimination and was not based on specific findings of discrimination in ***504** Richmond, Virginia. In essence, the program was not narrowly tailored to serve a compelling government interest. It did not matter if the program was designed to attack discrimination generally; this was not adequate to survive an equal protection challenge. Although O'Connor indicated in Wygant that she would consider diversity as a compelling government interest in education, Croson illustrated that the Court is suspicious of racial classifications that are at the center of affirmative actions programs designed to help minorities, rather than oppress them.

C. Metro Broadcasting

Metro Broadcasting retreated from the standards of Croson and held that certain FCC practices that benefited minorities were allowed. In holding that the FCC policy was constitutionally permissible, Justice Brennan argued that "courts should defer to Congress because of Section 5 of the Fourteenth Amendment and other considerations [and because] it found that Congress's broadcast policy was justified because racial preferences enhanced broadcast diversity." [FN50] Significantly, Metro Broadcasting maintained that the restrictions the Fourteenth Amendment placed on the states did not necessarily fall to the federal government. The federal government, bound by the Fifth Amendment to the U.S. Constitution, may utilize racial classifications if such classifications withstand an intermediate level of review. Brennan claimed: "[W]e conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies. . . . We also find that the minority ownership policies are substantially related to the achievement of the Government's interest." [FN51] The strict scrutiny standard, after Croson, was to be applied to the action of the several states, while intermediate scrutiny, under Metro Broadcasting, was to be applied to the actions of the federal government, particularly if it engaged in benign racial classifications. The Court clearly stated:

[B]enign race-conscious measures mandated by Congress--even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination--are constitutionally permissible to the ***505** extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives. [FN52]

In applying intermediate scrutiny, Brennan also stressed the purpose of the program. In deferring to the findings of Congress and the FCC, Brennan stated: "The FCC has determined that increased minority participation in broadcasting promotes programming diversity." [FN53] Metro Broadcasting, therefore, in addition to holding that benign racial classifications by the federal government will be subject to intermediate scrutiny, also argued that diversity was an interest that could justifiably permit a racial classification by the state.

D. Adarand

The confusion between invidious and benign racial classifications, between the restrictions placed on the federal, as opposed to state governments, and between the application of strict or intermediate scrutiny, was clarified in Adarand. Decided in 1995, Adarand serves as the Court's most recent statement on affirmative action and how racial classifications will be evaluated to determine whether they are constitutionally permissible. In Adarand, "a white contractor challenged a federal program that set aside contracts for minority- owned construction companies." [FN54] The Court, by a five-to-four vote, applied strict scrutiny to the program and found it unconstitutional. "With Justice O'Connor writing for the majority, the Court overruled its 1990 decision in Metro Broadcasting, which had held that federal set-asides should receive only intermediate scrutiny from the judiciary." [FN55] The O'Connor opinion outlined a definitive test for racial classifications made by the state, and "severely restrict[ed] the circumstances that justify affirmative action programs in any context." [FN56] The test is certain to be centrally important in evaluating affirmative action programs and racial classifications in the future.

In a bold opinion, O'Connor introduced the three-part test to govern racial classifications made by a state or a government. She stated: "Despite lingering uncertainty in the details, however, ***506** the Court's cases through Croson had established three general propositions with respect to governmental racial classifications." [FN57] The first proposition was skepticism. The Court determined that all racial classifications were to be viewed skeptically by applying the standards of strict scrutiny. [FN58] Next, the second general proposition under which to evaluate racial classifications made by the State was consistency. Turning to Croson, O'Connor reiterated "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." [FN59] In other words, the distinction between benign and invidious racial classifications was eliminated. Each would be viewed skeptically, and each would be subject to the same standard of review. Finally, the Court finished overruling the standard of review argument in Metro Broadcasting with the third and final proposition: congruence. The Metro Broadcasting Court entertained the argument that the Fourteenth Amendment placed specific restrictions regarding racial classifications on the states, but not on the federal government. [FN60] It distinguished between the requirements of Fourteenth Amendment equal protection and the implied equal protection of the Fifth Amendment. O'Connor expressly rejected this argument with congruence. She stated: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." [FN61] The Court, after outlining skepticism, consistency, and congruence, stated:

> Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that Metro Broadcasting is ***507** inconsistent with that holding, it is overruled. [FN62]

Adarand changed the nature of affirmative action and the permissibility of racial classifications radically. Although the Court in Adarand was quick to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,"' [FN63] the requirement of strict scrutiny for all racial classifications "severely restricts the use of affirmative action . . . ." [FN64]

Two additional observations are necessary. First, it is significant that only two Justices, Scalia and Thomas, endorsed a color-blind interpretation of equal protection under the Fifth and Fourteenth Amendments. [FN65] Scalia stated in his concurring opinion: "In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." [FN66] The plurality opinion authored by O'Connor, with its reference to "strict in theory, but fatal in fact" and noting "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it," [FN67] declined to endorse a color-blind equal protection. This will be significant when this Comment turns to an analysis of the Hopwood decision.

Second, Adarand did not deal specifically with the context of higher education. "Thus . . . a huge question remains: What happens to Bakke? Put another way, though Adarand said virtually nothing about education, did the Court somehow overrule Bakke sub silento?" [FN68] Because Adarand and the other significant affirmative action cases of the past fifteen years have not mentioned higher education, the application of recent affirmative action jurisprudence to racial classifications in the higher education context must be examined with care. Once again, this

will be the focus when this Comment reviews Hopwood.

***508** III Bringing Affirmative Action Jurisprudence to Higher Education: The Fifth Circuit and the Hopwood Decision

With the Adarand test of skepticism, consistency, and congruence outlined, "Bakke, it seems, now hangs by a thread." [FN69] "Energized by [Croson and Adarand], some opponents of contracting set-asides have now set their sights on educational diversity programs." [FN70] These opponents recently included Cheryl Hopwood, Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers. [FN71] Although, as mentioned, recent affirmative action jurisprudence was not focused on the unique context of higher education, and Bakke has not been overruled, the Fifth Circuit nonetheless found that racial classifications by a law school admissions office violated the Equal Protection Clause of the Fourteenth Amendment. [FN72] In order to argue that an awareness of race in the context of higher education is appropriate, necessary, and constitutional, it will be instructive to examine the Hopwood decision and highlight its errors. After Hopwood is analyzed, it will be possible to illustrate how race- conscious programs at institutions of higher learning may be justified, even within the Court's new structure in Adarand.

A. Hopwood

1. The District Court Decision

Before this Comment turns to the Fifth Circuit's decision in Hopwood, a review of the district court's detailed memorandum opinion in the case will offer additional counterpoise to the sweeping scope of the appellate opinion. The district court started by rejecting a color-blind approach to the Fourteenth Amendment:

The plaintiffs have contended that any preferential treatment to a group based on race violates the Fourteenth Amendment and, therefore, is unconstitutional. However, such a simplistic application of the Fourteenth Amendment would ignore the long history of pervasive racial discrimination in our society ***509** that the Fourteenth Amendment was adopted to remedy and the complexities of achieving the societal goal of overcoming the past effects of that discrimination. Further, the Supreme Court, which is continually faced with trying to reconcile the meaning of words written over a century ago with the realities of the latter twentieth century, has declined to succumb to an original intent or strict constructionist argument. Therefore, the Court will decline the plaintiffs' invitation to ignore the law established by the highest court of this land and to declare affirmative action based on racial preferences as unconstitutional per se. [FN73]

Significantly, the district court opinion acknowledged Supreme Court precedent and found it inconsistent with a color-blind interpretation of the Fourteenth Amendment.

The district court next turned to the record of discrimination by Texas in higher education. Beginning with Sweatt v. Painter, [FN74] where "a unanimous United States Supreme Court ruled that the State of Texas' provisions regarding the legal education of white and minority students violated the Fourteenth Amendment and ordered that Sweatt be admitted to the previously all- white University of Texas School of Law," [FN75] the court outlined Texas' non-compliance with Title VI of the Civil Rights Act of 1964 and the ongoing supervision of the Office of Civil Rights. [FN76] The court stated: "Against this historical backdrop, the law school's commitment to affirmative action in the admissions process evolved." [FN77]

The court traced the evolution of the admissions process and affirmative action programs at the University of Texas School of Law, culminating in a review of the 1992 admissions procedures, [FN78] which were the subject of the lawsuit. In order to comply with the Office of Civil Rights, to remedy the effects of past discrimination, and to achieve a diverse student body, the University of Texas School of Law instituted a race-conscious admissions program. The admissions program had several features designed to enhance the diversity of the institution and provide opportunities for minority applicants. First, the admissions office divided the applications into three categories: presumptive admit, ***510** discretionary zone, and presumptive deny. The office, however, had different requirements for white and minority candidates to be classified in one of these three categories. Minority applicants

needed a lower "Texas Index" (TI) to overcome the threshold to the presumptive admit, discretionary zone, or presumptive deny categories. [FN79]

Second, the admissions office evaluated the discretionary zone applicants differently according to race. "Nonminority files were divided into stacks of thirty, which were reviewed by three members of the admissions committee." [FN80] After the subcommittees of three voted on the nonminority applications, the list was forwarded to Stanley Johanson, chair of the admissions committee, for review. "Subject to Johanson's review, those applicants that received two or three votes were offered admission." [FN81] On the other hand:

The minority subcommittee reviewed the minority files. In theory, each member of the subcommittee was to be part of the three-person subcommittees that reviewed the nonminority files. The testimony reflected, however, that in 1992 Aleman was not on any of the nonminority screening subcommittees. According to the testimony, instead of each member of the minority subcommittee performing an individual review of the minority files, as was the procedure for review of nonminority files, the minority subcommittee met as a group and reviewed each minority applicant's file. [FN82]

Discretionary minority applicants were evaluated much differently than discretionary nonminority applicants.

After describing the contested admissions procedures, the district court began its analysis of the constitutionality of the affirmative action program by noting that "[a]ffirmative action plans ***511** based on race trigger strict judicial scrutiny." [FN83] As mentioned earlier, and noted by the Hopwood court, "[s]trict judicial scrutiny involves a determination of whether the law school process served 'a compelling governmental interest' and whether the process is 'narrowly tailored to the achievement of that goal."' [FN84] The court considered each of the prongs separately and extensively.

The court noted two distinct rationales that would qualify as a compelling governmental interest. First, it stated:

The plaintiffs do not dispute that under the holding of Bakke, obtaining the benefits that flow from a racially and ethnically diverse student body is a compelling interest justifying the use of racial preferences . . . . Absent an explicit statement from the Supreme Court overruling Bakke, this Court finds, in the context of the law school's admissions process, obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications. [FN85]

This statement is fundamental. The district court acknowledged the Bakke decision and carefully followed its precedent. It also reaffirmed the substance of that precedent--that race may be considered by institutions of higher learning because diversity of the classroom is a compelling governmental interest.

Second, the court held that solving the effects of past discrimination was a compelling governmental interest that would justify a racial classification. It shared: "[a]lthough under current law the goal of diversity is sufficient by itself to satisfy the compelling governmental interest element of strict scrutiny, the objective of overcoming past effects of discrimination is an equally important goal of the law school's affirmative action program." [FN86] While the plaintiffs in the case argued that the past discrimination was too distant to justify an affirmative action program in the 1990s, the court disagreed. "Despite these efforts [to solve for past effects of discrimination], however, the legacy of the past has left residual effects that persist into the present . . . . An affirmative action program is therefore necessary to recruit minority students because of the past discrimination." [FN87] The district court ***512** found that the University of Texas School of Law had demonstrated a compelling governmental interest as it concluded:

[D]espite the plaintiff's protestations to the contrary, the record provides strong evidence of some present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole. Therefore, the Court finds the remedial purpose of the law school's affirmative action program is a compelling governmental objective. [FN88]

The admissions program, however, failed under the second prong of strict scrutiny. The court outlined four factors to determine whether the "admissions process was narrowly tailored to achieve the goals of diversity and overcoming the present effects of past discrimination." [FN89] After dispensing with the initial three criteria, the court turned to the final factor in "narrowly tailored" analysis: "the impact of the procedure on the rights of innocent third parties." [FN90] "[I]t is imperative that the mechanics of any program implementing race-based preferences

respect and protect the rights of individuals who, ultimately, may have to sacrifice their interests as a remedy for societal wrongs." [FN91]

The court then turned its focus to the separation between minority and nonminority candidates and the "lack of individual comparison" between the applications. [FN92] Since the University of Texas School of Law maintained separate thresholds for minority and nonminority applicants, and constructed distinct procedures to evaluate minority and nonminority applicants, the court held that the program was not narrowly tailored because the impact on innocent third parties was not mitigated. The court argued: "[I]ndeed, affirmative action that ignores the importance of individual rights may further widen the gap between the races that the law school so diligently attempts to close and create racial hostility." [FN93] The court concluded:

The constitutional infirmity of the 1992 law school admissions ***513** procedure, therefore, 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. Because the law school's 1992 admissions process was not narrowly tailored, the Court finds the procedure violated the Equal Protection Clause of the Fourteenth Amendment. [FN94]

The important elements of the district court decision in Hopwood are: (1) Bakke rejects a color-blind interpretation of the Fourteenth Amendment and allows race-conscious decision-making within the higher education context; (2) strict scrutiny is to be applied to all racial classifications; (3) in higher education, remedying the vestiges of past discrimination and achieving diversity are both compelling governmental interests; and (4) racial classifications pursuing diversity or the correction of past discrimination must be narrowly tailored to achieve that goal.

2. The Fifth Circuit's Erroneous Decision

It is from the measured and detailed district court opinion that this Comment turns to the Fifth Circuit decision in Hopwood. While the Supreme Court has not considered the role of race in higher education since Bakke, the Hopwood decision has garnered substantial notoriety regarding race-conscious decision- making in higher education. It is from the context of the remarkable decision in Hopwood that we may evaluate how, even considering recent affirmative action jurisprudence, race-conscious classifications in higher education survive the strict scrutiny of the courts.

While the district court started its opinion by rejecting a color-blind interpretation of the Fourteenth Amendment, the Fifth Circuit rejected this approach. Instead, it concluded:

[T]he University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school. [FN95]

With this conclusion in mind, the error of the Fifth Circuit is ***514** most clear after examining its specific responses to the district court's opinion.

After reviewing the university's admissions scheme and confirming the district court's use of the two-pronged strict scrutiny test, the Fifth Circuit examined each of the supposed "compelling governmental interests" which the district court held satisfied the first prong of strict scrutiny. The Fifth Circuit summarized:

First, the court approved the non-remedial goal of having a diverse student body, reasoning that "obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications." Second, the court determined that the use of racial classifications could be justified as a remedy for the "present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole." [FN96]

The court first turned to the non-remedial compelling governmental interest--the value of diversity in higher education. Curiously, Hopwood immediately evoked Bakke to begin its discussion on the permissibility of diversity as a compelling governmental interest. "Justice Powell's separate opinion in Bakke provided the original impetus for recognizing diversity as a compelling state interest in higher education." [FN97] From this perspective, the Fifth

Circuit moved quickly to distinguish Bakke, and specifically the diversity rationale, from Hopwood:

We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. 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. . . .

Justice Powell's view in Bakke is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In Bakke, the word "diversity" is mentioned nowhere except in Justice Powell's single-Justice opinion. [FN98]

After arguing that Bakke did not hold that diversity within the context of higher education was compelling, Hopwood continued by opining that "[n]o case since Bakke has accepted diversity as a ***515** compelling state interest under a strict scrutiny analysis." [FN99] The court went further by stating "recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny." [FN100] It shared its analysis of two cases to demonstrate this claim.

First, "the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs." [FN101] "In Croson, the Court flatly stated 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.'" [FN102] Second, the Fifth Circuit argued that Adarand overruled Metro Broadcasting and, although diversity survived the intermediate scrutiny of the Metro Broadcasting majority, it is now dead under Adarand. [FN103]

There are several glaring problems, however, with this analysis. Hopwood is "in direct conflict with Supreme Court precedent, ignores a vital history of the Court's acknowledgment of the validity of race-sensitive government action in other contexts, and discounts the importance of achieving diversity in scholastic institutions." [FN104] First, as mentioned in this Comment's analysis of Bakke, "[t]he [Fifth Circuit] clearly erred when it dismissed Justice Powell's opinion in Bakke as garnering no votes other than his own and not representing the view of the majority of the Court." [FN105] When the "Brennan Four" joined Part V-C of Justice Powell's opinion, Bakke clearly held "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." [FN106]

Akhil Amar and Neal Katyal also argue that the rhetoric of the "Brennan Four" indicates theirsupport of the diversity rationale. After arguing that race-conscious university admissions were permissible, Justice Brennan included the following footnote: "We also agree with Mr. Justice Powell that a plan like the 'Harvard' plan is constitutional under our approach, at least so ***516** long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." [FN107] Opponents of race-conscious decision-making in higher education and the Fifth Circuit use Brennan's footnote to claim that the "Brennan Four" only approved of affirmative action if it was designated to remedy past discrimination. "But, if anything, the Brennan Four's test was more permissive than Powell's. The Brennan Four said more than their Harvard footnote." [FN108] Justice Brennan continued: "[The Davis program] does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together." [FN109] Amar and Katyal offer that "[t]his language, combined with the caveat 'at least' in their Harvard footnote, supports the diversity argument. . . ." [FN110] Finally, as Charles Fried stated in the Harvard Law Review, "it may not be wrong to say that the difference between Powell and Brennan in Bakke was one of degree . . . ." [FN111] The characterization by the Fifth Circuit that Powell wrote a single-Justice opinion without the agreement of the "Brennan Four" is misleading, and rejects a careful reading of both Powell's opinion and Brennan's concurrence.

Furthermore, in dismissing Bakke, the Fifth Circuit failed "to adhere to the doctrine of stare decisis in its decision . . . . The majority opinion in Planned Parenthood v. Casey counseled that the Supreme Court should be circumspect when it considers overruling a case, particularly one that involves an 'intensely divisive controversy . . . .'" [FN112] "As pointed out by the seven judges dissenting from the denial of rehearing en banc, this Court [the Fifth Circuit] is 'compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it.'" [FN113] Bakke remains good ***517** law, and the Fifth Circuit did not have the

authority to overrule or disregard it. [FN114]

As for the appeal to recent affirmative action jurisprudence, the analysis of the Fifth Circuit is misplaced. While Hopwood argues that Part V-C of Justice Powell's opinion does not mention diversity, the court turns to a plurality opinion in Croson and uses the statement "'[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"' [FN115] to prove that diversity may not be used in higher education decision-making. Strangely, just as the Fifth Circuit charged, this statement does not mention "diversity" either. The Croson statement shares the racial classifications "may" create an atmosphere of hostility. It does not, however, prevent a narrowly tailored program, which places race among many factors and adheres to Supreme Court precedent, from pursuing diversity as a compelling governmental interest. Once again, Bakke controls.

Additionally, the Fifth Circuit's characterization that Adarand upset Metro Broadcasting's diversity rationale is incorrect. While the Adarand Court did explicitly overrule Metro Broadcasting's use of intermediate scrutiny to uphold the FCC policy, "the diversity rationale was undisturbed." [FN116] Justice O'Connor's role in the emerging affirmative action jurisprudence also illustrates that diversity may still be considered a compelling governmental interest, especially in higher education. First, as mentioned in this Comment's review of Wygant, O'Connor concurred, stating: "[A] state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." [FN117] After her concurrence in Wygant, O'Connor wrote for the Court in Croson and Adarand. The Fifth Circuit claimed that these later opinions mitigate her ***518** statement about diversity in her 1986 concurring opinion. It stated:

The law school places much reliance upon Justice O'Connor's concurrence in Wygant for the proposition that Justice Powell's Bakke formulation is still viable. In her 1986 Wygant opinion, in the context of discussing Justice Powell's opinion, Justice O'Connor noted that [racial diversity is sufficiently compelling in the context of higher education].

The law school's argument is not persuasive. Justice O'Connor's statement is purely descriptive and did not purport to express her approval or disapproval of diversity as a compelling interest. Her subsequent statements . . . in Croson and Metro Broadcasting suggest strongly that reliance upon this statement in Wygant is unjustified. [FN118]

When coupled with O'Connor's Adarand admonition that strict scrutiny is not "strict in theory, but fatal in fact," however, reliance on her Wygant opinion is justified. The Fifth Circuit, with its misapplication of Bakke, used affirmative action jurisprudence that had little to do with higher education, to decimate O'Connor's careful movement through this explosive issue. The amicus brief submitted by the American Bar Association noted the following:

The import of Bakke for affirmative action in higher education has not been abrogated by the Supreme Court's decisions in subsequent cases. The Court's focus in [Croson and Adarand] was on remedial state action in contexts other than higher education. With no specific discussion in either case of diversity in an educational setting or of race-conscious admissions programs, it is difficult to understand how [the Fifth Circuit] in this case could so misinterpret Croson and Adarand to conclude that Bakke was no longer controlling. [FN119]

In essence, the Fifth Circuit removed Bakke from consideration so it could expand the applicability of affirmative action jurisprudence and move closer to a color-blind interpretation of the Fourteenth Amendment. The Fifth Circuit's analysis regarding whether diversity, in a non-remedial setting, in higher education, can be a compelling governmental interest, is erroneous because: (1) Bakke remains controlling precedent for the context of higher education; (2) Adarand did not disturb the diversity rationale of Metro Broadcasting; (3) Croson and Adarand are not concerned with the unique context of higher education; ***519** (4) O'Connor, the author of the fractured Croson opinion and Adarand distinguished the diversity rationale in higher education in her Wygant concurrence; and (5) strict scrutiny does not mean "strict in theory, but fatal in fact."

The Fifth Circuit also attacked the district court's holding that the use of race by the University of Texas School of Law was to remedy the effects of past discrimination. Specifically, the Fifth Circuit opined that "we must examine the district court's legal determination that the relevant governmental entity is the system of education within the state as a whole." [FN120] The Fifth Circuit disagreed with the district court's decision in Hopwood and concluded

that "the district court erred in expanding the remedial justification to reach all public education within the State of Texas." [FN121] In order for a racial classification to withstand strict scrutiny in the remedial context, the Fifth Circuit stated there must be proof that the specific state actor committed the discrimination. In other words, in order for the University of Texas School of Law to be constitutionally justified in using race to remedy past discrimination, they must show that the University of Texas School of Law, and not the Texas primary and/or secondary educational system, committed racial discrimination.

IV The Value of Diversity in Higher Education

The Fifth Circuit's decision in Hopwood was denied rehearing and denied rehearing en banc, [FN122] denied certiorari by the Supreme Court of the United States, [FN123] was remanded to the district court, [FN124] and is currently awaiting a decision by the Fifth Circuit on a petition by the University of Texas to hear the remanded district court opinion en banc. Nonetheless, it has set the stage for pending litigation regarding the use of race in higher education. Hopwood's impact, however, should be measured in its error and misreading of good law. With Bakke and a careful reading of affirmative action jurisprudence, it is clear that, in the context of higher education, a narrowly tailored program that uses race as one of many factors to achieve diversity ***520** may serve a compelling governmental interest and survive Adarand's mandate for strict scrutiny. As counsel of record for the American Council on Education, the American Association of University Professors, the Association of American Law Schools, and the Law School Admission Council, Robert A. Burgoyne writes: "Diversity in student populations is a constitutionally permissible, compelling government interest that should survive strict scrutiny when plans to achieve diversity through race-based action are carefully and narrowly devised. To hold otherwise is contrary to Supreme Court precedent and would have devastating, long-term consequences on higher education." [FN125] The question becomes: how do we avoid the "devastating, long-term consequences on higher education?" Why is diversity in higher education a compelling governmental interest?

A. The Unique Context of Education

As mentioned throughout the analysis of affirmative action jurisprudence, recent Supreme Court cases about racial classifications did not address higher education specifically. The error of the Fifth Circuit is highlighted by recognizing the unique place that education enjoys with the Court. Throughout its jurisprudence generally, and specifically with race- conscious measures, the Court has distinguished the context of education; Part V-C of Powell's opinion in Bakke and O'Connor's echo of its sentiment in her Wygant concurrence are but two examples. "Since Brown v. Board of Education, through to Bakke and Plyler v. Doe, the Court has recognized the key role education plays, and it has created standards for this arena that other contexts do not enjoy." [FN126] Finally, "[t]he U.S. Court of Appeals for the First Circuit recently recognized the importance of the proper competitive consideration of race in an educational context." [FN127] While the First Circuit ***521** held the admissions program at the Boston Latin School unconstitutional because it relied solely on race, [FN128] "it cited the decision of the panel in Hopwood as an example of overreaching." [FN129] Hopwood does not accurately reflect the unique position that education has in American society and enjoys with the vast majority of American courts.

Furthermore, in addition to the argument that education has gained special recognition by most courts, it is important to acknowledge the deference education requires because of academic freedom and implicated First Amendment values. "American higher education has gained world prominence in part due to its autonomy and freedom from governmental interference." [FN130]

Academic freedom, as outlined by Justice Frankfurter, encompasses the "four essential freedoms of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." [FN131] Because the courts show "great deference to judgment of educators . . . unless [their decisions represent] 'a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not exercise professional judgment,"' [FN132] "[t] he belief that racial and ethnic diversity serves an imperative educational purpose [by a substantial portion of the academic community]" [FN133] should be granted deference as long as the racial classifications comport with current Fourteenth Amendment jurisprudence.

B. Diversity in Higher Education Provides Concrete Benefits

In an increasingly multicultural world, the promotion of a sensitive awareness to the spectrum of viewpoints must be a motivation of higher education. In utilizing narrowly tailored race-conscious decision-making to uphold the value of diversity, institutions of higher education provide many benefits to their students ***522** and to the communities in which those students find themselves after attending college or university. Diversity, according to former president of Dartmouth College James Freedman, is:

> [A] richness of people coming together from a variety of backgrounds, bringing to the environment of the college points of view that necessarily are different because of the differences in the backgrounds of the members of the student body. . . . We need a greater variety of people on our campuses from a greater variety of backgrounds, coming together from their differences in order to help each of them educate others. [FN134]

Freedman's definition of diversity is echoed by the sentiment: "Much of the point of education is to teach students how others think and to help them understand different points of view--to teach students how to be sovereign, responsible, and informed citizens in a heterogeneous democracy." [FN135] It is from this definition that the specific benefits diversity offers our society can be articulated.

First, the cultivation of diversity by institutions of higher learning enhances democracy. This argument is illustrated by noting the relationship between Brown and Bakke:

> Bakke builds squarely on the rock of Brown. Brown held that education was sui generis and that even if racial segregation could be tolerated in other spheres, the school was different. . . . Bakke says that even if affirmative action is unconstitutional in other spheres, schools are different and may be able to take race into account to bring races together. [FN136]

Education is different because it "prepar[es] [students] for participation as a political equal in a pluralist democracy." [FN137] As Harvard president Neil Rudenstine argued: "Diversity in education has been valued and vital for more than a century. [It] was recognized as a necessary component of the education of citizens in a heterogeneous democracy as early as the mid- nineteenth century." [FN138] Second, "[n]umerous studies concretely demonstrate that students who are exposed to racial diversity in education ***523** have better cognitive skills, greater satisfaction with their college experience, and greater tolerance and less prejudice both in the educational setting and beyond." [FN139] Furthermore, "existing studies provide evidence that racial and ethnic diversity on college campuses promotes learning, increases understanding of racial groups and cultures, reduces racism and prejudice, and leads to cordial relationships between students of different racial and ethnic heritage." [FN140] Significantly, "[o]pponents of affirmative action have certainly not disproven the benefits of diversity, nor have they demonstrated that race-conscious affirmative action programs are unnecessary to obtain racial diversity and its concomitant educational benefits in higher education." [FN141] Each of these rationales--democratic citizenship and concrete educational benefit--justify the use of diversity at institutions of higher learning. It is difficult to imagine that ensuring a meaningful educational system or the survival of the republic itself would not qualify as compelling governmental interests.

C. Comment on Proposed Alternatives to Race-Conscious Decision-Making

Although the case for pursuing diversity through the narrow use of race in higher education has constitutional and precedential support, there are several pending cases asking the Court to adopt the erroneous Fifth Circuit decision in Hopwood. With this in mind, attorney Constance Hawke observed: "Assuming the societal benefits inherent in minority participation in American higher education, the challenge is to enhance that participation within the legal parameters being contemplated by the courts and state legislatures. In light of the arguments for and against affirmative action, solutions can be proposed to ameliorate the controversy." [FN142] Burogyne added:

> Because educational institutions perceive racial and ethnic diversity ***524** as such an important educational goal, and because they are committed to preserving a reputation of accessibility, openness, and inclusiveness, it is likely that, if all forms of race-conscious admissions are declared unlawful, they will seek to find other, albeit less satisfactory, ways to achieve the goal of diversity and to make clear that their doors are still open to everyone.

[FN143]

These less satisfactory ways include class-based and grade-based schemes. Hawke noted optimistically: "[T]here is no legal prohibition against preferences being given for 'economically disadvantaged' applicants." [FN144] Unfortunately, these alternatives, as a replacement for narrowly tailored race-based affirmative action have two primary disadvantages. First, "[s]tudies have . . . shown that class-based affirmative action . . . does not come close to replicating the levels of racial diversity that race-based affirmative action has achieved, especially for African-Americans." [FN145] Second, race-neutral systems, such as in Texas, which offer automatic admission to all Texas residents in the top ten percent of their high school class into the University of Texas system, may ironically compromise "currently high academic standards by lowering threshold admissions standards without requiring the concomitant subjective attributes that promise future achievement." [FN146] A common refrain of opponents of affirmative action at institutions of higher learning is that it will jeopardize academic standards. In fact, it may be the alternatives to race-based affirmative action lowering the quality of applicants and students.

Conclusion

"As it has for decades, affirmative action continues to generate firestorms of legal and political controversy. After the Supreme Court's 1995 decision in [Adarand], many observers predicted that affirmative action as we know it would soon vanish. Generally speaking, that hasn't happened." [FN147] Despite the erroneous ***525** Fifth Circuit decision in Hopwood, this Comment contends that the dismantling of affirmative action in higher education has not happened and should not happen because it can be justified, even under the restrictive paradigm of recent affirmative action jurisprudence.

Current affirmative action jurisprudence requires a racial classification to survive strict scrutiny. Although this definitive statement clarified years of confusing decisions, the precedent and rationale for allowing race to enter into decisions of higher education are still present. By upholding Bakke, interpreting the careful opinions of Justice O'Connor in affirmative action cases, and illustrating the errors of the Fifth Circuit, colleges and universities have the tools to enhance education and democracy by utilizing a narrowly crafted race-conscious program to assemble a diverse student body. Diversity, particularly within higher education, has concrete and substantial benefits. Diversity, under current law and Fourteenth Amendment interpretation, is a compelling governmental interest that may be narrowly tailored to survive the exacting gaze of the courts. Harvard University president Neil Rudenstine stated:

> [S]uch diversity is not an end in itself, or a pleasant but dispensable accessory. It is the substance from which much human learning, understanding, and wisdom derive. It offers one of the most powerful ways of creating the intellectual energy and robustness that lead to greater knowledge, as well as the tolerance and mutual respect that are so essential to the maintenance of our civil society. [FN148]

Hopwood banishes meaningful education, vibrant democracy, and common humanity as "accessories" to our existence; current law has not, and must not, follow its disastrous lead.

[FN1]. Coalition Pushes for More Minority Law Clerks at U.S. Supreme Court, Jet, Oct. 25, 1999, at 12.

[FN2]. Gregory W. Meeks, Q: Does the Supreme Court Need Affirmative Action for Its Own Staff? Yes: The Court's Clerks are Too White, Too Male, and Too Unlike the Rest of America, Insight Magazine, Jan. 25, 1999, at 24.

[FN3]. Id.

[FN4]. Robert W. Weir, South Carolina: Slavery and the Structure of the Union, in Ratifying the Constitution 201, 201-34 (Michael Allen Gillespie & Michael Lienesch eds., 1989).

[FN5]. Amicus Curiae Brief for the American Bar Association at 4, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (No. 98-50606) [hereinafter Amicus Curiae Brief] (quoting In re Slaughter-House Cases, 83 U.S. 36, 81 (1872)).

[FN6]. 163 U.S. 537 (1896).

[FN7]. 347 U.S. 483 (1954).

[FN8]. Id. at 493.

[FN9]. Amicus Curiae Brief, supra note 5, at 3 (quoting President Lyndon B. Johnson, Address at Howard University Commencement Ceremony, June 4, 1965).

[FN10]. Constance Hawke, Reframing the Rationale for Affirmative Action in Higher Education Admissions, 135 Ed. Law Rep., Aug. 1999, at 1, 2.

[FN11]. Id.

[FN12]. Id. at 3.

[FN13]. Note, An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, 109 Harv. L. Rev. 1357, 1357 (1996).

[FN14]. Cal. Const. art. I, ß 31(a) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."); Wash. Rev. Code Ann. ß 49.60.400(1) (West 1999) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

[FN15]. Stuart Taylor, Jr., Seeking Diversity Without Racial Preferences, National Journal, Nov. 20, 1999.

[FN16]. 438 U.S. 265 (1978).

[FN17]. Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996).

[FN18]. 515 U.S. 200 (1995).

[FN19]. 488 U.S. 469 (1989).

[FN20]. 497 U.S. 547 (1990).

[FN21]. 476 U.S. 267 (1986).

[FN22]. Stephanie E. Straub, Note, The Wisdom and Constitutionality of Race-Based Decision-Making in Higher Education Admission Programs: A Critical Look at Hopwood v. Texas, 48 Case W. Res. L. Rev. 133, 140 (1997).

[FN23]. Id.

[FN24]. Id.

[FN25]. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 325 (1978) (Brennan, J., concurring in part and dissenting in part).

[FN26]. Straub, supra note 22, at 142.

[FN27]. Bakke, 438 U.S. at 328 (Brennan, J., concurring in part and dissenting in part).

[FN28]. Straub, supra note 22, at 143.

[FN29]. Bakke, 438 U.S. at 412-13 (Stevens, J., concurring in part and dissenting in part).

[FN30]. Straub, supra note 22, at 140.

[FN31]. Bakke, 438 U.S. at 291 (Powell, J., plurality opinion).

[FN32]. Justice Powell identified that:

The special admissions program purports to serve the purposes of: (i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

Id. at 305-06 (citations omitted).

[FN33]. Id. at 320.

[FN34]. Amicus Curiae Brief, supra note 5, at 5; see also Straub, supra note 22, at 143-44 ("Despite the fact that the Davis plan was found to be untenable, one very important idea emerged from Bakke: Justices Powell, Brennan, White, Marshall, and Blackmun agreed that race could be a factor in admissions decisions at the professional school level, provided other factors such as geographic region, community activities, and athletic participation were also used."); Amicus Curiae Brief for the Association of American Law Schools, the American Council Education, the

American Association of University Professors, and the Law School Admission Council at 11, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (No. 98-50506) [hereinafter Amicus Curiae Brief for the Association of American Law Schools] ("Bakke has not been overruled by the Supreme Court.... Bakke therefore remains good law and should have been applied in the prior appeal."); Akhil Reed Amar & Neal Kumar Katyal, Bakke's Fate, 43 UCLA L. Rev. 1745, 1750 (1996) ("One certainty emerged from the splintered Court: Five Justices--the Brennan Four and Justice Powell--signed on to Part V- C of Justice Powell's opinion....").

[FN35]. Jonathan Alger, Affirmative Action in Higher Education: A Current Legal Overview, (visited Mar. 31, 1999) <http//www.aaup.org/aalgbvr.htm>. Alger observed:

"The Supreme Court has not issued an opinion on affirmative action in the higher education context since Bakke, and the settlement of Piscataway [v. Taxman, 91 F.3d 1547 (3rd Cir. 1996), cert. granted, 117 S. Ct. 2506, cert. dismissed, 118 S. Ct. 595 (1997)] means that the Court will not issue any definitive guidance on these issues in the immediate future (although lower court cases are pending which could eventually be reviewed by the Supreme Court....). Individual federal circuits and districts, however, have precedents in place such as Hopwood and Piscataway that have had a chilling effect on affirmative action programs in higher education throughout the country.").

Id.

[FN36]. 515 U.S. 200 (1995).

[FN37]. 476 U.S. 267 (1986).

[FN38]. 488 U.S. 469 (1989).

[FN39]. 497 U.S. 547 (1990).

[FN40]. Amar & Katyal, supra note 34, at 1754.

[FN41]. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (citations omitted).

[FN42]. Id. at 276 (citations omitted).

[FN43]. Id. at 288 n.* (O'Connor, J., concurring in part and concurring in the judgment).

[FN44]. Id. at 286 (emphasis added) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-15 (1978)).

[FN45]. Id. at 288 n.* ("Because this latter goal was not urged as such in support of the layoff provision before the District Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case.").

[FN46]. Id. at 315 (Stevens, J., dissenting) (citation omitted).

[FN47]. Amar & Katyal, supra note 34, at 1756.

[FN48]. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476-77 (1989).

[FN49]. Id. at 493.

[FN50]. Amar & Katyal, supra note 34, at 1759.

[FN51]. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567-68, 569 (1990).

[FN52]. Id. at 564-65 (emphasis added).

[FN53]. Id. at 569.

[FN54]. Amar & Katyal, supra note 34, at 1747.

[FN55]. Id. at 1746-47.

[FN56]. Straub, supra note 22, at 148.

[FN57]. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223 (1995).

[FN58]. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); Hirabayshi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.").

[FN59]. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

[FN60]. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565 (1990) ("In fact, much of the language and reasoning in Croson reaffirmed the lesson of Fullilove that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments.").

[FN61]. Adarand, 515 U.S. at 224 (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).

[FN62]. Id. at 227.

[FN63]. Id. at 237 (Marshall, J., concurring) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

[FN64]. Straub, supra note 22, at 148.

[FN65]. Amar & Katyal, supra note 34, at 1748 ("In fact, only two Justices, Thomas and Scalia, sounded the theme of absolute color-blindness.").

[FN66]. Adarand, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

[FN67]. Id. at 237.

[FN68]. Amar & Katyal, supra note 34, at 1747 (emphasis added).

[FN69]. Id. at 1745.

[FN70]. Id. at 1746.

[FN71]. These four are the plaintiffs in the Hopwood litigation. They are four white applicants who were denied admission to the University of Texas School of Law.

[FN72]. See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

[FN73]. Hopwood v. Texas, 861 F. Supp. 551, 553-54 (W.D. Tex. 1994) (first emphasis added).

[FN74]. 339 U.S. 629 (1950).

[FN75]. Hopwood, 861 F. Supp. at 555.

[FN76]. See id. at 555-57.

[FN77]. Id. at 557.

[FN78]. See id. at 557-60.

[FN79]. See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), in which the court noted:

The [TI] formulae were written by the Law School Data Assembly Service according to a prediction derived from the success of first-year students in preceding years. As the LSAT was determined to be a better predictor of success in law school, the formulae for the class entering in 1992 accorded an approximate 60% weight to LSAT scores and 40% to GPA.

The formula for students with a three-digit LSAT was calculated as: LSAT + (10)(GPA) = TI. For students with a

two-digit LSAT, the formula was: (1.25)LSAT + (10)GPA = TI.
Id. at 935 n.1 (citations omitted).

[FN80]. Hopwood, 861 F. Supp. at 562.

[FN81]. Id.

[FN82]. Id. (citation omitted).

[FN83]. Id. at 568. It may also be important to note that this district court decision was handed down after Metro Broadcasting, but before Adarand.

[FN84]. Id. at 569 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)).

[FN85]. Id. at 570-71.

[FN86]. Id. at 571.

[FN87]. Id. at 572.

[FN88]. Id. at 573.

[FN89]. Id. ("This determination requires the application of four factors: the efficacy of alternative remedies; the flexibility and duration of the relief; the relationship of the numerical goals to the percentage of minorities in the relevant population; and the impact of the relief on the rights of third parties."); see United States v. Paradise, 480 U.S. 149, 171 (1987).

[FN90]. Hopwood, 861 F. Supp. at 575.

[FN91]. Id.

[FN92]. Id.

[FN93]. Id. at 578.

[FN94]. Id. at 579.

[FN95]. Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir. 1996).

[FN96]. Id. at 941 (citations omitted) (quoting Hopwood v. Texas, 861 F. Supp. 551, 573 (W.D. Tex. 1994)).

[FN97]. Id.

[FN98]. Id. at 944.

[FN99]. Id.

[FN100]. Id.

[FN101]. Id.

[FN102]. Id. at 944-45 (citation omitted) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

[FN103]. Id. at 945.

[FN104]. Amicus Curiae Brief, supra note 5, at 5.

[FN105]. Id.

[FN106]. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

[FN107]. Id. at 326 n.1 (citations omitted) (Brennan, J., concurring in part and dissenting in part).

[FN108]. Amar & Katyal, supra note 34, at 1753.

[FN109]. Bakke, 438 U.S. at 374.

[FN110]. Amar & Katyal, supra note 34, at 1753.

[FN111]. Charles Fried, The Supreme Court, 1994 Term: Forward: Revolutions?, 109 Harv. L. Rev. 13, 48 (1995).

[FN112]. Amicus Curiae Brief, supra note 5, at 5-6 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 866-67 (1992)).

[FN113]. Id. at 6 (quoting Hopwood v. Texas, 84 F.3d 720, 722 (5th Cir. 1996) (Politz, C.J., and King, Wiener, Benavides, Stewart, Parker, and Dennis, J.J., dissenting from the failure to grant rehearing en banc)).

[FN114]. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

[FN115]. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

[FN116]. Amicus Curiae Brief, supra note 5, at 10.

[FN117]. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

[FN118]. Hopwood, 78 F.3d at 945 n.27.

[FN119]. Amicus Curiae Brief, supra note 5, at 7.

[FN120]. Hopwood, 78 F.3d at 949.

[FN121]. Id. at 950.

[FN122]. Hopwood v. Texas, 84 F.3d 720 (5th Cir. 1996).

[FN123]. 518 U.S. 1033 (1996).

[FN124]. 999 F. Supp. 872 (W.D. Tex. 1998).

[FN125]. Amicus Curiae Brief for the Association of American Law Schools, supra note 34, at 13.

[FN126]. Amicus Curiae Brief, supra note 5, at 7 (citing Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (describing education as the foundation of good citizenship); Regents of the Univ. of Cal. v. Bakke, 438 U.S 265, 318 (1978) (upholding use of race in admissions decisions); Plyler v. Doe, 457 U.S. 202 (1982) (striking down Texas' denial of education to undocumented students notwithstanding that education is not a fundamental right)); see also United States v. Fordice, 505 U.S. 717 (1992) (requiring more than objectively neutral admissions criteria to satisfy the affirmative duty to desegregate a system of higher education).

[FN127]. Amicus Curiae Brief, supra note 5, at 9.

[FN128]. Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).

[FN129]. Amicus Curiae Brief, supra note 5, at 9 (citing Wessmann, 160 F.3d at 800).

[FN130]. Amicus Curiae Brief for the Association of American Law Schools, supra note 34, at 13 (citing William Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions 287 (1998)).

[FN131]. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added).

[FN132]. Amicus Curiae Brief for the Association of American Law Schools, supra note 34, at 14 (quoting Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)).

[FN133]. Id.

[FN134]. Judith Block McLaughlin, Diversity & Dartmouth, Change, Sept.-Oct. 1991, at 25 (interview with James O. Freedman, former president of Dartmouth College).

[FN135]. Amar & Katyal, supra note 34, at 1774.

[FN136]. Id. at 1775.

[FN137]. Id. at 1774.

[FN138]. Amicus Curiae Brief for the Association of American Law Schools, supra note 34, at 15-16 (citation omitted) (quoting Neil Rudenstine, The Uses of Diversity, 98 Harv. Mag. 48, 49, 50 (1998)).

[FN139]. Id. at 17; see also Bowen & Bok, supra note 130, at 218-55; Marvin P. Dawkins & Jomills Henry Braddock II, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 J. Negro Educ. 394, 403 (1994); Alexander W. Astin, Diversity and Multiculturalism on the Campus: How are Students Affected?, Change, Mar.-Apr. 1993, at 44, 45-46.

[FN140]. Maureen T. Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L.J. 733, 753 (1998).

[FN141]. Jonathan R. Alger, Unfinished Homework for Universities: Making the Case for Affirmative Action, 54 Wash. U. J. Urb. & Contemp. L. 73, 74-75 n.5 (1998).

[FN142]. Hawke, supra note 10, at 16.

[FN143]. Amicus Curiae Brief for the Association of American Law Schools, supra note 34, at 26.

[FN144]. Hawke, supra note 10, at 17.

[FN145]. Amicus Curiae Brief for the Association of American Law Schools, supra note 34, at 26 (citing Deborah C. Malamud, Assessing Class-Based Affirmative Action, 47 J. Legal Educ. 452, 464-71 (1997)).

[FN146]. Id. at 27 (citing Bowen & Bok, supra note 130, at 271-74).

[FN147]. Robert S. Whitman, Affirmative Action on Campus: The Legal and Practical Challenges, 24 J.C. & U.L. 637, 637 (1998).

[FN148]. Ken Gewertz, President's Report Explores Diversity, Harv. U. Gazette (Feb. 8, 1996) <http://www.hno.harvard.edu/gazette/1996/02.08/PresidentsRepor.html> (quoting President Neil L. Rudenstine, Report to the Board of Overseers (1996)).

[FNa1]. Third-year law student, University of Oregon School of Law, Associate Editor, Oregon Law Review 2000-2001. The author would like to thank Professors Lisa Kloppenberg, Melinda Grier, and Gil Carrasco for their guidance.

END OF DOCUMENT