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THE DIVERSITY JUSTIFICATION FOR AFFIRMATIVE ACTION IN HIGHER EDUCATION: IS HOPWOOD v. TEXAS RIGHT?

Michelle M. Inouye*

[I]t is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.1

I. INTRODUCTION

The University of California, 1996. The Board of Regents voted to eliminate race as a factor in admissions to California's prestigious nine-campus, 162,000-student university system.2 In response, state democratic legislators threatened to cut funding, and university officials expressed fear for their safety on campus.3 Both the chancellors of the University of California (U.C.) flagship schools, U.C. Berkeley Chancellor Chang-Lin Tien and UCLA Chancellor Charles E. Young, opposed banning affirmative action in admissions. Chancellor Tien cited the value of student body diversity as the main reason why race should be taken into account during the admissions process.4 Yet U.C. officials admitted that affirmative action, on the individual applicant

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2. Two proposals will take effect Jan. 1, 1997. The first measure eliminates the use of "race, religion, gender, color, ethnicity or national origin" as criteria in admissions decisions. The second measure eliminates the same criteria in hiring and contracting decisions. Dave Lesher & Amy Wallace, UC Vote to End Affirmative Action Echoes Across U.S., L.A. TIMES, July 22, 1995, at 1A.

3. Id.

4. "[H]elping minority students may not be the most compelling reason for preserving affirmative action. . . . When there are diverse students, staff and faculty . . . everybody stands to gain." Chancellor Chang-Lin Tien, A View from Berkeley, N.Y. TIMES, Mar. 31, 1996, at 4A. The presumption that a diverse student body contributes to the educational experience of all the students is not new. The president of Princeton University and the Harvard College Admissions Program made the same argument in Bakke, 438 U.S. at 312-13 n.48, 321-24.
level, made it easier for a qualified minority than a qualified white to attend a U.C. school. 5

Regent Ward Connerly, sponsor of the proposal to eliminate affirmative action, defended his proposal by saying, "We cannot allow the desire for diversity to overshadow the need for the best-qualified students." 6 But what makes one candidate more "qualified" than another? Is it solely a mix of GPA and SAT scores? Or, does it also include achievements in athletics, proficiency in languages, extracurricular activities, community service, legacy status, and the ability to overcome economic or social disadvantage? Universities have a myriad of admissions criteria available to define the concept "qualified" applicant. The question is, does the Constitution allow race to be included as one of the criteria?

The affirmative action debate is nothing new to the halls of higher education. The educational setting has traditionally been considered a special context, as the unanimous opinion in Brown v. Board of Education noted: "Education is perhaps the most important function of state and local governments." 7 In Bakke, Justice Powell reinforced the unique place of higher education by noting a First Amendment concern when the right of a university to select its student body is impinged. 8 The diversity rationale for affirmative action, first voiced by Justice Powell in Bakke,

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5. For example, the mean grade-point average for entering freshmen at U.C. Berkeley differed by ethnicity for the entering class of 1994-95. The mean GPA was 3.4 for blacks; 3.7 for Hispanics; 3.8 for whites; and 3.9 for Asians. This excludes special admits based on athletic or musical talent. Evan Thomas & Bob Cohn, California Forecast: Storm on Campus, NEWSWEEK, June 26, 1995, at 20. See also Michael Lynch, Affirmative Action at the University of California, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y XX (1997).

6. Thomas & Cohn, supra note 5, at 20.


[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

8. Bakke, 438 U.S. at 312-13. Justice Powell put it this way:

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. . . . Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment.

Id. at 313.
assumes that there is something special about the interaction between diverse students that adds to the "robust exchange of ideas" at an institution of higher education.9

Despite its special character, however, higher education is not exempt from equal protection analysis. According to Justice Powell's opinion in Bakke, in order to be constitutional any race-based classification must pass the strict scrutiny test, regardless of its alleged purpose.10 The strict scrutiny test consists of two parts: (1) the race-based categorization must serve a compelling state interest; and (2) the program must be narrowly tailored to serve that interest.11 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."12

Institutions of higher education usually proffer two justifications for their race-based admissions preferences: remedying the present effects of past discrimination and creating a diverse student body.13 A remedial purpose, if properly evidenced and constructed, will pass strict scrutiny.14 The diversity justification, however, is highly controversial. Its proponents cite the freedom of universities to choose their own students, the inherent value of a diverse student body, the dispelling of racial stereotypes, the addition of minority viewpoints to the "robust exchange of ideas," and the university's First Amendment right to select its student body.15 Opponents of the diversity justification cite the negative effects of using race as a proxy for diverse characteristics, the stigma it places on minority students, and the impact

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9. "[The school] must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission." Bakke, 438 U.S. at 313.
10. Id. at 291.
13. Justifications that the Supreme Court rejected include reducing the deficit of traditionally disfavored minorities in medical schools and the medical profession; countering the effects of societal discrimination; increasing the number of physicians who will practice in minority communities currently under served; lessening of social stigma; and providing faculty role models. See Bakke, 438 U.S. at 294-95, n.34; Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
14. See Adarand, 115 S. Ct. at 2117.
15. See generally Anthony Lewis, Handcuffs on Learning, N.Y. TIMES, Mar. 22, 1996 (arguing that minority students do in fact have distinct life experiences and therefore diverse viewpoints that they can contribute to the university); Kathleen M. Sullivan, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 HARV. L. REV. 78 (1986) (suggesting alternative rationales for a diversity affirmative action justification).
affirmative action has on innocent, individual applicants. The Supreme Court has yet to decide whether the diversity justification for affirmative action in higher education constitutes a compelling state interest.

This Note assesses the constitutionality and the prudence of using racial preferences in an admissions process based on the diversity justification. Diversity has an intrinsic value in the context of higher education not only for the minority student but for the whole of the student body, and therefore diversity should constitute a valid justification for a race-based admissions process in the context of higher education. Nevertheless, this Note concludes that race-based admissions schemes are not narrowly tailored to serve the compelling institutional interest in diversity, and therefore current admissions practices that use race as a "plus" factor should fail the strict scrutiny test.

Part II of this Note discusses Hopwood v. Texas in which the Fifth Circuit held that diversity is not a valid compelling state interest upon which a race-based admissions program may be based. I will critique Hopwood in light of the Supreme Court's recent decision in Adarand v. Pena and the subsequent district and circuit court cases. Part III addresses the Hopwood decision from an ethical standpoint, analyzing the value of diversity in higher education and the moral desirability of using race as a proxy for diversity. Part IV discusses alternative admissions criteria that promote a school's interest in gaining and maintaining a diverse student body. This Note concludes that these alternatives are not only constitutional but are more ethical and principled than race-based affirmative action.

II. Hopwood v. Texas: Did the Fifth Circuit Interpret and Apply the Law Correctly?

In Hopwood v. Texas, the Fifth Circuit held that the University of Texas Law School had violated white applicants' rights under the Equal Protection Clause by giving a substantial racial preference to specified minorities in its admissions process. Rejecting diversity as a justification for the minority preferences, the Fifth Circuit stated that "there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs."


A. Supreme Court Precursors to Hopwood

The Supreme Court has twice ruled on diversity as a justification for classifications based on race; the outcomes of both are equivocal. The diversity justification for affirmative action first appeared in Justice Powell's opinion in *Regents of the University of California v. Bakke*, a higher education admissions case decided by a fractured Supreme Court. This issue appeared for a second time in *Metro Broadcasting v. Federal Communications Commission*.18

The *Bakke* decision consisted of six opinions, with no majority. Justice Powell announced the Court's judgment that strict scrutiny applied even to "benign" classifications based on race. He was joined on that issue by Justices Burger, Stewart, Stevens, and Rehnquist. Then Justice Powell, joined by Justices Brennan, White, Marshall, and Blackmun, reversed the California Supreme Court's injunction preventing the U.C. Davis Medical School from according any consideration to race in its admissions process.19 Justice Powell, as the necessary swing vote for both issues, wrote the lead opinion that has been widely cited and accepted as law.20 Yet no other Justice joined Powell's concurrence which contained his finding that student body diversity constituted a compelling state interest, a point later exploited by the Fifth Circuit in *Hopwood v. Texas*.21

Justice Powell wrote, "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education."22 A university that promoted diversity "must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission."23 In explaining why diversity was of such importance, Justice Powell first cited the essential freedom of a university to "make its own judgments as to education includ[ing] the selection of its student body."24 Justice Powell thus placed the right of a university to select students that it believes will contribute most to the exchange of ideas under the protection of First Amendment.25

Justice Powell next focused on the benefits derived from a diverse student body, for minority and non-minority students

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21. *Hopwood*, 78 F.3d at 941-44.
23. *Id.* at 313.
24. *Id.* at 312.
25. *Id.* at 313.
alike. Students learn informally when they come into contact with individuals who hold varying viewpoints and have had different life experiences. This informal learning, though difficult to quantify, is of great value, and "[t]he atmosphere of 'speculation, experimentation and creation' . . . is widely believed to be promoted by a diverse student body." Justice Powell found this benefit in undergraduate, graduate, law, and medical schools, adding that diversity of backgrounds enriched the students' training and better equipped them to serve a heterogeneous population.

After Justice Powell had determined that diversity constituted a compelling state interest in higher education, he turned to the narrowly tailored requirement. For diversity to pass the narrowly tailored portion of the strict scrutiny test, race must be one characteristic, one "plus" factor, among many considered by the university. Justice Powell suggested other qualifications a university could consider, including: "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [and the] ability to communicate with the poor . . . ." This wide range of "plus" factors allowed for an individualized comparison of each minority and non-minority applicant on a case-by-case basis, thus satisfying an individual's right not to be precluded from a certain seat by virtue of their race.

26. *Id.* at 312.

27. Ironically, Justice Powell cited *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) for this proposition. That case dealt with the University of Texas School of Law's practice of racial segregation. Justice Powell included this excerpt from *Sweatt*:

> The law school, the proving ground for legal learning and practice, cannot be effective insolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.


28. Justice Powell put it succinctly:

> Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body. Although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.

*Bakke*, 265 U.S. at 314.

29. *Id.* at 317.

30. Justice Powell explained what he meant by a "plus" factor:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate
this "plus" factor analysis, Justice Powell found that although the U.C. Davis Medical School had a compelling interest in student body diversity, the school's set-aside program was unconstitutional because it was not narrowly tailored to further diversity. U.C. Davis's set-aside program was not narrowly tailored because it insulated the individual from comparison with all other candidates for any available seat, and failed to treat "each applicant as an individual in the admissions process." Thus, U.C. Davis's racial classifications "focused solely on ethnic diversity, [which] would hinder rather than further attainment of genuine diversity." U.C. Davis's rigid set-aside system, found unconstitutional, gave way to the narrowly tailored alternative: the Bakke minority "plus" factor. Despite the fact that Justice Powell did not speak for the majority of the Supreme Court, schools have used his "plus" factor in their admissions programs ever since.

The second, and only other time, that the Supreme Court directly discussed the diversity justification was in Metro Broadcasting v. Federal Communications Commission. In Metro Broadcasting, a non-minority bidder for a broadcast license challenged FCC policies favoring minority bidders, including "distress sale" guidelines that allowed transfer of existing radio and television stations exclusively to minority controlled firms. Citing judicial deference to congressional legislation, Justice Brennan, writing for the Court, used intermediate scrutiny instead of the strict scrutiny standard used in Bakke to judge the constitutionality of the FCC polices. Under intermediate scrutiny he found that diversity served an "important government interest:"[T]he interest in enhancing broadcast diversity is, at the very least, an important government objective and is there-

the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive. . . .

Id. Justice Powell cited Harvard College's program as an example of how this might work. Id. at 321-24.
31. Id. at 318.
32. Id. at 315.
33. 497 U.S. 547 (1990) (the application of intermediate scrutiny to congressional programs was later rejected by the Court in Adarand).
34. Id. at 547.
35. For the FCC's policies to pass intermediate scrutiny they must serve an important government objective and must be substantially related to achievement of that objective. Id. at 565. In comparison, if the FCC policies needed to pass strict scrutiny they would have to serve a compelling state interest and the program would have to be narrowly tailored to serve that interest.
36. Id. at 567.
fore a sufficient basis for the Commission’s minority ownership policies. Just as a “diverse student body” contributing to a “robust exchange of ideas” is a “constitutionally permissible goal” on which a race-conscious university admissions program may be based, University of California v. Bakke, (opinion of Powell, J.). The diversity of views and information on the airwaves serves important First Amendment values.37

Justice Stevens, in his concurrence, underscored the “unquestionable” legitimacy of the diversity interest in both the “broadcast and the professional school setting.”38

Metro Broadcasting’s dissent, written by Justice O’Connor and joined by Justices Rehnquist, Scalia, and Kennedy, first criticized the majority’s application of intermediate scrutiny to federal programs. Justice O’Connor believed that strict scrutiny was the appropriate test.39 The dissent then discussed what it considered was a compelling state interest.

Rejecting the majority’s broadcast diversity justification,40 the dissent concluded that the equal protection doctrine had thus far recognized only one compelling state interest: remedying the effects of racial discrimination.41 The dissent criticized the majority’s broadcast diversity justification because it was “simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.”42

The dissent thought broadcast diversity too amorphous for several reasons. First, “[t]he FCC’s policies assume, and rely upon, the existence of a tightly bound ‘nexus’ between the owners’ race and the resulting programming.”43 Diversity is a compelling interest only if it exposes diverse viewpoints to the public.

37. Id. at 567-68.
38. Justice Stevens wrote that “[t]he public interest in broadcast diversity like the interest in an integrated police force, diversity in the composition of a public school body of a professional school — is in my view unquestionably legitimate.” Id. at 601-02. “Unquestionably legitimate” is the wording used by Stevens in strict scrutiny cases. Fullilove v. Klutznick, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting) (“Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate.”) (emphasis added).
40. Justice Kennedy, joined by Justice Scalia, labeled broadcast diversity a “trivial” state interest. Id. at 693.
41. Id. at 612.
42. Id.
43. Id. at 626.
The justification is necessarily based on the premise that different races have different viewpoints. "Such policies may embody stereotypes that treat individuals as the product of their race." To base a state program on the presumption that an individual held a viewpoint because of their race was for the state to "impermissibly equat[e] race with thoughts and behavior." Another problem the dissent had with the diversity justification for racial classifications was that it had "no logical stopping point." First, there is no principled way to define or measure a particular viewpoint that might be associated with race. How does one define a "Black viewpoint," an "Asian viewpoint," or a "White viewpoint"? Second, a diversity justification would support the indefinite use of racial classifications, "employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect the mixture." The dissent equated this with clearly unconstitutional "outright racial balancing." Third, the diversity justification is capable of supporting measures that are difficult, if not impossible, to distinguish from proscribed discrimination and can be used to benefit or burden racial groups:

Divorced from any remedial purpose and otherwise undefined, "benign" means only what shifting fashions and changing politics deems acceptable. Members of any racial or ethnic group, whether now preferred under the FCC's policies or not, may find themselves politically out of fashion and subject to disadvantageous but "benign" discrimination. Finally, after concluding that diversity did not constitute a compelling state interest, the dissent found that the FCC policy was not narrowly tailored to serve an interest in diversity. The dissent

44. Id. at 604. See also Shaw v. Reno, 509 U.S. 630, 647 (1993) ("[racial gerrymandering] reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.")

45. Justice O'Connor made this additional comment on the diversity justification: "[T]he interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications." Id. at 615.

46. Id. at 613. See also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (objecting to the role-model justification for race-based decision making because it is essentially limitless in scope and duration).

47. Metro Broadcasting, 497 U.S. at 614.

48. Id. at 614 (citing Croson, 488 U.S. at 507).

49. Id. at 615.
pointed out the availability of race-neutral alternatives. Citing Bakke, Justice O'Connor commented that

Even if distinct views could be associated with particular ethnic and racial groups, focusing on this particular aspect of the Nation’s views calls into question the Government’s genuine commitment to its asserted interest. Our equal protection doctrine governing intermediate review indicates that the Government may not use race and ethnicity as a proxy for other, more germane bases of classification.50

The dissent found that the FCC used race as a proxy for whatever views it believed to be under-represented. But a racial classification is both under-inclusive and over-inclusive because it fails to take into account the viewpoints in any individual case.51 A race-neutral alternative would be for the FCC to directly advance its interest by requiring licensees to provide programming that the FCC believed would add to broadcast diversity.52 The dissent also found that the FCC policies were unduly burdensome on the disfavored individuals.53

Though not directly concerned with diversity, the Supreme Court in Adarand Constructors, Inc. v. Pen254 overruled Metro Broadcasting’s intermediate scrutiny standard, dissolving the previous judicial distinction between federal and state actions. Adarand made it clear that all race-based classifications, imposed by a federal or state governmental actor, must be analyzed under strict scrutiny.55

Adarand raises two points of interest for our particular inquiry. First, Justice O’Connor, writing for the Court, overruled Metro Broadcasting only as far as it was inconsistent with the use of strict scrutiny in analyzing federal legislation.56 Justice

50. Id. at 621 (citation omitted).
51. Id.
52. Id. at 622.
53. Id. at 630.
55. Id. at 2113.
56. Justice Stevens, joined by Justice Ginsburg, noted in his dissent: The majority today overrules Metro Broadcasting only insofar as it is “inconsistent with [the] holding” that strict scrutiny applies to “benign” racial classifications promulgated by the Federal Government. [cite omitted] The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court’s holding today — indeed, the question is not remotely presented in this case — and I do not take the Court’s opinion to diminish that aspect of our decision in Metro Broadcasting.
Id. at 2127-28.
O'Connor did not comment on whether diversity, found to be "at least" an important state interest in Metro Broadcasting, could constitute a compelling state interest in certain contexts. Justice O'Connor also cited Bakke without criticizing or commenting on Justice Powell's use of the diversity justification.\(^7\) This may not be too surprising, however, since Adarand was a federal contracting minority set-aside case where the argument for diversity was not easily applicable.

The second interesting point in Adarand: Justices Scalia and Thomas, in separate concurring opinions, indicated rather strongly that no affirmative action program could survive strict scrutiny.\(^5\) Justice O'Connor, however, explicitly stated that strict scrutiny is not fatal in fact.\(^6\) Thus a majority of the Court left open the possibility that an affirmative action program properly based and constructed could pass strict scrutiny. Strong evidence suggests, however, that Chief Justice Rehnquist\(^5\) and Justice O'Connor\(^6\) would recognize only the remedying of present

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57. Justice O'Connor cited Powell's decision in Bakke to support the application of strict scrutiny to "benign" racial classifications. She also noted that Bakke lacked a majority opinion. Adarand, 115 S. Ct. at 2108.

58. Justice Scalia stressed that the Constitution protected the individual and reiterated that even the "most admirable and benign of purposes" still reinforces the thinking that produced "race slavery, race privilege and race hatred." Id. at 2118-19 (Scalia, J., concurring).

In line with Justice Scalia, Justice Thomas wrote: "[G] overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple." Id. at 2119 (Thomas, J., concurring).

59. Justice O'Connor wrote for the majority:

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." [cite omitted]. The unhappy persistence of both the practice and the lingering side 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. Id. at 2117.

60. To understand Justice Rehnquist's position, Justice Stewart's dissent in Fullilove v. Klutznick is helpful:

[A] judicial decree that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination. . . . Since the MBE provision [construction set-aside program] was in whole or in part designed to effectuate objectives other than the elimination of the effects of racial discrimination, it cannot stand as a remedy that comports with the strictures of equal protection.


61. For Justice O'Connor's position, Justice Powell's lead opinion in Wygant v. Jackson Board of Education is helpful. Powell wrote: "[T]he Court has insisted upon some showing of prior discrimination by the governmental unit
effects of past discrimination as a constitutionally permissible compelling state interest.

Since Adarand, only a few district courts have addressed the continued viability of the diversity justification for race-based classifications.

B. The Fifth Circuit Hopwood Decision

In Hopwood four white students applied to the University of Texas Law School in 1992. These students, based on GPA and LSAT scores, were considered discretionary candidates. This meant that they were between the presumptive admit and presumptive denial categories for white applicants. After the law school failed to extend an offer of admissions to any of the four plaintiffs, they sued primarily under the Equal Protection Clause of the Fourteenth Amendment, alleging that they were subjected to unconstitutional racial discrimination by the law school’s admissions process.

Applicants to the law school were categorized by race, which gave certain favored minority groups preferential treatment during the admissions process. The preferences assisted African Americans and Mexican Americans to the detriment of whites and non-preferred minorities. The law school maintained for the benefit of the preferred minorities different presumptive admit and denial standards, separate evaluation processes, and segregated waiting lists.

In Hopwood, District Court Judge Sparks held that all classifications based on race regardless of their purpose must be analyzed under strict scrutiny. As noted earlier, strict scrutiny means that race-based classifications are constitutional only if they are narrowly tailored measures that further compelling state interests. Judge Sparks rejected the plaintiffs’ argument that the only compelling state interest recognized by the Supreme

involved before allowing limited use of racial classifications in order to remedy such discrimination.” And that there is a “requirement that race-based state action be remedial.” Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 278 n.5 (1986) (Powell, J., opinion, joined by O’Connor, J.).

62. The University of Texas Law School receives over 4,000 applications a year to fill an entering class of about 500 students. Hopwood v. Texas, 78 F.3d. 932, 935 (5th Cir. 1996).


64. Hopwood, 78 F.3d at 934.

65. Id. at 936-38.

66. Hopwood, 861 F. Supp. 551, 567-69 (W.D. Tex.), rev’d, 78 F.3d 932 (5th Cir.).

Court as a valid justification for race-based classifications was the remedying of present effects of past racial discrimination. 68

Next, Judge Sparks turned to the diversity rationale proffered by the Texas law school. Judge Sparks first noted that education is a unique context in our society, and then wrote that none of the recent [affirmative action] opinions is factually based in the education context and, therefore, none focuses on the unique role of education in our society. 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. 69

Judge Sparks also cited evidence, including the testimony of deans from law schools across the country and former and current law students, that the benefits of a diverse student body were substantial. 70 Nevertheless Judge Sparks found that the University of Texas Law School's admissions program failed the strict scrutiny test because their admissions process was not narrowly tailored. Like the U.C. Davis program in Bakke, the University of Texas's program failed to provide an individual comparison between minority and non-minority candidates. Due to the segregated admissions process and waiting lists, the University of Texas in effect used race not just as a "plus" factor but rather as the determinative factor in admissions. 71

The Fifth Circuit reversed the district court and stated that "there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs." 72 Judge Smith, after reaffirming the district court's use of strict scrutiny, rejected diversity as a rationale for affirmative action and found that "Justice Powell's view in Bakke is not binding precedent" 73 on the issue of diversity because it "garnered only [Powell's] own vote and has never represented the view of a majority of the Court in the Bakke or any other case." 74 The court noted that no other Supreme Court decision had accepted diversity as a compelling state interest under strict scrutiny analysis. 75 Judge Smith, writ-
ing for himself and Judge DeMoss, cited what he dubbed Justice O'Connor's *Adarand*-vindicated dissent in *Metro Broadcasting*:

Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications. 76

To further his contention that diversity is not a valid justification for race-based classifications, Judge Smith articulated several anti-diversity arguments. First, Judge Smith argued that racial classifications, if not remedial, stigmatize minorities. Citing the *Croson* plurality, Judge Smith found 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.'" 77 Judge Smith also cited Justice Thomas's *Adarand* concurrence to buttress his stigma argument: "So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. . . . These programs stamp minorities with a badge of inferiority." 78

Next, Judge Smith emphasized the "rights created by the . . . Fourteenth Amendment are, by its terms, guaranteed to the individual." 79 In contrast, the concept of diversity assumes that race is a proxy for some desirable characteristics and focuses not on the individual but on a racial group. Judge Smith stated that

[w]ithin the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility. 80

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76. *Id.* at 945 (citing *Metro Broad. v. F.C.C.*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting)).
77. 78 F.3d at 944-45 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality decision)).
78. *Id.* at 945 (citing *Shevy v. Kraemer*, 334 U.S. 1, 22 (1948)).
79. *Hopwood*, 78 F.3d at 941 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).
80. *Id.* at 945.
The court also rejected wholesale the *Bakke* "plus" factor as unconstitutional:

The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood types of applicants. . . . [T]he use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional.81

As alternatives to race, the court suggested that the law school could reasonably consider a variety of other factors, "some of which may have some correlation with race,"82 when making admissions decisions. The list of factors reads much like Justice Powell's in *Bakke*—extra-curriculars, alumni status, etc.—with the exclusion of race. Race cannot be used as a "proxy for other characteristics that institutions of higher education value but that do not raise similar constitutional concerns."83 Recalling Justice O'Connor's dissent in *Metro Broadcasting*, the court rejected the use of assumptions based on race: "The assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group."84 This is not an assumption that the Constitution allows the government to make. "[I]t is incorrect and legally inappropriate to impute to women and minorities 'a different attitude about such issues as the federal budget, school prayer, voting, and foreign relations.'"85

The court also made it clear that no amount of social scientific evidence—evidence that may tend to establish a correlation between some viewpoints and race—can overcome the constitutional mandate to think in terms of an individual and not in terms of a racial group. In other words, even if there are substantial efficiencies gained by sorting people by race because it is a good proxy for functional classifications, the Equal Protection Clause prohibits the government from doing so.86

What's more, the court rationalized, if race were a proxy for diverse characteristics, diversity would be better served by looking directly at the diverse characteristics on an applicant-by-applicant basis. Returning to the Equal Protection Clause's protection of the individual the court found that "individuals,

81. *Id.* at 945-46.
82. *Id.* at 946.
83. *Id.
84. *Id.
85. *Id.
86. *Id.* at 946 n.30.
with their own conception of life, further diversity of viewpoint.87 By protecting the individual, the court would protect diversity. "[W]e only observe that 'diversity' can take many forms. To foster such diversity, state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race."88

The court then turned to the district court's determination that the law school's affirmative action program had a compelling "remedial purpose."89 Using the law school as the relevant state actor and not the Texas school system in general, the court found an insufficient nexus between any past discrimination and present effects. The court attributed the school's present hostile environment and bad reputation among minorities to "societal discrimination," and the Supreme Court in Bakke rejected "societal discrimination" as a justification for affirmative action.90 The Hopwood Court added that racial tension at the University of Texas, "if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions."91 The Hopwood majority significantly left open the possibility for the awarding of compensatory and punitive damages against offending universities.92

In contrast, Judge Wiener, concurring in the judgment, held diversity did constitute a compelling state interest. He wrote that

[t]he main reason that I cannot go along with the panel opinion . . . [that diversity is not a compelling state interest] is that I do not read the applicable Supreme Court precedent as having held squarely and unequivocally either that remedying effects of past discrimination is the only compelling governmental interest that can ever justify racial classifications, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling state interest. Indeed, the panel opinion itself hedges a bit on whether the Supreme Court's square holdings have gone that far, particularly in the realm of higher education. . . . I perceive no

87. Id.
88. Id. at 947.
91. Hopwood, 78 F.3d at 953.
92. This case was remanded to the district court to reconsider the issue of damages. Hopwood, 78 F.3d at 962.
“compelling” reason to rush in where the Supreme Court fears — or at least declines — to tread.93

Thus, Judge Wiener’s main concern appears to be the impropriety of ignoring Supreme Court precedent and not in the logical arguments against the diversity justification that Judge Smith articulated in his opinion. Even though Judge Wiener refused to join Judge Smith’s assessment of the precedential status of Justice Powell’s opinion in Bakke, he nevertheless joined the Court’s judgment because he found the law school’s program was insufficiently tailored to achieve diversity.94 He noted that “racial diversity is not true diversity, and a system thus conceived and implemented simply is not narrowly tailored to achieve diversity.”95

The Fifth Circuit, although never requested by the parties, polled its members and denied en banc review.96 Seven judges wrote a scathing dissent calling the panel opinion “not just en banc-worthy but en banc mandatory.”97 The dissent first criticized their colleagues for not granting en banc review in a case where “[t]he radical implications of . . . [Judge Smith’s panel 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.”98 The dissent then attacked the panel opinion for overruling Bakke, stating “[t]he syllogisms tacked together and proffered by the majority opinion as proof that Justice Powell’s diversity conclusion is no longer good law do not, under any standards of which we are aware, qualify as an overruling of Bakke.”99 Thus, even if the panel believed that the Supreme Court would eventually overrule Bakke, they nevertheless should have applied Bakke’s diversity analysis as binding precedent to the case before them. Instead, the panel “chartered a path into terra incognita. Judicial self-restraint was the first casualty; it proved to be too burdensome. The teachings proscribing the consideration of constitutional issues unnecessary to the decision soon followed. With these two limitations adroitly set aside, the panel majority apparently considered itself positioned to overrule Bakke.”100

93. Id. at 964-65 (Wiener, J., concurring).
94. Id. at 966.
95. Id.
96. Hopwood v. Texas, 84 F.3d 720, 721 (5th Cir. 1996).
97. Id. at 722 (Politz, C.J., dissenting, joined by King, Wiener, Benavides, Stewart, Parker and Dennis).
98. Id.
99. Id. at 723-24.
100. Id. at 724.
Three months after the Fifth Circuit denied en banc review, the Supreme Court denied certiorari, but Justice Ginsburg, joined by Justice Souter, wrote that "whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance." Justice Ginsburg noted that the law school and the plaintiffs both agreed that the 1992 admissions policy was unconstitutional, therefore the law school was requesting review of the Fifth Circuit's rationale behind their judgment and not of the judgment itself. Justice Ginsburg stated, "we must await a final judgment on a program genuinely in controversy before addressing the important question raised in the petition." This highly ambiguous statement suggests that denial of certiorari may have been based on mootness or lack of case or controversy grounds, and it left open the possibility that diversity may still constitute a compelling state interest in higher education.

Other district and appellate court decisions appear to support the Fifth Circuit's reading of the Supreme Court's current affirmative action jurisprudence. For instance, in McLaughlin v. Boston School Committee, a Massachusetts district court found that a thirty-five percent set-aside for Black and Hispanic students for admissions to a highly regarded public school violated a white candidate's right to equal protection. Judge Garrity, after admitting that "the development of the law in this politically charged area is far from complete," and that "school authorities are traditionally charged with broad power to formulate and implement educational policy," found that the set-aside failed the strict scrutiny test. Judge Garrity, like Judge Wiener's concurrence in Hopwood, declined to decide directly whether diversity constituted a compelling state interest. Instead, he mentioned both Bakke and Hopwood and refused to grant summary judgment for McLaughlin because at least two Supreme Court Justices (Ginsburg and Souter) indicated when denying certiorari that they did not view Hopwood as the final word on whether diversity constituted a compelling government interest in higher education.

102. Id.
104. Id. at 1009.
105. Id. at 1010 (quoting Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).
106. Id. at 1015.
After Judge Garrity skirted the diversity issue, he decided that Boston's race-based preference plan did not pass strict scrutiny because the set-aside failed the narrowly tailored portion of the test. Judge Garrity cited three reasons: (1) the set-aside had no built-in termination provision; (2) the school district did not consider less racially preferential plans to achieve the same diversity; and (3) such race-neutral alternatives were most likely available.¹⁰⁷

In another case consistent with Hopwood's analysis of race-based preferences, the Third Circuit en banc rejected the notion that diversity constituted a compelling state interest in Title VII employment cases. In Taxman v. Board of Education of the Township of Piscataway,¹⁰⁸ the school board, faced with the need to lay off one of two equally qualified teachers, chose to retain the African American teacher for diversity reasons (she was the only African American in her department). The Third Circuit found that this non-remedial purpose for the race-based program did not pass strict scrutiny.¹⁰⁹ Reluctant to find that a diverse faculty had no value at all, Judge Mansmann wrote the following:

While we rejected the argument that the Board's non-remedial application of the affirmative action policy is consistent with the language and intent of Title VII, we do not reject in principle the diversity goal articulated by the Board. Indeed, we recognize that the differences among us underlie the richness and strength of our Nation. Our disposition of this matter, however, rests squarely on the foundation of Title VII. Although we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measurers.¹¹⁰

Further, the court found that the program was not narrowly tailored because the Board's discretionary use of race as a tie-breaker between two equally qualified candidates was too vague for application, was unlimited in duration, and was void of goals and standards.¹¹¹

A third case, Podberesky v. Kirwan, pre-dates Hopwood but exemplifies how difficult it is to establish a compelling state interest to justify racial classifications even when the purpose of the

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¹⁰⁷. Id. at 1016.
¹⁰⁹. Id. at 1550.
¹¹⁰. Id. at 1567.
¹¹¹. Id. at 1564.
program is remedying the effects of past discrimination. The Fourth Circuit court concluded that a race-exclusive scholarship program failed the strict scrutiny test because it was not narrowly tailored to remedy present effects of past discrimination. The University of Maryland College Park (UMCP) also failed to demonstrate the existence of present effects of past discrimination despite previous de jure segregation of the Maryland school system and a lengthy research effort by the university. UMCP did not proffer a diversity justification for its race-exclusive scholarship program, but considering the high level of proof the Fourth Circuit demanded to justify remedial measures, it is highly unlikely a diversity justification would have fared better.

C. Criticism of the Hopwood Decision

There are various legal arguments available to refute the *Hopwood* decision. For instance, one could argue that Justice O'Connor, writing for the *Adarand* majority, did not in fact intend to overturn *Bakke*, but instead cited it without commenting on Justice Powell's diversity justification, thus leaving that portion of Powell's opinion standing. It is also unclear whether a majority of the Supreme Court intended to foreclose any other compelling state interest beyond remedying the effects of past discrimination. While there is evidence that some of the Justices would so limit affirmative action, there is also evidence that several Justices would give the state far more latitude. In light of the constitutional uncertainty left after *Adarand*, one might well wonder by what authority the Fifth Circuit disregarded *Bakke* and explicitly found no compelling state interest in diversity.

Despite the apparent consensus amongst *Hopwood*, *McLaughlin*, and *Piscataway*, federal courts lack unanimity on whether diversity can constitute a compelling state interest. In fact, the Department of Justice subscribed to an opposite reading of

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113. *Id.* at 161.
114. *Id.* at 161. *Contra* Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) (court upheld race-preference scholarships at state college campuses that showed present effects of past discrimination).
Supreme Court affirmative action jurisprudence. After the Supreme Court decision in Adarand, the Department of Justice noted that the "Court did not address the constitutionality of programs aimed at advancing nonremedial objectives — such as promoting diversity and inclusion."118 The Department of Justice concluded from this that "[u]nder strict scrutiny, it is uncertain whether and in what setting diversity is a permissible goal of affirmative action beyond the higher education context."119 The phrase "beyond the higher education context" assumes that within the higher education context diversity is clearly a compelling state interest. The Department of Justice also noted that Justice Stevens mentioned in his Adarand dissent that the majority’s silence on the question did not foreclose the use of affirmative action to serve nonremedial ends.120

Confronting the argument that the diversity justification is based on an impermissible presumption that members of a racial group have a "minority perspective," the Department of Justice stated that

[t]here are sound arguments to support the contention that seeking diversity in higher education rests on valid assumptions. The thesis does not presume that all individuals of a particular race or ethnic background think and act alike. Rather, it is premised on what seems to be a common sense proposition that in the aggregate, increasing the diversity of the student body is bound to make a difference in the array of perspectives communicated at a university.121

According to the Department of Justice’s analysis, Adarand affected the diversity justification only minimally, if at all. The Department of Justice only cautioned that after Adarand “a court might demand some proof of a nexus between the diversification of the student body and the diversity of viewpoints expressed on the campus.”122 This is much the same approach as some post-Adarand district and circuit courts.

For example, in Wittmer v. Peters123 the Court of Appeals for the Seventh Circuit, in an opinion written by Chief Judge Pos-
ner, held that administrators of a county boot camp could prefer black male applicants over white applicants for a lieutenant’s positions without violating the Equal Protection Clause. The plaintiffs in the case were three white correctional officers who applied unsuccessfully for a lieutenants position. A black applicant, ranking forty-second on the applicant test (while the plaintiffs ranked third, sixth, and eighth), received the position. The Illinois Department of Corrections did not deny that race was a factor in the appointment, but instead presented expert testimony attesting to the penological necessity for the appointment. The defendant pointed out that sixty-eight percent of the inmates at the correctional boot camp were black. In contrast the staff was overwhelmingly white.

The Seventh Circuit rejected the plaintiff’s contention that the only permissible race-based classification must be based on the compelling state interest in rectifying past discrimination. Judge Posner noted “[t]hat question remains open in the Supreme Court,” and that the majority is in favor of permitting some reverse discrimination, although how much is unclear. Applying the strict scrutiny test, Judge Posner found that “the rectification of past discrimination is not the only setting in which government officials can lawfully take race into

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Fourth Circuit found no “strong basis in evidence” for the necessity of diversity despite expert opinion of chief of police and reports prepared in response to urban riots).

124. The fact that the opinion was written by Judge Posner is interesting because he had previously appeared to reject any use of racial classifications:

[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America. . . . [T]he proper constitutional principle is not, no “invidious” racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens. . . . To ask whether racial exclusion may not have overriding benefits for both races in particular circumstances is to place the antidiscrimination principle at the mercy of the vagaries of empirical conjecture and thereby free the judge to enact his personal values into constitutional doctrine.


125. Wittmer, 87 F.3d at 917 (“The security staff consists of 48 correctional officers, of whom only 2 were black when the camp opened and during the period relevant to this suit, plus 3 captains all of whom were white and 10 lieutenants of whom 2 (a man and a woman) were black.”).

126. Id. at 918.

127. Id.
account in making decisions." Judge Posner could find no logical or equitable rationale to favor the rectification of past discrimination over other legitimate goals that race-based preferences might serve. He noted that

the usual case in which a remedy giving preference to a racial or other historically disfavored group is defended as necessary to rectify past discrimination, the plaintiffs, the people who will benefit from the remedy, are not the people who were discriminated against, but their successors or descendants. For them the relief is a windfall, and its justification must be sought elsewhere than in notions of compensation that might seem to make a stronger case for a discriminatory remedy than an interest in racial peace or effective prison administration would make.

He then proceeded to find a compelling state interest in hiring black correctional officers. Judge Posner's finding was based on two grounds, first that the law enforcement and correctional settings presented a special context and "the clearest examples of cases in which departure from racial neutrality are permissible," and second, on the defendant's unrefuted expert testimony that "[t]he black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp." Judge Posner conceded that the expert witnesses had in fact little experience with boot camps and that the "social scientific literature on which they relied on does not focus on such institutions." Unconvinced, however, by the plaintiffs, Judge Posner wrote that

[i]f academic research is required to validate any departure from strict racial neutrality, social experimentation in

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128. Id. at 919. Judge Posner wrote the following:
The plaintiffs argue that the only form of racial discrimination that can survive strict scrutiny is discrimination designed to cure the ill effects of past discrimination by the public institution that is asking to be allowed to try this dangerous cure. There are dicta to this effect. ... [b]ut there is a reason that dicta are dicta and not holdings, that is, are not authoritative. A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him.

Id. (citations omitted).

129. Id.

130. Id.

131. Id.

132. Id. at 920.

133. Id.
the area of race will be impossible despite its urgency. . . . On the conception of strict scrutiny advanced by the plaintiffs the first boot camp that tried to alter the racial composition of its staff would be enjoined. It would be impossible to accrue experience on the issue and the whole boot camp experiment might fail if, as the defendants’ experts believe, its success requires some departure from racial neutrality.\(^{134}\)

Judge Posner in essence concluded like Justice Burger in \textit{Fullilove} that “[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.”\(^{135}\) Thus, Judge Posner made two important analyses that merit attention. First, he explicitly stated that under the Seventh Circuit’s reading of the Equal Protection Clause, other state interests beyond remedying the past effects of discrimination could constitute a compelling state interest. Second, under strict scrutiny the government must have a “[s]trong basis in evidence” that affirmative action is necessary.\(^{136}\) Judge Posner implied that unrefuted expert testimony, though minimal, could serve as the necessary evidentiary nexus between a compelling state interest and a race-based preference program. Also, Judge Posner’s emphasis on the special nature of the “correctional setting” arguably fails to distinguish \textit{Wittmer} from an “educational setting” case because education, just like the correctional setting, has been afforded special constitutional consideration.\(^{137}\)

For this study of “diversity,” it is interesting to note that Judge Posner, though not directly invalidating diversity as a compelling state interest, mentioned that the defendants did not rely on “generalities about racial balance or diversity . . . [or] a goal of racial balanc[ing]”\(^{138}\) for their justification. This implies that

\(^{134}\) \textit{Id.}

\(^{135}\) \textit{Fullilove} v. Klutznick, 448 U.S. 448, 491 (1980) (opinion of Burger, J., announcing the judgment of the Court and in which Justices White and Powell joined).

\(^{136}\) \textit{Cf.} \textit{Podberesky} v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (Fourth Circuit held that the University of Maryland College Park failed to demonstrate a strong basis in evidence for its conclusion that remedial action is necessary despite previous de jure segregation of the Maryland school system and a lengthy research effort made by the university), \textit{cert. denied}, 115 S.Ct. 2001 (1995).


\(^{138}\) \textit{Wittmer}, 87 F.3d at 920.
a legislative experiment based on social scientific evidence could pass strict scrutiny because it is less vague and less amorphous than race-based classifications based on diversity. Furthermore, Wittmer racial-preferences infringe less on innocent third parties because the correctional institution can establish a termination goal, for instance, when the correctional facility hired a certain number of African American guards. Also, it is easier to measure a decrease in correctional boot camp belligerence or violence than it is to measure the improved quality of education stemming from diversity. In other words, the Wittmer project is more susceptible to proofs.199

III. Hopwood v. Texas: Is the Fifth Circuit’s Decision Ethical?

After considering the various legal arguments and case precedents available to refute or support the Hopwood decision, a core question remains: Was the decision right, not in a legal sense, but in an ethical sense? To answer this question, first one must decide whether or not diversity is valuable in the higher education context. If the answer is yes, then one must ask whether there are other interests that race-based affirmative action impinges, and if so, whether the importance of these interests outweigh the benefits of diversity.

A. The Value of Diversity

Probably the most famous and eloquent defense of diversity in an educational context comes from the President of Princeton University, cited by Justice Powell in Bakke:

[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process,

199. In another case, Shuford v. Alabama State Board of Education, a district court approved a consent decree that allowed state post-secondary education officials to consider race and gender when hiring employees. A consent decree is subject to the same analysis under strict scrutiny as a voluntary affirmative action plan. The decision did not discuss the effects, if any, of Adarand, and it did not specifically discuss the diversity justification. Shuford v. Alabama Bd. of Educ., 897 F. Supp. 1535 (M.D. Ala. 1995).
"People do not learn very much when they are surrounded only by the likes of themselves."

In the nature of things, it is hard to know how, and when, and even if, this informal "learning through diversity" actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth. Justice Powell in Bakke pointed to a common belief in academia that diversity added to the "robust exchange of ideas" so central to higher education as evidenced by the commentary of faculty, students, and administrators alike. Diversity, for Justice Powell, had a value despite its inability to be quantified, or even directly verified. A diverse student body could be viewed as an "'educational resource' comparable in importance to the faculty, library, or science laboratories." And the educational benefit of diversity extends beyond the student's formal education. For example, Neil L. Rudenstine, president of Harvard University, noted that if we want a society in which our physicians, teachers, architects, public servants, and other professionals possess a developed sense of vocation and calling; if we want them to be able to gain some genuine understanding of the variety of human beings with whom they will work, and whom they will serve; if we want them to think imaginatively and to act effectively in relation to the needs and the values of their communities, then we shall have to take diversity into account as one among many significant factors in graduate and professional school admissions and education. Also an appreciation of diversity helps avert racial tensions, and dispels — for black and white students alike — any idea that white supremacy governs our social institutions.

140. Bakke, 438 U.S. at 312-13 n.48 (Powell, J., opinion) (quoting Bowen, Admissions and the Relevance of Race, PRINCETON ALUMNI WKLY. 7, 9 (Sept. 26, 1977)).

141. Id. at 311-15.


143. Id. at 25.

144. For further forward looking, nonremedial justifications for voluntary affirmative action see Kathleen M. Sullivan, Sins of Discrimination: Last Term's
The amorphous, yet real value of diversity is also taken into account in other legal contexts. For instance, the law recognizes the need for a "fair cross section" of the community, including minorities, when constituting a jury.\textsuperscript{145} Also, as the majority in \textit{Metro Broadcasting} noted, many "voting rights cases operate on the assumption that minorities have particular viewpoints and interests worthy of protection."\textsuperscript{146}

\textbf{B. The Counter Value of Individual Fairness}

Justice Powell noted in \textit{Bakke} that "there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."\textsuperscript{147} This observation brings up an obvious point: when a minority is offered a seat in a law school class, someone else is not. This becomes a problem when that someone else is more qualified. An individual is being harmed just as an individual is being helped by affirmative action, and it is this individual who can call upon the Equal Protection Clause for protection. As Justice Powell wrote, "[i]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights."\textsuperscript{148} Justice Powell also noted that "[n]othing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups."\textsuperscript{149} Stephen L. Carter, professor of law at Yale University, stated it this way: "We must learn to love and cherish individuals for who they are, not for what they represent; and, having learned it once more ourselves, we can once more teach it to a doubting world."\textsuperscript{150}

Another negative side effect of favoring one person over another based on a racial preference is the likely resentment developed by the non-preferred individual:

\textit{Affirmative Action Cases}, 100 Harv. L. Rev. 78 (1986) (suggesting employers might advance forward-looking reasons for affirmative action like improving their services to black constituencies, averting racial tension over allocation of jobs in a community, or increasing diversity of a work force).

147. \textit{Bakke}, 438 U.S. at 298 (Powell, J., opinion).
148. \textit{Id.} at 299.
149. \textit{Id.} at 298.
150. \textit{Carter, supra note} 16, at 211.
The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.151

This resentment, as the *Hopwood* majority noted, will only contribute to any existing racial tension on campus.152

**C. Race as a Proxy for Diversity**

If one concedes that diversity is good and that students benefit immensely from it, problems still arise when an institution uses race as a proxy for desired diversity. For one, there are a myriad of procedural problems. In order to create an affirmative action plan, an institution must first decide which racial categories to use and which merit “heightened solicitude.”153 To make such a determination, the institution must decide which particular characteristics or viewpoints distinguish one race from another and which of these attributes its student body lacks. The institution would also have to decide when the proper mix of diversity has been reached and how best to maintain it.

An institution would then need to categorize each individual applicant by race. This will increasingly become a problem due to the proliferation of mixed-race children. There is also a problem of lumping racial groups together because, as Farber noted, racial scholarship “needs to be more attentive to diversity within and between minority groups. Much of the current scholarship is written as if all groups of non-whites were fungible.”154 Thus, the institution’s racial groupings will be imperfect, both as to the racial categories it constructs and as to its categorization of individual applicants.

Another problem with using race as a proxy for diversity is that it injures the minority it intends to assist. Race-based affirmative action tends to stigmatize minorities: “preferential pro-

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151. *Bakke*, 438 U.S. at 294-95 n.34 (Powell, J., opinion).
152. *Hopwood v. Texas*, 78 F.3d 932, 941 (5th Cir. 1996).
grams may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth because racial preferences are based on "generalizations impermissibly equating race with thoughts and behavior."

Proponents of race-based affirmative action argue that there is de facto affirmative action for non-minorities in the form of legacy status. What, then, is different about using race or ethnicity? The answer lies in the second side effect of race-based affirmative action: the inevitable stereotyping that occurs. The very presumption underlying race-based affirmative action is that minorities are different in some appreciable way due to their race. This is not true with legacy status or other admissions criteria. Affirmative action assumes that race is a valid indicator of other traits, traits that the educational institution believes will add to the diversity of its student body. This is problematic because, as Stephen L. Carter noted,

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\text{[t]he peculiar language forced upon us by programs that treat people as members of groups and assign characteristics on the basis of that membership has an ugly mirror image, for it is as easy to assign negative characteristics as positive ones. Preferential treatment comes in two kinds, the kind we like and the kind we hate. Both kinds have roots in the idea that race is a useful proxy for other information: in the early days of affirmative action, a proxy for disadvantage; today, a proxy for the ability to tell the story of the oppressed... [t]here has always been something unsettling about the advocacy of a continuation of racial consciousness in the name of eradicating it.}\]

Proponents of race-based affirmative action argue that

\[
\text{[t]he importance of a diverse student body and faculty does not depend on the false notion that one's race or}
\]

157. As Richard Delgado noted:

It turns out that my university, like most others, has a host of express quotas and a like number of preferences: drop-kickers, quarterbacks, legacy candidates whose parents are apt to give money if Johnny or Sally gets in, musicians, ROTC scholarship holders. Many of these individuals have SATs lower than those of the straight admits.

ethnicity defines a particular way of thinking about issues of law and policy. It does assume the reality — no less a reality because it is socially constructed — that people of different races and ethnicities often have different life experiences.\textsuperscript{159}

This is similar to the majority's logic in \textit{Metro Broadcasting}. Diversity will be achieved not because every individual minority holds a certain racially determined point of view, but because, in the aggregate, greater diversity will more likely occur with affirmative action than without.\textsuperscript{160}

But even if one is convinced that diversity is served by this aggregate approach (and that impermissible racial stereotypes are not at issue) a fundamental question remains: is the use of racial classifications the only practicable way of achieving diversity or is there a less problematic alternative?

\section*{IV. Race Neutral Alternatives: How to Maintain Diversity Without Offending the Constitution}

Thus, the critical criteria [that make up a diverse student body] are often individual qualities or experience not dependent upon race but sometimes associated with it.\textsuperscript{161}

Instead of giving racial minorities a "plus" factor it has often been suggested that admissions committees give the socio-economically disadvantaged a "plus" factor.\textsuperscript{162} This has the desirable effect of assisting many of the same minorities who would have benefited from race-based affirmative action, though admittedly not all of them.

The main advantage of socio-economic plus factors as opposed to racial plus factors is that it moots many of the harshest arguments against affirmative action.\textsuperscript{163} First, it does not even arguably violate the Equal Protection Clause. The Constitution addresses concerns about immutable characteristics, which economic and social status are not; therefore, any such program need not satisfy strict scrutiny. In fact, if ever challenged, the program would need only pass the rational basis test. Second,

\begin{itemize}
\item \textsuperscript{159} Paul Brest & Miranda Oshige, \textit{Affirmative Action for Whom?}, 47 STAN. L. REV. 855, 862 (1995).
\item \textsuperscript{160} \textit{Metro Broadcasting}, 497 U.S. at 579-82.
\item \textsuperscript{163} For a comprehensive analysis of the benefits of socio-economic "plus" factors as opposed to racial preferences. \textit{Id.}
\end{itemize}
the stigma argument loses its force since the "plus" factors are based on economic factors and not on the assumption that certain racial groups are less able to achieve success without assistance. Third, instead of using race as a proxy for need, it uses need itself, which advantages the most deserving in all racial groups. Likewise, the "plus" factors are not based on stereotypes or assumptions about any group but are based on the needs and qualities of particular individuals.

Brest and Oshige argue that socio-economic affirmative action is inefficient because it helps not only minorities but whites who don't have the same "corrective justice" or "multiplier effect"\textsuperscript{164} justification as minorities. In fact, the individual scrutiny of additional admissions criteria will inevitably lengthen the admissions process, rendering it more costly. But, as Judge Posner recognized, even if sorting people by racial and ethnic grounds is efficient, it is nevertheless impermissible: "efficiency is rejected as a basis for governmental action in [the equal protection] ... context."\textsuperscript{165} If there is a compelling institutional interest in diversity, the institutions will have to commit the resources to achieve that goal constitutionally despite the additional cost.

One final argument for switching to other diversity related factors is a pragmatic one. Munro put it this way:

[S]ome preferences are better than none. The very real danger of significant future cutbacks in permissible race-based preference programs should inspire proaffirmative action minority groups to consider contingency measures that would allow the retention of at least some marginal benefits to their constituencies. Thus, disadvantage preferences could be viewed as simply a wise hedge against future changes in the law.\textsuperscript{166}

The reality is that whether one thinks Hopwood correctly construed Adarand or not, the legal uncertainty and current political mood will likely lead to an increase in the number of institutions that voluntarily abandon their race-based affirmative action programs.\textsuperscript{167} The promotion of socio-economic "plus" factors then

\textsuperscript{164} The multiplier effect is the granting of preferences not to benefit the individual minority but to benefit other, less advantaged members of the group by example. Brest & Oshige, supra note 159 at 897-98.

\textsuperscript{165} Posner, supra note 124, at 22.

\textsuperscript{166} Munro, supra note 162, at 607.

\textsuperscript{167} The stakes are high for universities. For instance if a college is found in violation of the Equal Protection Clause they are not only open to civil suit and administrative sanctions, but they could lose their tax exempt status. Bob Jones Univ. v. United States, 461 U.S. 574 (1983). See also Rev. Rul. 71-447, 1971-2 C.B. 230.
becomes a safety position, enabling proaffirmative action groups to maintain some of the racial diversity they gained through race-based affirmative action.

On top of socio-economic "plus factors," the Department of Justice suggests several race-neutral alternatives to race-based admissions processes, including recruiting and outreach to minorities to expand the pool of minority applicants, training programs open to all employees, diversity seminars, and eliminating selection criteria that have a disproportionate impact on minorities. These broad programs, designed not to give minorities a "plus" in the application process but to get more minorities to apply, do not offend the Constitution and can add to the diversity of a student body.

In fact, this is the chosen route of the University of California. Since the Board of Regents banned the use of race as an admissions factor, the U.C. system has analyzed various substitute criteria they could use to maintain student body diversity. The U.C. system intends to add to its objective admissions criteria (GPA, SAT score) increased subjective criteria. These subjective criteria include athletic endeavors, interest in other cultures or proficiency in other languages, significant community service or significant participation in student government, and special circumstances in applicant's life experience that may evidence unusual persistence and determination (e.g. disabilities, low family income, first generation to attend college, need to work, disadvantaged social or educational environment, difficult personal and family situations or circumstances, refugee status, or veteran status).

The new criteria are intended to help maintain racial diversity without using race as a separate criterion. They do, however, have another side effect. The new race-blind criteria assist applicants with specific desirable characteristics and do so on an individual applicant-by-applicant basis, thus satisfying the Equal Protection Clause. Because the admissions process will be both more lengthy and labor intensive it will also be more costly, but if diversity does indeed constitute a compelling institutional interest, the added costs of achieving true diversity should be well spent.


169. Letter from U.C. President Richard C. Atkinson to the Regents of the University of California at 4 (March 11, 1996).
V. IN SUM

In the wake of Hopwood it remains to be seen if the Supreme Court or other circuit courts will foreclose the diversity rationale for race-based affirmative action. If diversity remains a possible justification, it is clear that a level of proof will be mandated and that diversity will have only a limited use, if any, outside the higher education context.

Depending on how many circuits adopt the Hopwood court’s interpretation of the Supreme Court’s affirmative action jurisprudence and on the Court’s willingness to clarify the interrelationship between Adarand and Bakke, socio-economic “plus” factors may become the only constitutional approach to create and maintain diversity in the future. Further, the political mood may find an increasing number of state universities abandoning their proaffirmative action policies. Institutions, due to pragmatic, judicial or legislative mandates, may find their alternatives limited to recruiting and expanding the pool of minority applicants and expanding admissions and financial aid criteria to include more indicia of diversity.

No matter how the Supreme Court and the circuit courts finally interpret the Equal Protection Clause, the use of race as a proxy for diversity will remain inaccurate. It injures both minorities, by stigmatizing and stereotyping them, and innocent non-minorities, by sacrificing individual fairness. This is an unacceptable result in light of the more accurate and individualized socio-economic “plus” factor admissions process, a process that can create and maintain student body diversity without offending the Constitution or our ethical sensibilities.