Hopwood v. Texas: The Beginning of the End for Racial Preference Programs in Higher Education

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I. FACTUAL BACKGROUND

In *Hopwood v. Texas*, the Court of Appeals for the Fifth Circuit held that the University of Texas ("UT") School of Law's admissions program, which gave preference to African-Americans and Mexican-Americans, violated the Fourteenth Amendment's Equal Protection Clause. For the 1992 school year, the University of Texas School of Law processed applications by using an applicant's Texas Index ("TI") number, a figure comprised of the applicant's undergraduate grade point average and Law School Admissions Test ("LSAT") score. Based on the TI, the law school distributed applications into three categories of review: presumptive admit, presumptive deny, and discretionary zone. For resident whites and nonpreferred minorities, the law school usually considered 199 to be the minimum presumptive admit score and 192 to be the maximum presumptive deny score. As part of the school's policy to admit more minorities, however, the law school reduced these two scores for African-American and Mexican-Americans to 189 and 179 respectively. The admissions board hoped to admit a class that reflected the percentage of African-Americans (five percent) and Mexican-Americans (ten percent) who graduated from Texas colleges. Of the Texas resident applicants, the law school's preference admitted one-hundred percent of the African-Americans, ninety percent of the Mexican-Americans, but only six percent of the whites.

1. 78 F.3d 932 (5th Cir.), cert denied, 116 S. Ct. 2581 (1996).
2. 78 F.3d at 932.
3. Id. at 935.
4. Id.
5. Id. at 936.
6. Id.
7. Id. at 937.
8. Id.
In addition to the TI reductions, the UT School of Law also reviewed preferred minority applications differently than nonpreferred minority applications by separating the minority applications from the nonpreferred applicants. For those minority candidates who fell in the discretionary zone, a subcommittee met and extensively discussed each candidate. The admissions office never individually reviewed each nonpreferred applicant with such care, and it never compared the preferred applicants to the nonpreferred applicants.

In 1991 and 1992, Cheryl Hopwood and three other white Texas residents applied for admission to the 1992 entering class at the UT School of Law. Despite TI scores ranging from 199 to 197, the law school rejected all four applicants. Believing that the law school discriminated against them, the four individuals brought suit in the Western District of Texas. They claimed that the admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964.

The district court found that the law school violated plaintiffs' equal protection rights, but refused to enjoin the school from making admission decisions based on race. Applying strict scrutiny, the court upheld the school’s use of different TI scores for various races. Thus, the district court allowed the law school to continue to use racial preferences in the application process. Nevertheless, the court decided that the use of separate admission committees violated plaintiffs' equal protection rights, and concluded that the admissions committee's failure to compare each applicant to the entire pool of all applicants resulted in the program's violation of the Fourteenth Amendment's Equal Protection Clause. In effect, the law school did not narrowly tailor the program to meet the goals of remedying past discrimination and achieving diversity.

9. Id.
10. Id.
11. Id.
12. Id. at 938.
13. Id.
14. Id.
16. Id. § 2000d.
17. 78 F.3d at 938.
18. Id. at 939.
19. Id.
20. Id.
21. Id.
22. Id.
Following plaintiffs' appeal of the district court's ruling, the Fifth Circuit held that the UT School of Law may not use race as an admissions factor in order to: (1) achieve a diverse student body; (2) combat the perceived effects of a hostile environment; (3) alleviate the law school's poor reputation in the minority community; and (4) eliminate the present effects of past discrimination by parties other than the law school.\textsuperscript{23} It allowed plaintiffs to reapply to the law school under a constitutionally valid admissions plan and remanded the question of damages to the district court.\textsuperscript{24}

\section*{II. LEGAL BACKGROUND}

\textit{Regents of the University of California v. Bakke}\textsuperscript{25} marked the first time the United States Supreme Court addressed the constitutionality of minority preference admissions policies in higher education.\textsuperscript{26} Allan Bakke, a white male, applied twice to the University of California at Davis Medical School.\textsuperscript{27} Despite grades and Medical College Admissions Test scores which were higher than admitted minority applicants, the medical school denied him admission both times.\textsuperscript{28} With no opinion receiving more than four votes, a divided Court partially upheld Bakke's claim that the medical school's affirmative action program violated the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.\textsuperscript{29} But, at the same time, Justice Powell's decisive opinion held that universities could take account of an applicant's race in some circumstances.\textsuperscript{30} Because no opinion garnered more than four votes on any issue, it left open the appropriate scrutiny level for analysis of preferential admissions programs.\textsuperscript{31}

Justice Powell's crucial opinion concluded that the Fourteenth Amendment applies to all races equally and does not protect one racial

\begin{footnotesize}
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  \item 23. \textit{Id.} at 962.
  \item 24. \textit{Id.}
  \item 26. \textit{Id.} at 265.
  \item 27. \textit{Id.} at 276.
  \item 28. \textit{Id.} at 276-77.
  \item 29. \textit{Id.} at 271-72.
  \item 30. \textit{Id.} at 296 n.36.
  \item 31. \textit{Id.} at 271-72. Justice Powell applied strict scrutiny. \textit{Id.} at 290. Justices Brennan, White, Marshall, and Blackmun applied an intermediate level of review. \textit{Id.} at 359. Chief Justice Burger and Justices Stewart, Stevens, and Rehnquist did not address the constitutionality of the admissions policy because they believed the Title VI issue was dispositive of the entire claim; thus, they did not apply a scrutiny level. \textit{Id.} at 412-13. See also Krista L. Cosner, \textit{Comment, Affirmative Action in Higher Education: Lessons and Directions from the Supreme Court}, 71 IND. L.J. 1003, 1018 (Fall 1996).
\end{itemize}
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Unwilling to interpret the Constitution as giving African-Americans and Mexican-Americans more protection than whites, Justice Powell stated: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." In addressing whether the admissions program served a compelling interest under strict scrutiny, Justice Powell discounted the goals of reducing the deficit of minorities in medical school; combating the effects of societal discrimination; and increasing the number of doctors who will practice in under-served communities. However, Justice Powell concluded that the admissions program's fourth rationale, promotion of diversity, reflected a constitutionally permissible goal. He wrote: "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.

Despite his recognition of diversity as a compelling interest, Justice Powell qualified its use as a rationale. In his view, the diversity foundation could not focus solely on an applicant's race. For diversity to suffice as a compelling state interest, it would have to encompass a number of different characteristics of which race acted as a single element. Universities could view race only as a "plus" in the admissions process. Due to the Court's divisions, the decision in Bakke did not substantially clarify the picture surrounding remedial based preference programs.

The Court remained elusive when it tackled affirmative action in Fullilove v. Klutznick two years later. Fullilove addressed the constitutionality of the Public Works Employment Act of 1977 which required at least ten percent of federal funds awarded for local public works projects to be set aside to obtain services from minority business-

32. 438 U.S. at 289-90.
33. Id. at 291.
34. Id. at 307.
35. Id. Justice Powell considered the purpose of remedying the effects of societal discrimination to be "an amorphous concept of injury that may be ageless in its reach into the past. We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings." Id.
36. Id. at 311.
37. Id. at 311-12.
38. Id. at 312.
39. Id. at 315.
40. Id.
41. Id. at 317.
42. 448 U.S. 448 (1980).
Although the Court held the federal program to be facially consistent with the Fifth Amendment's Equal Protection Clause, it did not resolve the scrutiny level question left open in Bakke. Nonetheless, Chief Justice Burger's plurality opinion stated that the set aside would survive "either 'test' articulated in the several Bakke opinions." Burger justified the program on the ground that it remedied the present effects of past discrimination. Unlike Justice Powell's opinion in Bakke, which rejected preference programs premised on accounting for past societal discrimination, the decision in Fullilove upheld the Act's program because Congress intended that the Act halt the denial of public contracting opportunities to minority businesses.

Several years later in 1986, the Court in Wygant v. Jackson Board of Education confronted the issue of affirmative action in employment. A majority of the Court held that a termination plan preferring minority teachers over white teachers with greater seniority violated the Fourteenth Amendment. As with the prior affirmative action cases, the Court was unable to muster a majority on the scrutiny level question. Justice Powell's plurality opinion applied strict scrutiny and required the racial classification to be justified by a compelling interest and the plan to be narrowly tailored to the achievement of the interest. As in Bakke, the plurality reiterated that remediing societal
discrimination did not constitute a compelling interest. Although the Court did not conclusively address permissibility of remediating the present effects of prior discrimination, it implied that such an interest may be compelling if the employer has a strong evidentiary basis to support remedial action. Finally, Wygant rejected the "role model" theory (minority teachers would act as role models for minority students) as a compelling reason for the classification.

Less than three years later, in *City of Richmond v. J.A. Croson Co.*, a majority of the Court adopted part of the Wygant plurality opinion and finally clarified several of the issues left unresolved. In *Croson*, the City of Richmond mandated that construction companies awarded contracts by the city subcontract at least thirty percent of each contract to "Minority Business Enterprises." Distinguishing *Fullilove*, where Congress established the set aside program, Justice O'Connor's majority opinion held that the local set aside program in *Croson* violated the Fourteenth Amendment's Equal Protection Clause.

The decision in *Croson* is significant because it established strict scrutiny as the appropriate scrutiny level for reviewing any case involving racial preferences. Justice O'Connor rationalized strict scrutiny by concluding it would both "'smoke out' illegitimate uses of race" and would reduce the danger of stigmatic harm. In addition, *Croson* reiterated the difference between remedying past societal discrimination and remedying the present effects of past discrimination. Citing Wygant, the Court held that only the latter produces an adequate rationale for race based classifications, provided that the governmental body imposing the classification specifically can identify...
the discrimination within the affected industry. Because Richmond could not clearly prove past discrimination within the Richmond construction industry, its intent to remedy the present effects of past discrimination was not compelling. Furthermore, due to the existence of other race neutral remedies, Richmond failed to narrowly tailor the program to its objectives.

Just as a majority of the Court finally recognized strict scrutiny as the appropriate standard of review in Croson, matters became unclear again in Metro Broadcasting, Inc. v. FCC. Metro Broadcasting addressed the constitutionality of a federal program which gave preference to minority controlled radio and television stations that applied to the FCC for licenses. Unlike Croson, the majority upheld the program using intermediate scrutiny, the scrutiny level Justice Marshall urged in his Fullilove concurrence, arguing that this was the appropriate scrutiny level for congressional programs employing benign racial classifications. Justice Brennan, writing for the Metro Broadcasting majority, upheld the goal of achieving programming diversity as an important governmental objective. In fact, Brennan referred to Powell's opinion from Bakke and wrote, "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 predicated, the diversity of views and information on the airwaves serves important First Amendment values."

The intermediate scrutiny level analysis used in Metro Broadcasting was short-lived. In 1995, Adarand Constructors, Inc. v. Pena partially overturned Metro Broadcasting and held that "to the extent that Metro Broadcasting is inconsistent [with strict scrutiny] it is overruled." Adarand involved a congressional program that provided financial

62. Id. at 499-500.
63. Id.
64. Id. at 507. Justice O'Connor stated that city financing of small firms, relaxation of bonding requirements, and simplification of bidding procedures could open up the construction industry to minorities. Such measures, however, would not require taking race into account. Id. at 509-10.
66. Id. at 557-58.
67. Id. at 564-65.
68. Id. at 566. Because the Court used intermediate scrutiny, it did not have to address the question of whether diversity is a compelling interest. Id.
69. Id. at 568 (quoting Bakke, 438 U.S. at 311-13).
71. Id. at 2113.
incentives to contractors that employed disadvantaged subcontractors. Justice O'Connor's majority opinion reasoned that equal protection analysis under the Fifth Amendment is the same as for the Fourteenth Amendment, and that all racial classifications are subject to strict scrutiny. Justice O'Connor recognized that Croson established the appropriate scrutiny level for racial preference programs and viewed Metro Broadcasting as straying from established precedent. Adarand never confronted the compelling interest question, because the Court remanded the case once it resolved the scrutiny level.

In 1994, the Fourth Circuit in Podberesky v. Kirwan had to apply the evolving case doctrine on minority preference programs to a University of Maryland scholarship program open only to African-American students. The Fourth Circuit applied strict scrutiny and rejected the scholarship program. Basing much of the opinion on Croson, the court failed to find a sufficient connection between past discrimination and the scholarship program's effect thereon.

The many different views, and the frequent inability to obtain a majority, make following the Court's convoluted lead surrounding racial preference programs a difficult task. Just as the Fourth Circuit had to look to the Supreme Court for guidance concerning racial preferences in higher education, the Fifth Circuit had to give meaning to the Court's opinions in Hopwood.

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72. Id. at 2103-04. Included in the definition of "disadvantaged" were minority-owned construction firms. Id.
73. Id. at 2111.
74. Id.
75. Id. at 2118.
77. 38 F.3d at 147.
78. Id. at 161.
79. Id. at 154-56. The University alleged that four present effects of past discrimination existed at the school: (1) a poor reputation within the African-American community; (2) an under-representation of African-Americans in the student population; (3) a low retention rate for African-American students; and (4) an atmosphere hostile to African-American students. Thus, they viewed the scholarship program as remedying these present effects. Id. at 152. The court rejected all four of these effects as being sufficient to justify the scholarship program. Id. at 151. Concerning the poor reputation and hostile environment effects, the court held that knowledge of historical fact is not a present effect that can justify a race exclusive remedy. Id. at 154. In terms of the remaining two effects, the University failed to demonstrate that the under-representation and higher attrition rate was connected to the prior discrimination. Id. at 155.
III. FIFTH CIRCUIT'S RATIONALE

The Fifth Circuit issued its decision in Hopwood more than a year and a half after the district court. Judge Smith began the Fifth Circuit's analysis by addressing the purpose of the Equal Protection Clause. Viewing the Equal Protection Clause as opposed to favoring one racial group over another, the majority concluded that discrimination based on any race is highly suspect. It considered meaningless the fact that a party may label a classification as benign or remedial. Accordingly, Judge Smith looked to Wygant, Croson, and Adarand and applied strict scrutiny to the racial preference used by the University of Texas School of Law. Thus, the racial classification had to serve a compelling government interest, and it had to be narrowly tailored to achieve that interest.

For the majority, the law school's admissions policy failed the first criterion of strict scrutiny. The district court concluded that the two goals of having a diverse student body, and remedying the present effects of past discrimination by the University of Texas system and the Texas educational system, represented compelling interests. The Fifth Circuit, however, rejected both of these goals as compelling government interests.

Although Justice Powell's plurality opinion in Bakke held that diversity could be a compelling interest, Judge Smith refused to abide by this conclusion. First, the court noted that Powell's swing view in Bakke was not binding, because his opinion received no other votes. Second, the court asserted that with the exception of Metro Broadcasting (which was later overruled in part) and Powell's Bakke opinion, no case has recognized diversity as a compelling interest. According to Judge Smith, the use of race to establish diversity contradicts the goals of the Equal Protection Clause because it fosters the use of race. In turn, he believed this could result in stereotyping and fuel racial animosity.

80. Hopwood v. Texas, 78 F.3d at 932.
81. Id. at 939-40.
82. Id. at 940.
83. Id.
84. Id.
85. Id. (citing Adarand, 115 S. Ct. at 2111, 2117).
86. Id. at 938.
87. 78 F.3d at 944, 954.
88. Id. at 944.
89. Id.
90. Id. at 945.
91. Id.
Despite Judge Smith's rejection of diversity as a compelling interest, he did not discount that remedying the present effects of past discrimination could be a compelling interest. Nevertheless, the court held that the governmental unit involved must show prior discrimination, and it must have convincing evidence that remedial action is necessary. The court also referred to Croson and held that the use of racial remedies must be carefully limited and restricted to the state actor who had previously discriminated. Although the district court accepted the claim that past racial discrimination by the Texas educational system justified the use of racial classifications, the Fifth Circuit found this to be overly broad. Because the admissions policy attempted to remedy either discrimination within the University of Texas system, or the entire Texas state educational system, it was too expansive and not sufficiently related to past harms within the law school. Judge Smith wrote: “In order for any of these entities to direct a racial preference program at the law school, it must be because of past wrongs at that school.” The Fifth Circuit cited Podberesky and determined that the law school could not prove that the “effect [the policy] proffers is caused by the past discrimination [within the law school] and that the effect is of sufficient magnitude to justify the program.” Judge Smith claimed that the three alleged effects of prior discrimination—(1) the reputation that the law school is a “white” school; (2) the under-representation of minorities at the law school; and (3) the perception that the law school is a hostile environment for minorities—were only effects of societal discrimination, as opposed to effects of prior discrimination in the law school. Only if the law school could prove prior discrimination within the law school itself might the admissions policy satisfy a compelling interest. Because Judge Smith found that the admissions policy did not constitute a compelling interest, he did not address whether the program was narrowly tailored.

Where Judge Smith concluded his opinion, however, Judge Weiner began his concurrence. Judge Weiner agreed that the admissions policy violated the Fourteenth Amendment, but he believed the court could

92. Id. at 951.
93. Id. at 949 (citing Wygant, 476 U.S. at 274, 277-78).
94. Id. at 950, 954 (citing Croson, 488 U.S. at 499).
95. Id. at 953-54.
96. Id. at 951 & n.43.
97. Id. at 952.
98. Id. (citing Podberesky, 38 F.3d at 153).
99. Id.
100. Id. at 954.
101. Id. at 955.
take a more confined approach by rejecting the program for not being narrowly tailored. Weiner asserted that Smith's opinion was "an extension of the law—one that . . . is both overly broad and unnecessary to the disposition of this case." Judge Weiner's concurrence clarified that he did not think that remedying the effects of past discrimination was the only compelling interest sufficient to justify racial classifications. Maintaining that the circuit court should not declare Bakke dead, Weiner also refused to find that diversity in higher education could never be a compelling interest. Consequently, he was reluctant to address compelling interests when he could decide the case based on narrow tailoring.

For Judge Weiner, because the law school's policy only focused on African-Americans and Mexican-Americans, the admissions plan was not narrowly tailored. If the law school sought to achieve diversity, why had it ignored other minority groups that could contribute to diversity? Judge Weiner perceived the admissions program as resembling a quota system for African-Americans and Mexican-Americans rather than an "academic admissions program narrowly tailored to achieve true diversity."

IV. IMPLICATIONS

On July 1, 1996, the Supreme Court declined to review the Fifth Circuit's ruling in Hopwood. Because of the Court's refusal to grant certiorari, the holding in Hopwood will be binding formally only in Texas, Louisiana, and Mississippi, the states which comprise the Fifth Circuit. Thus, the Court will forgo the opportunity to address the question of whether Powell's opinion in Bakke, which recognizes diversity as a compelling interest, is good law.

Despite the limited precedential basis of Hopwood, the Fifth Circuit's ruling could have profound implications for race-based preference programs in the area of higher education. Many law school deans fear that Hopwood will end affirmative action in higher education.  

102. Id. at 962 (Weiner, J., concurring).
103. Id. at 963.
104. Id. at 964.
105. Id.
106. Id. at 965.
107. Id. at 966.
108. Id.
109. Id.
Because *Hopwood* recognizes only one justifiable rationale, remedying the present effects of past discrimination, universities can no longer admit minorities in an attempt to diversify the student body.\(^{112}\)

According to Yale Law School Professor Paul D. Gewirtz, for most schools, however, the diversity rationale provides the main basis for affirmative action programs.\(^{113}\) Gewirtz believes that the rationale for affirmative action is no longer to correct the effects of discrimination.\(^{114}\)

*Hopwood* and *Podberesky* appear to make the remedying of the present effects of past discrimination virtually impossible.\(^{115}\) Both courts refused to view the admissions programs as doing anything more than remedying past societal discrimination.\(^{116}\) At the same time, most of the affirmative action cases after *Bakke* addressed affirmative action in the employment context; thus, very little guidance exists concerning racial preferences for university admissions.\(^{117}\) Consequently, public universities in the Fifth Circuit must follow the lead set out in *Hopwood*.

One argument holds that the rationale for affirmative action in higher education is much different than in other areas, and that racial and cultural diversity is necessary for the educational experience.\(^{118}\) If diversity continues to be treated as something less than a compelling interest, graduate level education has the potential of becoming virtually all-white.\(^{119}\) As a result, public universities will have to develop other ways of diversifying their student bodies.

Schools may attempt to replace diversity with a proxy of socioeconomic disadvantage.\(^{120}\) In fact, Justice Scalia in his concurrence in *Croson* stated: "Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks."\(^{121}\) Only such a program "is in accord with the letter and

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112. *Hopwood*, 78 F.3d at 945-46.
114. *Id.*
115. 78 F.3d at 952; *Podberesky*, 38 F.3d at 153, 157.
116. *Id.*
118. *Id.*
121. *Id.* (quoting *Croson*, 488 U.S. at 528 (Scalia, J., concurring)).
the spirit of our Constitution.’” Thus, a university admissions board could give an applicant a “plus” for demonstrating economic disadvantage. In addition, universities could try to reduce the emphasis on admissions tests. Because studies have shown that such tests are culturally biased and prefer whites over African-Americans, reducing the use of standardized tests could increase the number of minorities admitted.

With the Supreme Court’s refusal to review the decision in Hopwood, the brunt of its impact will occur in the Fifth Circuit. Nevertheless, a recent case in the Seventh Circuit, Wittmer v. Peters, cited but did not apply Hopwood in its analysis of an employment preference program. The plaintiffs in that case cited Hopwood as holding that strict scrutiny allows preferences only to remedy the present effects of past discrimination by the institution employing the remedy. The Seventh Circuit rejected this argument, declaring this claim dicta and not a holding.

Regardless of the potential limited effect of Hopwood, by failing to address the UT School of Law’s preference program on a narrower basis, as the concurrence did, Hopwood may alter the way many schools admit minorities. Consequently, Hopwood could disrupt the already murky picture surrounding racial preference programs in higher education.

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122. Id.
123. Cosner, supra note 120, at 1027.
124. Id.
125. Id. at 1028.
126. 87 F.3d 916 (7th Cir. 1996), cert. denied, No. 96-852, 1996 WL 716837 (U.S. S. Ct. Feb. 18, 1997).
127. 87 F.3d at 916.
128. Id. at 919.
129. Id.