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THE USE OF RACE IN THE ADMISSIONS PROGRAMS OF HIGHER EDUCATIONAL INSTITUTIONS - A VIOLATION OF THE EQUAL PROTECTION CLAUSE?

The Effect of Hopwood v. State of Texas, et al.¹

I. INTRODUCTION

"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 type of applicants."²

Race-conscious programs are on trial in America. Few debates invoke the level of controversy and spark the human emotions and frustrations, as does the debate concerning race-conscious programs. The debate erects a dividing line between people with starkly different views as to how our society should treat people of color. The debate focuses on the appropriateness, effectiveness, benefits, and fairness of programs using racial classifications.

The legacy of slavery and pervasive discrimination against African-Americans unfortunately permeates our Nation's history.³ Consequently, African-Americans represent the paradigmatic group for those arguing for the necessity and inclusion of race-conscious programs.⁴

Proponents of race-conscious programs argue that the vestiges of past discrimination maintain barriers to African-Americans. They point to President Lyndon B. Johnson's vivid imagery as a continual reminder that, "You do not take a person, who for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, 'You are free to compete with all the others,' and still justly believe that you have been

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¹. 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996).
². Hopwood, 78 F.3d at 945.
⁴. Id.
completely fair." These proponents believe that discrimination is still an active problem and that substantial progress toward leveling the playing field among African-Americans and caucasians will not be made without programs which consider race.

Those opposing race-conscious programs argue that the use of racial classifications fails to effectively create or maintain an equitable playing field by alleviating the effects of past societal discrimination. They claim that the current and continued use of such programs fail to create an equitable opportunity for all, and such preferential programs effectively create "reverse discrimination" which further divides the races in America. The Supreme Court has stated, "racial preferences appear 'to even the score'... only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white."

Institutions of higher education have traditionally used race as a factor in their admissions programs. The use of race in admissions programs ranges from using race to using race as the deciding factor. However, as the national debate over race-conscious programs rages, the constitutional validity of these admissions programs is being challenged. As a result, many have urged the American judicial system to resolve the controversy by invalidating such programs on constitutional grounds.

The Fifth Circuit Court of Appeals in Hopwood v. Texas addressed whether race could be used as a factor in an educational institution's admissions program. The University of Texas law school operated a dual track admissions program which granted preferential treatment to African-American and Mexican-American applicants. The Supreme Court has recently found that all race-conscious programs are inherently suspect in light of the Equal Protection Clause and must be subjected to the strictest of scrutiny. In order to satisfy strict scrutiny, schools using race-

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5. Id. at 515 (quoting President Lyndon B. Johnson, To Fulfill These Rights, Address at the Howard University Commencement Ceremony, June 4, 1965, shortly after the passage of the Civil Rights Act of 1964).
8. Id. at 90.
9. 78 F.3d 932.
10. See discussion infra part II.
conscious programs must demonstrate that their program both serves a compelling governmental interest and is narrowly tailored to meet that interest.12 The law school proffered that their admissions program served two compelling governmental interests by remedying the present effects of past discrimination and promoting diversity within their student body.13

The Fifth Circuit rejected both of the law school's proposals for compelling governmental interests and held that the program violated the Equal Protection Clause of the Fourteenth Amendment. First, the court in Hopwood refused to adhere to Justice Powell's opinion in the University of California v. Bakke14 which intimated that race may be used as a factor in admissions programs to promote diversity. Hopwood held that race could not be used as a proxy for diversity because the use of race in any manner fosters impermissible stereotyping of individuals based on the color of their skin.15 The court concluded that race could never be used as a factor in admissions programs to promote diversity as a compelling governmental interest.

Second, the court in Hopwood acknowledged that attempts to remedy the present effects of past discrimination serves a compelling governmental interest.16 However, the court found that insufficient evidence existed to show that the admissions program was remedying the present effects of past discrimination by the law school.17

Hopwood severely restricted the use of race as a factor in admissions programs for educational institutions in the Fifth Circuit.18 The Supreme Court denied writ of certiorari to Hopwood, thus prolonging the debate as to whether race should be used as a factor in school admissions programs.19

13. See infra notes 50-51 accompanying text.
14. 438 U.S. 265 (1979). In Bakke, the plaintiff claimed that the dual track admissions program violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause. See discussion infra part III.A.
15. Hopwood, 78 F.3d at 945-46.
16. Id.
17. Id. at 962. See infra notes 57-58 and accompanying text; see also discussion infra IV.A.2.
18. The decision in Hopwood focused on the role of race in the admissions process of law schools. The legal principles encompassed in the case could easily be applied to other areas of higher education.
This Note examines the burden placed on educational institutions to justify race-conscious admissions programs in light of the Equal Protection Clause. First, this note reviews the facts of the case and the decision in Hopwood. Next, this note provides a background of the law applicable to race-conscious programs by examining: (1) University of California v. Bakke; (2) the underlying theories of interpreting the Fourteenth Amendment; (3) the strict scrutiny standard of review; and (4) the Fourth Circuit's 1994 decision to invalidate a university's race-conscious scholarship program in Podberesky v. Kirwan.

Finally, this note analyzes the decision by the Fifth Circuit. The analysis reveals that the decision in Hopwood was overly broad in finding that race could never be used to achieve diversity. However, the analysis shows that the argument suggested by Hopwood that race should not be used as a proxy for diversity is provocative. The analysis explains the difficulty that race-conscious admissions programs have with sustaining constitutional validity, and suggests alternatives to using race in admissions.

II. THE CASE

The University of Texas School of Law consistently ranks as one of the nation's leading law schools. Admission to the school is intensely competitive. In a given year, the applicant pool consists of over 4,000 applicants, many of whom maintain some of the highest grades and test scores in the country, competing for an eventual entering class of 500.

In the early 1990's, the law school operated a race-conscious dual track admissions program. The school operated one admissions program for African-Americans and Mexican-Americans and maintained another separate admissions program for the remainder of the applicants. The school reviewed the applicants differ-

20. The purpose of this Note is to examine and outline the difficulty that school admissions programs which use race as a factor in their admissions have when confronted by Equal Protection scrutiny. This Note does not serve as a persuasive argument for either side of the race-conscious programs debate. The Note is intended to objectively portray the current state of the law in this area and to critically analyze the reasoning used by the Fifth Circuit in Hopwood.

21. Hopwood, 78 F.3d at 935 (quoting U.S. NEWS AND WORLD REPORT, Mar. 20, 1995, at 84 (national survey ranking of seventeenth)).

22. Id.

23. Id.
ently, separating the applicants into one of two groups based on the race of the applicant.

Due to the enormous pool of applicants each year, the law school has traditionally relied on numerical data in its admission process. In 1992, the law school based its initial admissions decision upon an index figure ("TI"). The TI consisted of a composite of undergraduate grade point average ("GPA") and Law School Aptitude Test ("LSAT") score. Based solely on their TI admissions score, the school sorted candidates into one of the following three categories: (1) "presumptive admit," (2) "presumptive deny," or (3) "discretionary zone." Those applicant's whose TI admissions score placed them in either the "presumptive admit" or "presumptive deny" categories received little review. Such placement resulted in the "presumptive admit" applicants receiving offers for admission and the "presumptive deny" applicants being denied admission. However, the applicants placed in the "discretionary zone" received a more extensive review.

Although the TI admissions score sorted all applicants into one of the three categories, the TI ranges for placing applicants into these categories varied depending on the race of the applicant. The school lowered the TI ranges used for initial sorting for African-Americans and Mexican-Americans. The minimum

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24. Id.
25. Id. at 935 n.1. The formulae, known as the "Texas Index," was written by the Law School Data Assembly Service according to a prediction derived from the success of first-year students in preceding years. The formulae required an approximate 60% weight to LSAT scores and 40% to GPA. In addition to the numerical data, the law school considered such qualitative factors as the strength of an applicant's undergraduate education, the difficulty of the applicant's major, significant trends in both the applicant's grades as well as the trends in grades at the applicant's undergraduate institution, and additional qualities the applicant would provide the incoming class. These qualitative factors were extremely important to consideration of marginal candidates.
26. Id. at 935.
27. Id. at 935-936.
28. Id. at 936.
29. Id.
30. Id.
31. Id. The consequence of using different ranges greatly affected an applicant's opportunity for admission. There existed a certain range of TI admission scores for which African-American and Mexican American applicant's would be placed in the "presumptive admit" category while all other applicant's with the same TI admission score would be placed in the "presumptive deny" category.
TI score for African-Americans and Mexican-Americans was 189 to be placed in the "presumptive admit" category and 179 for the "presumptive denial" category. In contrast, the minimum TI score for all other applicants was 199 for the "presumptive admit" category and 192 for the "presumptive denial" category.

The reduced range of TI scores for African-Americans and Mexican-Americans allowed the law school to consider and admit more individuals from these specified groups. The law school lowered the TI admission score in an attempt to meet an "aspiration" of admitting a class of African-Americans and Mexican-Americans which was roughly proportionate to the percentages of those races graduating from undergraduate institutions in Texas.

In addition to using different TI admission scores, the law school used a segregated application evaluation process. The process required that every African-American and Mexican American applicant within the "discretionary zone" receive an extensive

32. Id.
33. Id.
34. Id. In 1992, the white residents (for simplicity, Hopwood designated all non-preferred candidates as “white”) had a mean GPA of 3.25 and an LSAT of 164. Resident Mexican American applicants had a mean GPA of 3.27 and an LSAT of 158; African-Americans had a mean GPA of 3.25 and an LSAT of 157. “On the basis of the median LSAT’s national distribution percentile, one-half of the law school’s white resident applicants were in the top 9% of all test-takers, one-half of the resident Mexican Americans were in the top 25% of all test-takers, and one-half of the resident blacks were in the top 22% of test-takers.” The differing standards greatly affected a candidate’s chance of admissions. “Because the presumptive denial score for white applicants was a TI of 192 or lower, and the presumptive admit TI for preferred candidates was 189 or higher, a preferred candidate with a TI of 189 or above almost certainly would have been admitted, even though [that score] was considerably below the level at which a white candidate almost certainly would have been rejected.” Id. To illustrate the difference, consider that for an applicant with a GPA of 3.8, to avoid presumptive denial as a white by obtaining a TI score of 193 or above, the LSAT had to be at least 155. This score would be approximately in the top 32% of test-takers. In contrast, if the same applicant were African-American, thus needing a TI score of 180 to avoid presumptive denial, the applicant would have to score a 142 on the LSAT. This score would rank the applicant in only the top 80% of test-takers. Id. Therefore, the disparate classification of applicants according to race would clearly result in the opportunity and ultimate admission of more minority applicants.

35. Id. at 937. The rough percentages of those graduating from Texas colleges included approximately 5% African-Americans and 10% Mexican Americans. The law school was constantly adjusting its TI range over the course of the admissions process in an attempt to achieve the desired proportions.
review by one three-member minority subcommittee.\textsuperscript{36} A number of different subcommittees reviewed the remaining applicants within the "discretionary zone."\textsuperscript{37} Therefore, the admissions process failed to compare African-American and Mexican-American applicants with the rest of the applicant pool at any time during the process.\textsuperscript{38} The law school also maintained segregated waiting lists based on race and residence.\textsuperscript{39}

Cheryl Hopwood, Douglas Carvell, Kenneth Elliot, and David Rogers were among the white applicants who applied for admission to the 1992 entering law school class.\textsuperscript{40} Based on their TI admissions scores, the school placed these applicants in the "discretionary zone."\textsuperscript{41} If any of the four applicants had been African-American or Mexican-American, their respective TI score would have placed each of them in the "presumptive admit" category.\textsuperscript{42} Such a classification would have assured these applicants admission to the law school.\textsuperscript{43} However, upon being placed in the "discretionary zone," all four applicants were eventually denied admission into the 1992 entering law school class.\textsuperscript{44}

These four applicants brought suit in federal district court primarily under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{45} The plaintiffs' contended that they were discriminated against on the basis of race by the law school's process of evaluating their admissions.\textsuperscript{46} The district court subjected the

\begin{tabular}{l}
36. Id. \\
37. Id. \\
38. Id. at 938. \\
39. Id. \\
40. Id. Cheryl Hopwood's TI admission score was actually a 199, based upon her 3.8 GPA and the equivalent of a 160 LSAT score, but she was dropped from the "presumptively admit" category to the "discretionary zone" because the law school determined that her undergraduate GPA was overstated by her educational background. Carvell, Elliot, and Rogers had a TI score of 197. \\
41. Id. at 938. \\
42. Id. at 936. \\
43. Id. \\
44. Id. at 938. See supra text accompanying notes 28-36. \\
45. Id. at 938. The plaintiffs also claimed derivative statutory violations of 42 U.S.C. §§ 1981 and 1983 and of Title VI of the Civil Rights Act, 42 U.S.C. §2000d. The suit was brought against the following defendants: the State of Texas, the University of Texas Board of Regents, the University of Texas at Austin, the President of the University of Texas at Austin, the University of Texas Law School, the dean of the law school, and the Chairman of the Admissions Committee. All individuals were sued in their official capacity. \\
46. Id.
\end{tabular}
program to strict scrutiny and found that two justifications prof-
ferred by the law school for using race in the admissions process
served as compelling governmental interests. These justifica-
tions were: (1) obtaining the educational benefits that flow from a
racially and ethnically diverse student body ("diversity") and (2)
remedying the present effects of past discrimination ("remedial
purpose").

Despite finding constitutionally valid reasons for using race
in the admissions program, the district court determined that the
admissions program violated the Equal Protection Clause. This
violation resulted from the program's deferential treatment of
candidates of different races without comparing the candidates of
different races with one another at some point in the admissions
process. However, the district court granted virtually no relief
to the plaintiffs, therefore, the plaintiffs appealed the verdict.

On appeal, the Fifth Circuit reversed and held that the
defendants failed to submit any constitutionally "compelling" rea-
sons for the use of race in the admissions program of the law
school. The Fifth Circuit refused to adhere to the portion of Jus-
tice Powell's opinion in Bakke suggesting that achieving diversity
in an educational institution could be a constitutionally "compel-
ling" reason to use race in an admissions process. As a result,

47. Id. See discussion of compelling governmental interest and the strict
scrutiny standard of review infra part III.C.1.

48. Hopwood, 861 F. Supp. 551, 571-572. The district court found that the
entire State of Texas' institutions of higher education would be used to determine
if any present effects of past discrimination existed. The district court found
three present effects of past discrimination: (1) "the law school's lingering
reputation in the minority community, particularly with prospective students, as
a 'white school'; (2) an under-representation of minorities in the student body;
and (3) some perception that the law school is a hostile environment for
minorities."

49. Id. at 579.

50. Id.

51. The district court not only failed to order that the plaintiffs be admitted to
law school, but the district court also refused to enjoin the law school from using
race in admissions decisions. The district court determined that the only
appropriate relief was a declaratory judgment and an order to allow the plaintiffs
to reapply to the school of law without charge. The plaintiffs were awarded
damages of only a one-dollar nominal award to each plaintiff. Hopwood, 738 F.3d
at 939.

52. Id. at 962.

53. Id. For a discussion of Justice Powell's opinion, see infra text
accompanying notes 73-87. In fact, the court found that diversity, in and of itself,
was not a compelling governmental interest which is necessary to meet the strict
the court found that the law school may not consider race as a factor in admissions in order to achieve diversity in its student body.\textsuperscript{54}

The Fifth Circuit also found that remedial admissions program may serve a compelling governmental interest, but these programs could not be sustained based entirely on societal discrimination.\textsuperscript{55} Relying extensively on the 1994 ruling by the Fourth Circuit in \textit{Podberesky v. Kerwin},\textsuperscript{56} the Court of Appeals found that there was insufficient evidence to support the finding that any present effects of discriminatory practices resulted from the past discrimination by the law school.\textsuperscript{67} The Court of Appeals granted the plaintiffs the opportunity to reapply to the law school under an admissions program that did not use race as a factor in admissions and remanded to the district court to reconsider the question of damages.\textsuperscript{58}

In a separate concurrence, Judge Wiener agreed that the admissions program was unconstitutional, but he viewed the opinion of the majority panel as overly broad.\textsuperscript{59} He stated the majority unnecessarily concluded that the use of race in the admissions program to achieve diversity would never serve as a compelling governmental interest.\textsuperscript{60} Even assuming that diversity in education could serve as a compelling governmental interest, Judge Wiener asserted that this particular dual track admissions program was not narrowly tailored and clearly failed to meet constitutional validity.\textsuperscript{61}

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\textit{scrutiny test for constitutional validity. See Adarand Constructors v. Pena, 115 S. Ct. 2097, 2111 (1995); see also the discussion concerning strict scrutiny \textit{infra} parts III.B. and III.C.1.}
54. \textit{Hopwood}, 738 F.3d at 962.
55. \textit{Id.}
57. \textit{Hopwood}, 78 F.3d at 952-953.
58. \textit{Hopwood}, 78 F.3d at 952-953.
59. \textit{Id.} at 962-963.
60. \textit{Id.} See the discussion concerning compelling governmental interests and strict scrutiny \textit{infra} parts III.B. and III.C.1.
61. \textit{Hopwood}, 78 F.3d at 966. See discussion of Judge Wiener's concurring opinion \textit{infra} part IV.B.1.
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III. BACKGROUND

A. The Initial Look at the Use of Race in Admissions Programs in Higher Education—Regent's of the University of California v. Bakke

The Supreme Court first looked at race-conscious programs in higher education nineteen years ago in Regent's of the University of California v. Bakke. Since 1978, Bakke has become the cornerstone for analyzing non-remedial race-conscious educational programs. In 1973 and 1974, the University of California at Davis School of Medicine denied admission to Allan Bakke, a white male, although his academic qualifications were considerably higher than those of minority candidates who were admitted.

The medical school operated a dual track admissions program which consisted of one tract of admissions for the general population and a separate, “special admissions” tract for certain minorities and “disadvantaged” persons. The medical school allotted 16 seats out of an incoming class of 100 under this special admissions program. At no time during the admissions process were the minority and “disadvantaged” applicants who were competing

63. Id. For an in-depth analysis of Bakke, see NOWAK & ROTUNDA, supra note 12, §14.10, at 711-21.
65. 438 U.S. at 277 n.7. See Chin, supra note 64, at 883. For example, Bakke's undergraduate science grade point average (“GPA”) was 3.44 and his overall GPA was 3.46. In comparison, the 1973 entering class from the special admissions program had an average science GPA of class of 1973 had an average science GPA of 2.62 and an overall average GPA of 2.88. In 1974, those entering the school via the special admissions program had an average science GPA of 2.42 and an overall average GPA of 2.62. Bakke, 438 U.S. at 277 n.7.
66. 438 U.S. at 272-73, 275. The medical school's admission program considered race, educational background, and economic deprivation to determine whether a student qualified as disadvantaged. Applying candidates were asked to indicate whether they wished to be considered as “economically and/or educationally disadvantaged” applicants, as well as whether they wished to be considered as members of a minority group. The Medical School apparently viewed the minority group as “Blacks,” “Chicanos,” “Asians,” and “American Indians.” “No formal definition of “disadvantaged” was ever produced, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation.” Once an applicant was placed into the special admissions program the applicant received a more lenient review of GPA and standardized test scores. Id. at 274-275.
67. Id. at 274.
for the 16 allotted seats ever compared with the general applicants.\textsuperscript{68} Allan Bakke challenged the medical school's race-conscious "special admissions" program claiming that it violated both his constitutional right under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.\textsuperscript{69}

A divided Court in \textit{Bakke} failed to deliver a majority opinion, however, five Justices, for differing reasons, found the program in violation of Title VI.\textsuperscript{70} A majority of the Court did reach the Equal Protection Clause issue, however, only Justice Powell found that the program violated the Constitution.\textsuperscript{71} Justice Powell's opinion provided the swing vote to invalidate the admissions program and became the subject of numerous debates.\textsuperscript{72} Justice Powell addressed the constitutional issue and found that the admissions program violated the Equal Protection

\textsuperscript{68.} Id. \\
\textsuperscript{69.} Id. at 277-278. \\
\textsuperscript{70.} Id. at 271-272. Six justices filed separate opinions with none of the opinions garnering more than four votes.

\textsuperscript{71.} \textit{Bakke}, 438 U.S. at 271-72. Four of the justices - Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens - concluded that the admissions program violated Title VI of the Federal Civil Rights Act, and they found it unnecessary to reach the constitutional issue. \textit{Id.} at 421. Four other justices - Justices Brennan, White, Marshall and Blackmun - addressed the constitutional issue first because they were of the opinion that Title VI meant to bar only such racial discrimination as was prohibited by the Fourteenth Amendment. They found that the school's program did not violate the Equal Protection Clause, therefore it did not violate Title VI. As a result, Justice Powell's opinion cast the deciding vote to invalidate the admissions program. \textit{Id.} at 325. \textit{See infra} notes 74-75 for a discussion of the various reasons for finding a Title VI violation.

\textsuperscript{72.} \textit{See, e.g.,} Vincent Blasi, \textit{Bakke as Precedent: Does Mr. Justice Powell Have a Theory?}, 67 CAL. L. REV. 21, 24 (1979) (arguing that Bakke's precedential force is governed by the common conclusions of Justices Powell and Stevens, though it is erroneous to conclude that Powell's opinion has "controlling significance on all questions"); \textit{But see, e.g.,} Robert G. Dixon, Jr., \textit{Bakke: A Constitutional Analysis}, 67 CAL. L. REV. 69 (1979) (Justice Powell's "tiebreaking opinion . . . has acquired wide pragmatic appeal.").
Furthermore, he concluded that as a result of the constitutional violation, the program also violated Title VI. 74

Justice Powell found that the medical school's special admissions program which was based solely on race, constituted a quota system which was not narrowly tailored and failed strict scrutiny. 75 He stated that, "[p]refering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." 76 Programs which set aside a specific number of seats for identified minority groups without comparing those groups with other applicants, unfairly benefited the identified group at the expense of other innocent individuals and violated the Equal Protection Clause. 77

73. Bakke, 438 U.S. at 271-284. Justice Powell agreed with Justice Brennan and three other Justices that Title VI only barred discrimination that was unconstitutional. Therefore, Justice Powell addressed the constitutional issue first before deciding the Title VI issue. Nevertheless, Justice Powell sided with Chief Justice Burger and three other Justices by finding that this particular program violated Title VI. The five members of the Court that addressed the constitutional issue found that the use of racial classifications in the special admissions program required the program to be subjected to strict scrutiny to determine its constitutional validity. For a discussion of the strict scrutiny standard of review see discussion infra part III.C.

74. Bakke, 438 U.S. at 271-284. Justice Powell's reasoning for finding a Title VI violation differed from the other four Justices in that his determination of a Title VI violation came as a result of a prior determination that the program violated the Equal Protection Clause. Chief Justice Burger, along with Justices Stewart, Rehnquist, and Stevens, found the program in violation of Title VI without reaching the constitutional issue.

75. Id. at 315. Racial classifications are subject to strict scrutiny to determine their constitutional validity, and a program must meet a two prong test to satisfy strict scrutiny. serve both a compelling governmental interest and be narrowly tailored to meet that interest. For a further discussion of the strict scrutiny test see discussion infra part III.C. ’Justice Powell’s opinion suggests that, even assuming that educational diversity would conceivably be a compelling governmental interest, the medical school’s program was not narrowly tailored to meet that interest, thus it failed the strict scrutiny test. Bakke, 438 U.S. at 315.


77. Id. Racial classifications are subject to the strictest of scrutiny to determine their constitutional validity, and a race-conscious program must meet the following two prong test to satisfy strict scrutiny: (1) these programs must both serve a compelling governmental interest and (2) be narrowly tailored to meet that interest. Nowak & Rotunda, supra note 12, §14-5. Justice Powell’s opinion suggests that, even assuming that educational diversity would conceivably be a compelling governmental interest, the medical school’s program was not narrowly tailored to meet that interest, thus it failed the strict scrutiny test. Bakke, 438 U.S. at 307. For a discussion of the “strict scrutiny” standard for
As an alternative to the medical school's special, race-based quota system, Justice Powell approved of an admissions program which used race as one of many factors to achieve a diverse student body. Justice Powell wrote, "the attainment of a diverse student body [is] a constitutionally permissible goal for an institution of higher education." Justice Powell concluded that educational excellence is widely believed to be promoted by a diverse student body which contributes to a robust exchange of ideas, therefore, admissions programs using race as one factor among others to achieve diversity would withstand constitutional scrutiny.

Under Justice Powell's recommended system, race or ethnic background may be deemed a "plus factor" in a particular applicant's file, yet the applicant's file would still be compared with other applicants at some point in the admissions process. Although some may argue that discretionary programs could be a subtle means of employing racial preference, Justice Powell found that "good faith would be presumed" on behalf of an institution implementing such a program.

Despite his proposal that race may be deemed a "plus factor" in order to achieve diversity, Justice Powell's proposal did not precisely outline a procedure for the use of race among other factors. Justice Powell neglected to provide a definition for diversity which outlines the characteristics necessary for achieving constitutional validity and the narrowly tailored element of strict scrutiny see discussion infra parts III.B. and III.C.

78. *Bakke*, 438 U.S. at 316.
79. *Id.* at 311. Justice Powell found diversity to be a compelling governmental interest that would satisfy strict scrutiny as long as the race-conscious program was narrowly tailored. In addition, Justice Powell found that although remedying the present effects of past discrimination constitutes a compelling governmental interest, the medical school's special admissions program did not serve to remedy the present effects of past discrimination. The special admissions program was neither necessary to remedy societal or institutional discrimination, nor was the program necessary to increase the representation of minority physicians in community's that were underserved. *Bakke*, 438 U.S. at 308-311. For a discussion concerning the strict scrutiny standard of review for race-conscious programs see discussion infra part III.B.
81. *Id.* at 317.
82. *Id.* at 318.
83. Chin, *supra* note 64, at 890.
ing diversity. Consequently, the opinion left educational institutions without a guide to help design an admissions program using race as a factor to achieve diversity.\(^{84}\)

Two portions of Justice Powell's opinion were joined by four other Justices: (1) the statement of facts, and (2) the paragraph which stated that not all racial classifications were invalidated by the Fourteenth Amendment.\(^{85}\) No other Justice joined in Justice Powell's opinion that using race to achieve educational diversity, in and of itself, would serve a compelling governmental interest and meet constitutional scrutiny. Four Justices in a concurring opinion did agree that an admissions program could use race as one factor in achieving diversity so long as diversity is necessary to remedy societal discrimination.\(^{86}\) Therefore, these Justices did not concur with Justice Powell's intimation that diversity, alone, could constitute a compelling governmental interest.

Although Justice Powell found that using race as the deciding factor in the medical school's admissions program by setting aside allotted seats and failing to compare racially classified applicants at any time during the process violated the Equal Protection Clause, he proposed that the use of race in conjunction with other factors to achieve diversity would survive constitutional scrutiny. Therefore, Justice Powell's opinion in \textit{Bakke} made it appear that the interest in educational diversity could support some use of racial classifications and withstand constitutional scrutiny.

\section*{B. The Supreme Court's Decision to Subject All Race-conscious Programs to Strict Scrutiny}

At the heart of the debate concerning the constitutional validity of race-conscious admissions programs lies the Equal Protection Clause of the Fourteenth Amendment.\(^{87}\) The Fourteenth Amendment, adopted and ratified in 1868, states in pertinent part, "No State shall make or enforce any law which shall ... deny

\begin{itemize}
\item \textit{Id.} at 883.
\item \textit{Bakke}, 438 U.S. at 271-284.
\item \textit{Bakke}, 438 U.S. at 326 n.1 (Brennan, J., concurring in part and dissenting in part). Justices Brennan, White, Marshall and Blackmun were of the opinion that even this dual track, race-conscious admission program did not violate the Equal Protection Clause. Therefore, these Justices joined Justice Douglas in the intimation that a program could use race in conjunction with other factors to achieve diversity. However, these Justices conditioned the use of race to achieve diversity upon the necessity for remedying the present effects of past discrimination.
\item U.S. Const. amend. XIV § 1.
\end{itemize}
to any person within its jurisdiction the equal protection of the laws.\textsuperscript{88} The constitutional validity of such programs ultimately rests in the resolution of whether the use of race alone, or in conjunction with other factors, in admissions programs violates the Equal Protection Clause.

Over 100 years have passed since Justice Harlan, "in a lonely dissent, observed '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among its citizens."\textsuperscript{89} Recent Supreme Court decisions have seemingly acknowledged Justice Harlan's words by establishing a significant trend toward eliminating programs involving racial classifications in areas outside the realm of higher education.

In its last term, the Supreme Court invalidated race-conscious programs which sought to remedy the effects of past discrimination,\textsuperscript{90} to create congressional districts,\textsuperscript{91} and to award federal contracts.\textsuperscript{92} The Court's current position of restricting race-conscious programs will undoubtedly influence determinations of the validity of these programs in higher education.

The recent eradication of race-conscious programs outside the realm of higher education results from the Supreme Court's 1989 decision in \textit{Richmond v. J.A. Croson Co.}\textsuperscript{93} Croson firmly established that the appropriate standard of review for race-conscious programs should be strict or heightened scrutiny.\textsuperscript{94} In \textit{Croson}, a bidder challenged the plan of the City of Richmond which required prime contractors, who were awarded city contracts, to subcon-
tract at least 30% of the dollar amount of each contract to "Minority Business Enterprises." The Court decided that the city's plan must be subjected to strict scrutiny for constitutional validity and found that the plan violated the Equal Protection Clause. In *Croson*, a majority of the Court agreed that all state and local government programs involving racial classifications must be subjected to strict scrutiny to satisfy constitutionally validity. In 1995, the Court reaffirmed the *Croson* decision to subject programs involving racial classifications to strict scrutiny in *Adarand Constructors, Inc. v. Pena*. The Court in *Adarand* extended the strict scrutiny standard of review to race-conscious programs implemented by the Federal Government. The Court found that, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." In *Adarand*, a subcontractor initiated a suit after the Department of Transportation awarded a construction contract to a minority-owned company despite the fact that Adarand submitted

95. Id.

96. Id. *Croson* found that the strict scrutiny standard of review for race-conscious programs under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. Id. at 483.


99. Id. In 1990, the Court in *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990) declined to subject a Congresionally mandated program which utilized racial classifications to strict scrutiny, and instead used an "intermediate scrutiny" standard of review. See infra p. 24 and note 133. Although *Croson* definitively set forth the strict scrutiny test for state and local government race-conscious programs, uncertainty still existed, in light of *Metro*, as to the appropriate standard of review for federally approved race-conscious programs. The Court in *Adarand* laid the uncertainty to rest by all race-conscious programs will be subjected the strictest of scrutiny.

100. *Adarand*, 115 S. Ct. at 2113. After *Croson* and *Adarand* all racial classifications, even race-conscious programs enacted to aid the traditionally underprivileged races, are subject to strict scrutiny.
the lowest bid. Adarand challenged a federal program designed to provide highway contracts to disadvantaged business enterprises. The Court stated that, because racial classifications 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 classification be clearly identified and unquestionably legitimate... racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.

Current Supreme Court Equal Protection jurisprudence views all racial classifications as inherently suspect and subjects them to strict scrutiny. Therefore, the constitutional validity of race-conscious admissions programs in higher education must be subjected to strict scrutiny.

C. Strict Scrutiny Standard of Review for Constitutional Validity

Race-conscious programs subjected to strict scrutiny must fulfill a rigorous two-prong test. In order for a program involving racial classification to satisfy strict scrutiny, courts require entities to demonstrate that the program both: (1) serves a compelling governmental interest, and (2) is narrowly tailored to meet that interest. Programs subjected to strict scrutiny have difficulty meeting both prongs of the test.

101. Id.
102. Id. The Small Business Administration Act declares it to be “the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals... shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal Agency.” 15 U.S.C. §637(d)(1). The Act defines “socially disadvantaged individuals” as “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities.” 15 U.S.C. §637(a)(5).
103. Adarand, 115 S. Ct. at 2117 (quoting Fullilove v. Klutznick, 448 U.S. at 533-535, 537 (1980)).
104. NOWAK & ROTUNDA, supra note 12, §14.3, at 602. See also Adarand, 115 S. Ct. at 2113.
105. Id. Note the contrast between strict scrutiny and the two lower standards of review for constitutional validity. The “rational relation” test only requires a showing that “it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution.” Id. at 601. The “intermediate scrutiny” test only requires a showing that “the classifications has a 'substantial relationship' to an 'important'
1. The Difficulty in Finding a Compelling Governmental Interest For Racial Classifications

The first prong of the strict scrutiny standard of review requires that admissions programs which use racial classifications serve a compelling governmental interest, such as remedying the present effects of past discrimination or promoting diversity. The Supreme Court has only recognized remedial efforts as compelling governmental interest for programs involving racial classifications. The Court, however, has made it difficult for race-conscious programs initiated to remedy the present effects of past discrimination to survive the strict scrutiny test.

In *Wygant v. Jackson Board of Education*, non-minority school teachers challenged the validity of a race-conscious layoff plan encompassed in a collective bargaining agreement between a school board and a teacher's union. The Supreme Court, in a plurality opinion written by Justice Powell, addressed whether the plan provided a remedy for the present effects of past discrimination such that it would serve a compelling governmental interest. The Court stated that, "societal discrimination alone is [not] sufficient to justify a racial classification." "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."

The *Wygant* Court "insisted upon some showing of prior discrimination by the governmental unit involved before allowing the use of racial classifications to remedy such discrimination." The Court required "convincing" or "sufficient" evidence to show that the governmental unit discriminated in the past and that the present remedial action is warranted. Applying the *Wygant* Court's finding to the educational arena requires institutions to show that either their specific educational institution or their school system discriminated in the past in order for a remedial government interest." *Id.* at 603. Both the rational relation and intermediate scrutiny test grant considerably more deference to federal and state legislatures in utilizing classifications of people.

108. *Id.*
109. *Id.*
110. *Id.* at 276.
111. *Id.* at 274. The plurality decision in *Wygant* was reaffirmed by a majority of the Supreme Court in *Croson*. *Croson*, 488 U.S. at 488.
admissions program to serve a compelling governmental interest.\footnote{113}

The decision in \textit{Wygant} erects an obstacle for race-conscious programs which attempt to remedy past discrimination. These institutions often fail to show the nexus between their specific educational institution or school system's past discriminatory practices and the resulting present effects.\footnote{114} Without this nexus, educational institutions fail to justify the use of race in their admissions programs on the basis of remedying the effects of past discrimination.

Diversity provides an important interest for race-conscious admissions programs. Notwithstanding Justice Powell's opinion, a majority of the Court has yet to hold that racial classifications used to achieve diversity may serve a compelling governmental interest in the educational arena.\footnote{115} However, the Court in \textit{Metro Broadcasting, Inc. v. F.C.C.} did address the use of preferential racial classifications to achieve diversity outside the educational arena.\footnote{116}

In \textit{Metro}, the Court determined the constitutional validity of two Federal Communication Commission measures that favored racial minorities when issuing broadcast licenses.\footnote{117} The Commission's policies were designed to increase broadcast diversity.\footnote{118} Despite the holding in \textit{Croson} one year earlier that racial classifications for state and local governments must be subjected to strict scrutiny, a majority of the Court in \textit{Metro} held that because the racial classification involved a Federally operated race-conscious program, the appropriate standard of review was intermediate scrutiny.\footnote{119} Intermediate scrutiny requires that the classification have a "substantial relationship" to an "important" government interest, whereas strict scrutiny requires a "compelling" govern-

\footnote{113. For a discussion of the remedial interest's application to a school's scholarship program see infra part III.D.}
\footnote{114. \textit{Id.}}
\footnote{115. Recall, that four Justices in \textit{Bakke} held that diversity constitutes a compelling governmental interest, however, they found that the use of race to achieve diversity must be necessary to remedy the present effects of past discrimination. Therefore, those four Justices did not agree with Justice Powell that diversity alone would constitute a compelling governmental interest. See \textit{supra} note 87.}
\footnote{116. 497 U.S. 547 (1990).}
\footnote{117. \textit{Id.}}
\footnote{118. \textit{Id.}}
\footnote{119. \textit{Id.} at 576.}
mental interest and a program which is "narrowly tailored" to meet that interest. As a result of being subjected to a lesser than strict scrutiny standard of review, the Court upheld the constitutionality of the racial classification. The Court found that diversity was an "important" governmental interest to which the Federal Communication Commission's policies were substantially related.

The following year, the Court in *Adarand* specifically overruled the *Metro*’s application of the intermediate scrutiny test to programs involving racial classification. However, the Court did not address the diversity issue in *Adarand*. Because *Metro* failed to use the strict scrutiny test, the Court found diversity to be an important, not compelling, governmental interest. Therefore, a majority of the Court has yet to find that diversity constitutes a compelling governmental interest which would satisfy strict scrutiny.

The possibility of diversity serving as a compelling governmental interest will remain until the Supreme Court emphatically rejects such rationale. Therefore, any analysis of whether admissions programs using racial classifications serve a compelling governmental interest should include a determination as to whether the program serves as a remedy for the present effect of past discrimination or possibly achieves diversity.

2. The Difficulty in Narrowly Tailoring a Program Involving Racial Classifications

When an entity's use of racial classifications serves a compelling governmental interest, the classification must be narrowly tailored in accomplishing the compelling governmental interest. The narrowly tailored requirement "ensures that the means chosen fit this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Race-conscious programs may be invalidated for lack of narrow tailoring if they provide ben-

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122. *Adarand*, 115 S. Ct. at 2097.


benefits for individuals who do not represent the subjects for which the compelling governmental interest was found.

In 1987, the Court in United States v. Paradise articulated the narrowly tailored element of strict scrutiny while addressing a district court order that required a racial quota promotion program be put in the workplace. The Court in Paradise unanimously concluded that the appropriate factors to consider in determining whether a race-conscious program was narrowly tailored included: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship between the numerical goals and the relevant labor market; and (4) the impact of the relief on the rights of third parties. After the Court found the district court's order demonstrated a compelling governmental interest by remedying the present effects of past discrimination by the governmental actor, the Court applied these four factors and found that the program was also narrowly tailored.

The Court's holding in Paradise provided evidence that a race-conscious program could survive strict scrutiny. Paradise shows that recent decisions by the Court in Croson and Adarand, which subjected all programs involving racial classifications to strict scrutiny, do not render such programs unconstitutional per se. To the contrary, the Court in Adarand specifically "wish[ed] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" In practice, however, subjecting a race-conscious program to strict scrutiny almost always renders the program unconstitutional.

D. The Fourth Circuit Invalidates a University’s Race-Based Scholarship Program

In 1994, the Fourth Circuit Court of Appeals demonstrated the difficulty that race-conscious programs have in passing a strict scrutiny analysis. In Podberesky v. Kirwan, the court applied the

126. 480 U.S. 149 (1987). Paradise involved a district court order that required the promotion of one African-American for every white person promoted. The district court order came as a result of a finding that the Alabama Department of Public Safety had systematically excluded African-Americans from employment or promotion. Id.
127. Id.
128. Id. at 186.
129. Adarand, 115 S. Ct. at 2118.
strict scrutiny test to a merit-based scholarship program for African-American students attending the University of Maryland. The plaintiff, Daniel Podberesky, a Hispanic-American student, claimed that he was denied equal protection under the law by being excluded from consideration for the race-based scholarship program. The University argued that the race-based scholarship program served a compelling governmental interest by attempting to remedy the present effects of past discrimination.

The district court sustained the University's argument that the scholarship program served a compelling governmental interest after finding a long history of pervasive discrimination by the University against African-Americans resulted in four present effects of past discrimination: (1) the University's poor reputation in the African-American; (2) the present perception of a hostile campus climate for African-American; (3) under-representation of African-Americans in the student body; and (4) a disproportionately high attrition rate among African-American students.

The district court also found that the program was narrowly tailored to remedy the present effects of past discrimination.

On appeal, the Fourth Circuit held that the district court erred in concluding that the present effects of past discrimination existed. The court in Podberesky stated that "to have a present effect of past discrimination sufficient to justify the [race-conscious remedial] program [under the Equal Protection Clause], the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by past discrimination and that the effect is of sufficient magnitude to justify the program." The court rejected the notion that the "poor reputation in the black community" could support the race-based scholarship program.

While the record demonstrated that the University had discriminated in the past, the University failed to establish the nexus

131. Podberesky, 38 F.3d at 147.
132. Id. Daniel Podberesky was a Hispanic/white student, thus, he would normally be classified as a minority. However, African-Americans were the specific minority targeted for the scholarship benefits, therefore, he was not a minority for the purposes of qualifying for the scholarship benefits.
133. Id.
134. Id. at 152.
135. Id.
136. Id.
137. Id. at 153.
138. Id. at 154.
between those discriminatory practices and any present effects of that discrimination that may be remedied by the use of the race-based program.\textsuperscript{139} The court found that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this."\textsuperscript{140} Even if the University has a bad reputation in the minority community,

"the case against race-based programs does not rest on the sterile assumption that American society is untouched or unaffected by the tragic oppression of the past. [I]t is the very enormity of that tragedy that lends resolve to the desire to never repeat it, and find a legal order in which distinctions based on race shall have no place."\textsuperscript{141}

The Fourth Circuit found that the "hostile climate," "under-representation," and the "attrition rate," were present effects of past discrimination that would meet the compelling governmental interest requirement of strict scrutiny.\textsuperscript{142} However, the University failed to show the necessary nexus between these present effects of discrimination and the past discrimination by the University.\textsuperscript{143} Therefore, the compelling governmental interest prong of strict scrutiny was not satisfied.\textsuperscript{144}

Even assuming that the University had proven the necessary nexus between the acknowledged present effects of discrimination and its own past discrimination, the court found that the scholarship program was not narrowly tailored to meet the purported compelling governmental interest.\textsuperscript{145} The race-conscious program only offered scholarships to high-achievers.\textsuperscript{146} The court found that by limiting the scholarships to high-achieving African-Americans, the program was not sufficiently tailored to meet the problems of the "hostile climate," "under-representation," and the "attrition rate."\textsuperscript{147} "High-achievers, whether African-American or not, are not the group against which the University discriminated

\textsuperscript{139} Id. at 154-55.
140. Id.
141. Id. (quoting Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1079 (4th Cir. 1993)).
142. Podberesky, 38 F.3d at 156.
143. Id.
144. Id.
145. Id. at 158.
146. Id.
147. Id.
in the past. Thus, the court concluded that the program failed the narrowly tailored prong of strict scrutiny.

Even though higher educational institutions have traditionally implemented scholarships involving racial classifications as a matter of course, this practice will not continue in the Fourth Circuit. The holding in Podberesky displays the difficulty which race-conscious remedial programs encounter when constitutionally challenged and subjected to strict scrutiny.

The law surrounding race-conscious programs in higher education remains in an uncertain state. The courts have told schools that race-conscious programs serve a compelling interest when remedying past discrimination, yet the courts have not defined the nexus requirements. The courts have also stated that diversity may serve a compelling interest, yet in the educational context, the Court has given nothing more firm than the confusing plurality in Bakke as guidance.

IV. ANALYSIS

A. The University’s Admissions Program Fails to Serve a Compelling Governmental Interest.

1. Hopwood Refused to recognize Justice Powell’s Educational Diversity As a Compelling Governmental Interest.

The Fifth Circuit Court of Appeals in Hopwood acknowledged strict scrutiny as the appropriate standard of review for racial classifications and began its analysis by applying strict scrutiny to the school’s admissions program. The court in Hopwood initially reviewed the district court’s finding that using race as an admissions factor achieved educational diversity which served a compelling governmental interests. The court acknowledged that Justice Powell’s separate opinion in Bakke provided the impetus for recognizing diversity as a compelling governmental interest in higher education. Therefore, the Fifth Circuit reviewed the opinion of Justice Powell in Bakke and its significance to the issue presented in Hopwood.

148. Id.
149. Hopwood, 78 F.3d at 940.
150. Id.
151. Id.
152. Hopwood, 78 F.3d at 941-947.
The court stated that Justice Powell intimated that a school could use race among other factors in an admissions process.153 *Hopwood* reviewed Justice Powell's belief that diversity in education serves a compelling governmental interest and sufficiently justifies the use of racial classifications.154 The court also recognized that Justice Powell's opinion precluded schools from refusing to compare applicants of different races during the admissions process or establishing a race-based quota system.155

The Fifth Circuit, however, emphasized that the Court in *Bakke* failed to reach a consensus with six Justices filing separate opinions, none of which received more than four votes.156 The court in *Hopwood* pointed out that Justice Powell's opinion, that educational diversity would serve a compelling governmental interest, "garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case."157 Therefore, the Fifth Circuit declared that "Justice Powell's view in *Bakke* is not binding precedent on this issue."158

The court then recited Supreme Court precedent and noted that no case since *Bakke* has stated that diversity alone may serve as a compelling governmental interest under strict scrutiny.159 *Hopwood* stated, "The [Supreme] Court appears to have decided that there is essentially only one compelling governmental interest to justify racial classification: remedying past wrongs."160 Given this, the court in *Hopwood* addressed the issue of whether race may be used to achieve educational diversity and serve a compelling governmental interest.

The Fifth Circuit's opinion expressed that "within 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. It treats minorities as a group, rather than as individuals."161 Therefore, the court required additional justifications for using race in admissions and

153. *Id.* at 943.
154. *Id.* at 942-43.
155. *Id.* at 943-44.
156. *Id.* at 941. *See supra* note 71.
157. *Hopwood*, 78 F.3d at 944.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 945.
found that educational diversity did not serve a compelling governmental interest.\textsuperscript{162}

In finding that using race to achieve educational diversity did not serve a compelling governmental interest, the court reasoned that race is not synonymous with diversity. "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 type of applicants."\textsuperscript{163} The court proposed that diversity may be achieved by a host of factors that may be correlated with race.\textsuperscript{164} These factors include: musical talent, athletic ability, academic achievement, and geographic residence.\textsuperscript{165}

Other factors, which may be correlated to race, may also serve to achieve diversity such as the economic or educational background of one's parents.\textsuperscript{166} However, the Fifth Circuit rejected the idea that race should serve as a proxy for diversity.\textsuperscript{167} The court found that using race as a proxy for diversity fostered stereotyping individuals.\textsuperscript{168} The court stated that "the assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group."\textsuperscript{169} Furthermore, "the 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."\textsuperscript{170}

In concluding its analysis of the diversity interest, the court in \textit{Hopwood} held that using race to achieve diversity in admissions would never serve a compelling governmental interest.\textsuperscript{171} In so holding, \textit{Hopwood} created new law and became the first court to declare the death of Justice Powell's opinion in \textit{Bakke}, at least in the Fifth Circuit.

\textsuperscript{162} Id. at 945-46.
\textsuperscript{163} Id. at 945.
\textsuperscript{164} Id. at 946.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 946 n.31.
\textsuperscript{167} Id. at 946.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{171} Id. at 947.
2. *Hopwood Relied Extensively Upon Podberesky and Found That the Law School's Admissions Program Was Not Remedying the Present Effects of Past Discrimination.*

The court in *Hopwood* next addressed the district court's determination that the remedial purpose of the law school's program served a compelling governmental interest.\(^\text{172}\) Since the Supreme Court in *Wygant* held that to remedy the present effects of past discrimination there must be some showing of prior discrimination by the particular government unit involved, the court needed to determine the appropriate government entity. The court identified the law school, as opposed to the entire Texas school system, as the relevant alleged past discriminator.\(^\text{173}\)

Prior discrimination existed at the University of Texas Law School. The Supreme Court in *Sweatt v. Painter*,\(^\text{174}\) struck down the law school's proposed "separate but equal" format for discrimination which violated of the Equal Protection Clause. However, the district court found that such prior discrimination ended in the 1960's.\(^\text{175}\)

In determining whether the remedial purpose of the law school's admissions program served a compelling governmental interest, the Fifth Circuit relied extensively on the Fourth Circuit's ruling in *Podberesky v. Kirwan*. In *Podberesky*, the Fourth Circuit held that in order to have a present effect of past discrimination which sufficiently justifies a race-conscious educational program, the party seeking to validate the program must prove that the present discriminatory effect is caused by past discrimination and is of sufficient magnitude to justify the program.\(^\text{176}\) Therefore, the court in *Hopwood* reviewed the district court's finding that present effects of past discrimination existed.

The district court in *Hopwood* found the following to be present effects of past discrimination: (1) the law school's lingering reputation in the minority community; (2) the under-representation of minorities in the student body; and (3) the perception that the law school is a hostile environment for.\(^\text{177}\) In addressing these proffered effects of past discrimination, the Court of Appeals for

\(^{172}\) *Id.* at 948.

\(^{173}\) *Hopwood*, 78 F.3d at 952.


\(^{175}\) *Hopwood*, 78 F.3d at 953 (citing *Hopwood*, 861 F.Supp. at 555).

\(^{176}\) *Podberesky*, 38 F.3d at 153.

\(^{177}\) *Hopwood*, 78 F.3d at 952.
the Fifth Circuit acknowledged that "the Fourth Circuit examined similar arguments in Podberesky."\(^{178}\)

Upon reviewing the Fourth Circuit's analysis in Podberesky, the court in Hopwood concluded that the law school's "lingering reputation" did not represent present effects of past discrimination. The Fifth Circuit held, as did Podberesky in the Fourth Circuit, that any poor reputation of the law school is tied to knowledge of historical discrimination and not present effects of discrimination.\(^ {179}\)

The court next addressed the "under-representation" argument. The law school claimed that discrimination by the State of Texas educational system had a direct present effect on the educational attainment of the targeted minorities.\(^ {180}\) However, as previously mentioned, the court found the law school to be the appropriate governmental unit from which the present effects of past discrimination must be shown.\(^ {181}\)

The Fifth Circuit did not find that a "sufficient" showing existed between past discrimination by the law school and the present under-representation of minority applicants.\(^ {182}\) The court also noted that even had the entire Texas school system been identified as the appropriate governmental unit which discriminated in the past, the necessary relationship between the past discrimination and the present effects would still be lacking. Only "grossly speculative" evidence existed to show that the present "under-representation" resulted from past discrimination by the state's school system.\(^ {183}\) In addition, the present "hostile environment" lacked the necessary nexus with the law school's past discrimination because the "hostile environment" was found to be a result of societal discrimination.\(^ {184}\)

The court in Hopwood found that the law school failed to show that the admissions program served a compelling governmental interest by attempting to remedy the present effects of past discrimination.\(^ {185}\) As a result of finding that both of the law school's purported governmental interests failed to survive strict

\(^{178}\) Id.

\(^{179}\) Hopwood, 78 F.3d at 952-955.

\(^{180}\) Hopwood, 78 F.3d at 953.

\(^{181}\) Id. at 952.

\(^{182}\) Id.

\(^{183}\) Hopwood, 78 F.3d at 955.

\(^{184}\) Id. at 953.

\(^{185}\) Id. at 955.
scrutiny, the court held that the admissions program violated the Equal Protection Clause. The court ordered the law school to allow the plaintiffs to reapply under a constitutionally valid admissions system and remanded to the district court to reconsider the question of damages. 186

B. "We judge best when we judge least, particularly in controversial matters of high public interest." 187

1. Hopwood "Was Overly Broad and Unnecessary to the Disposition of the Case." 188

In a written concurring opinion, Judge Wiener of the three judge panel expressed concern that the court in Hopwood improperly analyzed the case. Therefore, Judge Wiener concluded that the majority's decision "was overly broad and unnecessary to the disposition of the case." 189 Judge Wiener stated, "we judge best when we judge least, particularly in controversial matters of high public interest . . . We should decide only the case before us, and should do so on the narrowest possible basis." 190

Judge Wiener's concurring opinion briefly affirmed the majority panel's holding that the law school failed to demonstrate the present effects of past discrimination sufficient to justify the use of racial classification. 191 Judge Wiener then addressed the majority's ruling that race could never be used to achieve diversity in education because diversity did not serve a compelling governmental interest. 192 Judge Wiener declared that the majority panel unnecessarily discussed the issue of educational diversity serving a compelling governmental interest. 193

For the purpose of his opinion, Judge Wiener assumed that Justice Powell's proposed educational diversity did serve a compelling governmental interest. 194 However, Judge Wiener demonstrated that the majority panel could have reviewed the

186. Id. at 962. The court in Hopwood discussed issues concerning the proper damages which should be awarded and whether proposed intervenors were properly denied intervention. Both issues are beyond the scope of this note.
187. Id.
188. Id. at 963.
189. Id. at 962.
190. Id.
191. Id.
192. Id. at 962, 964-965.
193. Id. at 962.
194. Id.
admissions program by determining whether the program was narrowly tailored. In so doing, he concluded that the majority panel would have found the program lacked the narrow tailoring necessary to satisfy strict scrutiny. Judge Wiener's analysis:

Focusing as it does on blacks and Mexican-Americans only, the law school's 1992 admissions process misconceived the concept of diversity... Diversity which furthers a compelling [governmental] interest 'encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element...'

... Blacks and Mexican-Americans are but two among any number of racial or ethnic groups that could and presumably should contribute to genuine diversity....

... In this light, the limited racial effects of the law school's preferential admissions process, targeting exclusively blacks and Mexican-Americans, more closely resembles a set aside or quota system for those two disadvantaged minorities than it does an academic admissions program narrowly tailored to achieve true diversity. I concede that the law school's 1992 admissions process would increase the percentages of black faces and brown faces in that year's entering class. But facial diversity is not true diversity, and a system thus conceived and implemented simply is not narrowly tailored to achieve diversity.

As Judge Wiener pointed out, Justice Powell in Bakke stated that diversity which furthers a compelling governmental interest "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." As a result, Justice Powell refused to accept an admission program such as the one in place in Hopwood that used race as the sole factor in determining diversity.

In Bakke, a majority of the Court agreed that a university's admissions program that favored minority groups and never compared them with other individual applicants violated the Equal

195. Id. at 965-966.
196. Id.
197. Id. at 965 (quoting Bakke, 438 U.S. at 316).
198. Hopwood, 78 F.3d at 965-966.
199. Bakke, 438 U.S. at 316.
200. Id.
A Violation of the Equal Protection Clause. Such was the case with the law school in Hopwood, as the school failed to compare African-Americans and Mexican-Americans with the remainder of the applicant pool during the admissions process. In this regard, the admissions program was analogous to the admissions program invalidated by Bakke.

The Court in Bakke would likely have invalidated the admissions program at issue in Hopwood by using the same analysis the Court used in Bakke. Acknowledging this, Judge Wiener concluded that the majority panel’s decision was overreaching in unnecessarily declaring the death of Justice Powell’s educational diversity.

However, the decision in Hopwood which forbade racial classifications to achieve educational diversity constituted a defensible extension of recent Supreme Court precedent. Judge Wiener acknowledged that a bright-line rule proscribing any use of race as a determinant in admissions programs may have a simplifying appeal which may in time become the position of the Supreme Court. Despite this, Judge Wiener concluded that such a time has not arrived for the Supreme Court to make such a declaration.


Judge Wiener’s concurring opinion identified the analysis the court in Hopwood should have followed. In analyzing racial diversity, the court violated the well-recognized principle that constitutional issues should be reached only when necessary. The Supreme Court has stated that “it is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them.”

This rule of judicial restraint is well-recognized in the Fifth Circuit. The majority author of Hopwood, Judge Jerry Smith,

201. Bakke, 438 U.S. at 265.
203. Hopwood, 78 F.3d at 963.
204. Id.
205. Id.
206. NOWAK & ROTUNDA, supra note 12, §1.4, at 7.
acknowledged this rule in writing a Fifth Circuit opinion in *Wilkserson v. Whitley.*\(^{208}\) The court in *Hopwood* should have recognized this rule of judicial restraint and reserved the Supreme Court the right to determine whether diversity could ever serve a compelling governmental interest.

C. The Effects of *Hopwood* on the Current Judicial Climate Concerning the Role of Race in Admissions.

1. Race-conscious Admissions Programs Have Difficulty Surviving Strict Scrutiny and Equal Protection Review.

The decision in *Hopwood* reveals the current dilemma educational institutions face in seeking to maintain their practice of using race in admissions programs. The decision, consistent with *Wygant,* portrays the difficulty in using race as a remedy to past discrimination. The decision also articulates the argument that any use of race to achieve educational diversity would fail to serve a compelling governmental interest because race is not synonymous with diversity. Although the majority's opinion was over-reaching, the proper analysis utilized by Judge Wiener's concurrence rendered the same outcome by finding that the program violated the Equal Protection Clause.

The state of the law concerning race-conscious programs creates problems for educational institutions which desire to continue using race as a factor in their admissions programs. In an initial response to the question of whether race should be used as a factor in admissions, individuals often recite the necessity of reversing the present effects of past societal discrimination. Many Americans find it unacceptable that the American judicial system can admit that the Constitution was violated for over a century through unjust treatment of African-Americans, while at the same time subjecting proposed remedies to strict scrutiny. Using race to remedy historical discrimination places institutions in the unenviable position of showing that discrimination by that particular institution or school system caused the present effects.

Standard 212 of the American Bar Association Standards for the Accreditation of Law Schools vividly illustrates this dilemma in the admissions programs of law schools.\(^ {209}\) Standard 212 dis-

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208. Chin, *supra* note 64, at 945 (citing 28 F.3d 498 (5th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 740 (1995)).

discusses established race-conscious policies concerning admissions requirements for law schools. Standard 212 requires all law schools to have race-conscious policies for "qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms."

Standard 212 is concerned explicitly with addressing historical discrimination. However, if the implementation of this policy results in the admission of applicants who would otherwise have been rejected, compliance with Standard 212 likely would violate the Equal Protection Clause. The school would not be acting to overcome its own history of discrimination as required by Wygant. Even this "model" admissions program for accredited law schools seems to invite schools to implement race-conscious programs while ignoring the constraints set down by Wygant.

Because educational institutions have difficulty proving that the present effects of discrimination are a result of their own or their school system's prior discrimination, the institutions are relegated to arguing that the use of race is necessary to achieve diversity. As shown by the analysis in Hopwood, race may not necessarily be equated with diversity. Despite its overly broad holding, the case demonstrates the persuasive argument that race is not synonymous with diversity and should not be used as a proxy for diversity.

The court in Hopwood argued that using racial classifications in admissions programs results in nothing more than stereotyping of individuals based solely on the color of their skin. Even Justice Douglas, the proponent of educational diversity, in another often-cited opinion, stated:

There is no constitutional right for any race to be preferred . . . if discrimination based on race is constitutionally permissible when those holding the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordion-like quality.

The viewpoint that race should not be a proxy for diversity appeals to many. As a result, Hopwood's bright-line rule prohibiting the use of race to achieve diversity admissions programs could

210. Id.
211. Id.
212. Id.
213. Id.
214. Chin, supra note 64, at 887.
be adopted by other circuits. Even if other circuits do not adopt the Fifth Circuit's prohibition of diversity serving a compelling governmental interest, race-conscious admissions programs would still have difficulty overcoming strict scrutiny. In the event that a court would hold that race contributes to diversity, which in turn serves a compelling governmental interest, Judge Wiener's concurring opinion demonstrates the difficulty in satisfying the narrowly tailored requirement of strict scrutiny.216

The implicit assumptions of race-conscious admissions programs appear to result in such programs failing the narrowly tailored prong of strict scrutiny. Institutions often seek to assist students that are disadvantaged. Because a disproportionate number of racial minorities seemingly fit within the disadvantaged category, institutions use race to determine who will benefit from the preferential admissions treatment.217 By operating race-conscious admissions programs, institutions implicitly assume that all members of certain racial minorities are disadvantaged. As a result, these admissions programs are over-inclusive in that they include certain racial minorities who may not be disadvantaged.

Further, by offering preferential admissions treatment to only certain races, race-conscious admissions programs implicitly assume that the only disadvantaged people are those who belong to the particular race that is receiving the benefit of the preferential treatment.218 In so doing, race-conscious admissions programs eliminate potentially disadvantaged applicants who may not be a member of the race designated to receive preferential treatment. In this regard, these programs are under-inclusive. The implicit assumptions of race-conscious admissions programs lead to both over-inclusive and under-inclusive preferential treat-

216. For a comprehensive analysis of the potential ways to make an admissions program narrowly see Chin, supra note 64, at 891. Chin suggests that culturally diverse programs are capable of being narrowly tailored. The article analyzes the four potential ways of narrowly tailoring a program seeking to achieve diversity and finds that these four ideas are incapable of being narrowly tailored: (1) using the proportion to the population; (2) maximizing cultural diversity; (3) using cultural selectivity; and (4) maximizing racial diversity. Id. But see orig. Garfield, supra note 80. Garfield proposes a model admissions program which utilizes race as a factor in admissions and argues that the proposed program would satisfy strict scrutiny.

217. Thro, supra note 89, at 627.

218. Id.
ment, causing these programs to fail the narrowly tailored prong of strict scrutiny.

An application of the holding in United States v. Paradise also reveals that race-conscious programs likely fail the narrowly tailored requirement. An application of the holding in United States v. Paradise also reveals that race-conscious programs likely fail the narrowly tailored requirement. 219 First, it would seem possible to remedy past discrimination or achieve a diverse student body without using race in the admissions process. 220 Second, most of these admissions programs are intended to last indefinitely and lack a clear termination point. 221 Third, the numerical goals of the institutions lack the necessary relationship to the relevant labor market. 222 Fourth, these admission programs disqualify other races. 223 Therefore, even if diversity could serve as a compelling governmental interest that would justify race-conscious programs, such programs would seemingly lack the necessary requirements to be narrowly tailored.


The Fifth Circuit's decision in Hopwood and other recent Supreme Court cases show that the judiciary has made it difficult for admissions programs to use racial classifications. Educational institutions which insist on assisting disadvantaged applicants should look to alternative race-neutral admissions policies that serve the same purpose as race. These alternatives would provide disadvantaged applicants access to education without regard to their race. These factors include: (1) the socioeconomic status of the applicant; (2) educational background of the applicant's family; (3) the degree to which the government has supported the family in the past; (4) the geographical area in which the applicant resides; (5) ranking of the primary and secondary educational institutions by historical standardized test score averages; and (6) utilizing open-ended questions on applications such as "describe any obstacles you have had to overcome in your lifetime." 224

220. Thro, supra note 89, at 627.
221. Id.
222. Id.
223. Id.
224. Any one of these factors alone would not achieve either diversity or allow an opportunity to one who may have been underprivileged in the past. Socioeconomic status would not serve as a proper indicator because the
A high correlation between these proposed alternative factors and certain racial minorities should inevitably result. However, the admissions process would not include or exclude potential candidates on the basis of their race. There may be some white applicants which fall into the disadvantaged category and some African-American applicants who would not fall into such a category.

By shifting the focus of institutional admissions programs from race to disadvantaged status, the institutions would assist disadvantaged people, regardless of their race, to obtain the benefits of acquiring an education. At the same time, these institutions would alleviate any Equal Protection concerns. In light of the judiciary's recent trend of eradication of race-conscious programs, institutions should consider these alternatives in order to operate admissions programs that do not violate the Equal Protection Clause.

V. CONCLUSION

The court in Hopwood found that the use of race in admissions programs to achieve diversity could never serve a compelling governmental interest that would survive strict scrutiny. Further, the court demonstrated the difficulty that admissions programs when using race to remedy the present effects of past discrimination have accomplishing a compelling governmental interest. The court in Hopwood, for all practical purposes, eliminated the use of race as a factor in admissions programs within the Fifth Circuit.

Although the majority's decision overstated the death of Justice Powell's opinion concerning educational diversity, the Fifth Circuit's argument is provocative. The use of race to symbolize demographics of the population show numerous white applicants of low socioeconomic status for every comparative African-American person. Thus, the white applicants would receive the benefits of such a system because there are simply more white applicants applying. A composite of these factors, however, may produce a similar result as the use of race in admissions programs without the stereotypical effects that race equals diversity. For an in-depth look at a proposed model of an admissions program, see Garfield, supra note 80, at 901-908. See also Thro, supra note 89, at 627.

225. Thro, supra note 89, at 627.
226. Id.
227. Id.
228. Id.
229. Id.
diversity requires a stereotypical analysis of individuals based on the color of their skin. This argument, in light of the Supreme Court’s recent invalidation of other programs involving racial classifications, may very well be accepted by other circuits.

_Hopwood_ was likely not the proper case for the Supreme Court to hear to determine the role of race in admissions programs. The dual track admissions program in _Hopwood_ clearly violated the Equal Protection Clause because it used race as the deciding factor in admissions decisions. The Supreme Court should decide the constitutionality of an admissions program which uses race as one factor among many and compares all of the individual applicants at some point in the process.

In doing so, the Court must decide the validity of Justice Powell’s opinion that race may be used as a factor in admissions programs to achieve the compelling governmental interest of educational diversity. If the Court confirms Justice Powell’s intimation, the Court should specifically define the “diversity” which is sought and provide a guideline for the proper role of race in admissions programs in keeping with the Equal Protection Clause. Until the Supreme Court clarifies the role of race in admissions programs, _Hopwood_ will likely precipitate an increase in rejected applicants challenging the constitutionality of admissions programs for violating the Equal Protection Clause.

Race-neutral alternatives exist to assist the same disadvantaged applicants that race-conscious programs are intended to benefit. In light of the present difficulty that present programs have with satisfying the Equal Protection Clause of the Fourteenth Amendment, educational institutions should consider these alternatives in school admissions programs.

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230. Chin, _supra_ note 64, at 887.