Higher Education, Hopwood, and Homogeneity: Preserving Affirmative Action and Diversity in a Scrutinizing Society

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HIGHER EDUCATION, *HOPWOOD*, AND HOMOGENEITY: PRESERVING AFFIRMATIVE ACTION AND DIVERSITY IN A SCRUTINIZING SOCIETY

Visitors entering the expansive campus of the University of Texas at Austin (U.T.) are greeted by a beautiful welcome center nestled in the corner of the Martin Luther King Boulevard entrance. Named for the first African-American to be admitted to the School of Law, the Heman Sweatt Campus\(^1\) boasts a restored nineteenth-century building converted into a monument to U.T.'s rich history and heritage.\(^2\) Ironically, these tributes to advances in diversity and racial equality are but a few blocks from one of the nation's premier law schools\(^3\)—an institution that, under a recent Fifth Circuit ruling, likely will be nearly all white by the turn of the century.\(^4\) Despite the hard-fought and monumental legal victories of Sweatt\(^5\) and other civil rights pioneers, African-Americans in Texas and other states may once again find themselves looking to "separate but equal" schools for a legal education.\(^6\)

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1. Actually part of the U.T. campus, the Sweatt Campus, or "Little Campus," is a dedicated memorial at the edge of University property, and is not a separate campus. Heman Sweatt was an African-American who applied to the University of Texas School of Law (U.T. Law) in 1946, and was rejected solely on the basis of his race. *Sweatt v. Painter*, 339 U.S. 629, 631 (1950). At that time, there were no law schools in Texas that admitted African-Americans, and in response to Sweatt's suit, Texas established a "law school for Negroes." *Id.* at 631-32. The proposed institution was to have four members of U.T. Law's faculty who would teach at both schools while maintaining offices only at U.T. Law. The library was to be less than one-sixth the size of U.T. Law's, and the unaccredited school was to have no full-time librarian. *Id.* at 633.

2. The Sweatt campus encompasses two buildings, including a U.T. historical information and visitor center, and, ironically, an admissions office.

3. See generally *America's Best Graduate Schools*, U.S. NEWs & WORLD REPORT, Mar. 20, 1995, at 77, 84 (reviewing top graduate schools in the country, including law schools, and ranking U.T. Law 17th). The criteria used to evaluate schools in this survey included quality of the faculty, reputation of the program in the eyes of judges and the academic community, success of recent alumni in the legal profession, selectivity of the student body, and job placement rates. *Id.* at 84-85.

4. Lino A. Graglia, *Hopwood v. Texas: Racial Preferences in Higher Education Upheld and Endorsed*, 45 J. LEGAL EDUC. 79, 79-80 (1995) (indicating that if the school's ordinary admissions standards were applied to all applicants, African-Americans would likely constitute less than one percent of the student body and Hispanics would constitute between two and three percent). Similarly dire results have been forecast for California, where regents at the University of California voted to eliminate gender and ethnicity as admissions criteria. Arleen Jacobius, *Affirmative Action on Way Out in California*, 81 A.B.A. J. 22, 22 (1995).

5. *Sweatt*, 339 U.S. at 636 (finding Texas' separate but equal educational systems in violation of the Fourteenth Amendment). Interestingly, the criteria used by the Supreme Court in determining the inequality of the institutions included library resources, "reputation of the faculty . . . position and influence of the alumni, standing in the community, traditions, and prestige." *Id.* at 633-34. These assets are nearly identical to those widely used to evaluate and rank law schools today. See * supra* note 3.

Federal anti-discrimination law has evolved tremendously over the past half-century, yet racial equality remains elusive. At the time Sweatt first applied to U.T. School of Law (U.T. Law), formal segregation remained legal under the fifty-year-old Plessy v. Ferguson decision which held that separation did “not necessarily imply the inferiority of either race.” Nonetheless, African-Americans continued to challenge the constitutionality of such laws, particularly in education. The “separate but equal” approach was finally rejected in Brown v. Board of Education and Bolling v. Sharpe. The interpretation of the Fourteenth Amendment announced in those cases was furthered over the next forty years by affirmative action programs designed to remedy the present effects of past discriminatory practices and prevent the return of discrimination to American society.

In 1994, four white applicants to U.T. Law challenged the school’s affirmative action admissions program. Originally developed as an attempt to comply with Title VII, the program gave preference to African-American and Hispanic candidates. Although the district court found the program unconstitutional, it nonetheless upheld the value of diversity in higher education as a compelling government interest. On appeal, however, the Fifth Circuit held the program violated the Equal Protection Clause of the Fourteenth Amendment, and boldly suggested that diversity in higher education can never justify race-conscious admissions policies. The decision sent shock waves rippling throughout the nation, and legal scholars quickly proclaimed the case as the beginning of the end for affirmative action programs in higher education. Questions remain whether diversity in higher education can never justify race-conscious admissions policies. The decision sent shock waves rippling throughout the nation, and legal scholars quickly proclaimed the case as the beginning of the end for affirmative action programs in higher education. Questions remain whether diversity in higher

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8. Plessy, 163 U.S. at 544. In a forward-looking dissent, Justice Harlan argued that “[t]he constitution is color-blind,” and thus cannot allow classification among citizens. Id. at 559.

9. While the Court in Sweatt found that U.T. Law’s admissions policy had violated the Equal Protection Clause, it did not explicitly challenge the “separate but equal” doctrine. Instead, the Court found that the alternative “Negro” institution was inferior to U.T. Law. See Sweatt, 339 U.S. at 633-34.


11. 347 U.S. 497, 500 (1954) (finding that the District of Columbia’s segregated public education system was unconstitutional).


16. Id. at 578. The court found the separate admissions committees and the lack of comparative evaluation between all candidates violated the Equal Protection Clause, holding that the program was not “narrowly tailored” to achieve the compelling government interest of diversity. Id. at 577-79.


18. See Krista L. Cosner, Affirmative Action in Higher Education: Lessons And Directions from the Supreme Court, 71 IND. L.J. 1003, 1021 (1996) (stating that the court’s application of strict scrutiny in Hopwood II could have “far-reaching and devastating implications” for affirma-
education is itself a compelling government interest and/or whether it serves any necessary role in the battle against discrimination.

This paper will examine the Hopwood II decision, critique the rationale used by the Fifth Circuit in overturning the district court, and present arguments and proposals for protecting diversity in higher education as both a compelling government interest and the appropriate means of preventing discrimination. While it is important to understand the historical precedent and jurisprudence behind the debate over affirmative action and diversity, it is equally essential to accept the concrete and real-life effects these programs have upon individuals of all backgrounds. Thus, interspersed within this paper are several narratives about actual individuals whose lives have been significantly affected by the affirmative action policy challenged in Hopwood II.

I. THE HISTORY OF AFFIRMATIVE ACTION IN AMERICA

William grew up in a small town in East Texas and attended U.T. with the help of race-based scholarships. A bright, enthusiastic student, he graduated with a 3.2 grade point average (GPA) in communications in 1987. William was active in campus activities, and eager to attend law school. His test scores were average, but as an African-American he received special consideration under U.T. Law's affirmative action plan. Today he works for a small civil rights law firm in Houston, and donates many hours of work to assist indigent and needy minority clients.

"If it weren't for the special consideration I received," William confides, "I would have never been able to attend U.T. as a law student." He feels that affirmative action is necessary to remedy the effects of past discrimination as well as to overcome the institutionalized hurdles that still exist for minorities. "Growing up in East Texas makes you learn that there is still a long way to go for African-Americans. Most Anglos don't understand that all African-Americans still face many forms of discrimination and bias. I challenge anyone to visit my high school and drive through the rural poverty and despair that I grew up in and tell me honestly that America is past the point of discrimination, intentional or not. Without the opportunities I was given, I might still be there today."19

A. Progress and Programs

William's story epitomizes the struggle of many African-Americans, particularly those in the South. The many benefits he received from racial
considerations in higher education were precisely what remedial affirmative action programs were designed to accomplish.

Affirmative action grew from the Reconstruction-era Constitutional Amendments and the legislation that accompanied the amendments. Following the Civil War, Congress implemented several programs intended to assimilate freedmen into society and prevent discrimination. While these programs gave preference to African-Americans on the basis of their race, they remained constitutionally valid in the context of the legislative intent behind the Fourteenth Amendment. Modern affirmative action emerged in the 1960s with President Kennedy's order to federal contractors to "promote and ensure equal opportunity for all qualified persons, without regard to race," and use "affirmative action" to implement the order. Congress then incorporated Executive Order 10,925 into Titles VI and VII of the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, or national origin in programs receiving federal funds and in places of employment. In 1965, President Johnson issued Executive Order 11,246 which prohibited all government contractors from discriminating on the basis of race.

20. After the Civil War, Congress established the Freedman's Bureau to provide relief and assistance to former slaves. Act of March 3, 1865, ch. 90, 13 Stat. 507. Nine months later, Congress amended the Act by providing educational assistance to former slaves. Act of July 16, 1966, ch. 200, 14 Stat. 173. Although controversial, the legislation was less than what many called for, and the programs were quickly dismantled. See Claude F. Oubre, Forty Acres and A Mule: The Freedmen's Bureau and Black Land Ownership 181-83 (1978). For an in-depth look at the history of affirmative action within the context of the Fourteenth Amendment and post-Civil War congressional legislation, see generally Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 VA. L. REV. 753 (1985).


22. Carl E. Brody, Jr., A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court, 29 AKRON L. REV. 291, 292-93 (1996) (arguing that constructionist jurisprudence demands a more lenient level of analysis than strict scrutiny when the legislative intent can be clearly inferred); see also Michael J. Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 309-16 (1991) (noting that the framers of the Fourteenth Amendment also passed race-conscious legislation designed to benefit ex-slaves, and that race-neutral jurisprudence ignores the original intent behind the Fourteenth Amendment). Since Congress passed these programs soon after the ratification of the Fourteenth Amendment, it seems logical to assume that the original intent of the Fourteenth Amendment must have been compatible with race-conscious remedial measures.


B. The Battle Over the Level of Judicial Scrutiny

In 1971, the United States Supreme Court upheld race-conscious remedies for past discrimination in *Swann v. Charlotte-Mecklenburg Board of Education.* After that decision, affirmative action plans became common. In 1980, the Supreme Court upheld a congressionally-mandated federal affirmative action program for government construction contracts in *Fullilove v. Klutzman.* In 1989, however, the Court struck down a similar state-mandated program in *City of Richmond v. J. A. Croson Co.* In both cases, the Court applied a two-prong test, requiring that a race-based classification be narrowly tailored to achieve a compelling government interest. The federal program survived the test, while the state program did not. This difference in result may have been based upon the premise that, as a "co-equal branch," Congress is entitled to deference above and beyond that which states should receive. In 1990, the Supreme Court clarified the *Fullilove/Croson* distinction in *Metro Broadcasting v. FCC.* Defining diversity as an important government objective, the Court held that congressionally-mandated programs should be subject to intermediate scrutiny. The Court's ruling created controversy and drew calls for a uniform standard of review. In a scathing dissent, Justice O'Connor argued that the Court should apply strict scrutiny, decrying the "renewed toleration of racial classifications.

26. 402 U.S. 1, 15-31 (1971) (charging state and local governments with the "affirmative obligation[ ]" to take steps necessary to end discrimination, and holding that the remedial power of courts to remedy past discrimination is broad).
28. 448 U.S. 448, 478 (1980) (granting deference to congressional race-based actions when Congress found a long history of discrimination and intended to combat the present effects of past discrimination). While the Court did not define the level of review appropriate for evaluating congressional race-based actions, Justices Burger and Powell stated that even strict scrutiny would have been satisfied. See id. at 491-92; see also id. at 514-15 (Powell, J., concurring); Jerome R. Watson & Akinyale Harrison, *Government Contracting: Affirmative Action After Adarand,* 74 MICH. B.J. 1162, 1162 (Nov. 1995).
29. 488 U.S. 469, 511 (1989) (holding that strict scrutiny is the appropriate test for evaluating state and local programs that classify on the basis of race). In distinguishing the case from *Fullilove,* the Court noted that the deference granted to congressional findings of historical discrimination does not extend to states and municipalities. Id. at 498-511.
30. "Narrowly tailored" has been defined to include several restrictions. A program must be limited in scope and duration, must not unduly burden third parties, and cannot stand if there exists a less intrusive alternative. United States v. Paradise, 480 U.S. 149, 171 (1987).
31. *Croson,* 488 U.S. at 498-506. "Compelling government interests" have rarely been held to exist outside the realm of remedying the present effects of past discrimination. Id. at 494-506.
32. *Fullilove,* 448 U.S. at 472 (noting that Congress is charged specifically with enforcing the Equal Protection Clause of the Fourteenth Amendment through legislation).
34. *Metro Broadcasting,* 497 U.S. at 564-65 (defining intermediate scrutiny as requiring race-based laws to be substantially related to an important government objective). In general, intermediate scrutiny has been reserved for gender-based classifications. Craig v. Boren, 429 U.S. 190 (1976).
35. Watson, *supra* note 28, at 1162-65 (suggesting *Metro Broadcasting* highlighted a judicial inconsistency that the Court was forced to address in *Adarand*).
Following the five to four decision in *Metro Broadcasting*, the Supreme Court sharply reversed itself in *Adarand Constructors, Inc. v. Pena.*

*Adarand* involved a congressionally-mandated affirmative action program for minority business subcontractors. Holding that strict scrutiny analysis applies to all racial classifications, regardless of the governmental entity that created them, the Court implicitly rejected the idea that the government has an important interest in bringing about diversity. Expressly overruling *Metro Broadcasting*, the *Adarand* Court reiterated that the level of review should not depend upon which race is burdened by race-based classifications. Attempting to counter the perception that strict scrutiny is "fatal in fact," Justice O'Connor expressly noted that affirmative action programs could conceivably meet the level of review set forth in *Adarand.*

In his concurrence, Justice Thomas criticized minority set-aside programs as "racial paternalism," which he labelled "as poisonous and pernicious as any other form of discrimination." Hailed as appropriately determining that even "benign" race-based programs are nonetheless unconstitutional, *Adarand* has drawn blistering criticism from those who believe affirmative action is still justifiable as both a remedy for past discrimination and a tool for creating diversity.

37. Id. at 610. O'Connor suggested that the goal of the affirmative action program devised by the FCC was to achieve racial balancing rather than diversity, and questioned the "fit" of the means to achieve the FCC's stated goal. Id. at 625 (O'Connor, J., dissenting). Justice Kennedy suggested the decision "move[s] us from 'separate but equal' to 'unequal but benign.'" Id. at 637-38 (Kennedy, J., dissenting).


39. Id. at 2111 (stating that courts must require "any governmental actor subject to the Constitution [to] justify any racial classification subjecting [people] to unequal treatment under the strictest judicial scrutiny").


41. *Adarand*, 115 S. Ct. at 2113 (stating explicitly that all racial classifications are subject to strict scrutiny, which requires a narrowly tailored measure that furthers a compelling government interest).

42. Id. at 2111 (citing *Croson*, 488 U.S. at 494).

43. *Adarand*, 115 S. Ct. at 2117 (citing *Paradise*, 480 U.S. at 167, as demonstrating an appropriately narrowly-tailored measure meeting strict scrutiny).

44. *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in the judgment).

45. See Brian C. Eades, *The United States Supreme Court Goes Color-Blind: Adarand Constructors, Inc. v. Pena—Turning Back the Clock on Minority Set-Asides*, 23 S.U. L. REV. 771, 771 (1995) (arguing that despite the deplorable problem of racial discrimination in this country, affirmative action is not the solution); see also Minnich, supra note 40, at 280 (applauding *Adarand's* rejection of the notion that diversity can constitute a compelling government interest).

46. See generally E'Vinski Davis, *Adarand Constructors, Inc. v. Pena: Turning Back the Clock on Minority Set-Asides*, 23 S.U. L. REV. 79 (1995) (arguing that the Court should have followed past precedent by granting deference to Congress in matters involving the Fourteenth Amendment). In his dissent in *Adarand*, Justice Stevens basically argued the same principle, stating that the Court had deferred to Congress the past two times it addressed federal affirmative action programs. *Adarand*, 115 S. Ct. at 2126-27.

47. See Terrence M. Lewis, Comment, *Standard of Review Under the Fifth Amendment Equal Protection Component: Adarand Expands the Application of Strict Scrutiny*, 34 DUQ. L.
C. Affirmative Action in Higher Education

Katie graduated from U.T. with a marketing degree and immediately applied to several law schools. She was surprised, however, when she was denied admission to U.T. Law. Her 3.65 GPA and seventy-fifth percentile LSAT, combined with many extracurricular achievements, earned her immediate acceptance at several other top-quality institutions. After a brief but successful time spent working toward an M.B.A., she applied again, this time with a ninetieth percentile LSAT score and a graduate school GPA of 3.65. Again she was denied admission to U.T. Law. Undeterred from a legal career, she enrolled at Baylor, a private school in Waco, Texas, and graduated in 1994 near the top of her class. Her resumé at Baylor was enviable: she graded onto Law Review; won top honors in moot court competitions; and, made the school’s nationally-acclaimed appellate team. Had it not been for financial assistance, however, Katie would have been unable to meet the high tuition at Baylor. Overall she was forced to spend over twice as much for law school as she would have at U.T.

As an Anglo applicant, Katie knew all along that she faced a more difficult admissions process at U.T., but still felt cheated by the fact that she was unable to enjoy the benefits of low tuition, close proximity to home, and a legal education at the state’s most renowned and prestigious legal institution. Had she been Hispanic or African-American, she likely would have been admitted. Today she works as a litigator for a large Dallas law firm. She is successful and happy, but still remains somewhat resentful. Overall, she feels that she has reaped the benefits of a smaller school, but acknowledges that “I wish the process had been more merit based, and not contingent only upon the color of an applicant’s skin. It was wrong to deny admission to those with higher objective credentials.”

Katie’s experiences with affirmative action illustrate the myriad problems arising from affirmative action programs in higher education admissions. In 1973, the Supreme Court directly addressed this issue in Regents of the University of California v. Bakke. Writing for a precariously balanced five to four majority, Justice Powell stated that affirmative action programs in higher education admissions can be justified under two rationales: 1) creating diversity in student populations; and, 2) remedying the present effects of REV. 325, 350 (1996) (arguing that the Court ignored current racial disparities, discrimination, and prejudice, and that the benefits of cultural diversity outweigh any possible harms to white contractors disadvantaged by the affirmative action program).

48. See U.S. NEWS & WORLD REPORT, supra note 3, at 84 (ranking U.T. law considerably higher in quality than any other Texas law school).
50. Telephone Interview with anonymous U.T. Law applicant (July 10, 1996).
51. 8 U.S. 265 (1978). Although the Court found the particular program at issue to be unconstitutional, its guidelines for affirmative action legitimized other programs. Id. at 315-20.
53. Bakke, 438 U.S. at 311-15. While Justice Powell found diversity to be a compelling state
past discrimination. Categorizing the preference of one person over another solely on the basis of race as "discrimination for its own sake," Justice Powell specifically stated that only documented discrimination at the institution implementing the program justifies race-based action.

In 1994, the Fourth Circuit addressed the issue of race-based minority scholarships in *Podberesky v. Kirwan*, holding that such programs are not constitutional without a strong showing of the need for remedial measures to combat the present effects of past discrimination. In so holding, the court also determined that "present effects" necessary to justify race-based remedial action must be clearly tied to past discrimination. The court also distinguished between present societal discrimination and past discrimination by a university, holding that the "hostile-climate effect" argument as a justification for remedial action was insufficient to support a race-conscious program. In finding poor reputation as insufficient grounds for the establishment of race-based remedial programs, the court acknowledged Maryland's history of discrimination, yet stated that "mere knowledge of historical fact" cannot justify race-exclusive remedies. The court also rejected the University's underrepresentation and attrition arguments.

II. THE HISTORY OF DISCRIMINATION AT THE UNIVERSITY OF TEXAS

Albert grew up in South Texas as the son of impoverished immigrant farm workers. A bright student, he came to U.T. in 1981, uncertain of his future. He worked his way through college and graduated with a "B" average in psychology. As a Hispanic student, Albert was eligible for special consideration under U.T. Law's admissions process, and was admitted in

interest, no other case since *Bakke* has accepted that rationale under a strict scrutiny analysis.


55. *Bakke*, 438 U.S. at 307.

56. *Id.* at 310. The Court upheld the application of strict scrutiny for state mandated racial classifications in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986). In *Wygant*, the Court used strict scrutiny to reject race-based layoff plans for teachers to remedy general societal discrimination. *Id.* at 280.


58. *Id.* at 153 (citing *Croson*, 488 U.S. at 500, and *Wygant*, 476 U.S. at 277). At controversy was a merit-based scholarship program at the University of Maryland limited exclusively to African-Americans. *Podberesky*, 38 F.3d at 152.

59. *Podberesky*, 38 F.3d at 153. The University claimed that there existed four clear effects of past discrimination: (1) a poor reputation within the African-American community; (2) underrepresentation of African-Americans in the student body; (3) low retention and graduation rates for enrolled African-American students; and (4) an environment on campus perceived as hostile to African-American students. *Id.* at 152.

60. *Id.* at 154. The University based much of its argument on the results of a student survey that demonstrated student perceptions of social segregation and a racist environment. *Id.*

61. *Id.* at 153-55.

62. *Id.* at 154.

63. *Id.*

64. *Id.* at 156-60.
1986. He graduated in 1989 with average grades and today works in immigration law in south-central Texas.

"People don't truly understand the problems facing many Hispanics in Texas," Albert says, "and while there are some doors open now that never existed before, there are still terrible obstacles in the way of many Hispanics. Inadequate public education, a lack of health care, and racist politics contribute to an environment that keeps Hispanics out of many parts of society." He attributes his success, in part, to affirmative action programs and race-based scholarships. "Without these kinds of tools, Hispanics will continue to remain mired in poverty and illiteracy. We've been in Texas at least as long as the Anglos. Why do you think we're only now seeing Hispanic elected officials and businessmen?" 65

The Texas educational system in which Albert was educated has long been rife with racial discrimination and its effects. 66 While the landmark case of Sweatt v. Painter 67 invalidated the state law prohibiting African-Americans from attending U.T. Law, it was not until 1983 that the State of Texas agreed to implement a court-mandated plan to desegregate its higher education system, including U.T. and U.T. Law. 68 As late as 1971, U.T. Law did not have a single African-American student in its entering class. 69

In 1977, under court order, 70 the United States Department of Health, Education, and Welfare's (HEW) Office for Civil Rights (OCR) began an investigation of Texas' statewide higher educational system for discrimination. In 1980, after a two-year investigation, OCR concluded that the State of Texas' higher educational system remained segregated, and declared Texas in violation of Title VI of the 1964 Civil Rights Act. 71 OCR also determined that there was a severe underrepresentation of Hispanics as well as African-Americans, and mandated that both categories of students must be included in goals for a desegregation plan. 72

Texas submitted an initial desegregation plan shortly thereafter indicating a commitment to equal educational opportunity and racial desegregation, but

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65. Telephone Interview with anonymous U.T. Law applicant (June 28, 1996).
66. Hopwood 1, 861 F. Supp. at 572 n.63 ("Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute. . . .") (quoting League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 866 (5th Cir. 1993), cert. denied, 510 U.S. 1071 (1994). Historically, a principal part of Southern politics, and those of Texas in particular, has been the "maintenance of control [of African-Americans] by a white majority." CHANDLER DAVIDSON, RACE AND CLASS IN TEXAS POLITICS 5 (1990).
68. Hopwood 1, 861 F. Supp. at 556.
69. Id. at 558. Despite his monumental legal victory, Heman Sweatt dropped out of U.T. Law in 1951 after enduring threats, violence, cross-burnings, and humiliation at the hands of students and faculty. Id. at 555.
71. Hopwood 1, 861 F. Supp. at 555-57.
72. Id. at 555-56. Historically, the population of Texas has been severely segregated along both geographic and socioeconomic lines. JAMES ANDERSON ET AL., TEXAS POLITICS 27-30 (4th ed. 1984).
the OCR rejected it as deficient.\textsuperscript{73} In 1982, a revised plan again was rejected as inadequate because it did not mandate specific goals for each institution.\textsuperscript{74}

In 1983, proceedings began against the State of Texas to enforce the original judgment, and OCR recommended that Texas adopt a plan including provisions admitting African-American and Hispanic students to higher education programs who “demonstrate potential for success but do not necessarily meet all the traditional admission requirements.”\textsuperscript{74} In June 1983, OCR accepted Texas’ third plan, the “Texas Plan,” which had the stated goal of having African-American and Hispanic students enter graduate schools at ratios equal to their percentage of all college graduates within the State of Texas.\textsuperscript{75}

During this period of litigation concerning Texas’ higher educational system, much of the state’s public school system was operating under court-ordered desegregation plans intended to combat decades of educational inequality.\textsuperscript{76} This segregation and discrimination was not limited to African-Americans; in \textit{United States v. Crucial},\textsuperscript{77} the Fifth Circuit held that Ector County had “clearly and egregious(ly)” violated the Constitution\textsuperscript{78} through continued segregation of both African-Americans and Hispanics.\textsuperscript{79} At the same time, the Dallas Independent School District was found to have intentionally “opposed any student desegregation, no matter how feasible or how minimal,” thus failing to meet the requirements of a court-ordered desegregation plan.\textsuperscript{80} Statewide, public school districts remain in noncompliance with Justice Department requirements, and in many cases actually have increased segregation of African-American and Hispanic students.\textsuperscript{81}

III. \textit{Hopwood II}

Kevin applied to U.T. Law in the spring of 1989, unsure about a legal career but confident in his ability to succeed. Coming from a middle-class background, his credentials were impressive: a 3.7 GPA in government from U.T., top-quartile LSAT scores, three years experience with an Austin law firm, and a “loaded” resume. He had been in countless academic and social organizations, was president of the school’s nationally famous marching band,

\textsuperscript{73.} \textit{Hopwood I}, 861 F. Supp. at 556.
\textsuperscript{74.} \textit{Id.}
\textsuperscript{74.} \textit{Id.}
\textsuperscript{75.} \textit{Id.} \& n.6. For example, if African-Americans had constituted ten percent of all college graduates, the goal would have been for graduate programs to have entering classes that were ten percent African-American. Acceptance of minority students was contingent, however, on state funding for the projects and timely completion of certain activities. \textit{Id.} at 556.
\textsuperscript{76.} \textit{Id.} at 554; see also \textit{Davidson, supra} note 66, at 115 (stating that Texas “inherited the traditional black-white caste system”).
\textsuperscript{77.} 722 F.2d 1182 (5th Cir. 1983).
\textsuperscript{78.} \textit{United States v. Crucial}, 722 F.2d 1182, 1188 (5th Cir. 1983).
\textsuperscript{79.} \textit{Id.} at 1184-85.
\textsuperscript{80.} \textit{Tasby v. Wright}, 713 F.2d 90, 93 (5th Cir. 1983).
\textsuperscript{81.} \textit{Crucial}, 722 F.2d at 1188. Today, “white-flight” has also created a “de-facto resegregation” in the suburbs of larger Texas cities. \textit{Davidson, supra} note 66, at 248.
had worked and paid his way through school, and had glowing letters of recommendation from professors and attorneys. To his surprise, however, he received a quick letter of rejection.

After some soul-searching, Kevin looked to teaching as an alternative, with overwhelming success. In his first year, he was selected Teacher-of-the-Year for his school, and one year later he was selected as one of the top thirty high school teachers in the state of Texas. Kevin completed a Master's Degree in Educational Administration in August, 1996 as the outstanding student in the graduate school, and currently serves as assistant principal in a small town near Austin.

Despite his success in teaching, Kevin is still bitter about his rejection from U.T. Law. Several of his nonwhite friends, all with lower LSAT scores and GPAs, were admitted to U.T. Law. In particular, Kevin is bothered by the admittance of a wealthy Hispanic friend who had been through private schools all his life, yet qualified for U.T. Law under the affirmative action plan. Kevin understands the need for opening up the School of Law to a more diverse group of students, but feels that "when you categorize people simply by race you open up a dangerous can of worms . . . . for everybody. I'm very happy with my life today, but I'll never know what might have been." 82

Kevin's story is not unusual. Like other Anglo applicants, his credentials were impressive and diverse, yet inadequate to secure admission to U.T. Law. In 1992, Cheryl Hopwood and three other Anglo plaintiffs applied for admission to the University of Texas School of Law. 83 The admissions policy at the school measured all applicants using their "Texas Index," 84 and based on this index each application was placed in one of three categories: 1) presumptive admission; 2) discretionary admission; and 3) presumptive denial. 85 All four plaintiffs were placed in the second category. Candidates in the first category were likely offered admission, those in the latter category were usually denied admission, and those in the second category were referred to a three-person committee for review. 86

Under the admissions policy in effect at the time, 87 preferred candidates 88 were evaluated under a completely separate system which used lower presumptive-admit and presumptive-deny "Texas Index" scores than those used to evaluate non-minority applicants. 89 The stated goal of the program was to admit an entering class which included African-American and Hispanic students in numbers approximately equal to the proportion they represented of all Texas college graduates. 90 In addition, while ordinary

82. Telephone Interview with anonymous U.T. Law applicant (June 28, 1996).
84. Hopwood II, 78 F.3d at 935. The index was a composite formula using the applicant's undergraduate grade point average and LSAT score. Id.
85. Id.
86. Id. at 935-36.
87. The admissions process at issue was discontinued in 1992. See generally Hopwood I, 861 F. Supp. at 557-63 (describing the history and evolution of the U.T. Law admissions system).
88. African-Americans and Hispanics were the only preferred candidates. Hopwood II, 78 F.3d at 936 n.4.
89. Id. at 936.
90. Id. at 937. In 1992, these percentages were such that approximately eleven percent of the
candidates placed in the discretionary category were evaluated by one or two members of a committee, all preferred candidates were extensively evaluated by a special minority subcommittee which discussed every discretionary preferred application.91

After being denied admission, plaintiffs filed suit claiming that the school’s affirmative action program violated the Equal Protection Clause of the Fourteenth Amendment.92 The district court found part of the school’s program to be unconstitutional, but recognized a compelling state interest in obtaining diversity and remedying the effects of past discrimination.93

The Fifth Circuit Court of Appeals reversed the decision, finding the school’s program and use of diversity as grounds for race-conscious admissions to be in violation of the Equal Protection Clause.94 Writing for the court, Judge Smith stated that the “central purpose of the Equal Protection Clause ‘is to prevent the States from purposefully discriminating between individuals on the basis of race.’”95 Such discrimination, the court stated, is therefore highly suspect and subject to strict scrutiny.96 In applying strict scrutiny, the court found that neither the diversity nor remedial arguments presented by U.T. constituted a “compelling government interest.”97

Directly addressing Bakke, the court stated that Justice Powell was incorrect in determining that there exists a First Amendment right to academic freedom sufficient to constitute a compelling government interest to use race as an admissions factor.98 Quoting from Adarand, the court stated that the “failure [of] Bakke . . . left unresolved the proper analysis for remedial race-

91. Hopwood II, 78 F.3d at 937. In addition to extensively reviewing each discretionary application, the minority subcommittee also had “virtually final” say in the admissions process. Id. Preferred students not presumptively admitted or placed in the discretionary category were even placed on a separate preferred waiting list. Id. at 938.
92. Id. In finding the constitutional violation, the court held that U.T. Law could not use race as a factor in admissions for the stated purposes of: (1) achieving diversity; (2) combating a perceived hostile environment toward minorities at the school; (3) alleviating the school’s poor reputation in the minority community; or, (4) remedying the effects of past discrimination by anyone other than U.T. Law. Id. at 952. The court did not address the possibility of present discrimination by U.T. Law.
93. Hopwood I, 861 F. Supp. at 570 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1973) and United States v. Paradise, 480 U.S. 149, 167 (1987)). The court acknowledged the testimony of professors indicating the substantial value of having a diverse student body. Furthermore, the court noted that had the 1992 admissions process been conducted without the affirmative action plan, there would have been at most nine African-Americans and 18 Hispanics among the approximately 900 students offered admission. Hopwood I, 861 F. Supp. at 563, 573.
94. Hopwood II, 78 F.3d at 934.
95. Id. at 939-40 (quoting Shaw v. Reno, 509 U.S. 630, 642 (1993)).
97. Hopwood II, 78 F.3d at 945-55.
98. See id. at 944 (arguing that Justice Powell’s view in Bakke is not binding precedent because, although he announced the opinion, no other Justices joined him in it). Judge Smith stated that “any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.” Id.
based government action.' The opinion also stated that the only case in which diversity has been acknowledged by the Supreme Court as a compelling government interest, Metro Broadcasting, was explicitly overturned by Adarand.100

After rejecting the diversity argument, the court then addressed the issue of remedial action as a compelling government interest. First, the court noted that past decisions allowed for remedial action only in light of “present effects of past discrimination.”101 U.T. Law argued that racial criteria were justified at U.T. Law to remedy the effects of past discrimination in the state’s public school system, but the court found that it erroneously used the improper unit for analysis.102 Under the strict reasoning of Croson and Wygant,103 the court reasoned, the only past discrimination U.T. Law may address is that which occurred within the law school itself.104 Stating that there is no evidence of any existing discrimination, nor effects of past discrimination, the court suggested that any existing racial tension is likely the product of societal discrimination.105

The University of Texas appealed to the Supreme Court, and although many legal experts predicted the case would be accepted, the Court denied certiorari.106 In an unusual concurring opinion, Justices Ginsburg and Souter acknowledged that the issue of race-conscious admissions policies in higher education is “of great national importance,” but agreed with the denial on the grounds that because U.T. Law no longer used the challenged policy, the Court must await “a final judgment on a program genuinely in controversy before addressing [this] important question.”107 While other circuits continue to follow Bakke, the issue remains clearly unresolved and will undoubtedly come before the Supreme Court again in a case with a justiciable controversy.108

99. Id. (quoting Adarand, 115 S. Ct. at 2109).
100. Hopwood II, 78 F.3d at 944. The effects of past discrimination in Texas society are incontrovertible. Between whites and minorities, both educational attainment and income vary tremendously, and the state historically has a great disparity in wealth between whites and minorities. African-Americans and Hispanics are far more likely than whites to be impoverished, undereducated or unemployed. ANDERSON ET AL., supra note 72, at 31-32.
101. Id. at 952 (citing Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994), cert. denied, 115 S. Ct. 2001 (1995)).
102. See Hopwood II, 78 F.3d at 949-54.
103. The decisions in Croson and Wygant indicate that “racial remedies must be carefully limited.” Id. at 950.
104. Hopwood II, 78 F.3d at 952. The court presented the potential “slippery-slope” effects of such remedial action, stating that if higher education can be analogized to affect the entire educational system, such programs legitimately could be extended to cover “any other state activity that in some way is affected by the educational attainment of the applicants.” Id. at 950.
105. Id. at 953. The court also postulated that current racial preferences actually contribute to racial tensions rather than help alleviate them. Id.
107. Id.
108. See generally Sylvia A. Law, Diversity in Jeopardy as Supreme Court Declines to Review Hopwood, THE EQUALIZER, Aug. 1996, at 1, 4-5 (noting the implications of the denial of review by the Supreme Court and suggesting that the Fifth Circuit’s holding “effectively reverses a Supreme Court decision” causing shocking effects that have reverberated throughout the nationwide academic community). While there are no pending cases before the Supreme Court addressing the Hopwood issues, so many law schools and institutions of higher education use affirmative
IV. ANALYSIS AND IMPLICATIONS OF HOPWOOD II

In overturning the district court decision, the Fifth Circuit overstepped its authority by attempting to predict the outcome of a potential Supreme Court review rather than applying binding law. In holding U.T. Law to be the proper scope for evaluating the validity of remedial action, the court turned a blind eye to the pervasive and egregious racism present throughout society, and Texas in particular, as well as the lingering effects of past state-sanctioned racial discrimination. The court also failed to recognize possible forms of present discrimination in higher education based on flawed evaluations of merit.

Completely disregarding Bakke, Judge Smith declared that Justice Powell’s diversity rationale was inadequate to pass strict scrutiny, and stated that the only permissible grounds for race-based actions are remedial. This action policies similar to U.T. Law’s program that college administrators and admissions staff are scrambling to develop response strategies to possible court challenges in other circuits. See generally Akhil Reed Amar & Neal Kumar Katyal, Bakke’s Fate, 43 UCLA L. REV. 1745 (1996) (discussing the diversity rationale in depth and suggesting that the Supreme Court may choose to preserve Bakke and the special consideration given to academic freedom). Other scholars have a less optimistic viewpoint. Jim Chen, Diversity and Damnation, 43 UCLA L. REV. 1839, 1852 (1996) (“[a]ffirmative action Armageddon is at hand, and the legal fate of diversity will be the richest prize at stake”).

The ultimate effects on U.T. Law remain unknown. Dean M. Michael Sharlot pessimistically noted that the Supreme Court’s decision “resulted in a great irony.” While U.T. Law and other schools located in the Fifth Circuit remain bound by Hopwood, other schools outside the region, many of which have little or no history of state-sanctioned discrimination, are free to utilize affirmative action programs. Combined with a recent Texas Attorney General’s ruling that financial aid must be administered in a race-neutral manner, Hopwood threatens to turn U.T. Law “from being the nation’s leading producer of African-American and Mexican-American lawyers to one that will have very few members of these groups.” Dean M. Michael Sharlot, Hopwood Update, TEXAS ALCALDE COLLEGE ROUNDUP, in TEXAS ALCALDE, Nov.-Dec. 1996, at 32D; see also Avrel Seale, Sipping Tea With Bob Berdahl, TEXAS ALCALDE, Sept.-Oct. 1996, at 23-24 (interviewing University of Texas President, who notes that “[w]e’re [now] at a terrific comparative disadvantage and there’s no question but that we will have a very palpable, discernible decline in minority enrollment, especially in certain programs”).

109. Hopwood II, 78 F.3d at 943-44 (arguing that Justice Powell’s opinion in Bakke is mere dictum rather than binding law, and suggesting that Powell’s diversity argument would not withstand strict scrutiny). See generally Jeffrey Rosen, The Day the Quotas Died: Affirmative Action’s Posthumous Life, THE NEW REPUBLIC, April 22, 1996, at 21, 24 (labeling Judge Smith’s opinion as “clumsy vote count[ing]” instead of the application of existing law). Furthermore, while it appears clear that U.T. Law’s use of separate admissions committees and singular consideration of race were in violation of the Fourteenth Amendment and Justice Powell’s rationale in Bakke, the Fifth Circuit went beyond simply holding the specific program unconstitutional and broadly addressed the general concepts of affirmative action and diversity in all higher education. See also The Hon. Nathaniel R. Jones, The Harlan Dissent: The Road Not Taken–An American Tragedy, 12 GA. ST. U. L. REV. 951, 971 (1996) (criticizing the Fifth Circuit’s Hopwood II ruling as an improper attempt to overrule Bakke, and suggesting that the U.T. administration’s determination of discriminatory effects at U.T. Law was made well within the boundaries of administrative competence).


111. See infra notes 139-156 and accompanying text.

112. Hopwood II, 78 F.3d at 944-45 (citing Adarand and Croson). Judge Smith also cited Justice O’Connor’s dissent in Metro Broadcasting, in which she stated “[m]odern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination.” Id. at 945 (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 612 (1990) (O’Connor,
tortured interpretation ignored part V-C of Bakke,\textsuperscript{113} in which Justice Powell was joined by Justices Brennan, White, Marshall, and Blackmun.\textsuperscript{114} In effect, the Fifth Circuit failed to recognize the profound and compelling value of diversity in higher education in general. Equally erroneous was the court's failure to recognize the value of diversity in legal education as the necessary and narrowly-tailored means to serve other compelling government interests. Among these interests are preventing discrimination, preserving academic freedom, serving the interests of the community, and creating access to the law for all people.

A. Remediying Past Institutional Discrimination

The Hopwood \textit{II} court ignored Texas' well-documented arguments about remediying the present effects of past discrimination as well as the factual evidence indicating strong lingering effects of past discrimination throughout the state's educational system. Federal investigators examined the state's higher education system in the mid-1970s,\textsuperscript{115} and found pervasive and egregious discrimination.\textsuperscript{116} Although U.T. Law itself was formally integrated in 1950, forms of state-sanctioned segregation at the law school continued well into the 1960s.\textsuperscript{117} While a small number of African-Americans were admitted to U.T. Law during this period, as late as 1971 there were still some entering classes which had no African-American students.\textsuperscript{118}

Just as there were clear and offensive remnants of segregation twenty-one years after the court-ordered integration of U.T. Law, equally unequivocal signs exist today indicating that racial equality has not yet found its way to many institutions of higher education.\textsuperscript{119} The fact that the student body of a

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  \item \textsuperscript{113} See Bakke, 438 U.S. at 320 (stating that "the State has a substantial interest that may legitimately be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.").
  \item \textsuperscript{114} Id. at 272 n.4.
  \item \textsuperscript{115} Hopwood \textit{I}, 861 F. Supp. at 555-56. The investigating agency was the Department of Health, Education, and Welfare (HEW) Office for Civil Rights (OCR). Id. at 555. The investigation revealed that Texas had "failed to eliminate vestiges of its former de jure racially dual system of public higher education, a system which segregated blacks and whites." As a result of the investigation, Texas submitted a compliance plan called the "Texas Plan." Id. In 1982, Assistant Secretary of Education Clarence Thomas formally informed Texas governor Bill Clements that the Texas Plan was insufficient because the numerical goals for African-American and Hispanic graduate school enrollment did not meet the state's commitment to enroll them in proportions equal to their representation among all graduates of state undergraduate institutions. Id.
  \item \textsuperscript{116} Id. at 555-56.
  \item \textsuperscript{117} See id. at 555 (noting that until the mid-1960s Mexican-American students were segregated in on-campus housing, and African-American students were prohibited from living in or even entering white dormitories).
  \item \textsuperscript{118} Id. at 558. The district court also noted that in the late 1960s U.T. Law offered race-based scholarships which, ironically, were for whites only. Id. at 557; see also Robert S. Chang, \textit{Reverse Racism: Affirmative Action, the Family, and the Dream That Is America}, 23 Hastings Const. L.Q. 1115, 1117-19 (1996) (arguing that the use of a "narrow temporal framework" by opponents of affirmative action to evaluate present effects of past discrimination fails to consider the broader societal effects of past discriminatory practices).
  \item \textsuperscript{119} See Paul Brest & Miranda Oshige, \textit{Affirmative Action For Whom?}, 47 Stan. L. Rev. 855, 877-78 (1995) (noting the wide disparities between African-Americans and Anglos in both
\end{itemize}
top-quality law school, in a state where Anglos constitute little more than half of the population, would become nearly all-white if affirmative action were eliminated from the admissions process is ample evidence that there exists some form of discrimination or lingering effects that go far beyond formal race-based admissions barriers. Furthermore, the fact that severe racial segregation still exists today in the nation's educational system is evidence of the pervasive societal discrimination which evades all attempts to eradicate it.

The Fifth Circuit also erred in finding that the proper scope for evaluating the need for remedial action is U.T. Law itself. Citing Wygant, the court narrowly held that U.T. Law could not initiate any race-based measures except those narrowly designed to eliminate the effects of past discrimination within the institution itself. By so holding, the court blatantly ignored the incontrovertible nexus between higher education and society. Although the link between government construction contracts and societal discrimination may be ambiguous, higher education—and law in particular—provide society with leadership, a forum for dissemination of ideas, and a laboratory for intellectual and political development. Law, more than any other profession, is inextricably linked to our social fabric, government, and political processes. The detrimental effects of segregated law schools have a tremendous ripple effect reaching into every facet of society.

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120. See Robert M. Berdahl, Understanding Hopwood, TEXAS ALCALDE, July-Aug. 1996, at 16, 17 (U.T. President noting that the State of Texas will have no ethnic majority by the turn of the century).
121. See Hopwood I, 861 F. Supp. at 573 (stating that, in the absence of race-conscious admissions, the 1992 entering class would have included, at most, nine African-Americans and eighteen Hispanics). In addition, it should be noted that while these twenty-seven students might have been offered admission to U.T. Law, the number of minorities actually accepting offers might be much lower. In the absence of affirmative action, the homogenous academic environment could actually deter qualified minority candidates from accepting spots in the entering class. According to the Dean of U.T. Law, competition between elite law schools for highly-qualified minority candidates is "very fierce." Interview with M. Michael Sharlot, Dean of U.T. Law, in Austin, Texas. (June 19, 1996).
122. Hopwood I, 861 F. Supp. at 554 (noting that in Texas alone there are desegregation lawsuits pending against over 40 school districts, and recognizing Texas' history of intentionally resisting court-ordered desegregation).
123. See id. at 570-73.
124. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (stating that general societal discrimination is not grounds for remedial action in a particular arena that does not itself overtly show the effects of past discrimination). Judge Smith also used Croson, holding that the scope of remedial action extends only to the governmental actor that had previously discriminated. Hopwood II, 78 F.3d at 954 (citing Croson, 488 U.S. at 499).
125. See Hopwood II, 78 F.3d at 954.
126. See Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (stating that "the classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas. . . . " (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).
127. See infra notes 157-180.
Moreover, the court passed over the fact that while institutions of higher education have been formally opened to minorities, minorities are still tremendously underrepresented in undergraduate and graduate programs nationwide, including law. Socialized biases that extend far beyond formal admissions barriers cannot be quantified or eliminated by merely "opening up the doors" to disadvantaged racial minorities; there still exists a pervasive discriminatory atmosphere in society that disadvantages many, and thus, justifies race-based remedies. As stated in The Civil Rights Cases, remedial action is justified as long as there are lingering effects of societal discrimination permeating all areas of society.

While optimistic scholars hope for a color-blind society in which race conscious measures are unnecessary, pervasive inequities and racism, both intentional and unintentional, creates invisible but real barriers to African-Americans that limit their potential for personal and professional development and perpetuates negative perceptions about African-Americans.

130. See generally, Kenneth S. Tollett, Sr., The Case For Black Higher Education & Affirmative Action, 10-FEB NBA NAT'L B.A. MAG. Jan.-Feb. 1996, at 13 (discussing the persistent existence of an African-American "underclass" and recent declines in African-American enrollment at institutions of higher education). In addition, the underrepresentation of minorities in law can be seen not only by looking at overall social demographics, but also by comparing the percentages of minority college graduates to the percentage of minority students enrolled at law schools. Hopwood v. Texas, 861 F. Supp. at 558-61 (pointing out that U.T. Law's original percentage goals for preferred students were approximately equal to their percentages of all Texas college graduates). While much contemporary legal scholarship has focused upon the plight of African-Americans, statistics also show that Hispanics in America face equal if not greater challenges. While this may in part be due to language and educational barriers arising from immigration, Hispanics as a group are the least educated major ethnic group. While they represent about nine percent of the U.S. population, only three percent of attorneys and approximately five percent of law school graduates. While much contemporary legal scholarship has focused upon the plight of African-Americans, statistics also show that Hispanics in America face equal if not greater challenges. While this may in part be due to language and educational barriers arising from immigration, Hispanics as a group are the least educated major ethnic group. While they represent about nine percent of the U.S. population, only three percent of attorneys and approximately five percent of first-year law students are Hispanic. Brest, supra note 119, at 883-87.

131. Justice Powell noted the existence of socialized biases in Bakke, stating that the "perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history." Bakke, 438 U.S. at 291.

132. See Beschle, supra note 52, at 1142-45 (stating that many opponents of affirmative action were the same voices once opposed to removing formal racial barriers, contending that individuals in society do not begin bias-free, and stating that just as society must constantly strive to maintain law and order, it must constantly work to eliminate the inherent trait of individuals to discriminate against those who are least like themselves).

133. See Frank Adams, Jr., Why Brown v. Board of Education and Affirmative Action Can Save Historically Black Colleges and Universities, 47 ALA. L. REV. 481, 510 (1996) (noting, among other factors, the severe psychological barriers to racial equality that defy traditional attempts to eradicate racism by "leveling the playing field").

134. See Tollett, supra note 130, at 13 (arguing that the persistently wide gaps in income levels, educational attainment, life expectancy, incarceration, and political representation are indicative of a continuing racism permeating society).

135. See The Civil Rights Cases, 109 U.S. 3 (1883) (holding that while remedial action is not meant to be permanent, it is justified as long as there is continued discrimination in society).

136. O'Ko, supra note 129, at 191-94 (arguing that racism presents such a severe threat to the stability of this nation that the government bears the responsibility of allowing minority representation in society through affirmative action programs). For a discussion of the continued need for affirmative action in the face of societal discrimination, see generally Tollett, supra note 130. In Texas, for example, these lingering effects are especially prominent. For minorities, particularly African-Americans and Hispanics, assimilation into society has been slow and inconsistent. This reflects "the effects of centuries of political, social, and economic discrimination that Americans of darker skins have endured in this society." ANDERSON ET AL., supra note 72, at 98.

137. See generally Kirk A. Kennedy, Race-Exclusive Scholarships: Constitutional Vel Non, 30 WAKE FOREST L. REV. 759 (1995) (arguing that race-neutral jurisprudence is the only way to achieve nondiscrimination). Other scholars argue that even academic diversity should be entrusted
discrimination in society illustrate the need for continued race-based measures, both as a remedy for past discrimination and a vigilant means of achieving the compelling goal of a nondiscriminatory society.\textsuperscript{3}

B. Challenging the Bias of Merit: The Search For Standards

Opponents of affirmative action contend that such programs unfairly discriminate against whites who have better qualifications for the desired positions.\textsuperscript{3} In support, they often cite anecdotal evidence of a white student with higher test scores or grades displaced by a "less qualified" minority.\textsuperscript{9} Such divisive arguments invariably stir deep emotions on both sides of the debate, but lost in the rhetoric is the silent and erroneous assumption that higher test scores and grades are incontrovertible measurements of merit. This has been challenged as perpetuating inherent systemic biases.\textsuperscript{14}

The most common "objective" measurement of law school applicants, the Law School Admissions Test (LSAT), is generally considered (along with undergraduate grades)\textsuperscript{4} to be an accurate indicator of the ability to succeed in law school.\textsuperscript{4} Critics charge that standardized tests are, in reality, a "general, but imperfect, indicator of merit" rather than a concrete identifier of the same forces that govern diversity in our private lives." Chen, supra note 108, at 1910. While noble in principle, such blind trust ignores the inherent human tendency to discriminate against that which is different or unfamiliar. Beschle, supra note 52, at 1142-45.

138. The compelling government interest in preventing discrimination is unquestionable and well grounded in Fourteenth Amendment jurisprudence. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (stating that all discrimination is "poisonous and pernicious") (Thomas, J., concurring in part and concurring in the judgment); United States v. Paradise, 480 U.S. 149, 167 (1987) (finding discriminatory conduct adequate justification for race-based remedies); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (noting "[t]he Court is in agreement that . . . remedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program") (O'Connor, J., concurring in part and concurring in the judgment); Loving v. Virginia, 388 U.S. 1, 11 (1967) (stating explicitly that the purpose of the Fourteenth Amendment was to eliminate discrimination); Brown v. Board of Educ., 347 U.S. 494-95 (citing studies about the adverse effects of discrimination on students); Shelley v. Kraemer, 334 U.S. 1, 22 (1948) ("[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities").

139. See Kennedy, supra note 137, at 790-91 (arguing that race-based scholarships and admissions criteria deny higher education opportunities to those with "stronger credentials").

140. See Ken Feagins, 'Wanted—Diversity: White Heterosexual Males Need Not Apply,' 4 WIDENER J. PUB. L. 1, 12 (1994) (offering a vignette concerning a white male who was rejected by three medical schools even though his scores would have been acceptable for admission had he been a minority applicant); see also Paul D. Carrington, Diversity, 1992 UTAH L. REV. 1105, 1136 (1992) (arguing that racial classifications ignore individuality while focusing on stereotypes of "overprivileged white males or underprivileged black females").


142. Leslie G. Espinoza, The LSAT: Narratives and Bias, 1 AM. U. J. GENDER & L. 121, 121 & n.3 (1993) (noting that not only is the test universally used, but almost all ABA-approved schools require it in combination with undergraduate grades). While the use of undergraduate grades to determine admissions has also been challenged as inaccurate for measuring the ability of applicants to be successful in the legal profession, this article will limit the examination of the law school admissions criteria to the LSAT. At U.T. Law, the admissions index combined grades and LSAT scores, but the LSAT weighed more heavily than grades. Hopwood I, 861 F. Supp. at 557. For a discussion of the inadequacy of using academic measurements as an admissions factor, see generally C. WOODARD, THE AMERICAN LAW SCHOOL AND ANGOLO-AMERICAN LEGAL TRADITION 27 (1983).

143. Espinoza, supra note 142, at 127.
While researchers consistently attempt to improve the examination, questions persist about the ability of standardized tests to provide an accurate representation of the qualifications or abilities that potential students bring to law school. The flaws in the LSAT as an objective measure for screening applicants are threefold: 1) the test itself is inherently culturally and racially biased such that it inaccurately measures the "intelligence" of minority students; 2) the ability of the LSAT to predict success in law school is statistically weak; and 3) the racially and culturally biased nature of law schools and the process of legal education is such that mere academic success in the traditional law school environment bears little relevance to the ability to succeed as a lawyer.

Moreover, if we dismantle the argument that race-conscious admissions always discriminate against whites, we find that a diversity-oriented selection process which emphasizes an individual's overall potential contribution to the academic and educational environment cannot possibly discriminate against "similarly situated" individuals. Indeed, accepting the reality that all students with a certain minimum level of qualifications are adequately suited for law school inevitably leads to the conclusion that considering additional beneficial characteristics, including diversity, creates

144. See Berdahl, supra note 120, at 118 (explaining the admissions policies at U.T. and stating that while test scores may vary between white and preferred candidates, no unqualified students are admitted, regardless of race).

145. Espinoza, supra note 142, at 163.

146. Eulius Simien, The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action, 12 T. MARSHALL L. REV. 359; see also Oko, supra note 129, at 201-03 (discussing the effects of societal discrimination and poverty on the academic performance of African-Americans, and concluding that only affirmative action can lead to increased participation by African-Americans in the legal profession).

147. Simien, supra note 146, at 382-85 (noting various studies that have examined and criticized the ability of the LSAT to predict success in either law school or the legal profession).


149. Simien, supra note 146, at 382-83; see also Espinoza, supra note 142, at 163-64 (stating that the use of statistics correlating LSAT scores and academic success in law school is no more valid than using data showing that family income also correlates well to academic ability, and suggesting that law schools should show a nexus between standardized tests and the ability to succeed in the profession of law).

150. See Espinoza, supra note 142, at 127-29 (noting that the law school experience, including casebooks, examinations, and traditional legal teaching methods are biased in favor of those who, because of their culture, education, and background are able to understand the processes).

151. For an example of this perspective, see Ken Feagins, Affirmative Action or the Same Sin?, 67 DENY. U. L. REV. 421, 422 (1990) (suggesting that white males are quickly becoming the most discriminated-against class in America).

152. The general standard for equal protection analysis was set forth in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (noting "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike") (emphasis added). But see Feagins, supra note 140, at 26-29 (arguing that all race-based classifications increase racial tensions by blindly favoring one group over another).

153. Nevertheless, as long as numerical or "objective" measures are the primary method of evaluating most candidates there will exist a stigma, attached to minority or disadvantaged students, of being inferior or unqualified. See Sheila Foster, Difference and Equality: A Critical Assessment of the Concept of "Diversity", 1993 Wis. L. REV. 105, 145-46.

154. Such characteristics might include ethnicity, religion, sexual orientation, superior aca-
the potential for an ideal educational environment. As stated by Justice Harry Blackmun, "[i]n order to get beyond racism, we must first take account of race."

C. Preserving Academic Freedom

Despite Judge Smith's dismissal of the diversity argument presented in Bakke, ample evidence suggests a continued compelling governmental interest in promoting diversity in higher education. Academic freedom, a long established prerogative of institutions of higher learning, extends to the choice of classroom curriculum, the appointment of faculty, and the freedom to select a student body that best serves the interests of higher education. This choice includes the "four essential freedoms" of determining "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." This "national commitment" to protecting such liberties was emphasized in Keyishian v. Board of Regents and United States v. Associated Press. These freedoms determine the very nature of the nation's future leaders, and the overwhelming First Amendment interest cannot be overlooked. As stated in Sweatt v. Painter, "few students... would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." Diversity in higher education serves not only as the compell-
ling interest as stated in Bakke, but also as the necessary and narrowly-tailored means to safeguarding academic freedom.

The benefits of such diversity extend to all of the students in the classroom. Just as minority and underprivileged students can benefit from learning mainstream ideas and values, those students coming from an affluent background or those without diverse cultural knowledge can better understand and learn in a diverse environment. For those unfamiliar with minority cultures or ideas, it provides the opportunity to interact with and meet those from different backgrounds and value systems, an experience all the more necessary for those entering the legal profession. Students of all races and backgrounds benefit from a diverse student population, for the process of assimilation, rejection, and modification of a wide range of ideas constitutes the very definition of higher education.

Some scholars, however, reject the value of race-based classifications as a means of achieving diversity. They contend that such classifications erroneously assume a consistent viewpoint from all people of the same color or ethnicity. This specious argument denies the inherent racism present in American culture. Racism has consistently transcended economic or class lines, subjecting even affluent or "undisadvantaged" minorities to violence or discrimination. While it would be improper to assume a consistent viewpoint from all minorities, logic dictates that a different viewpoint can

169. The very nature of academic freedom and the deference to schools to determine their own needs is such that each institution has different priorities. The appropriate "fit" of diversity in the role of furthering the compelling interest of academic freedom can best be analyzed by examining the particular and unique needs of each educational environment.
170. See Foster, supra note 153, at 138-39 (explaining the benefits to all viewpoints from an exchange of diverse ideas).
171. See Brest, supra note 119, at 862-63 (presenting a comprehensive explanation of the intellectual and academic value of diversity for both minorities and other students).
172. See Garfield, supra note 155, at 914 (noting the benefits to "innocent third parties"); see also BERGMANN, supra note 141, at 106.
173. See Simien, supra note 146, at 369.
174. See Berdahl, supra note 120, at 17 (noting "[e]ducation is the process of encountering that which we are not, that with which we are unfamiliar, that which we do not know").
175. See Kennedy, supra note 137, at 775 (stating that skin color, ethnicity, and gender provide no "meaningful insight into an individual's mental processes"); see also Carrington, supra note 140, at 1133-34 (ridiculing the affirmative action presumption that minorities are needed to express some specific "minority" point of view); Chen, supra note 108, at 1907 (stating that "we have sacrificed diversity within racial groups in order to accentuate diversity between groups").
176. See Oko, supra note 129, at 190-92 (arguing that racism today is still so pervasive and damaging to society that it "threatens the very existence of this nation").
177. See Brest, supra note 119, at 878-79 (describing how racism and discriminatory attitudes by whites affect African-Americans of all economic classes).
178. Although not every minority student is guaranteed to bring a unique viewpoint to the academic environment, the fact that the overwhelming majority of African-Americans experiences some degree of racial discrimination justifies the assumption of such a diverse perspective. Similarly, just as the ability to provide a convincing writing sample does not guarantee qualities that will be useful in law school, schools nonetheless have determined that the likelihood is great enough to justify their use.
179. See Brest, supra note 119, at 862 (stating that while it cannot be assumed that all members of a race have identical ways of thinking, it is likely that members of discriminated-against minority groups have a viewpoint different from mainstream whites). Accepting the differences in viewpoint between historically disadvantaged minorities and mainstream Anglos, while rejecting
safely be assumed for those of ethnic or cultural minorities who have historically been discriminated against.

D. Serving Community and Constituents

Even a pragmatic approach to evaluating the validity of race-conscious admissions reveals a compelling state interest in protecting the political interests of a university funded primarily by a state legislature. From a practical standpoint, a university must be able to demonstrate to its constituents that it is an asset worthy of taxpayer support. Just as private institutions that depend upon alumni donations and endowments are given great deference in allowing student bodies to include the children of wealthy benefactors or alumni, state institutions must be allowed the freedom to include the children of their "benefactors." Courts have even allowed state institutions the freedom to choose a student population based upon a need to satisfy alumni who "provide monetary support." In a university heavily dependent upon state funding, diversity properly achieves the compelling goal of serving the community and the school's constituents by allowing access to higher education for all segments of society.

the "essentialist" theory that impoverished urban African-Americans share a common, monolithic belief system with middle-class educated African-Americans, is the key to recognizing the importance of transcendent race lines in America. See Foster, supra note 153, at 139-41.

In his concurrence, Judge Weiner wrote that while he disagreed with the majority that diversity is never a compelling government interest, he concurred in the judgment because he thought U.T. Law's admissions process was not "narrowly tailored" to achieve diversity. Hopwood II, 78 F.3d at 962. In particular, he noted, that only African-Americans and Hispanics were given preferential treatment, rather than all possible groups that could contribute to a desirably diverse environment. Id. at 966. Quoting Justice Powell in Bakke, he stated that diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Id. at 965 (quoting Bakke, 438 U.S. at 315).

See Berdahl, supra note 120, at 17 (stating that by the year 2000, Anglos in Texas will no longer be a majority of the population, evoking the possibility that the University of Texas will have to seek funding for a nearly all-white law school from a legislature whose constituents, as a group, generally cannot be admitted). Such political considerations are significant.

There is little dispute about the overwhelming societal benefits created by colleges and universities. Nonetheless, if the benefits are demographically or geographically disparate, political support may be difficult to obtain. Much like academic freedom, political considerations are unique to each school and should be evaluated at the discretion of the individual institution. See generally Chen, supra note 108, at 1878 (stating that "diversity must be a broad concept" and that any affirmative action program that utilizes diversity criteria must "confer some tangible benefit" that must "accrue to all constituencies within the academic community.")

See Berdahl, supra note 120, at 17 (noting the reluctance of one state legislator to approve funding for an institution that does not admit any of his constituents).

Critics of affirmative action who bitterly complain about lowered admissions standards for minorities, fail to address the reality that students admitted under legacy consideration have combined SAT scores that average thirty-five points below those of other students. Foster, supra note 153, at 143. Legacy or lineage preferences are commonly used at many colleges and univer-
E. Creating Access to the Law

The unique nature of law and the concurrent ethical and social responsibilities imposed upon lawyers are such that adequate representation for minority clients is of paramount importance. Many of those most disadvantaged or discriminated against cannot speak English, and an all-white Bar is unlikely to provide the same aggressive advocacy for such clients as a legal profession rich in diversity and representative of such values or culture. Moreover, in light of past state-sanctioned discrimination against minorities, there is a need for minority representation in the legal profession greater than their representation in society at large.

Finally, the crucial role lawyers and the legal profession play in politics and legislation also indicates the critical importance of diversity in the legal profession as a means of preserving and facilitating access to the law for all members of society. Such a disproportionately large number of legislators and politicians come from legal backgrounds, that a homogeneous legal profession cannot reasonably be expected to represent adequately the values and ideas of all citizens. Just as the diversity of police departments has

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187. See Simien, supra note 146, at 368 (noting a lack of adequate legal services in many African-American communities); see also Smith, The Role of Primary and Secondary School Teachers in the Motivation of Black Youths to Become Lawyers, 52 J. NEGRO EDUC. 302, 369 (1983) (noting that while the number of African-Americans in the legal profession proportional to their overall population has remained relatively constant over the last 60 years, the corresponding ratio of Anglo lawyers has doubled); see also Simien, supra note 146, at 369.

188. See Simien, supra note 146, at 369 (noting that while the needs of African-Americans can often be met by non-African-American lawyers, "similar backgrounds and experiences" enable lawyers to better identify with and represent their clients).

189. See Brest, supra note 119, at 877 (citing statistics showing that while African-Americans comprise about twelve percent of the general population in the U.S., they constitute only three percent of all attorneys and approximately eight percent of all first-year law students). In response to the argument that the eight percent figure indicates progress, it should be noted that attrition rates for African-American students are significantly higher than for whites. Hopwood I, 861 F. Supp. at 554 & n.3; see also Judith G. Greenberg, Erasing Race from Legal Education, 28 U. MICH. J. L. REFORM. 51, 52-54 (1994) (noting that attrition rates for minority students in accredited law schools are more than twice as high as those for non-minority students).

190. A broad interpretation of "the law" includes not only attorneys and legislators, but also judges, bureaucrats and administrators, government officials, prosecutors, civic leaders, politicians, law teachers, scholars, and students.

191. See Brest, supra note 119, at 863 (noting that the legal profession possesses tremendous social and political power); see also David E. Van Zandt, Myit at the Right Tail: Education and Elite Law School Admissions, 64 TEX. L. REV. 1493, 1494 (1986) (reviewing ROBERT KLITGAARD, CHOOSING ELITES (1985) (noting that selection to "elite" law schools almost invariably opens doors of opportunity and employment greater than those for students at nonelite institutions)).

192. Lundwall, supra note 128, at 148. In addition to race, economic status plays a critical role in political participation. Lower socioeconomic status creates difficulties in becoming in-
been justified as necessary to preserve public confidence in the police system, in order to preserve social stability in an increasingly diverse nation, there must be a wide range of views and values represented by judges, prosecutors, and attorneys. In recent years it has become clear that perceptions and understandings of the law are closely linked to cultural and social backgrounds. Consequently, a legal profession that reflects the diversity of culture and ideas is imperative.

V. A PLAN FOR THE FUTURE

In order to develop a diversity-based admissions plan that can serve the interests of all citizens, survive strict judicial scrutiny, and preserve the integrity and quality of our educational system, institutions of higher learning must begin by reevaluating and reconfiguring the "objective" academic criteria to reflect a more responsible and unbiased method of evaluating merit. To avoid the admission of "underqualified" students, schools may determine a point above which a faculty can rest reasonably assured that all students have the intellectual ability to succeed in the program. By allowing this level of

193. See Foster, supra note 153, at 113-15 (arguing that race-conscious government policies serve "forward-looking" goals of reducing racial tensions and promoting equality); see also Wygant, 476 U.S. at 314 (Stevens, J., dissenting) (stating that police departments could better serve a community plagued by racial problems with a diverse and racially balanced police force, and that an integrated public school faculty could provide a better educational environment that one that is all white).

194. See Simien, supra note 146, at 369 (suggesting that without adequate minority representation in the legal profession, historically disadvantaged minorities will never have respect and confidence in the legal system).

195. See id. at 369-70 (stating that the positions of power and trust held by the legal profession demand increased representation by African-Americans, thus enabling them to participate in the active development of society).

196. See Peter M. Shane, Why Are So Many People Unhappy? Habits of Thought and Resistance to Diversity in Legal Education, 75 IOWA L. REV. 1033, 1039-40 (1990) (arguing that interpretations of legal issues are greatly dependent upon "a web of relationships and past experiences unique to each individual").

197. See generally Robert L. Bach, Building Community Among Diversity: Legal Services for Impoverished Immigrants, 27 U. MICH. J.L. REFORM. 639 (1994) (discussing the role legal services play in the development and health of poor communities, particularly those with immigrant or diverse populations).

198. Currently, most applicants to law school, when taking the LSAT, enter a code or codes indicating school preferences. The grading system of the LSAT or other standardized tests could be reconfigured to reflect only a form of "pass/fail" results based upon that school's requirements, or even a more generalized "band" system grouping scores into more general categories than the raw numerical and percentile score used today. This might prevent the petty argument that one applicant is more qualified than another based upon a one point difference in the numerical score. See generally Dannye Holley & Thomas Kleven, Minorities and the Legal Profession: Current Platitudes, Current Barriers, 12 T. MARSHALL L. REV. 299, 315-16 (1987) (discussing the need for more accurate testing methods to select law students).

199. Allowing each school's faculty or administration to determine its own "baseline" figures for academic qualifications would give schools the flexibility to select students according to each institution's particular needs. Moreover, schools would not be bound to follow a standardized approach developed by outsiders and would not necessarily be compelled to fall into the trap of competing for students with higher numbers. In addition, instead of promoting themselves to potential students through the presentation of "objective qualifications" of incoming students, such as
“competency” to vary depending on the goals, abilities, and needs of the institution, each institution’s faculty would thereby preserve its own academic freedom and ability to evaluate applicants based on the unique needs of that particular institution.200

Once this baseline figure is set, a school would be free to select students with qualifications at or above that point based upon additional characteristics. By declaring that all applicants who have met the cutoff requirement are considered equally qualified with regard to this measurement,201 schools could eliminate the argument that some candidates are inherently more qualified than others202 based solely upon tests scores or grades.203 In addition to limiting the importance of numerical qualifications,204 schools would solicit information from applicants about what qualities, characteristics, or unique abilities they would bring to the educational environment.205 To identify nontraditional or subjective characteristics,206 schools could require GPA and LSAT scores, schools would better serve their diversity interests by focusing on outcome-based statistics, such as bar passage rates, job placement figures, and even graduate income statistics to advertise the quality of their program.

200. While schools known for their academic program and curriculum could focus on students whose qualifications appear to be matched, schools with a more practical or clinically-based program could select an entering class based upon qualities the school perceives to be preferable for its curriculum.

201. Schools could formally state the general irrelevance (or limited relevance) of academic numbers above a certain point as valuable to the law school community. In addition to eliminating applicants’ obsession with numerical minutiae, such a plan would also encourage alternative achievement in areas that could substantially benefit an applicant and the legal community. In order to preserve the incentive to perform well in traditional forums of evaluation in undergraduate school, schools could also develop a plan for giving limited relevance and consideration to marginal academic achievement above the requirements. This paper does not suggest a diminished value for superior academic performance, but only proposes that other equally valuable criteria be considered.

202. See Simien, supra note 146, at 374 (arguing that today’s “objective” admissions standards subjectively choose among the qualified rather than simply identifying those capable of succeeding in law or contributing to the profession).

203. This perception may be difficult to overcome, but one possible tool in promoting the idea of a more holistic admissions system is the process of conducting interviews, no longer used by many schools because of the cost and the large number of applicants.

204. Some scholars have argued that current GPA and LSAT-based admissions criteria are faulty, and advocate developing an admissions process that is actually tailored to increase minority admissions to law schools. Russell L. Jones, The Legal Profession: Can Minorities Succeed?, 12 T. MARSHALL L. REV. 347, 351-53 (1987); see also J. Clifton Fleming, Jr., Thoughts About Pursuing Diversity in Legal Education for Pedagogical Rather than Political or Compensatory Reasons: A Review Essay on Stephen L. Carter’s “Reflections of an Affirmative Action Baby”, 36 HOW. L.J. 291, 297-98 (1993) (arguing that current admissions criteria cannot measure “an applicant’s commitment to the common good or willingness to serve others,” and suggesting that as long as schools screen out incompetent candidates, nontraditional characteristics should be considered as beneficial to an application).

205. At this point in the admissions process diversity characteristics assume a key role. See supra note 154. In addition to looking at “traditional” indicators, such as letters of recommendation and resumes, committees could accept nontraditional media such as written or videotaped essays, work products or records, or any other means by which the applicant believes they can convey a unique contributing quality.

206. While critics of current law school admissions have only recently begun to question the relevance and value of traditional forms of measurement, other academic disciplines have long used alternative methods of evaluating applicants. For example, the admissions committee for the U.T. Graduate Conducting program uses performance videotapes as the primary criteria for evaluating candidates. This method precludes all other standards of merit, skill, or achievement. Such
each applicant to submit a personal statement about life experiences, educational aspirations, or career goals.

In addition to ethnic, racial, or other personal characteristics, hardship and economic disadvantage should be taken into account for the purposes of diversifying student populations. While scholars have suggested this approach as an alternative to race-conscious measures, others argue that such a policy would fail to accomplish the goal of combating discrimination and creating equal opportunity by failing to distinguish between applicants whose economic disadvantage is due to discrimination and those whose

methods "invariably tell us things about a candidate's ability to succeed in the profession that mere grades alone cannot begin to indicate." Telephone Interview with Paula A. Crider, Professor of Music at U.T. (Aug. 27, 1996). Although previous academic achievement and the abilities it indicates will always be extremely important in law school, communication, performance, oral, and interpersonal skills should be adequately recognized as significant in the legal profession. The logistical difficulties of identifying valuable diversity characteristics are less imposing than they appear. Current law school admissions policies often require writing samples and other indicators of background, viewpoints, and unique or valuable skills. Christopher A. Ford, Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action, 43 UCLA L. REV. 1953, 2022 (1996) (noting that the "raw material is already there" in the law school admissions process).

In addition to providing the admissions committee with a useful writing sample, personal statements allow applicants to identify what they believe are important abilities or characteristics that cannot be measured by standardized tests or mere numerical evaluations. By allowing students to "sell themselves" through these statements and other means, schools not only diversify their class through their own criteria, but also are exposed to possible qualities and contributions not previously considered or known by the faculty.

Richard D. Kahlenberg, Getting Beyond Racial Preferences: The Class-Based Compromise, 45 AM. U. L. REV. 721, 726-28 (1996) (suggesting that a color-blind jurisprudence could better address racial inequality by assisting disadvantaged people of all races). This approach, though admirably principled, ignores the idea that racism and bigotry are inherent human characteristics, and their elimination is not the successful result of a difficult struggle, but rather the goal of a never-ending fight against human nature. See Beschle, supra note 52, at 1180-81 (stating that racial prejudice and other biases are inherent and natural human behaviors, and that constant and flexible corrective action is needed to combat them).

Other scholars suggest that class-based affirmative action should be used to complement race-conscious measures. Ford, supra note 206, at 2019 (arguing that "class-based affirmative action is clearly one approach that deserves future study" while stating that it shouldn't be substituted for effective race-conscious programs); see also Richard H. Fallon, Jr., Affirmative Action Based on Economic Disadvantage, 43 UCLA L. REV. 1913, 1950-51 (1996) (arguing for economic-based affirmative action programs but stating that such programs should not "divert attention from the need for other, more effective public policies to combat both poverty and race-based disadvantage").

Interestingly, while numerous critics of race-based affirmative action programs propose class-based alternatives, our legal system and jurisprudence have never fully recognized economic condition as a suspect class for the purposes of equal protection. See United States v. Kras, 409 U.S. 434, 450 (1973) (upholding mandatory filing fees for bankruptcy); Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971) (outlawing fees imposed on poor people filing for divorce); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 688 (1966) (stating "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."). If conservatives alter affirmative action to be class-based, they will have, in effect, taken the first step in doing what social liberals have unsuccessfully attempted for years. See Deborah C. Malamud, Class-Based Affirmative Action: Lessons and Caveats, 74 TEX L. REV. 1847, 1847-48 (1996) (pointing out that "the political irony of class-based affirmative action" is that "legal thinkers on the left have long sought the legal recognition of economic inequality--or, even better, of 'class'--as a force in American life and that Adarand is a step in that direction").

See Beschle, supra note 52, at 1180-81 (arguing that creating equal opportunity is a compelling interest that may demand race-conscious measures designed to combat inherent human biases).
condition is not. Nonetheless, individuals from various economic backgrounds can make significant contributions, and in order to create a true model for diversified higher education admissions, class-based considerations must play an essential role.

Above all, race and ethnicity as contributing factors must be variable. Because one of the primary benefits of diversity is the exchange of a wide range of ideas and values, it follows that an environment rich in certain viewpoints will gain less from additional "similar" voices, while a heterogeneous educational institution would stand to benefit from almost any diversification of viewpoint. By implementing a flexible program for diversity admissions, schools can avoid the criticism that they are accepting "quotas" of minority candidates. Furthermore, an adaptive definition of diversity recognizes the dynamic elements of our society and allows for changes in preferences that reflect the needs of a healthy university environment.

CONCLUSION

Despite the apparent setback dealt by the Hopwood II court, affirmative action in higher education is far from dead in America, and continued discrimination and bias in society are constant reminders that race-conscious

211. See Brest, supra note 119, at 897-99 (labeling class-based affirmative action programs inefficient and not conducive to achieving the goals of affirmative action). While middle-class members of an historically disadvantaged race might be likely to serve as role models or beneficiaries for the minority community, the same might not be true for economically disadvantaged whites who may or may not have a personal or cultural connection to their original economically disadvantaged community.

212. Id.

213. See Foster, supra note 153, at 161 (arguing that true diversity is "neither fixed nor final; rather, it is local and contingent"). This proposal leaves open the possibility that schools could choose admissions criteria that do not include diversity, and does not suggest that the law mandates diversity; rather, that diversity is both a compelling interest in and of itself and the means to achieving the compelling interest of preventing discrimination. Thus, faculty, legislatures, or whatever governing body determines the institution's interests would be free to choose what diversity interests are best for them while remaining compliant with constitutional equal protection rules against racial discrimination.

214. For example, a law school with a majority African-American student population might have less to gain by preferencing African-American culture than it would by attempting to select students of Hispanic or Anglo background.

215. These policies and academic values could be developed, within the accepted parameters of "academic freedom," by the faculty, the administration, or even the legislature.

216. See Feagins, supra note 151, at 448-49 (arguing that preferential treatment of groups erroneously assumes that each individual within the group has identical characteristics). This paper's approach eliminates the problem of preferential treatment for groups by focusing instead on individuals who can contribute separately to the academic and educational environment.

217. While African-Americans have generally been seen as the most victimized and discriminated-against ethnic group, demographic and political changes may occasionally alter the discriminatory landscape of America. Contemporary political movements and hostilities, such as against Hispanic immigrants in California, Haitians in Florida, Vietnamese immigrants in Texas, or even against homosexuals or religious groups may indicate the need for periodic adaptations of what elements of diversity are desirable. In addition, the availability of a diverse population may vary. For example, if a school in a state with a large Hispanic population is unable to find an adequate pool of disadvantaged minority applicants, then less economically disadvantaged Hispanics may present a greater asset to the school than if there were a deeper and more diverse pool of Hispanic applicants.
measures are needed. By recognizing the continued discrimination present in society, as well as the far-reaching effects of past state-sanctioned discrimination and socialized biases, colleges and universities can implement remedial measures that open the doors of higher education and the legal profession to those held back by bias or disadvantage. In addition, we must acknowledge the value of academic freedom and diversity by welcoming into the halls of higher education viewpoints and ideas of every race, culture, ethnicity, and individuality. Particularly in the law, we must take heed of the tremendous ethical and moral responsibilities concomitant with the profession, and insure that all citizens have access to a legal profession that is both understanding and representative of all cultures and viewpoints. Diversity in higher education, law, and society in general is both a compelling end in and of itself, and the necessary and appropriate means to achieving the unquestionably compelling goal of preventing discrimination and a return to "separate but equal" educational systems.

As this country approaches a time where there exists no ethnic or racial majority, the concept of diversity must be recognized as essential to the survival of our nation, one in which race and culture are consanguineous with various political, moral, and philosophical ideologies. We must accept the inherent human tendency to be fearful of and biased against that which is different or unknown, and utilize diversity as the single most effective mechanism for vigilance against discrimination. The utopian vision of a great potpourri of people, cultures, and ideas can never truly exist without diversity and the substantial contributions it can make to our nation's future.

Kent Kostka*

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218. Similarly, the Fourth Circuit's decision in Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) to strike down exclusive minority scholarship preferences, is not indicative of the future of financial assistance for disadvantaged or minority students. Despite the apparently devastating circuit rulings, the Supreme Court has yet to address the issue, and by applying a flexible diversity rationale instead of strict racial classifications, scholarship awards could be used in a manner beneficial to the concept of diversity.

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