HOPWOOD AND AFFIRMATIVE ACTION 
IN THE EDUCATIONAL CONTEXT

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I.
INTRODUCTION

In September, 1992, four white applicants rejected by the University of Texas Law School sued the State of Texas asserting that they had been discriminated against by the Law School's 1992 admissions policies and procedures. The lawsuit was tried in May, 1994 before Judge Sam Sparks in Austin, Texas. Judge Sparks' decision upheld the Law School's affirmative action policy and absolved the University and its agents of any liability to the Plaintiffs, but found a constitutional defect in one of the admissions procedures used in 1992. Hopwood v. State of Texas, 861 F. Supp. 551 (W.D. Tex. 1994).

The Hopwood case is now on appeal in the Fifth Circuit Court of Appeals. Oral argument was heard in August, 1995, and a decision is expected shortly. Hopwood raises a plethora of significant issues concerning the used of affirmative action by institutions of higher education. Although strong policy arguments can be made that educational concerns warrant deference from the courts, the near uniform answer of the federal bench has been that racial classifications in any context should be strictly scrutinized. See, e.g., Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. 4523

1 Most of the leading Supreme Court decisions in the affirmative action sphere have arisen in the employment context. Affirmative action concerns are significantly different when they arise in the realm of admission to selective institutions of higher education. Affirmative action in higher education does not disrupt vested or settled expectations, such as those held by senior employees faced with the loss of their jobs or denial of accrued promotion rights. See Wygant v. Jackson Board of Education, 476 U.S. 267, 280-83 (1986) (contrasting affirmative action in layoff context as opposed to entry-level positions). See also Johnson v. Transportation Agency, 480 U.S. 616, 623-26 (1987) (applying same analysis to promotions). In addition, because of the unique role of education in providing channels for social advancement for historically excluded groups, affirmative action should be upheld if it is reasonably calculated to achieve a significant governmental objective and does not unnecessarily trample on the rights of third parties. See United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979).

Strict scrutiny means that a court will analyze whether an affirmative action admissions program is supported by compelling governmental or institutional interests, and, if so, whether it is narrowly tailored to achieve those interests. Croson, 488 U.S. at 500. Thus, the first issue analyzed by this paper is the limits of what courts will accept as compelling interests. Second, this paper attempts to provide some insights into the keys to narrowly tailoring an affirmative action program once compelling interests are found.

II.

THE AFFIRMATIVE ACTION PROGRAM AT THE UNIVERSITY OF TEXAS LAW SCHOOL

The facts of the Hopwood case provide an excellent canvas on which to draw the picture of allowable affirmative action today. The Law School granted a racial preference to applicants who were black or Mexican-American. Traditionally, these two historically disadvantaged groups in Texas have been underrepresented in the Law School’s entering class.³

²Adarand overruled Metro Broadcasting, Inc. v. FCC, 487 U.S. 547 (1990), which held that an intermediate level of scrutiny applied to affirmative action programs adopted pursuant to congressional mandate. Today, congressionally mandated affirmative action programs, like programs mandated by state statutes, municipal ordinances, or (at colleges and universities) institutional policies, must satisfy the more demanding “strict scrutiny” standard from Croson and other cases.

³Before the implementation of an affirmative action program in the 1970’s, these two groups represented an insignificant portion of the Law School student body. Even after affirmative action, neither group ever achieved numbers in the entering class that approximated their percentage in the Texas population. Blacks, who constitute 12 percent of the State’s population, have never accounted for more than 9 percent of the entering class. Mexican-Americans, 21 percent of the State’s population, have ranged from a low of 10 percent to a high of 14 percent of the entering class.
The effects of the affirmative action program on these two groups at the Law School have been significant over the years, and were quantified at trial. In 1992, the entering class was comprised of 41 blacks, 55 Mexican-Americans, and 418 whites and other minorities not belonging to those two groups. See attached Exhibit “A”. The evidence adduced at trial showed that, without an affirmative action program in 1992, the Law School’s entering class would have been comprised of at most nine blacks and 18 Mexican-Americans. With affirmative action, blacks and Mexican-Americans together constituted 19 percent of the entering class; without affirmative action, they would have accounted for barely more than 5 percent of first-year students. The results of the affirmative action program were clear. The question was whether the program was supported by compelling governmental objectives.

The affirmative action procedures used by the Law School in 1992 were complex, but a short-hand explanation will suffice for purposes of this paper. Applicant files were initially sorted based on “Texas Index” scores. The Texas Index, or “TI,” was a composite score calculated from an applicant’s Law School Admission Test score and his or her undergraduate grade point average. Based on TI scores, applicants were sorted into three categories: presumptive-admit, discretionary zone, and presumptive-deny. Those in the presumptive-admit zone were granted admission absent extraordinary circumstances. The same was true in reverse for those in the presumptive-deny category.

All other applicants fell into the discretionary zone for further consideration. However, the presumptive-admit, discretionary zone, and presumptive-deny cut-off points were different for blacks and Mexican-Americans than for other applicants. In other words, when the initial sorting was complete, the discretionary zone included blacks and Mexican-American applicants whose TI scores were lower than those of non-minority applicants who were also in the discretionary zone.

In 1992, the Law School utilized a minority subcommittee to evaluate minority files and then make a recommendation to the whole admission committee as to which of the minority files should be considered for admission. Within the discretionary zone, factors other than the TI score were considered and weighed in comparing the applicants’ files to each other (e.g., writing samples, letters of recommendation, extenuating circumstances, etc.). The hard admissions decisions were made in
the discretionary zone, and it was one of the Law School’s procedures in this zone -- the use of the minority subcommittee -- that was found defective by Judge Sparks.\textsuperscript{4}

However, the \textit{Hopwood} litigation was also an all-out frontal assault on affirmative action at the Law School. The Plaintiffs argued that the policy of affirmative action could not withstand strict scrutiny because it was unsupported by compelling governmental interests and all of its components, not just the minority subcommittee, failed to pass the test of being narrowly tailored to achieve compelling governmental interests. Judge Sparks’ determinations about the Law School’s policies and practices and other recent case law provide a guide to what it takes to uphold a successful affirmative action process under current law.

\section*{III. ACCEPTED COMPPELLING INTERESTS}

Over the years, litigants have proffered many reasons to support the existence of affirmative action programs. Only two have been accepted by the federal courts: (1) remedying the present effects of past discrimination, \textit{e.g.}, \textit{United States v. Paradise}, 480 U.S. 149, 167 (1987) ("the government unquestionably has a compelling interest in remedying past and present discrimination by a state actor"); and (2) fostering diversity, \textit{e.g.}, \textit{Regents of the University of California v. Bakke}, 438 U.S. 265, 316 (1978) (Powell, J.), and \textit{Metro Broadcasting, Inc. v. FCC}, 487 U.S. 547, 569-583 (1990) (broadcast diversity).\textsuperscript{5} These two compelling interests are discussed in turn below.

\begin{flushright}
\footnotesize
\textsuperscript{4} In early 1994, prior to trial, the Law School instituted an administrative admissions procedure under which the minority subcommittee was abolished. The new procedure utilizes a three-person administrative committee that reviews all files without separating them into presumptive-admit, discretionary zone, and presumptive-deny categories. The committee selects the entering class while still considering race and giving an admissions preference to blacks and Mexican-Americans. Although the new procedure was not in dispute before Judge Sparks in \textit{Hopwood}, Judge Sparks found that the new policy remedied the constitutional defect he had found, in that it abolished the minority subcommittee, and he accordingly refused to issue any injunctive relief that would in any way restrain affirmative action practices at the Law School in the future.

\textsuperscript{5} Some doubt the continued viability of diversity as a compelling interest. The Supreme Court last addressed diversity as a justification for affirmative action in \textit{Metro Broadcasting, Inc. v. FCC}, 487 U.S. 547 (1990), in which a bare majority of the Justices upheld an FCC affirmative action (continued...)}
A. Remedying Past Discrimination

In general, courts will not uphold affirmative action programs aimed at remedying "mere" societal discrimination. Wygant, 476 U.S. at 275. That is, state actors are generally limited to remedying discrimination in which they participated. Croson, 488 U.S. at 498. Therefore, for example, a governmental entity cannot simply decide to grant layoff preferences to minorities in an effort to cure societal ills of discrimination. Wygant, 476 U.S. at 274 (there must be "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy ... past discrimination"). However, different standards may apply in the educational context in some circumstances.

A system of higher education is under an affirmative duty to eliminate vestiges of racial segregation and discrimination in its state and to reform policies and practices that contribute to separation of the races. United States v. Fordice, 112 S. Ct. 2727, 2743 (1992). As one court has noted, "[a]pplicants do not arrive at the admissions office of a professional school in a vacuum." To be admitted, they ordinarily must have been students for sixteen years. Geier v. Alexander, 801 F.2d 799, 809 (6th Cir. 1986). Thus, an institution at the apex of that system does more than remedy "amorphous" social discrimination when it institutes a program of affirmative action. Id. at 810. Accordingly, states that have long recognized histories of educational discrimination against blacks and other minorities may be better able to meet the burden of showing that affirmative action in higher education is justified to remedy the present effects of past discrimination.

In Hopwood, the State of Texas met this burden by showing the unfortunate history of discrimination against minorities in its primary, secondary, and postsecondary systems of education.

(...continued)

program giving minority-owned broadcasting stations a preference in the licensing process. As noted in footnote 2, above, the Adarand decision in the summer of 1995 overruled Metro Broadcasting, and there is considerable doubt whether today's Supreme Court would react sympathetically to a college or university affirmative action program predicated solely on the diversity rationale. Nose-counters point out that four Justices (O'Connor, Scalia, Kennedy and Chief Justice Rehnquist) dissented in Metro Broadcasting on the ground that modern equal protection doctrine recognizes the remediation of past discrimination as the only compelling interest warranting racial preferences; Justice Thomas's concurrence in Adarand suggests that there is a potential fifth vote for that position.
and also by illustrating the effects of the absence of affirmative action in resegregating law school education in Texas. First, "Texas' long history against its black and Hispanic citizens in all areas of public life is not the subject of dispute." *League of United Latin American Citizens v. Clements*, 999 F. 2d 831, 866 (5th Cir. 1993) (Higginbotham, J.); see also id. at 915 (King, J., dissenting). The State of Texas, by constitution and statute, previously required the maintenance of separate "free public schools" for black students and white students. This requirement was not repealed until 1969. *Texas Constitution Art. VII, § 7* (repealed August 5, 1969). Pursuant to this constitutional provision, Texas segregated its primary and secondary schools and also denied admission to law school to blacks.

In 1946, Heman Sweatt applied for admission to the law school. He met the admission requirements, but was precluded from attending by the Texas Constitution. *Sweatt v. Painter*, 210 S.W. 2d 442, 443 (Tex. Civ. App. -- Austin 1948, writ ref'd), rev'd, 339 U.S. 629 (1950). In 1947, the Texas Legislature created what is now Texas Southern University in Houston for the purpose of avoiding integration of the University of Texas. The law school at TSU was originally created specifically to defeat Heman Sweatt's suit for admission to the University of Texas Law School. The abandonment of the affirmative action program at the Law School today would result in significant resegregation of the State's flagship law school and the concentration of minority law students in Texas in what had initially been established as a separate minority law school. See Exhibits "A" and "B." Accordingly, in *Hopwood*, the State of Texas was able to justify its affirmative action program in part by showing its past history of discrimination in its educational system, thereby evoking its affirmative duty under *Fordice* to ensure that past discrimination was remedied.

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6 Regardless of system-wide discrimination, the University of Texas had proof of past discrimination against blacks by excluding them from attendance and *de facto* discrimination against Mexican-Americans. Thus, the defendants in *Hopwood* met the even stricter standards of *Wygant*.

7 Texas was aided in making this proof by official findings of the Department of Education Office for Civil Rights and the existence of a federal consent decree under which Texas was obligated to take affirmative steps to prevent the re-emergence of a dual system of higher education.
B. Diversity

In Bakke, Justice Powell recognized that an educational institution had a compelling interest in obtaining the benefits that flow from a racially and ethnically diverse student body. Bakke, 438 U.S. at 315-317. This interest justified the use of racial preferences (but not quotas). Id. at 318.

The diversity interest is recognized in the educational context due to the unique role of education in our society. To invoke the diversity interest, an educational institution seeking to uphold an affirmative action program can and should present evidence that diversity in the classroom is beneficial and that it is not impossible to achieve meaningful diversity under a race-neutral admissions program. For example, in Hopwood, law school deans from across the nation testified that diversity, especially in the law school environment, contributed to the learning experience and benefitted the entire class. Based on this evidence, Judge Sparks found the pursuit of diversity alone could justify an affirmative action program. Hopwood, 861 F. Supp. at 571.

IV.

KEYS TO NARROW TAILORING

Compelling interests having been advanced and accepted, an affirmative action program is only halfway to being upheld. It must withstand an analysis of whether it is tightly matched to achieving its stated governmental objectives. In Paradise, the Supreme Court established a four-part test to determine if an affirmative action plan supported by compelling interests was narrowly tailored: (1) the necessity for relief and the efficacy of alternative remedies; (2) the flexibility and

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8 Brown v. Board of Education, 347 U.S. 483, 493 (1954): “[Education] is the very foundation of good citizenship. Today it is a principal instrument for awakening the child to cultural values and preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably expect to succeed in life if he is denied the opportunity to an education.”

9 Because the Supreme Court has not spoken on diversity in the educational context since Bakke and the Bakke opinion most widely cited by the courts represented the views of only a single Justice (Justice Powell), a public educational institution defending its affirmative action program should, if the facts allow, advance remedying past discrimination as a companion goal. Relying solely on diversity may prove a dangerous tactic -- particular if this aspect of the trial court decision in Hopwood is substantially modified on appeal.
duration of the relief; (3) the relationship of numerical goals to the relative minority “market”; and (4) the impact of relief on the rights of third persons. *Paradise*, 480 U.S. at 171.

Under the first component of the test, courts merely seek to determine whether the procedures used to carry out an affirmative action program are in fact needed. In *Hopwood*, the State illustrated it was not possible to achieve a diverse student body without affirmative action and without it the goal of remedying past discrimination could not be achieved, *i.e.*, Texas would return to a system of segregated law schools. The key to this proof was testimony that without consideration and admission of minority applicants with lower Texas Index scores than white applicants, the Law School would have only token representation of blacks and Mexican-Americans and Texas would return to a starkly dual system in which virtually all minority law students in Texas attended TSU law school. Under these circumstances Texas was constitutionally compelled to overcome the segregated effects of race-neutral admission standards. *Fordice*, 112 S. Ct. at 2736-39.

Second, courts look to the flexibility and duration of the affirmative action program. Set-asides, quotas, and race-exclusive programs have always been highly disfavored and are often struck down. *E.g.*, *Bakke*, 438 U.S. at 319 (assignment of a fixed number of places in medical school class to certain minority groups struck down); *Podberesky*, 38 F. 3d at 153 (race-exclusive scholarship program found unconstitutional); *contra*, *Geier*, 801 F. 2d at 802 (affirming a court-approved plan to pre-admit 75 black college sophomores each year to Tennessee professional schools). Courts define an illegal quota as an unyielding number rigidly and inflexibly obtained regardless of the competition for the benefit conferred. See, *e.g.*, *Metro Broadcasting*, 497 U.S. at 599 (a quota is a “fixed quantity set aside”); *Croson*, 488 U.S. at 499 (rigid and unyielding 30-percent minority set-aside was a quota); *Bakke*, 438 U.S. at 288 (defining quota as a fixed number of seats set aside in an entering medical school class).

In *Hopwood*, the Law School’s affirmative action program passed the flexibility component of the narrow tailoring test because admissions data showed that “the percentages fluctuate randomly, albeit in a relatively narrow range, and show no consistent pattern of increase.” *Hopwood*, 861 F.
Although the Law School maintains stated goals of obtaining an entering class that is 10 percent Mexican-American and 5 percent black, these goals are manifestly targets only, and not quotas. In some years, the Law School failed to meet its goals because of the relatively weak strength of the minority applicant pool. Therefore, held Judge Sparks, the affirmative action program demonstrably did not function as a rigid, unyielding quota.

Third, to show that an affirmative action program is narrowly tailored, an educational institution must establish a reasonable relationship between the numerical goals it pursues and the relevant population of prospective students. *Hopwood*, 861 F. Supp. at 575. See also *Paradise*, 480 U.S. at 179-183.

In *Hopwood*, the Law School’s goals of an entering class that was 10 percent Mexican-American and 5 percent black were derived from the college graduation rates for those groups in Texas. The Law School did not attempt to set goals that would reflect the percentages of minorities in the general population or even the percentages of minorities attending college. The court found that these goals were reasonable and logical as related to the pool of prospective law students. *Hopwood*, 861 F. Supp. at 575.

Finally, courts seek to ascertain whether the racial preference granted has an undue impact on the rights of third parties. Here, education again appears to enjoy special consideration. Racial preferences in higher education admissions have significantly less impact on third parties than they do in the employment context. *Geier*, 801 F. 2d at 806. They do not disrupt the settled expectations of any party. *Johnson*, 480 U.S. at 638; *Weber*, 443 U.S. at 208. Unlike hiring and firing in stagnant

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Admissions data from 1983 to 1993 reflect the following minority admissions as a percentage of the total entering class:

<table>
<thead>
<tr>
<th>Year</th>
<th>Black</th>
<th>Mexican-American</th>
<th>Year</th>
<th>Black</th>
<th>Mexican-American</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>9.3</td>
<td>10.0</td>
<td>1989</td>
<td>6.0</td>
<td>11.4</td>
</tr>
<tr>
<td>1984</td>
<td>6.2</td>
<td>14.3</td>
<td>1990</td>
<td>7.1</td>
<td>11.6</td>
</tr>
<tr>
<td>1985</td>
<td>4.6</td>
<td>11.2</td>
<td>1991</td>
<td>6.9</td>
<td>10.6</td>
</tr>
<tr>
<td>1986</td>
<td>4.4</td>
<td>13.1</td>
<td>1992</td>
<td>8.0</td>
<td>10.7</td>
</tr>
<tr>
<td>1987</td>
<td>3.2</td>
<td>10.2</td>
<td>1993</td>
<td>5.9</td>
<td>10.0</td>
</tr>
<tr>
<td>1988</td>
<td>7.0</td>
<td>10.7</td>
<td></td>
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</tbody>
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sectors of the economy, admission to a particular college or graduate school is not a “zero sum game.” Fleming, Pursuing Diversity in Legal Education, 36 How. L. J. 291, 294-96 (1993).

The Hopwood plaintiffs themselves proved that the Law School’s affirmative action program did not unduly impact them. Of the three plaintiffs who applied to law schools other than the University of Texas, all three received offers of admission from at least one law school. One was admitted to Texas Tech, one to the University of Houston, and one to Southern Methodist University. The fourth plaintiff, Ms. Hopwood herself, did not apply to any other law school. Therefore, the State of Texas did not deny anyone the right to pursue a legal education. Despite affirmative action at the University of Texas, there is no doubt that all four plaintiffs could be well on their way to finishing law school and embarking on their legal careers at Texas.

However, it is this branch of the narrowly tailored test that led the trial court in Hopwood to conclude that one of the procedures utilized by the Law School in 1992 was unconstitutional. Judge Sparks found that the use of the minority subcommittee deprived white applicants of the right to individual comparison. He found that Justice Powell’s statement in Bakke that race or ethnicity should “not insulate the individual from comparison with all other candidates for available seats” forbade the use of a procedure such as the minority subcommittee. While the court held that the aspect of the Law Center’s affirmative action program that gave minority applicants a “plus” was lawful, Judge Sparks still felt that “the possibility existed that the Law School could select a minority who, even with a ‘plus’ factor, was not qualified to be a part of the entering class as a non-minority denied admission.” Hopwood, 861 F. Supp. at 577-78. Thus, “the constitutional infirmity of the 1992 Law School admissions procedure ... is not that it gives preferential treatment on the basis of race, but that it fails to afford each individual applicant a comparison with the entire pool of applicants.” Id. at 579. However, Judge Sparks quickly concluded that none of the plaintiffs was, in fact, damaged or discriminated against by the minority subcommittee and therefore they were not entitled to any actual damages or relief because of the Law School’s use of the minority subcommittee. Id. at 580-83.
V. CONCLUSION

Affirmative action continues to be an area of hot debate in our society. It is increasingly coming under attack in all fields, but especially in education. When an affirmative action program is challenged, a court will carefully scrutinize the reasons for its existence and the mechanisms used to administer it.

Only two reasons to practice affirmative action have been accepted by the courts. A college or university can employ race-based preferences as part of an affirmative action program (1) to remedy the present effects of past discrimination, and/or (2) to foster diversity in its student body.

Once these compelling interests are shown, the affirmative action program in question must still survive an inquiry as to whether it is narrowly tailored to achieve those goals. The key to surviving narrowly tailored analysis can be summed up in one word: reasonableness. A college or university seeking to uphold an affirmative action program must show that the program is necessary in light of the goals it has put forward to support the program; that the program is operated in a flexible fashion that accommodates individual considerations that may override the goal of achieving minority representation; that numerical goals are reasonable in light of the minority population possessing the credentials for admission; and that the program is geared to minimize the impact on the rights of third parties. The process should ensure that each applicant is assessed against every other applicant; there should be no suggestion that minority applicants are compared only against each other. If an affirmative action program is reasonably designed, reasonably maintained, and reasonably administered, the chances of its being upheld in court are maximized.