HOPWOOD AND AFFIRMATIVE ACTION IN THE EDUCATIONAL CONTEXT

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I.

INTRODUCTION

In September of 1992, four white applicants, rejected by the University of Texas School of Law, 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 of 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. *See* ***Hopwood v. State of Texas***, 861 F.Supp. 551 (W.D. Tex. 1994).

The ***Hopwood*** case raises a plethora of significant issues relevant to how, when, where and why affirmative action may be legally pursued by public educational institutions. This paper focuses on two which arise from the standard of judicial review applied when an institution of higher learning pursues the goals of affirmative action. Although strong policy arguments can be made that educational concerns warrant deference from the courts,[1] the near uniform answer of the federal bench has been that racial classifications in any context should be strictly scrutinized. *See, e.g.*, ***City of Richmond v. J.A. Croson Co.***, 488 U.S. 469, 500 (1989) (striking down minority preference granted in city contracts); ***Podberesky***

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[1] 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 States Steel Workers v. Weber***, 443 U.S. 193, 208 (1979).

v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994) (finding scholarship program reserved exclusively for blacks unconstitutional).[2]

Strict scrutiny means that a court will analyze whether an affirmative action admissions program is supported by compelling governmental 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 insight 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 SCHOOL OF LAW

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

[2] The Supreme Court has applied an intermediate level of scrutiny to affirmative action programs adopted pursuant to congressional mandate requiring only that they serve important governmental objectives and that the procedures used are substantially related to those objectives. *Metro Broadcasting, Inc. v. FCC*, 487 U.S. 547 (1990)(upholding FCC preference for minority-owned radio stations). However, that standard is now under direct challenge and will soon be reconsidered by the Supreme Court. *See Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994) *cert. granted*, 115 S.Ct. 569 (1994).

class.[3] The effects of the affirmative action program on these two groups at the Law School are measurable.

In 1992, the entering class with affirmative action was comprised of 41 blacks, 55 Mexican-Americans and 418 Whites and other minorities not belonging to those two groups. *See* attached Exhibit "A". Without an affirmative action program in 1992, the Law School's entering class would have been comprised of, at most, 9 blacks, 18 Mexican-Americans and 487 Whites and other minorities. *See* attached Exhibit "B". That is, if admissions criteria were applied without regard to race and if those blacks and Mexican-Americans that were offered admission under a race neutral system accepted and attended in the same numbers as they did when an affirmative action program was in place, blacks would represent 1.8% of the entering class and Mexican-Americans would represent 3.6% of the entering class. The results of the affirmative action program are therefore clear. The question is whether this program is supported by compelling governmental objectives.

The process used invokes the narrowly tailoring question. The procedures used by the Law School in 1992 were somewhat complex, but a short-hand explanation will suffice for the purposes of this paper. In general, in 1992 applicant files were initially sorted based on their Texas index. The Texas index is a composite score calculated from an applicant's score on the LSAT and their undergraduate grade point average. Based on the Texas index score, applicants were sorted into three categories: presumptive-admit, discretionary zone

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[3] Prior to the implementation of an affirmative action program in the 1970's, these two groups represented a statistically insignificant portion of the Law School student body. Even with the Law School's affirmative action program, neither group has ever achieved numbers in the entering class that approximate their percentage in the Texas population (blacks - 12% of the population; from 3 1/2% to 9% of the Law School's entering class; Mexican-Americans - 21% of the population; from 10% to 14% of the Law School's entering class).

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, what constituted the presumptive-admit, discretionary zone and presumptive-deny categories was different for blacks and Mexican-Americans. That is, when the initial sorting was complete, the black and Mexican-American discretionary zone constituted applicants with lower Texas indexes than those in the white 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 Texas index score were considered and weighed in comparing the applicant's 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 - *i.e.*, the use of the minority subcommittee - that was found defective by Judge Sparks.[4]

However, the ***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

[4] In early 1994, prior to trial, the Law School elected to institute an administrative admissions procedure abolishing the minority subcommittee. This new procedure utilizes a three person administrative committee that reviews all files without separating them into presumptive-admit, discretionary zone or presumptive-deny categories. The administrative admissions committee selects the entering class while still considering race and giving a racial preference to blacks and Mexican-Americans. Although the particulars of this procedure were not in dispute before Judge Sparks in the ***Hopwood*** litigation, Judge Sparks found that the new policy remedies the constitutional defect he had found, in that it abolished the minority subcommittee, and accordingly, he refused to issue any injunctive relief which would in any way restrain affirmative action practices at the Law School in the future.

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. As discussed below, this attack on the Law School's affirmative action program was unsuccessful. 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.

III.

ACCEPTED COMPELLING INTERESTS

Over the years, litigants have proffered many reasons to support the existence of affirmative action programs. However, only two have been accepted by the federal courts: (1) remedying the present effects of past discrimination. *See, e.g.*, ***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. *See, e.g.*, ***Regents of the University of California v. Bakke***, 438 U.S. 265, 316 (1978) (Powell, J.); *see also* ***Metro Broadcasting, Inc. v. FCC***, 487 U.S. 547, 569-583 (1990) (broadcast diversity).[5] These two compelling interests are discussed in turn below.

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.

[5] Some doubt the continued viability of diversity as a compelling interest. ***Metro Broadcasting***, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting, joined by Rehnquist, Scalia and Kennedy) (modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination).

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 contributed 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 higher systems of education and also by illustrating the effects of the absence of affirmative action which would resegregate law school education in Texas.[6] First, "Texas' long history against its black and

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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***.

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.); *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 Article 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 ("TSU") located 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.[7]

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[7] Texas was aided in making this proof by official findings of the Department of (continued...)

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.[8] 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 possible 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 benefits the entire class. Based on this evidence, Judge Sparks found that pursuit of diversity alone could justify an affirmative action program. ***Hopwood***, 861 F.Supp. at 571.[9]

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[7](...continued)
Education Office of Civil Rights and the existence of a consent decree with the federal government that Texas take affirmative steps to prevent the re-emergence of a dual system of higher education.

[8] ***Brown v. Board of Education, 347 U.S. 483, 493 (1954)*** ("[Education] is the very foundation of good citizenship. Today it is a principle 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 reasonable expect to succeed in life if he is denied the opportunity of an education.")

[9] Because the Supreme Court has not spoken on diversity in the educational context since ***Bakke*** and the ***Bakke*** opinion itself only represented Justice Powell's views, 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.

IV. Keys to Narrowly 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 program supported by compelling interests was narrowly tailored: (1) the necessity for relief and the efficacy of alternative remedies; (2) the flexibility and 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 parties. ***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 that without affirmative action, the state could not remedy past discrimination, *i.e.*, Texas would return to a system of segregated law schools without affirmative action. The key to this proof was testimony that without consideration and admission of minority applicants with lower Texas indexes 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, not only was the law school's affirmative action program narrowly tailored, but Texas is constitutionally compelled to overcome the segregated effects of race neutral numerical admission standards. ***Fordice***, 112 S.Ct. at 2736-39.

Second, courts looked to the flexibility and duration of the affirmative action program. Duration is not often tested, but flexibility is often the key to upholding an

affirmative action program. Set asides, quotas and race exclusive programs have always been highly disfavored and are often struck down. *See, 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 (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% minority set aside was a quota); ***Bakke***, 438 U.S. at 288 (defining quota as a fixed number of seats set aside in the 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."[10] ***Hopwood***, 861 F.Supp. at 574. Although the law school maintains stated

[10] Admissions data from 1983 to 1993 reflects the following minority admissions as a percentage of the total entering class:

Year	Black	Mexican-American
1983	9.3	10.0
1984	6.2	14.3
1985	4.6	11.2
1986	4.4	13.1
1987	3.2	10.2
1988	7.0	10.7
1989	6.0	11.4
1990	7.1	11.6
1991	6.9	10.6
1992	8.0	10.7

(continued...)

goals of obtaining an entering class that is 10% Mexican-American and 5% black, these goals are only guidelines. In some years, the law school failed to meet its goals because of the relatively weak strength of the minority applicant pool. *Id.* Therefore, in 1992 the affirmative action program at the law school was not 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 is 10% Mexican-American and 5% Black were derived from the college graduation rates for those groups in Texas. The law school did not attempt to set goals which would reflect a percentage of the minorities in the general population or even of the percentage 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, in determining whether an affirmative action program is narrowly tailored, courts seek to ascertain whether the racial preference granted has an undue impact on the rights of third parties. Here, education again seems to enjoy special consideration. Racial preferences in higher education admissions have significantly less impact on third parties than they do in employment decisions. ***Greer***, 801 F.2d at 806. They do not disrupt settled expectations of any party. ***Johnson***, 480 U.S. at 638; ***Weber***, 443 U.S. at 208. Unlike hiring and firing in stagnant sectors of the economy, admission to a particular law school is

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[10](...continued)

1993	5.9	10.0

not a "zero sum game." Fleming, ***Pursing 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 that applied to law schools other than the University of Texas, all three received offers of admission. One received an offer of admission at Texas Tech, one received an offer of admission to The University of Houston and one received and accepted an offer at Southern Methodist University Law School. The fourth, Hopwood herself, did not apply to any other schools. Therefore, the State of Texas did not deny anyone the right to pursue a legal education. Thus, 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 in Texas.

However, it is this branch of the narrowly tailoring test that led the 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. ***Hopwood***, 861 F.Supp. at 577-78. While the court held that the aspect of the Law School'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." *Id.* at 578. Thus, "the constitution affirmity of the 1992 Law School admissions procedure, therefore, 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 ***Hopwood*** Plaintiffs were, 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 580-583.

In sum, the key to surviving narrowly tailoring analysis can be summed up in one word: reasonableness. A state actor 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 flexible and willing to accommodate individual considerations which may override the goal of achieving minority representation; that the goals that it seeks to achieve are reasonable in light of the minority population and the credentials for admissions they possess; and that the program is geared to minimize impact on the rights of third parties. Whites and other minorities should not be put through a process that even appears to deprive them of a fair chance to being compared to minorities. Thus, if an affirmative action program is reasonably created, reasonably maintained and reasonably administered, the chances of it being upheld in court are maximized.

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 it is challenged, courts 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 state actor may attempt to remedy the present effects of past discrimination and/or

it may seek to create diversity in its student body. Once these compelling interests are proven, the affirmative action program in question must still survive an inquiry as to whether it is narrowly tailored to achieve those goals. If it reasonably fulfills those goals with consideration given to the rights of parties not eligible for the affirmative action program, it may be upheld in a court of law.

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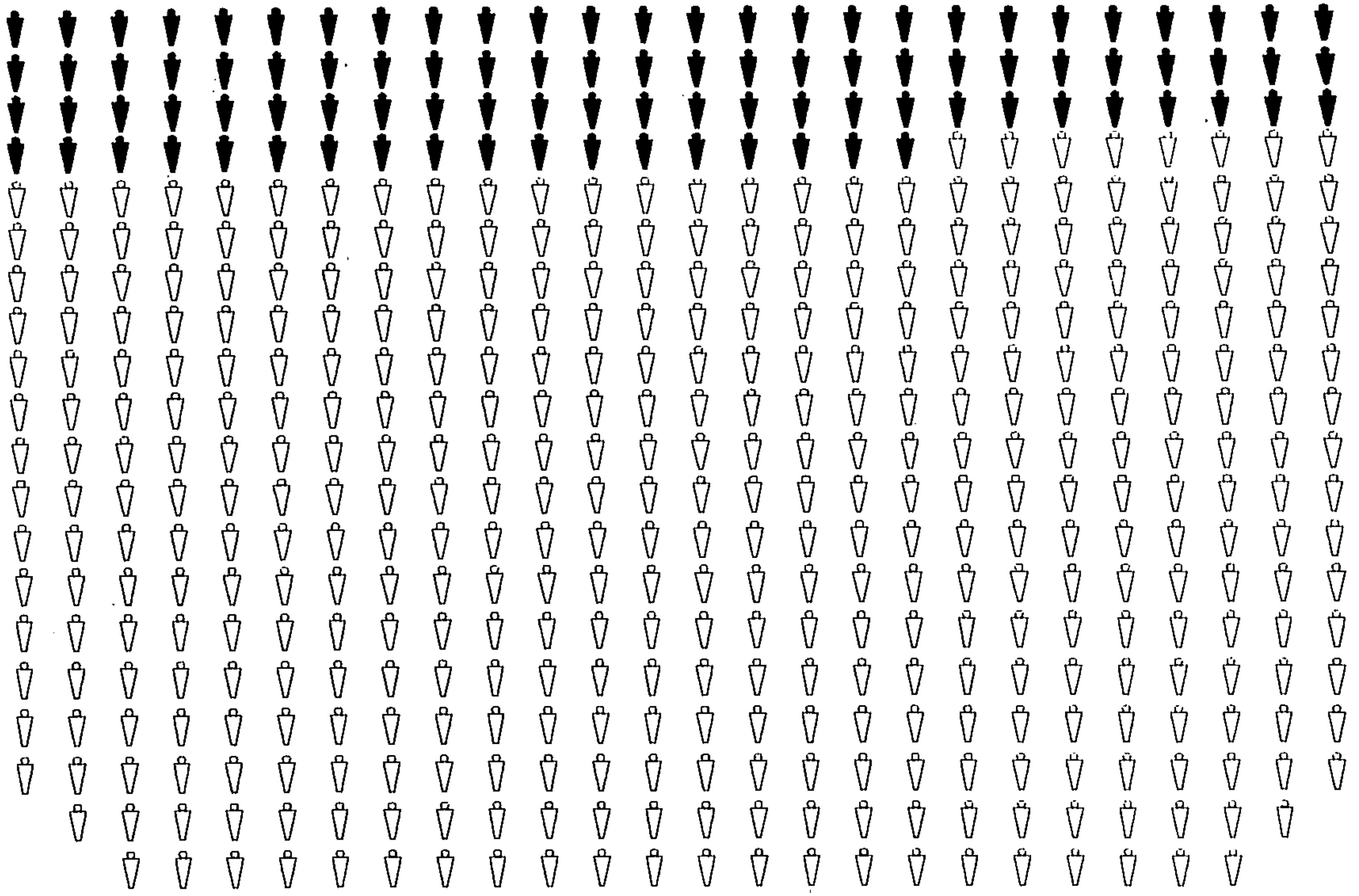

EXHIBIT "A"

HIGHEST LEVEL OF DIVERSITY OF 1992 ENTERING CLASS WITHOUT AFFIRMATIVE ACTION