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HOPWOOD, BAKKE AND THE FUTURE OF THE DIVERSITY JUSTIFICATION

*by Lackland H. Bloom, Jr.**

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I. INTRODUCTION

The decision of the Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*¹ sent shock waves through the academic community with its holding that the Equal Protection Clause of the Fourteenth Amendment² prohibited the University of Texas Law School from taking account of race as a factor in its admissions process.³ In the course of invalidating certain procedures employed by the law school, the Fifth Circuit concluded that Justice Powell's influential opinion in *Regents of the University of California v. Bakke*,⁴ which recognized the pursuit of diversity in higher education as a compelling state interest,⁵ had never constituted a majority holding of the Court, had been substantially undermined by recent precedent, and was inconsistent with basic principles of equal protection.⁶ Consequently, the Fifth Circuit concluded that the promotion of racial diversity in the law school's student body was not a compelling state interest under the Equal Protection Clause.⁷ While acknowledging that providing a remedy for the present identified effects of past discrimination can be a compelling state interest, the Court of Appeals concluded that the law school had failed to establish any such present effects.⁸ In the absence of a compelling state interest, the court held that the law school could not constitutionally take race into account in the admissions process.⁹ The United States Supreme Court denied the state's petition for certiorari.¹⁰ Consequently, public universities in Texas are presently precluded from taking account of race in admissions and, presumably, in financial aid as well.¹¹ The same restrictions apparently apply to private institutions within

1. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

2. U.S. CONST. amend. XIV, § 1.

3. The Society of American Law Teachers sponsored an emergency conference on *Hopwood* in Chicago on September 20, 1996. The Association of American Law Schools scheduled a workshop on *Hopwood* and diversity on January 4, 1997 as part of its annual meeting.

4. 438 U.S. 265 (1978).

5. *See id.* at 314.

6. *See Hopwood*, 78 F.3d at 944-48.

7. *See id.* at 948.

8. *See id.* at 951-55.

9. *See id.* at 962.

10. *See Hopwood v. Texas*, 116 S. Ct. 2581 (1996).

11. *See Hopwood*, 78 F.3d at 962. Public universities in Mississippi and Louisiana may continue

the Fifth Circuit receiving federal aid pursuant to the Civil Rights Act of 1964,¹² for both in *Bakke*,¹³ and in subsequent cases, a majority of the Supreme Court has held that the substantive standard under Title VI is identical to that of equal protection.¹⁴

Because many institutions of higher learning have relied on the Powell opinion in *Bakke* as the blueprint for designing and operating a constitutionally acceptable affirmative action admissions process,¹⁵ *Hopwood* will have a significant impact in the immediate future in the Fifth Circuit¹⁶ and may eventually have a similar impact nationally if its reasoning is adopted by the Supreme Court or by other Courts of Appeal. Predictably, supporters of racial preferences have been highly critical of the *Hopwood* decision¹⁷ while opponents of racial preferences have hailed it as a long needed

to rely on race as these states are under federal court orders to remedy the effects of past discrimination. See Op. Tex. Att'y Gen. No. DM 97-001 n.13 (1997).

12. 42 U.S.C. § 2000d (1994).

13. See *Bakke*, 438 U.S. 265. In *Bakke*, both Justice Powell, writing for the Court, and Justice Brennan, writing for four members of the Court, took the position that, with respect to racial discrimination, Title VI was intended to apply the same standard as the Equal Protection Clause of the Fourteenth Amendment. See *Bakke*, 438 U.S. at 287 (Powell, J.); *id.* at 328 (Brennan, J., concurring in the judgment in part and dissenting in part). Justice Stevens, writing for four justices, took the position that Title VI prohibited the use of racial preferences independent of the equal protection standard. See *id.* at 415-16 (Stevens, J., concurring in the judgment in part and dissenting in part).

14. See *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 610-12 (1983) (Powell, J., concurring in the judgment); *id.* at 612-13, (O'Connor, J., concurring in the judgment); *id.* at 635-45 (Stevens, J., dissenting). The same principle has been recognized in a more recent case challenging a law school diversity-based admissions program. See *Davis v. Halpern*, 768 F. Supp. 968, 974 (E.D.N.Y. 1991).

15. See Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 12, *Texas v. Hopwood*, 116 S. Ct. 2581 (April 30, 1996) (No. 95-1775); BERNARD SCHWARTZ, BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT 154-56 (1988); Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1769 (1996).

16. Enrollment statistics compiled by the State Bar of Texas indicate that minority enrollment at the law schools of the University of Texas, Southern Methodist University, and Texas Tech University declined significantly, while minority enrollment at the University of Houston's and Baylor University's law schools remained about the same. St. Mary's University School of Law experienced a decline in the enrollment of black students but an increase in the enrollment of Hispanic and Mexican American students. Declines in minority enrollment at the law schools of Texas Southern University and Texas Wesleyan University were accompanied by correspondingly large decreases in the size of the entering classes. No comparative 1996 figures were available from South Texas College of Law. DEPARTMENT OF RESEARCH AND ANALYSIS, STATE BAR OF TEXAS, SURVEY OF TEXAS LAW SCHOOLS: THE RACIAL/ETHNIC COMPOSITION OF FIRST YEAR CLASSES 1996-1997, 1997-1998 (1997) (see Appendix I). See also Peter Applebome, *Minority Law School Enrollment Plunges in California and Texas*, N.Y. TIMES, June 28, 1997, at A1 (Enrollment at California state law schools has also declined following the passage of a state referendum prohibiting racial preferences in admission.).

17. See Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1141 (1996); Barbara Bader Aldave, Address at the Laredo Bar Association Law Day, (May 3, 1996) (transcript on file with the Texas Tech Law Review); Michael A. Olivas, *The Road Not Taken: Hopwood v. State of Texas*, BRIEFCASE, Summer 1996, at 16.

correction.¹⁸ A strong dissent from a rehearing en banc¹⁹ and many legal academics have questioned the institutional propriety of the court's rejection of *Bakke*.²⁰

This article will focus on the *Hopwood* court's treatment of *Bakke* and the diversity issue.²¹ It will work through relevant aspects of the Supreme Court's racial preference case law and then analyze *Hopwood*'s treatment of that law. This article concludes that, while the holding of *Bakke* is maddeningly ambiguous, the Fifth Circuit may well have been technically correct in concluding that Justice Powell's diversity rationale was never a valid precedent in that it was never supported by a majority of the Court. This article also concludes that if *Bakke* was a valid precedent, the Fifth Circuit was incorrect in determining that it has been significantly undermined by subsequent case law, although tension is certainly mounting. This article will also show that the Powell opinion in *Bakke* is not inconsistent with the equal protection principles of individuality, anti-stigmatization, and the elimination of enduring racialism. Furthermore, it will contend that, whether or not it ever commanded a majority, the Powell opinion in *Bakke* is entitled to a fair amount of judicial respect because it has been openly relied upon by a large number of universities and professional schools nationwide without apparent disapproval by the Court. Finally, this article recommends that the principle of strict scrutiny be combined with a proposed requirement that institutions that employ race as a diversifying factor publish relevant information about their admissions processes. Such a combination should provide adequate judicial and political checks against the apparent pattern of abuse of the diversity justification.

II. RACIAL CLASSIFICATIONS, STRICT SCRUTINY, AND AFFIRMATIVE ACTION—AN INTRODUCTORY SUMMARY

In *Korematsu v. United States*,²² the Supreme Court first held that state classifications based on race are subject to the strict standard of judicial

18. See Kingsley R. Browne, *Affirmative Action: Policy-Making By Deception*, 22 OHIO N.U. L. REV. 1291, 1295-96 (1996); Lino A. Graglia, "Affirmative Action," *Past, Present, and Future*, 22 OHIO N.U. L. REV. 1207, 1220-22 (1996); John Doggett, *UT Can Find Qualified Minorities*, DALLAS MORNING NEWS, Apr. 8, 1996, at A11.

19. See *Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996) (Politz, C.J., dissenting).

20. See Gabriel Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J., 881, 942-46 (1996); Note, *Fifth Circuit Holds That Educational Diversity Is No Longer A Compelling State Interest*, *Hopwood v. Texas*, 110 HARV. L. REV. 775, 778-79 (1997); Olivas, *supra* note 17, at 18; Aldave, *supra* note 17, at 4.

21. This article will not discuss the court's treatment of the remedial justification in any detail, see *Hopwood*, 78 F.3d at 948-55, the burden of proof issue on damages, see *id.* at 955-57, the denial of injunctive relief, see *id.* at 957-59, the denial of punitive damages, see *id.* at 959, nor the denial of a motion to intervene, see *id.* at 959-61.

22. 323 U.S. 214 (1944).

review under the Equal Protection Clause of the Fourteenth Amendment.²³ This has been interpreted to mean that a racial classification will be upheld only if there is a compelling state interest, the classification is narrowly tailored to serve that interest, and there are no less discriminatory alternatives.²⁴ Initially, this principle developed in cases involving "invidious" discrimination; however, the Court has recently made it clear that the strict standard applies as well to "benign" discrimination such as racial preferences in affirmative action programs.²⁵

The ongoing debate regarding the constitutionality of racial preferences for purposes of affirmative action often focuses on whether the reasons for being especially suspicious of invidious racial discrimination are equally applicable to "benign" preferences.²⁶ To a large extent, contemporary disputes over racial preferences tend to pit two different conceptions of equal protection in the context of race against each other. The *Hopwood* majority, as well as Justice Scalia,²⁷ essentially rely on the "colorblind principle," which holds that any consideration of race in governmental decision making, other than for strictly remedial purposes, is presumptively unconstitutional.²⁸ This conclusion may arise for some or all of the following reasons: such consideration of race is inconsistent with the original understanding of equal protection,²⁹ is premised on assumptions of racial inferiority,³⁰ denigrates the individual through the use of irrelevant and racially based stereotypes,³¹ is immoral,³² is stigmatizing,³³ or leads to enduring racialism.³⁴ Arguably, Justice Powell applied a softer version

23. See *id.* at 216.

24. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 n.6 (1986).

25. See *Adarand*, 515 U.S. at 227; *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion).

26. Compare *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring in the judgment) (arguing that benign racial preferences deserve the same suspicion as invidious racial discrimination) with *id.* at 535 (Marshall, J., dissenting) (arguing that benign discrimination is permissible).

27. See *Adarand*, 515 U.S. at 239.

28. See *Hopwood*, 78 F.3d at 941 n.18; see also *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.").

29. See *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 82-83 (1990).

30. See *Croson*, 488 U.S. at 493.

31. See *Adarand*, 515 U.S. at 236; *Croson*, 488 U.S. at 493.

32. See *Croson*, 488 U.S. at 521 (Kennedy, J., concurring); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) cited by Justice Powell in *Bakke*, 438 U.S. at 295 n.35.

33. See *Croson*, 488 U.S. at 493; *Bakke*, 438 U.S. at 357, 373-74.

34. See *Hopwood*, 78 F.3d at 945-48; see also *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment) (stating that "racial paternalism and its intended consequences can be as poisonous and pernicious as any other form of discrimination"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602, 612-14 (1970) (O'Connor, J., dissenting) (arguing that race-based classifications and unjustified stereotypes promote racial hostility); *Croson*, 488 U.S. at 493, 495, 497-98, 505-06

of the colorblind principle in *Bakke*, concluding that all racial classifications must be strictly scrutinized, but that the non-remedial interest of diversity in education could justify a limited use of racial preferences.³⁵

A competing approach favored by many academics, and partially reflected in the opinion of Justice Marshall in *Bakke*, is known as the "anti-subordination principle," which holds that the use of race by the government is wrong only when it subordinates any racial group.³⁶

The colorblind principle exalts the rights of the individual, while the anti-subordination principle emphasizes the rights of racial groups.³⁷ Both of these principles usually lead to similar results in cases of classic invidious discrimination; however, they tend to produce diametrically opposite conclusions in the context of affirmative action.³⁸ The anti-subordination

(forwarding the idea that classifications based on race may in fact strengthen and solidify the very stereotypes and notions of racial inferiority they seek to remedy); *id.* at 520 (Scalia, J., concurring in the judgment) (discussing the difficulty of removing the national tendency to judge others based on the color of their skin); TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 139-42 (1996) ("[W]e need only consider the history of our country to see that when government makes racial distinctions, bad things do follow."); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) (concluding that racism will not disappear if different treatment based on race is tolerated in the practices of government); Charles Fried, Comment, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 111-12 (1990) (considering the potential effects of race based programs and classifications).

35. See *infra* notes 55-69, 94-112 and accompanying text.

36. See *Bakke*, 438 U.S. at 387-88 (Marshall, J., concurring in the judgment in part and dissenting in part); see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 223-39 (1978) (explaining that only segregation which disadvantages blacks offends their right to be treated as equals); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-21, at 1515 (2d ed. 1988) ("The core value of this principle is that all people have equal worth."); T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1114 (1991) ("The view that race discrimination law ought to be about ending the second-class citizenship of blacks . . . is at the core of the Civil War Amendments from which antidiscrimination norms derive."); Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1015 (1986) ("[I]t would be permissible for a state actor to use facially differentiating policies to redress subordination; it would not be permissible for a state actor to use facially differentiating policies that perpetuate subordination."); Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1986); ("[W]hat is critical, however, is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group. This is what the Equal Protection Clause prohibits."); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1336 (1986) ("*Brown* and its progeny . . . stand for the proposition that the Constitution prohibits any arrangements imposing racial subjugation . . ."); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2453 (1994) (discussing how formal distinctions between races can produce inequality, particularly a "second-class status"). See generally Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (considering the history of segregation and the subordination of blacks).

37. See Morris Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1318, 1326 (1986); Robert G. Dixon, Jr., *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69, 84-85 (1979); Fried, *supra* note 34, at 108-09.

38. Compare *Croson*, 488 U.S. at 528 (Scalia, J., concurring) (arguing that programs based solely on race will have a "disproportionately beneficial impact" on blacks), with *id.* at 529 (Marshall, J., dissenting) (contending that programs based on the colorblind approach discourage acts designed to remedy past discrimination).

approach has been definitively rejected by the courts.³⁹ Thus, the judicial debate, as reflected by *Hopwood*, has focused on whether the pure colorblind approach of Justice Scalia or the more moderate colorblind approach of Justice Powell in *Bakke* should prevail.⁴⁰

III. FROM *BAKKE* TO *HOPWOOD*

The *Hopwood* majority based its rejection of Justice Powell's approach in *Bakke* on three conclusions: The Powell opinion was never a valid precedent, it has been undermined by subsequent Supreme Court case law, and it is inconsistent with accepted equal protection principles.⁴¹ In order to evaluate these conclusions, it is necessary to work through the Supreme Court's affirmative action case law from *Bakke* to *Hopwood* in detail and then to evaluate the *Hopwood* opinion critically.

A. *Regents of the University of California v. Bakke*

1. Background

During the late Sixties and the early Seventies, many colleges, universities and professional schools adopted programs to increase the number of minority students admitted.⁴² Many of these programs involved "affirmative action" in perhaps the most literal and traditional sense: increased recruiting efforts at minority schools and in minority communities along with summer tutorial programs for incoming minority students.⁴³ However, some institutions also adopted policies which gave preference in the admissions process to members of certain minority groups.⁴⁴ An initial challenge to such a policy was brought to the United States Supreme Court in the case of *DeFunis v. Odegaard*; however, it was dismissed as moot.⁴⁵ Four years later, the Court confronted the issue on the merits in *Regents of the University of California v. Bakke*.⁴⁶

Alan Bakke sued the University of California at Davis under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 after having twice been denied admission to the medical

39. See *infra* notes 156-57, 189-90, 208-15 and accompanying text.

40. See Alcinikoff, *supra* note 36, at 1078-89.

41. See *Hopwood v. Texas*, 78 F.3d 932, 944-46 (5th Cir.), *cert. denied*, 116 S. Ct. 2581.

42. See EASTLAND, *supra* note 34, at 58-62.

43. See Anthony Scanlon, *The History and Culture of Affirmative Action*, 1988 B.Y.U. L. REV. 343, 351-52 (1988); Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES MAG., June 11, 1995, at 36, 40-43, 52.

44. See *id.*

45. 416 U.S. 312 (1974).

46. 438 U.S. 265 (1978).

school.⁴⁷ The California Supreme Court invalidated the school's admissions program, which had reserved sixteen of one hundred seats in the entering class for applicants who were "'economically and/or educationally disadvantaged'" and who were members of specified minority groups.⁴⁸ A five member majority of the United States Supreme Court affirmed in part, holding that an explicit set-aside based on race was illegal,⁴⁹ while a different five member majority held that an educational institution could make some limited use of race in the admissions process.⁵⁰ Justice Powell linked these two holdings together.⁵¹ Justice Stevens and three concurring justices (the Stevens four) concluded that a flat racial set-aside violated Title VI,⁵² while Justice Powell reached the same result based on equal protection.⁵³ Justice Brennan, plus three concurring justices (the Brennan four), concluded that even a flat racial set-aside could be legal under both Title VI and the Equal Protection Clause.⁵⁴ The Brennan Four joined with Justice Powell, who concluded that the use of race as one factor in a "competitive" admissions process could satisfy equal protection, for an apparent holding that institutions could use race to a limited extent in the admissions process.⁵⁵ As was immediately recognized, Justice Powell's lengthy opinion is the key to *Bakke*, and as such, it has been regarded as the cornerstone of affirmative action in university admissions ever since.⁵⁶

2. The Standard of Review

Justice Powell took the position that when the state uses race as a factor in its decision making process, even for purportedly benevolent purposes, it must satisfy the strict standard of review.⁵⁷ He set forth several reasons for this conclusion. Focusing on the text of the Fourteenth Amendment, Justice Powell noted that it is written in individualistic language prohibiting the state from denying equal protection of the laws "to all persons" without

47. See *id.* at 277. See also SCHWARTZ, *supra* note 15 (providing a detailed history of *Bakke*).

48. *Bakke*, 438 U.S. at 274-75. Black, Chicano, Asian, and American Indian applicants qualified for consideration under the program. See *id.* at 274.

49. See *id.* at 269-73. Justice Powell, who authored the Court's opinion, Chief Justice Burger, and Justices Stevens, Rehnquist and Stewart formed the majority. See *id.* at 271.

50. See *id.* at 269-72. Justice Powell and Justices Brennan, White, Marshall, and Blackmun formed this majority. See *id.* at 272.

51. See *id.* at 269-324 (Powell, J., plurality opinion).

52. See *id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part).

53. See *id.* at 319-20 (Powell, J., plurality opinion).

54. See *id.* at 324-25 (Brennan, J., concurring in the judgment in part and dissenting in part).

55. See *id.* at 272 (Powell, J., plurality opinion); *id.* at 324-25 (Brennan, J., concurring in the judgment in part and dissenting in part).

56. See Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21 (1979); Robert G. Dixon, Jr., *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69 (1979).

57. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287-99 (1978).

reference to membership in a particular racial group.⁵⁸ At the outset, he rejected the process oriented approach to strict scrutiny derived from the famous *Carolene Products* footnote four,⁵⁹ which suggests that race is a suspect classification only when it disadvantages “ ‘discrete and insular minorit[ies].’ ”⁶⁰ Rather, Justice Powell quoted *Hirabayashi v. United States* for the proposition that “ ‘[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people’ ”⁶¹

Turning to history, Justice Powell acknowledged that the Equal Protection Clause originated in an effort to provide protection for recently freed slaves; however, he observed that the Court’s precedent had long since extended its application to any form of racial or ancestral discrimination.⁶² Moreover, he argued that an attempt to apply heightened review to only selected minority groups would be both unprincipled and unadministratable given the racial and ethnic diversity of modern America.⁶³

Justice Powell then explained that racial preferences raise serious considerations of justice because they may not be so benign, may reinforce negative racial stereotypes, and may impose an unfair burden on innocent individuals.⁶⁴ He also noted that judicial deference to racial preferences could undermine principled constitutional decision making by placing too much reliance on transitory political calculations.⁶⁵ In response to Justice Brennan, Justice Powell rejected the notion that the concept of stigma is crucial to the application of strict scrutiny on the grounds that, because stigma has no textual support, the concept could not be applied in a predictable or principled manner.⁶⁶

Thus, Justice Powell based his case for strict scrutiny of all racial classifications on a highly individualistic conception of equal protection.⁶⁷ In deriving this principle, Justice Powell relied heavily on text, precedent, administrability, fairness, and the constraints of principled constitutional decision making.⁶⁸ Ultimately, Justice Powell concluded that the risk of constitutional harm from state reliance on race as a classifying factor was

58. See *id.* at 293 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

59. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Professor Ely argued in a much cited article that the process oriented approach was appropriate and that it should result in less than strict review of racial preferences where the majority places burdens on itself. See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

60. *Bakke*, 438 U.S. at 290 (quoting *Carolene Products*, 304 U.S. at 152 n.4).

61. *Id.* at 290-91 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

62. See *id.* at 291-96.

63. See *id.* at 295-99.

64. See *id.* at 298.

65. See *id.*

66. See *id.* at 294 n.34.

67. See *id.* at 289-91.

68. See *id.* at 291-99.

simply too severe to justify a more deferential judicial approach regardless of benevolent intentions.⁶⁹

By way of contrast, Justice Brennan, writing for three other justices, argued vigorously that a somewhat less demanding intermediate standard of review should suffice to review benign racial preferences.⁷⁰ At the outset, Justice Brennan asserted that the principle propounded by Justice Powell had never been adopted by a majority of the Court.⁷¹ Unlike Justice Powell's individualistic focus, Justice Brennan considered whites as a group and noted that the white race had not been subject to " 'a history of purposeful unequal treatment, or relegated to such a position of political powerlessness.' " ⁷²

In reliance on a variety of equal protection precedents, Justice Brennan concluded that racial preferences in the admissions process that are not irrelevant to legitimate governmental purposes do not stigmatize disadvantaged black applicants as inferior.⁷³ Nevertheless, Justice Brennan concluded that an intermediate standard of review, as opposed to a mere rationality standard, was warranted in view of the risk of stigma and the potential unfairness of disadvantaging an individual based on an immutable characteristic such as race.⁷⁴ Thus, it appears that Justice Brennan tended to focus on group oriented considerations in rejecting strict scrutiny and individualistic oriented concerns in preferring an intermediate standard.

The debate between Justice Powell and Justice Brennan on the standard of review provides an abridged version of the debate which preceded *Bakke*.⁷⁵ This debate continues to this day over the correct approach under the Equal Protection Clause regarding state-sanctioned racial preferences. Although Justice Powell wrote only for himself while Justice Brennan wrote for four justices, the Court has since adopted Justice Powell's approach with respect to the appropriate standard of review.⁷⁶

3. *The State Justifications*

The state offered the following four justifications for the racial set-aside: 1) increasing the number of historically disfavored minorities in the medical school and the medical profession, 2) countering the effects of societal

69. See *id.* at 319-20.

70. See *id.* at 361-62 (Brennan, J., concurring in the judgment in part and dissenting in part).

71. See *id.* at 355-56.

72. *Id.* at 357 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

73. See *id.* at 357-58.

74. See *id.* at 358-62.

75. See *id.* at 287-99 (Powell, J.); *id.* at 356-62 (Brennan, J., concurring in the judgment in part and dissenting in part).

76. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring). See also *infra* notes 138-57 and accompanying text (discussing in detail the Court's adoption of Justice Powell's approach).

discrimination, 3) increasing the number of physicians who will practice in currently underserved communities, and 4) obtaining the educational benefits which flow from an ethnically diverse student body.⁷⁷ Although this article focuses almost exclusively on the diversity justification, some account of the other rationales will prove useful.

a. Increasing Minority Representation

Justice Powell summarily dismissed the first justification, increasing the number of historically disfavored minorities in medical school and the medical profession, as an invalid purpose in and of itself.⁷⁸ Thus, admissions procedures that purportedly rely on the diversity justification and in fact attempt to simply bolster the number of minority students or graduates for reasons of social policy can claim no support whatsoever from the Powell opinion in *Bakke*.

b. Countering the Effects of Societal Discrimination

Justice Powell recognized the significance of the state interest in providing a remedy for past discrimination.⁷⁹ He concluded, however, that the state interest could only be compelling if a state institution, with the requisite competence and authority, made findings in the record that the racial preference program was adopted in response to identified discrimination.⁸⁰ In addition, Justice Powell found that the Regents of the University of California had not made such findings and were not competent to do so in the absence of an express delegation of authority.⁸¹

Justice Powell's institutional competence approach was novel. This approach may have been prompted by an article published three years prior to *Bakke* by Dean Sandalow of the University of Michigan Law School that made a similar argument.⁸² The article is sensitive to a familiar complaint against racial preference programs: that they are usually adopted administratively, without publicity or debate, by bodies such as university faculties.⁸³ These faculties are not politically accountable and have little understanding of the costs of these programs or sympathy with the individuals most likely to bear those costs.⁸⁴

77. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978).

78. See *id.* at 307.

79. See *id.* at 307.

80. See *id.* at 309.

81. See *id.*

82. See Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 695 (1975).

83. See *id.*

84. See *id.* at 695-96; Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1867-68

Justice Brennan vigorously disagreed, and argued that the school should be allowed to adopt a racial set-aside program as a remedy for societal discrimination.⁸⁵ He further asserted that this adoption should be allowed if the school could establish that "there is a sound basis for concluding that minority underrepresentation is substantial and chronic, . . . [and] the handicap of past discrimination is impeding access of minorities to the . . . school," the program does not stigmatize any discrete group or individual, and it is reasonably used in light of its objectives.⁸⁶ In an extended discussion, Justice Brennan attempted to show that each of these elements was satisfied by Cal-Davis' admissions program.⁸⁷ He contended that the state need not establish that it had discriminated on the basis of race and could thus adopt a race-conscious admissions program.⁸⁸ Justice Brennan concluded, however, that a race-conscious admissions program could only be adopted if there was a sufficient basis for concluding that underrepresentation of targeted minorities was attributable to what is often referred to as "societal discrimination."⁸⁹ Justice Marshall added a passionate dissent urging that a group oriented remedial approach was quite appropriate in view of the group based focus of our history of racial discrimination.⁹⁰

In a series of cases since *Bakke*, the Supreme Court has bolstered the approach of Justice Powell and rejected that of Justice Brennan.⁹¹ These cases addressed the appropriate standards for assessing the constitutionality of race-conscious remedial programs, at least in the contexts of employment and government contracting.⁹² The question of just how far the Court has gone in constraining the remedial approach, though not the focus of this article, was a significant issue in *Hopwood*.⁹³

*c. Improving the Delivery of Health Care Services to
Underserved Communities*

Justice Powell recognized that improving the delivery of health care services to underserved communities could be a compelling state interest.⁹⁴

(1996); Chin, *supra* note 20, at 934; Van Alstyne, *supra* note 34, at 801-02.

85. See *Bakke*, 438 U.S. at 362, 373-74.

86. *Id.*

87. See *id.* at 362-78.

88. See *id.* at 369.

89. See *id.* at 370-73.

90. See *id.* at 387 (Marshall, J., dissenting).

91. See *infra* Part III.B.1-5.

92. See *infra* Part III.B.1-5.

93. *Hopwood v. Texas*, 78 F.3d 932, 948-55 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

94. See *Bakke*, 438 U.S. at 310-11.

However, he concluded that there was no evidence that a racial preference would promote this interest any better than race-neutral alternatives.⁹⁵

d. Diversity of the Student Body

For Justice Powell, the case turned on the final justification—the promotion of the educational benefits derived from a diverse student body.⁹⁶ Justice Powell readily concluded that the right of the university to select a student body best able to promote a robust and effective exchange of ideas is a compelling state interest.⁹⁷ He bolstered this conclusion with the observation that the selection of the student body is an essential element of academic freedom that in turn is a “special concern” of the First Amendment.⁹⁸ Nevertheless, Justice Powell determined that if the state chose to rely on race as a means of furthering diversity, it must do so in a way that could satisfy strict scrutiny.⁹⁹ Justice Powell proceeded to reject Cal-Davis’ set-aside program on the ground that it promoted racial diversity but not the “genuine” diversity that furthers a compelling interest.¹⁰⁰

Justice Powell set forth the approach of Harvard College as a model of the broad based, multi-factored, genuine diversity that finds support in the First Amendment and allows for the consideration of race as one of many “pluses” in the file.¹⁰¹ According to Justice Powell, the constitutional virtues of the “Harvard plan” were that it preserved individual competition between applicants and permitted the consideration of a wide array of seemingly relevant factors.¹⁰² Indeed, he concluded that “[t]he denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner’s special admissions program.”¹⁰³ Justice Powell also emphasized that a set-aside was constitutionally problematic because it “will be viewed as inherently unfair by the public generally as well as by applicants.”¹⁰⁴ Both of these considerations dovetailed nicely with his earlier discussion of the individualistic character of equal protection.¹⁰⁵

Finally, Justice Powell rejected the suggestion that a “plus-in-the-file” approach would merely serve as a convenient cover for quotas and set-

95. *See id.*

96. *See id.* at 311-12.

97. *See id.* at 311-15.

98. *See id.* at 312.

99. *See id.* at 290-91.

100. *See id.* at 315.

101. *See id.* at 316-18.

102. *See id.* at 317.

103. *Id.* at 318 n.52.

104. *Id.* at 319 n.53.

105. *See id.* at 299.

asides.¹⁰⁶ He stated that the Court would assume good faith on the part of educational institutions and that such programs could be challenged if there was reason to believe that schools were not pursuing an individualized case-by-case approach.¹⁰⁷

Justice Brennan did not address the diversity rationale in any detail.¹⁰⁸ He did note, however, that any racial preference, including a Harvard type plus-in-the-file, would all but inevitably mean that race made the difference between admittance and rejection in some cases.¹⁰⁹ This is beyond argument; however, Justice Brennan apparently believed that Justice Powell's model of individualized consideration tended to obscure this fact. Justice Brennan also argued that the Harvard plan and the Cal-Davis plan were quite similar in that Harvard also had a clear minority admissions goal that it was attempting to meet.¹¹⁰ Consequently, the only advantage of the Harvard plan was that its use of race as a decisive factor was more concealed from the public.¹¹¹ Perhaps most significantly, Justice Brennan refused to provide an unqualified endorsement of the diversity rationale. Instead he conceded that "a plan like the 'Harvard' plan . . . is constitutional . . . at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."¹¹²

B. *From Fullilove to Adarand*

1. *Fullilove v. Klutznick*

Since *Bakke*, the Supreme Court's racial preference precedent has developed primarily in the context of set-asides for minority contractors in government contracting programs.¹¹³ In *Fullilove v. Klutznick*,¹¹⁴ the Court rejected a facial challenge to a congressional program which required that, absent a waiver, ten percent of the federal funds allocated to state and local governments for the construction of public works be used to hire minority owned businesses.¹¹⁵ In an opinion by Chief Justice Burger, the Court easily sustained the program under a highly deferential standard of

106. See *id.* at 318.

107. See *id.* at 318-19 n.53.

108. See *id.* at 326 n.1.

109. See *id.* at 378.

110. See *id.* at 379.

111. See *id.*

112. *Id.* at 326 n.1.

113. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

114. 448 U.S. 448 (1980).

115. See *id.* at 492.

review.¹¹⁶ Justice Powell wrote a concurring opinion contending that the program could satisfy the strict standard of review which he applied in *Bakke*.¹¹⁷ Justice Stevens wrote a lengthy dissent contending that the program could not possibly meet the strict standard of review if applied honestly.¹¹⁸ At the very least, *Fullilove* appeared to mean that the Court would be more deferential to congressionally mandated racial preference programs than to those adopted by state institutions.¹¹⁹

2. *Wygant v. Jackson Board of Education*

In the 1986 case of *Wygant v. Jackson Board of Education*,¹²⁰ a sharply divided Court invalidated a portion of a collective bargaining agreement negotiated by the Jackson, Michigan Board of Education and its teachers union.¹²¹ The agreement provided that, despite seniority, minority teachers would not be laid off in greater proportion than their existing percentage in the school system.¹²² Writing for a plurality, Justice Powell rejected the argument that providing "role models" for minority students could justify the racially conscious layoff plan.¹²³ The role model theory was based on societal discrimination rather than specific and identified discrimination; hence the plan had "no logical stopping point."¹²⁴ Additionally, such a plan could not be a narrowly tailored means capable of satisfying strict scrutiny.¹²⁵ Justice Powell noted that the plan could not be defended as a narrowly tailored remedy because the layoff percentages were tied to the disparity between minority students and teachers rather than to any measure of past discrimination against teachers.¹²⁶ Justice Powell further concluded that correcting societal discrimination could not vindicate a racial classification,¹²⁷ and that, because of the burden imposed on innocent employees, a racially preferential layoff plan could not be the least discriminatory means of accomplishing any valid state goal.¹²⁸

116. *See id.* at 473, 490.

117. *See id.* at 496 (Powell, J., concurring).

118. *See id.* at 532 (Stevens, J., dissenting).

119. *Compare Fullilove* 418 U.S. at 448 (reviewing congressionally mandated racial preferences), with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 245, 265 (reviewing racial preferences mandated by the State of California).

120. 476 U.S. 267 (1986).

121. *See id.* at 275-76, 283-84.

122. *See id.* at 267.

123. *See id.* at 275-76.

124. *Id.* at 275.

125. *See id.*

126. *See id.*

127. *See id.* at 274.

128. *See id.* at 283-84.

In a concurring opinion, Justice O'Connor agreed that neither remedial gains for past discrimination nor the role model theory were compelling state interests.¹²⁹ However, she made a point of noting that "[t]he goal of providing 'role models' . . . should not be confused with the very different goal of promoting racial diversity among the faculty."¹³⁰ Justice White concurred in the judgment in a brief opinion summarily rejecting all of the state's justifications.¹³¹ Justice Marshall wrote a lengthy dissent, joined by Justices Brennan and Blackmun, maintaining that the plan should be sustained on remedial grounds.¹³² Justice Stevens submitted a dissent defending the role model theory as a constitutionally valid inclusionary justification for a race-conscious plan.¹³³

Wygant, even more than *Bakke*, was a difficult decision to piece together in view of the absence of a clear majority rationale.¹³⁴ It is of some significance to the issue of diversity in higher education that only one Justice, Justice Stevens, showed any enthusiasm for the forward-looking role model justification.¹³⁵ Justice Stevens' dissent bore some theoretical similarities to *Bakke*'s diversity approach,¹³⁶ despite Justice O'Connor's attempt to distinguish them.¹³⁷

3. *City of Richmond v. J.A. Croson Co.*

A clear majority of the Supreme Court finally began to coalesce around certain principles for analyzing race-conscious preference programs in *City of Richmond v. J.A. Croson Co.*¹³⁸ In *Croson*, the Court invalidated a program adopted by the Richmond, Virginia City Council which required

129. See *id.* at 288 & n.*, 289 (O'Connor, J., concurring).

130. *Id.* at 288 n.* (O'Connor, J., concurring). Justice O'Connor seemed to differ with Justice Powell on the need for contemporaneous fact findings of discrimination as a predicate for a race-conscious remedial plan on the ground that it would discourage voluntary compliance. See *id.* at 291 (O'Connor, J., concurring). She concurred in the judgment, however, on the ground that the school board and the lower courts failed to rely on the provision of a remedy for the state's own discrimination as opposed to societal discrimination. See *id.* at 293 (O'Connor, J., concurring). Justice O'Connor was not prepared to conclude that a racially conscious layoff plan could never satisfy strict scrutiny. See *id.* at 293-94 (O'Connor, J., concurring).

131. See *id.* at 294-95 (White, J., concurring).

132. See *id.* at 303-96 (Marshall, J., dissenting).

133. See *id.* at 315-20 (Stevens, J., dissenting).

134. See *id.* at 269. Joining Justice Powell were Chief Justice Burger and Justices Rehnquist and O'Connor. See *id.*

135. See *id.* at 315 (Stevens, J., dissenting).

136. Compare *id.* (Stevens, J., dissenting) (arguing that a school board might legitimately find value in an integrated faculty being able to provide benefits to a student body), with *Bakke*, 438 U.S. at 312-20 (1978) (arguing race might be legitimately taken into account in college admissions to promote diversity in the interchange of ideas).

137. See *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring).

138. 488 U.S. 469 (1989).

prime contractors on city construction contracts to subcontract at least thirty percent of the amount of the contract to businesses owned by specified minorities.¹³⁹ For the first time, a majority of the Court agreed that a benign racial classification adopted by a state or its subdivisions, such as this subcontracting set-aside, must satisfy a strict standard of review.¹⁴⁰

In a portion of the majority opinion joined by Chief Justice Rehnquist and Justices White and Kennedy, Justice O'Connor emphasized the individualistic nature of equal protection rights.¹⁴¹ Justice O'Connor pointed out that strict review is essential to determine whether a classification is in fact benign rather than invidious, and to ensure that the classification does not stigmatize the racial groups affected.¹⁴² Justice O'Connor relied quite heavily on Justice Powell's opinions in *Bakke* and *Wygant* as support for the decision to apply strict scrutiny.¹⁴³ While not joining the O'Connor opinion, Justice Scalia added a concurrence agreeing that strict scrutiny must apply to all governmental racial classifications.¹⁴⁴

Writing for a majority of the Court, Justice O'Connor concluded that, like the role model theory in *Wygant*, the Richmond plan could not survive constitutional scrutiny because it relied on generalized assertions of "societal discrimination" rather than on findings of "identified discrimination."¹⁴⁵ Moreover, the city failed to establish that the small amount of public funding received by minority contractors was attributable to past or present discrimination.¹⁴⁶ Consequently, the Court held that the City of Richmond had not shown a compelling state interest.¹⁴⁷ Relying on the Powell opinion in *Bakke*,¹⁴⁸ the Court concluded that state adoption of racial preferences, based on nothing more than conclusions about societal discrimination, would result in "a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."¹⁴⁹ The Court also noted that, while the record was inadequate to permit full consideration of the tailoring of the remedy, the city erred by failing to consider race-neutral means as well as by relying on set-asides instead of on individual assessment.¹⁵⁰

139. See *id.* at 478.

140. See *id.* at 493-94; 519 (Kennedy, J., concurring); *id.* at 520 (Scalia, J., concurring).

141. See *id.* at 493.

142. See *id.* at 493-94.

143. See *id.* at 493-98.

144. See *Croson*, 488 U.S. at 520 (Scalia, J., concurring).

145. *Id.* at 499.

146. See *id.* at 499-506.

147. See *id.* at 505.

148. See *id.* at 506.

149. *Id.*

150. See *id.* at 507-08.

Justice Stevens concurred in the judgment and in parts of the opinion, emphasizing, as in *Wygant*, that the Court should be more favorably disposed to forward-looking rather than backward-looking racial classifications.¹⁵¹ Justice Kennedy concurred in most of Justice O'Connor's opinion, noting that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause."¹⁵² Justice Scalia concurred in the judgment, urging the Court to reject group rights thinking and adopt a strict colorblind approach.¹⁵³ He would permit a race-conscious remedy only when the state acted "to eliminate their own maintenance of a system of unlawful racial classification."¹⁵⁴ Justice Marshall, joined by Justices Brennan and Blackmun, submitted a lengthy dissent challenging the Court's approach to remedial racial preferences by arguing that the Richmond program clearly satisfied strict scrutiny.¹⁵⁵

Croson is a watershed case on racial preferences. It is the first case in which a majority of the Court applied strict scrutiny to a benign racial preference.¹⁵⁶ It is also noteworthy because of the commitment by a clear majority of the Court to the individualistic antidiscrimination approach coupled with an equally firm rejection of the group rights oriented anti-subordination theory.¹⁵⁷ The implications of these determinations extend well beyond the context of public contracting set-asides.

4. *Metro Broadcasting, Inc. v. FCC*

In *Metro Broadcasting, Inc. v. FCC*,¹⁵⁸ the Court sustained the constitutional validity of two FCC initiated racial preferences: one that gave minority owned businesses an advantage in a comparative license proceeding, and another that allowed licensees who were on the verge of losing their licenses to sell to minority owned businesses at distress sale prices.¹⁵⁹ The preference programs, endorsed by Congress,¹⁶⁰ were intended to increase programming oriented toward minorities by increasing minority ownership of broadcast licenses.¹⁶¹

151. See *id.* at 511 (Stevens, J., concurring).

152. *Id.* at 518 (Kennedy, J., concurring).

153. See *id.* at 526-28.

154. *Id.* at 524.

155. See *id.* at 528-61.

156. See *id.* at 493-94; 519 (Kennedy, J., concurring); *id.* at 520 (Scalia, J., concurring).

157. See *id.*

158. 497 U.S. 547 (1990).

159. See *id.* at 552.

160. Congress expressed its approval of the preference policies by prohibiting the FCC from spending appropriated funds to repeal them. See *id.* at 560.

161. See *id.* at 554-58.

Relying on *Fullilove*, the Court deferred to Congress by applying an intermediate, rather than a strict, standard of review to the preferences.¹⁶² In direct reliance on the Powell opinion in *Bakke*, Justice Brennan concluded that enhancing broadcast diversity was an important state interest.¹⁶³ After a lengthy consideration of the history of FCC efforts to increase broadcast diversity, the Court concluded that these programs were substantially related to the achievement of their ends.¹⁶⁴ In response to the dissent's argument that the preferences were based on impermissible stereotypes, the majority noted the FCC's conclusion that, in the aggregate, minority owners were more likely to contribute to greater programming diversity.¹⁶⁵ This conclusion was quite similar to Justice Powell's assumption in *Bakke* that the admission of more minority students would contribute to a broader interchange of ideas.¹⁶⁶ The Court also concluded that the impact of these relatively limited policies on non-minorities was slight.¹⁶⁷ Justice Stevens added a short concurrence pointing out that the Court's decision clearly rejected the notion that racial classifications could only be legitimately employed by the government for remedial purposes.¹⁶⁸

Justice O'Connor wrote a lengthy and potentially significant dissent joined by Justices Rehnquist, Scalia, and Kennedy.¹⁶⁹ She began by emphasizing the individualistic nature of the equality principle with respect to race and warned that the use of racial classifications "endorse[s] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."¹⁷⁰ Consequently, Justice O'Connor argued that only the strict standard of review was appropriate.¹⁷¹ She then asserted that providing a remedy for past discrimination was the only previously recognized compelling state interest capable of supporting a racial classification and that increasing diversity in broadcasting was clearly not such an interest.¹⁷² As will be developed in greater detail later,¹⁷³ Justice O'Connor argued that the

162. See *id.* at 563-65 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980)).

163. See *id.* at 567-68 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 311-13 (1978)).

164. See *id.* at 569.

165. See *id.* at 579-80.

166. See *id.* The Court discussed a variety of empirical studies the FCC considered which purported to bolster this conclusion. See *id.* at 580-83.

167. See *id.* at 596-97.

168. See *id.* at 601.

169. See *id.* at 602.

170. *Id.* at 602-03. Justice O'Connor began her opinion with the observation that: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not 'as simply components of a racial, religious, sexual or national class.'" *Id.* at 602 (quoting *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983)).

171. See *id.* at 603.

172. See *id.* at 612.

173. See *infra* notes 312-37 and accompanying text.

interest in broadcast diversity could be easily abused and that it improperly equated race with behavior.¹⁷⁴

In a strongly worded dissent, Justice Kennedy, joined by Justice Scalia, compared the majority's analytical approach to the Court's rationale in *Plessy v. Ferguson*.¹⁷⁵ Justice Kennedy argued that an interest "so trivial as 'broadcast diversity' " could never justify a racial preference.¹⁷⁶ Justice Kennedy also asserted that the majority avoided confronting the stigmatic harm that a racial preference could inflict on both the advantaged and disadvantaged classes.¹⁷⁷

Although *Metro Broadcasting* was overruled by *Adarand*,¹⁷⁸ it remains an important case because of the four dissenting justices' assessment of the diversity interest in the broadcasting context.¹⁷⁹ For that reason, *Metro Broadcasting* must be carefully considered in evaluating the continuing validity of Justice Powell's diversity justification in the educational context of *Bakke*.¹⁸⁰

5. *Adarand Constructors, Inc. v. Pena*

In *Adarand Constructors, Inc. v. Pena*, a majority of the Court, in an opinion written by Justice O'Connor, held that a strict standard of review applied to a complex, federally funded construction program.¹⁸¹ This program granted a preference to subcontracting firms controlled by "socially and economically disadvantaged individuals," whereby members of specified minority groups were presumed to be such individuals.¹⁸² Justice O'Connor concluded that the Court's affirmative action jurisprudence could be summarized by three principles: 1) skepticism, 2) consistency, and 3) congruence.¹⁸³ Skepticism requires that racial classifications be subjected to strict scrutiny.¹⁸⁴ Consistency demands this result whether the classifications are purportedly benign or invidious.¹⁸⁵ Finally, congruence provides that the same standard must apply to state or federal action.¹⁸⁶ In defense of these principles, the Court quoted from the portion of Justice Powell's

174. See *Metro Broad., Inc.*, 497 U.S. at 614-15, 619-20.

175. See *id.* at 631-38 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

176. *Id.* at 633.

177. See *id.* at 637.

178. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231-35 (1995).

179. See *Metro Broad., Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting).

180. See *supra* note 166 and accompanying text.

181. 515 U.S. 200, 227 (1995). Justice O'Connor's opinion constituted a majority only to the extent that it was consistent with Justice Scalia's concurring opinion. See *id.* at 204.

182. See *id.* at 205, 207.

183. See *id.* at 223-24.

184. See *id.*

185. See *id.* at 224.

186. See *id.*

Bakke opinion which discussed the individualistic character of equal protection principles with respect to racial classifications.¹⁸⁷ In order to adopt these principles, especially congruence, the majority found it necessary to overrule *Metro Broadcasting* because that case applied an intermediate standard of review to a racial preference.¹⁸⁸

Responding to Justice Stevens' dissent, Justice O'Connor asserted that good intentions by the government should not be sufficient to lower the standard of review for a racial preference because even a well intentioned preference can exacerbate racial prejudice.¹⁸⁹ Rather, the Court maintained that an individual disadvantaged by race has suffered an injury which may or may not be justifiable in a particular case.¹⁹⁰ Justice O'Connor sought "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,' " suggesting instead that racial classifications can sometimes be sustained.¹⁹¹ The Court remanded the case for reconsideration under the strict standard of review.¹⁹²

Justice Scalia submitted a short concurrence which was important because he provided the fifth vote for the Court's decision.¹⁹³ Indeed, the syllabus to Justice O'Connor's opinion for the Court states that her opinion (with the exception of the *stare decisis* section III-C) "is for the Court except insofar as it might be inconsistent with the views expressed in Justice Scalia's concurrence."¹⁹⁴ Justice Scalia reiterated his strong colorblind approach to equal protection, noting that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."¹⁹⁵ He concluded that "under our Constitution there can be no such thing as either a creditor or debtor race."¹⁹⁶ Justice Thomas wrote a short concurrence taking issue with what he characterized as the dissenting Justices' "racial paternalism exception" to equal protection.¹⁹⁷ He asserted that "[s]o-called 'benign' discrimination teaches many that, because of chronic and

187. See *id.* at 180 (referring to *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)).

188. See *id.* at 227. In section III-C of her opinion, joined only by Justice Kennedy, Justice O'Connor explained that overruling *Metro Broadcasting* was consistent with *stare decisis* because *Metro* had sharply departed from existing precedent. See *id.* at 231-35.

189. See *id.* at 228-29.

190. See *id.* at 228.

191. *Id.* at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

192. See *id.* at 237.

193. See *id.* at 239.

194. *Id.* at 200.

195. *Id.* at 239 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring)).

196. *Id.*

197. *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence."¹⁹⁸

Justice Stevens, joined by Justice Ginsburg, dissented, criticizing the Court's analytical approach as well as its results.¹⁹⁹ Justice Stevens contended that the Court's principle of consistency "would disregard the difference between a 'No Trespassing' sign and a welcoming mat."²⁰⁰ He asserted that it was not difficult to distinguish between good and bad intentions in racial classifications.²⁰¹ Justice Stevens' dissent also argued that the principle of congruence was inconsistent with precedent and therefore misguided.²⁰² Justice Stevens interpreted the Court's overruling of *Metro Broadcasting* as merely a rejection of the application of the intermediate standard of review and by no means a denial of the significance of the state interest in promoting diversity.²⁰³ Justices Souter and Ginsburg also submitted short dissents.²⁰⁴

6. *The Minority-Majority Redistricting Cases*

In a series of recent cases, the Supreme Court addressed the constitutionality of state legislative redistricting plans.²⁰⁵ These redistricting plans involved strangely shaped voting districts designed to ensure that members of a particular racial minority group constituted a majority of the voters in those districts.²⁰⁶ The Court applied a strict standard of review when it found that race was the predominant factor in creating districts.²⁰⁷ These cases are quite different factually from the racial preference in education and contracting cases and hence do not warrant detailed consideration. However, these cases are of some significance in that, like the racial preference cases, they place strong emphasis on the individualistic character of equal protection rights and minimize the significance of group oriented theories.²⁰⁸ This focus was especially telling in the voting rights context

198. *Id.* at 241.

199. *See id.* at 242-64 (Stevens, J., dissenting).

200. *Id.* at 245.

201. *See id.* at 246.

202. *See id.* at 259.

203. *See id.* at 258.

204. *See id.* at 264-71 (Souter, J., dissenting); *id.* at 271-76 (Ginsburg, J., dissenting).

205. *See Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

206. *See e.g.*, *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) (finding the redistricting plan at issue an unconstitutional violation of the Equal Protection Clause and not narrowly tailored to serve a compelling state interest).

207. *See Bush*, 116 S. Ct. at 1953 (citing *Miller*, 115 S. Ct. at 2488).

208. *See Shaw II*, 116 S. Ct. at 1902; *see also Miller*, 115 S. Ct. at 2486 ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not 'as simply components of a racial, religious, sexual or national class.' " (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting))).

because almost by definition, electoral districting involved "associational" or group-oriented considerations.²⁰⁹

The Court conceded that some degree of race consciousness in electoral districting was all but inevitable and did not automatically lead to strict scrutiny.²¹⁰ However, the Court determined that a preoccupation with race in districting, to the virtual exclusion of other traditionally relevant factors, was constitutionally suspect.²¹¹ Such a preoccupation appeared to proceed on the stereotypical assumption that members of racial groups "think alike, share the same political interests, and will prefer the same candidates at the polls."²¹² Additionally, redistricting encouraged greater racial balkanization in the political process.²¹³ These redistricting cases emphasized that the Court has firmly settled on an individualistic anti-discrimination model as opposed to a group oriented anti-subordination model for evaluating race-conscious governmental decision making.²¹⁴ The Court utilizes this model across the board and not simply in the contracting and employment contexts.²¹⁵ These various lines of cases will tend to reinforce each other.

C. Hopwood

In the early seventies, the University of Texas School of Law adopted various preferential policies to increase the number of black and Mexican-American students admitted.²¹⁶ By 1992, it had developed a weighted index of applicant grade points and LSAT scores for classifying applicants as "presumptive admit," "discretionary zone," and "presumptive deny."²¹⁷ The law school admitted the vast majority of applicants in the presumptive admit category but downgraded some into the discretionary zone.²¹⁸ Most of the applicants in the presumptive deny category were denied admission, although some were upgraded into the discretionary zone.²¹⁹ The applications in the discretionary zone received more exten-

209. See *Bush*, 116 S. Ct. at 1999-2000 (Souter, J., dissenting).

210. See *Shaw*, 509 U.S. at 647.

211. See *id.*

212. *Id.*

213. See *id.* at 648-49.

214. See *Miller*, 115 S. Ct. at 2486.

215. See *id.*

216. See *Hopwood v. Texas*, 78 F.3d 932, 937 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). Prior to the adoption of the processes taking race into account, the law school had few if any black students. See *Hopwood v. Texas*, 861 F. Supp. 551, 558 (W.D. Tex. 1994). The district court opinion provided a lengthy history of the evolution of the use of racial preferences in the law school's admissions process. See *id.* at 557-63. The racial preferences were designed in part to help the school achieve targets of 10% Mexican-American students and 5% black students established by the Office of Civil Rights in negotiation with the University of Texas. See *id.* at 563.

217. See *Hopwood*, 78 F.3d at 935.

218. See *id.* at 935-36.

219. See *id.* at 936.

sive consideration as admissions personnel took account of additional characteristics to include the following: the strength of the undergraduate institution, the applicant's major, grade trends, background, and work experience before rendering a final decision.²²⁰

To help ensure the admittance of a representative number of blacks and Mexican-Americans, the law school adopted different presumptive admit and presumptive deny index scores for non-minorities,²²¹ blacks, and Mexican-Americans.²²² Indeed, the presumptive deny index score for non-minority students was higher than the presumptive admit score for black and Mexican-American applicants.²²³ Moreover, applications from black and Mexican-American students in the discretionary zone were reviewed by a minority subcommittee rather than one of the ordinary discretionary zone subcommittees.²²⁴ The decisions of these minority subcommittees were subject to review by the admissions committee as a whole but were "virtually final."²²⁵ The school also maintained separate waiting lists for non-minorities, blacks, and Mexican-Americans.²²⁶ As a result of these policies, black and Mexican-American applicants were frequently admitted with index scores lower than those of many non-minority applicants denied admission.²²⁷ The law school continually readjusted its index range to achieve the desired racial mix.²²⁸

Four non-minority applicants who had been denied admission to the law school in 1992 filed suit alleging that the racial preferences utilized by the law school violated their constitutional rights to equal protection of the laws under the Fourteenth Amendment.²²⁹ Prior to trial, the law school abandoned the racially separate presumptive admit and presumptive deny lines, as well as the separate subcommittees for minority and non-minority applicants.²³⁰ Applying the strict standard of review, the district court held that the discontinued practices of employing separate subcommittees and separate presumptive denial lines violated equal protection.²³¹ The

220. See *id.* at 935.

221. Non-minority is a term of art used by the Court of Appeals to indicate all applicants not covered by the preference plan, which was everyone other than blacks and Mexican-Americans. See *id.* at 936.

222. See *id.* at 935-36.

223. See *id.* at 936. In 1992, the presumptive deny score for non-minorities was 192 while the presumptive admit score for blacks and Mexican-Americans was 189. The presumptive deny score for minorities was 179. See *id.*

224. See *id.* at 937.

225. *Id.* at 937.

226. See *id.* at 938.

227. See *id.* at 937. In 1992, the first year class contained 41 blacks and 55 Mexican-American students constituting 8% and 10.7% of the class. See *id.*

228. See *id.* at 937 n.10.

229. See *id.* at 938.

230. See *id.* at 939 n.16.

231. See *Hopwood v. Texas*, 861 F. Supp. 551, 576 n.1 (W.D. Tex. 1994). The district court

employment of separate considerations precluded the individualized consideration of applicants required by Justice Powell in *Bakke*.²³² However, pursuant to the Powell opinion in *Bakke*, the school could continue to use race as a factor in the admissions process.²³³ The district court found that the plaintiffs failed to prove that they would have been admitted under a constitutional admissions process.²³⁴ In so finding, it declined to issue an injunction ordering their admission or to award damages.²³⁵ However, the district court did order the plaintiffs be given the opportunity to reapply without paying any additional fee.²³⁶ The plaintiffs appealed to the Fifth Circuit.

Like the district court, the court of appeals employed the strict standard of review to evaluate the law school's use of racial preferences.²³⁷ However, it rejected the district court's conclusions that the law school's use of racial preferences in the admissions process could be justified as a narrowly tailored means of serving either a compelling interest in promoting diversity or providing a remedy for the continuing effects of past discrimination.²³⁸ After a lengthy discussion of *Bakke*, the Fifth Circuit shocked the academic community by holding that diversity of the student body was not a compelling state interest.²³⁹ It reached this result by concluding that Justice Powell's opinion in *Bakke*, approving of the diversity justification, had never been a valid precedent because it had not been joined by any other justice.²⁴⁰ Moreover, the Fifth Circuit concluded that the diversity justification had been undermined by subsequent Supreme Court precedent and was inconsistent with the equal protection principles of treating persons as individuals rather than as members of racial groups.²⁴¹ As such, the diversity justification stigmatized individuals and perpetuated state approved race-conscious decisionmaking.²⁴² The court did recognize that universities could legitimately take account of a variety of factors including, inter alia, special talents, alumni connections, and extracurricular activities.²⁴³ However, the court concluded that the law school could not use race as a

did not object to the separate admit lines since non-minorities who fell below the non-minority presumptive admit line and the minority presumptive admit line would still receive individualized consideration along with minorities in the discretionary zone. *See id.*

232. *See id.* at 578-79.

233. *See id.* at 579.

234. *See id.* at 581.

235. *See id.*

236. *See id.* at 581-83.

237. *See Hopwood*, 78 F.3d at 939.

238. *See id.*

239. *See id.* at 944.

240. *See id.*

241. *See id.*

242. *See id.* at 944-46.

243. *See id.* at 946.

proxy for other characteristics, such as point of view, because this was the very type of racial stereotype prohibited by equal protection.²⁴⁴ The court of appeals noted, however, that a correlation between race and other permissible characteristics, such as financial background, would not violate equal protection as long as the other characteristics were "not adopted for the purpose of discriminating on the basis of race."²⁴⁵ The Fifth Circuit also concluded that the use of racial preferences in the admissions process would undermine equal protection in that it would tend to stigmatize the recipient as unable to compete.²⁴⁶ Finally, the diversity justification could lead to a permanent system of state sponsored race consciousness at war with equal protection's ultimate goal of a colorblind society.²⁴⁷

With respect to the remedial justification, the Fifth Circuit held that the constraints of strict scrutiny permit the law school to employ racial preferences only for purposes of providing a remedy for identified present effects of its own discrimination and not for discrimination by the educational system as a whole for general societal discrimination.²⁴⁸ There was no dispute that the University of Texas had refused to admit black students until ordered to do so by the United States Supreme Court in *Sweatt v. Painter*²⁴⁹ in 1950.²⁵⁰ The Fifth Circuit concluded, however, that the school's purported lingering bad reputation in minority communities, underrepresentation of minorities in the student body, and a perception that the school's environment was hostile toward minorities did not constitute such present effects of the law school's past discrimination, especially in view of the amount of time which had passed since the school was legally segregated, as well as the affirmative remedial steps subsequently taken by the school.²⁵¹

244. See *id.* at 946.

245. *Id.* at 947 n.31. This suggests that if a law school decided to rely on these characteristics because they would result in racial diversity rather than because of their independent validity, it would be in violation of *Hopwood*. See *id.*

246. See *id.* at 947.

247. See *id.* at 948 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)).

248. See *id.* at 952. The district court had found that it was permissible to consider discrimination by the Texas higher education system as a whole; however, it also concluded that it would find sufficient present effects of past discrimination if it focused only on the law school. *Hopwood v. Texas*, 861 F. Supp. at 572.

249. 339 U.S. 629 (1950).

250. See *Hopwood*, 78 F.3d at 953. The district court had set forth the history of racial discrimination by the University of Texas in some detail. See *Hopwood v. Texas*, 861 F. Supp. at 553-57.

251. See *Hopwood*, 78 F.3d at 952-55. Because the Court of Appeals failed to find a compelling state interest, it did not consider whether the means were narrowly tailored. See *id.* at 955. The district court had concluded that the use of race in the admissions process was narrowly tailored to the compelling interest in providing a remedy for the effects of past discrimination because, without such preferences, few black or Mexican-American students would be admitted. See *Hopwood*, 861 F. Supp. at 573.

Because the court could not identify a compelling state interest, it prohibited the law school from relying on race as a factor in the admissions process.²⁵² Consequently, it ordered the law school to permit the plaintiffs to reapply for admission under a process in which race was not taken into account.²⁵³

Judge Wiener submitted a concurring opinion in which he agreed with the majority with respect to the remedial justification, but differed as to diversity.²⁵⁴ Judge Wiener argued that, while diversity might well be a compelling interest, the law school's admissions process was not narrowly tailored to achieve it.²⁵⁵ He concluded that it was both unnecessary and inappropriate for the majority to reject the Powell opinion in *Bakke* since its validity under existing Supreme Court precedent was very much an open question.²⁵⁶ Rather, Judge Wiener would invalidate the school's use of racial preferences on the ground that the racial preferences were not narrowly tailored to creating diversity in the student body because the preferences limited their focus to only two racial groups.²⁵⁷ As such, the process tended to resemble a set-aside for the two preferred groups.²⁵⁸

The parties did not seek a rehearing en banc, and the Fifth Circuit declined to grant one on its own motion.²⁵⁹ Judge Politz filed a dissent for seven judges, arguing that the case should be reheard.²⁶⁰ The dissent contended that the court reached out in dicta to purportedly overrule the Powell opinion in *Bakke*, thus causing significant disruption to settled academic admissions practices.²⁶¹ The dissent further argued that *Bakke* was a legitimate Supreme Court precedent that had not been overruled by subsequent decisions.²⁶² As such, it was beyond the authority of the court of appeals to reject.²⁶³ The United States Supreme Court denied a petition for certiorari.²⁶⁴ Justice Ginsberg, joined by Justice Souter, filed a short opinion stating that granting the petition for certiorari was inappropriate because the petition challenged only the rationale of that part of the court of

252. See *Hopwood*, 78 F.3d at 962.

253. See *id.*

254. See *id.* (Wiener, J., concurring).

255. See *id.*

256. See *id.* at 964. Judge Wiener conceded that Justice Powell was the only justice in *Bakke* to discuss diversity and that no other Supreme Court opinion supports the diversity justification. See *id.* at 964 n.18. Still, he would leave questions as to the continuing validity of *Bakke* as a precedent to the Supreme Court, which in the appropriate case "will have no chance but to go with, over, around, or through Justice Powell's *Bakke* opinion." *Id.*

257. See *id.* at 965-66.

258. See *id.* at 966.

259. See *Hopwood v. Texas*, 84 F.3d 720, 722 (5th Cir. 1996).

260. See *id.* at 721.

261. See *id.* at 722.

262. See *id.* at 722-24.

263. See *id.*

264. See *Texas v. Hopwood*, 116 S. Ct. 2581 (1996).

appeals' opinion prohibiting any use of race by the law school in the future and not the final judgment declaring only the voluntarily discontinued 1992 admissions procedures unconstitutional.²⁶⁵ If a judgment that precludes the use of race under any circumstances is ever entered, further review of *Hopwood*, perhaps even by the Supreme Court, is a possibility.²⁶⁶

IV. *BAKKE* AS PRECEDENT

A. *Was the Powell Opinion in Bakke Ever a Precedent?*

Critics of the *Hopwood* majority have charged that *Bakke* is clearly Supreme Court precedent and that consequently *Bakke* could not be discarded by a circuit court of appeals.²⁶⁷ The question of *Bakke*'s precedential significance has bedeviled commentators ever since the case was decided.

In *Bakke*, Justice Powell and the Brennan four clearly concluded that race could constitutionally be employed as a factor in the admissions process.²⁶⁸ Specifically, the five justices concurred in the following language:

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.²⁶⁹

Technically, this is the holding of *Bakke* with respect to the constitutionally permissible use of race in an admissions process.²⁷⁰ On its face, however, it says very little about when, how, or why race can be employed. The answers to these questions are essential to understanding what, if anything, *Bakke* actually permits. When attempting to derive these answers, it is necessary to examine the Powell and Brennan opinions carefully in order to determine whether there is any common ground.

In *Marks v. United States*, the Supreme Court indicated that "[w]hen a fragmented Court decides a case and no single rationale explaining the

265. See *id.*

266. See *id.*

267. See *Hopwood v. Texas*, 84 F.3d 720, 722-24 (5th Cir. 1996) (Politz, C.J., dissenting from denial of rehearing en banc); *Hopwood v. Texas*, 78 F.3d 932, 962-63 (5th Cir. 1996) (Wiener, J., specially concurring).

268. See *Regents of the Univ. of Cal. v. Bakke*, 487 U.S. 265, 320 (1978).

269. *Id.*

270. See *id.*

result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds'²⁷¹ *Marks* seems to contemplate a situation, as was presented to the Court in that case, in which one plurality rationale is a lesser included subset of the rationale of another plurality.²⁷² The *Marks* approach may not be particularly useful in a case where the plurality opinions are arguably inconsistent with each other. In such a case, it may be impossible to conclude in any meaningful respect which opinion is in fact the "narrowest." Arguably, *Bakke* is just such a case.

If *Marks* simply means that the opinion that affords the most limited relief on the facts of the case before the Court is the narrowest, and hence its rationale is controlling, Justice Powell's diversity approach would presumably be the opinion of the Court in *Bakke*. This is because Justice Powell was willing to support a lesser degree of racial preference than Justice Brennan.²⁷³ Institutions that have relied on the Powell approach since *Bakke* would argue that this is indeed the proper reading of the case. However, at a more abstract level, Justice Brennan's approach may be narrower than Justice Powell's since the former would require the proof of some type of past discrimination while the latter would not.²⁷⁴ The Powell approach would permit an institution seeking to achieve diversity to favor a racial group that had not been the subject of discrimination within the United States while the Brennan approach would not. Consequently, the breadth of a particular holding may depend on the context in which it is applied.

If Justice Powell never addressed remediation and Justice Brennan never addressed diversity, an interpreter would be left to struggle with the difficult, if not meaningless, task of determining which of these two very different theories is in some sense the narrowest. However, Justice Powell addressed the remedial justification in some detail, and Justice Brennan addressed diversity, at least briefly, in a footnote.²⁷⁵

271. 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

272. In *Marks*, the question was whether Justice Brennan's three judge plurality position in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), to the effect that allegedly obscene materials are sometimes protected by the First Amendment, was the holding of the Court given that Justices Black and Douglas concurred to make a majority on the ground that obscene material is always protected by the First Amendment. See *Marks*, 430 U.S. at 193-94.

273. See *Bakke*, 438 U.S. at 296 n.36.

274. Compare *Bakke*, 438 U.S. at 296 n.36 (reflecting Justice Powell's conclusion that "race may be taken into account as a factor in an admissions program") with *id.* at 326 n.1 (demonstrating Justice Brennan's view that the use of race was permissible only to correct the effects of past discrimination).

275. See *id.* at 326 n.1.

Justice Powell made it clear that he could not accept a remedial justification unless it was based on a finding of specific discrimination by an accountable body.²⁷⁶ Justice Powell's approach is clearly a narrower approach to remediation than the approach taken by Justice Brennan. With respect to a remedial justification, it would seem that an institution would be required to meet the tighter standards of Justice Powell to comply with *Bakke*.

Justice Brennan attempted to summarize the agreement on this point by noting the *Bakke* opinions meant that:

Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.²⁷⁷

This statement was a matter of controversy between Justices Powell and Brennan during the preparation of the *Bakke* opinions.²⁷⁸ Justice Powell understandably believed the statement did not accurately reflect his position.²⁷⁹ Justice Stevens chastised Justice Brennan for attempting to state the holding of the Court when he did not have the votes to do so.²⁸⁰

Just as Justice Powell indicated that his approach to remediation was narrower and more demanding than Justice Brennan's, so Justice Brennan also seemed to indicate that his approach to diversity was narrower and more demanding than Justice Powell's.²⁸¹ Justice Brennan indicated that he would accept "a plan like the Harvard plan . . . at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."²⁸² Justice Powell would permit the use of race as a factor to achieve educational diversity;²⁸³ however, Justice Brennan would only allow race to be used to achieve diversity to cure the effects of past discrimination.²⁸⁴ Why, then, is Justice Brennan's

276. See *id.* at 307.

277. *Bakke*, 438 U.S. at 325 (Brennan, J., concurring in the judgment in part and dissenting in part).

278. See B. SCHWARTZ, *supra* note 15, at 87-89.

279. See *id.*; see JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* 81-108 (1992) (criticizing Justice Brennan's attempt to misstate the holding).

280. See *Bakke*, 438 U.S. at 408 n.1 (Stevens, J., concurring in the judgment in part and dissenting in part).

281. See *id.* at 326 n.1 (Brennan, J., concurring in the judgment in part and dissenting in part).

282. *Id.* See also *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.) (quoting this footnote for the proposition that only Justice Powell accepted diversity as a compelling state interest), *cert. denied*, 116 S. Ct. 2581 (1996).

283. See *Bakke*, 438 U.S. at 307.

284. See *id.* at 326 n.1 (Brennan, J., concurring in the judgment in part and dissenting in part).

approach not the narrower and hence controlling approach with respect to diversity, as Justice Powell's opinion is with respect to remediation?

Justice Brennan's footnote may require an institution that uses race in achieving diversity only to explain that it was necessary to do so because of the continuing effects of past "societal" discrimination. This would impose an additional burden on the institution; however, this burden might be easy enough to satisfy, at least to the extent that the institution was using race to favor blacks and perhaps Latinos. If Justice Brennan's rationale simply narrows Justice Powell's approach, then pursuant to *Marks*, it presumably controls.²⁸⁵ However, it certainly may be argued that Justice Brennan's emphasis on remediation undermines and contradicts, rather than narrows the Powell approach.

For Justice Powell, a remedial approach could be employed only pursuant to specific findings of past discrimination by a competent and accountable body.²⁸⁶ It would be peculiar, to say the least, if Justice Brennan could, through a casual footnote, impose the type of loose remedial approach that Justice Powell adamantly rejected in the text of his opinion. Moreover, it would appear that remediation is not simply a subset of diversity but an entirely different and arguably inconsistent theory.²⁸⁷ For Justice Powell, diversity had nothing to do with the remediation of past discrimination.²⁸⁸ For Justice Brennan, diversity is only permissible as an aspect of such remediation.²⁸⁹ Justice Powell's approach looks to the future while Justice Brennan's approach focuses on the past.²⁹⁰ Viewing diversity as one method of rectifying past societal discrimination does not simply add one more element to the equation. It changes the focus of the diversity approach entirely from enhancement of the educational process to compensation for prior wrongs. Under this rationale, the focus in the admissions process shifts from the positive contribution that an applicant can

285. See *Marks*, 430 U.S. at 194-95.

286. See *Bakke*, 438 U.S. at 307.

287. See Chen, *supra* note 84, at 1863-67 (arguing that diversity and remediation are mutually exclusive theories). See also Chin, *supra* note 20, at 898, 908; Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2059 (1996) ("Diversity is appealing for what it is not It is not based on controversial views of compensation for past discrimination."). See also *Davis v. Halpern*, 768 F. Supp. 968, 981-82 (1991) (noting that the school seemed to confuse diversity with a remedial approach).

288. See *Bakke*, 438 U.S. at 307.

289. See *id.* at 326 n.1 (Brennan, J., concurring in the judgment in part and dissenting in part).

290. Justice Stevens has frequently argued that the Court should favor forward-looking over backward-looking approaches in this area to avoid the focus on blameworthiness and hence the inherent divisiveness of the remedial approach. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 601 (1990) (Stevens, J., concurring); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (Stevens, J., concurring); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting). See also Kathleen M. Sullivan, *Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91-97 (1986) (favoring "forward-looking" over "backward-looking" justifications of racial preferences).

make to the student body to the degree to which the applicant's racial group has been mistreated in the past. This approach would limit educational diversity to those racial groups who could show that they were victims of past discrimination. This is quite inconsistent with the type of broadbased diversity favored by Justice Powell and reflected in the Harvard plan.²⁹¹

Arguably, the Brennan and Powell opinions might be reconciled by construing the holding to mean that a diversity approach may be utilized only if the institution satisfies Justice Brennan's rationale by finding lingering effects of past discrimination and Justice Powell's by making specific fact findings. Such a solution destroys the utility of the diversity justification by requiring a predicate finding of past discrimination that most universities could not possibly satisfy. This would be a classic case of saving the village by destroying it.

Another reading might proclaim that the holding is wholly contained within the two sentences of section V-C of the Powell opinion. An institution is free to ignore everything else in the Powell and Brennan opinions since the rest of these opinions did not attract a majority of the Court. To comply with *Bakke*, section V-C says that an institution needs to ensure that it has constructed "a properly devised admissions program involving the competitive consideration of race and ethnic origin."²⁹² How is the institution to know whether the process is "properly devised" or whether it is "competitive" unless it consults the Powell opinion with its references to the Harvard plan? If the Powell opinion, representing only one vote, is binding with respect to these considerations, why then is the Brennan opinion, representing four votes, not equally binding with respect to the need of tying diversity to remediation of past discrimination?

Perhaps the Powell opinion provides useful guidance with respect to what might be constitutionally acceptable, but it does not have the force of law as such. The difficulty with this concession is that it leaves educational institutions more exposed than they would prefer. Since section V-C says nothing about "diversity," "pluses in the file," or "the Harvard plan,"²⁹³ an institution could not be certain that its admission process was constitutionally valid simply because it was modelled on the guidelines in Justice Powell's opinion. The legality of the admissions process would depend on whether a reviewing court concluded that the plan was properly devised and competitive. Presumably, such a court would rely on the Powell opinion in *Bakke*, but it would not be required to do so if the Powell opinion's discussion of diversity did not constitute part of the holding.

291. See *supra* note 268-70 and accompanying text.

292. *Bakke*, 438 U.S. at 320.

293. See *id.*

A university that placed its reliance on nothing more than section V-C would face another significant difficulty. As the law has developed through *Croson* and *Adarand*, it is clear that the Supreme Court will not sustain a racial classification absent a compelling state interest; yet, there is no recognition of compelling state interests in section V-C.²⁹⁴ Instead, section V-C states that an institution has "a substantial state interest" in the competitive use of race in the admissions process.²⁹⁵ However, it is well established today that institutions desiring to employ race in the admissions process, such as the University of Texas in *Hopwood*, need to establish that diversity is a compelling state interest in order to survive strict scrutiny. In order to do so, institutions must move beyond section V-C and rely on the remainder of the Powell opinion. Also, because Justice Powell constituted only one vote, an institution would need to look beyond section V-C and beyond Justice Powell's opinion to Justice Brennan's. An institution would be unable to find adequate support in the Brennan opinion for the proposition that diversity is a compelling state interest. Therefore, an institution that chose to rely on section V-C as justification for a diversity-based racial preference program must recognize that, at most, it has received an ambiguous and arguably useless blessing from the Supreme Court.

In a recent article, Professor Amar and Mr. Katyal have argued that perhaps Justice Brennan's footnote, qualifying the Powell diversity approach, may have stemmed from a concern that diversity might be misused.²⁹⁶ Thus, it would be a misuse of diversity to exclude presently overrepresented minorities who have been the subject of past discrimination, like Jews and Asians.²⁹⁷ Perhaps Justice Brennan was concerned about the continued use of diversity after disparities based on societal discrimination had been ameliorated.²⁹⁸ Presumably, Justice Brennan would be prepared to accept the Powell diversity approach as long as neither of these problems existed. The most obvious difficulty with this reading is that there is no evidence whatsoever to suggest that this is what Justice Brennan had in mind. Further, there is no reason to believe that Justice Powell would have accepted either of these qualifications. The employment of a diversity-based admissions process by an institution that attracts a disproportionate percentage of Jewish or Asian applicants would almost inevitably result in the exclusion of some students from these groups who would otherwise be admitted. As long as the decisions are made on a competitive basis, this result would not trouble either Justice Powell or Justice Brennan. If Justice Brennan was suggesting that diversity is only appropriate as long as it can

294. *See id.*

295. *See id.*

296. Amar & Katyal, *supra* note 15, at 1753.

297. *See id.*

298. *See id.*

be viewed as necessitated by the lingering effects of past discrimination, one must return to the question of whether this emphasis on diversity as a remedy is at all consistent with the concept of educational diversity as articulated by Justice Powell. If diversity is about educational enhancement through exposure to different perspectives, racially grounded cultural differences could contribute to diversity quite apart from the legacy of discrimination. If so, there is no reason why its justification should vanish simply because the effects of discrimination have been ameliorated.

The holding of *Bakke* is a hard nut to crack. It is difficult, if not impossible, to explain when, how, and why an institution may utilize race in its admissions process in a manner that is consistent with the opinions of Justices Powell and Brennan and does not render the actual holding in section V-C virtually an empty vessel. As Professor Sunstein recently stated, the rule of *Bakke* that a state university may use race as a factor, but not a quota, "represented the view of Justice Powell alone."²⁹⁹ He pointed out that "the other eight participating Justices explicitly rejected that rule."³⁰⁰

Ultimately, *Bakke* may hold slightly more than the Fifth Circuit assumed in *Hopwood*, but significantly less than its advocates contend. *Bakke* does hold that race can be used as a competitive factor in an admissions process, but it does not hold that diversity is a compelling state interest or that there is any other compelling state interest that would justify a competitive use of race. The Fifth Circuit in *Hopwood* was quite arguably correct in concluding that *Bakke* provides little useful precedential support for a race-conscious diversity-based admissions program.

B. Has Subsequent Supreme Court Precedent Undermined Justice Powell's Diversity Justification?

In addition to concluding that the Powell opinion, legitimizing some use of race in the admissions process, never received the support of a majority of the Justices, the Fifth Circuit in *Hopwood* also concluded that in any event, it had been undermined by subsequent Supreme Court precedent. This controversial conclusion provoked disagreement from both Judge Wiener³⁰¹ and Chief Judge Politz.³⁰²

299. See Cass A. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CALIF. L. REV. 1179, 1185 (1996).

300. See *id.*

301. See *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir.) (Wiener, J., concurring), *cert. denied*, 116 S. Ct. 2581 (1996); *supra* notes 254-58 and accompanying text.

302. See *Hopwood v. Texas*, 84 F.3d 720, 721 (5th Cir. 1996) (Politz, C.J., dissenting); *supra* notes 259-63 and accompanying text.

The *Hopwood* majority quoted Justice O'Connor's plurality opinion in *Croson* where she stated that "[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."³⁰³ Justice O'Connor had made this statement to explain that the Court needed to apply the strict standard of review to all racial classifications.³⁰⁴ As a basis for this principle, Justice O'Connor cited Justice Powell's opinion in *Bakke*.³⁰⁵ However, because the Powell opinion in *Bakke* was the genesis of the notion that diversity could be a compelling state interest, it would be strange authority to cite for the principle that diversity could not be a compelling interest. Justice O'Connor's statement did not address the question of whether anything, other than remediation, could be a compelling state interest, a question that was not before the Court in *Croson*.³⁰⁶ Therefore, Justice O'Connor's statement would appear to be casual dicta taken quite out of context by the *Hopwood* majority. If *Bakke* was precedent, this quotation provides no basis for suggesting that *Bakke* has been undermined.

If anything, Justice O'Connor's opinion in *Croson* strengthens the legitimacy of the Powell opinion in *Bakke*. In *Croson*, a majority of the Court, for the first time, agreed with Justice Powell's important conclusion that strict scrutiny should apply to benign racial classifications.³⁰⁷ In reaching this conclusion, Justice O'Connor cited to and quoted from Justice Powell's opinion in *Bakke*.³⁰⁸ With respect to the criteria for evaluating remedial programs, Justice O'Connor built upon the principles that Justice Powell had begun to set forth in *Bakke* and continued to explain in his concurrence in *Wygant*.³⁰⁹ Since *Croson* involved neither an educational context nor a diversity justification, the Court had no reason to address the validity of the Powell approach in *Bakke* and did not do so.³¹⁰ Judge Wiener called attention to these distinctions in his *Hopwood* concurrence.³¹¹

The *Hopwood* majority then turned to Justice O'Connor's dissent in *Metro Broadcasting*, where she was joined by Justices Rehnquist, Scalia, and Kennedy in observing that:

303. *Hopwood*, 78 F.3d at 944-45 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

304. *See Croson*, 488 U.S. at 493.

305. *See id.* at 493-94 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)).

306. *See id.* at 486.

307. *See id.* at 493-94. Although Justice O'Connor wrote only for a plurality at this point in her opinion, Justice Scalia, who concurred in the judgment, clearly agreed that at least the strict standard of review should apply. *See supra* notes 153-54 accompanying text.

308. *See id.* at 493-98. Justice O'Connor quoted from Justice Powell's opinion in *Bakke* six times in the standard of review section of her opinion alone. *See id.*

309. *See id.* at 498-506 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)).

310. *See Hopwood*, 78 F.3d at 965 n.21 (Wiener, J., concurring).

311. *See id.* at 964-65 & nn.18-19 & 21.

Modern equal protection doctrine has recognized only one . . . [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.³¹²

The *Hopwood* majority noted that Justice Thomas expressed agreement with this general view in his *Adarand* concurrence,³¹³ thereby indicating that there is now a majority of the Court that has cast doubt on diversity as a compelling state interest.³¹⁴

This point must be taken quite seriously. The majority in *Metro Broadcasting*, using the intermediate standard of review, sustained the congressionally approved use of racial preferences in the award and transfer of broadcast licenses on the ground that promoting diversity of viewpoints over the public airwaves is a substantial state interest.³¹⁵ This would appear to be quite similar to the interest in promoting diversity of discussion in the classroom identified as compelling by Justice Powell in *Bakke*.³¹⁶ For example, both interests can be supported by First Amendment arguments.³¹⁷

After quoting her *Croson* opinion, which the Fifth Circuit relied on in *Hopwood*, Justice O'Connor explained in her *Metro Broadcasting* dissent that an interest capable of supporting the use of racial preferences must be "sufficiently specific and verifiable, such that it supports only limited and carefully defined uses of racial classifications."³¹⁸ Justice O'Connor cited the remediation of societal discrimination in *Croson* and the role model theory in *Wygant* as two interests that had previously failed to meet these criteria.³¹⁹ She then stated that the interest in increasing diverse viewpoints in broadcasting suffered from the same problems.³²⁰ As with societal discrimination, there was nothing short of racial proportionality to limit the scope of either the preferences or their duration.³²¹ Nor was there a principled means of determining which viewpoints were underrepresented and hence which groups were entitled to preferences absent a remedial

312. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612 (1990).

313. *See Hopwood*, 78 F.3d at 945.

314. *See id.*

315. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 567-68 (1990); *supra* notes 158-64 and accompanying text.

316. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978).

317. *See id.* at 312.

318. *Metro Broad.*, 497 U.S. at 613 (O'Connor, J., dissenting).

319. *See id.* at 613-14.

320. *See id.* at 614.

321. *See id.*

justification.³²² She noted that such an approach “impermissibly equat[es] race with thoughts and behavior” and would make it impossible to determine whether the decision maker was truly attempting to encourage particular viewpoints or merely creating naked racial preferences.³²³ Justice O’Connor noted that such an interest could be utilized readily as a cover to achieve racial proportionality into the indefinite future.³²⁴

In rejecting a policy based on a presumption that race dictates behavior, Justice O’Connor noted that Justice Powell had similarly rejected the state’s argument in *Bakke* that racial preferences would serve a compelling state interest by increasing the number of minority physicians who would return to serve minority communities.³²⁵ Justice O’Connor further commented that a stereotype equating race with behavior is necessarily both overinclusive and underinclusive and, as such, cannot meet the narrow tailoring requirements of strict scrutiny.³²⁶ Moreover, such a stereotype would be inconsistent with the individualistic premises of equal protection even if empirically supported.³²⁷

Justice O’Connor did not discuss Justice Powell’s diversity justification in her *Metro Broadcasting* dissent, despite the fact that the majority relied on it in upholding the programs.³²⁸ However, the parallels between the two cases are inescapable. Both the University of California at Davis and the FCC relied on racial preferences based on the assumption that people of different races would hold and express different viewpoints and perspectives based on racially diverse experiences and that the promotion of such diversity was quite valuable.³²⁹ If designing a policy based on these conclusions is impermissible racial stereotyping in the broadcast context, it is not obvious why it would be any different in the education context. In each instance, the assumptions on which such policies are based would seem to be basically the same and thus, subject to the same criticisms. Each can claim support from the First Amendment, and each can claim to be of some social significance.³³⁰ However, because the government has traditionally been permitted a larger regulatory role in the broadcast context due to spectrum scarcity,³³¹ this might suggest that there could be more leeway for racial preferences in broadcasting than in education.

322. See *id.*

323. *Id.* at 615.

324. See *id.* at 614.

325. See *id.* at 619.

326. See *id.* at 621-22.

327. See *id.* at 620.

328. See *id.* at 579-80.

329. See *id.* at 569-71.

330. See *Bakke*, 438 U.S. at 312.

331. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396-400 (1969).

Metro Broadcasting might be distinguished from *Bakke* on the ground that there is an extra step in the FCC policy in *Metro Broadcasting* that was not present in *Bakke*. In *Bakke*, the state argued, and Justice Powell seemed to assume, that racially and otherwise diverse students "may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."³³² In *Metro Broadcasting*, the government argued that minority owners would exercise their authority to ensure that station management would broadcast programming which would increase diversity of viewpoints over the airwaves.³³³ Justice O'Connor challenged this latter assumption on the ground that station owners may have limited ability to control programming.³³⁴ Moreover, she challenged the assumption that persons of a particular race will generally express a particular point of view with even more vigor.³³⁵ In contrast, Justice Powell's diversity approach could be read as resting on this assumption.³³⁶ The *Hopwood* majority thought so.³³⁷

Bakke could also be distinguished from *Metro Broadcasting* by the way the racial preferences operated. As noted above, *Metro Broadcasting* involved two different racial preference programs.³³⁸ One, the distress sale policy, provided a preference only for members of specified racial groups.³³⁹ This was the type of flat set-aside that was clearly inconsistent with the Powell opinion in *Bakke*.³⁴⁰ The other racial preference provided a plus-in-the-file for minority ownership, which was to be considered along with several other specified factors.³⁴¹ This program was more like the Harvard plan but there appear to be some relevant differences. Under the Harvard plan, the characteristics of all applicants are assessed and compared to determine whether they will add to the diversity of the student body.³⁴² In *Metro Broadcasting*, however, although racial diversity of ownership was being balanced against other factors, it was not compared with other potentially diversifying characteristics.³⁴³ Thus, it would seem that the FCC was concerned with a narrower diversity than Justice Powell found

332. *Bakke*, 438 U.S. at 314.

333. *See Metro Broad.*, 497 U.S. at 569-71.

334. *See id.* at 627 (O'Connor, J., dissenting).

335. *See id.*

336. *See infra* notes 370-79 and accompanying text.

337. *See Hopwood v. Texas*, 78 F.3d 932, 945-46 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

338. *See Metro Broad.*, 497 U.S. at 552.

339. *See id.*

340. *See Bakke*, 438 U.S. at 299.

341. *See Metro Broad.*, 497 U.S. at 552.

342. *See Bakke*, 438 U.S. at 316-18, 321-24.

343. *See Metro Broad.*, 497 U.S. at 566-68.

appropriate in *Bakke*.³⁴⁴ On the other hand, it did not appear that any of this mattered to Justice O'Connor. Her primary complaint was not with the operation of the specific preferences, but rather with the underlying assumption that race correlates with behavior, viewpoint, or perspective.³⁴⁵

Although Justice O'Connor did not challenge the *Bakke* diversity justification in her *Metro Broadcasting* dissent, and even relied on other aspects of the Powell opinion, the Fifth Circuit was certainly correct in recognizing that the primary thrust of her dissent inevitably struck at the very heart of that opinion.³⁴⁶ When *Metro Broadcasting* was decided, the O'Connor opinion did not undermine *Bakke* since it was after all, a dissent.³⁴⁷ However, when Justice O'Connor wrote the opinion for the Court in *Adarand Constructors v. Peña* overruling *Metro Broadcasting*, the tables had turned.³⁴⁸ Certainly the Court did not need to adopt Justice O'Connor's *Metro Broadcasting* critique of diversity in broadcasting to overrule the case.³⁴⁹ It was more than sufficient that the *Metro Broadcasting* majority applied an intermediate standard of review because the Court had now agreed that even Congress must justify racial preferences pursuant to strict scrutiny.³⁵⁰

Still, *Metro Broadcasting* was overruled by Justice O'Connor,³⁵¹ the three Justices who joined in her *Metro Broadcasting* dissent,³⁵² and Justice Thomas, who submitted a concurring opinion in *Adarand* essentially agreeing with Justice O'Connor's basic critique of the non-remedial use of racial preferences.³⁵³ Thus, although *Adarand* does not outlaw FCC use of racial preferences to achieve diversity, much less educational use, the decision in *Adarand* would seem to indicate that a majority of the Court may presently be inclined to disfavor a justification which presumes that race produces divergent viewpoints, perspectives, or behavior.

The *Hopwood* majority rejected the law school's argument that Justice O'Connor's attempt to distinguish Justice Powell's diversity approach in *Bakke* from the role-model justification before the Court in *Wygant* indicated

344. See Amar & Katyal, *supra* note 15, at 1762-65 (arguing that Justice O'Connor was especially concerned with the degree to which the FCC programs in *Metro Broadcasting* categorically equated race with viewpoint); CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 137 (1996).

345. See Amar & Katyal, *supra* note 15, at 1762-65.

346. See *Hopwood*, 78 F.3d at 945.

347. See *Metro Broad.*, 497 U.S. at 602-31 (O'Connor, J., dissenting).

348. 515 U.S. 200, 225-27 (1995).

349. See generally *Metro Broad.*, 497 U.S. at 602-31 (O'Connor, J., dissenting) (stating that the use of racial classifications in FCC broadcasting policies was not permissible under standards established by previous opinions of the Court).

350. See *Adarand*, 515 U.S. at 227.

351. See *id.*

352. See *Metro Broad.*, 497 U.S. at 602.

353. See *Adarand*, 515 U.S. at 240-41 (Thomas, J., concurring).

that *Bakke* retained precedential value.³⁵⁴ The Fifth Circuit noted that Justice O'Connor was merely being descriptive in noting that *Bakke* was different and was not indicating her approval.³⁵⁵ Moreover, the Court found that her subsequent opinions in *Croson* and *Metro Broadcasting* undermined her statement in *Wygant*.³⁵⁶ This seems fairly convincing. Justice O'Connor addressed the issue of racial preferences in far greater depth in *Metro Broadcasting*, *Croson*, and *Adarand*, than in *Wygant*. To the extent of any inconsistency, presumably her later opinions should be given greater weight.

If the Powell opinion in *Bakke* constituted a valid precedent for the propositions that diversity in the admissions process is a compelling state interest and that race may be used as one of many factors to obtain a diverse student body, it cannot be concluded that the Court has overruled such a holding.³⁵⁷ Since *Bakke*, the Court has not decided another educational admissions case nor has it purported to confront the Powell opinion directly. Therefore, from a technical standpoint, *Bakke* is still good law, if it ever was. Nevertheless, in recent cases that are related but not directly on point, five members of the Court appear to have indicated that they disagree with the underlying assumption of the Powell diversity rationale—that race may be used as a proxy for viewpoint, perspective, or behavior.³⁵⁸ Unless one or more of these five Justices should change their mind, there is reason to believe that the present Court would reject diversity as a compelling state interest.³⁵⁹ This is not to say, however, that the Court might not cling to *Bakke* as a matter of stare decisis or distinguish the educational context from employment, contracting, voting, or broadcasting. However, the momentum of the Court would appear to run to the contrary.³⁶⁰ Consequently, *Hopwood* was certainly correct in suggesting that recent Supreme Court

354. See *Hopwood*, 78 F.3d at 945 n.27.

355. See *id.*

356. See *id.*

357. But see Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 999 (1991). Professor Paulsen observes that: [I]t is not at all clear what it means to "overrule" a case like *Bakke*, as there was no majority opinion and the opinion usually thought to represent the holding of the case—Justice Powell's half-and-half concurrence—announced a rationale rejected by eight Justices in the *Bakke* case itself. It is not clear that Justice Powell's opinion was, in any meaningful sense of the term, "the law"—even at the time *Bakke* was decided. It scarcely seems necessary for the Court to formally overrule single-member concurrences by since-retired Justices in order for current precedents to be given their full logical weight.

Id.

358. See, e.g., Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1043 (1996) (predicting a 5 to 4 majority on the present Court to reject diversity as a compelling state interest).

359. See *id.*

360. See *id.*

precedent calls the Powell opinion into serious question.³⁶¹ However, the decision was incorrect to the extent that it suggested that *Bakke* has been effectively overruled.³⁶²

C. Is Justice Powell's Diversity Justification in Bakke Inconsistent with Equal Protection Principles as Expounded by the Supreme Court?

1. Hopwood and Equal Protection Principles

Finally, the *Hopwood* majority argued that Justice Powell's approach in *Bakke* was inconsistent with well developed principles of equal protection.³⁶³ Essentially, the Court contended that the use of race as a factor in an admissions process was inconsistent with equal protection principles because it treated persons as members of groups rather than as individuals, stereotyped and stigmatized the individuals whom the process was supposedly designed to benefit, and created a system under which the use of race could extend indefinitely into the future.³⁶⁴ There is no question that these three themes resonate through the Supreme Court's opinions. The emphasis on the individualistic nature of equal protection would seem to be the major premise of all of the Court's recent affirmative action decisions, including *Wygant*, *Croson*, *Adarand*, and the voting rights cases. The Court has clearly cast its lot with the individualistic oriented anti-discrimination principle and rejected the academically popular anti-subordination principle.³⁶⁵ Likewise, the Court has consistently expressed concern about the potentially stigmatizing effect of benign racial classifications, as well as their potentially indefinite duration.³⁶⁶

2. Justice Powell in Bakke and Equal Protection Principles

The Fifth Circuit's use of these principles to reject diversity as a compelling state interest is somewhat puzzling given that Justice Powell essentially shared at least two, if not all three, of these very same principles in his *Bakke* opinion.³⁶⁷ He wrote that "it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather

361. See *Hopwood*, 78 F.3d at 944.

362. See *id.* at 944-46.

363. See *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

364. See *id.* at 945-48.

365. See Fried, *supra* note 34, at 107-09. It is often pointed out, however, that consideration of individuals under equal protection analysis must still make reference to characteristics possessed by members of a group, be it race, expertise or intelligence. See, e.g., Sunstein, *supra* note 299, at 1188.

366. See *supra* notes 29-34.

367. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978).

than the individual only because of his membership in a particular group.³⁶⁸ Indeed, it would not be inaccurate to say that the Powell opinion in *Bakke* is one of the cornerstones of the Court's individualistic approach to equal protection and race.³⁶⁹ Although Justice Powell debated with Justice Brennan about the significance of stigma in the analysis, he did note that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."³⁷⁰ Thus, Justice Powell was also concerned with the stigmatizing effect of purportedly benign racial classifications.³⁷¹ Although Justice Powell did not express concern about the indefinite reach of racial preferences in *Bakke*, it was a concern that he took seriously in his opinions in *Fullilove*³⁷² and *Wygant*.³⁷³

Justice Powell's emphasis on the individualistic character of equal protection, as well as the potentially stigmatizing effects of racial preferences, led him to conclude that strict scrutiny must apply to the benign use of racial preferences.³⁷⁴ This of course is a principle that the present Court endorses.³⁷⁵ Likewise, Justice Powell concluded that a set-aside was not narrowly tailored to the achievement of a diverse student body because it would fail to treat applicants as individuals with respect to race and would not achieve broad based diversity in any event.³⁷⁶ Justice Powell certainly did not believe that the individualistic nature of equal protection or the potentially stigmatizing effect of racial preferences precluded diversity from being a compelling state interest.³⁷⁷ Rather, he found the interest in diversity compelling because the state was able to convince him that diversity was quite important to its educational mission and that it was supported, at least tangentially, by First Amendment considerations.³⁷⁸

However, if a diversity program uses race as a factor it must withstand the rigors of strict scrutiny.³⁷⁹ This was Justice Powell's method, and indeed the Court's normal method, of attempting to reconcile highly

368. *Id.*

369. See Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 110 (1979) (commenting on Justice Powell's decisive rejection of the "notion that the equal protection clause is exclusively, or even mainly, a protection of special groups").

370. *Bakke*, 438 U.S. at 298.

371. See *id.*

372. See *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring).

373. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986).

374. See *Bakke*, 438 U.S. at 290.

375. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

376. See *Bakke*, 438 U.S. at 317-19.

377. See *id.* at 314.

378. See *id.* at 316.

379. See *id.* at 290-91.

important state interests with fundamental constitutional rights.³⁸⁰ The Fifth Circuit, on the other hand, seemed to have concluded that the very factors which give rise to strict scrutiny also preclude the state's interest in diversity from qualifying as compelling.³⁸¹ This would seem to prevent any meaningful balancing of interests. This is essentially the hard line colorblind approach taken by Justice Scalia³⁸² and Justice Thomas.³⁸³ It is far from obvious, however, that a majority of the Supreme Court believes that general equal protection principles dictate such a result.³⁸⁴

3. *The Risks to Equal Protection Principles Posed by Racial Preferences*

a. *Individuality and the Risk of Stereotyping*

The *Hopwood* majority argued that diversity was inconsistent with equal protection principles because "[i]t treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility."³⁸⁵

The Fifth Circuit continued by noting that "[t]o believe that a person's race controls his point of view is to stereotype him."³⁸⁶ It acknowledged that Justice Powell in *Bakke* apparently believed race could serve as a proxy for viewpoint, but then the court quoted from law review articles critical of Justice Powell's position.³⁸⁷ The Fifth Circuit then quoted Justice O'Connor's dissent in *Metro Broadcasting*: "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think."³⁸⁸

The Fifth Circuit did not cite a majority opinion of the Supreme Court for the proposition that any use of race as a proxy for viewpoint or perspective automatically violates an equal protection principle prohibiting racial stereotyping.

380. See *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in judgment).

381. See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

382. See *Croson*, 488 U.S. at 520 (Scalia, J., concurring).

383. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239, 240-41 (1995) (Thomas, J., concurring).

384. See e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

385. *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

386. *Id.* at 946.

387. See *id.* (citing Richard A. Posner, *The Defunis Case and the Constitutionality of Preferential Treatment of Minorities*, 1974 SUP. CT. REV. 1, 2 (1976); Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1000 (1993)).

388. *Hopwood*, 78 F.3d at 946 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

To suggest that the diversity justification is based on the assumption that a person's race controls point of view is an overstatement.³⁸⁹ As Professor Paul Brest and Miranda Oshige noted in a recent article, such an assumption is basically a straw man.³⁹⁰ Advocates of diversity need not and should not assert that there is a black point of view or even several black points of view.³⁹¹ This is probably not the case, and it hardly matters. The fact that a person's race, like economic, geographic, or employment background, will lead to experiences that will occasionally provide a different perspective on the discussion of issues is enough.³⁹² A person who has been raised in a home receiving welfare may bring a different perspective to a discussion of welfare reform than someone from a wealthy suburban environment. A person who has lived in a totalitarian country may bring a different perspective to freedom of press issues than a typical American student. A person with combat experience might bring a different perspective to a discussion of women in the military than a life-long civilian. So it is with race. A black person may offer a distinct perspective on the treatment of blacks by the police or the adequacy of city services provided to the black community, based not on a stereotypical black point of view, but rather on personal experience.³⁹³ Then again, he may not.

The fact that black persons may offer distinct perspectives based on unique experiences is all that diversity need claim, and this appears to be a rather modest claim. Moreover, a person's perspective is based, not on some overreaching stereotype, but rather on the individual's unique life

389. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862 (1995). See also Blasi, *supra* note 56, at 44 (discussing the use of race as a proxy for other characteristics important in education).

390. See Brest & Oshige, *supra* note 389, at 862.

391. See *id.*

392. See *id.*; Amar & Katyal, *supra* note 15, at 1776. In *Metro Broadcasting*, Justice Brennan attempted to draw this distinction, at least to some extent. See *Metro Broad., Inc.*, 497 U.S. 547, 579-83 (1990). However, Justice O'Connor suggested it was an irrelevant distinction. See *id.* at 616, 620 (O'Connor, J., dissenting). Justice Brennan wrote:

The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in *Bakke* that greater admission of minorities would contribute, on the average, "to the robust exchange of ideas." To be sure, there is no ironclad guarantee that each minority owner will contribute to diversity.

Id. at 579 (citations omitted). Justice O'Connor replied:

The racial generalization inevitably does not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race rather than upon a relevant criterion. . . . This reliance on the "aggregate" and on probabilities confirms that the Court has abandoned heightened scrutiny, which requires a direct rather than approximate fit of means to ends.

Id. at 620 (O'Connor, J., dissenting) (citation omitted).

393. See Brest & Oshige, *supra* note 389, at 862.

experiences.³⁹⁴ As such, focusing on the distinct perspectives a black person may offer would be more consistent with the individualistic approach to equal protection the Court favors, as opposed to an approach that would disregard a significant personal characteristic of the individual such as race.³⁹⁵

As Professor Sandalow put it some time ago, "race and ethnicity are socially significant characteristics."³⁹⁶ There will be occasions when a person's experiences will be affected by race.³⁹⁷ Critical race scholars have documented a wide range of instances, often through narrative method, in which race has apparently influenced the way an individual has been treated, either by government officials, or by members of the dominant culture.³⁹⁸ A commonly cited example is the case of a black student or professor stopped and questioned by the police in a middle-class, white, suburban neighborhood near a university campus for no apparent reason other than race.³⁹⁹ There will generally be no adequate race-neutral proxy capable of illuminating similar instances of racially influenced treatment or experience.⁴⁰⁰ If an individual is treated differently specifically because of race, that experience would not necessarily be shared by someone who is poor, or someone who grew up in an urban environment, or someone who attended public schools. If institutions are allowed to pursue students who add to diversity based on any relevant characteristic except race, true diversity will be undermined almost as much as if institutions pursued only that diversity which is attributable to racial difference.

Intuitively, it seems obvious that persons of different races may have experienced racially-based differential treatment, which in turn can contribute to the overall diversity of perspective and, hence, understanding. Presumably, the *Hopwood* majority, and to some extent Justice O'Connor in *Metro Broadcasting*, contend that racially based diversity is inconsistent with constitutional principle, even if there is a relationship between race and

394. See *id.*

395. See Aleinikoff, *supra* note 36, at 1094; see Gotanda, *supra* note 17, at 1140.

396. Sandalow, *supra* note 82, at 683. See also Aleinikoff, *supra* note 36, at 1062 (explaining that society is not colorblind because race is socially significant to disadvantaged minorities); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 140 ("Race is a proxy for experiencing life in the United States differently.").

397. See Brest & Oshige, *supra* note 389, at 862.

398. See DERRICK BELL, *CONFRONTING AUTHORITY* (1994); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, reprinted in *Critical Race Theory* 329 (1996); Richard Delgado & David Yun, *The Neoconservative Case Against Hate Speech Regulation - Lively, D'Souza, Gates, Carter and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1813 (1994); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

399. This happened to a black professor at the school where I teach within the past few years. See Paul Butler, *Walking While Black*, LEGAL TIMES, Nov. 10, 1997, at 23 (recounting a similar incident).

400. See Blasi, *supra* note 56, at 44.

experience.⁴⁰¹ To a significant degree, this contention would seem to be based on a fear that such a reliance on race would risk engaging in the very type of racial stereotyping that the Fourteenth Amendment is intended to eradicate.⁴⁰² The *Hopwood* majority makes this point with the following quotation from Judge Posner: “ ‘The use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America.’ ”⁴⁰³

To put it differently, the *Hopwood* majority is pointing out that, because of our nation's history of discrimination, and the history and purpose of the Fourteenth Amendment, race is constitutionally different from virtually all other personal characteristics.⁴⁰⁴ The risk of abuse, especially through stereotyping, is of a qualitatively different order.⁴⁰⁵ Racial stereotypes have been used as instruments of discrimination in the United States to an extent that no other characteristic has been. This is scarcely controversial.

Due to this history and the continued risk of abuse, the Supreme Court has insisted on employing strict scrutiny whenever the state relies on race, even for purportedly benign purposes.⁴⁰⁶ As noted above, this was the approach of Justice Powell in *Bakke*,⁴⁰⁷ as well as a majority of the Supreme Court in *Croson*⁴⁰⁸ and *Adarand*.⁴⁰⁹ Thus, a state institution could explicitly favor applicants who contributed to diversity based on geography, age, educational background, employment experience, or special skills and talents with virtually no prospect of meaningful judicial oversight.⁴¹⁰ If, however, the institution chooses to diversify based on race, it must satisfy the most demanding judicial standard.⁴¹¹

The *Hopwood* majority and, in a noneducational context, the O'Connor dissent in *Metro Broadcasting*, go farther, contending that, when strict scrutiny is applied, the interest in racial diversity cannot qualify as an

401. See Volokh, *supra* note 287, at 2059-62.

402. See *id.*; Fried, *supra* note 34, at 123; Paulsen, *supra* note 387, at 1000-01; Chen, *supra* note 84, at 1892; Charles W. Collier, *The New Logic of Affirmative Action*, 45 DUKE L. J. 559, 572-73 (1995).

403. *Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996) (quoting Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12 (1974)).

404. See *id.* at 939-40.

405. See *id.*

406. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287-91 (1978).

407. See *supra* Part III.A.

408. See *supra* Part III.B.3.

409. See *supra* Part III.B.5.

410. See *Hopwood*, 78 F.3d at 946.

411. See *id.* at 951-52.

interest compelling enough to survive, presumably in part because of the risk of abuse through stereotyping.⁴¹² Asserting that diversity cannot be a compelling state interest might be an appropriate response if race is being used as a broad-based proxy for viewpoint or behavior.⁴¹³ This was arguably the case in *Metro Broadcasting*, where Congress and the FCC concluded that minority broadcast owners would likely provide programming of interest to minority listeners.⁴¹⁴ The *Hopwood* rationale might also follow if an institution employed racial preferences on the theory that students of different races would bring racially distinctive voices or viewpoints to the campus. The courts might appropriately reject this interest as an improper and overly broad stereotype. This should not necessarily be the case, however, if in a competitive process an institution honestly uses race as simply one of many characteristics which may be indicative of the unique personal experiences of the individual applicant.⁴¹⁵ This is consistent with the Powell approach in *Bakke*, as well as the individualistic approach to equal protection that is rightly skeptical of racial stereotyping.⁴¹⁶

The difference between racially distinct viewpoints and racially influenced experiences may seem slim, but it is basically the difference between treating a person as a member of a group and treating a person as an individual. This difference should also be the difference between violating equal protection and complying with it. By examining an institution's explanation of why it pursues racial diversity, as well as the weight it accords to race compared to other potentially diversifying factors, a court should be able to evaluate whether the institution is either employing race as a stereotype for viewpoint or behavior or evaluating the applicant's race as one of many personal characteristics which may have contributed to the individual's life experiences. If it appears that an institution accords an applicant's race overriding significance in the admissions process, it should be apparent to a reviewing court that the institution is not making a good faith attempt to comply with Justice Powell's diversity justification.⁴¹⁷ As such, it would not satisfy strict scrutiny.⁴¹⁸ In addition, as will be developed later, requiring institutions that desire to utilize race as a diversifying factor to make their admissions procedures and their gross admissions statistics publicly available could also provide a significant check against

412. See *id.* at 946-48; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602-05 (O'Connor, J., dissenting).

413. See Brest & Oshige, *supra* note 389, at 862.

414. See Amar and Katyal, *supra* note 15, at 1761.

415. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-19 (1978).

416. See *supra* Part IV.A.

417. See Amar & Katyal, *supra* note 15, at 1777.

418. See *Bakke*, 438 U.S. at 319-20.

abuse through stereotyping and stops short of rejecting diversity as a compelling state interest.⁴¹⁹

b. The Risk of Stigma

The majority in *Hopwood* also contended that the diversity rationale was inconsistent with equal protection principles because it inevitably stigmatized its "beneficiaries" as less qualified.⁴²⁰ This is a common criticism of any strictly non-remedial racial preference program.⁴²¹ It is a fair criticism. By definition, the employment of a racial preference in admissions means that some applicants, who would not otherwise be admitted, are being admitted because of their race.⁴²² They may be as well qualified to fill the position as competing applicants, or they may not. Much will depend upon the nature of the applicant pool and the degree of the preference.⁴²³ An institution which pursues a policy of racial diversity, no matter what the cost, may well favor applicants who are significantly less qualified, at least by any form of objective measurement.⁴²⁴ On the other hand, if an institution faithfully followed the rather modest plus-in-the-file approach sketched by Justice Powell in *Bakke*,⁴²⁵ race might be little more than a strong tie breaker among a pool of relatively equally qualified applicants.

Most racial preference programs are operated in complete secrecy, making it easy for the public to assume whatever it wants about the degree and impact of the preferences.⁴²⁶ In this context, the potential for stigmatization is certainly present. Some members of non-preferred racial groups will assume that all minority students are the beneficiaries of affirmative action and are significantly less qualified, when neither is the case.⁴²⁷ Some minorities who were not the beneficiaries of affirmative action will feel stigmatized and assume, perhaps correctly, that non-minorities question their qualifications.⁴²⁸ Many members of racial minority groups will not know whether or not they were beneficiaries of racial preferences but may

419. See *infra* Part V.

420. See *Hopwood v. Texas*, 78 F.3d 932, 947 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996). The court noted that several minority students testified that they felt that other students assumed they were admitted only because of a racial preference. See *id.* at 953 n.45.

421. See EASTLAND, *supra* note 34, at 85-86; STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 50 (1991); Brest & Oshige, *supra* note 389, at 858; Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEGAL EDUC. 97, 101 (1992); Collier, *supra* note 402, at 572.

422. See Collier, *supra* note 402, at 560-63.

423. See Brest & Oshige, *supra* note 389, at 856-57.

424. See Collier, *supra* note 402, at 560-63.

425. See *Bakke*, 438 U.S. at 315-20.

426. See Browne *supra* note 18, at 1291; Graglia, *supra* note 18, at 1218.

427. See EASTLAND, *supra* note 34, at 85-86.

428. See *id.* at 85.

suspect that they were, and those suspicions may undermine their self-confidence.⁴²⁹ Thus, the problem of stigma is very real and must be taken seriously.

In *Bakke*, Justice Powell seemed to assume that a competitive consideration of race as one of many factors would minimize, if not eliminate, the problem of stigma.⁴³⁰ Strict scrutiny of the program would ensure that it was in fact a good faith competitive process rather than a concealed racial quota. If race is accorded little, if any, more weight in the admissions process than geographic diversity, economic hardship, special talent, relationship to alumni, or work experience, then presumably the beneficiaries of racial preferences should be subject to no greater stigma than the beneficiaries of any of these other relatively well-accepted preferences. An admissions process which complied with the letter and spirit of Justice Powell's diversity justification in *Bakke* would go a long way toward minimizing stigma.

Stigma is a matter of perception however. In order to minimize it, the public must be in a position to evaluate the process.⁴³¹ A secretive admissions process in which race is taken into account may inevitably lead to suspicion, misunderstanding, and stigma.⁴³² The price of minimizing stigma then may be the operation of an honest, open, and publicly comprehensible admissions process. Though it would not be appropriate, or even legal, for a university to reveal the test scores and grade points of individual applicants, it could certainly make public the gross statistics and any objectively weighted factors, as was done in the context of the litigation in *Hopwood*.⁴³³ This publicity might eliminate stigma attributable to erroneous perceptions of racially based disparities. However, stigma attributable to real differences in qualifications might be even more pronounced if the disparities were more visible. Presumably, the potential for increasing stigma and resentment, not to mention litigation, through the open publication of admissions data would provide a powerful check against abuse by admissions officials. An institution which chose to employ racial preferences to override extreme disparities in the academic indicators of applicants should understand that its procedures are likely to be counterproductive and would inevitably create stigma and racial polarization.⁴³⁴ Moreover, the institution should also understand that these preferences will be highly vulnerable to judicial challenge as implicit set-asides.⁴³⁵

429. See *id.*

430. See *Bakke*, 438 U.S. at 318.

431. See Graglia, *supra* note 421, at 1218.

432. See EASTLAND, *supra* note 34, at 84-87.

433. See *Hopwood*, 78 F.3d at 935-38.

434. See EASTLAND, *supra* note 34, at 84-87.

435. See *Bakke*, 438 U.S. at 319-20.

Even making gross statistics and other objectively weighted factors available will not eliminate the problem of stigma with respect to a minority student who is admitted without the aid of racial preferences.⁴³⁶ As long as the racial preference is only one of many relatively equally weighted diversifying factors, the stigma should be no greater than that which might be borne by an athlete or legacy who was admitted without the benefit of any preference. Any preferences would remain troublesome, but arguably not troublesome enough to justify rejection of any utilization of race as a diversifying factor. It must be emphasized, however, that this would be the case if and only if the public understood that racial preferences were being used in a fairly modest way.

A proponent of a strict colorblind approach might argue that any non-remedial use of race, no matter how modest, would inevitably lead to the type of stigmatic harm that equal protection is intended to eliminate. The approach is clear, certain, and cannot be definitively refuted. It may well be true that minority students who benefit, as well as those minority students who do not benefit, from racial preferences have the potential of being harmed by race-conscious decision making. A strict colorblind approach avoids that possibility by refusing to recognize the validity of the competing consideration of pursuing racial diversity in the face of racially correlated disparities in qualifications. Ultimately, the issue boils down to a constitutional value judgment.

The *Hopwood* majority essentially concluded that the risk of stigma is inevitable and simply too great of a price to pay.⁴³⁷ This strict colorblind approach is consistent with the rigorous approach to equal protection employed by Justice Scalia.⁴³⁸ Requiring a publicly open admissions process, policed by meaningful strict scrutiny, does not eliminate the risk of stigma, but attempts to contain it. This approach is consistent with Justice Powell's approach in *Bakke*, and is not presently inconsistent with the Supreme Court's equal protection principles.⁴³⁹

c. *The Risk of Enduring Racism*

The *Hopwood* majority also contended that "the use of race to achieve diversity undercuts the ultimate goal of the Fourteenth Amendment: the end of racially-motivated state action. Justice Powell's conception of race as a 'plus' factor would always allow race to be a potential factor in admissions decisionmaking."⁴⁴⁰

436. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 517 (1989).

437. See *Hopwood*, 78 F.3d at 953.

438. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

439. See *Bakke*, 438 U.S. at 269.

440. *Hopwood v. Texas*, 78 F.3d 932, 947-48 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

The Fifth Circuit noted that Justice Blackmun, concurring and dissenting in *Bakke*, emphasized that present race consciousness was, unfortunately, a necessary prerequisite to the ultimate achievement of a race-neutral society.⁴⁴¹ However, the *Hopwood* majority, quoting from Justice O'Connor's plurality opinion in *Croson*, where she expressed concern that the *Croson* dissent's call for an intermediate standard of review would lead to a permanent state of race consciousness, opined that the Supreme Court had abandoned this position.⁴⁴² Some would argue that race consciousness will always be a part of our society and the goal of colorblindness is nothing short of utopian.⁴⁴³ However, the Fifth Circuit is correct in concluding a solid majority of the Supreme Court favors an approach to equal protection which directs the law toward an ideal of governmental colorblindness in the future.⁴⁴⁴ Consequently, a practice which has the potential to perpetuate enduring government sanctioned racialism will be perceived as being in serious tension with the purpose of equal protection. A majority of the Justices, if not a majority of the Court, have indicated that a continuing focus on race by the state tends to perpetuate the evils, such as unfairness, inaccurate stereotyping, stigmatization, resentment, and conflict, associated with racial discrimination.⁴⁴⁵

A logical stopping point for the remedial use of racial preferences is when the violation has been cured. However, the use of racial preferences to achieve diversity in educational institutions could continue as long as racially correlated disparities in academic indicators persist and race continues to influence life experience.⁴⁴⁶ There is every reason to assume these conditions will be present into the foreseeable future. A primary response to the concern over the potentially indefinite duration of racial preferences to achieve diversity is Justice Blackmun's argument that racial preferences are a way-station on the road to a colorblind society, but it may take an extremely long time to reach that ultimate destination.⁴⁴⁷ The

441. See *id.*; Ely, *supra* note 59, at 723.

442. See *Hopwood*, 78 F.3d at 948 (quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 495 (1989) (O'Connor, J., plurality opinion)). The quotation reads: "The dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race, . . . will never be achieved.' " *Id.*

443. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); RICHARD DELGADO, *RODERIGO CHRONICLES* 24-28, 74-81, 148-63 (1995).

444. See Paul Mishkin, *Forward: The Making of a Turning Point—Metro and Adarand*, 84 CAL. L. REV. 875 (1996).

445. See *supra* Part III.B.1-5.

446. In *Metro Broadcasting*, Justice Brennan tried to defuse criticism of the program at issue in that case, noting that, like the Harvard plan in *Bakke*, there would be no further need for the program once sufficient diversity is achieved. See *Metro Broad., Inc. v. Bakke*, 497 U.S. 547, 596 (1990).

447. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part).

imposition of a colorblind principle on a color conscious society can be criticized as indifferent to historical and social context.⁴⁴⁸

The *Hopwood* majority quoted Professor Van Alstyne's ringing retort to this argument:

One gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race. Indeed that is the great lesson for government itself to teach⁴⁴⁹

This position can be defended both as a matter of principle and pragmatism. The principle that racially based government action is wrong and harmful, regardless of the motives or the intended beneficiaries, is clear, simple, and carries great rhetorical force. The racially based governmental action builds on the proposition recognized by the Supreme Court that any employment of racial preference is readily subject to abuse, capable of inflicting harm, and is easily misunderstood.⁴⁵⁰ The longer racial preferences are utilized, the greater the risk of abuse, harm, and misunderstanding becomes. The "colorblindness now" position can readily place the proponents of racial preferences on the defensive by drawing on a wealth of historically based discomfort with the official employment of racial classifications.

This position recognizes that racial preferences for supposedly benign purposes can become self-fulfilling prophecies. If members of minority groups receive valuable preferences on the presumption their experiences have been affected by race, there will be some incentive to ensure their experiences continue to be so affected. Thus, rewarding race consciousness may encourage more race consciousness.⁴⁵¹ Moreover, as with any government entitlement, the interest groups benefitted will have an understandable incentive to press for the continuation of the program. At some point, as Professor Farber has noted, racial preferences to achieve diversity may begin to appear as part of the natural order of things.⁴⁵² In

448. The point was well made in *Bakke* by Justice Marshall, *see Bakke*, 438 U.S. at 388 (Marshall, J., concurring in the judgment in part and dissenting in part), and Justice Blackmun, *see id.* at 403 (Blackmun, J., concurring in the judgment in part and dissenting in part). *See* Richard Delgado, *Roderigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1718 (1995).

449. *Hopwood*, 78 F.3d at 948 n.35 (quoting William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809-10 (1979)).

450. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-95 (1989).

451. *See* SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 118, 142 (1990).

452. *See* Jim Chen, *Embryonic Thoughts on Rural Identity as New Property*, 68 U. COLO. L. REV. 1123, 1155 (1997); Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 917 (1994).

this case, racial preferences become more difficult to eliminate.⁴⁵³ Seemingly endless racial preferences may lead to greater resentment and may stigmatize intended beneficiaries more severely than temporary racial preferences. At some point, semi-permanent racial preferences may begin to appear as little more than a politically extracted benefit for an undeserving and non-competitive group.⁴⁵⁴

Thus, the *Hopwood* court is correct in recognizing that the potentially indefinite duration of diversity-based racial preferences is in "tension" with the long term colorblind goals of the Supreme Court's equal protection jurisprudence.⁴⁵⁵ There is no basis for concluding that the Supreme Court has formulated a principle that, independent of strict scrutiny, racial preferences of relatively indefinite duration are necessarily inconsistent with equal protection. The *Hopwood* court was unable to cite any solid support for such a principle.⁴⁵⁶ The court of appeals acknowledged that, if *Bakke* is in fact still good law, long enduring racial preferences are constitutionally acceptable.⁴⁵⁷ Virtually all of the concerns expressed by the Supreme Court, as well as by individual Justices, regarding the indefinite duration of racial preferences have occurred in the context of remedial programs.⁴⁵⁸ The emphasis on duration, in the context of remedial programs, is distinguishable from diversity in education to the extent that it is necessary to limit the duration of the remedy in order to tailor it to the scope of the wrong. To the extent the Court was concerned with the burdens imposed on non-minorities and the divisiveness caused by indefinitely extended racial preferences, the diversity rationale is implicated.

Justice Scalia favors the type of hard line colorblind approach adopted by the *Hopwood* court; however, he has never garnered a majority.⁴⁵⁹ Beyond the remedial context, Justice O'Connor's *Metro Broadcasting* dissent criticized the majority's diversity rationale in that case on the ground that it would support the use of racial preferences indefinitely.⁴⁶⁰ Justice O'Connor argued diversity of viewpoint in broadcasting is not a compelling state interest.⁴⁶¹ This is similar to the argument advanced by the *Hopwood* majority.⁴⁶² If Justice O'Connor were to stand by the views she announced

453. See *id.*

454. See David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 24-25.

455. See *Hopwood*, 78 F.3d at 948.

456. See *id.* at 932-55.

457. See *id.* at 948.

458. See *supra* Part III.B.3-4 (discussing *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

459. See *Adarand*, 515 U.S. at 239 (Scalia, J., concurring); *Croson*, 488 U.S. at 520 (Scalia, J., concurring).

460. See *Metro Broad.*, 497 U.S. at 614.

461. See *id.*

462. See *Hopwood*, 78 F.3d at 945.

in *Metro Broadcasting* in a majority opinion addressing diversity in education, the *Hopwood* court would be a reliable prophet, but that has not yet occurred.

Thus, *Hopwood* is incorrect in its assertion that the risk of enduring racialism necessarily precludes diversity in education from qualifying as a compelling state interest.⁴⁶³ The *Hopwood* court is correct, however, in recognizing that the risk of enduring racialism is a concern that would be taken very seriously by the present Supreme Court. As the law stands, the Court will apply strict scrutiny to racial preferences intended to achieve diversity. The seemingly indefinite duration of such preferences might cause the Court to question whether, in a particular case, they are narrowly tailored enough to the compelling interest.

This is a point on which the political process can provide a better check than judicial review. Public support for racial preferences is clearly waning.⁴⁶⁴ At some point, which may not be very far away, public dissatisfaction with enduring racial preferences which seek diversity may lead to the legislative demise of such preferences quite apart from *Hopwood* and equal protection principles.

D. Do Educational Institutions Have a Legitimate Reliance Interest in Justice Powell's Diversity Justification?

The *Hopwood* majority contended racial diversity in education is not a compelling state interest because the Powell opinion in *Bakke* never commanded a majority, *Bakke* has been undermined by subsequent precedent, and *Bakke* is inconsistent with equal protection principles.⁴⁶⁵ If any of these propositions is correct, it would be worth considering whether educational institutions have acquired a reliance interest in Justice Powell's diversity approach.

While there may not be any completely reliable information, there seems to be a consensus that a great many educational institutions, including most elite institutions, have purported to rely on Justice Powell's discussion of the Harvard plan as a model for designing constitutionally permissible admissions processes. Is nineteen years of relatively open reliance on the

463. See *id.* at 946.

464. See Lemann, *supra* note 43, at 54; Browne, *supra* note 18, at 1291; Jayne Noble Suhler, *58% Back Ruling on Race College Entrance*, DALLAS MORNING NEWS, Nov. 16, 1997 at 45A (A poll indicated that 58% of Texans agree with the ruling in *Hopwood* while only 29% oppose it.); Sam Howe Verhovek, *In a Poll, Americans Reject Means But Not Ends of Racial Diversity*, N.Y. TIMES, Dec. 14, 1997, at A1 (A minority of Americans support racial diversity in education but oppose the use of racial preferences.). But see Sam Howe Verhovek, *The 1997 Elections: Houston Voters Turn Back Affirmative Action Ban Much Like the One in California*, N.Y. TIMES, Nov. 24, 1997, at A24 (Voters in Houston rejected a ban on affirmative action in city hiring and contracting.).

465. See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

Powell opinion sufficient to insulate these programs from challenge even if the Powell opinion never commanded a majority?

Hopwood has been criticized as an exercise in illegitimate anticipatory overruling.⁴⁶⁶ That would seem to be a fair criticism if the *Hopwood* majority's rejection of *Bakke* relied only on the conclusion that the Powell opinion is inconsistent with subsequent Supreme Court precedent and equal protection principles. *Hopwood* is arguably incorrect with respect to both of these conclusions, but even if it is correct, these inconsistencies are not so obvious as to warrant anticipatory overruling by a circuit court. Rather, as Judge Wiener noted in his concurrence, the majority had to extend existing Supreme Court precedent beyond its present limits to reach its conclusion.⁴⁶⁷ This is important to the ultimate outcome of the *Hopwood* case itself, but not necessarily to the future of the diversity justification. Inevitably, the Supreme Court will confront this issue and have the clear authority to overrule its own precedent.

However, *Hopwood* cannot simply be dismissed as an illegitimate example of anticipatory overruling. The *Hopwood* majority's first argument against *Bakke*, and quite possibly its strongest, was that the Powell opinion had never commanded a majority of the Supreme Court.⁴⁶⁸ If this is the case, there was nothing to be overruled. The Fifth Circuit has simply pointed out that the emperor has never worn any clothes.

Without repeating the prior analysis of the Powell opinion's precedential status, recall that Justice Powell's opinion presented all but unsolvable ambiguities.⁴⁶⁹ Five Justices agreed race could be a factor in a competitive admissions process, but a majority could not agree when or why race could be a factor.⁴⁷⁰ Universities will seize on the official holding of *Bakke* to defend race-conscious admissions decisions; however, they may not be able to claim that diversity is a compelling state interest or that the Harvard plan was blessed by anyone other than Justice Powell.

Most institutions presumably read *Bakke* to mean the Court will permit an institution to use race as one factor in the admissions process to achieve a diverse student body as long as there are no quotas or set-asides and as long as there are meaningful comparisons of applicants across racial

466. See *Hopwood v. Texas*, 84 F.3d 720, 721-24 (5th Cir. 1997) (Politz, C.J., dissenting); *Hopwood v. Texas*, 78 F.3d 932, 964 (5th Cir.) (Weiner, J., concurring), cert. denied, 116 S. Ct. 2581 (1996). The Supreme Court has held that lower courts should follow controlling Supreme Court precedent even when the rationale supporting the authority has been rejected by other lines of Supreme Court authority. See *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484 (1989).

467. See *Hopwood*, 78 F.3d at 964 (Wiener, J., concurring).

468. See *id.* at 944.

469. See *supra* Part IV.A.

470. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-19 (1978); *id.* at 362-69 (Brennan, J., concurring in the judgment in part and dissenting in part).

lines.⁴⁷¹ *Bakke* has been read as if the Powell opinion itself was the majority opinion. As noted earlier, this is a permissible reading, but it is certainly open to serious challenge.⁴⁷²

Educational institutions which have treated the Powell opinion as a majority opinion may have assumed that the Court implicitly suggested that the Powell approach could safely be followed. Indeed, Justice Powell rather explicitly set forth the Harvard plan for the purpose of providing guidance.⁴⁷³ Such an interpretation by universities is certainly self-serving since diversity is a relatively easy and comfortable rationale for most institutions to adopt in order to justify racial preferences.⁴⁷⁴ However, such a reading is fraught with risk. The Powell opinion does not purport to be the opinion of the Court with the exception of one very ambiguous paragraph.⁴⁷⁵ It is scarcely radical to suggest that interpreters of the opinion should rely on what the Court in fact said, as opposed to what they would like to infer.

Some commentators have suggested that *Bakke* sent the cynical message that institutions could do whatever they wanted with regard to racial preferences as long as they concealed it from the public.⁴⁷⁶ As long as institutions did not employ explicit quotas, the Court would take no interest in their affirmative action programs, even if they failed to employ a truly competitive process. This type of disingenuous reading may have led to the abuses by the University of Texas Law School as revealed in the *Hopwood* litigation.⁴⁷⁷ There is no legitimate legal support for such a reading.

Arguably, institutions which read *Bakke* liberally may have concluded it was apparent that the Brennan four were more disposed to racial preferences than Justice Powell. While refusing to accede to the Powell approach in *Bakke*, if push came to shove, the Brennan four would surely accept an unqualified diversity rationale if it was necessary to save

471. See Amar & Katyal, *supra* note 15, at 1751.

472. See *supra* Part IV.A.

473. See *Bakke*, 438 U.S. at 316-24.

474. See Volokh, *supra* note 287, at 2059.

475. See *Bakke*, 438 U.S. at 325-26 (Brennan, J., concurring in the judgment in part and dissenting in part).

476. See Lino H. Graglia, *Hopwood v. Texas: Racial Preferences in Higher Education Upheld and Endorsed*, 45 J. LEGAL EDUC. 79, 86-87 (1995); see also Greenawalt, *supra* note 369, at 129 ("[U]niversities would continue pretty much as in the past, . . . not really reacting conscientiously to Justice Powell's standards but able to state a justification in those terms."); SCHWARTZ, *supra* note 15, at 156 ("[T]he post-*Bakke* situation is, . . . not very different from what it was before the Supreme Court decision. Minority admissions are still treated as special and universities continue to accord racial preferences to ensure minority students constitute a significant portion of those enrolled."). But see Blasi, *supra* note 56, at 59-60 (rejecting such a reading).

477. See Graglia, *supra* note 476, at 86-87; Aldave, *supra* note 17, at 3. Dean Aldave describes how she resigned from the University of Texas Law School's Admissions Committee when it adopted approaches which clearly seemed to violate *Bakke*. See Aldave, *supra* note 17, at 3.

affirmative action. However, *Bakke* would seem to be the very case in which push came to shove and the Brennan four declined to yield.

Alternatively, institutions may have concluded Justice Brennan was only one vote away from a majority while Justice Powell needed four. If a new justice agreed with Justice Brennan, then diversity would become irrelevant and institutions could use racial preferences, including outright set-asides, to remedy societal discrimination, checked only by a relatively friendly, intermediate standard of review. At the time, some institutions may have concluded it was worth gambling that the Brennan four would find the crucial fifth vote. If so, that gamble has not paid off.

Thus, there are a number of readings of *Bakke* which might lead a university to conclude it was relatively safe to rely on the Powell opinion. However, under any of these interpretations, the conscientious reader must ultimately concede that none of the justices in *Bakke* other than Justice Powell ever asserted that educational diversity constituted a compelling state interest. Thus, no matter how many institutions have purported to rely on the Powell opinion, and no matter how long they have continued to do so, the risk that such reliance is unwarranted remains.

Should such a widespread, open, uncorrected interpretation, even if it is, in fact, based on a misinterpretation, create a reliance interest worthy of respect? One obvious response to any claim of reliance on the Powell opinion is it simply was not reasonable, given it is clear from the face of the opinion that the Powell diversity approach does not command a majority.⁴⁷⁸ Institutions that have relied on the Powell opinion might respond that a majority of the Court did hold race was a permissible factor to use in the admissions process. Yet, an inability to rely on the Powell opinion would effectively preclude this response.⁴⁷⁹ It should hardly be unreasonable to construe *Bakke* in such a way as to prevent the central holding from being ineffectual. This argument carries some force.

Still, the Justices, rather than the interpreter, are primarily responsible for the apparent deadlock. Had the Brennan four desired to provide a clear safe harbor for academic institutions, they could have done so easily by saying: "Although we believe that a remedial approach is preferable, we agree with Justice Powell that diversity is a compelling state interest capable of supporting the use of racial preferences in the admissions process." Instead, they insisted that even a plus-in-the-file approach was permissible only as a remedy for past discrimination.⁴⁸⁰ The Brennan Four apparently favored doctrinal fidelity over clarity and guidance.

478. See generally *Bakke*, 438 U.S. at 325 (Brennan, J., concurring in the judgment in part and dissenting in part) (stating that no single opinion spoke for the court).

479. See Amar & Katyal, *supra* note 15, at 1769 n.117.

480. See *Bakke*, 438 U.S. at 326 n.1 (Brennan, J., concurring in the judgment in part and dissenting in part).

Perhaps even more significantly, the Stevens four went out of their way to caution the reader that "the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate."⁴⁸¹ Thus, the Stevens four highlighted the fact that Justice Powell's discussion of the Harvard plan was gratuitous dicta and, presumably, should not be relied upon.⁴⁸²

Until *Croson*⁴⁸³ and *Adarand*,⁴⁸⁴ if not *Hopwood* itself, there was no judicial suggestion beyond *Bakke* that the academic world's working interpretation of *Bakke* was misguided. The Court may have recognized, as any interested observer would, that universities were treating diversity and the Harvard plan as if they carried a constitutional seal of approval. Should such a practice eventually become self-validating? One obvious answer to such reliance on judicial silence is that the Court is not constitutionally capable of initiating proceedings to correct public misunderstandings of its work product. Rather, it must wait until an appropriate justiciable case is presented.⁴⁸⁵ That simply did not happen prior to *Hopwood*, and still has not. Thus, the risk of misguided reliance is simply a cost of an incremental system of adjudication. The courts cannot allow private actors to preempt constitutional interpretation by willfully or innocently overreading precedents.

While the Court itself cannot initiate its own litigation, it does have ways of addressing issues which are not presently before it. For instance, when it appeared that lower courts were misinterpreting the breadth of the Court's holding in *Gannett Co. v. DePasquale*⁴⁸⁶ with respect to the propriety of closing pretrial and trial proceedings in criminal cases, several Supreme Court Justices addressed the issue publicly.⁴⁸⁷ Moreover, although the Court was not confronted with any educational admissions cases since *Bakke*, it has decided a number of employment and contracting cases in which it was confronted with the affirmative action issue.⁴⁸⁸ Had the Court been concerned that educational institutions were misreading *Bakke*, it could have dropped a footnote stating the educational area was quite unclear because the Powell opinion did not represent a majority of the

481. *Bakke*, 438 U.S. at 411 (Stevens, J., concurring in the judgment in part and dissenting in part).

482. *See id.*

483. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

484. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

485. *See Muskrat v. United States*, 219 U.S. 346, 356 (1911).

486. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

487. *See Linda Greenhouse, Stevens Says Closed Trials May Justify New Laws*, N.Y. TIMES, Sept. 9, 1979, at 41; Linda Greenhouse, *The Open Disarray of Closed Justice*, N.Y. TIMES, Aug. 18, 1979, at 18; Linda Greenhouse, *Powell Says Court Has No Hostility Toward Press*, N.Y. TIMES, Aug. 14, 1979, at A13.

488. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

Court. This of course would have been attacked, perhaps quite legitimately, as wholly inappropriate dicta, but it would have put the educational community on notice that it was precarious to rely on the diversity justification or the Harvard plan. Given that the Court created the problem by its inability to agree on much in *Bakke*, perhaps it was under an obligation to use whatever means it had available to provide some degree of warning if the segment of society most affected by the decision appeared to be misinterpreting it. This assumes the Court is paying attention to what universities are doing after *Bakke*, and perhaps such an assumption is unwarranted.

It may be argued this lengthy, widespread, and unchallenged reliance on the Powell opinion, though perhaps self-serving, is entitled to some respect. Exactly how much respect this reliance deserves should turn to some extent on the degree of dislocation that a rejection of Justice Powell's diversity justification would cause, both to the institutions and to their constituencies. No amount of reasonable reliance should prevent the correction of a rule which has been misinterpreted if the change will cause little harm.

A rejection of the Powell diversity approach could result in several different types of harm. Redesigning admissions procedures itself could cause expense and inconvenience to the schools.⁴⁸⁹ A prohibition of racial preferences could result in a significant decrease in minority enrollment.⁴⁹⁰ This in turn could lead to social turmoil and demoralization of minority students.⁴⁹¹ It has been alleged that if the diversity rationale of *Bakke* is indeed rejected, most universities and professional schools in the country will be required to significantly alter their admissions procedures.⁴⁹² Thus, the breadth of the reliance on the Powell opinion may seem impressive.

Forcing hundreds, if not thousands, of schools to revise their procedures may seem daunting. Yet, it is hardly apparent why requiring schools to cease using race as a factor in the admissions process should be particularly burdensome. Most, if not all, schools presumably review and fine tune their admissions procedures on a regular basis.⁴⁹³ Applicant pools change, test score scaling changes, availability of financial aid

489. These observations reflect in part my own past experience serving on and serving as chairman of the admissions committee at the SMU School of Law.

490. See Linda Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 51-52 (1997); Deirdre Shesgreen, *Schools Look at the 'Whole Person'*, LEGAL TIMES, Jan. 13, 1997, at 2.

491. See Brest & Oshige, *supra* note 389, at 858; Deborah Malamud, *Values, Symbols and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1713 (1997) (Race has become the constitutive issue for blacks like abortion is for feminists.).

492. See *supra* note 489.

493. See *supra* note 489.

changes, projected class size varies.⁴⁹⁴ Procedures are reviewed as new deans and administrators are hired and new faculty join admissions committees.⁴⁹⁵ The admissions process is a dynamic constantly evolving enterprise.⁴⁹⁶ Quite apart from the courts, political controversy over racial preferences has no doubt forced many schools to rethink their approaches to the use of racial preferences. There is little reason why compliance with the rejection of diversity as a compelling state interest could not fit comfortably within this ongoing revision of procedures.

Most institutions presently relying on racial preferences would no doubt like to continue to attract a racially diverse student body through permissible means, such as increasing recruitment efforts, focusing on socioeconomic background, or building an institution particularly attractive to minority students. These approaches will require time and effort; however, they tend to be strategies many schools have already been pursuing to some degree.⁴⁹⁷ What is required then is not necessarily a radical restructuring of admissions procedures, as much as a significant shift in emphasis. While the status quo tends to be comfortable, it should not necessarily be viewed as an entitlement.

Universities may protest that they, as well as society at large, have come to rely on the results of the Powell approach—a larger enrollment of minority students and a more experientially diverse student body. A rejection of diversity as a compelling state interest could significantly diminish these achievements, leading to both educational and societal harm.⁴⁹⁸ If true, this is a crucial issue for consideration, and may counsel strongly against significant change. To a large extent, the institutional interest in maintaining the present level of racial diversity is simply a repackaging of the argument on the merits that a competitive racial preference diversity program is indeed a compelling state interest, as discussed earlier in this paper.⁴⁹⁹

There is certainly room to question how severely a race-neutral admissions process would reduce minority enrollment nationwide. Arguably, because of the smaller minority applicant pool, the elimination of racial preferences would redistribute minority students down the educational hierarchy, but might not significantly reduce the total number of minority

494. See *supra* note 489.

495. See *supra* note 489.

496. See *supra* note 489.

497. See *supra* note 489.

498. See Brest & Oshige, *supra* note 389, at 858; Wightman, *supra* note 490, at A26; Shesgreen, *supra* note 490, at 2.

499. See *supra* Part IV.A.

students enrolled.⁵⁰⁰ Elite institutions would be hit particularly hard.⁵⁰¹ Less elite institutions might actually benefit by increasing the effective size of their minority applicant pool. If so, it is not obvious that the harm is devastating. The educational process at elite institutions might suffer from a lack of racial diversity.⁵⁰² However, the cure is readily within the control of the institutions themselves. If schools have a sufficient commitment to racial diversity, they can simply become less elite in their overall selection process. If it is appropriate to lower admissions criteria for minority students, it is not apparent why it would be catastrophic to adjust criteria downward for non-minority students as well. It may be painful for elite institutions to have to choose between racial diversity and academic elitism, but that may simply be the choice that *Bakke*, properly understood, poses.

Minority students who would have benefitted from racial preferences would suffer to some extent by being deprived of the education, prestige, and opportunities that elite institutions offer.⁵⁰³ This is a loss that should be taken into account; however, some determination should be made as to how much worse off these students would be with an education and degree from a less elite institution. Arguably, minority students as a whole might be better off academically if they attended institutions where they were admitted on a race-neutral competitive basis rather than as a result of vigorous racial preferences.⁵⁰⁴

Perhaps the most serious concern about abandoning racial preferences in admissions would be that it would send a demoralizing message to minority communities. Such a message might convey to minorities that the doors of higher education are no longer open, or at least not as open, as they have been over the past several years. This is indeed a consideration that should be taken seriously. The prospect of admission at a leading university, or professional school, may be a significant motivating factor for

500. See EASTLAND, *supra* note 34, at 156. Studies by Professor Wightman suggest that this might not be the case and that many minority students who presently are admitted would not get into any institution, or at least any institution they could afford to attend if racial preferences were prohibited. See Wightman, *supra* note 490, at 18-20. This is troubling, and lends support to an approach which would permit the employment of moderate racial preferences. It should be noted, however, that Professor Wightman's conclusions are based on assumptions about how universities, professional schools, and applicants would behave under a very different set of legal rules than those currently in effect in most of the country. Furthermore, no one can be certain that in a world without racial preferences, admissions officers would not be able to find other means to maintain racial diversity, or that minority applicants might not choose to attend institutions which they otherwise would not. See *id.* at 18-25.

501. See Brest & Oshige, *supra* note 389, at 858; Kennedy, *supra* note 36, at 1329; Graglia *supra* note 476, at 82.

502. See Brest & Oshige, *supra* note 389, at 862-65.

503. Wightman, *supra* note 490, at 26.

504. See Stuart Taylor, *Ducking Hopwood: The Passive Virtues*, LEGAL TIMES, July 8, 1996, at 21; Scanlon, *supra* note 43, at 356-57.

minority students. Moreover, the presence of a significant number of minority students at most institutions of higher learning may send the message that members of minority groups have a stake in the system, as well as access to opportunities.⁵⁰⁵ If the rejection of the diversity justification resulted in a significant decrease in the number of minority students in higher education across the board, a strong argument could be made that the reliance interest in the present system was too strong to be overcome. If, on the other hand, the rejection of *Bakke* leads merely to a redistribution of minority students down the educational pecking order, the societal harm might be cognizable but hardly unbearable.

In evaluating the reliance interest in *Bakke*, it is important to focus on those benefits achieved through a fair application of Justice Powell's "race as a competitive factor" approach.⁵⁰⁶ Such an approach, as opposed to those which were improperly achieved through the use of quotas, set-asides, separate admission committees, or separate criteria, allows race to be considered as a factor only.

Even if *Hopwood* is correct in its conclusion that Justice Powell's opinion in *Bakke* never achieved a majority,⁵⁰⁷ a decent argument can be made that widespread unchallenged reliance on Powell's opinion, by many if not most, universities is entitled to some consideration. Whether it would be enough to insulate Justice Powell's opinion from rejection depends, in part, upon predictions about the overall impact of such a change.

If *Hopwood* is incorrect in concluding that the Powell opinion never commanded a majority, the reasonableness of the reliance interest increases substantially, perhaps to a degree which would effectively preclude the possibility it will be overruled. In addition, if the Supreme Court were to consider overruling *Bakke* on the other grounds relied upon in *Hopwood*—that *Bakke* has been undermined by subsequent precedent and that it is inconsistent with the equal protection principles⁵⁰⁸—factors in addition to reasonable reliance must be considered.

In *Planned Parenthood v. Casey*, the joint opinion of Justices O'Connor, Souter, and Kennedy engaged in a comprehensive discussion of stare decisis.⁵⁰⁹ The Court concluded that, in addition to reliance interests, when determining whether a precedent should be overruled, the Court may consider whether the rule has become unworkable, whether it has been undermined by subsequent precedent, and whether it is based on faulty

505. See, e.g., Lemann, *supra* note 43, at 54; Sandalow, *supra* note 82, at 688-89; Paul Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1152.

506. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

507. See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

508. See *id.* at 944-48.

509. 505 U.S. 833 (1992).

factual premises.⁵¹⁰ None of these factors point in favor of overruling the Powell opinion in *Bakke*.

It would be impossible to determine that the judicial principles expounded by Justice Powell have become unworkable since, prior to *Hopwood*, they have not been the subject of legal challenge. Certainly the principle that racial classifications should be strictly scrutinized has carried the day and is applied regularly by the Court.⁵¹¹ However, there is hardly sufficient judicial consideration of Justice Powell's distinction between a plus-in-the-file and a set-aside to conclude that it is not a judicially manageable standard. Although there is no actual judicial support for this position, Justice Brennan in *Bakke* and some commentators, have contended it would be difficult to determine whether an institution was employing an implicit quota or set-aside.⁵¹²

Hopwood found that the Powell opinion in *Bakke* has been undermined by subsequent Supreme Court precedent and is inconsistent with equal protection principles.⁵¹³ I have argued at length earlier that, while there is some basis for these conclusions, the better argument is to the contrary.⁵¹⁴ If, however, the Supreme Court concludes that *Bakke* is inconsistent with existing precedent or principle, such consideration would, by definition, resolve this factor in favor of overruling it.

Finally, there is no basis for concluding that the factual assumptions underlying the Powell opinion in *Bakke* have been proven incorrect. Perhaps the only assumption of any relevance is that race correlates to some extent with distinctive experience.⁵¹⁵ This is a controversial proposition, and there are those who reject it.⁵¹⁶ However, there are also many who support it.⁵¹⁷ The assumption is not easy to establish or to refute empirically. It is fair to say that there is certainly no body of solid empirical evidence that rejects it. Thus, the criteria of changed factual assumptions is largely irrelevant to a decision to overrule.

510. See *id.*

511. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212-31, 235-37 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986).

512. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 378-79 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part); Graglia, *supra* note 476, at 87; Chin, *supra* note 20, at 936; Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 926-28 (1983).

513. See *Hopwood*, 78 F.3d at 944-48.

514. See *supra* Part IV.B-D.

515. See *Bakke*, 438 U.S. at 316-18.

516. See EASTLAND, *supra* note 34, at 80-82; CARTER, *supra* note 421, at 40; Paulsen, *supra* note 387, at 1000; Chen, *supra* note 84, at 1868; Carrington, *supra* note 505, at 1147-48.

517. See Amar & Katyal, *supra* note 15, at 1774-76; Brest & Oshige, *supra* note 389, at 862-63; Blasi, *supra* note 56, at 43-45; Sandalow, *supra* note 82, at 685-86; Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1366-73 (1996).

In addition to these specific considerations, the majority joint opinion in *Casey* argued that the Court should be hesitant to overrule a case, such as *Roe v. Wade*,⁵¹⁸ where it has attempted to resolve an "intensely divisive controversy" by calling the contending sides to accept "a common mandate rooted in the Constitution."⁵¹⁹ It may be naive to believe that the Court has the power to end such heated controversies with a judicial decision. Just as *Roe v. Wade* certainly did not end the debate over abortion, *Bakke* did not end the debate over racial preferences in education. But if *Roe* qualifies as such an attempt, then so does *Bakke*.⁵²⁰ Indeed, Professor Mishkin wrote a provocative article arguing that *Bakke* largely succeeded in this endeavor while *Roe* failed.⁵²¹

The joint opinion in *Casey* is hardly the sole authority on stare decisis, but it provides a recent and thoughtful summary of its principles.⁵²² Arguably all of the factors cited in *Casey* support continued adherence to the Powell opinion in *Bakke*.⁵²³

V. THE FUTURE OF THE DIVERSITY JUSTIFICATION

At least for now, *Hopwood* has eliminated diversity as an effective justification for using racial preferences in college and professional school admissions programs within the Fifth Circuit, or at the very least, has rendered it a legally risky endeavor. In the future, other circuit courts of appeals, as well as the Supreme Court, will need to determine whether *Hopwood* is correct and should be followed.⁵²⁴ *Hopwood's* reading of *Bakke* as precedent is stronger than *Hopwood's* critics would care to acknowledge. Nevertheless, the question is shrouded in all but insoluble ambiguity and can be definitively resolved only by future Supreme Court consideration. The *Hopwood* majority's conclusion that the Powell opinion has been undermined by subsequent precedent reads more into that precedent than is warranted.⁵²⁵ *Hopwood* relies on dicta from cases involving employment and contracting, which may well be distinguishable from the educational admissions context.⁵²⁶

518. 410 U.S. 113 (1973).

519. *Casey*, 505 U.S. at 866-67.

520. See Amar & Katyal, *supra* note 15, at 1770. But see, Kahlenberg, *supra* note 358, at 1044.

521. See Mishkin, *Ambivalence*, *supra* note 512, at 923.

522. See *Casey*, 505 U.S. at 854-55.

523. See *id.* at 866-67.

524. Cases similar to *Hopwood* have been filed challenging racial preferences employed by the University of Washington School of Law and by the University of Michigan at the undergraduate level. Steven Holmes, *Major Ruling on Affirmative Action Is Likely Sooner or Later*, *Experts Say*, N.Y. TIMES, Dec. 1, 1997, at A15.

525. See *Hopwood v. Texas*, 78 F.3d 932, 944-45 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

526. See *id.* at 940.

There is no question that Justice O'Connor's dissent in *Metro Broadcasting* is in serious tension with the Powell opinion in *Bakke*.⁵²⁷ It is a dissenting opinion, however, and as such is not precedent. Nose counting suggests that a majority of the Court may agree with that dissent, especially since Justice O'Connor wrote the subsequent opinion in *Adarand* overruling *Metro Broadcasting*.⁵²⁸ But the question remains whether the rationale of the *Metro Broadcasting* dissent extends comfortably to the educational context. The *Hopwood* majority also concluded that the Powell opinion in *Bakke* was inconsistent with the equal protection principles of individuality, elimination of stigma, and avoidance of enduring racialism.⁵²⁹ There can be some question as to the prominence of these three principles, but if their validity is accepted, Justice Powell's approach in *Bakke* is extremely consistent with the first and largely consistent with the second. The diversity justification is in tension with the third principle.

Right or wrong, many universities and professional schools have modelled their admissions programs on the diversity justification set forth by Justice Powell in *Bakke*. That reliance is entitled to some respect, perhaps enough to preclude the rejection of the Powell approach by the Supreme Court even if it should conclude that Powell's opinion was incorrect.⁵³⁰

Justice Powell's approach in *Bakke* lacks the rhetorical force and clarity of the pure colorblind theory; however, its individualistic nature is consistent with the Court's recent equal protection jurisprudence.⁵³¹ By applying strict scrutiny, the Powell approach takes the risks of race-conscious governmental action quite seriously.⁵³² If applied honestly, strict scrutiny should provide adequate protection against abuse. Furthermore, strict scrutiny does a better job of accommodating the general antidiscrimination principle with the realities of a racially conscious society than does a purely colorblind approach. The thesis of the diversity justification is that race often gives rise to distinctive experience and that the educational process is significantly enhanced by students with diverse backgrounds.⁵³³ The fact that racial diversity is only one of many appropriate diversifying characteristics still holds true and still should be considered a compelling state interest. In short, I conclude that Justice Powell got it right in *Bakke* and that his

527. See *Metro Broad., Inc. v. FCC*, 497 U.S. 546, 614 (1990) (O'Connor, J., dissenting).

528. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

529. See *Hopwood*, 78 F.3d at 943.

530. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992).

531. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

532. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-320 (1978).

533. See *supra* notes 391-400 and accompanying text.

approach should be reaffirmed on the merits and not simply on the basis of stare decisis.

Race consciousness in general and the diversity justification in university admissions in particular have been subject to escalating challenge in recent years. Part of this attack is undoubtedly attributable to the belief that race-conscious government action is counterproductive and that a colorblind approach is the best way to achieve racial equality.⁵³⁴ But some of the reaction against the emphasis on diversity in university admissions is probably attributable to the belief that educational institutions have abused the Powell approach in an attempt to achieve other goals which were rejected by Justice Powell, such as racial representation or remediation for societal discrimination.⁵³⁵

In *Hopwood*, the University of Texas did just that.⁵³⁶ Data with respect to university admissions processes, especially where diversity is concerned, tends to be a tightly guarded secret. In the past few years, students at Georgetown and University of Miami law schools have been disciplined for revealing aggregate data which showed the disparity in academic credentials between minority and non-minority students.⁵³⁷ Thus, it is difficult to know, but easy to suspect, that many institutions other than the University of Texas have employed procedures, criteria, and purposes inconsistent with the Powell approach in *Bakke* in the quest for greater racial diversity. Some institutions may have accorded so much weight to race that it overrides every other factor, including traditional indicators of academic potential.⁵³⁸ This would also violate the Powell approach⁵³⁹ since it amounts to an implicit quota, and is not a good faith effort to operate a competitive admissions process.

As noted above, in *Bakke*, Justice Brennan suggested that the Powell diversity approach would result in disingenuous behavior by admissions officers intent on adopting effective, though clandestine, quotas.⁵⁴⁰ Justice Powell responded that the Court should assume the good faith of institutions purporting to achieve diversity until there is reason to doubt it.⁵⁴¹ The *Hopwood* majority opined that "even if a 'plus' system were permissible,

534. See *Hopwood*, 78 F.3d at 946-48.

535. See Browne, *supra* note 18, at 1293-95; Chen, *supra* note 84, at 1848-50; Chin, *supra* note 20, at 882-84; Graglia, *supra* note 421, at 99, 102; Carrington, *supra*, note 505, at 1106-07; Greenawalt, *supra* note 369, at 122; Posner, *supra* note 387, at 26; SCHWARTZ, *supra* note 15, at 156.

536. See *Hopwood*, 78 F.3d at 936-38.

537. See Graglia, *supra* note 421, at 97-98; Frances Robles, *Conservative Law Student Brings Furor to Forefront*, MIAMI HERALD, Oct. 1, 1995, at 1B.

538. See Browne, *supra* note 18, at 1293; Graglia, *supra* note 18, at 1215; Lemann, *supra* note 43, at 54.

539. See *Bakke*, 438 U.S. at 318-19.

540. See *id.* at 379 (Brennan, J., concurring in the judgment in part and dissenting in part).

541. See *id.* at 318-19.

it likely would be impossible to maintain such a system without degeneration into nothing more than a 'quota' program."⁵⁴² In view of the widely held perception that many institutions have used diversity as a cover to achieve racial proportionality, the time has come to doubt that good faith and insist that institutions pursuing racial diversity develop far more visible procedures to guarantee the public that the institutions are indeed operating within the legitimate confines of *Bakke*.

Presumably, such abuse of the diversity justification could be corrected through legal challenge and the application of strict scrutiny as in *Hopwood*.⁵⁴³ Perhaps the very existence of *Hopwood* will cause other universities outside of the Fifth Circuit to review their admissions policies to ensure that they are at least consistent with a good faith reading of the Powell opinion in *Bakke*.⁵⁴⁴ But because of the secrecy surrounding the admissions process, a potential challenger may have difficulty determining whether there might be abuse and, hence, a basis for litigation. Arguably, the most effective check on abuse of the diversity justification would be a requirement that institutions desiring to employ race as a diversifying factor in a competitive admissions process publish sufficient data about the process to allow interested and affected constituencies to make an intelligent assessment of what the institution is doing.

The primary point of such publicity would be to provide a political check. Hopefully, institutions would not stray too far from a good faith interpretation of *Bakke* if they could be held accountable to their student body, the faculty, university counsel, the central administration, the board of regents and trustees, alumni, potential donors, state legislators, political groups, the press, and insurance carriers. The publication of such information would allow potential plaintiffs to make an informed judgment as to whether their rights had been violated but, presumably, the primary impact of publication would be to provide a politically potent incentive for institutions to comply with the law.

Pursuant to this approach, institutions that choose to employ race as a diversifying factor should be required to publish the following information. First, the institution should explain why it considers diversity, and especially

542. *Hopwood*, 78 F.3d at 948 n.36. See Lino Graglia, *Podberesky, Hopwood, and Adarand: Implications for the Future of Race Based Programs*, 16 N. ILL. U. L. REV. 287, 291 (1996) (arguing that universities would abuse the use of race in the admissions process).

543. See *Hopwood*, 78 F.3d at 940.

544. Discussion by admissions committee members and admissions officers at a recent American Association of Law Schools Conference on Diversity tends to confirm this assertion. Workshop on Achieving a Diverse Student Body in a Time of Retrenchment: Rising Controversy and Renewed Commitment (Jan. 4, 1997) (unpublished workshop booklet of the American Association of Law Schools, on file with the Texas Tech Law Review). On the other hand, several private law schools in Texas covered by Title VI are at least considering continuing to rely on *Bakke* despite *Hopwood*. See Sylvia Moreno, *Morales' Position Draws Fire*, DALLAS MORNING NEWS, Feb. 22, 1997, at 1A.

racial diversity, important to its educational mission. Requiring the institution to prove its case for diversity empirically would probably be too onerous, although it would greatly bolster its position if the institution could prove its case.⁵⁴⁵ In any event, the institution should provide something more than boilerplate. The purpose of this requirement would be to ensure that the institution has put some thought into its adoption of a race-conscious policy and has not adopted diversity as a convenient cliché behind which to employ race in an unjustifiable manner.⁵⁴⁶ A statement that attempts to justify a commitment to racial diversity on the basis of the unique experiences of the institution should be especially worthy of respect. Obviously, certain technical programs, such as theoretical physics or veterinary science, might find it more difficult to explain why racial, or for that matter any, diversity is important to the program's legitimate goals.⁵⁴⁷

Second, the institution should also be required to explain how it purports to achieve diversity. It would be quite misguided to encourage institutions to adopt an equation or formula for considering diversifying factors in the admissions process. That would indeed turn the Powell opinion on its head because one of the Powell opinion's central tenets is that, when race is a factor, the applicant must be treated as a unique individual with many potentially relevant characteristics.⁵⁴⁸ Devising a formula which assigns a particular weight to diversifying characteristics, including race should not be unconstitutional; however, it would be unduly limiting. Still, an institution ought to be able to explain which factors it considers important, and why, and how the institution attempts to balance these factors in the admissions process. Indeed, an institution might attempt to create several representative hypothetical files and explain how it would assess and rank them. This could benefit the institution by forcing it to focus on its admissions process in a disciplined manner to ensure that it really is engaged in a good faith effort to comply with the Powell approach in *Bakke*. Likewise, requiring an institution to explain its diversity process would provide some assurance to the public that the institution was living within the law rather than surreptitiously evading it.

Third, if an institution decides to use race as a diversifying factor, it should be required to publish aggregate statistics detailing the type of diversity it has achieved and whether that diversity is based on race,

545. See Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1366-73 (1996). But see Chen, *supra* note 84, at 1871-72 (arguing that there is no proof that "command and control diversity" is any more effective at producing a rich exchange of ideas than race-neutral diversity).

546. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-01 (1989) ("A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists.").

547. See Amar & Katyal, *supra* note 15, at 1778.

548. See *Bakke*, 438 U.S. at 317-18.

geography, age, gender, educational background, etc. This should be accompanied by comparative objective criteria, such as average grade point and standardized test scores for the various groups that have benefitted from preferences. Such data would permit the constituencies of the institution to assess the admissions process and respond positively or negatively. The institution would need only provide comparative statistics on the basis of those criteria it considers important.⁵⁴⁹ If an institution takes the position that grades and test scores are significant factors in the admissions process, then the institution should explain how its reliance on various diversifying factors causes it to deviate from these criteria. If, however, an institution abandons reliance on standardized tests or utilizes them only as a minimum threshold, then it need not provide comparative test score data.

Finally, the institution should publish any data it has accumulated indicating graduates admitted pursuant to a diversity program perform as well as, or better than, other graduates in their post-graduate occupations.⁵⁵⁰

Justice Brennan was correct in suggesting the Powell approach is not defensible if it merely intends to achieve political acceptability by allowing institutions to conceal racial quotas from the public.⁵⁵¹ The publication of comparative admissions criteria for the various groups affected by the admissions process would provide a sorely needed check against such bad faith manipulation by institutions. Extreme discrepancies between the academic indicators of different racial groups might lead to the conclusion that race was not being employed simply as a permissible plus-in-the-file, but was illegitimately used as the overriding factor in the decisionmaking process.⁵⁵² Even if the good faith of the institution is not impugned by such a comparison, it would give the constituencies of the institution the information necessary to adequately evaluate its admissions practices.

In the section of his *Bakke* opinion addressing the use of racial preferences to provide a remedy for past discrimination, Justice Powell

549. See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 149 (1996) (concluding that public visibility, what he called transparency, of affirmative action criteria and procedures is a good thing, but that its cost may be too high if it is used to undermine the programs).

550. See Ethan Bronner, *Colleges Look for Answers to Racial Gaps in Testing*, N.Y. TIMES, Nov. 8, 1997, at A1, A8 (summarizing studies suggesting minority students with lower test scores are nearly as successful after graduation); Ethan Bronner, *Study of Doctors Sees Little Effect of Affirmative Action on Careers*, N.Y. TIMES, Oct. 8, 1997, at A1 (A study of minority doctors admitted under an affirmative action plan to the Cal-Davis medical school after *Bakke* indicates that they have been about as successful as non affirmative action admits.); Richard Delgado, *Why Universities Are Morally Obligated to Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action*, 68 U. COLO. L. REV. 1165, 1171 (1997) (Minority law graduates seem to be as successful as non-minority graduates.).

551. See *Bakke*, 438 U.S. at 379 (Brennan, J., concurring in the judgment in part and dissenting in part).

552. For the argument that the gross disparities in academic indicators of minorities and non-minorities is evidence that most institutions engage in race norming, see Chen, *supra* note 452, at 1150.

argued it is important that policy choices in the area of racial preferences are made by politically accountable bodies.⁵⁵³ The point was well taken. The use of racial preferences, though sometimes justifiable, has extreme potential to be divisive and counterproductive.⁵⁵⁴ Some measure of visibility (and thus, hopefully, political accountability) should help protect against these dangers.⁵⁵⁵ The Supreme Court has not held, nor need it hold, that racial preferences for purposes of creating diversity may be utilized only by a body that is elected or politically removable. People who have the powerful insulation of life tenure often establish admissions policies.⁵⁵⁶ There should be nothing constitutionally improper about this. Rendering the process more visible to interested parties, however, would, even if only by the grace of the institution, create a significant check short of constitutional litigation.

As discussed earlier in the section on stigma, publication of admissions criteria and aggregate admissions data could be counterproductive to the diversity enterprise.⁵⁵⁷ Publication would raise uncomfortable questions about the qualifications of minority students admitted with lower academic indicators. Also, publication might undermine minority self-esteem and could contribute to racial polarization on campus.⁵⁵⁸ These are very real concerns; however, they are best viewed as attributable to the underlying admissions policies themselves rather than their publication.⁵⁵⁹ There are legitimate and serious costs of racial preferences which should be confronted rather than concealed. There is every reason to be suspicious of a policy that can be maintained and justified, if and only if, the public does not understand what is occurring.⁵⁶⁰ Presumably, a publicity requirement would create strong political and legal incentives to employ only those racial preferences that are mild enough in context to avoid significant stigmatization or polarization. The use of racial preferences as sketched by Justice Powell in *Bakke* should be acceptable both as a matter of constitutional law and as a matter of educational policy, but only if the use of racial preferences can be defended openly and in good faith. There is no reason why this

553. See *id.* at 308-09.

554. See *supra* note 404 and accompanying text.

555. See Sunstein, *supra* note 299, at 1192-93 (arguing that racial preferences should be the subject of public debate and deliberation). But see Chin, *supra* note 20, at 936 (arguing that any use of race in the admissions process will create an appearance of abuse).

556. See Sunstein, *supra* note 299, at 1192-93.

557. See *supra* Part IV.C.3.b.

558. See Derrick A. Bell Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 18 (1979).

559. See *id.* at 14; Deborah Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 996 (1997) (Stereotyping based on racial disparities in academic indicators is now unavoidable since *Hopwood* widely publicized those disparities.).

560. See Graglia, *supra* note 421, at 102; Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1793 (1996).

cannot occur. However, if the price of honesty is too dear, then racial preferences deserve the fate they received in *Hopwood*.

Finally, an institution that employs racial preferences should affirmatively review its policies periodically to determine whether the pursuit of racial diversity, through racial preferences, still serves its mission and remains worth the social costs.

Perhaps the most serious criticism of the diversity rationale is there is no stopping point.⁵⁶¹ Theoretically, diversity justifies race-conscious admissions indefinitely. If a colorblind society is our long term constitutional goal, then entrenched racial preferences create serious problems. There may be no logical stopping point to race-conscious diversity, but if an institution periodically re-examines its policies, it may well conclude race consciousness no longer serves the institution's purposes or that its policies must at least be adjusted to reflect changes in social context. A commitment to good faith, periodic reevaluation may provide some protection against unthinking acceptance of race-conscious diversity as a permanent and unchallengeable aspect of the educational landscape.

The O'Connor plurality made a similar point in *Croson* when it recognized that proper fact findings of past discrimination as a predicate to the remedial use of racial preferences:

[S]erve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.⁵⁶²

Equal protection jurisprudence does not presently compel the publication of this type of data. However, requiring a relatively open admissions process can be justified as a prophylactic measure designed to minimize forms of abuse that violate equal protection. The Court's emphasis on narrow tailoring of the remedial use of racial preferences lends some support to such an obligation. In *Croson*, the plurality approvingly quoted Justice Stevens' dissent in *Fullilove* for its recognition that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."⁵⁶³

561. See *supra* Part IV.C.3.c.

562. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 269, 510 (1989).

563. *Id.* at 505 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting)). The call for candor should extend to the judiciary as well. In his dissent in *Metro Broadcasting*, Justice Kennedy criticized the majority on this point, noting that

The publication of relevant data about the use of race in the admissions process could attempt to meet this concern even short of litigation. Even if publicizing the admissions process is not constitutionally required, an institution might conclude that it could render its own diversity program more politically palatable and less subject to legal challenge by providing its constituencies with relevant information. That assumes, of course, that the institution is employing a defensible process. If not, there is little reason to be sympathetic to the institution's plight.

Whether Justice Powell spoke for a majority or only for himself, his opinion in *Bakke* provided a wise and constitutional means of reconciling the quest for a colorblind society with the reality of a race-conscious one. Diversity, as a compelling state interest achieved through careful, good faith competitive evaluation, should stand the test of time. As such, *Hopwood* was wrong to reject it. On the other hand, there is every reason to believe that the diversity justification has been seriously abused by educational institutions in recent years. The combination of strict scrutiny and publicity should be sufficient to curb such abuse and put diversity back on track.

Until the Court is candid about the existence of stigma imposed by racial preferences on both affected classes, candid about the 'animosity and discontent' they create . . . and open about defending a theory that explains why the cost of this stigma is worth bearing and why it can consist with the Constitution, no basis can be shown for today's casual abandonment of strict scrutiny.

Metro Broad., Inc. v. FCC, 497 U.S. 547, 637 (1990) (Kennedy, J., dissenting).

Summary of SURVEY OF TEXAS LAW SCHOOLS: THE RACIAL/ETHNIC COMPOSITION OF FIRST YEAR CLASSES
1996-1997, 1997-1998

	<u>Black</u>		<u>Hispanic</u>		<u>Asian</u>		<u>Native American</u>	
	<u>96-97</u>	<u>97-98</u>	<u>96-97</u>	<u>97-98</u>	<u>96-97</u>	<u>97-98</u>	<u>96-97</u>	<u>97-98</u>
Baylor	0	0	4	3	0	1	1	1
St. Mary's	18	14	78	92*	11	5	1	1
South Texas	16			45**		18***		0
SMU	22	6	26	13	13	6	5	1
Texas Southern	161	145	66	57	22	8	3	1
Texas Tech	4	1	23	17	4	2	1	1
Texas Wesleyan	15	12	21	17	7	6	5	7
U. of Houston	11	10	32	31	24	11	3	2
U. of Texas	31	4	42	26****	30	39	8	3

* Students separately categorized as Hispanic, Mexican-American and Puerto Rican by St. Mary's have been combined for purposes of this chart under the heading Hispanic.

** Students separately categorized by South Texas as Hispanic and Puerto Rican have been combined for purposes of this chart as Hispanic.

*** Students categorized separately by South Texas as Asian and Indian have been combined for purposes of this chart as Asian.

**** Students categorized by the University of Texas as Mexican-American have been listed as Hispanic in this chart.

