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I. FACTS

Cheryl J. Hopwood, Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers applied for admission to the 1992 entering class of the University of Texas School of Law, ("university").[1] All four were white residents of Texas and were denied admission.[2] They filed suit against the university under Title VI of the Civil Rights Act of 1964, and 42 U.S.C. §§ 1981 and 1983, alleging violations of the Equal Protection Clause of the Fourteenth Amendment.[3] The allegations stemmed from plaintiffs' contention that the university's admissions program discriminated against them by giving substantial preference to less qualified African and Mexican -American applicants. The plaintiffs sought injunctive and declaratory relief, as well as compensatory and punitive damages.

The university's admissions decisions were based largely upon each applicant's Texas Index number ("TI") which was a function of the applicant's undergraduate grade point average and Law School Aptitude Test Score.[4] For administrative convenience, the university placed applicants in one of three categories according to their TI scores: "presumptive admit," "presumptive deny," or a middle "discretionary zone."[5] The plaintiffs fell into the discretionary zone. The TI ranges used to categorize resident African and Mexican-Americans for placement into the three admissions categories were lower than for whites.[6] In addition, a special three-member subcommittee reviewed black and Mexican - American candidates within the applicable "discretionary zone" separately from whites and non-preferred minorities.[7]

Although the district court found that aspects of the university's affirmative action admissions program passed constitutional muster, it held that the program's failure to compare each individual applicant with the entire pool of applicants violated the Equal Protection Clause of the Fourteenth Amendment.[8] On this basis alone, the district court struck down the 1992 admissions policy as administered by the university, finding that it fell outside of the narrowly tailored framework established by the Court.[9] The district court however, refused to enjoin the university from using race in admissions decisions or to grant damages beyond the nominal award of one-dollar.[10] The court granted declaratory relief and ordered that the plaintiffs be allowed to reapply without paying the administrative fees.[11] Examining the admissions program through a lens of strict scrutiny, required for racial classifications, the district court held that the residual effects of past discrimination in a particular component of

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

[2] *See Hopwood v. Texas*, 861 F. Supp. 551, 567 (W.D. Tex. 1994.) The defendant contested the ripeness of Hopwood and Elliot's claims because neither had been denied admission. The district court found in pretrial motions and hearings that each had been denied admission. The defendant further challenged the standing of all plaintiffs because none demonstrated that they would have been granted admission absent the challenged admissions policies. During the same pretrial hearing, the court determined that all the plaintiffs had standing because they proved that the university's admissions process was the cause of their injury and that a judicial order could redress the injury.

[3] Title VI proscribes discrimination that violates the Equal Protection Clause of the Fourteenth Amendment. The prohibitions against discriminatory conduct contained in Title VI govern "program[s] or activit[ies] receiving Federal financial assistance." 42 U.S.C. §2000(d) (1964). The University, as a recipient of Title VI funds, is required to comply with Title VI.

[4] *Hopwood*, 78 F.3d at 935.

[5] *Id.*

[6] *Id.* at 936. In March 1992, the presumptive TI admission score for resident whites and non-preferred minorities was 199. Mexican Americans and blacks needed a TI of 189 to be presumptively admitted.

[7] *Id.* at 937.

[8] *Hopwood*, 861 F. Supp. at 579.

[9] *See United States v. Paradise*, 480 U.S. 149, 171 (1987). (Establishing whether race-conscious remedies are appropriate. The Court looked at several factors including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of relief; the relationship of the numerical goals to the relevant market and the impact of the relief on the rights of third parties).

[10] The issue of damages is outside the scope of the casenote. For a resolution of this issue, *See Hopwood*, 78 F.3d at 955-957.

[11] *Hopwood*, 78 F.3d at 938.

Texas' educational system must be analyzed in the context of the state's educational system as a whole.[12] On this basis, the trial court expanded the analysis from reviewing the history of discrimination within the context of the law school alone to the context of the totality of the educational system. In doing so, the court determined that the broad-based remedy employed by the law school satisfied the compelling governmental interest of remedying the present effects of past discrimination necessary to justify the university's affirmative action program. The district court also noted that the legacy of past *de jure* discrimination within the university fostered a campus environment hostile towards minorities.[13] The district court concluded that in the context of the university's admissions process, the benefits of a racially and ethnically diverse student body supported the use of racial classifications.[14] The court's reliance on the testimony of law school deans, students and professors supported its position that the legacy of past discrimination was manifest in the university's present malevolent reputation in the minority community, particularly among prospective students, as a "white school" with an under-representation of minorities. The trial court, therefore, concluded that absent the affirmative action program, the university would be unable to achieve its compelling goal of diversity.[15]

II. HOLDING

The United States Court of Appeals for the Fifth Circuit reversed and remanded for entry of judgment in favor of plaintiffs.[16] The Fifth Circuit held that the university's efforts to remedy the present effects of past *de jure* discrimination must be confined to correcting its own history of discrimination rather than discrimination by Texas or society in general. Specifically, the court refused to recognize the perceived effects of a hostile environment towards minorities and the university's poor reputation in the minority community as a compelling governmental interest. Departing from *Regents of the University of California v. Bakke*,[17] the court also held that achieving diversity in the university was not a compelling governmental interest. Accordingly, the Fifth Circuit held that the university's admission system violated the Equal Protection Clause of the Fourteenth Amendment. The court further instructed the district court to revisit the issue of which party bears the burden of proof regarding damages for a proven constitutional violation.[18] The United States Supreme Court declined to review this case.[19]

III. ANALYSIS/APPLICATION

A. REMEDIAL PURPOSE

In *Hopwood*, the Fifth Circuit employed the heightened level of judicial scrutiny outlined in *Richmond v. J.A. Croson Co.*[20] to its evaluation of the racial classifications implemented by the university. Only when a strong basis exists for believing the state actor has discriminated in the past will a court conclude that a state entity's remedial action is necessary.[21] To pass constitutional muster, the state's use of remedial racial classifications must be limited to the harm caused by a specific state actor.[22]

The Fifth Circuit applied the teachings of *Croson* and its progeny, and it appropriately held that the district court erred in allowing the university's remedial justification to lie in the racial discrimination of all public education within the State of Texas.[23] The circuit court did not impugn the principle of applying remedial action to all discrimination cases. Instead, it limited the application of remedying past discrimination to specific state actors. The circuit court commented that, "when one state actor begins to justify racial preferences based upon the actions of other state agencies, the remedial actor's competence to determine the existence and scope of the harm . . . and the appropriate reach of the remedy is called into question."[24] The circuit court found that addressing the actions of other state

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[12] *See Sweatt v. Painter*, 339 U.S. 629, 636 (1950). (Ordering University of Texas to admit Sweatt, an African-American to the previously all-white law school based on the Texas educational system's discrimination against African-Americans).

[13] *Hopwood*, 861 F. Supp. at 572.

[14] *Id.* at 571.

[15] *Id.*

[16] *Hopwood*, 78 F.3d at 961.

[17] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

[18] The appropriate standard elucidated by the Fifth Circuit employed a burden shifting exercise whereby once a Constitutional violation has been established by the plaintiffs, the university must demonstrate by a preponderance of the evidence that it would have rejected the plaintiffs to the university.

[19] *Hopwood v. Texas*, 116 S. Ct. 2581 (1996).

[20] *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[21] *Croson*, 488 U.S. at 500.

[22] *Hopwood*, 78 F.3d at 949.

[23] *Id.* at 950.

[24] *Id.* at 951.

bodies would call for "boundless remedies" which would expand beyond constitutional limits.[25]

Upon reviewing the university's admissions policy, the Fifth Circuit determined the dispositive factors of the district court's rulings and concluded that the university retained no present effects of past discrimination. Despite the district court's clear determination that the university's documented history of discrimination, as well as its poor reputation in minority communities and the perception of a hostile environment, warranted a race-based admissions program, the Fifth Circuit found otherwise.[26] Instead of remanding the issue to the district court outlining the appropriate standard to determine a factual finding, however, the Fifth Circuit reversed the district court.[27] Relying on *Podberesky*,[28] the circuit court held that the university's poor reputation was "tied solely to knowledge of the [u]niversity's discrimination before it admitted African-American students."[29] It further held that "[m]ere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy."[30] The court further opined that, although the school once embraced institutionalized *de jure* discrimination in denying admission to blacks, this practice ended in 1950 when the United States Supreme Court struck down the law school's discriminatory admissions program.[31] According to the Fifth Circuit, any further discrimination ended in the 1960's.[32] Based on this reasoning, the court came to the questionable conclusion that any present racial tension at the university was predicated on current societal discrimination unrelated to the university's past institutionalized discrimination.[33]

The Fifth Circuit also justified its finding that the university was not hostile to minority students by highlighting that African-American students continued to apply for admission despite the university's poor reputation.[34] Using this reasoning, the court found that minority students who applied to universities with reputations of discrimination substantiated the notion that the institution did not discriminate. Effectively, the Fifth Circuit's holding leaves room for a remedial measure only when minority applicants fail to apply for admission.

B. DIVERSITY

The Supreme Court held in *Bakke* that diversity is a compelling state interest.[35] Despite the holding in *Bakke*, the Fifth Circuit held that any consideration of race or ethnicity by a university for the purpose of achieving a diverse student body was not permissible under the Fourteenth Amendment.[36] In support of its departure from *Bakke*, the Fifth Circuit relied on recent Supreme Court decisions that recognize a compelling interest in affirmative action programs when the programs seek to remedy the past effects of racial discrimination.[37] However, none of the decisions relied upon by the Fifth Circuit related to diversity specifically in the educational context.[38] For example, in *Croson*, the Court struck down a city race-based affirmative action policy which required contracts to be awarded to minority business enterprises.[39] The *Adarand* Court overruled *Metro Broadcasting* and held that federal minority set-aside radio programs must satisfy strict scrutiny.[40] None of these cases suggests that *Bakke* should be overruled, because neither of these cases examines the unique role of higher education, the circuit court's heavy reliance on them is questionable.

The United States Supreme Court has held that the educational considerations at issue in *Bakke* are subject only to a narrow avenue of judicial review.[41]

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[25] *Id.*

[26] *Id.*

[27] A finding is clearly erroneous when, based on the entire evidence the reviewing court concludes with firm conviction that the lower court's decision is completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting data. *See* Fed. R. Civ. P. 52(a); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394-395 (1948); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 82 (3d Cir. 1992).

[28] *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert denied*, 115 S.Ct. 2001 (1995).

[29] *Hopwood*, 78 F.3d at 952.

[30] *Id.* at 952.

[31] *Sweatt v. Painter*, 339 U.S. 629 (1950).

[32] *Hopwood*, 78 F.3d at 953.

[33] 78 F.3d at 953.

[34] *Id.*

[35] *Bakke*, 438 U.S. at 313.

[36] *Hopwood*, 78 F.3d at 944.

[37] *Id.* at 943.

[38] *Id.*

[39] *Croson*, 488 U.S. at 469.

[40] *Adarand Construction v. Pena*, 115 S. Ct. 2097 (1995), (Overruling in part *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990)).

[41] *University Of Michigan v. Ewing*, 474, U.S. 214, 227 (1985). (Holding that courts are not suited to evaluate the substance of the multitude of academic decisions that require an expert evaluation.) *See also* Note, *An Evidentiary Framework For Diversity As A Compelling Interest In Higher Education*, 109 Harv. L. Rev. 1357, 1364 (1996). (Explaining the evidentiary framework for diversity as a compelling interest in higher education).

One of the areas the Court has sought to protect is the autonomous decisionmaking of academic institutions.[42] Freedom of decisionmaking by institutions protects both the individual academic freedom of teachers and students encompassed by the First Amendment as well as the institutional academic freedom meant to be protected by the Court in *Regents of Michigan v. Ewing*.[43] And in *Bakke*, Justice Powell discussed the four essential freedoms of a university—"the academic freedom to decide who may teach, what may be taught, how it is taught and who may be admitted to study."[44] A university admissions decision is an example of such an academic decision.[45] Interference in institutional academic freedom could impair individuals' freedom to inquire, to study, and to evaluate protected intellectual pursuits essential to the quality of higher education.[46]

In addition to protecting academic decision making, Justice Powell in *Bakke* supported the consideration of ethnicity as "one element" in a range of factors that universities may consider in achieving the legitimate academic goal of heterogeneous student body.[47] Describing race or ethnic background as a "plus" in an applicant's file, the Justice wrote that individuals who receive admission as a result of their combined qualifications, including "plus" factors, would not unconstitutionally displace applicants who were rejected because they were not the right color or background.[48] The "plus" applicants, however, could not insulate themselves from comparison with all other applicants. Thus, a program which considered race or ethnicity among a host of factors as a "plus" which might "tip the scales" in the admissions decision would be constitutional.[49]

The district court in *Hopwood* addressed the First Amendment concerns of the Court by deferring to the University's decisionmaking after it heard the testimony of deans from law schools across the country, as well as the University of Texas faculty. Based on the evidence presented, the court concluded that, although the university had made genuine efforts to end discrimination, the legacy of the past had nonetheless left residual effects that persisted in the present.[50] The district court found that without affirmative action, the university could not achieve its goal of diversity. In fact, the minority representation at the university would have been woefully inadequate had the law school based its 1992 admissions solely on TI's without regard to race and ethnicity.[51] The court acknowledged that, without an affirmative action admissions policy, the 1992 entering class would have consisted of, at most, nine African and eighteen Mexican -Americans.[52]

The Fifth Circuit, however, adopted a different approach. Relegating the First Amendment issue to a footnote, the circuit court noted that the university did not have a First Amendment interest in the context of diversity.[53] The court then criticized Justice Powell's concept of the "plus" program and its application under the Fourteenth Amendment. The "plus" program was designed to allow universities to consider ethnicity as a contributing factor towards their goal of diversity in admissions. The Fifth Circuit determined that achieving a diverse student body was not a compelling state interest under the Fourteenth Amendment. Because Justice Powell's argument in *Bakke* received only his own vote, the Fifth Circuit held that it was not bound by Powell's conclusion.[54] Citing *Croson* and *Metro Broadcasting*, the Fifth Circuit concluded that the Supreme Court foreclosed a finding of diversity as a compelling state interest when it stated that "there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs."[55]

In striking down the university's admissions process in *Hopwood*, the Fifth Circuit stated that the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of Fourteenth Amendment Equal Protection.[56] The court asserted that diversity treats minorities as a group, rather than individuals. While the court recognized that such treatment may further remedial purposes, the court's holding rested on the notion that it might just as likely promote improper racial stereotypes and thus fuel racial hostility.[57]

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[42] *University of Michigan*, 474 U.S. at 226 n. 12 (1985).

[43] *Id.*

[44] *Bakke*, 438 U.S. at 312. (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

[45] Note, *supra* note 41, at 1365.

[46] *Id.*

[47] 78 F.3d at 943.

[48] *Id.*

[49] *Id.* at 943-944.

[50] *Hopwood*, 861 F. Supp. at 571.

[51] *Id.*

[52] *Id.*

[53] *Hopwood*, 78 F.3d at 943 n. 25.

[54] 78 F.3d at 943 n. 25.

[55] *Id.* at 944, (citing *Croson*, 488 U.S. at 493 (plurality opinion)).

[56] *Id.* at 945.

[57] *Id.*

IV. CONCLUSION

Based on the Fifth Circuit's review of *Hopwood*, a narrow application of remedial purpose limited to the past discrimination of the remedying entity, is the only compelling state interest sufficient to satisfy strict scrutiny. Despite *Bakke*, a university's goal of a diverse student body cannot support an admissions policy which considers race and ethnicity. The Court's refusal to review *Hopwood* further strengthens the Fifth Circuit's position against using racial classifications and racial preferences in admissions programs. Thus, it appears that the Court is allowing the dismantling of affirmative action programs in higher education which have taken many years to build.

After *Hopwood*, affirmative action in admissions programs for institutions of higher learning may become defunct. The Fifth Circuit, however, left open the possibility for affirmative action admissions programs to be constitutional. Universities which adopt remedial programs must make a showing that they have a strong basis of evidence establishing discrimination and that discrimination is particularized to the institution.[58] Any programs based on findings of past discrimination must be limited in scope and duration in order to ensure that the relief adopted in fact redresses the precise injury complained of, rather than societal discrimination.[59] Therefore, a university must exclude from its affirmative action program applicants whose race is adequately represented, or those who have not suffered from past discrimination.[60]

Affirmative action programs with the goal of diversity may be designed to encompass First Amendment values in education. The functions of a university are varied. Among them are the basic goals of learning, including the freedom to inquire, to study, to evaluate, and to gain new maturity and understanding.[61] Central to these roles is the goal of academic freedom on both the individual and institutional levels. A university's assessment that a diverse student population is essential to these freedoms and contributes to the fulfillment of the institution's mission should, thus, receive favorable judicial treatment.[62] With evidence that diversity furthers an educational environment, courts should continue to follow *Bakke* and diversity in higher education as a compelling First Amendment interest.[63]

Although states will continue to amend their affirmative action admissions programs for state institutions as a result of the Fifth Circuit's *Hopwood* interpretation of the constitutional guidelines set forth in Bakke, states will still have viable constitutional arguments for their programs. In deciding *Bakke*, Justice Powell acknowledged the First Amendment issues in reviewing admissions programs by noting that universities must have wide discretion as to who should be admitted. The Court will not second guess legitimate "academic" decision-making.[64] Since *Bakke*, the Court has emphasized that academic decisions are subject only to a narrow avenue of judicial review because those decisions are not readily adapted to procedural tools of judicial or administrative decision making.[65] Many complex academic decisions, according to the Court, require expert evaluation of cumulative information about which the Court is ill-informed.[66] By ignoring the First Amendment implications of its decision in *Hopwood*, the Fifth Circuit left the door open for future challenges to its holding. Challenges that recognize Justice Powell's concerns, and advocate that admissions programs are legitimate and highly subjective academic entities, may succeed in retaining well-structured affirmative action programs.

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[58] Note, *supra* note 40, at 1359.
[59] *Id.* at 1361.
[60] *Id.*
[61] *Id.* at 1364.
[62] *Id.* at 1365.
[63] *Id.* at 1374.
[64] *Id.* at 1365.
[65] *Id.*
[66] *Id.*