

FOR ANTI-DISCRIM.

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because the Forest Service created SNEP at congressional request to provide information to Congress -- and not to the Executive Branch -- regarding the Sierra Nevada ecosystem. The court of appeals has now reversed, holding that SNEP was established in the interest of providing recommendations to the Forest Service as well as to Congress and that FACA therefore applied. The court remanded for further proceedings to determine whether injunctive relief is warranted.

- **Mexican Spotted Owl:** Maricopa Audubon Society, et al. v. U.S. Forest Service, (Jan. 6, 1997). Plaintiffs, an environmental organization and individual, want to monitor the activities of the Forest Service in protecting the Mexican spotted owl, a "threatened" species under the Endangered Species Act. Plaintiffs requested copies of the agency's "management territory" maps showing specific spotted owl nest sites. The Forest Service denied the request, relying on FOIA Exemption 2, which protects from disclosure information "related solely to the internal personnel rules and practices of an agency." The district court rejected the claim, holding that the information was not sufficiently "related to" agency practices, but because of the potential for harm to the owls, ordered the agency to disclose the information only to plaintiffs under a confidentiality agreement. The government appealed. The Tenth Circuit has now affirmed.
- **University of TX Affirmative Action Case:** On January 9, DOJ filed an amicus brief supporting TX motion for summary judgment in Lesage v. State of Texas, et al., a "reverse discrimination" suit brought by a white male plaintiff, who alleges that the University violated the Constitution in considering race in the admissions process for its Counseling Psychology doctoral program in order to foster diversity. The plaintiff argued that the University's affirmative action efforts were barred by the Fifth Circuit panel ruling last year in the Hopwood case. DOJ argued that the court need not reach the constitutional issue, because the plaintiff would not have been admitted to the program even if race had not been a factor in the overall process. DOJ also argued that notwithstanding the panel ruling in Hopwood, academic diversity remains a permissible predicate for affirmative action in higher education, and the TX program was fair and flexible.
- **Crown Heights Trial:** On January 6, the trial started in U.S. v. Price and Nelson, which is the latest prosecution arising out of the racial violence incident in Crown Heights, NY, several years ago. The defendants were charged last year in a superseding indictment reflecting the filing of formal charges against defendant Lemrick Nelson as an adult for his role in the stabbing of Yankel Rosenbaum, and also charges defendant Charles Price with violating the civil rights of Yankel Rosenbaum by inciting the crowd to commit acts of violence against Jewish people in Crown Heights, NY.

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## RECENT CASES

CONSTITUTIONAL LAW — EQUAL PROTECTION — AFFIRMATIVE ACTION — FIFTH CIRCUIT HOLDS THAT EDUCATIONAL DIVERSITY IS NO LONGER A COMPELLING STATE INTEREST. — *Hopwood v. Texas*, 78 F.3d 932. (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

Affirmative action is "one of the most divisive issues faced by society" today.<sup>1</sup> In recent years, the Supreme Court has required lower courts to view government use of racial classifications with great skepticism.<sup>2</sup> In response to this command, the Fifth Circuit in *Hopwood v. Texas*<sup>3</sup> correctly ruled that the University of Texas School of Law's admissions system improperly discriminated on the basis of race. Unfortunately, the court also held that the school's use of racial preferences to achieve diversity in the student body was unconstitutional. This latter ruling contravened both precedent and cautionary principles of jurisprudence. The court should neither have considered the constitutional question nor anticipatorily overruled a decision of the Supreme Court. In addition, the court unwisely overlooked the possible ill effects of using other factors that it approved in admissions.

In 1992, four white applicants were denied admission to the University of Texas School of Law<sup>4</sup> under a system in which the regular admissions committee considered applications of nonminority students, while a subcommittee reviewed those of African-American and Mexican-American students.<sup>5</sup> Both groups used applicants' Texas Index scores<sup>6</sup> to place each application into one of three categories: "presumptive admit," "presumptive deny," or "discretionary."<sup>7</sup> The scores required for each category varied depending on race.<sup>8</sup>

The four rejected applicants filed suit in federal district court, alleging that this system violated the Fourteenth Amendment and federal civil rights statutes.<sup>9</sup> The district court concluded that the school

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<sup>1</sup> *Hopwood v. Texas*, 861 F. Supp. 551, 553 (W.D. Tex. 1994).

<sup>2</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (holding that all racially based classifications used by federal, state, or local governments must meet the test of strict scrutiny).

<sup>3</sup> 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

<sup>4</sup> See *Hopwood*, 78 F.3d at 938.

<sup>5</sup> See *Hopwood*, 861 F. Supp. at 560. This system was created to ensure that each entering class would be approximately 10% Mexican-American and 5% African-American. See *id.*

<sup>6</sup> The Texas Index is a composite score that reflects an applicant's undergraduate grade point average and score on the Law School Admissions Test. See *id.* at 557 n.9.

<sup>7</sup> *Hopwood*, 78 F.3d at 935.

<sup>8</sup> See *id.* at 936. In fact, the score at which non-minorities would be presumptively denied admission was higher than the presumptive admission score for Mexican-Americans and African-Americans. See *Hopwood*, 861 F. Supp. at 561-62.

<sup>9</sup> See *id.* at 553.

had violated the plaintiffs' Fourteenth Amendment rights.<sup>10</sup> However, the court refused to preclude the law school from using race in its consideration of future applicants.<sup>11</sup>

The Fifth Circuit reversed and remanded.<sup>12</sup> The court first noted that the Supreme Court had recently declared that strict scrutiny applies to all government racial classifications, and then set forth two questions to be answered: "(1) Does the racial classification serve a compelling government interest, and (2) is it narrowly tailored to the achievement of that goal?"<sup>13</sup>

To answer the first question, the court began by examining the district court's conclusion that "obtaining . . . a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications."<sup>14</sup> In order to frame the issue, the court considered the Supreme Court's decision in *Regents of the University of California v. Bakke*,<sup>15</sup> focusing on Justice Powell's opinion.<sup>16</sup> Justice Powell had supported the use of race as a "plus" factor to attain diversity in the educational context.<sup>17</sup> Because "Justice Powell's argument in *Bakke* garnered only his own vote[,] has never represented the view of a majority of the Court in *Bakke* or any other case," and had been "implicitly rejected" by the four Justices who would have upheld the quota system, the Fifth Circuit declined to regard Justice Powell's view as "binding precedent."<sup>18</sup> Instead, it concluded that the Supreme Court "finally ha[d] recognized that only the remedial use of race is compelling"<sup>19</sup> and held that "the use of race to achieve a diverse student body . . . cannot be a state interest compelling enough to meet the steep standard of strict scrutiny."<sup>20</sup>

The court then asked whether the admissions program served a remedial purpose and thus a compelling government objective.<sup>21</sup> The court concluded that the purpose was not remedial, because the law school had failed to show any present effects of past discrimination by the law school itself.<sup>22</sup> The Fifth Circuit deemed the three such effects that the district court had identified — the law school's poor reputa-

<sup>10</sup> See *Hopwood*, 78 F.3d at 938. Besides granting declaratory relief, the court awarded each plaintiff nominal damages of one dollar and ordered that the plaintiffs be allowed to reapply to the law school without paying an application fee. See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* at 935.

<sup>13</sup> *Id.* at 940 (citing *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111, 2117 (1995)).

<sup>14</sup> *Id.* at 941 (quoting *Hopwood v. Texas*, 861 F. Supp. 551, 571 (W.D. Tex. 1994)) (internal quotation marks omitted).

<sup>15</sup> 438 U.S. 265 (1978).

<sup>16</sup> See *Hopwood*, 78 F.3d at 941-44. Justice Powell announced the judgment of the Court in *Bakke*, but other Justices joined his opinion only in parts.

<sup>17</sup> See *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

<sup>18</sup> *Hopwood*, 78 F.3d at 944.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 948.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* at 949-55.

tion with minority students, the perception that the school was a hostile environment for minorities, and the underrepresentation of minorities in the student body — unconvincing. The court claimed that “[a]ny racial tension at the law school [was] . . . the result of present societal discrimination”<sup>23</sup> and that minority underrepresentation was not caused by past discrimination by the law school itself.<sup>24</sup>

The court concluded by severely limiting the law school’s ability to use race in admissions.<sup>25</sup> However, the court declined to issue an injunction to that effect, relying instead on the school administration to comply and suggesting that punitive damages might be awarded if it did not.<sup>26</sup> The Fifth Circuit denied rehearing en banc,<sup>27</sup> and the Supreme Court denied certiorari, with two Justices noting that certiorari was denied because the admissions program was no longer “genuinely in controversy.”<sup>28</sup>

Language contained in recent Supreme Court decisions on racial preferences arguably supports the Fifth Circuit’s disposition of *Hopwood*. But “there is a reason that dicta are dicta and not holdings, that is, are not authoritative.”<sup>29</sup> Rather than going out of its way to use recent Supreme Court dicta to invalidate *Bakke*’s endorsement of diversity in education as a compelling state interest, the Fifth Circuit should have followed jurisprudential principles and confined its ruling to cover only what was necessary to decide the case before it. The court also should have devoted as much attention to the possible discriminatory effects of nonracial preferences as it did to the deleterious effects of racial preferences before approving the nonracial criteria.

Justice Powell’s opinion in *Bakke* tied together two distinctly different approaches to that case in order to render a decision. Four Justices saw no constitutional problem with state use of racial quotas in medical school admissions to help alleviate the present effects of past discrimination.<sup>30</sup> Another four Justices would have decided the case

<sup>23</sup> *Id.* at 953.

<sup>24</sup> *See id.* at 953–54. Because no compelling interest existed, the court found it unnecessary to consider its second question. *See id.* at 955.

<sup>25</sup> The court held that the law school could not continue to use race in admissions “for the purpose of (1) obtaining a diverse student body; (2) altering the school’s reputation in the community; (3) combating the school’s perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.” *Id.* at 958.

<sup>26</sup> *See id.* at 958–59. Judge Wiener specially concurred in the judgment, urging the panel to “take a considerably narrower path . . . to reach an equally narrow result.” *Id.* at 962 (Wiener, J., specially concurring). He would not have considered whether diversity is a compelling interest, but would have resolved the case instead by concluding that the remedy was not narrowly tailored. *See id.* at 965. He also would not have given the district court any instructions on an injunction. *See id.* at 967.

<sup>27</sup> Seven of seventeen active judges on the Fifth Circuit dissented from this decision. *See Hopwood v. Texas*, 84 F.3d 720, 721 (5th Cir. 1996).

<sup>28</sup> *Texas v. Hopwood*, No. 95-1773 (U.S. July 1, 1996) (Westlaw, SCT database) (memorandum opinion of Ginsburg, J., with whom Souter, J., joined).

<sup>29</sup> *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996).

<sup>30</sup> *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 325–26 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

on statutory grounds.<sup>31</sup> Justice Powell bridged the gap between these groups by holding that, although the use of racial quotas that "insulate[d] [minorities] from comparison with all other candidates," as the California system did, could not be allowed, the use of race as a "plus" factor to achieve a diverse student body was constitutionally sound.<sup>32</sup> Thus, the California system was struck down, even though five Justices agreed 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."<sup>33</sup>

Despite the Fifth Circuit's misgivings, the fact that no other Justices explicitly joined Justice Powell's "lonely opinion"<sup>34</sup> regarding the issue of diversity does not lessen its precedential value. The Supreme Court has said that in cases in which there is no clear majority opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."<sup>35</sup> The Fifth Circuit's claim that Justice Powell's position was "implicitly rejected" by the four Justices who would have upheld the California quota system<sup>36</sup> is clearly mistaken. Although they limited their agreement with Justice Powell's approach to situations in which "the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination,"<sup>37</sup> they interpreted the term "past discrimination" broadly.<sup>38</sup> The Fifth Circuit itself admitted that the four Justices believed that affirmative action programs were appropriate in a wide range of settings.<sup>39</sup> Given their broad interpretation of situations in which affirmative action programs would be constitutionally allowable, these Justices clearly did not reject Justice Powell's diversity justification; rather, they argued for a broader understanding of the circumstances under which affirmative action was appropriate that subsumed Justice Powell's diversity justification. Although these Justices did not use the word "diversity," in some parts of their opinion, "[t]hey spoke the language of diversity as

<sup>31</sup> These Justices maintained that Title VI barred California from considering race in making admissions decisions. See *id.* at 421 (opinion of Stevens, J.).

<sup>32</sup> *Id.* at 317 (opinion of Powell, J.).

<sup>33</sup> *Id.* at 320.

<sup>34</sup> *Hopwood*, 78 F.3d at 945.

<sup>35</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)) (internal quotation marks omitted).

<sup>36</sup> *Hopwood*, 78 F.3d at 944.

<sup>37</sup> *Id.* (quoting *Bakke*, 438 U.S. at 326 n.1 (opinion of Brennan, White, Marshall, and Blackmun, JJ.)) (emphasis omitted).

<sup>38</sup> See *Bakke*, 438 U.S. at 369 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("[A] state government may adopt race-conscious programs if the [programs'] purpose . . . is to remove the [potential] disparate racial impact [of] its actions . . . and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.")

<sup>39</sup> See *Hopwood*, 78 F.3d at 949 n.39 (noting that "under [the Brennan group's] standard, almost any school could adopt an affirmative action plan").

well."<sup>40</sup> Justice Powell's opinion therefore represented the narrowest holding on the subject of the proper scope of affirmative action, and should be taken to be authoritative.

The Fifth Circuit correctly noted that "there has been no indication from the Supreme Court" about whether diversity is a compelling state interest since *Bakke*, but its conclusion that "[s]ubsequent Supreme Court caselaw strongly suggests . . . that it is not"<sup>41</sup> is flawed. The Court's recent decisions have not undermined the educational diversity rationale because these decisions dealt with areas other than education, and thus far education is the only area in which the Court has found diversity to be a compelling interest.<sup>42</sup> Even as the Court was mandating close examination of racially-based classifications, one of its members recognized the holding of *Bakke*, by stating that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."<sup>43</sup>

Because the Supreme Court has not repudiated the teachings of *Bakke*, the Fifth Circuit's decision to do so was startling, particularly because the Fifth Circuit did not need to consider whether diversity is a compelling interest in order to reach a decision. *Hopwood* could have been decided on the grounds that the admissions plan was not narrowly tailored because it granted preferences only to certain races.<sup>44</sup> Besides violating cautionary principles of jurisprudence that dictate that courts should decide constitutional issues on the narrowest possible grounds,<sup>45</sup> the Fifth Circuit also transgressed the Court's rule against the anticipatory overruling of its cases: the Court has specifically reserved the right to overrule its own decisions. The Court has warned that, even if a case appears to have been undermined by subsequent decisions, the courts of appeals should follow it.<sup>46</sup> The Fifth

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<sup>40</sup> Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1753 (1996); see also *Bakke*, 438 U.S. at 363 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("[S]tate educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities . . .").

<sup>41</sup> *Hopwood*, 78 F.3d at 945.

<sup>42</sup> See Amar & Katyal, *supra* note 40, at 1746 ("[T]he Supreme Court has [recently] said a lot about contracting and rather little about education."). For a description of how diversity can provide unique benefits in the educational context, see Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1369-73 (1996).

<sup>43</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

<sup>44</sup> See *Hopwood*, 78 F.3d at 965-66 (Wiener, J., specially concurring) (chiding the panel for "rush[ing] in where the Supreme Court fears — or at least declines — to tread").

<sup>45</sup> See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (noting that the Court will avoid ruling on constitutional questions if possible, and will rule as narrowly as possible if not).

<sup>46</sup> See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881, 944 (1996).

Circuit thus made an unnecessarily broad constitutional ruling in a manner specifically proscribed by the Court.

In stark contrast to the careful consideration it gave to racially-based classifications, the Fifth Circuit devoted inadequate attention to another classification, which it approved: alumni preferences.<sup>47</sup> The court should have given alumni preferences more searching consideration, because in light of the history of discrimination in higher education in Texas, these preferences produce the kind of present effects of past discrimination by the law school that the court recognized as warranting a race-based remedy. The law school uncontestedly discriminated against blacks until the 1960s,<sup>48</sup> therefore, the percentage of African-American applicants who are related to alumni must be lower than the percentage of nonblack applicants who are so related.<sup>49</sup> Thus, if the law school adopted an admissions policy that employed only those factors that the court approved,<sup>50</sup> past racial discrimination by the law school itself would create a present disadvantage for African-Americans: they would be less likely to gain admissions preferences on the basis of alumni relations. By focusing on the use of racial classifications, the court overlooked this effect.

In the end, *Hopwood* suggests that the question whether diversity can be a compelling state interest must be answered.<sup>51</sup> The *Hopwood* decision is certain to have an effect on schools in the Fifth Circuit. Both public and private schools are now changing their admissions policies as a result of the decision.<sup>52</sup> School administrators have noted that the decision might make the Fifth Circuit seem like "a less friendly place than the rest of the country," and thereby disadvantage Fifth Circuit schools in minority recruitment.<sup>53</sup> However, the Fifth Circuit's anticipatory overruling of *Bakke* clearly was not compelled. Until the Supreme Court itself addresses the status of diversity as a compelling interest, other circuits should continue to follow *Bakke*.

<sup>47</sup> See *Hopwood*, 78 F.3d at 946 ("An admissions process may . . . consider an applicant's . . . relationship to school alumni.").

<sup>48</sup> See *id.* at 953; see also *Hopwood*, 861 F. Supp. at 573 n.66 (noting that Texas had created a separate law school to avoid integrating the University of Texas School of Law).

<sup>49</sup> Cf. Amar & Katyal, *supra* note 40, at 1749 (calling alumni preferences "educational grandfather clauses"); Connie Leslie, Pat Wingert & Farai Chideya, *A Rich Legacy of Preference*, NEWSWEEK, June 24, 1991, at 59, 59 (noting that alumni children, who are usually white and affluent, receive preferences in admissions to prestigious universities).

<sup>50</sup> It appears that, at this time, the law school does not take alumni relationships into account.

<sup>51</sup> The Supreme Court correctly declined to review *Hopwood*: the case no longer presents a genuine controversy because the admissions policy has been changed.

<sup>52</sup> See, e.g., Sylvia Moreno, *Private Colleges Say They'll Revise Programs*, DALLAS MORNING NEWS, July 3, 1996, at 6A; Terrence Stutz, *UT, A&M to Drop Race Factor*, DALLAS MORNING NEWS, July 2, 1996, at 1A.

<sup>53</sup> Moreno, *supra* note 52 (quoting Kathryn Costello, Vice President for University Advancement, Rice University) (internal quotation marks omitted).