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# Comments: Should Race Be a Factor in Law School Admissions? A Study of Hopwood v. Texas and How the Equal Protection Clause Makes Race-Based Classifications Unconstitutional

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# SHOULD RACE BE A FACTOR IN LAW SCHOOL ADMISSIONS? A STUDY OF *HOPWOOD v. TEXAS* AND HOW THE EQUAL PROTECTION CLAUSE MAKES RACE-BASED CLASSIFICATIONS UNCONSTITUTIONAL

## I. INTRODUCTION

In promoting a color-blind society, America should not violate the very principles underlying its color-blind Constitution.<sup>1</sup> Any analysis of affirmative action must begin with the premise that racial equality is a goal that all members of American society share. Starting from this premise, the differences of opinion center around the methods used to attain this goal.

Today's typical law student grew up during a time when the American government advanced meaningful policies aimed at protecting all races from discriminatory treatment.<sup>2</sup> Americans raised

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1. The Declaration of Independence and the original United States Constitution did not extend egalitarian ideals and rights to everyone in America. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* 4-7 (1978). While the Framers succeeded in alienating those precious inalienable rights from Africans, today's Constitution permits no such exclusions. See U.S. CONST. amends. XIII, XIV & XV; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) ("Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society."). However, many dispute whether the Constitution ought to be color-blind:

Despite the suggestion that our Constitution should be "color-blind," it has long been recognized that this is a misleading metaphor. Just as race has played a crucial role in our nation's past, so it must play a role in the present—whether to eradicate racial distinctions from our future, or to overcome the lingering effects of racial discrimination, or to achieve racial pluralism and diversity without racial domination.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-22, at 1521-22 (2d ed. 1988).

2. Persons born in America during the late 1960s and early 1970s did not grow up in a society that legally sanctioned racism. See *Civil Rights Act of 1964*, 28 U.S.C. § 1447, 43 U.S.C. §§ 1971, 1975(a)-1975(d), 2000(a), 2000(d), 2000(e) (1988); *Voting Rights Act of 1965*, 42 U.S.C. §§ 1973, 1973(b), 1973(aa)-(1a), 1973 (aa)-(6) (1988); *Fair Housing Act of 1968*, 42 U.S.C. § 3614 (1991); *Civil Rights Act of 1991*, Pub. L. No. 102-66, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

and educated in a society that teaches equality and does not tolerate racism are more apt to hold egalitarian views than individuals who grew up in America's past when intolerance was taught and segregation sanctioned. While we must never forget America's history of racism and intolerance,<sup>3</sup> with every new generation of Americans we leave that past further behind. In essence, society can remember the past without repeating its mistakes.

This Comment narrowly focuses on four specific areas. Part II examines two different approaches for determining whether the Framers' original intent of the Equal Protection Clause envisioned affirmative action programs.<sup>4</sup> Part III examines Supreme Court precedent in the area of race-based classifications.<sup>5</sup> Part IV reviews and analyzes *Hopwood v. Texas*,<sup>6</sup> a recent affirmative action decision of the United States Court of Appeals for the Third Circuit.<sup>7</sup> Part V questions the constitutional framework presently utilized by the Supreme Court in affirmative action cases and advocates a return to the principles espoused by earlier Courts.<sup>8</sup> Part VI concludes that race should not play a role in a law school's admissions process.<sup>9</sup>

## II. AN EXAMINATION OF THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause does not require that "everyone must be treated equally."<sup>10</sup> Rather, it commands that everyone must be treated equally with respect to race.<sup>11</sup> Thus, it is appropriate to question whether a government entity could adopt *any* affirmative

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3. See F. Michael Higginbotham, *Affirmative Action, Selective Memory Loss, and the Mistakes of Adarand*, 95 ANN. SURV. AM. L. 415, 415 (1995).

4. See *infra* notes 10-59 and accompanying text. Section 1 of the Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

5. See *infra* notes 60-180 and accompanying text.

6. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996).

7. See *infra* notes 181-267 and accompanying text.

8. See *infra* notes 268-287 and accompanying text.

9. See *infra* text accompanying note 288.

10. Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 655 (1975). Professor Sandalow noted that the government may tax individuals at different rates. See *id.*

11. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217-18 (1995); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978).

action program and remain true to this dictate. To determine what equal treatment with respect to race truly means, one must first attempt to decipher the original intent of the Equal Protection Clause.

Commentators have advanced two general frameworks for analyzing whether the Equal Protection Clause<sup>12</sup> was originally intended to permit the government to adopt affirmative action programs. The methods that academicians have developed for unraveling the original intent of the Equal Protection Clause vary markedly, as do the labels affixed to each method. This Comment attempts to place the most commonly asserted approaches to the original intent of the Equal Protection Clause into two pigeonholes: (1) a plain meaning, text-based approach and (2) a more open-ended original understanding approach.<sup>13</sup> These labels are merely academic in that Supreme Court opinions might intimate their acceptance, but have yet to clearly articulate their meaning or adopt them as controlling in any Equal Protection Clause case.

#### A. *The Text-Based Approach*

The starting point for decoding the meaning of any clause in the Constitution is its text. The text-based approach to the Equal Protection Clause focuses primarily on the Clause's text in an attempt to decipher its plain meaning.<sup>14</sup> When competing claims about the meaning of the text exist, a textualist attempts to "apply

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12. Although found only in the text of the Fourteenth Amendment, the Equal Protection Clause applies to both federal actions through the Fifth Amendment and state actions, through the Fourteenth Amendment. See *Adarand*, 515 U.S. at 217-18 (reviewing cases addressing whether equal protection is analyzed differently under the Fifth Amendment, as opposed to the Fourteenth Amendment, and finding that it is not).

13. Advocates of the original understanding approach argue that the intent behind the Equal Protection Clause of the Fourteenth Amendment was to ensure that states did not discriminate against freed slaves. See generally Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291 (1996) (discussing and supporting an original understanding approach to the Equal Protection Clause); Carl L. Livingston, Jr., *Affirmative Action on Trial: the Retraction of Affirmative Action and the Case for its Retention*, 40 HOW. L.J. 145 (1996); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997); Justin Schwartz, Comment, *A Not Quite Color-Blind Constitution: Racial Discrimination and Racial Preference in Justice O'Connor's "Newest" Equal Protection Jurisprudence*, 58 OHIO ST. L.J. 1055, 1062 (1997).

14. See Christo Lassiter, *The New Race Cases and the Politics of Public Policy*, 12 J.L. & POL. 411, 447 (1996).

the law as it plainly reads” in light of past judicial interpretations of accepted canons of construction.<sup>15</sup>

This approach leads certain textualists to assert that the command of the Equal Protection Clause is self-evident—no language could be clearer than “[n]o State shall make or enforce any law which . . . den[ies] to any person within its jurisdiction the equal protection of the laws.”<sup>16</sup> The language in the Clause does not limit its scope to protecting minorities; its egalitarian concept applies to any and all persons.<sup>17</sup> Even though the aim of the Civil War Amendments was to provide aid to freed slaves,<sup>18</sup> “[t]here is . . . no textual support for the argument that these rights apply differently to people of different races—the [A]mendments say everything about equality and nothing about permissible discrimination.”<sup>19</sup> The command of equal protection, therefore, is often characterized as a mandate for color-blind laws.<sup>20</sup>

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15. *Id.*

16. U.S. CONST. amend. XIV, § 1; see John Marquez Lundin, *The Call for a Color-Blind Law*, 30 COLUM. J.L. & SOC. PROBS. 407, 438 (1997) (supporting the use of the Equal Protection Clause’s text to ascertain its plain meaning); Russell N. Watterson, Jr., *Adarand Constructors v. Pena: Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation*, 1 BYU L. REV. 301, 326 (1996) (arguing that the most reliable means of interpreting a constitutional Amendment is to consider the plain meaning of its text); L. Darnell Weeden, *Yo, Hopwood, Saying No to Race-Based Affirmative Action is the Right Thing to do from an Afrocentric Perspective*, 27 CUMB. L. REV. 533, 542 (1996) (supporting a plain meaning approach to interpreting the text of the Equal Protection Clause that would proscribe race-based classifications); see also Fullilove v. Klutznick, 448 U.S. 448, 526 (1980) (Stewart & Rehnquist, JJ., dissenting) (explaining the simple command of the equal protection clause). *But see* Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984) (criticizing a plain meaning approach to the Fourteenth Amendment as simplistic).

17. See Weeden, *supra* note 16 at 542-43; see also Fullilove v. Klutznick, 448 U.S. 448, 526 (1980) (Stewart & Rehnquist, JJ., dissenting) (explaining that the arbitrary or unfair effect of a racially discriminatory law violates Equal Protection regardless of the race of the individual harmed).

18. See Jonathan L. Entin, *An Uneasy Case for Affirmative Action: Some Notes from Law, History, and Demography*, 22 OHIO N.U. L. REV. 1191, 1192 (1996) (“Although the Equal Protection Clause is written in general terms . . . the original understanding was that this provision was designed primarily to protect the rights of African Americans.”).

19. Lundin, *supra* note 16, at 440-41.

20. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (opining that “only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle

### 1. Justices Who Emphasize the Plain Meaning of the Text

Over time, certain Justices have emphasized the plain meaning of the text of the Equal Protection Clause when analyzing the constitutionality of affirmative action programs. Justice Powell articulated this plain meaning, text-based approach in *Regents of the University of California v. Bakke*, when he wrote: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."<sup>21</sup> A clearer example of this approach surfaced one year later in *Fullilove v. Klutznick*,<sup>22</sup> when Justice Stewart persuasively asserted:

The command of the equal protection guarantee is simple but unequivocal: In the words of the Fourteenth Amendment: "No State shall . . . deny to *any* person . . . the equal protection of the laws." Nothing in this language singles out some "persons" for more "equal" treatment than others. . . . From the perspective of a person detrimentally affected by a racially discriminatory law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law's purpose, be it purportedly "for the promotion of the public good" or otherwise.<sup>23</sup>

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embodied in the Fourteenth Amendment that [o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens" (internal quotation marks omitted)); Lundin, *supra* note 16, at 427.

21. 438 U.S. 265, 289-90 (1978). For an analysis of the splintered decision of the *Bakke* Court, see *infra* notes 44-45, 112-17 and accompanying text.
22. 448 U.S. 448, 524 (1979) (Stewart & Rehnquist, JJ., dissenting).
23. *Id.* at 526 (Stewart & Rehnquist, JJ., dissenting) (emphasis added). Justice Stewart's dissenting opinion appears to be based on a textualist interpretation of the Constitution. See *id.* at 526-27. Justice Stewart reached the preceding conclusion by way of the following analysis:

No one disputes the self-evident proposition that Congress has broad discretion under its spending power to disburse the revenues of the United States as it deems best and to set conditions on the receipt of the funds disbursed. No one disputes that Congress has the authority under the Commerce Clause to regulate contracting practices on federally funded public works projects, or that it enjoys broad powers under § 5 of the Fourteenth Amendment "to enforce by appropriate legislation" the provisions of that Amendment. But these self-evident truisms do not begin to answer the question before us in this case. For in the exercise of its powers, Congress must obey the Constitution just as the legislatures of all the States must obey the Constitution in the exercise of their powers.

In *Adarand Constructors, Inc. v. Peña*,<sup>24</sup> Justice Scalia based his opinion on a textual interpretation of several constitutional provisions.<sup>25</sup> In Justice Scalia's concurring opinion, he succinctly stated that the "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."<sup>26</sup> In perhaps his most persuasive argument, Justice Scalia wrote:

[To] pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is

*Id.* In light of this approach, Justice Stewart would have held that the Minority Business Enterprise Provision at issue in *Fullilove* violated the Equal Protection Clause. *See id.* at 527.

24. 515 U.S. 200 (1995) (Scalia, J., concurring).

25. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring). Scalia's text-based analysis proceeded as follows:

[U]nder our Constitution there can be no such thing as either a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual, *see* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to *any person*" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, *see* U.S. CONST. amend. XV, § 1 (prohibiting abridgment of the right to vote "on account of race") or based on blood, *see* U.S. CONST. art. III, § 3 ("[N]o Attainder of Treason shall work Corruption of Blood"); U.S. CONST. art. I, § 9 ("No Title of Nobility shall be granted by the United States").

*Id.* (Scalia, J., concurring).

While Justice Thomas may not have taken a strict textualist approach, he reached the same result in his interpretation of the Equal Protection Clause. Relying on the Declaration of Independence, Justice Thomas reasoned that despite the best intentions, there is a principle that "under our Constitution, the government may not make distinctions on the basis of race. . . . There can be no doubt that the paternalism that appears to lie at the heart of [race-based programs] is at war with the principle of inherent equality that underlies and infuses our Constitution." *Id.* at 240 (Thomas, J., concurring).

*Adarand* highlights Justices Scalia and Thomas's shared view that affirmative action should be abandoned entirely. *See* Livingston, *supra* note 13, at 164. Their ideas do not ignore originalism; the view they hold is simply that affirmative actions runs contrary to the original understanding of the Fourteenth Amendment. *See id.* at 176.

26. *Adarand*, 515 U.S. at 239 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989)) (Scalia, J., concurring).

American.<sup>27</sup>

From a textual standpoint, it seems self-evident that in order to ensure an eternally fair approach to the Fourteenth Amendment, the Equal Protection Clause should be interpreted to establish a *per se* prohibition on race-based classifications. A truly equal approach to interpreting the Equal Protection Clause would guarantee for every generation, regardless of race, that no government entity may consider race in its decision making. If government line-drawing takes any form, it logically follows that it should be based on merit alone.

One asserted weakness of placing too much emphasis on the text of the Equal Protection Clause, particularly when combined with traditional methods of statutory construction, is that courts are expounding a Constitution, not simply a run-of-the-mill statute.<sup>28</sup> Additionally, advocates focusing on a plain meaning rationale are criticized for ignoring the history and circumstances that surrounded the ratification of the Fourteenth Amendment.<sup>29</sup> Therefore, even though the textual command appears clear, commentators urge courts to look to what they conceive to be the drafters' original intent of the Equal Protection Clause from a more open-ended perspective.

#### *B. The Original Understanding Approach*

Affirmative action advocates often rely on a more open-ended approach in determining the original intent of the Equal Protection Clause—the original understanding approach. In resolving the original intent of the Equal Protection Clause under the original understanding approach, a court would look to the language employed in light of its meaning when the Clause was enacted.<sup>30</sup> In addition, courts could view the surrounding circumstances that led to its enactment.<sup>31</sup> This open-ended approach suggests that a court should attempt to put itself in the position of the drafters in order to discern what the drafters intended their words to mean.<sup>32</sup> A closer ex-

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27. *Id.* (Scalia, J., concurring).

28. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852-53 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget it is a constitution we are expounding.”)).

29. See Maltz, *supra* note 16, at 933.

30. See Paul Brest, *Affirmative Action and the Constitution: Three Theories*, 72 IOWA L. REV. 281, 282 (1987).

31. See *id.*

32. See *id.* (“Picture yourself back in 1868 when the [F]ourteenth [A]mendment



amination of the original understanding approach illustrates its shortcomings.

In order to pierce the seemingly impermeable barrier imposed by the text of the Equal Protection Clause, advocates of affirmative action point to the context in which the Fourteenth Amendment was passed. Proponents of affirmative action argue that at the time the Fourteenth Amendment was ratified, Congress was involved in enacting Reconstruction legislation such as the Freedman's Bureau Act—legislation “conceived of as a massive affirmative action program for blacks.”<sup>33</sup> The Fourteenth Amendment garnered the support of the same legislators who favored concurrently enacted race conscious Reconstruction laws.<sup>34</sup> Therefore, the politicians who ratified the Fourteenth Amendment must have understood that it would permit affirmative action programs for blacks to continue.

The support for Reconstruction programs, however, was far from unanimous. Similar to the present debate surrounding affirmative action programs, the Reconstruction programs of the time were repeatedly objected to by politicians who asserted that they were unfair to Caucasians.<sup>35</sup> Under the original understanding approach, however, it must be implied that if the views of those who objected to Reconstruction legislation had prevailed, there would have been specific language in the Fourteenth Amendment that addressed their concerns. Under this line of reasoning, the history surrounding the Fourteenth Amendment's ratification and the language employed do not reveal an intent to prohibit affirmative action pro-

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was framed and adopted, and ask what its drafters and adopters intended with respect to reverse discrimination.”). For example, in Justice O'Connor's opinion in *Croson* she noted the following:

The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.

Livingston, *supra* note 13, at 176 n.176 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (plurality opinion)).

33. Brest, *supra* note 30, at 282.

34. See Livingston, *supra* note 13, at 179.

35. See *id.* at 178.

grams.<sup>36</sup> From this view of history, one could further imply that the Framers of the Fourteenth Amendment intended that affirmative action programs would not violate the Equal Protection Clause.<sup>37</sup>

Advocates of the original understanding approach often bolster their position by relying on an early interpretation of the Fourteenth Amendment by the Court in the *Slaughter-House Cases*.<sup>38</sup> For example, scholars and commentators such as Judge A. Leon Higginbotham, Jr., often quote the *Slaughter-House* Court for the proposition that the Fourteenth Amendment addressed "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."<sup>39</sup> From this precedent on the heels of the Fourteenth Amendment's ratification, one could argue that to interpret the Equal Protection Clause to afford protection to whites would "turn[] the intent and meaning of the Fourteenth Amendment on its head."<sup>40</sup>

However, even these early interpretations of the Equal Protection Clause made clear that all races, including the Caucasian race, "may invoke the Fourteenth Amendment's prohibition against racial discrimination."<sup>41</sup> Moreover, scholars have chronicled three different strands of the original understanding of the Equal Protection

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36. See Brest, *supra* note 30, at 282; Brody, *supra* note 13, at 295-98. As one commentator explained:

From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the Framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.

Livingston, *supra* note 13, at 178.

37. See Livingston, *supra* note 13, at 178.

38. See Entin, *supra* note 18, at 1192.

39. A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593, 1645 (1994) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 71).

40. *Id.*

41. Entin, *supra* note 18, at 1193.

Clause that evolved through Supreme Court precedent.<sup>42</sup> Thus, pointing to merely one strand of precedent—the *Slaughter-House Cases*' Negro Rights Theory—ignores the other lines of judicial thinking.<sup>43</sup>

Although the *Slaughter-House Cases* may have been one of the Court's first interpretations of the Fourteenth Amendment, it has not been the last. Notably, in *Regents of the University of California v. Bakke*,<sup>44</sup> Justice Powell explained:

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit . . . It is settled beyond question that the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.<sup>45</sup>

Thus, despite evidence that the Fourteenth Amendment was originally designed to protect only the freed slaves, it clearly has since been construed to protect all races.<sup>46</sup>

Other scholars who favor an original understanding approach suggest that courts focusing on earlier equal protection precedent often stray from the original intent of the Clause.<sup>47</sup> For example, Professor Tribe maintains that the "color-blind" notion initially espoused by first Justice Harlan has been misconstrued.<sup>48</sup> Indeed, Professor Tribe asserts that the Framers of the Fourteenth Amendment meant only to prevent "white supremacy" through the Fourteenth

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42. See Schwartz, *supra* note 13, at 1063 (explaining that the "Negro rights theory" of the *Slaughter-House* Court was merely the first of three strands of original understanding jurisprudence employed by the Court).

43. See generally *id.*

44. 438 U.S. 265 (1978).

45. *Id.* at 289-90 (citations omitted) (internal quotation marks omitted). *But see* Palmer v. Thompson, 403 U.S. 217, 220 (1971) ("[T]he Equal Protection clause was principally designed to protect Negroes against discriminatory action by the States.").

46. See *Bakke*, 438 U.S. at 289-90.

47. See TRIBE, *supra* note 1, § 16-22, at 1525. Professor Tribe asserts that this approach is much more in keeping with judicial activism and creative constitutionalism. See *id.* at 1526.

48. See *id.* at 1524-25.

Amendment.<sup>49</sup> However, if one accepts that the sole purpose of the Fourteenth Amendment was to prevent white supremacy, then one must also agree that the Fourteenth Amendment would permit any race to be supreme in the United States provided it is not the white race. This argument is undoubtedly flawed and has been rejected by the Court on many occasions.<sup>50</sup>

An original intent interpretation of the Equal Protection Clause that concludes that its exclusive purpose was to protect freed slaves produces inconceivable results. Under this type of constitutional interpretation, no Asian-American, Hispanic-American, Native American, or other "protected class" could seek protection under the Equal Protection Clause.<sup>51</sup> Under an original understanding approach, a Nigerian who emigrates to this country today would not have equal protection rights if that Nigerian was not a descendant of a freed American slave.<sup>52</sup> Similarly, a Filipino immigrant who settles in this country today would not have equal protection rights under the Fourteenth Amendment because she too could not trace her roots to the slavery that historically existed in the United States.<sup>53</sup> To support this reading of the Equal Protection Clause is an anathema to the principles of equality; equal protection rights are individual rights possessed by each person regardless of race.<sup>54</sup>

No language could be clearer than, "[n]o State shall make or enforce any law which . . . den[ies] to any person within its jurisdiction the equal protection of the laws."<sup>55</sup> It would therefore appear that as long as European-Americans are defined as persons, they too have the right to equal protection of the laws.

Other commentators have pointed out the illogical result that would follow from concluding that the Fourteenth Amendment was intended to permit affirmative action today:

To say that Congress, by providing relief to newly freed slaves, intended to make them and all their descendants

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49. *See id.* at 1525.

50. *See* Entin, *supra* note 18, at 1193 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

51. *Cf.* John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection Laws"*, 50 COLUM. L. REV. 131, 167-69 (1950) (concluding that the Fourteenth Amendment has broad application).

52. *See id.*

53. *See supra* text accompanying notes 33, 39-40.

54. *See* *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.").

55. U.S. CONST. amend. XIV, § 1.

(and any other dark-skinned person) a permanently protected class would be akin to saying that when Congress votes disaster relief funds for hurricane victims in Florida it thereby intends to create a class of persons and to endow that class with permanent protections that exist without regard to the conditions that were the justification for the legislation.<sup>56</sup>

In sum, the only common ground that these competing philosophies share is that none are fully embraced by the present Court. The splintered decisions rendered by the recent Court led one scholar to conclude: "We neither obey the plain text of the amendments nor do we claim to be bound by the intent or original understanding of the amendments' Framers."<sup>57</sup> Accordingly, some com-

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56. Lundin, *supra* note 16, at 451. In recognition of the diverse methods employed to interpret the Equal Protection Clause, it should be noted that Judge (then Professor) Posner detailed an economic analysis of the Equal Protection Clause. See Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1. Judge Posner's analysis of the Fourteenth Amendment, however, was not limited solely to economics. See *id.* at 21. He recognized that if an interpretation of the Equal Protection Clause was based solely on the intent of the drafters, then whites would "have no leg to stand on" when their constitutional rights were violated. See *id.* (referring to the fact that the Equal Protection Clause was drafted in the political environment of post-Civil War Reconstruction, when the plight of the recently freed slaves was the focus of legislators). Judge Posner reasoned, "[s]o bizarre would discrimination against whites in admission to institutions of higher learning have seemed to the Framers of the Fourteenth Amendment that we can be confident that they did not consciously seek to erect a constitutional barrier against such discrimination." *Id.* at 21-22.

57. Lundin, *supra* note 16, at 438. For example, although Justice O'Connor has authored many opinions in affirmative action cases, her philosophical approach remains unclear. See *Shaw v. Reno*, 509 U.S. 630, 633-75 (1993); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602-31 (1990) (O'Connor, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284-94 (1986) (O'Connor, J., concurring). Certainly Justice O'Connor looks to the intent of the Framers of the Fourteenth Amendment. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (plurality opinion) (explaining "that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of a race as a criterion for legislative action, and to have the federal courts enforce those limitations"). Like many other opinions, however, Justice O'Connor generally begins from the premise that her opinion is confined by the Court's precedent. Thus, a thorough analysis of the constitutionality of affirmative action, as intended by the Framers, cannot be located in any Supreme Court opinion.

mentators suggest that the original understanding and textual approaches fail to provide suitable guidance for resolving affirmative action issues.<sup>58</sup> Instead, it is suggested that the attention should focus on “ ‘the great decisions of the Supreme Court’ ” such as *Brown v. Board of Education* and its progeny.<sup>59</sup> The next section of this Comment explores several noteworthy Equal Protection Clause decisions handed down by the Court.

### III. SUPREME COURT PRECEDENT IN RACED-BASED CLASSIFICATIONS

Any discussion of modern race-based classifications<sup>60</sup> properly begins with the Supreme Court’s admonition in *Hirabayashi v. United States*.<sup>61</sup> The *Hirabayashi* Court stated that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>62</sup>

One year later in *Korematsu v. United States*,<sup>63</sup> the Court elaborated on the approach in *Hirabayashi* and explained “that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”<sup>64</sup>

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58. See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1335 (1986).

59. *Id.*

60. Perhaps the most slippery aspect of race-based classifications is that the Judicial Branch of government has not been able to formulate a consistent, unanimous constitutional approach to how best remedy this nation’s discriminatory past. See, e.g., *United States v. Paradise*, 480 U.S. 149, 166-67 & n.17 (1987). While frustrating, it is perhaps fitting because it likely reflects society’s struggle with the issue.

61. 320 U.S. 81, 102 (1943) (holding that a military curfew order imposed on a natural born citizen of Japanese ancestry, while America was at war with Japan, was a valid exercise of war power).

62. *Id.* at 100.

63. 323 U.S. 214 (1944).

64. *Id.* at 216. Thus was born the phrase that eventually became known as the strict scrutiny test. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-91 (1978) (holding that all races are protected under the Fourteenth Amendment) (citing *Korematsu*, 323 U.S. at 216). It would appear the phrase, “[t]hat is not to say that all such restrictions are unconstitutional,” *Korematsu*, 323 U.S. at 216, was written in recognition of the constitutional escape hatch the Court used to limit constitutional freedoms during times of war—the war powers conferred upon Congress and the Executive. See *id.* at 217. The *Korematsu*

In *Korematsu*, the Court justified the detention of persons of Japanese descent, following the attack on Pearl Harbor for fear that they might conspire with the Japanese armed forces in an invasion of the United States.<sup>65</sup> The rights curtailed in *Korematsu* involved exclusion orders and curfews imposed upon Japanese-Americans who resided in areas that the military labeled as vital to national security.<sup>66</sup> The Supreme Court upheld the orders as constitutional, reasoning that they were designed to "protect[] against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities."<sup>67</sup> The Court accepted the government's position that the presence of an undeterminable number of disloyal Japanese-Americans while the United States was at war with Japan made the exclusion and curfew orders constitutional.<sup>68</sup> The Court noted that it was aware of the hardships such orders would cause,<sup>69</sup> but justified its opinion on the ground that "hardships are part of war, and war is an aggregation of hardships."<sup>70</sup> However, the Court limited its holding when it explained that "compulsory exclusion of large groups of citizens from their homes, *except under circumstances of direst emergency and peril*, is incon-

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Court explained the exception as follows:

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

*Id.* at 219-20.

65. See *Korematsu*, 323 U.S. at 217-20. The *Korematsu* decision has been widely criticized because it justified an extreme form of racial discrimination. See *DeFunis v. Odegaard*, 416 U.S. 312, 339-40 n.20 (1974) (Douglas, J., dissenting). The Court formulated its opinion in the aftermath of the surprise attack by the Japanese on Pearl Harbor. See *id.* (Douglas, J., dissenting) (pointing out that the World War II race-based classifications were the result of an overly prudent military in time of war). The acts taken by our government during this period "went to the verge of wartime power." *Id.* (Douglas, J., dissenting). In retrospect, the detention of Japanese-Americans for fear that they would provide assistance to the Japanese armed forces in an invasion was clearly excessive. See *id.* (Douglas, J., dissenting).

66. See *Korematsu*, 323 U.S. at 215-17.

67. *Id.* at 217.

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

69. See *id.* at 219.

70. *Id.*

sistent with our basic governmental institutions.”<sup>71</sup>

Although the wisdom of the *Korematsu* Court has been criticized because it is thought today that the exigent circumstances that the country faced did not warrant the constitutional restrictions it imposed,<sup>72</sup> questions still exist as to whether the Equal Protection Clause protects all Americans.

It would appear that under the limiting principle established in *Korematsu*, race-based classifications violate the Fifth and Fourteenth Amendments unless Congress declares war and determines that the nation is faced with the “direst emergency and peril”<sup>73</sup> and must “protect[] against espionage and against sabotage to national-defense material, national-defense premises, and to national-defense utilities.”<sup>74</sup> Nonetheless, the Supreme Court has moved from permit-

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71. *Id.* at 219-20 (emphasis added).

72. See TRIBE, *supra* note 1, § 16-14, at 1466-67 n.7. Professor Tribe seems to agree with Justice Murphy’s dissent in *Korematsu* which “found it ‘difficult to believe that reason, logic or experience could be marshaled in support of [the] assumption’ on which the exclusion order was based—namely, that ‘all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage.’” *Id.* (quoting *Korematsu*, 323 U.S. at 235). Under this same reasoning, perhaps Professor Tribe would support the parallel argument that affirmative action programs that discriminate against *all* whites on the presumption that *all* whites have been afforded privileged backgrounds ought to be stricken. *But see id.* at 1521 (asserting that by reading the Constitution to forbid color-consciousness in government acts would defeat our nation’s effort “to eradicate racial distinctions from our future”).

Professor Tribe explains that even the *Korematsu* Court distinguished between “pressing public necessity” and “racial antagonism” when permitting racial classifications. *Id.* at 1524 (quoting *Korematsu*, 323 U.S. at 216). Professor Tribe implies that racial classifications are permissible as long as they do not reflect racial antagonism. *See id.* Professor Tribe assures his readers that, “[r]acial antagonism, of course, is hardly the motive of today’s minority set-aside programs.” *Id.* While it is arguable whether racial antagonism is the present motive of any particular affirmative action program, it is clearly the collective result of the institution itself. Indeed, minority set-aside programs create a cycle incapable of accomplishing the very purpose Professor Tribe asserts to justify their existence—“to eradicate racial distinctions from our future.” *Id.* at 1521.

Notably, Professor Tribe does not attempt to compare the pressing public necessity of national defense during World War II with the presumed public necessity of minority set-aside programs. It may be fairly argued that the constitutionality of *Korematsu* was based on the exigencies of an entire world at war and that the Court would not have permitted any other racial classifications short thereof. *See Korematsu*, 323 U.S. at 220.

73. *Korematsu*, 323 U.S. at 220.

74. *Id.* at 217; *cf. id.* at 219-20 (applying this standard to the “[c]ompulsory exclu-



ting racial distinctions in time of war to allowing race-based classifications for other reasons considerably less exigent.<sup>75</sup>

A. *Supreme Court Precedent in the Past Thirty Years*

In order to understand the context of *Hopwood v. Texas*,<sup>76</sup> it is necessary to review *Korematsu's* relevant progeny including *DeFunis v. Odegaard*,<sup>77</sup> *Regents of the University of California v. Bakke*,<sup>78</sup> *Wygant v. Jackson Board of Education*,<sup>79</sup> *City of Richmond v. J.A. Croson Co.*,<sup>80</sup> and *Adarand Constructors, Inc. v. Peña*.<sup>81</sup> Although the Supreme Court recently denied *certiorari* in *Hopwood*,<sup>82</sup> it granted *certiorari* twenty-two years earlier in a factually similar case—*DeFunis v. Odegaard*.<sup>83</sup>

In *DeFunis*, an applicant to the University of Washington School of Law (UW), Marco DeFunis, sued the law school on the grounds that he had been denied admission on the basis of his race.<sup>84</sup> The admissions process at UW utilized an index called the "Predicted First Year Average" (Average)—a formula applied to an applicant's undergraduate grade point average and Law School Admission Test (LSAT) score.<sup>85</sup> The school then established admissions categories by which an applicant would be either offered admission, denied

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sion of large groups of citizens from their homes"). Whether or not the nation ought to be at war with racism and whether racial inequality creates *Korematsu's* exigent circumstances is not the subject of this Comment. However, it is clear that the race-based classifications used today are not established out of a justifiable fear that without them, the country would become the victim of espionage or sabotage against our nation's security, as was the case in *Korematsu*. See *id.* at 217. Without an exigent justification, any race-based classification should fail by analogy under *Korematsu*. Cf. *id.* at 219-20.

75. Compare *Korematsu*, 323 U.S. at 223-24, with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (recognizing that race may be a permissible factor to consider in a university's admissions process).

76. 78 F.3d 932 (5th Cir. 1996).

77. 416 U.S. 312 (1974) (per curiam).

78. 438 U.S. 265 (1978).

79. 476 U.S. 267 (1986) (plurality opinion).

80. 488 U.S. 469 (1989) (plurality opinion).

81. 515 U.S. 200 (1995).

82. 78 F.3d 932 (5th Cir. 1996).

83. 416 U.S. 312 (1974). The admissions policies found at the University of Texas Law School are similar to those at the University of Washington. Compare *id.* at 321-24 (describing an admissions process where an applicant's grade point average and LSAT score were combined into a formula and the use of special committees to evaluate minority applicants), with *Hopwood v. Texas*, 78 F.3d 932, 935-38 (5th Cir. 1996).

84. See *DeFunis*, 416 U.S. at 314.

85. See *id.* at 321 (Douglas, J., dissenting).

admission, or held for further review.<sup>86</sup> If an applicant's Average was above a specific number, admission was nearly certain.<sup>87</sup> Conversely, if an applicant's Average was below a specific number, admission was denied unless other information in the applicant's file existed that "indicat[ed] greater promise than suggested by the Average."<sup>88</sup> Those applicants whose Average fell between the high and low range were held for further consideration.<sup>89</sup>

DeFunis, whose Average was 76.23, claimed that UW violated his Fourteenth Amendment rights because the school denied him admission in favor of thirty-seven minority students with lower Averages.<sup>90</sup> The state trial court granted DeFunis's motion for injunction and ordered UW to admit DeFunis.<sup>91</sup> The Washington Supreme Court reversed the trial court's order and ruled that UW's admissions policies were constitutional.<sup>92</sup> DeFunis then appealed to the Supreme Court of the United States.<sup>93</sup>

The Supreme Court initially granted DeFunis's petition for *certiorari* but subsequently denied further review.<sup>94</sup> By the time the case reached the Supreme Court, DeFunis was in his third year of law school at UW.<sup>95</sup> In response to DeFunis's petition, UW stated that, regardless of the Supreme Court's decision, DeFunis would be permitted to finish his legal education at UW.<sup>96</sup> The Supreme Court ruled that the case was moot "[b]ecause the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation."<sup>97</sup> Justice Douglas dissented from the Court's finding the case moot.<sup>98</sup>

Justice Douglas's dissent,<sup>99</sup> he did not find that UW's use of sep-

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86. *See id.* at 321-24 (Douglas, J., dissenting).

87. *See id.* at 321-22 (Douglas, J., dissenting).

88. *Id.* at 322 (Douglas, J., dissenting).

89. *See id.* at 322-23 (Douglas, J., dissenting).

90. *See id.* at 324 (Douglas, J., dissenting).

91. *See id.* at 314-15.

92. *See id.* at 315 ("Mr. Justice Douglas, as Circuit Justice, stayed the judgment of the Washington Supreme Court pending the final disposition of the case by [the *DeFunis*] Court.") (internal quotation marks omitted).

93. *See id.*

94. *See id.*

95. *See id.* at 314-15.

96. *See id.* at 315-16 n.2.

97. *Id.* at 319.

98. *See id.* at 320-48 (Douglas, J., dissenting).

99. *See id.* at 320 (Douglas, J., dissenting). Justice Brennan issued a separate dis-

arate admissions policies for minorities and whites violated the Fourteenth Amendment, but he expressed disapproval nonetheless.<sup>100</sup> Justice Douglas observed that “[a]pplicants who had indicated on their application forms that they were either black, Chicano, American Indian, or Filipino were treated differently in several respects.”<sup>101</sup> Regardless of their Average, none could be summarily rejected by the admissions committee’s chairman.<sup>102</sup> Instead, black applicants were assigned for review to a first-year black law student and a professor who worked in a program dealing with disadvantaged college students considering law school.<sup>103</sup> Applications from among the other three minority groups were assigned for review to an assistant dean who was on the admissions Committee.<sup>104</sup> Minority applicants, although compared against one another for admission, “were never directly compared to the remaining applications . . . . Thirty-seven minority applicants were admitted under this procedure. Of these, thirty-six had Averages below DeFunis’[s] 76.23, and thirty had Averages below 74.5, and thus would ordinarily have been summarily rejected by the Chairman.”<sup>105</sup>

Justice Douglas explained that “the consideration of race as a measure of an applicant’s qualification normally introduces a capricious and irrelevant factor working an invidious racial discrimination.”<sup>106</sup> Referring to the Court’s decision in *Loving v. Virginia*,<sup>107</sup> Justice Douglas stated that “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious discrimination in the States.”<sup>108</sup>

One marvels at Justice Douglas’s foresight, articulating the inevitable stigmatizing effects of continued emphasis on race, when he wrote:

The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be

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senting opinion in the case. *See id.* at 348 (Brennan, J., dissenting).

100. *See id.* at 331-34 (Douglas, J., dissenting).

101. *Id.* at 323 (Douglas, J., dissenting).

102. *See id.* (Douglas, J., dissenting).

103. *See id.* (Douglas, J., dissenting).

104. *See id.* (Douglas, J., dissenting).

105. *Id.* at 323-24 (Douglas, J., dissenting).

106. *Id.* at 333 (Douglas, J., dissenting) (citations omitted).

107. 388 U.S. 1 (1967).

108. *DeFunis*, 416 U.S. at 334 (Douglas, J., dissenting) (quoting *Loving*, 338 U.S. 1 at 10).

to produce good lawyers for Americans . . . . That is the point at the heart of all our school desegregation cases, from *Brown v. Board of Education* through *Swann v. Charlotte-Mecklenburg Board of Education*. A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer . . . . All races can compete fairly at all professional levels. So far as race is concerned, any state-sponsored preference to one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.<sup>109</sup>

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109. *Id.* at 342-44 (Douglas, J., dissenting) (citations omitted); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239-40 (1995) (Scalia, J., concurring); *id.* at 240-41 (Thomas, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1979) (Stewart & Rehnquist, JJ., dissenting) ("[H]istory contains one clear lesson. Under our Constitution, the government may never act to the detriment of a person solely because of that person's race.").

Nevertheless, the Court has ruled that race-based remedial measures are constitutional. In holding that a desegregation plan, which took into account the race of elementary children did not violate the Fourteenth Amendment, the Court explained that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) and *Youngblood v. Board of Pub. Inst.*, 430 F.2d 625, 630 (5th Cir. 1970)). Furthermore, the Court in *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), held that "[j]ust as the race of the students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.* at 46.

These desegregation cases are distinguishable from affirmative action programs used in a school admissions process. *McDaniel*, *Charlotte-Mecklenburg*, and *Swann* involved situations in which public schools remained segregated, thereby directly contravening the Court's mandate in *Brown v. Board of Education*, 347 U.S. 483 (1954). In other words, in refusing to honor the holding in *Brown*, the various school boards were violating the Fourteenth Amendment rights of black school children by resisting desegregation. *See generally Swann*, 402 U.S. at 45; *McDaniel*, 402 U.S. at 41; *Charlotte-Mecklenburg*, 402 U.S. at 14. The *McDaniel* Court correctly noted that it would be impossible to measure whether schools were desegregating if the race of the students involved could not be examined. *See McDaniel*, 402 U.S. at 41. As such, the Court examined the race of the students in adjudicating their rights. *See id.*

Similarly, in adjudicating whether the University of Texas School of Law violated the constitutional rights of white applicants, the Fifth Circuit examined the race of all of the students applying. *See infra* note 194-96 and ac-

To this day, Justice Douglas's position enjoys support of certain members on the Court.<sup>110</sup>

Five years following *DeFunis*, the Court in *Regents of the University of California v. Bakke*<sup>111</sup> tackled a graduate school's admissions procedures that used race as a factor.<sup>112</sup> Bakke, a white student, applied for admission to the Medical School of the University of California at Davis (UC Davis) in 1973 and 1974.<sup>113</sup> At UC Davis, the admissions program set aside sixteen places for minority candidates in a class of 100.<sup>114</sup> Bakke alleged that "the Medical School's special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment."<sup>115</sup>

In *Bakke*, the Court announced a majority judgment, but not a majority opinion, that invalidated the UC Davis program.<sup>116</sup> However, the *Bakke* decision is most notable for Justice Powell's opinion that strict scrutiny was the appropriate standard of review for all race-based classifications,<sup>117</sup> and that the rights guaranteed in the

accompanying text. This author submits that Texas cannot, without ignoring the principles set forth in *Korematsu*, discriminate on the basis of race. See *supra* notes 63-75 and accompanying text.

110. See *supra* notes 23-27 and accompanying text; *Fullilove*, 448 U.S. at 524 (Stewart & Rehnquist, JJ., dissenting).

111. 438 U.S. 265 (1978).

112. See *id.*

113. See *id.* at 276-77.

114. See *id.* at 275.

115. *Id.* at 277-78. Bakke claimed violations under both the Equal Protection Clause, Article I, Section 21 of the California Constitution, and Title VI, Section 601 of the Federal Civil Rights Act of 1964. See *id.* at 278.

116. See JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 14.10(b)(1), at 710 (5th ed. 1995).

[A]ll nine Justices vot[ed] on the legality of the Davis program. Four Justices . . . concluded that the Davis program violated Title VI of the Federal Civil Rights Act. They found that the application of Title VI to the admissions program made it unnecessary to reach any constitutional issue. Four Justices . . . [concluded] that the Davis program did not violate either the equal protection clause or Title VI. Thus, the ruling of the case turned on the vote of Justice Powell, even though his analysis of the issues was not supported by a majority of Justices. Justice Powell found that the equal protection clause and, therefore, Title VI, required invalidation of the Davis program.

*Id.* at 712-13.

117. See *Bakke*, 438 U.S. at 299 ("When [classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a com-

Fourteenth Amendment apply to all individuals regardless of race.<sup>118</sup>

The notion that a Court's level of scrutiny should not change merely because the affirmative action program affects a race not historically discriminated against was bolstered in *Wygant v. Jackson Board of Education*.<sup>119</sup> The primary issue in *Wygant* was whether a school board "may extend preferential protection against layoffs to some of its employees because of their race or national origin."<sup>120</sup> In a collective bargaining agreement between a teacher's union and the Jackson Board of Education, the parties agreed that if teacher layoffs became necessary, teachers with the most seniority would be retained.<sup>121</sup> The scheme also provided that minority teachers, regardless of seniority, would be retained in the same proportion as minority personnel employed before the layoff.<sup>122</sup>

In determining the constitutionality of the racial classifications, the *Wygant* Court applied a strict scrutiny standard of review<sup>123</sup>

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elling governmental interest."). For a discussion of other Justices that support Justice Powell's opinion, see *infra* note 119.

118. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (plurality opinion).

119. 476 U.S. 267, 273 (1986) (plurality opinion). Justice Powell's opinion was joined by three Justices: Chief Justice Burger, Justice Rehnquist, and Justice O'Connor. See NOWAK & ROTUNDA, *supra* note 116, § 14.10(b)(2), at 722. Justice O'Connor concurred in the standard of review, but noted that "the distinction between a compelling and an important government purpose may be a negligible one." *Id.* at 723 (internal quotation marks omitted). Justice White was the fifth Justice to join in the judgment, although he did not speak to the issue of the appropriate standard of review. See *id.* at 723.

120. *Wygant*, 476 U.S. at 269-70.

121. See *id.* at 270.

122. See *id.* at 281-83; see also NOWAK & ROTUNDA, *supra* note 116, § 14.10(b)(2), at 721. The collective bargaining agreement read, in pertinent part:

In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance.

*Wygant*, 476 U.S. at 270 (internal quotation marks omitted).

123. See *Wygant*, 476 U.S. at 273-74. For a discussion of the four Justices that joined in holding that strict scrutiny was the appropriate standard of review see *supra* note 119.

through a two-prong test.<sup>124</sup> According to the Court, the strict scrutiny standard of review meant that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.”<sup>125</sup> The first prong of the test required the government to demonstrate that the racial classification was justified by a compelling government interest.<sup>126</sup> The second prong required the government to demonstrate that the means chosen were narrowly tailored to achieve the compelling government interest.<sup>127</sup>

The *Wygant* Court held that the government interests advanced by the Jackson Board of Education were not compelling.<sup>128</sup> Specifically, the *Wygant* Court rejected the Board’s proposed use of societal discrimination as a constitutional avenue for racial classifications.<sup>129</sup> Instead of allowing the Board to rely on the “amorphous”<sup>130</sup> phrase “societal discrimination,”<sup>131</sup> the *Wygant* Court demanded that the specific governmental unit, in this case the Jackson Board of Education, demonstrate that it had engaged in prior discrimination.<sup>132</sup> Notably, the *Wygant* Court viewed the Board’s attempt to remedy past societal discrimination by providing minority role models for school children as being constitutionally insufficient.<sup>133</sup>

In addition, the *Wygant* Court held that the Board’s program was not narrowly tailored because it imposed an unfair burden on

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124. See *Wygant*, 476 U.S. at 274.

125. *Id.* at 273-74 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980)). This author disagrees with this bifurcated manner of scrutinizing racial classifications to the extent that it dilutes the *Korematsu* Court’s requirement that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.” *Korematsu v. United States*, 323 U.S. 214, 216 (1945). While the *Korematsu* Court may have couched its standard in terms of restrictions “which curtail the civil rights of a single racial group,” *id.*, there is no meaningful distinction between government restrictions that explicitly curtail the civil rights of a single racial group and those that have the effect of curtailing a single racial group’s civil rights.

126. See *Wygant*, 476 U.S. at 274.

127. See *id.*

128. See *id.* at 274-76.

129. See *id.* at 276.

130. *Id.*

131. *Id.*

132. See *id.* at 276-77.

133. See *id.* While the Court noted that “[a]s part of this Nation’s dedication to eradicating racial discrimination, *innocent persons* may be called upon to bear some of the burden of the remedy,” it held that the burden at issue was too great. *Id.* at 281-84 (emphasis added).

the non-minority teachers.<sup>134</sup> The *Wygant* Court distinguished between “hiring goals”<sup>135</sup> and “layoffs.”<sup>136</sup> The Court explained that a greater burden could be placed on an innocent party when hiring is the issue because “[d]enial of a future employment opportunity is not as intrusive as loss of an existing job.”<sup>137</sup> The *Wygant* Court emphasized that losing a job was distinguishable because it often results in severe hardship to an employee who had established seniority and stability in his job.<sup>138</sup> The *Wygant* Court explained that when one loses his job the result is a “serious disruption of [one’s life]. That burden is too intrusive.”<sup>139</sup> The Court concluded by noting that a less intrusive program to achieve the Board’s desired results could have been aimed at hiring goals instead of a discriminatory lay-off program.<sup>140</sup>

This Comment suggests that a *Wygant* method of analysis is unnecessary hairsplitting at best and haphazard guessing at worst. Had the *Wygant* Court recalled the earlier admonitions in *Hirabayashi* and *Korematsu*,<sup>141</sup> it would have alleviated its need to attempt to discern the difference between denying future employment and losing an existing job. Instead, *Wygant* should have adhered to the principles espoused in *Hirabayashi* and *Korematsu* by holding that any employment decision that considers an individual’s race as a factor is impermissible under the Fourteenth Amendment.

In *City of Richmond v. J.A. Croson Co.*,<sup>142</sup> the Supreme Court addressed the constitutionality of a program established by the city of Richmond that required prime contractors to subcontract at least thirty percent of their total contract to Minority Business Enterprises (MBEs).<sup>143</sup> The city invited contractors to submit bids on a project to provide and install plumbing fixtures in the city’s jail.<sup>144</sup> Croson, the only contractor to submit a bid, made a good faith effort to find MBE subcontractors in order to meet the city’s thirty-

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134. *See id.* at 281-84.

135. *Id.* at 282.

136. *Id.* at 282-83.

137. *Id.*

138. *See id.* at 283.

139. *Id.*

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

141. *See supra* notes 61-71 and accompanying text.

142. 488 U.S. 469 (1989) (plurality opinion).

143. *See id.* at 477.

144. *See id.* at 481.



percent requirement.<sup>145</sup> Initially, no interested MBE had the means or credit to be a subcontractor for the project.<sup>146</sup> However, after further search Croson was able to locate a qualified MBE, but the MBE charged substantially more than the price Croson quoted in its overall bid for the project.<sup>147</sup>

Croson requested that the city allow it to increase the overall submission price to reflect the higher bid submitted by the MBE subcontractor.<sup>148</sup> The city refused and elected to rebid the contract.<sup>149</sup> Consequently, Croson sued claiming that the ordinance was unconstitutional on its face and as applied to its situation.<sup>150</sup>

In determining whether Richmond's plan was constitutional, a *majority* of the Court held strict scrutiny was the appropriate standard of review in an affirmative action case.<sup>151</sup> In analyzing the case under the strict scrutiny standard of review, the Court utilized the two-prong test set forth in *Wygant*.<sup>152</sup> Richmond attempted to justify its race-based classification on broad claims of discrimination in the construction industry in Richmond, the Commonwealth of Virginia, and across the nation.<sup>153</sup> The Court criticized Richmond's reasoning, and held that broad assertions of discrimination across an entire industry or encompassing the whole nation could never be narrowly tailored because they are without a " 'logical stopping point.' " <sup>154</sup> The Court found that "none of the evidence presented

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145. *See id.* at 482.

146. *See id.* at 482-83.

147. *See id.* The bid by Continental, the qualified MBE, increased the project cost by \$7,663.16. *See id.*

148. *See id.* at 483.

149. *See id.*

150. *See id.* Croson raised a claim pursuant to 42 U.S.C. § 1983 (1994). *See id.*

151. *See id.* at 494; *see also id.* at 551 (Marshall, J., dissenting) ("Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures."); NOWAK & ROTUNDA, *supra* note 116, § 14.10(a)(4), at 704 ("Justice O'Connor's opinion, together with the opinions of concurring Justices, marks the first time that a majority of the Court agreed that classifications that were designed to assist members of minority racial groups should be tested under the strict scrutiny-compelling interest test.").

152. For a discussion of the two-prong test formulated in *Wygant*, *see supra* notes 124-27 and accompanying text.

153. *See Croson*, at 498-500, 504-06.

154. *Id.* at 498 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion)). "[I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Id.* at 507.

. . . identified discrimination in the Richmond construction industry.”<sup>155</sup>

The *Croson* Court noted that *Wygant* required the government to show a compelling interest before employing racial preferences.<sup>156</sup> The Court ruled that Richmond did not even meet the compelling interest prong of the *Wygant* test, because Richmond’s asserted interests were based on broad, sweeping, and ill-founded allegations of racial discrimination.<sup>157</sup> The Court further highlighted the lower court’s finding that the racial “set-aside” program seemed more the result of politics than an attempt at remedying *proven*<sup>158</sup> present effects of past discrimination; and as such, struck down Richmond’s program.<sup>159</sup>

The most recent Supreme Court case addressing the conflict between maintaining the guarantees of the Equal Protection Clause and dealing with legitimate race-based classifications is *Adarand Constructors, Inc. v. Peña*.<sup>160</sup> One of the central issues addressed in *Adarand* was the level of scrutiny applicable to race-based programs promulgated by the *federal* government.<sup>161</sup> The *Adarand* Court analyzed whether equal protection challenges under the Fifth Amendment should be viewed with less scrutiny than those challenges under the Fourteenth Amendment.<sup>162</sup> The Court ruled that state and federal programs discriminating on the basis of race are subject to the same level of scrutiny.<sup>163</sup>

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155. *Id.* at 505.

156. *See id.* at 485.

157. *See id.* at 498-503. In rationalizing its remedy, the city of Richmond cited the exclusion of blacks from trade unions and trade programs, but also noted “a host of nonracial factors which would seem to face a member of any racial group.” *Id.* at 498-99.

158. *See id.* at 485. The Court cited the court of appeals’s opinion that found “no record of prior discrimination by the city in awarding public contracts,” based on the statistical data and a debate on the subject at a City Council meeting. *Id.* (quoting *J.A. Croson Co. v. Richmond*, 822 F.2d 1355, 1358 (4th Cir. 1987)).

159. *See id.*

160. 515 U.S. 200, 213-18 (1995).

161. This question appears to have been answered by the Court fifty-one years before *Adarand*. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court declared the following: “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.” *Id.* at 216.

162. *See Adarand*, 515 U.S. at 213-18.

163. *See id.*

Adarand submitted the low bid as a subcontractor for a government highway construction contract.<sup>164</sup> The general contractor was awarded<sup>165</sup> more money if it hired a subcontractor that met the Small Business Administration's (SBA) definition of socially disadvantaged.<sup>166</sup> The SBA definition created the presumption that individuals were socially disadvantaged if they were "Black, Hispanic, Asian Pacific, Subcontinent Asian, [or] Native Americans . . . [or] 'members of other groups designated from time to time by SBA.'"<sup>167</sup> The *Adarand* Court noted that the Small Business Act established a government-wide goal that at least five percent of all contract and subcontract awards should go to socially and economically disadvantaged individuals.<sup>168</sup>

The general contractor awarded the subcontract to a "socially and economically disadvantaged" business even though the lowest subcontract bid was entered by Adarand, a non-minority as defined by the SBA.<sup>169</sup> The general contractor's chief estimator submitted an affidavit stating that the contract would have been awarded to Adarand but for the fact that the general contractor received more money by awarding the contract to a socially and economically disadvantaged business.<sup>170</sup> Adarand argued that this socially and economically disadvantaged presumption "discriminated on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws."<sup>171</sup> The Supreme Court, while not addressing whether the Government subcontractor compensation program violated the Equal Protection

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164. *See id.* at 205.

165. *See id.*

166. *See id.* at 205-07 (citing 13 C.F.R. § 124.105(b)(1)(1970)).

167. *Id.* at 207.

168. *See id.* at 206. This five percent rule seemingly establishes a quota. Justice Powell suggested the ambiguity of the terms "goal" and "quota" when he described the admissions program at UC Davis in *Bakke*.

The special admissions program is undeniably a classification based on race and ethnic background . . . . Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status. . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978).

169. *Adarand*, 515 U.S. at 205 (internal quotation marks omitted).

170. *See id.*

171. *Id.* at 205-06.

Clause, remanded the case to the lower courts to determine whether the program would survive strict scrutiny.<sup>172</sup>

The preceding summary of the major cases decided by the Court provides the backdrop for the issue before the Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*.<sup>173</sup> In light of the principle of *stare decisis*, the Fifth Circuit's opinion in *Hopwood* is well reasoned. Supreme Court precedent such as *Hirabayashi's* warning that using race as a deciding factor is odious to a free society;<sup>174</sup> *Korematsu's* intimation that race-based classifications can survive strict scrutiny only in times of war while the country fears espionage and sabotage;<sup>175</sup> *Bakke's* recognition that whites are protected under the Equal Protection Clause of the Fourteenth Amendment;<sup>176</sup> *Wygant's* two-prong test used to apply a strict scrutiny standard of review, and its rejection of societal discrimination as a legitimate purpose for race-based classifications;<sup>177</sup> *Croson's* rejection that local affirmative action programs can be justified through evidence of nationwide discrimination;<sup>178</sup> and *Adarand's* holding that federal programs that distinguish people depending on their race are subject to strict scrutiny,<sup>179</sup> illustrate the solid ground upon which *Hopwood* stands.<sup>180</sup>

#### IV. THE FACTS AND THE FIFTH CIRCUIT'S ANALYSIS OF HOPWOOD

In order to be considered constitutional, a race-based classification must pursue a compelling government interest and be narrowly tailored in pursuit of that interest.<sup>181</sup> The United States Court of Appeals for the Fifth Circuit ruled that the University of Texas School of Law's (UT) admissions practices were unconstitutional because UT failed to present a compelling government interest that justified the practices adopted.<sup>182</sup>

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172. See *id.* at 239.

173. 78 F.3d 932 (5th Cir. 1996).

174. See *Hirabayashi v. United States*, 320 U.S. 81, 105 (1943).

175. See *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944).

176. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-91 (1978).

177. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).

178. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-503 (1989) (plurality opinion).

179. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 206-08 (1995).

180. See *supra* notes 61-172 and accompanying text.

181. See *supra* notes 125-27 and accompanying text.

182. See *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996).

A. *Factual Background*

After being denied admission to UT, Cheryl J. Hopwood, Douglas W. Chervil, Kenneth R. Elliot, and David A. Rogers sued the State of Texas<sup>183</sup> for violations of the Fourteenth Amendment, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964.<sup>184</sup> After examining the pertinent facts, the district court opinion,<sup>185</sup> and the pertinent case law, the Fifth Circuit determined that UT presented “no compelling justification, under [the Equal Protection Clause of] the Fourteenth Amendment or Supreme Court precedent, that [could] allow[] it to continue to elevate some races over others, even for the wholesome purpose of correcting [a] perceived racial imbalance in the student body.”<sup>186</sup>

Competition for admission into UT was intense.<sup>187</sup> Therefore, UT established the Texas Index (TI), which the school used to evaluate an applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score.<sup>188</sup> First, UT would enter an applicant's GPA and LSAT score into a formula and arrive at a TI score.<sup>189</sup> This TI score would then be used to rank applicants.<sup>190</sup>

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183. Other defendants included the University of Texas Board of Regents, members of the Board, the University of Texas School of Law, the President of the University, the dean of the law school, and the Chairman of the Admissions Committee, all in their official capacity. *See id.* at 938 n.13.

184. *See Hopwood v. Texas*, 861 F. Supp. 551, 553 (W.D. Tex. 1994).

185. *See id.* The district court ruled in favor of UT. *See id.* at 554.

186. *Hopwood*, 78 F.3d at 934. The Fifth Circuit ruling did not preclude the possibility of a compelling justification for the use of race-based classifications. It only held that Texas's race-based admissions program was not justified under the Fourteenth Amendment.

187. *See id.* at 935.

188. *See id.* The LSAT's effectiveness in predicting an applicant's success in law school has been called into question by Supreme Court Justice Douglas. In his dissent in *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (per curiam), Justice Douglas cogently noted:

The test purports to predict how successful the applicant will be in his first year of law school, and consists of a few hours' worth of multiple-choice questions. But the answers the student can give to a multiple-choice question are limited by the creativity and intelligence of the test-maker; the student with a better or more original understanding of the problem than the test-maker may realize that none of the alternative answers are any good, but there is no way for him to demonstrate his understanding.

*Id.* at 328 (Douglas, J., dissenting).

189. *See Hopwood*, 78 F.3d at 935 n.1.

190. *See id.* at 935. The TI score was also used to predict the applicant's probability

If an applicant's TI score was above a certain number, the applicant was placed in the "presumptive admit" category.<sup>191</sup> If an applicant's TI score was below a certain number, the applicant was placed in the "presumptive deny" category.<sup>192</sup> The law school placed a great deal of weight on an applicants TI score in its admission decisions.<sup>193</sup>

Based on the applicant's race, UT established different ranges of scores that could qualify a particular candidate for the presumptive admit or deny status.<sup>194</sup> Notably, the minority applicants<sup>195</sup> were reviewed under a lower TI requirement than other applicants so that UT could admit more minorities.<sup>196</sup> For example, the presumptive denial TI score for whites was a 192 or lower.<sup>197</sup> The presumptive denial TI score for minorities was 179 or lower.<sup>198</sup> The Fifth Circuit explained one consequence of these differences in the TI cut-off scores as follows:

These disparate standards greatly affected a candidate's chance of admission. For example, by March 1992, because the presumptive *denial* score for whites was a TI of 192 or lower, and the presumptive *admit* TI for minorities was 189 or higher, a minority candidate with a TI of 189 or above almost certainly would be *admitted*, even though his score was considerably below the level at which a white candidate

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of success in law school. *See id.*

191. *Id.* (internal quotation marks omitted).

192. *Id.* (internal quotation marks omitted).

193. *See id.* After ranking applicants based on their TI score, UT "could consider an applicant's background, life experiences, and outlook." *Id.* at 935 (noting that "these hard-to-qualify factors were especially significant for marginal candidates").

194. *See id.* at 936.

195. The court of appeals indicated that, for the sake of simplicity, the word "minorities" meant Mexican Americans and black Americans and the use of the word "whites" meant white Texas residents and *non-preferred minorities*. *Id.* at 936 n.4 (internal quotation marks omitted). This Comment uses the term "minority" to refer to black and Mexican Americans, consistent with the *Hopwood* court's decision.

196. *See id.* The purpose behind admitting more minorities was detailed by the district court. *See generally* Hopwood v. Texas, 861 F. Supp. 551, 554-57 (W.D. Tex. 1994). The district court noted that affirmative action embraces the reasoning that the removal of barriers does not "suddenly make minority individuals equal and able to avail themselves of all opportunities." *Id.* at 554.

197. *See Hopwood*, 78 F.3d at 936.

198. *See id.*

almost certainly would be *rejected*.<sup>199</sup>

Candidates who were neither presumptively admitted nor denied were placed in a discretionary zone and received further scrutiny.<sup>200</sup> All candidates falling in the discretionary zone received considerably more attention than those in the presumptive admit or deny categories.<sup>201</sup> However, minority applicants could fall into the discretionary zone with lower scores than their non-minority counterparts.<sup>202</sup> Moreover, minority candidates in the discretionary zone were treated more favorably than non-minority applicants.<sup>203</sup>

Non-minority applicants in the discretionary zone were assigned to a subcommittee composed of three members of the full admissions committee.<sup>204</sup> Each subcommittee would review approximately thirty applicants.<sup>205</sup> Each subcommittee member could cast between nine and eleven votes in favor of the applicants that they selected for admission.<sup>206</sup> Subject to the chairman's veto, if an applicant received two or three votes, an offer of admission would be made.<sup>207</sup> If

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199. *Id.* at 937 (emphasis added). The 1992 entering class at UT consisted of forty-one African Americans and fifty-five Mexican Americans. *See Hopwood*, 861 F. Supp. at 574 n.67. The district court in *Hopwood* noted that if 1992 admissions were based only on TIs, no more than nine African Americans and eighteen Mexican Americans would have been admitted to UT in 1992 on merit alone. *See id.* at 571. Thus, when one considers the nine African-Americans and eighteen Mexican-Americans that would have been admitted irrespective of UT's affirmative action program, Justice Thomas's caveat in *Adarand* becomes increasingly personified. Justice Thomas poignantly warned:

[S]uch programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.

*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1994) (Thomas, J., concurring).

200. *See Hopwood*, 78 F.2d at 935-36. Applicants in the presumptive admit category could be downgraded to the discretionary zone if it was determined that they possessed a degree in a noncompetitive major or had an inferior undergraduate education. *See id.* at 936.

201. *See id.*

202. *See id.*

203. *See id.* at 937.

204. *See id.* at 936.

205. *See id.* at 936 & n.3.

206. *See id.*

207. *See id.*

only one vote was cast, the applicant would be placed on a waiting list.<sup>208</sup> If a candidate received no votes, the application was denied.<sup>209</sup>

In order to facilitate the evaluation of minority applicants in the discretionary zone, a minority subcommittee was formed to evaluate and discuss every minority candidate.<sup>210</sup> The minority subcommittee consisted of the same number of members, however, the minority subcommittee "could meet and discuss every minority candidate."<sup>211</sup> Thus, every minority candidate falling in the discretionary range received "extensive review and discussion."<sup>212</sup> Additionally, even though the minority subcommittee reported summaries to the admissions committee, "the minority subcommittee's decisions were " 'virtually final.' "<sup>213</sup>

The third difference noted by the Fifth Circuit was that non-minority and minority candidates were placed on separate waiting lists.<sup>214</sup> The Fifth Circuit explained that the minority waiting list necessarily consisted of minority students that had marginal qualifications, who were nonetheless acceptable to the law school if space permitted.<sup>215</sup> Under these policies, UT could reject a white applicant with the same TI score as a minority applicant placed on the waiting list.<sup>216</sup> The "segregated" waiting lists were designed to help "the law school maintain a pool of . . . minority candidates."<sup>217</sup>

In 1992, as a result of the disparate standards, white residents<sup>218</sup>

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208. *See id.*

209. *See id.* at 936.

210. *See id.* at 937.

211. *Id.*

212. *Id.* at 937. Although the court did not indicate specifically, it can be implied that African-American and Mexican-American students in the discretionary zone had their applications reviewed by the three committee members meeting as a group, with each individual application receiving the attention of the entire committee at once. It appears that the committee members reviewing the applications of non-minorities in the discretionary zone viewed the applications separate from other committee members, and later reported their votes to the entire committee.

213. *Id.* Non-minority applicants receiving two votes from a subcommittee were still subject to the committee chairman's veto. *See id.* at 936.

214. *See id.* at 938.

215. *See id.* The record is not clear about how UT compared minority and non-minority students on the waiting list when spaces became available. *See id.* at 938 n.11.

216. *See id.* at 937.

217. *Id.* at 938.

218. The applicant's residency status also played a material role in the admissions



admitted to the law school had a mean GPA of 3.53 and an LSAT of 164, whereas the mean scores for Mexican-Americans were 3.27 and 158, and the mean scores for African-Americans were 3.25 and 157.<sup>219</sup> The court of appeals made note of Hopwood's assertion that "600-700 higher scoring white residents were passed over before the first blacks were denied admission."<sup>220</sup> In sum, a UT applicant's objective qualifications were viewed by the admissions board in markedly different light depending upon the applicant's race. Accordingly, the Fifth Circuit found UT's race-based admissions policy for achieving a diverse student body and remedying the present effects of past discrimination unconstitutional.<sup>221</sup>

### B. *Legal Analysis*

An analysis of the *Hopwood* court's rationale must begin by recognizing that the "central purpose of the Equal Protection Clause 'is to prevent the States from purposefully discriminating between individuals on the basis of race.'"<sup>222</sup> The Fifth Circuit properly noted that any constitutional examination of a federal or state program "that expressly distinguishes between persons on the basis of race" must be strictly scrutinized.<sup>223</sup> In other words, a government program relying upon race as a factor must satisfy the two-pronged test developed by the *Wygant* Court.<sup>224</sup> First, there must be a compelling

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process. *See id.* at 935 n.2. The circuit court stated:

Under Texas law in 1992, the law school was limited to a class of 15% non-residents, and the Board of Regents required an entering class of at least 500 students. The law school therefore had to monitor offers to non-residents carefully, in order not to exceed this quota, while at the same time maintaining an entering class of a manageable size.

*Id.*

219. *See id.* at 936.

220. *Id.* at 937 n.9. The Fifth Circuit did not make a specific finding, nor did it rely on this statistic in making its decision, but noted that UT did not appear to refute it. *See id.*

221. *See id.* at 962.

222. *Id.* at 939 (quoting *Shaw v. Reno*, 509 U.S. 630, 642 (1993)). Additionally, the Fifth Circuit noted that the Fourteenth Amendment's ultimate purpose is to "render the issue of race irrelevant in governmental decisionmaking." *Id.* at 940 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

223. *Id.* at 940 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (holding that whenever the government makes racial distinctions, the Constitution requires the most exacting scrutiny)); *see also supra* notes 123-25 and accompanying text.

224. *See Hopwood*, 78 F.3d at 940 (citing *Adarand*, 515 U.S. at 224, 235); *see also supra*

government interest served.<sup>225</sup> Second, the program must be narrowly tailored to fulfill that government interest.<sup>226</sup>

The *Hopwood* court addressed the two compelling government interests that the lower court found to justify UT's admissions process.<sup>227</sup> The first interest examined by the Fifth Circuit was the lower court's finding that "in the context of the law school's admissions process, obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications."<sup>228</sup> The Fifth Circuit explicitly rejected this holding as "reversibly flawed."<sup>229</sup> The *Hopwood* court held that "the use of race to achieve a diverse student body" in higher education could never be a compelling government interest that would overcome the steep standard mandated by strict scrutiny.<sup>230</sup> Second, the lower court found strong evidence of the present effects of past discrimination at UT and held that "the remedial purpose of the law school's affirmative action program was a compelling governmental objective."<sup>231</sup> However, the Fifth Circuit reversed the lower court because it found that UT "failed to show a compelling state interest in remedying the present effects of past discrimination sufficient to maintain the use of race in its admissions system."<sup>232</sup>

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notes 123-27 and accompanying text.

225. See *Hopwood*, 78 F.3d at 940; see also *supra* note 126 and accompanying text.

226. See *Hopwood*, 78 F.3d at 940; see also *supra* note 127 and accompanying text.

227. See *Hopwood*, 78 F.3d at 938 (citing *Hopwood v. Texas*, 861 F. Supp. 551, 571 (W.D. Tex. 1994)).

228. *Hopwood*, 861 F. Supp. at 571. This finding by the district court was heavily criticized by the circuit court. See *Hopwood*, 78 F.3d at 948. First, in finding diversity a compelling government interest, the district court relied on the testimony of "deans from law schools across the country and the testimony of former and current law students." *Hopwood*, 861 F. Supp. at 571 (citations to the trial record omitted). While the opinions of law school deans certainly have their place, they are hardly the steel from which a compelling government interest should be forged. To bolster its holding, the district court placed great emphasis on Justice Powell's opinion in *Bakke* that diversity serves a compelling government interest; an opinion joined by no other Justice. See *infra* notes 233-38 and accompanying text.

229. *Hopwood*, 78 F.3d at 948.

230. *Id.* at 948 & n.36.

231. *Hopwood*, 861 F. Supp. at 573.

232. *Hopwood*, 78 F.3d at 955.

## 1. Compelling Government Interest Based on Diversity

Defining diversity in higher education as a compelling government interest originated in Justice Powell's separate opinion in *Bakke*.<sup>233</sup> The district court relied heavily on Justice Powell's conclusion that better education flows from diversity.<sup>234</sup> The United States Court of Appeals for the Fifth Circuit forcefully rejected Justice Powell's diversity rationale espoused in *Bakke*.<sup>235</sup> The court of appeals noted that, since the *Bakke* decision, the Supreme Court "has accepted the diversity rationale only once in its cases dealing with race."<sup>236</sup> The Fifth Circuit declined to follow Justice Powell's opinion that diversity is a compelling state interest that justifies race-based affirmative action programs in higher education.<sup>237</sup> The court's primary reason for rejecting that proposition was that no other Justice joined Justice Powell's opinion.<sup>238</sup> Moreover, the Fifth Circuit determined that other Supreme Court precedent suggested that diversity should not be considered.<sup>239</sup> The Fifth Circuit stated that "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. . . . Justice Powell's view in *Bakke* is not binding precedent on this issue."<sup>240</sup> As such, the Fifth Circuit decided that the district court erred when it held that diversity was a compelling governmental interest.<sup>241</sup>

The Fifth Circuit also rejected diversity as a compelling government interest because, in the arena of higher education, diversity may effectively counter its own intended results.<sup>242</sup> The Fifth Circuit noted that:

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233. See *id.* at 941; see also *supra* note 117 and accompanying text.

234. See *id.* (citing *Hopwood*, 861 F. Supp. at 571).

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

236. *Id.* at 944 (citing and discussing *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), as the only other case accepting diversity as a compelling state interest).

237. See *id.*; see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) ("[Diversity] clearly is a constitutionally permissible goal for an institution of higher education.").

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

239. See *id.* at 945 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring); *Metro Broad.*, 497 U.S. at 612 (O'Connor, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

240. *Id.* at 944.

241. See *id.* at 948.

242. See *id.* at 945.

Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes the use of race. It 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.<sup>243</sup>

The *Hopwood* Court highlighted the fact that even if diversity was a compelling government interest, UT did not further that interest through its admission program. The preferential treatment inherent in UT's admissions process only extended to African-Americans and Mexican-Americans.<sup>244</sup> Preferential treatment was not granted to members of other races or national origins. Thus UT's unstated argument that diversity was reached once the proportionate number of African-Americans, Mexican-Americans, and European-American males were enrolled was an obviously irrational conclusion.<sup>245</sup>

## 2. Remedial Purpose Must be Limited to the Specific State Actor

The Fifth Circuit explained that before a racial classification could be permitted to remedy past discrimination, there must be " 'some showing of prior discrimination by the governmental unit involved.' " <sup>246</sup> The Fifth Circuit noted that the Supreme Court previously rejected generalized assertions of past societal discrimination.<sup>247</sup> Instead, remedial state action must be "limited to the harm

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243. *Id.* Several commentators have asserted just the opposite—diversity can be a compelling government interest. See Andy Portinga, *Racial Diversity as a Compelling Government Interest*, 75 U. DET. MERCY L. REV. 73 (1997) (supporting diversity as a compelling government interest in limited circumstances, including higher education); Robert A. Lauer, Recent Development, *Hopwood v. Texas: A Victory for "Equality" that Denies Reality*, 28 ST. MARY'S L.J. 109 (1996) (asserting that diversity is a compelling government interest in the realm of higher education); Emily V. Pastorius, Note, *The Erosion of Affirmative Action: The Fifth Circuit Contradicts the Supreme Court on the Issue of Diversity*, 27 GOLDEN GATE U. L. REV. 459 (1997) (proposing that the Fifth Circuit's rejection of diversity as a compelling government interest was "hasty").

244. See *Hopwood*, 78 F.3d at 936 n.4.

245. See *id.* at 945.

246. *Id.* at 949 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1985) (plurality opinion)).

247. See *Hopwood*, 78 F.3d at 950; see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (plurality opinion); *Wygant*, 476 U.S. at 274.

caused by [the] specific state actor."<sup>248</sup> The defendants at the district level successfully argued that the entire State of Texas was the state actor that discriminated in the past.<sup>249</sup> The Fifth Circuit disagreed.<sup>250</sup> The Fifth Circuit ruled that by defining the state actor as the whole State of Texas, the district court violated the Supreme Court's admonition that remedial programs must be carefully limited.<sup>251</sup> Thus, the *Hopwood* Court aptly recognized that the Constitution will only permit a much narrower definition of state actor.<sup>252</sup>

In addition, the district court erroneously expanded the scope of evidence of racial discrimination by considering evidence of discrimination in Texas's primary and secondary schools.<sup>253</sup> The Fifth Circuit, relying in part on *Korematsu*,<sup>254</sup> held that UT had no way to measure the present effects of past discrimination in Texas's primary and secondary schools.<sup>255</sup> Being unmeasurable, any remedy based on this type of perceived discrimination knew no bounds and was therefore held unconstitutional.<sup>256</sup>

### 3. Remedying the Present Effects of Past Discrimination

In *Hopwood*, the lower district court held that the remedial purpose of the law school's affirmative action program was a compelling government interest.<sup>257</sup> The evidence presented to the district court demonstrated that one of the reasons UT adopted its affirmative action program was to remedy a history of past discrimination.<sup>258</sup> The district court explained that the present effects of past discrimination were established by the following: "the law school's

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248. *Hopwood*, 78 F.3d at 950.

249. *See Hopwood v. Texas*, 861 F. Supp. 551, 572-73 (W.D. Tex. 1994). However, it should be noted that "defendants concede[d] and the district court found, there [was] no recent history of overt sanctioned discrimination at the University of Texas." *Hopwood*, 78 F.3d at 951 n.44.

250. *See Hopwood*, 78 F.3d at 951.

251. *See id.* at 950.

252. *See id.* at 949-51.

253. *See id.* at 950.

254. *See id.* at 945 n.26.

255. *See id.* at 951.

256. *See id.* The Fifth Circuit did not turn a blind eye to Texas's past. The court merely found UT's broad remedy unconstitutional under strict scrutiny. *See id.* at 949-51. In referring to *Sweatt v. Painter*, 339 U.S. 629 (1950), the court noted that UT did have a discriminatory past, however, it determined that the discrimination no longer existed. *See Hopwood*, 78 F.3d at 953.

257. *See Hopwood v. Texas*, 861 F. Supp. 551, 573 (W.D. Tex. 1994).

258. *See id.* at 572.

lingering reputation in the minority community, particularly with prospective students, as a 'white' school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities."<sup>259</sup>

The Fifth Circuit noted that in order to prove present effects of past discrimination, "the party seeking to implement the program must, at a minimum, prove that the effect it proffers was caused by the past discrimination and that the effect is of sufficient magnitude to justify the program."<sup>260</sup> Employing the Fourth Circuit's rationale in *Podberesky v. Kirwan*,<sup>261</sup> the Fifth Circuit ruled that the district court erred when it determined that a "lingering reputation" and a "hostile environment" were present effects of past discrimination worthy of a constitutional remedy.<sup>262</sup> Specifically, the Fifth Circuit quoted *Podberesky* as standing for the proposition that " 'mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this.' "<sup>263</sup>

Finally, the Fifth Circuit addressed the claim that minorities were underrepresented in the law school because of past discrimination.<sup>264</sup> The law school claimed that this underrepresentation was caused by discrimination in Texas's primary and secondary schools and thus gave rise to a compelling government interest that was constitutionally repressible.<sup>265</sup> However, the Fifth Circuit noted that under *Croson*, the redress must be limited to the state actor who committed the discriminatory acts.<sup>266</sup> As such, the fact that Texas's primary and secondary schools had committed acts of past discrimination did not justify UT's race-based classifications today.<sup>267</sup>

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259. *Id.*

260. *Hopwood*, 78 F.3d at 952 (quoting *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994)).

261. 38 F.3d 147.

262. *Hopwood*, 78 F.3d at 952. In *Podberesky*, the Fourth Circuit reasoned that a bad reputation was linked solely to the university's past policies, not to its present policies. *See id.* at 952 (citing *Podberesky*, 38 F.3d at 154).

263. *Id.* at 952-53 (quoting *Podberesky*, 38 F.3d at 154).

264. *See id.* at 953.

265. *See id.* at 953-54.

266. *See id.* at 954 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (plurality opinion)).

267. *See id.*

## V. AFFIRMING EQUALITY IN THE CONSTITUTION

Race should play no role in law school admissions. Despite the lingering effects of past discrimination, racial equality cannot be achieved as long as the government continues to justify the use of race-based classifications for implementing amorphous, inconsistent programs which purportedly promote racial harmony.<sup>268</sup> Today, no racial classification should be constitutional unless a situation exists that equals the exigent circumstances encountered by this nation during World War II, when *Korematsu v. United States*<sup>269</sup> was decided.

In *Korematsu*, the Court held that government sponsored racial distinctions which curtail the civil rights of a single racial group must be subject to the "most rigid scrutiny."<sup>270</sup> The *Korematsu* Court upheld the government's use of racial distinctions based on a number of factors, most importantly the fact that the world was at war. The United States had recently been attacked at Pearl Harbor, and it feared that espionage and the sabotage of the country's war-making capabilities could threaten the nation's very existence.<sup>271</sup> Whether those facts stand the test of history's hindsight is not relevant to the current constitutional inquiry. The central idea that courts should borrow from *Korematsu* is that these exigent circumstances are not present today and certainly were not in *Hopwood v. Texas*.<sup>272</sup> If the Constitution permits any exceptions, absent the most perilous circumstances, then it no longer provides a meaningful guarantee of equal protection under the law.

The conditions present at the University of Texas in 1996 pale in comparison to the circumstances that purportedly justified the ra-

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268. *But see* Lauer, *supra* note 243, at 138-45.

269. 323 U.S. 214, 219-20 (1944) (allowing racial distinctions based on the burden of war and need to protect against dangers of espionage).

270. *Id.* at 216.

271. *See id.* at 217. Having widely discredited the government's detention of people based on race in the name of public necessity in time of war, incredibly, it is now permissible to deny equal protection rights to European Americans under the same flag in time of peace. *See* DeFunis v. Odegaard, 416 U.S. 312, 339-40 (1974) (Douglas, J., dissenting). Instead of public necessity due to war, the new euphemistic banner for government-sponsored racial discrimination is "remedying the present effects of past discrimination." *Paradise*, 480 U.S. at 180-82. While the new phrase may be politically correct, its underlying policy is constitutionally contemptible and odious to a free society. *See* Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

272. *See* *Hopwood*, 78 F.3d at 945 n.26 (noting that a social emergency was not present).

cial classifications during World War II.<sup>273</sup> The circumstances when the government has a compelling interest to make racial distinctions has mutated from a world at war, in which our very existence is threatened, to a law school's admission process.<sup>274</sup>

There is no doubt that America has taken dramatic steps to improve racial equality in the past forty years.<sup>275</sup> Nevertheless, there is considerable dispute as to how much progress our country has made in improving race relations. Judge Higginbotham explained:

While white America apparently approves of African-Americans serving in entertainment roles, such as basketball players Michael Jordan at the University of North Carolina and Grant Hill at Duke, anxiety appears to rise when avenues open for African-Americans to attain significant political power and to determine the public policy rather than the entertainment policy of this nation.<sup>276</sup>

However, one cannot ignore the fact that many African and Caribbean-Americans have achieved positions of power in this nation. Widespread encouragement for retired General Colin L. Powell to seek the 1996 Republican nomination for the U.S. presidency, arguably the most significant political office in the world, is but one example of how far this nation has come.<sup>277</sup> Equally remarkable is that thirty-six years ago a young man named Robert Mack Bell was arrested and convicted of trespass for sitting at a whites-only restaurant.<sup>278</sup> In 1997, the Honorable Robert M. Bell was appointed as the Chief Judge of the Court of Appeals of Maryland, the state's highest

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273. *See id.*

274. If race is to be used as a benefitting factor in admissions decisions, the only people who can arguably benefit from affirmative action are those who are as qualified or less qualified than non-minority applicants. Logic dictates that if a minority applicant is equally or more qualified than a non-minority applicant and is admitted without consideration given to race, then the program confers no benefit on the minority. Thus, by definition, an affirmative action program can only work when it gives an advantage, based on the immutable characteristic of race, to someone equally or less qualified. When the minority applicant is equally or less qualified and is admitted because of his race, then the non-minority's expectation to be treated equally under the law is violated. This was the circumstance in *Hopwood*, and can only be seen as a violation of equal protection.

275. *See* A. LEON HIGGINBOTHAM, JR., *supra* note 1, at ix.

276. A. Leon Higginbotham, Jr. et al., *supra* note 39, at 1647.

277. *See* John F. Stacks, *The Colin Powell Factor*, TIME, July 10, 1995, at 1.

278. *See generally* Bell v. Maryland, 227 Md. 302, 176 A.2d 771 (1961).



court. Indeed, General Powell's rise to the highest ranking military officer of the most powerful military force in our world's history, and Chief Judge Bell's rise to the highest judicial office in Maryland suggest that America's egalitarian promises of the eighteenth century are fulfilled.

The question remains, should the Equal Protection Clause apply on a case-by-case basis, or should our Constitution reflect a timeless, universal principle of equality under the law?<sup>279</sup> The cycle of permissive race-based distinctions sanctioned by government must cease if the Constitution is ever to become a document truly for the ages. Absent the most exigent circumstances, the Equal Protection Clause should be interpreted so as to refuse to embrace the historical argument that there are times when the government is allowed to discriminate based on race.<sup>280</sup>

It has been argued that race-based remedies do not encourage polarization but that they are actually necessary to prevent further polarization of the nation.<sup>281</sup> This argument fails to acknowledge

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279. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239-40 (1995) (Scalia, J., concurring); *id.* at 240-41 (Thomas, J., concurring); see also *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (holding that the rights guaranteed under the Fourteenth Amendment are "personal rights" guaranteed to individuals).

280. See *supra* note 71 and accompanying text.

281. See A. Leon Higginbotham, Jr. et al., *supra* note 39, at 1605. Judge Higginbotham, discussing the ramifications of the 1993 *Shaw v. Reno* Supreme Court decision, noted: "The *Shaw* majority's concern that minority-majority districts will polarize the nation and work to the detriment of African-Americans is unfounded." *Id.* To bolster the point, Judge Higginbotham stated, "[i]n congressional districts throughout America, white congressmen represent the majority of African-Americans without unduly polarizing the nation." *Id.* One could argue, however, that polarization arises when a congressional district is specifically drawn on racial lines, regardless of who benefits. Arguably, the polarization is recycled when admission to a law school is denied to an applicant because of the applicant's race. The polarization arises when the government abdicates the promise of the Equal Protection Clause by tolerating race-based classifications.

At its heart, the argument for respondents in *Shaw v. Reno* and for Texas in *Hopwood* is that the Constitution, when certain factors are present, permits racial discrimination; the deciding factor is who the victim of the program or law might be. This position was further set forth by Judge Higginbotham when he stated, "[b]ut what sets lawful classifications apart from outright discrimination is the fact that discrimination injures those adversely classified." *Id.* at 1602. Judge Higginbotham's argument is not conclusive, but based on one constitutional construction of the Equal Protection Clause. See A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1010 & n.16 (1992) (discussing the Con-

that some racial classifications have the very real effect of punishing those who have not committed any act of discrimination, thereby furthering, not diminishing, polarization. This is viewed by affirmative action proponents as a justifiable cost, not a punishment.<sup>282</sup> It has been specifically argued that:

[T]here are simply no alternative means of remedying the severe inequities suffered by certain minorities. And when balancing the competing equities, many would argue that despite the apparent unfairness to the rejected [non-minorities], the moral claims of the victimized minorities for reparations are more substantial. . . . [W]hether or not the [non-minorities] have themselves participated in acts of discrimination, they have been the beneficiaries—*conscious or unconscious*—of a fundamentally racist society. They thus may be held independently “liable” to suppressed minorities for a form of unjust enrichment.<sup>283</sup>

Otherwise put, whites who were not alive during this nation’s era of legalized racism, have received benefits because of acts their ancestors may or may not have committed. Therefore, the government has the moral authority to legally violate the rights of whites because of these past, albeit sometimes fictional, benefits conferred upon them.<sup>284</sup> It is difficult to imagine a better recipe for

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stitution’s level of ambiguity which enables the Court to fill in the interstitial gaps) (citing BENJAMIN CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 10 (1921)).

A plain meaning approach to the Equal Protection Clause recognizes no distinctions between lawful and unlawful racial classifications; both are forbidden absent the most exigent circumstances. See U.S. CONST. amends. V & XIV, § 1; see also *supra* note 71 and accompanying text.

282. See *Adarand*, 515 U.S. at 247 (Stevens, J., dissenting). Justice Stevens stated that “a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives’ decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.” *Id.* The only material difference between the two, however, is the race of the individual being discriminated against. Moreover, it is doubtful that Cheryl Hopwood, or any other applicant, would characterize a denial letter from UT as “incidental.” *But see Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980) (finding that the “[f]ailure of non-minority firms to receive certain contracts is, of course, an incidental consequence of the program”).
283. Martin H. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 *UCLA L. REV.* 343, 389 (1974) (emphasis added).
284. See *id.*; cf. *Fullilove*, 448 U.S. at 475 (finding that even though a business was

polarization.

Furthermore, the argument that "moral claims" trump constitutional rights is at odds with the Constitution. The suggestion that moral claims should be accorded more weight than constitutional rights is a dangerous proposition. The protections that the Constitution guarantees cannot be given or taken away based on the "morality" of the government or the individual.<sup>285</sup> Regardless of the moral claims of any group, a person's right to equal protection under the Fourteenth Amendment should not be diminished or enhanced because of his skin color.

Professor Tribe asserts, however, that "it is not a decisive objection to a voluntarily adopted racial preference favoring non-whites that some or even all of the white individuals disfavored by it have themselves been guilty of no discriminatory act."<sup>286</sup> Professor Tribe's willingness to let the Cheryl Hopwoods of the world shoulder the burden of history's prejudices is curious. One wonders how Professor Tribe would react were he denied his position as the Ralph S. Tyler, Jr., Professor of Constitutional Law, Harvard Law School,

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not shown to have violated anti-discrimination laws, it could be forced to award contracts to minority businesses). *But see* Posner, *supra* note 56, at 16 n.32. Judge Posner addressed the "benefits" DeFunis had received because he was a white male:

One could spend many profitless hours discussing whether DeFunis is better or worse off as the result of the history of racial discrimination in this country. Perhaps he is better off because, but for a history of discrimination, there would be a larger pool of qualified black applicants for a law school education. Perhaps he is worse off because, but for the history of discrimination, fewer blacks . . . would be interested in becoming lawyers.

*Id.* at 16 n.32. *See generally* Ralph K. Winter, Jr., *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. CHI. L. REV. 817 (1967). Professor Winter opined:

In any event, preferential programs are fundamentally countereducative on the basic issue of racial discrimination itself. Instead of helping to eliminate race from politics, they inject it. Instead of teaching tolerance and helping those forces seeking accommodation, they divide on a racial basis. Such programs tend to legitimate the back-lash by providing it with much of the philosophical and moral base from which the civil rights movement itself began. And, indeed, there is no reason to believe that if racial issues become more, rather than less, of a political issue, Negroes will be the winners.

*Id.* at 854.

285. *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (upholding the First Amendment rights of members of the Ku Klux Klan).

286. TRIBE, *supra* note 1, § 16-22, at 1522.

under some voluntarily adopted racial preference favoring non-whites. One might also wonder whether Professor Tribe would view this denial as being "incidental."<sup>287</sup>

## VI. CONCLUSION

We jeopardize the strides that have been made towards equal rights when we punish selected innocent Americans with government sponsored discrimination. Today, instead of in the name of racial superiority, rights are trampled in the name of a "compelling government interest" or "narrowly tailored program," or some other politically neutral term for racial discrimination.

Is there any sense or productive value in implementing arbitrary decisions regarding who should benefit and who should bear the burden of race-based classifications? Should the Norwegian, Bosnian, Polish, Lebanese, Syrian, Israeli, Iranian, Libyan, or Swedish citizens emigrating to the United States today be treated as a non-minority whose rights may be dismissed under the Constitution because they have benefitted, consciously or otherwise, from events that took place in the United States long before they arrived in this country? Under the same reasoning, should the Nigerian, Sudanese, Namibian, Mexican, Colombian, Chinese, Indonesian, Filipino, or Brazilian citizens emigrating to the United States today receive benefits because they have suffered, consciously or otherwise, from events that took place in the United States long before they arrived? When does it all end? The Fourteenth Amendment provides the answer. It orders, "[N]or shall any State . . . deny to *any* person within its jurisdiction the equal protection of the laws."<sup>288</sup> Whether we choose to learn history's lesson that racial discrimination is impermissible, only time will tell.

As long as we insist on highlighting our racial differences, instead of embracing what we share in common, race will always play a hurtful role in America. Until we learn that racial distinctions were wrong, are wrong, and always will be wrong, the present effects of past discrimination will always exist. Each day that the government insists that we consider race before we award a contract, offer employment, or grant admission to a school, is another day we are

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287. For a discussion of the purported distinction between a wrongful discriminatory act and a discriminatory act with mere incidental effects, see *supra* note 282.

288. U.S. CONST. amend. XIV, § 1 (emphasis added).

further delayed from Reverend Martin Luther King's dream; and justice delayed is justice denied.

*Michael A.B. Turner*