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Elimination of Race as a Factor in Law School Admissions: An Analysis of Hopwood v. Texas

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ELIMINATION OF RACE AS A FACTOR IN LAW SCHOOL ADMISSIONS: AN ANALYSIS OF *HOPWOOD V. TEXAS*

I. INTRODUCTION

On March 18, 1996, the Fifth Circuit Court of Appeals in *Hopwood v. Texas*[1] held that the Equal Protection Clause of the Fourteenth Amendment[2] does not allow race to be used as a factor in law school admissions. *Hopwood* is one of the most recent decisions addressing the controversial "legal and moral thicket" known as affirmative action.[3] Although the United States Supreme Court denied certiorari,[4] *Hopwood* has the potential to significantly impact the future of affirmative action programs and should capture the attention of law school admissions committees across the nation.

This Note provides a summary of the facts and holdings of *Hopwood*, as well as a background of the law on which the *Hopwood* decision rested. Next, it provides an evaluation of the Fifth Circuit Court of Appeals decision and, lastly, presents a critical analysis of the court's reasoning and the decision's potential impact.

II. STATEMENT OF THE CASE

Cheryl J. Hopwood, Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers, all "nonminority"[5] residents of the State of Texas, applied to the University of Texas School of Law ("law school") for the 1992-1993 academic year.[6] At that time, the law school employed an admissions program which used race as a factor in its admissions decisions.[7] The goals of the law school's affirmative action admissions program included achieving diversity and overcoming past effects of

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1. 78 F.3d 932 (5th Cir. 1996), *rev'g* 861 F. Supp. 551 (W.D. Tex. 1994), *cert. denied*, 116 S. Ct. 2580 (1996).

2. The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

3. Burt Neuborne, *Notes for the Restatement (First) of the Law of Affirmative Action: An Essay in Honor of Judge John Minor Wisdom*, 64 TUL. L. REV. 1543, 1544 (1990).

4. 116 S. Ct. 2580 (1996).

5. "Nonminority" in the context of the *Hopwood* cases refers to any race or ethnicity not including Mexican American or African American.

6. *Hopwood*, 78 F.3d at 938.

7. *Id.* at 934.

discrimination.[8]

The admissions decisions for 1992-1993 admission to the law school were made by a full admissions committee and a minority subcommittee.[9] After being placed in a color-coded folder indicating minority or nonminority status,[10] each application was placed in either the presumptive admit, discretionary, or presumptive denial category based on the applicant's Texas Index ("TI").[11] At the discretion of one member of the admissions committee, an application could be moved into a lower category based on factors such as the caliber of undergraduate institution and the competitiveness of major.[12] Minority applications were not only segregated and subject to a lower admissions standard based on the applicant's TI, but each minority application also received extensive consideration from all three members of the minority subcommittee if it fell within the discretionary zone.[13] The decision of the minority subcommittee whether to grant admission to a discretionary zone applicant was "virtually final."[14] In contrast, nonminority applications in the discretionary zone were divided into groups of thirty and each member of a three-member subcommittee was allowed to cast typically nine to eleven votes per group in favor of admission.[15] Nonminority applicants in the discretionary zone receiving two or more votes received an offer, while those receiving one vote were placed on a waiting list and those receiving no votes were denied admission.[16]

Hopwood had an undergraduate G.P.A. of 3.8 and an LSAT score of 39, giving her a TI of 199 and placing her at the low end of the presumptive admit category for resident nonminorities.[17] Carvell,

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8. Hopwood v. Texas, 861 F. Supp. 551, 570 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 2580 (1996).

9. *Id.* at 560.

10. *Id.*

11. *Hopwood*, 78 F.3d at 935. The TI was a formula written by the Law School Data Assembly Service used to serve as a predictor of the success of first-year law students. *Id.* at n.1. By March 1992, Mexican Americans and blacks faced a presumptive admit TI of 189 or higher and a presumptive denial TI of 179 or lower. *Id.* at 936-37. For nonminorities, the presumptive admit TI was 199 or higher and the presumptive denial TI was 192 or lower. *Id.* at 936.

12. *Hopwood*, 861 F. Supp at 561.

13. *Hopwood*, 78 F.3d at 937. *Every* minority candidate in the discretionary zone was discussed at a meeting of the minority subcommittee. *Id.*

14. *Id.*

15. *Id.* at 936. This voting procedure did not require a discussion of the committee.

16. *Id.*

17. *Id.* at 938. Since Hopwood's TI was at the bottom of the presumptive admit category, it was reviewed by a member of the admissions committee. *Id.* A determination was

Elliott, and Rogers each had a TI of 197, placing them at the high end of the discretionary zone for resident nonminorities.[18] None of the applicants were given an offer of admission.[19]

The Plaintiffs filed suit in United States District Court, alleging that the law school's affirmative action program violated the Equal Protection Clause of the Fourteenth Amendment.[20] Applying strict scrutiny as the standard of review, the district court held that the law school admissions program did not pass constitutional muster.[21] The district court found that although the law school had compelling government objectives of obtaining a diverse student body[22] and of remedying present effects of past discrimination,[23] the admissions process was not narrowly tailored to achieve these ends because it treated minority applicants as a separate class.[24] However, the district court held that "the aspect of the law school's affirmative action program giving minority applicants a 'plus' is lawful."[25]

The Fifth Circuit Court of Appeals upheld the district court's ruling that the law school's admission process was unconstitutional, but reversed its holding that race could not be used as a factor in law school admissions under the Fourteenth Amendment.[26] The court of appeals held that under strict scrutiny, neither achieving diversity within the student body[27] nor remedying the effects of past discrimination[28] serve as sufficiently compelling state interests to justify using race as a factor in making admissions decisions.

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made by that member that she did not attend academically competitive undergraduate institutions and that her G.P.A. likely was inflated. *Id.* Her application was therefore moved into the discretionary zone. *Hopwood*, 861 F. Supp. at 564.

18. *Hopwood*, 78 F.3d at 938.

19. *Id.*

20. *Hopwood*, 861 F. Supp. at 553.

21. *Id.* at 584-85. Because the district court found that the plaintiff's equal protection rights had been violated, each plaintiff was awarded nominal damages of one dollar and the district court ordered that each be allowed to re-apply to the law school without paying another application fee. *Id.* at 583.

22. *Id.* at 571.

23. *Id.* at 573. The effects found to satisfy a compelling government objective included the law school's lingering reputation in the minority community as a "white school," an under-representation of minorities in the student body, and a perception that the law school is a hostile environment for minorities. *Id.* at 572.

24. *Id.* at 578-79.

25. *Id.* at 578.

26. *Hopwood*, 78 F.3d at 934.

27. *Id.* at 948.

28. *Id.* at 955.

III. BACKGROUND OF THE LAW

Hopwood v. Texas is the most recent in a line of controversial cases that have scrutinized affirmative action programs. The cases preceding *Hopwood* indicate that this area of the law is characterized by tremendous uncertainty. The standard of review used by the courts in cases involving race-based programs has ranged from "a most searching examination" standard to strict scrutiny, the latter of which currently is the standard used in cases of benign racial classifications. It is also a standard which could prove fatal to the constitutionality of affirmative action programs.

A. Regents of the University of California v. Bakke

The legal controversy surrounding benign racial classifications began with the *Regents of University of California v. Bakke*.[29] *Bakke* involved a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment to the admissions program at the Medical School of the University of California at Davis ("Davis"). Davis used a special admissions program to reserve a specified number of spaces in its entering class for minority students.[30] The special admissions program purportedly served four purposes: "(i) [to] reduc[e] the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) [to] counter[] the effects of societal discrimination; (iii) [to] increas[e] the number of physicians who will practice in communities currently underserved; and (iv) [to] obtain[] the educational benefits that flow from an ethnically diverse student body."[31]

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29. 438 U.S. 265 (1978).

30. *Id.* at 269-70. Like the program at issue in *Hopwood*, the admissions program at issue in *Bakke* subjected applicants to two different admissions standards depending on minority status. *See id.* at 274-75. The special admissions program considered Blacks, Chicanos, Asians, and American Indians as minorities. *Id.* at 274. If the applicant indicated that he or she was a member of one of these minority groups, the applicant was considered separately under the special admissions program. *Id.* at 274-75. Allen Bakke, a white male who was denied admissions to the medical school in 1973 and 1974, had a science G.P.A. of 3.44, an overall G.P.A. of 3.46, and MCAT percentiles of 96, 94, 97, and 72. *Id.* at 277 n.7. In 1973, these numbers were slightly below the average numbers for regular admittees, but significantly above those for special admittees. *Id.* In 1974, all of Bakke's numbers met or exceeded the average of regular admittees and again were significantly above those of special admittees. *Id.*

31. *Id.* at 306.

Justice Powell, writing the lead opinion,[32] declared the proper standard of judicial review for suspect racial and ethnic classifications to be strict scrutiny.[33] In order to satisfy this "most exacting judicial examination,"[34] Justice Powell determined that Davis must show a constitutionally permissible and substantial interest or purpose and that its use of a racial classification must be necessary to accomplish its purpose.[35] Under this analysis, Justice Powell rejected all but the fourth stated purpose, achieving a diverse student body, as constitutionally permissible.[36] Justice Powell couched the constitutional permissibility of this fourth purpose in the concept of "academic freedom"[37] and made two important qualifications: (1) that the student be "otherwise qualified," and (2) that diversity be considered as one of several other factors.[38]

In answering the question of whether a racial classification is necessary to promote the compelling interest of diversity, Justice Powell concluded that in this case, it did not. He concluded that the "fatal flaw" of Davis' program was in its manner of application: minority applicants could compete for every available seat in the class while nonminorities could compete only for those not reserved for minorities; thus an applicant's racial status as a nonminority excluded them from competing for a percentage of seats.[39] Although the result in this case was that the program did not satisfy strict scrutiny, Justice Powell's opinion left open

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32. There was no majority opinion in this case. The lack of a majority opinion had a significant effect on the weight accorded to it in later opinions. *See, e.g., infra* notes 96, 99, 116 and accompanying text.

33. *Id.* at 291.

34. *Id.* Justice Powell then discussed the historical development of Equal Protection jurisprudence and why this case presented a question of a suspect classification deserving of the "most exacting judicial scrutiny." *See id.* at 291-305.

35. *Id.* at 305.

36. Justice Powell stated that the purpose of obtaining a certain percentage of minorities was "discrimination for its own sake," and that the stated purpose of countering the effects of societal discrimination, without a judicial, legislative, or administrative findings of a past constitutional or statutory violation was "an amorphous concept of injury that may be ageless in its reach into the past" and thus, also was not a compelling state interest. *Id.* at 307. Regarding this same purpose, Justice Powell stated that it "does not justify a classification that imposes disadvantages upon third persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.* at 310. He rejected the third purpose, increasing health-care services to underserved communities, because there was no evidence to show that the special admissions program furthered that goal. *Id.*

37. *See id.* at 312.

38. *Id.* at 314.

39. *Id.* at 319-20.

the possibility . . . by holding that . . . left open the possibility that a "properly devised admissions program" could satisfy strict scrutiny by holding that diversity could serve as a compelling state interest.[40]

B. *Fullilove v. Klutznick*

Two years later, in *Fullilove v. Klutznick*,[41] the United States Supreme Court held that a Congressional set-aside provision for minority business enterprises (MBE provision) in the Public Works Employment Act of 1977 did not violate the equal protection guarantees of the Fifth Amendment.[42] The MBE provision promulgated by Congress required that applicants for federal contracting grants must show that at least ten percent of the amount of each grant shall be used for minority business enterprises.[43] Chief Justice Burger, writing for a plurality, recognized 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."[44]

The "most searching examination" standard of review applied by Chief Justice Burger employed a two-part test. The first prong involved a determination that the objectives of the legislation were within the powers of Congress.[45] In this instance, the primary objective of the legislation was to prevent practices by federal fund grantees that would

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40. Justice Powell stated in Part V.C., a Part in which Justices Brennan, White, Marshall, and Blackmun joined, that "the State has a substantial interest that legitimately *may* be served by a properly devised admission program involving the competitive consideration of race and ethnic origin." *Id.* at 320.

41. 448 U.S. 448 (1980). There was no majority opinion in this case. Chief Justice Burger announced the judgment of the Court and delivered an opinion in which Justices White and Powell joined.

42. *Id.* at 492. The petitioners in *Fullilove* included a firm and several associations which were involved in the construction industry. *Id.* at 455. The petitioners alleged that they had suffered economic injury as a result of enforcement of the MBE provision and that the provision on its face violated the equal protection guarantees of the Constitution as well as several other statutory antidiscrimination provisions. *Id.*

43. 42 U.S.C. § 6705(f)(2) (1976). Minority business enterprises included businesses owned by at least fifty percent minorities or, if the business was publicly held, minority shareholders of at least fifty-one percent. *Fullilove*, 448 U.S. at 454. Minorities included blacks, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts. *Id.* The presumption of a past deprivation of opportunity based on race was rebuttable. *Id.* at 464.

44. *Id.* at 491.

45. The Chief Justice found that the Spending Power, U.S. CONST., art. I, § 8, cl. 1, and the Commerce Power, U.S. CONST., art. I, § 8, cl. 3, allowed Congress to promulgate the MBE provision. *Fullililove*, 448 U.S. at 473-80. Furthermore, Chief Justice Burger stressed the remedial powers of Congress under the Constitution in justifying Congress' power to devise the MBE provision. *Id.* at 483.

result in "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities."[46] The second prong involved a determination that Congress may constitutionally use racial and ethnic criteria as a condition attached to a federal grant as a means of achieving its objectives.[47]

The plurality qualified its holding of constitutionality by noting that the MBE provision was "limited"[48] and could be viewed as a "pilot project."[49] Chief Justice Burger also made reference to "the right to experiment"[50] and suggested that the administrative process could provide remedies if the provision triggered improper use of racial and ethnic criteria.[51] In addition, he noted the significance of the availability of a waiver, and that the two "congressional assumptions" underlying the program were rebuttable.[52] Although the Court held that the MBE provision passed constitutional muster on its face, Fullilove left open the possibility that the manner of application of the provision may later render the provision unconstitutional.

C. Richmond v. J.A. Croson, Co.

Almost a decade later, the Court was faced with determining the constitutionality of a set-aside program similar to that in *Fullilove*, except that this time the program was promulgated by a City Council rather than by Congress. The Court held in *Richmond v. J.A. Croson, Co.*,[53]

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46. *Fullilove*, 448 U.S. at 473.

47. The Court rejected the contentions that Congress must be "color-blind" when acting in the remedial context, that the program deprives nonminority businesses access to a portion of government contracting opportunities, that the program is underinclusive, and that the program is overinclusive. *Id.* at 482, 484-86.

48. *Id.* at 489.

49. *Id.*

50. *Id.* at 491 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

51. *See id.* at 489 ("That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that the application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied.").

52. *Id.* at 487. The two assumptions were:

> (1) that the present effects of past discrimination have impaired the competitive position of business owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at lest 10% of the federal funds granted under the [Act] would be accounted for by contracts with available, qualified, bona fide minority business enterprises.

Id.

53. 488 U.S. 469 (1989).

that an MBE set-aside program which required contractors in the city of Richmond, Virginia to subcontract a minimum of thirty percent of its contract to at least one MBE was unconstitutional under the Fourteenth Amendment.[54] The majority held that, in light of its recent decision in *Wygant v. Jackson Board of Education*,[55] the proper standard of review for "benign" or "remedial" racial classifications was strict scrutiny.[56] The Court went to great lengths to distinguish *Fullilove*, which used a lesser standard of review, on the basis that *Fullilove* involved a program mandated by Congress, a governmental body which is afforded broad deference when using its power to enforce the Constitution.[57]

Under strict scrutiny, the Court held that the City of Richmond failed to demonstrate a compelling governmental interest which justified the program. Specifically, the Court held that evidence of past discrimination in the construction industry as a whole was too general to justify the use of the set-aside program.[58] The Court suggested that a compelling state interest could exist if there was a demonstrated great statistical disparity between eligible and participating MBE's;[59] however, no such showing was made.

Even though the Court found that the program did not satisfy the

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54. *Id.* at 477. The Minority Business Utilization Plan adopted by the Richmond City Council defined a MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." *Id.* at 478. "Minority group members" included "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* Of significance is the Plan's availability of a waiver of the MBE requirement, which would be awarded only in "exceptional circumstances," such as if an MBE was unavailable to act as a subcontractor. *Id.* at 478. The Appellee in this case was a construction company denied a waiver and as a result lost its construction contract. *See id.* at 481-83.

55. 476 U.S. 267 (1986).

56. *Id.* at 493. By declaring strict scrutiny to be the proper standard of review, the Court "reaffirm[ed] the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Id.* at 494. The majority relied on the analysis in *Wygant* in coming to this conclusion.

57. *See id.* at 486-91. *See also supra* note 45 and accompanying text.

58. *Id.* at 499. The Court stated that "[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, . . . an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.* In addition, the Court found that "[t]here is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut person in any aspect of the Richmond construction industry." *Id.* at 506. The Court also noted in its explanation of why there was no compelling state interest that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities *qualified* to undertake the particular task." *Id.* at 501-02 (emphasis added).

59. *Id.* at 503.

first prong of strict scrutiny, it briefly addressed the issue of whether it was narrowly tailored. Because the City gave no consideration to the use of alternative, race-neutral means to accomplish the its goal,[60] and because the Plan's waiver system did not inquire into whether a particular MBE truly suffered from effects of prior discrimination,[61] the Court held that "such a program is not narrowly tailored to remedy the effects of prior discrimination."[62]

D. Metro Broadcasting v. FCC

Shortly after deciding *Croson*, the Court considered the constitutionality of benign racial classifications used by the FCC in *Metro Broadcasting, Inc. v. FCC*.[63] Employing intermediate scrutiny, the Court held that the FCC's racial classifications were not in violation of the equal protection component of the Fifth Amendment.[64] At issue in *Metro Broadcasting* was a program created by the FCC that awarded an enhancement credit for minority ownership in comparative hearings for new broadcasting licenses[65] and a minority "distress sale" program that allowed only minority controlled firms to take over ownership of certain existing radio and television broadcast stations.[66]

In determining the proper standard of review, the Court followed the pronouncement in *Fullilove* and affirmed in *Croson* that "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than similiar classifications constructed by state and local governments,"[67] and, therefore,

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60. The Court again distinguished *Fullilove*, this time on the basis that in that case, race-neutral alternatives were carefully examined and rejected prior to the enactment of the set-aside provision. *Id.* at 507.

61. *Id.* at 508. In effect, this lack of inquiry created a presumption of disadvantage that was not subject to challenge.

62. *Id.* at 508.

63. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

64. *Id.* at 552.

65. Petitioner Metro Broadcasting, Inc. was originally granted, then denied, a broadcasting license because another applicant was awarded a substantial enhancement due to its minority ownership. *Metro Broadcasting*, 497 U.S. at 559. The other applicant's minority credit ultimately outweighed Metro's advantages; thus, the other applicant was granted the license. *Id.*

66. *Id.* The FCC defines minorities as "Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, and Asiatic American extraction." Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 n.8 (1978).

67. 497 U.S. at 565.

employed the intermediate scrutiny standard.[68] Accordingly, the Court analyzed whether the policies "serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."[69] Under the first prong of this standard, the Court found that promoting programming diversity was an important governmental objective and that such an objective could properly serve as a constitutional basis for the minority-favoring policies.[70] The Court reasoned that diversity was in the public interest and that the public had a right to be exposed to diverse views.[71] Under the second prong, the Court found that a substantial relationship existed between the minority ownership policies and the governmental objective of promoting programming diversity.[72]

The Court also added a third prong to its intermediate scrutiny analysis. Here, the Court held that the FCC policies could be upheld only if they did not "impose undue burdens on nonminorities."[73] Because the Court did not believe that applicants had an expectation that a license would be granted without consideration of minority ownership as a public interest factor[74], and because procedures existed to avoid being subject to the FCC "distress sale" policy,[75] the Court determined that nonminorities were not unduly burdened by the policies, and, therefore, it held that the FCC program was constitutional.

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68. The Court was greatly criticized in subsequent opinions for its use of intermediate scrutiny. Specifically, Justice O'Connor, writing for the Court in *Adarand* attacked the *Metro Broadcasting* Court for not applying the holding in *Croson* that benign racial classifications enacted by state governments are subject to strict judicial scrutiny. *Adarand*, 115 S. Ct. at 2097 (1995).

69. *Metro Broadcasting*, 497 U.S. at 565.

70. *Id.* at 567-68.

71. *Id.* at 567.

72. *Id.* at 569-97. In making the determination that a substantial relationship existed, the Court gave great weight to the experiences of the FCC and Congress, which had both concluded at some juncture that programming diversity was fostered by participation of minorities. *Id.* at 569-79.

73. *Id.* at 597. The Court quoted a passage from Justice Powell's opinion in *Wygant* to support it's addition of this important prong: "As 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." *Id.* at 596 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (1986)).

74. *Id.* at 596-600. Even if an expectation existed, it has been suggested that if the goal of the program is remedial, the loss of the expectancy would not be determinative. Neuborne, *supra* note 3, at 1550 ("When . . . a third person is asked to forgo a mere expectancy or an unearned advantage, the Court has held that the imperative of repairing a damaged institution or righting a past wrong generally will justify using otherwise forbidden criteria.").

75. *Id.* at 484.

E. Milwaukee County Pavers Ass'n v. Fielder

After *Metro Broadcasting*, the Seventh Circuit struck down as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment a program which set aside certain Wisconsin state-funded construction projects for "disadvantaged business enterprises."[76] The court of appeals did not apply a particular standard of review, but instead relied upon the United States Supreme Court decisions in *Fullilove* and *Croson*. From these decisions, the court of appeals gleaned the lesson that "the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do."[77] More specifically, the court of appeals stated that only remedial purposes, not disadvantage or diversity, would justify racial preferences by a state or municipality.[78] In dicta, the court of appeals suggested that if the presumption that a certain race is disadvantaged was irrebuttable, the program would very likely be unconstitutional.[79]

F. Adarand Constructors, Inc. v. Pena

Not long before *Hopwood* district court decision was appealled, the United States Supreme Court overruled the holding in *Metro Broadcasting* that congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny. In *Adarand Constructors, Inc. v. Pena*,[80] the Court also concluded that the decision it reached in *Fullilove*—that federal racial classifications were subject to a lesser standard of review than state or municipal classifications—no longer had

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76. Milwaukee County Pavers Ass'n v. Fielder, 922 F.2d 419, 421, (7th Cir. 1991), *aff'g* 731 F. Supp. 1395 (W.D. Wis. 1990). Under the program, a business enterprise is presumably "disadvantaged" if fifty-one percent of its owners are black, Hispanic, Asian, American Indian, or female. *Id.* at 422.

77. 922 F.2d at 424.

78. *Id.* at 422.

79. The program at issue in *Milwaukee County Pavers* actually permitted the state to apply the presumption of social or economic disadvantage without investigating the situation of the applicants; however, a third party could rebut the presumption by "'present[ing] evidence that the [applicants] are not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups.'" *Milwaukee County Pavers*, 922 F.2d at 425 (quoting 49 C.F.R. pt. 23, subpt. D, App. C). The court of appeals stated that the state would be vulnerable to challenge under *Croson* "if it made the racial presumption in the regulations irrebuttable, for that would be going beyond the authorization in the federal program." *Id.*

80. 115 S. Ct. 2097 (1995).

controlling value.[81] Instead, the Court held that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny."[82] In order to pass constitutional muster under strict scrutiny, a racial classification must be narrowly tailored to further a compelling governmental interest.[83]

Adarand involved a constitutional challenge under the equal protection component of the Fifth Amendment's Due Process Clause to the federal government's use of race-based presumptions in identifying "socially and economically disadvantaged individuals."[84] Delivering the opinion of the Court, Justice O'Connor[85] criticized the Court's reasoning in *Metro Broadcasting*.[86] Justice O'Connor's analysis clarified the past decisions of the Court and laid the groundwork for overruling *Metro*

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81. *Id.* at 2117.

82. *Id.* at 2113.

83. *Id.* at 2117.

84. *Id.* The Petitioner, Adarand Constructors, Inc., was denied a subcontracting job despite the fact that it submitted the low bid. *Id.* The contract was awarded instead to a certified small business controlled by "socially and economically disadvantaged individuals" which allowed the contractor to receive additional payment from the Federal Government. *Id.* at 2104. The plaintiffs challenged that the presumption required by federal law that provided that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. §§ 637(d)(2)(3). The Small Business Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). The Act defines "economically disadvantaged individuals" as "those . . . whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A).

85. Justice O'Connor's opinion was joined by Justices Rehnquist, Kennedy, Thomas, and Scalia, except with respect to Part III-C, which analyzed the principles of precedent and *stare decisis*. *See id.* at 2101.

86. *Id.* at 2112. Justice O'Connor presented a well-written summary of the cases which preceded *Metro Broadcasting*, including *Bakke*, *Fullilove*, and *Wygant*, with a focus on the standard of review in each. *Id.* at 2108-11 (citing Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978); Fullilove v. Klutznick, 448 citing U.S. 448 (1980); and Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)). She noted that each of these cases failed to produce a majority opinion which "left unresolved the proper analysis for remedial race-based governmental action," but that *Croson* somewhat resolved the issue in holding that strict scrutiny should be the single standard for review for all race-based classifications by state or local governments. *Id.* at 2110-11. Justice O'Connor specifically criticized the *Metro Broadcasting* Court for not using strict scrutiny as was suggested in *Croson*, and for undermining the principles set forth by the cases preceding it, namely skepticism, consistency, and congruence. *Id.* at 2112-14. *See also supra* note 68.