Constitutional Criteria: The Social Science and Common Law of College Admissions Decisions

Monograph 97-1

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"[Diversity includes] city dwellers and farm boys; violinists and football players; biologists, historians, and classicists; potential stockbrokers, academics, and politicians...." Justice Powell, Regents of the University of California v. Bakke (1978)

"[Colleges] have given conceded preferences up to a point to those possessed of athletic skill, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful...." Justice Blackmun, Regents of the University of California v. Bakke (1978)

"A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni...." Fifth Circuit Justices Jerry Smith and Harold DeMoss, Hopwood v. State of Texas (1996)
When judges consider college admissions criteria, they wax eloquent, as in the excerpts above. When racial issues are in the mix, as they were in Bakke*1 and Hopwood,*2 the eloquence illumines which dimension the decision allows on the mobius strip of racial values and individual values. Justice Powell's landmark balancing act in Bakke split the difference--banning rigid quotes but allowing "plus points" for race, a primer that has lasted nearly two decades and is thoroughly enmeshed in the millions of admissions decisions made each year. Justice Powell's Bakke remains the law of the land, the Supreme Court never having since accepted a frontal challenge to the holding. True, recent affirmative action cases have whittled away at Bakke's underpinnings, as in teacher layoffs,*3 city contracting,*4 and federal construction projects,*5 but save the postsecondary desegregation cases*6, the Court has chosen not to revisit Bakke's central holding in higher education law. It has declined two occasions to do so, leaving two courts of appeals decisions to frag their way across circuits, as Podberesky v. Kirwan and Hopwood v. State of Texas*7 have done.

However, given the increase of cases, statutes, and trustee actions*8 to overrule Bakke, the Supreme Court will in the near future have to revisit the case and decide if it holds up under scrutiny. The question will be the same then as it was in 1978: how to square claims to individual merit with distributive justice theories that favor racial criteria, as envisioned in Justice Powell's modest use.

Professional admissions decisions are crucial both to institutions and to students.
Institutions care about the fit between students and the program, and, of course, every faculty member wants to teach the "best" students they can attract and enroll. Students, of course, want the best and most efficacious program to which they can reasonably aspire. Therefore, institutions strive to adopt admissions criteria that will accurately and reliably predict optimum performance in their programs, casting their eyes to the best mix of admittees who will validate their schools as institutions that attract high scorers, students on whom they will take some modest risks that they can succeed, although their academic predictors do not place them at the top end of their classes. These students have other characteristics that presage academic success in schools. In elite undergraduate colleges or in highly competitive graduate and professional programs, the places to be filled are simply too precious to award to persons unlikely to finish or successfully complete the course of study. For example, in the mid 1980's, Georgetown University Law Center received over 10,000 applications to fill its approximately 650 first year seats.*9 Harvard College received 18,000 applications for its 1,620 freshman places.*10 The University of California at Berkeley considers over 25,000 applicants to fill its 3,500 student freshman class.*11

Admissions procedures and criteria have become extremely important social considerations, as judged by the amount of scholarship devoted to the topic, the number of informal and formal challenges to admissions results, the public's involvement in admissions matters, and the attention paid in the popular press. Even so, many
decisionmakers, from professors to judges, know little about the social science of admissions. Becoming familiar with the research scholarship on the admissions process and court opinions about admissions issues makes it clear that the process is an art, not a science, and an imperfect art at that. Current admissions criteria that have been used historically to predict a measure of achievement, particularly first year grade point averages in graduate or professional schools, are being questioned as the sole criteria determining admissions decisions.*12 New evidence on what constitutes "success" in graduate or professional schools as well as court challenges to long-practical admissions procedures have made it necessary to review and refine admissions practices and criteria so that they have more powerful predictive validity, increased reliability, and heightened sensitivity to the increasingly-heterogenous student body under consideration in modern applicant populations.

The first Section investigates the research literature on several of the more commonly employed admissions practices and evaluates the differential validity (that is, different populations reveal different measurement properties) for predicting student "success" as it is usually defined, and the "success" of different graduate and professional student populations (e.g., minorities, women, older students). The discussion will then focus upon selective “fairness models” as a concept, particularly their use in the selective measurement of minorities. Section II examines the underlying assumptions of admissions statistical models. Throughout, it is clear that many measures of merit are socially
constructed value judgments, not merely psychometrically determined predictors. That this is so will become particularly evident in Section III, where judges apply these criteria to admissions challenges. Here, I will examine several admissions cases that turn on different dimensions of the admissions process. While many of these cases include undergraduate measures, such as the SAT or ACT, the principles transcend the specific setting, as Bakke’s significance has proven to be beyond its narrow medical school setting and Hopwood’s reach far beyond the law school context. In many ways, admissions cases have import beyond their immediate venue, and serve as proxies for larger themes of distributive justice and fairness. Section IV challenges the metaphors, proposing "The River" as an apt evocation. The final Section probes the implications of Bakke, noting that the admissions process is likely better understood and administered than at any previous time.

Section I. The Social Science of Admissions

For discussion purposes, this Section focuses upon law school and other professional school admissions decisions, in part because of the bounded nature of professional education,*13 in part because several major court challenges arose in this arena,*14 and in part because virtually all law schools require the same admissions materials and employ the same standardized exam and application criteria. Elite undergraduate institutions, highly regarded graduate programs, and competitive
professional schools are more alike than they are different from each other. Sorting out many qualified applicants requires similar procedures, cutting across institutional type. Thus, I will use examples from selective institutions rather than open door colleges, and will refer to both undergraduate and post-baccalaureate colleges, and to graduate and professional programs. In general, virtually all graduate and professional schools require their applicants to complete and submit an application form, all collegiate transcripts showing undergraduate and graduate coursework, a current standardized test score (LSAT, MCAT, GRE, Miller’s Analogy, or the like), an essay setting out the applicant's brief for admission, letters of recommendation, and other pertinent institutional information requirements (e.g., financial aid forms, proof of eligibility to sit for the bar, attestation of residency or domicile, parental data). Many dental and medical schools continue to employ personal interviews as a formal part of the process, as do some elite undergraduate colleges (often employing alumni/ae as the interviewers), but legal and business education, and most graduate programs, do not use this means to differentiate students. While the weight accorded the admissions materials may vary by institutions and even departments or units within institutions, admissions committees overwhelmingly rely upon previous cumulative grade point averages and standardized test scores to make their admissions decisions.

Underlying this use of scores and grades are an administrative purpose and two basic, unspoken assumptions. First, scores and grades can be reduced to shorthand
measures, extremely useful in sorting out applications: the standardized test score can be reduced to a number to fit all, and grades can be measured on a 4.0 scale that provides rough equivalence among the applications. Thus, a 3.5 GPA (on a four point scale) and a 160 LSAT (in 1997, the 83rd percentile) can be algorythmically combined by a commercial service to produce a 212 (of 220) scale. All things being equal, a 220 predicts the applicant will finish her first year of law school with a better average than will an applicant with an index of 200; less certain is the accuracy of measures totaling smaller differences, say a 209 versus a 210, particularly near the modal or the mean point where scores will bunch together. The differences here may be the result of one course grade or a few answers on the standardized exam. Second, this administrative convenience is buttressed by two widely-held assumptions: that previous academic achievement and performance on a standardized test are fair predictors of a candidate's academic performance in the graduate or professional program, and that the behavior and skills essential for graduate and professional schools are but extensions of the behaviors and skills necessary for successful academic achievement in college.*15

Faculty use undergraduate grade point averages (UGPA) and standardized test scores in order to predict how students will do in the first year of study. There are several reasons why faculty are especially concerned with first year academic performance. If professional schools are to retain their students, it is obviously important that students succeed in their first year. Further, the first year curriculum is standarized, enough
anyway so that a meaningful class rank can be established. In addition, forced-curve grade requirements and "section equivalence" (i.e., that each student across multiple sections has substantially the same courses and treatment) strengthen the accuracy of predictors based upon admissions criteria.

However, while it is possible to predict first year professional or graduate school grades, however imperfectly,*16 two questions arise: is the predictive validity (the statistical relationship between the test and first year grades) equally distributed across groups, and is the desired result (predicting first year grades, however well) a desirous result? That is, is the criterion of first year grades a good measure of the efficaciousness of the admissions process?

As it develops, the most disconcerting feature of the combined LSAT/UGPA (and of other such combined measures) is that, standing alone it measures different groups differentially well, and that combined with UGPA, it only improves slightly overall, beyond the first year. For example, at the University of Texas, the correlation between LSAT scores only and first year grades was .24 for white students. For blacks, it was .28 when combined with undergraduate grades. At the University of Pennsylvania, for all students the r2 was .11 for first year, .15 for second, and .21 for third year grades.*17 In sum, LSAT’s are weak predictors, performing less well for different schools and different years in school. Similar problems exist for the Graduate Record Examination, the test for graduate studies.*18 A recent reanalysis of thirty previously-published validity studies
revealed statistically insignificant correlation coefficients between first year graduate school GPA and GRE-V/GRE-Q scores. In other words, the overall finding was that the GRE, both Verbal and Quantitative, did not predict graduate school first year academic performance with any meaningful statistical certainty.*19 Studies by several admissions scholars reveal small or no meaningful statistical relationships between test scores and academic performance, particularly with minority populations.*20 Psychologist Richard Duran, for one, has noted: "Taken in toto, the results cited [in my review of predictive validity studies] suggest that Hispanics' college grades are less well predicted than [are] those of whites but that the reasons for this difference are not allied with a consistent bias in the direction of prediction."*21 In other words, some studies showed that predictive validity for Latino populations sometimes underpredicted college grades and sometimes overpredicted the same, at a level statistically more significant than the over-or-under error of white students' grades. That such unevenness should be detectable is evidence that for Latino students, the usual practice of a test score combined with a GPA is less-justifiable when its predictive validity is so variable. It is likely that English language fluency, Spanish language fluency, and other ethnic or socioeconomic variables affect this population validity, as would the institutional characteristics; Hispanics, for example, are more likely than any other ethnic group to enroll in two year community colleges.*22 Two year colleges have fewer instructional resources than do senior colleges, and may dampen the enthusiasm for transferring to a baccalaureate-granting institution.
For older students and women, standard predictors of first year performance are often inaccurate. Older students (i.e., those who complete undergraduate studies beyond the age of twenty five) receive over one-third of all U.S. baccalaureate recipients, and studies show that their test taking skills, perhaps rusty from infrequent or long ago use, result in consistent underprediction of graduate and professional school grades.*23 Despite their entering law school with similar academic records, legal education so favors aggressive, competitive learning styles that women perform less well academically than do their male counterparts.*24 A review of this rich literature makes clear that the predictive validity for first year GPA is not a meaningful single factor that applies equally across all groups.*25 In other words, everything is not equal nor is it measured equally.

But suppose, for argument's sake, that the predictive validity were higher, and that it were distributed equally in the general graduate/professional school population. Would that make the use of this admissions criterion fairer? More efficacious? More acceptable? An important problem is that first year GPA, while an intuitively-compelling dependent variable, is of questionable value in the larger scheme of postbaccalaureate education's overall purpose: producing good graduates and professionals.*26 In other words, what do first year grades have to do with being a good doctor, lawyer, veterinarian, or English professor? Indeed, do first year grades even correlate with subsequent grades, so that there is a strong and positive effect of the uniform first year regimen upon the second and third year of law school, of the second through fourth year upon medical residency, or of
classroom work upon the completion of a PhD dissertation? The evidence here is even weaker than that of UGPA and test scores upon the curriculum's first year.*27 J.C. Hathaway's study of Columbia Law School found statistically significant differences between the predictive validity for males and females in the first year, which degrees of relationship increased by the final year of law school.*28 Maria Pennock-Roman, after a careful review of validity studies, summarized: "grades of black and chicano students improved much more than [did] the grades for white students between their first and third years of law school. The mean difference in grades between minority and white students narrowed by the third year."*29 After reviewing minority and white grade patterns, Donald Powers summarized, "the differential improvements of minority students [by the end of their studies] would seem to provide further justification to admitting minority and other disadvantaged students with lower admissions credentials."*30

In a review of the literature in this area, Maria Pennock-Roman noted that several explanations likely account for any grade discrepancies among groups.*31 First, decreases in the reliability of grading practices made such measurements different. For example, "grade inflation" may account for the difficulty in explaining group grade differentials. This would occur if all grades rose and bunched together at the top end; this would create a non-normal distribution that would make all grades less accurate as markers of achievement. With regard to patterns of enrollments, Pennock-Roman found no systematic evidence that white students took upper division courses that were graded any differently
than were the courses taken by minority students.*32 Other explanations for minorities' improvement by their third year could be that minority performance improves because courses after the first year are more elective and therefore interesting or because these students catch on and conclude they can indeed perform as well as their counterparts; Powers calls this possibility the improvement that results from the students' "own initiative or from effective institutional support services".*33 Richard Duran, in his review of Hispanic student achievement dubs this feature "resourcefulness,"*34 even while noting that this cognitive construct is difficult to measure or identify.

While the research literature seems to point to group differences and differential validity measures, do any of these make a difference? What exactly is it that we are measuring? If there are as many troubling aspects to the concept of fair measurements across groups (or within groups, as every group has its own curve of measured achievement), even more troubling is the criterion itself. Predicting first year grades, as problematic as it is, pales in comparison to the difficulties with any other outcome variables, whether they be third year GPA's, performance upon the state bar examination, ability to obtain a position in practice, performance in practice, acting in an ethical fashion, interacting with clients, etc. For admissions purposes of sorting out thousands of applications for the smaller number who will be admitted, first year grade prediction may be a useful desideratum, but it surely cannot be the only marker.

With a movement towards integrating more practice skills into the legal curriculum,
as evidenced by the MacCrate Report's emphasis upon trial advocacy and clinical skills training, law schools have already signalled the importance of increased client contact, practical and didactic instruction, and clinical or hands-on experiences for credit in the curriculum.*35 While there is no evidence that first year class rankings have decreased in importance for employment purposes, clerk-hiring, or law review competitions, the movement in skills training and out-of-class advocacy experience is a step away from purely classroom academic achievement. Thus, law schools can, with good reason, justify an emphasis upon interpersonal skills measures and other non-cognitive criteria in their admissions process, if the information is available and provides real evidence that the applicant possesses character traits that portend the practice of law. For example, exceptional skills in debate, forensics, and expository writing, or meaningful experiences in student government or other leadership positions may provide the desired evidence, if the experiences are genuinely instructive and properly evaluated or documented by supervisors. Nothing is more useless in reading an admissions file than an application with a laundry list of student accomplishments without any evaluation or attestation.

As noted earlier, a second assumption undergirds the heightened reliance upon undergraduate GPA as a predictive criterion for postbaccalaureate graduate and professional studies: that such study is an extension of undergraduate study and that one's record in collegiate work is simply a continuum. In this scenario, more specialized graduate or professional academic achievement serves as the natural continuation of
knowledge acquisition. Stated differently, there is a strong assumption in relying upon UGPA that the cognitive and non-cognitive experiences of undergraduates are so similar or predictive of continued study that applicants' behaviors in the undergraduate arena presage and predict similar behaviors in graduate/professional school. Despite the discontinuities between the two arenas, this assumption holds powerful sway in postbaccalaureate admissions.

Admissions committees assume the continuum rather than question the increased specialization, the narrowing of the curriculum, the inculcation into a discipline or professional field, the gap that likely exists between college completion and further studies, the intervention of work and/or family obligations, or the financial obligations that now fall upon an independent student rather than upon the parents of an undergraduate dependent student. For example, if a student has been out of formal schooling for a number of years, standardized testing and study skills may be rusty; even increased desire and resourcefulness (to use Richard Duran's apt description)*36 make the transition from college to graduate/professional study difficult. When nearly everyone has done well in school--a prerequisite to postbaccalaureate study--small differences in experience, motivation, and resources can be magnified in class results. Even with the increasing age of the undergraduate student body, professional/graduate school experiences often reward those who do not have to re-learn what it is like to be a student. Moreover, graduate schools and professional curricula hold students to higher academic standards and require
a much more focused concentration upon studies than do most undergraduate programs. Therefore, admissions practices that concentrate upon the results of the undergraduate experience may overlook or de-emphasize the tortoises in the group, whose earlier records may not reflect their current learning styles, study habits, and life experiences. A student's learning style is a dynamic criterion, one which is likely to be more adaptive and focused by maturity; overlooking this sign of intellectual growth and change may be inherent in overreliance upon traditional criteria based upon academic achievements of the applicant's youth.*37

Graduate education, particularly that which attempts to inculcate scholarly values and academic achievement, may be better suited to the use of supplemental admissions materials such as writing samples, interviews, an advanced Graduate Record Examination specialized test, and letters from teachers than is professional study, which may not place such a premium upon these markers. Producing professionals for a field calls for a higher level of generic skills that can be taught through more didactic means, such as "how to conduct a patient protocol," "how to think like a lawyer," or "how to interact with patients and clients." Because these skills are not likely to be taught to undergraduates, the transition to graduate school may be more justified in employing traditional criteria than would be a professional school admissions process. However, as has been discussed, traditional criteria such as grades and test scores may have limiting defects, particularly on non-traditional student populations.*38 This review has shown the cautions necessary
in employing admissions criteria or practices that predict performance differentially for different categories of students. When it is shown that the quantitative ("statistical") treatment of universal indices or variables is also flawed or laden with covert social values, one cannot feel any more comfortable with the present reliance upon these criteria. While the burden of persuasion no doubt rests upon those who wish to see movement away from "the numbers approach," any fair and thorough review of current practice will be unsettling, as the status quo, so seemingly statistical and quantifiable, is grounded upon weak assumptions, weaker statistical relationships, and questionable criteria. Many faculty accept the notion that these measures are imperfect, but point to their overall efficacy and fairness.*39 However, it is important to examine the structural assumptions built into the process, if only to assure the larger polity that the measures do indeed work at least as well as others, perhaps non-traditional means would work. The status quo has an intuitive and appealing symmetry to it, one that defines "meritocracy" by these majoritarian measures. The correlations are modest, but positive for most students, and characterizing the process as fair and impartial reassures the gatekeepers that those selected for admissions have the wherewithal to undertake the field of study.

A review of fair-selection statistical models, nonetheless, reveals that the results can show different values, attributes, and consequences. In truth, this aspect of admissions -- how one treats the variables statistically -- is not widely known or examined, even by those committees who rely upon the statistical or other arithmetic calculations used in their
institutional validity studies. First, and most obviously, unless a school undertakes a validation study, as those available from standardized testing services, where the services will undertake a predictive validity study and tweak the institution's algorythmic admissions index, it may be a long time between such validity checks; it is easier for a school or program to employ its traditional criteria than it is to reexamine its assumptions, even when admissions numbers ebb and flow. This can be a serious problem, whether applications are in decline or on the increase. For example, in 1965, there were nearly 45,000 LSAT testtakers, trying to fill 24,000 first year places. In 1975, there were over 133,000 LSAT testtakers to fill nearly 40,000 places. By 1985, this number had declined to 92,000 competitors for 41,000 seats. In 1995, 115,000 applicants vied for 42,000 spots.*40 During that time, the LSAT changed scale format several times, and the exam itself was overhauled many times, as were other graduate and professional tests, sometimes in response to court orders to do so or to release old test responses.*41 The new computer-adaptive GRE not only can be taken at students' convenience in a centralized testing office, but each version is paced to provide individualized (not standardized) versions, depending upon the testtakers' speed and accuracy in responding to the questions.*42 Given the response differential that is attributed statistically to students' speededness (i.e., how well they perform under timed testing circumstances), this development alone—which will likely spread to other "standardized" examinations for graduate and professional schools*43--should cause concern to faculty in programs that do
not revisit their criteria and validity criteria. The next Section reviews the statistical assumptions of admissions practice.

Section II. Statistical Models of Fair Testing:

Lies, Damned Lies, and Admissions Statistics

The previous Section warned against overreliance upon grade point averages and test scores in admissions decisions for graduate and professional schools, noting the discontinuities between some admissions criteria and their dependent variables, the problems with unexamined assumptions in the ends/means relationship, and the flaws that can arise when there are major shifts in the demography of admissions. In particular, it was noted that the overreliance upon UGPA and test scores can fail to capture the dynamic changes that can occur in learning styles once an older person commits to a program, and that these measures predict less well for people of color than they do for Anglos.

In this Section, I review another facet of the social science of admissions, the statistics that undergird predictive validity studies. In order to measure the relationship between test scores and GPA’s, several statistical approaches can be employed; these are referred to as “fair selection models” in admissions predictive validity. This is tricky business, in part because not a large number of admissions decisionmakers have the technical expertise to conduct or even interpret the statistics, and because the explanation of the statistical treatment is complex and subtle, leading to reification of such data: for
example, an explanation of correlation coefficients is likely to stress the robustness of the relationships, rather than the underlying social construction, societal values, or intrinsic political assumptions of the statistical package itself.

That there are societal values inherent in arithmetic equations often surprises observers, who may have come to believe that such calculations are value-free or apolitical. However, the choice of variables employed to measure statistical relationships requires value-laden assumptions and choices. One psychologist summarized this dimension of measurement, "considerations of group parity and fair selection ultimately are determined by social political values... [and] while the social role of standardized testing often is both advocated and challenged in technical terms, the prominent social concerns surrounding standardized testing, both now and in the past, are rooted in matters of social and political values".*44

All fair selection models have the same basic approach to measuring relationships between two variables: there is a single criterion (Y), such as the professional school first year GPA that measures a successful result. In addition, a predictor (X) made up of one or more variables, such as the LSAT score, predicts Y’s success; this is also known as a “cut score.” The different statistical models measure how strongly X predicts a correct classification—-that is, where X accurately measures those who should be admitted or denied. Because the relationship among predictors and the criterion does not always work out (a high scorer can fail her classes, while an applicant with a marginal GPA and test
scores could find herself on the dean's list), X may accurately predict success or fail to do so. If Y is dichotomized into “success” or “failure,” four possibilities arise: *true positives* (admittees who perform well on the criterion, e.g., the top half of the class, "correct acceptances"); *false negatives* (persons not admitted, but who would have succeeded if they had been admitted, "incorrect rejections"); *true negatives* (persons not admitted, but who would have failed had they been admitted, "correct rejections"); and *false positives* (persons admitted, but who do not perform well on the criterion variable, e.g., the bottom half of the class, "incorrect acceptances"). These can be measured statistically, according to at least eight models, each of which poses a different value judgment.*45 Admissions committees should discuss the measurement assumptions of their work, and should understand the consequences of using one approach versus another. For example, a decision to treat non-residents with stricter scrutiny or to consider them against each other would be a different model than would be the case considering them the same as residents. Table 1 displays the dichotomized fair-selection models for both majority and minority applicants.

(Table 1 about here)

The models include: single-group regressions, separate-group regressions, equal-risk, desirable criterion-level performance (Darlington), constant ratio (Thorndike), conditional-probability model (Cole), expected-utility, equal-impact, and proportional (growth) models. Each of these will be examined to make more explicit their values,
particularly their values on group membership; their differential predictive validity; and their technical flaws.

*Single-group Regression Model.* In this model, the cutting score for X (i.e., the minimum LSAT score chosen to admit applicants) is the same for each discrete grouping: it is the value of the predictor which most perfectly predicts the minimum criterion performance when combining all groups.*46 Thus, one would analyze which cut score best predicts success for residents, and which best for non-residents. Together, they combine for a minimum criterion performance.

*Separate-groups Regression Model.* This approach uses separate within-group regressions to single out the LSAT cutoff scores (for each separate group) that best estimate the desired criterion in each group; thus, the criterion levels used to define success would be the same for all groups. Because only two groups are traditionally considered, such as majority and minority, this approach is also known as the "two groups" model.*47

*Equal-risk model.* This approach resembles the separate-groups model, except that it also considers the probability of success to a set test score (i.e., the LSAT) for each of the different discrete subgroups, rather than for only two groups.*48

*Desirable Criterion-level Performance Model.* Also known as the Darlington regression, this model resembles the separate-groups regression equation, except that each group receives its own desirable criterion-level performance definition. Thus, if the
desired minimum criterion level performance for group A members is Y, then the performance level for group B would be Y-K, where K is a positive numeral chosen at the discretion of the admissions gatekeepers.*49 For example, non-residents could be admitted at an index of 225, while residents would be admitted at a 220 level.

*Constant ratio model.* Also known as the Thorndike model, this equation separately sets out scores for each groups so that the admissions choices are proportional to each group's success ratio.*50 In this fashion, the LSAT criterion for non-residents would be set to admit 20% of those admissible in the non-resident population, and another LSAT level would be chosen for residents, to assure the same ratio.

*Conditional-probability model.* Also known as the Cole model, this approach requires that the admissions choices each have the same probability of selection in each group.*51 As one example, this would set out the top quarter of residents and non-residents alike.

*Expected-utility model.* This approach, which derives from game theory as well as psychometrics, assigns a number (called the "utility value") to each of the selection outcomes, representing the desirable value of that particular outcome. This explicit value, which is determined subjectively and openly declared, is then used to weight the criterion. This process assigns cutoff scores to each group, in under to maximize the selection's expected utility. Hence, this index becomes a function both of the criterion and separate group membership.*52 This would be operationalized by declaring that no non-residents
should be chosen who would be predicted to fail, even while admitting residents whose
LSAT scores predict they might fail.

*Equal-Impact model.* In order to evaluate the equal impact in admissions, one
would use this model to determine individual cut scores that would result in the same
selection percentages across groups, ignoring any differences in average X scores across
the groups.*53

*Proportional (Quota) model.* Using some external reference (e.g., the percentage
of black undergraduates in the state), this approach would employ specified percentages
for groups A and B, irrespective of the groups' average criterion score.*54

These fair-selection models each employ a given statistical treatment to a choice set,
or statistical population either explicitly or implicitly stating a value upon the desired
outcome. Each has full psychometric and measurement properties, that is, each model can
measure predictive validity and other psychometric values, and each represents a different
admissions approach that could be selected and agreed upon by an admissions committee.
All advance an important societal value, ranging from the single-group regression model's
narrowly-defined "success" criterion (e.g., membership in the top half of the first year
class) to the equal impact and proportional/quota models' group-membership variable,
which differentiates within-group decisions.*55

As one would imagine, each approach has supporters and detractors, as every model
measures a different phenomenon. For instance, the separate-groups, equal-risk,
construct-ratio, and conditional-probability approaches employ discrete-group-measures (that is, different measures for each different group) in their predictions of "success," which is a purely psychometric concept. Within this approach, however, the first two resolve doubts in favor of the institution (excluding applicants with poorer predictors), while the latter two models favor the applicant to the institution, including those with poorer predictors.*56

One could also differentiate among the models according to how each treats various selection outcomes and how each treats selection errors. For example, the constant-ratio, conditional probability, and desirable criterion-level performance models treat the likelihood of false negatives for group B as intrinsically worse than false positives, for example, assuming that the failure to admit minorities is of greater significance than would be admitting persons who are not as likely to be successes according to the X criterion variable. The two-groups and equal-risk models treat false negatives or incorrect rejections as being of equal undesirability whether they occur in Groups A or B.*57 Each, of course, advances a perspective on the risks inherent in admissions policy, guised as neutral selection theory or fair-standards measures.

Proponents of each advance their statistical package as "fair" and "neutral," while assailing the other treatments as political or misguided. For example, in criticizing the constant ratio and conditional-probability models, Peterson and Norvick, two prominent psychologists, proposed alternative "converse-constant ratio" and "converse conditional
probability" models. They argued that the latter approaches were contradictory and "internally inconsistent": "a definition of selection fairness can only be satisfactory if one considers... both sides (selection-success and rejection failure)." The originators of the conditional probability model shot back: these "converse models are expressions of different values than those expressly by the original rules... they certainly do not represent logical contradictions to the rules, as Peterson and Norvick suggest."

Other weaknesses lie in the extent to which any one model can affect regression characteristics of one group versus another. As an example, most regressions predict less well for Latino and Latina students than they do for Whites; this result may be the function of wide variability within a small population. Another such problem may be the use of a model to increase black enrollments which could inadvertently disadvantage Asians or another discrete subgroup. In addition, different models have differential explicitness built into their structure; of the eight models considered, the desirable criterion-level performance, equal-risk, and expected-utility models are the only ones that explicitly and openly indicate the weights accorded selection outcomes. In contrast, the single-group regression approach completely overlooks individual group-membership data while preferring any group that has a smaller slope-intercept (i.e., is over-predicted). Of course, there are also technical difficulties associated with the models, such as how the degree of preference given to any discrete subgroup will vary in its predictive validity as a result of mean differences among the groups. In other words, each group will have
an internal spread, and these spreads will often overlap the spreads of other groups. Indeed, this problem is often ignored by admissions committees forced to make fine distinctions among many hundreds of statistically-similar applicants. The best evidence of this is the use of a cutoff score, where all applications above a certain point will be presumptively admitted (say, above a 210 index), but only a small percentage of applicants at 209 or below will be selected, despite minute differences in the underlying characteristics. These flaws are magnified in a large group of applicants, where hundreds of applicants across an index will have records distinguished by only one course grade or a single answer on a standardized test.

This brief review has made it clear that even such "neutral" tools as statistical programs have hidden elements that favor one philosophy over another or have assumptions about the arithmetic relationship among the variables. When this information is considered with the problems identified in Section III, those of the criteria themselves, it is revealed that admissions decisions are complex political acts that are flawed by the limitations of the undimensional Y, whether predicted by the undergraduate GPA or the more complex index derived from the UGPA and a standardized test score; by the statistical treatment of the relationship between X and Y; by the problems of the self-reported data; by the wide variations in merit intrinsic in the application (being a physics or physical education major or electing honors courses, taking a commercial test preparation course, re-taking the standardized test); by differential criteria for non-resident
students in order to favor residents or to achieve geographical diversity;*63 and by the human factors that stubbornly resist the odds—an older student who adapts to the curriculum, an average student who catches on fire and wildly exceeds statistical expectations, a wonderful student who goes down in flames.

Anyone teaching for a number of years recognizes all these flaws in the process, and this why we read whole files and weigh the imponderables among the data. It is an art, not a science, and particularly not an exact measurement science. In Section III, the common law of admissions, a review of judge-made admissions decisions is offered for the proposition that admissions cases often turn on political value considerations rather than upon merits. This is true of all admissions decisions, not merely those that involve racial issues; the earlier examples of how to treat non-residents show how subtle these issues can be. These cases were chosen to cover the cross-section of legal issues in admissions, especially including standardized testing and racial admissions. Although several of these cases concern undergraduate admissions, the issues of testing and race transcend the particular level of higher education. Just as Bakke affects undergraduates, so does Brown affect higher education. The judicial treatment of the admissions practice is worth examining for its value at all levels of education.

III. The Common Law of Admissions Criteria

A surprising number of admissions cases have been decided by courts, largely but
not exclusively turning on the American trope of race; before the landmark 1978 Supreme Court case of Regents of the University of California v. Allan Bakke,*65 these cases were largely the postsecondary forerunners of Brown v. Board of Education*66 and the few college cases following Brown, where intransigent whites actively resisted college desegregation, manipulated admissions criteria to deny college or professional school admissions to blacks, or advanced theories that Brown was somehow limited to public elementary and secondary schools.*67 Since Bakke, admissions cases have been largely a function of white challenges to admissions practices that appear to favor minorities.

Bakke has also become an almost totemic holding, one that has been invoked in settings well beyond its medical school admissions setting, ranging from governmental setasides for minority contractors and highway guardrails to 4H club membership rules.*68 However, this case -- which holds that setasides are unlawful in admissions but that race may be used as a “plus” factor -- is under assault. Several commentators and judges have acted as if Bakke had no continuing validity; in Hopwood v. Texas, a panel of the Fifth Circuit argued in striking down a legal admissions program at the University of Texas Law School that had given preferences to Black and Chicano applicants that Bakke no longer is the law of the land--having been overruled sub silentio by the Supreme Court in a series of affirmative action cases not in an educational setting.*69

However, the U.S. Supreme Court has not overturned Bakke, notwithstanding its decisions in the trio of affirmative action cases, City of Richmond v. J.A. Croson Co.,*70
Metro Broadcasting, Inc. v. FCC,*71 and Adarand Constructors, Inc. v. Pena.*72 In a thorough review of these cases and the argument for their having been overruled, either explicitly or implicitly, Akhil Reed Amar and Neal Kumar Katyal summarized, "Since Adarand overruled Metro Broadcasting in part, and Metro Broadcasting relied upon Bakke, does this mean that the Court has overruled Bakke? No. The Court, we repeat, nowhere explicitly overruled Bakke, and so, under well established general principles, it clearly remains binding precedent for all lower courts, state and federal."*73 By this reasoning, Metro Broadcasting was overruled by Adarand only insofar that it was "inconsistent [with the holding that] strict scrutiny is the proper standard for analysis of all racial classifications, whether imposed by federal, state, or local actors."*74 And while Adarand overturned the Congressional discretion to enact minority setaside contracting programs, it has not addressed the diversity premise of Bakke. Even the third member of the Hopwood panel who voted to strike down the University of Texas Law School's affirmative action admissions program demurred at ruling Bakke lifeless: "if Bakke is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement."*75

Exactly how for does Bakke reach? Is it still alive? How have judges ruled in admissions cases since Bakke? Inasmuch as Bakke endorsed the Harvard admissions program for achieving diversity, is affirmative action permissible for the right reasons? Reviewing Bakke and a sample of its progeny on this issue is still instructive, after all these
years. In addition, a review of undergraduate admissions cases will also shed light upon the practice of employing standarized tests in graduate and professional schools.

_Bakke v. Regents of the University of California._ In this now-famous case, Allan Bakke applied for the 1973 and 1974 100-member medical school classes at the University of California at Davis (UC-D). After a review of his admissions portfolio and "benchmark scores," which included his undergraduate GPA, the GPA of his science courses, MCAT score, letters of recommendation, other application materials, declaration of California residence, and scores from his interviews with the admissions committee, the committee chose not to admit him, either to the 84-member general admissions or to the 16 affirmative action places.*76 Members of the applicant pool who were minorities and who indicated they wished to be included in the 16-place special admissions program for "economically and/or educationally disadvantaged" applicants were considered for admissions; in the four years of the program, including both years Bakke applied, 63 disadvantaged minority students were admitted, one shy of the full 16 annual slots.*77 (Forty four minorities were admitted by the regular admissions process, averaging 11 per year for each of the four years.) After he was denied admission for the second time, he sued in California state court on the grounds that his Equal Protection rights had been violated, and that UC-D had violated Title VI of the 1964 Civil Rights Act in maintaining the racially-separate admissions policies. The trial court found for Bakke, holding that the separate admissions process was an unconstitutional racial quota and that his federal and
state constitutional rights had been violated, as had his Title VI rights; however, because he could not show that he would have been admitted but for the special program, the trial court did not order him to be admitted to the medical school.*78

He appealed to the California Supreme Court, which did not pass upon his state constitutional or federal statutory rights, but which found that the UC-D program violated his Equal Protection rights. They also reversed the burden of proof regarding admissions, and held that since UC-D could not show that Bakke would not have been admitted, notwithstanding the minority program, he had to be accommodated. Thus, race could not be used as an admissions criterion, and he was admitted to the medical school.*79

The U.S. Supreme Court took the case, and in a complex and frustrating series of opinions, affirmed in part and reversed in part.*80 The evenly-divided court held on the one hand that racial setasides such as the UC-D plan could not operate lawfully but on the other hand that race could be used as one of several factors in admissions. This was accomplished by the Court's opinion, authored by Justice Lewis Powell, which attracted the votes of Justices Stevens, Rehnquist, and Stewart, as well as Chief Justice Burger for the former holding,*81 and the votes of Justice Brennan, Marshall, White, and Blackmun for the latter.*82 Justice Powell proved to be the swing vote for each 5-4 holding, and he also affirmed that Bakke should be admitted to the UC-D medical school.

This opinion, particularly Part V-C, has lasted for nearly two decades, and its view on the permissibility of racial factors in admissions has held sway in judicial opinions and
institutional practice. Even the Bush Administration's mid-1980's attempt to rule out minority scholarships beat a hasty retreat, citing *Bakke.* Part V-C reads:

In enjoining [UC-D] from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins [UC-D] from any consideration of the race of any applicant must be reversed.*84

Further, he identified the admissions-criteria that could appropriately further this diversity “substantial interest”:

The file of a particular black applicant may be examined without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed appropriate.*85
In addition, the four Justices aligned with Justice Powell in supporting racial criteria as one part of a comprehensive admissions plan, would have even upheld the UC-D plan: the program did "not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together."*86

After their review of Bakke itself and the recent Supreme Court cases concerning affirmative action, Aman and Katyal summarized, "Our survey of the post-Bakke affirmative action cases will demonstrate an important distinction between contracts and schools. We want to persuade readers that a wall between these two domains exists, and that this wall--at the base of Bakke--has not collapsed under the weight of the various post-Bakke contracting cases."*87 Whether Bakke "hangs by a thread" or has vitality and precedential value, it continues to be the touchstone case for college admissions and its endorsement of racial and ethnic criteria as a part of selective admissions has driven this process since 1978, in both public and private-colleges. If it were to be overruled, it would affect nearly every college and minority in the country, both in admissions and financial aid.

As will become evident from the review of other postsecondary admissions cases, no other criterion delivers racial results more than does race itself. There is no good proxy, no narrower tailoring, no statistical treatment that can replace race.*88 A movement away from Bakke, therefore, would likely completely deracinate the admissions
and financial aid processes, even in a world where racial minorities have become the plurality or majority populations. Meanwhile, in some special settings such as historically black institutions of higher education, whites who find themselves as racial "minorities" have access to court-ordered scholarships at the same time that black-only or minority scholarships have been struck down by courts.*89

* Martin v. Helstad. This interesting case turns on the issue of what is not included in an application, as well as what constitutes a completed application package for review by an admissions committee. Henry Martin applied to the University of Wisconsin Law School in December, 1980 from federal jail in Michigan, where he was serving a ten year sentence for a conviction in Oregon on seven counts of aiding and abetting interstate transportation of forged securities. On the UWLS application, he indicated that his current and permanent address was in Milwaulkee, and listed previous employment in the state. During these periods of time (1978-1980), he was incarcerated in Michigan, including the periods where he had said he was working.*90

Like virtually every law school, UWLS requires applicants to complete a section of the application that details any criminal or civil convictions, in order to judge applicants' moral character and to screen out candidates who may be ineligible to sit for the State Bar examination or practice law in the state. On his application, Martin failed to indicate his current status as an incarcerated felon, but listed instead two earlier convictions; his entire response was "I am a former legal offender. I received a full Pardon in 1971 from
Wisconsin Governor J. Lucey. This Pardon is an file in the Secretary of State's Office."*91 This concession triggered a closer examination by the UWLS admissions committee, but they did not rescind their offer of admission until three weeks before school was to start, when they received a call from Martin's parole officer, who was preparing a furlough arrangement that would allow him to attend law school in Madison. In discussing the arrangements, UWLS staff discovered Martin's current incarcerated status following his 1978 felony conviction.

After discovering this hitherto-unknown felony conviction, UWLS officials talked by phone with Martin and requested he explain the conviction and why he had omitted it from the application. In a long reply, Martin wrote that he had omitted the conviction from his application because he felt it would be overturned by the Ninth Circuit and because he felt it would harm his chances for admissions: "[a person] may avoid explaining a situation if he feels that such explanation will create more questions than it resolves or that it will somehow prove unduly prejudicial."*92 Upon further review, UWLS officials discovered that the Ninth Circuit had already upheld his conviction and that the remaining action was a collateral action challenging his sentence. This was resolved in November, 1981 when the Ninth Circuit affirmed the sentence by the district court and dismissed Martin's motion to vacate and set aside the sentence. This brought the pending cases to an end.*93

Faced with this information, the law school had almost no choice but to rescind his
admissions offer:

…After a thorough consideration of your case, and mindful of the serious effects this may have on your future life, we have decided that your failure to disclose the requested information constitutes sufficient grounds for revoking your admission to this law school. You will thus not be allowed to register for entrance to this law school.*94

Martin filed suit for preliminary injunctive relief, and enrolled in law school at Boalt Hall, University of California at Berkeley. The district court and Seventh Court denied the preliminary injunction, after which UWLS moved for summary judgment.*95 The District Court determined that Martin had a "slight" property interest, prior to actually enrolling, in the already-accepted offer of admissions, but that the UWLS faculty committee had already given him all the process due to him by notifying him of their doubts and by soliciting his additional information: "keeping in mind that the inquiry concerned whether plaintiff failed to disclose truthfully and completely his 1978 conviction in response to question 6 on the application. I conclude that additional safeguards would not have enhanced the fairness or reliability of the law school’s determination."*96

Had the facts been in dispute or if there had been no opportunity for Martin to supplement the record, or if he had already begun school, the judge would likely have required UWLS to provide a more formal hearing. However, here, the facts were not in dispute, "the only dispute is over the inferences that are to be drawn from those facts."*97
Under these circumstances, he did not require the law school to provide Martin a face to
face hearing.

While the facts that gave rise to Martin, the concealment of several felony
convictions and the application to law school from a federal penitentiary, are unusual, the
issue of pre-enrollment fraud in the application process is, regrettably, very common in
admissions.*98 Had he enrolled even for one class, it is likely that he would have had the
full panoply of procedural process due him, at least as much as UW's regulations allowed
him. That it was "disciplinary" and not "academic" meant a more searching look by a
judge as the issue and a higher amount of process due than would have been at issue in a
grading case or other academic judgment.*99 Even if fraud is discovered after the receipt
of the degree, cases brought as long as twenty years after the degree was awarded have
upheld the revocation.*100 There may be no statute of limitations upon degree revocation,
provided the institution has good evidence and provides a modicum of due process.*101
Following Martin v. Halstad, we have a clearer understanding of what process is due to
applicants who may have obtained their offer of admission fraudulently by omission or
commission, and what kind of minimal hearing or opportunity to be heard is required to
pass muster. Indeed, not much process is due the applicant. As is true in so many areas
of personal behavior, honesty is the best approach to completing college applications.

Groves v. Alabama State Board of Education. Virtually every standardized test has been
challenged in court, either for its psychometric properties, its disparate impact upon
minorities, or its inappropriate administration. Virtually all of these challenges were to the examinations' use in admissions to an institution, where the exam served a required gatekeeping function in sorting out applicants.*102 In Groves, though, the American College Testing Program's ACT exam was challenged for its use in screening students for entrance into a college major, that of teacher education.

As has been noted, standardized tests (usually the SAT or the ACT) are required for applying to most four-year colleges in the country. However, several institutions, particularly less-selective, open door colleges do not require a test, relying instead upon other measures, such as high school grades or General Educational Development (GED), certificates of completion of a high school equivalency examination. In Alabama, even though standardized test scores are not required for admission to several institutions, including Alabama State University, the Alabama State Board of Education in 1977 imposed a requirement upon teacher training programs that they require applicants to those majors to take the ACT and receive a minimum of 16, a score roughly equivalent to the 39th percentile, and approximately the state's average ACT score. Other requirements for education major included a minimum GPA of 1.2 (on a 3.0 scale), an interview, and an English Language Proficiency Examination.*103

After almost a dozen years, black plaintiffs filed a class action to challenge the ACT requirement as violations of Title VI of the 1964 Civil Rights Act, inasmuch as it had an adverse impact upon potential black teachers, who as a group scored lower on the test than
did potential white teacher education majors. The plaintiffs also claimed intentional
discrimination and disparate treatment, but because the court agreed with the disparate
impact theory, it did not choose to address these claims.*104

The District Court Judge first reviewed the Title VI argument and the disparate
effect the ACT cutoff scores had upon black applicants to the major; his review of cases
led him:

to examine two issues: whether a challenged practice has a sufficiently
adverse racial impact--in other hands, words, whether it fails significantly
more for a minority racial group than on the majority--and if so, whether the
practice is nevertheless adequately justified.*105

He relied upon the history of the enactment of the requirement to show that the State Board
had not deliberated very long or thoroughly upon the requirement or considered its likely
effect, although one participant recalled that they "were putting both feet, both hands, in
the middle of a philosophic war, a media war, [and] a racial war."*106

The Judge was particularly struck by the inappropriateness of the ACT measure for
its use as a screen for teacher training. He noted that the ACT testmaker, ACTP, had
counseled against its use for this purpose; that only four states besides Alabama employed
the test for such a purpose; that the 16 cutoff score "fluctuated" in different meanings from
year to year; that the exam was never designed to be used as an "absolute criterion;" or
that it was never intended to be used for predicting or diagnosing teaching ability.*107
The Judge then showed a sophisticated knowledge of the various statistical methodologies available to measure the adverse impact, including the competing statistical approaches offered as proofs for each side's pleadings: "Here, both the plaintiffs and the State Board have wrapped themselves in complex statistical data and terminology… Nevertheless, the very limited, singular perspective that the Board would have the court adopt as circumstantial proof of how adverse racial impact cannot outweigh the overwhelming circumstantial evidence presented from other perspectives to the effect that the ACT requirement has resulted in substantial adverse racial impact. Indeed, to reach any other conclusion the court would have to close its eyes to the obvious."

Finally, in reviewing the Board’s educational justification, the Judge was almost scornful at what he characterized as a "selection device [that] was adopted for bizarre, irrational reasons and was not designed to measure job performance directly or indirectly…." He considered the state's effort to explain why is had chosen the 16 ACT cutoff score to be "feeble" and "more likely than not an actual product of intentional discrimination." He then struck down the use of the ACT cutoff score for admission with the education major and enjoined and restrained the State from denying admissions based upon the failure to obtain the ACT score.

This case was undoubtedly influenced by Judge Thompson's earlier experience in presiding over a similar case involving a racial discrimination claim concerning Alabama's teacher certification policies, Richardson v. Lamar County Board of Education, where he
found the policies to be discriminatory and was upheld by the Eleventh Circuit.*111 Moreover, there had been additional litigation over these matters. Other circuits had also considered the racial impact of testing in a number of cases, so that the Judge had a substantial record from which to draw, both from cases where plaintiffs won and where the states had prevailed.*112 His decision in this case was affirmed by the appeals court.*113

Knight v. State of Alabama. The twists and turns of this case resemble nothing so much as a Dickens novel: an Office for Civil Rights (OCR) action brought in 1981 by then-OCR Director, now-Justice Clarence Thomas;*114 a suit brought in 1981 by private actors, later certified as a class action in 1982, but stayed in 1984 after the Department of Justice filed the OCR suit in 1983 in the same court;*115 after initial procedural skirmishes, Auburn University (AU), a defendant public institution, twice sought to have the original trial judge to recuse himself;*116 he refused to disqualify himself, but the Eleventh Circuit ordered that the motion to remove be heard by another District Judge, who, in 1983 ordered the removal;*117 within a month, he vacated his original order and recused himself from the disqualification hearing;*118 another Judge, assigned by the Eleventh Circuit, heard the original recusal motions and denied them in 1984;*119 the original Judge then began hearing Knight in 1985, which he bifurcated into a 1985 higher education desegregation case, United States v. Alabama,*120 and a teacher education certification case of the same name in 1986;*121 the Eleventh Circuit panel affirmed the
injunction barring the State Board of Education from decertifying Alabama State University's (ASU) teacher education programs, but denied ASU the Title VI right to sue the state;*122 the full Circuit denied an en banc rehearing in 1986;*123 the U.S. Supreme Court denied certiorari in 1987.*124

Back at the District Court level, another complex set of skirmishes was taking place with the original Knight defendants, denying all their motions;*125 at the Circuit, a motion was granted to stay the remedy phase;*126 Judge Clemon was removed;*127 and the Knight plaintiffs were allowed to continue their case on the District Court's original ruling on a Fourteenth Amendment-vestiges theory.*128 After six more judges either were removed by the Circuit or recused themselves, a visiting Judge from Georgia, Harold Murphy, was specially assigned.*129

After yet another series of procedural skirmishes concerning consent decrees, Judge Murphy began the trial in October 1990, and presided until its close in April, 1991.*130 His December 30, 1991 decision and remedy constituted over 250 pages, and covered a vast array of institutional issues, including governance matters.*131 Among its findings was that Auburn University's (AU) admission standard violated Title VI and the Fourteenth Amendment. The pre-Knight AU admissions criteria required both a score of at least 18 on the ACT and a 2.0/4.0 high score school GPA; the revised standards were a sliding scale that required higher scores or grades if the other were below the admissions standards. Thus, an ACT of 16 could be counterbalanced by a 3.0, a 17 by a 2.5, and an
The District Court, reviewing this challenge by the *Knight* plaintiffs, noted that the new plan, while slightly more stringent than the University of Alabama's Court-approved sliding scale, and while it disqualified almost three times as many black students as it did whites, was acceptable. The Court noted that the use of the ACT in conjunction with a sliding scale was non-discriminatory, as it provided a more sound educational reason for using the measure. Although the Court did not indicate its reasoning or cite similar cases or research literature, Judge Murphy appeared convinced that the more flexible sliding scale approach rather than the use of cutoffs for both GPA and the ACT was preferable. He noted that the revised approach, although the criteria were slightly higher than the standards required at the University of Alabama, still were a substantial improvement over the AU original criteria: AU's data showed that 36% more black applicants could qualify under the revised sliding scale approach than before.

Auburn University also chose not to implement a conditional admissions program for students who did not qualify through the new sliding-scale, as the University of Alabama had done for its applicants with lower-than-required scores or grades. The Court did not require Auburn to implement such an alternative admissions program, but indicated that it would review the new AU sliding scale approach for 90 days and see how well it worked.

Finally, in a 1992 case in Mississippi, *United States v. Fordice*, the U.S. Supreme
Court had struck down what is characterized as two "Constitutionally problematic" practices concerning the ACT: the need to provide a sound educational reason for differential entrance requirements at state institutions with different missions, and for the case of the ACT without reference to high school grades.*136 Judge Murphy held that AU's revised approach was in conformity with the Supreme Court's Fordice standards, and on September 25, 1995 denied the Knight appeal.*137 This case, almost a decade long, ended with a whimper rather than a bang.

U.S. v. Fordice. This case, originally, known as Ayers v. Allain*138 and filed in 1975, is at least as Dickensian as Knight v. State of Alabama, and even longer: filed originally in 1975, it continues today, after the original 1987 trial,*139 the 1992 Supreme Court case,*140 and subsequent remand back to the District Court.*141 Arguments before the Fifth Circuit were made in January, 1997, and final resolution could last well into the millennium.

The case is the logical extension of the 1954 and 1955 Brown v. Board of Education decisions,*142 as well as that of James Meredith's efforts to be admitted into the University of Mississippi (UM) in 1962 and the 1963 state imposition of an ACT requirement.*143 Not having employed standardized tests before Meredith's widely publicized application, UM clearly undertook to provide groundcover for its failure to recruit blacks or admit them into undergraduate programs before or since Brown, decided nearly a decade before. After Meredith was ordered to be admitted, several state
institutions, including UM, began to require ACT scores of 15, a number between the state's median black ACT score of 7 and the white score of 18; the Meredith litigation also struck down UW's previous requirement of recommendation letters from UW alumni/ae, virtually guaranteeing that no black could present a complete admissions portfolio.*144

The Supreme Court was particularly skeptical of the standardized test requirement, given the racial history of the ACT's use in the state, and because it was both used as a sole criterion in defiance of the ACT testmaker's recommendations and accorded different weights even at institutions with similar academic missions and state-designated equivalence. For instance, Mississippi University for Women used an 18 automatic cutoff admissions score, while the historically-black Alcorn State and Mississippi Valley State Universities--which had similar state designations as "regional institutions"--used a 13 score for automatic admissions.*145  Justice White noted that the "courts below made little, if any, effort to justify in educational terms those particular disparities in a entrance requirements or to inquire whether it was practicable to eliminate them."*146  Regarding the use of ACT as a sole criterion, Justice White wrote: "In our view, such justification [i.e., that grades cannot be used because of their incomparability and grade inflation] is inadequate because the ACT requirement was originally adopted for discriminatory purposes, the current requirement is traceable to that decision and seemingly continues to have segregative effects, and the State has so far failed to show that the `ACT-only' admissions standard is not susceptible to elimination without eroding sound educational

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policy."*147

They remanded for reconsideration, and the District Court Judge Biggers reconsidered.*148 After reviewing the State's plan for remediation the historically-white institutions largely stood pat, keeping the equivalent of a 15-ACT; the historically-black institutions, however, lowered the bar from 13-ACT to 11-ACT, with provisions to admit students in exceptional cases with an even lower score of 9. Judge Biggers determined these differential score admission standards would resegregate, using the "channeling effect" language from *Fordice,*149 which struck down actions that would not aid in encouraging blacks to attend white institutions and vice versa. He ordered that the state's plan be adopted, which included the higher scores overall, and a summer preparatory program for special admissions.*150 The first program was held in Summer, 1996.*151 He also allowed the use of ACT cutoff scores in the awarding of scholarships and alumni preferences, determining that they had no discriminatory purpose.*152 The black plaintiffs appealed this decision, which is before the Fifth Circuit in Spring, 1997.

*Baker v. Board of Regents of State of Kansas.* Marvin Baker applied to the University of Kansas School of Medicine (UKSM) for academic years 1984, 1985, and 1986. He had good grades and test scores, a 3.53/4.0 GPA and combined GPA/MedCAT index of 625, the highest index of any state resident not admitted. For its admissions, the UKSM used four major quantified standards, including UGPA, the Medical School Admissions Test (MCAT or MedCAT), faculty or professional recommendations, and
education scores from candidates' personal interviews with a faculty/staff team.*153

When Baker sought information after his third consecutive denial, he was informed by administrators that he "had done poorly in his interview." When he discovered that he had been at the top of the list for Kansas residents not admitted, he filed suit in federal district court in June, 1988, charging that he had been denied admission in favor of lower-scoring minorities.*154

However, he did so more than two years after he was notified by the original January, 1986 that he would be denied admission; therefore, the District Court held that he had missed the state's two year statute of limitations for filing suit;*155 the Appeals Court for the 10th Circuit affirmed, leaving the summary judgment in place.*156 Therefore, neither court reviewed the merit of his complaint concerning the constitutionality of interviews. However, absent an Equal Protection challenge that might arise if only one discrete group of students (say, for example, only women or only minorities) were required to undergo personal interviews, perhaps as a means of identifying reasons not to admit them, a court might find the practice unconstitutional. However, Bakke involved the practice of interviews and made no mention of any such proscription, suggesting that the non-discriminatory practice is sufficiently evenhanded to withstand scrutiny.*157 Like Marvin Baker, Allan Bakke had done poorly in his interviews at UC-Davis. Only medical schools use the practice extensively, partially to measure the demeanor of applicants and, at least in part, to get an overall sense of the
applicants' potential "fit" within the program. UKSM did not undertake any validity studies of interview data, and Baker did present some research evidence that interviews correlated poorly with school performance. The District Court intimated that Baker was denied admissions due to his poor interview skills, but would not have ruled this practice unconstitutional, as there was no evidence that this was racially-related.*158 Thus, while we have no clear resolution of this issue, absent an inappropriate use of interview data, it will likely be upheld by courts as a reasonable requirement by schools that engage in the practice.

_Hopwood v. State of Texas._ Like other Southern states in the 1970’s and 1980’s, following the _Adams_ litigation that ordered the federal government to monitor postsecondary institutions more aggressively and to enforce Title VI at the collegiate level,*159 Texas found itself required to produce a remedial plan that would increase the college-going of Black and Hispanic Texans. This increased enforcement activity, led by then-OCR director, now Associate Justice Clarence Thomas, is the background for the University of Texas Law School’s special efforts to recruit Black and Latino applicants.*160 The University’s efforts led to _Hopwood._

As recently as in the academic year 1971, the University of Texas did not admit a single black applicant that year, and in the same year admitted only a handful of Mexican Americans.*161 In order to increase the number of minority applicants, the Law School began to read applications from minority and white disadvantaged students separately, in
order to give "fuller consideration," that is, a full-file review extending beyond the sheer numbers of the UGPA and LSAT score.*162 By 1992, the Law School attracted a larger number of higher-scoring minority applicants, and had evolved a complex system of review that functionally resembled the original UC-Davis practice of the *Bakke* case, in which two separate admissions processes were used, one for blacks and Mexican Americans and another for whites. A different "presumptive admission" score was used for each process, a combined LSAT/UGPA index of 192 for whites and 179 for the minority applicants.*163 Moreover, minority applications at all index levels were reviewed by the "minority subcommittee," while not all white files below a certain index score were reviewed. Although there were no setaside places, as had proven fatal in *Bakke*, there was clearly evident a separate decisionmaking process, different actors, and different standards employed for minority applicants than for white applicants.*164

In 1992, Cheryl Hopwood (and three other plaintiffs) applied for admission to UTLS. Her UGPA of 3.8 and LSAT of 39 (83rd percentile) gave her a combined index of 199, which placed her in the "presumptive admit" category. However, because her file was not fully complete and because she attended an undergraduate institution that the chair of the admissions committee considered "non-competitive" (California State University-Sacramento), he marked her down and moved her from the presumptive admit category to the discretionary category. When she did not receive enough votes to move her application higher in the queue, she was offered a place on the waiting list. She was not
admitted,*165 nor were the other three plaintiffs.*166

The District Court Judge first held that Bakke was the controlling precedent: "Absent an explicit statement from the Supreme Court overruling Bakke, this Court finds, in the context of the law school's admissions process, obtaining the educational benefit that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications."*167 To the extent that the UT's process accorded extra points to minority applicants, he found the process to be constitutional. However, in that the four plaintiffs were compared only with other white applicants and not with the entire group, the Judge found that the process was not narrowly tailored and was thus a violation of their Equal Protection rights.*168

However, while he struck down the original admissions process, which had since been discarded by UTLS, he declined to order the applicants admitted; he found, for example, that white applicants had been admitted with very low indices, and that many whites with indices lower than Hopwood's were admitted--more than the total number of minorities admitted. He ordered $1 in damages to each, and ordered they be allowed to reapply without any charge the following year, noting: "The Court simply cannot find from a preponderance of the evidence that the plaintiffs would have been offered admission [even] under a constitutional system."*169

The Fifth Circuit panel saw it differently. Judges Jerry Smith and Harold DeMoss, writing for the panel majority, would have none of the diversity logic, nor of Bakke itself,
calling Justice Powell's holding a "lonely opinion."*170 The panel majority opinion read Bakke as having no bearing upon Hopwood: "Justice Powell's view in Bakke is not binding precedent on this issue [of diversity as an acceptable goal]. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In Bakke, the word 'diversity' is mentioned nowhere except in Justice Powell's single-Justice opinion."*171

Further, they saw the recent Adarand,*172 Wygant,*173 and Croson*174 cases as essentially rendering Bakke as either "not express[ing] a majority view" or "questionable as binding precedent."*175 They then reached this sweeping conclusion:

Accordingly, we see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge.*176

Thus, they ruled that even the revised UT program, which the District Judge had held to be constitutional, was unconstitutional for relying upon "diversity" as it did: "We do note that even if a 'plus' system were permissible, it likely would be impossible to maintain to such a system without degeneration into nothing more than a 'quota' program."*177

In his special concurrence, third panel member Judge Jacques Wiener agreed that the revised program was unconstitutional, determining that it was not sufficiently narrowly
tailed, but he disagreed that race as a single criterion among many could not be used for diversity reasons: "I would assume arguendo that diversity can be a compelling interest but conclude that the admissions process here under scrutiny was not narrowly tailored to achieve diversity."*178 He also scolded his colleagues for their overreaching: the panel's "conclusion may well be a desirable extension of recent Supreme Court precedent... Be that as it may, this position remains an extension of the law--one that... is both overly broad and unnecessary to the disposition of this case... [If] Bakke is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement."*179

The Fifth Circuit declined to take up the case en banc,*180 and the Supreme Court denied certiorari in 1996, with terse language from Justices Ginsburg and Souter, indicating that they believed the case was moot, as UTLS had abandoned the original program under which Hopwood and the others were considered.*181 This left the two judge panel (with the concurring judge) as the authority for the Fifth Circuit. The states of Louisiana and Mississippi, the two other Fifth Circuit states, were involved in litigation concerning the desegregation of their own public higher education institutions, so they are not bound by Hopwood.*182 This leaves Texas as the only state adversely affected by the decision. Moreover, the Texas Attorney General has issued legal advice to his client colleges, expanding Hopwood's admissions decision to minority scholarships as well, leading both public and private colleges and state agencies to dismantle their minority
Is Judge Wiener correct? Did the two judge panel overreach? Can a Circuit declare a Supreme Court decision overturned? First, neither a panel nor a full circuit can expressly overrule the Supreme Court; for *Hopwood* to have effect, it had to treat *Bakke* as explicitly or *sub silentio* no longer in force.*184 Second, to the extent that *Hopwood* does control, it does so only in the narrow area of college admissions; there is no precedent for extending it to minority scholarships, as the Texas Attorney General decided to do following the decision. Most AGO’s strive hard to narrow decisions and to contain damage done to state agencies or institutions.*185 Indeed, this expansive reading not only led to another State’s Attorney General applying *Hopwood* to his college clients in another circuit, but led virtually every public and private college in Texas, and the state’s postsecondary agency (the Texas Coordinating Board) to dismantle longstanding and legally-unchallenged financial aid programs, including areas established by the legislature with proper statutory foundation.*186

By selectively citing from Supreme Court opinions in *Croson* and *Adarand*, including dissents, the Fifth Circuit panel of Judges Smith and DeMoss treat *Bakke* as either overruled or nonbinding: "Justice Powell’s view in *Bakke* is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale."*187 This is simply incorrect, and the flawed reading poisons the reasoning that flows from this basic error.
In part V-C of *Bakke*, which was authored by Justice Powell, joined by Justice Brennan, Blackmun, Marshall, and White, and thus constitutes a 5-Justice majority, Justice Powell wrote:

In enjoining [UC-D] from ever considering the race of any applicant, ... the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins [UC-Davis] from any consideration of the race of any applicant must be reversed.*188

While a majority did not apply to Section V-A, where he explained the “substantial interest” (diversity), Justice Powell went on to write that admitting a "diverse student body... clearly is a constitutionally permissible goal for an institution of higher education... [It] is not too much to say that 'the nation's future depends upon leaders trained through wide exposure to 'the ideas and mores of students as diverse as this Nation of many people.'"*189

Although the two-Judge panel treated the *Bakke* holding (what they termed his "lonely opinion")*190 as questionable precedent, the Supreme Court has never overturned *Bakke* or, for that matter, accepted for review any higher education affirmative action case since that 1978 decision. Justice O'Connor, for example, in her opinion in *Wygant* noted that "although its precise contours are uncertain, a state interest in the promotion of racial
diversity in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."*191

Judges Smith and DeMoss simply omit mention of Section V-C, the authentic, 5-member central opinion, and ignore its “substantial interest” holding. Further, by declaring Bakke to be dead, they ignore Rodriguez de Quijas v. Shearson/American Express, Inc.*192 and American Trucking Associations, Inc. v. Smith,*193 two recent Supreme Court holdings that reserve to that Court "the prerogative of overruling its own decisions." Moreover, in Adarand, Justice O'Connor has held, "when race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."*194 This hardly sounds like the death knell, especially for well-crafted admissions programs.

As the panel misreads Bakke and strikes down racial admissions criteria, the opinion is even more curious for the criteria it would allow. In its laundry list of acceptable criteria, the panel Judges would allow alumnus/ae privilege, what they termed the applicant's "relationship to school alumni";*195 they also indicated a college could consider, among other factors, "whether an applicant's parents attended college."*196

In the context of UTLS, consider these criteria, one of which rewards applicants fortunate enough to have parents who were allowed to attend the law school, and one of
which rewards applicants who were fortunate enough (in this narrow sense) to have parents who did not attend college. Operationalized at public schools, the former criterion could exclude substantial numbers of African Americans, Mexican Americans, and Asians. At the University of Houston, which became a public institution in 1963-64, the first black law alumnus did not graduate until 1970; only a trickle of approximately one dozen Mexican Americans graduated before 1972.*197 Even as recently as the year 1971, UTLS enrolled no new black students in its first year class.*198 Their children, if born at the time their parents attended law school, would now be eligible for the alumnus/ae preference—in competition with the thousands of white applicants who could invoke the privilege. While it is true that the latter criterion—first generation preferences—would more likely favor minority children, whose parents were denied admission or were unable to attend college, many uneducated white families would likewise transmit this "advantage." As a recent Texas Coordinating Board study group that attempted to review alternative criteria determined, there is no good proxy for race.*199 Deracinating the racial criterion simply cannot work. In 1997, the first year under post-Hopwood procedures, minority applications to the University of Texas Law School were down by almost 60% for blacks and nearly two thirds for Mexican Americans.*200

One of the Hopwood plaintiffs presented a letter of recommendation from a professor who described his academic performance at his small college, where he graduated 98th in a class of 247, as "uneven, disappointing, and mediocre." That such
students could obtain high scores on the UT index, utilizing only GPA’s and LSAT scores, is a clear indication of why law schools look to features other than mere scores in order to determine who will be admitted. Any professional school could be wary of incomplete applications or ones where letters of recommendation singled out a student for “mediocre” performance. Even articulate critics of Bakke and race-based affirmative action, such as Professor Jim Chen, whose erudite critique is published elsewhere in this special issue, believes that Bakke remains good law.*201 Until the Supreme Court accepts another such case, as they declined to do in Podberesky and Hopwood, it governs college admissions and the variety of allied applications. Unfortunately, Texas now plays on a very uneven surface, as no other circuit has struck down Bakke’s holding in admissions.*202

IV. The "Pool Problem" Problem*203

I switch gears here, to consider the appropriate metaphors for the admissions process, particularly the search for minorities in college enrollments. First, in the search for paradigms, I would like to enact a ban, or at least a temporary restraining order, on the "pool" and the "pipeline." Much of the research literature on admissions and discussions about affirmative action employ these metaphors, prominently and uncritically.*204 I am not merely quibbling, like the deconstructionists over original intent, or the theologians over articles of faith and morals. Rather, I believe the paradigms of the "pool" and "pipeline" are inapt, both because they misconstrue the nature of the problems (as I define them) and because they misdirect attention. A pool is static, likely

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to turn brackish, and bounded. It requires restocking and resupply, and if it overflows its bounds, it is no longer a pool. Most crucially, it can become stagnant and unusable without fresh water; it cannot replace itself. A pipeline is even worse as a metaphor, though I acknowledge its widespread use and recognition value. But think of the pipeline in its quotidian, oil-industry meaning. It is a foreign mechanism introduced into an environment, an unnatural device used to leach valuable products from the earth. It requires artificial construction; in fact, it is a dictionary-perfect artifice. It cuts through an ecosystem and can have unintended and largely uncontrollable, deleterious effects on that environment. It can, and inevitably does, leak, particularly at its joints and seams.*205 It can also rust prematurely, and if any part of it is blocked or clogged, the entire line is rendered inoperative.

For the admissions process, I prefer the metaphor of the river. It is an organic entity; one that can be fed from many sources, including other bodies of water, rain, and melting snow. It can be diverted to form other tributaries without altering its direction or purpose, feeding streams, canals and fields; it can convey goods, drive mills and turbines, create boundaries, and irrigate land -- all without diminishing its power. Although it can be fouled by unnatural pollutants, it has a natural filtration system to slough off impurities. Despite its natural flow, it can adapt to new flows and can even be reversed or altered by engineering and hydraulic interventions. Its surface can be frozen, yet its power will be undiminished beneath the floes.
This is the image I want to convey, rather than those conjured by pipelines or pools, neither of which have the sense of a river's power, purpose, potential, fecundity, or majesty. If this is a simple autobiographical quirk derived from my childhood in New Mexico, with its magnificent Rio Grande, then understand my search for a more apt metaphor.

Without making too much more of this point, I'll say that the difference in metaphor is important for its characterization of the problem, for the evidence mounted to measure the problem, and for solutions proffered to resolve the problem. Let me illustrate briefly. Characterizing the problem of minority underenrollment at any level as a "pool problem" suggests a supply shortage or, at best, a failure to cast one's line in the right fishing hole. The pipeline metaphor reinforces this view of the problem, suggesting that it is simply a delivery glitch, or that faculties would admit minorities if only they used better conveyances. After all, pipelines do not produce anything of value; they only carry or convey products. While both the supply function and conveying function are important, they are not, individually, rich enough metaphors to portray the complex phenomenon of both functions intertwined to produce undergraduates and transform them into graduate or professional students.

A river, in contrast, provides nutrients and conveys resources, unlike its more static counterparts that do one or the other, but not both. As a final matter, a river also creates demand through dynamic flow and natural, organic properties. It constantly changes form,
seeking new flows and creating new boundaries. It can even wear down rock, as the Rio Grande Gorge and Grand Canyon will attest. This is the sense I wish to convey, one where demography and efforts by schools to do the right thing will inevitably lead to improvement over time.

Conclusion and Implications

In the beginning, I cited the *Hopwood* panel decision's singling out students with special talents, even though I believe Judge Smith and DeMoss use the articulate metaphors of talented athletes and musicians in a cynical fashion;*206* I believe Justice Blackmun, also cited in the beginning, was also cynically noting that college admissions have historically been the preserve of the wealthy and powerful, even when the official story is that the criteria were meritocratic.*207* Truth be told, selective admissions have always been the preserve of the advantaged. Had I been a UTLS faculty member, I am certain I would have voted for Cheryl Hopwood, had I known her entire record. At the least, I would not have marked her down for attending the California State University, a system that reserves its places for the top 25% high school graduates in the state, and which enrolls many minority and working class students.

The plaintiffs in *Hopwood*, as well as other white beneficiaries of admissions standards, assume that they reached their station in life on their merits, while members of minority groups have advanced only through bending of the rules. One of the plaintiffs,
denied admission on his 197 UT index, was so sure he had been denied a place to a less-worthy minority that his father wrote the Law School Dean saying just that.*208 However, the blacks admitted to UTLS averaged 3.3 on their UGPA and 158 on the LSAT; Mexican Americans averaged 3.24 and 157, making them extremely well qualified to do the work, at UT or other elite law schools.*209 Indeed, those indices would be medians at other very good law schools.*210

Yet, critics of affirmative action, and many federal judges, have become convinced that higher scores on tests translate into more-deserving, more-meritorious applications, and that relying upon "objective" measures and statistical relationships constitute a fair, race-neutral process. The evidence for this proposition is exceedingly thin; indeed, a substantial body of research and academic common practice refutes it. The heavy reliance upon solitary test scores and cut-off marks and the near-magical properties accorded them inflate the narrow, modest use to which any standardized scores should be put. Accepted psychometric principles, testing-industry norms of good practice, and research on the efficacy of testing all suggest limited claims for test scores, standing alone or combined with other imperfect measures such as grades or rank in class.*211 For example, judges in Mississippi and Alabama, among others, have struck down inappropriate uses of tests--as a cutoff for admissions or for use in determining one's fitness to become a teaching major.*212

More important, the same score means different things for different populations.
Careful studies of predictive validity consistently show that scores from standardized tests are less predictive of Hispanic college students' first year GPA's (both overpredictive and underpredictive) than are the scores of Anglo students.*213 The SAT measures less well for math ability and better for verbal ability for females than it does for males.*214 If research consistently shows that test scores for one population predict differently and less well for different populations, it weakens substantially the claim by affirmative action critics that the LSAT or other standardized tests should be given more weight in the admissions process.

The *Hopwood* plaintiffs and the Fifth Circuit panel treated the revised UTLS admissions procedures as if a massive dislocation of deserving whites had occurred because many undeserving students of color had taken their rightful places. The data simply contradict this viewpoint. The number of white students studying law in the 1990's is at an alltime high: in 1995-96, more than 110,000, or almost 81% of the total enrollment in ABA member law schools, was white. Blacks and other minorities, including Puerto Ricans in the three Commonwealth law schools, measure approximately 20% of the total.*215 In 1990, white applicants took 79% of the LSAT exams administered, and 58% of all whites who applied were admitted to a law school; of all groups, only Asians, at 61% were admitted at a higher rate. There is an equipoise evident between test takers and those who enroll: 79% of the testtakers were white and 79% of enrollments the next year were white.*216 There is no evidence of unfairness here, and no hint of unfairness. And
no law school can afford to admit students who cannot do the work; the transaction costs are too high and the spaces are too precious.

Moreover, it was not "lesser-qualified" minorities who displaced the Hopwood plaintiffs. More whites were taken off the waiting list than the total number of minority group students enrolled that year in the UTLS.*217 Given the expense of applying and the self-selection, virtually all the applicants to the Law School could do the work. In apparent seriousness, conservative scholars have even suggested a lottery be used to apportion precious admissions places.*218 At an elite college such as Harvard, after the original freshman class is carefully chosen, another full class could be admitted from the waiting list without losing a single digit on the mean GPA's and SAT scores.*219 At UC-Berkeley, over 9,000 students with 4.0 or better (by means of honors classes) vie for the 3000 freshmen slots.*220 California's Proposition 209 and the University of California Regents action to deracinate admissions to the UC have been put on hold, pending court challenges to both actions.*221

Admissions programs today at all colleges and professional schools are more thorough and better administered than ever; the survival of selective and open door colleges depends upon competence and fairness in the admissions process. The sheer crush of applicants--Georgetown Law School received over 10,000 applications in the mid 1990's,*222 Harvard College received 18,000 (including 2900 valedictorians), *223 while UC-Berkeley received over 25,000*227--means that admissions officers can choose from
among thousands of exceptionally qualified people.

This is a key point. When they choose from among thousands of applicants, nearly all of whom have the credentials to do the work, admissions committees are doing exactly what they are charged to do: they are assembling a qualified, diverse student body. Bakke sanctions this; common sense dictates it; and no anecdotal horror stories or isolated allegations can change this central fact. Very few whites are displaced in the process, and those who are affected likely have many alternatives. Using Bakke reasonably, the surprise is not that the system works fitfully, but that it works so well in today’s crush of applicants.

When I am asked if Bakke can survive, I answer that its longevity is proof that there is a god. Of course, I did not think so two decades ago, when the Court’s admitting Allan Bakke to the UC-Davis Medical School led me to believe he had won. He did win, but the carefully-nuanced Powell opinion has proven surprisingly resilient and supple over the two decades since. As demographic changes occur and historical practices fade, the ability to ground racial admissions in the eradication of discriminatory vestiges will become an impossible task, and few legislatures are likely to confess prejudice or find it in their state agencies. Affirmative action will have to be theoretically and operationally grounded in the First Amendment, in academic freedom, and in the four tenets of autonomy, which includes the freedom to choose students.*225 To the extent that this will justify diversity as an admissions consideration, it will only do so in a way that uses race among other
criteria. It is not that every applicant will bring diversity to the process, although in a sense, all do. To the extent that race is accounted for in the process, it should be one of many considerations: I have argued that Justice Powell's opinion is the correct route for the Supreme Court to affirm when it takes up Bakke's progeny. For consistency's sake, and in fairness, I have tried not to rely upon race as the trump card in my own reading of admissions files, but I use it as an asterisk, to highlight and add nuance. Someday, I hope even this will not be necessary.