IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-50664

CHERYL J. HOPWOOD, ET AL.,

Plaintiffs-Appellants,

v.

STATE OF TEXAS, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court

for the Western District of Texas

A-92-CV-563

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February 10, 1995

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

At stake in this appeal is the ability of any state to use affirmative action in higher education to remedy past discrimination and compose a diverse student body. If not by the State of Texas, with its long and continuing history of discrimination against blacks and Mexican Americans at all levels of education, then where? If not by the limited plus given to blacks and Mexican Americans in admissions decisions at the University of Texas School of Law, then what else is left?

This case presents starkly the question whether the State of Texas, its educational system burdened by more than a century of historical discrimination and massive current discrimination, can take modest affirmative steps at the Law School to overcome the effects of that discrimination. If it cannot, Texas will return to operating a lily white flagship law school, relegating nearly all minorities to the separate school the State specifically created to avoid integrating the Law School.

Because of the importance this case bears for the future of the State of Texas and this nation, Defendants-Appellees respectfully request the Court to grant oral argument.

RECORD REFERENCES

This Brief will refer to the record as follows:

Transcript of Trial Testimony __Tr. __

Opinion of the District Court	Op.___
Record Excerpts of Appellants	RE Tab ____
Record Excerpts of Appellees	Appellees RE Tab____
Brief of Appellants Hopwood and Carvell	Br. ___
Brief of Appellants Elliott and Rogers	Br. (ER) ___

Explanation

By way of example, the references to specific pages will be made as follows:

1. A reference to Volume 1 of the transcript of testimony at pages 145-57 will be cited as 1 Tr. 145-57.

    (a) When more than one group of pages in one volume is being cited, the pages will be separated by commas, *e.g.*, 1 Tr. 145-57, 163.

    (b) When more than one volume of the record is being cited, the references will be separated by semicolons, *e.g.*, 1 Tr. 145-75, 163; 3 Tr. 312-23.

2. A reference to Tab 8 of the Record Excerpts of Appellees will be cited as Appellees RE Tab 8.

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RICHARD KLUGER, *The Spurs of Texas are Upon You*, in SIMPLE JUSTICE ch. 12 (1976) 12

STATEMENT OF JURISDICTION

The district court had federal subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 over Plaintiffs' claims under the Fourteenth Amendment of the United States Constitution and under 42 U.S.C. §§ 1981 and 2000d. This Court has jurisdiction over this appeal from the district court's final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court properly find that Defendants had a strong basis in evidence to conclude that affirmative action was needed to meet compelling state interests and that the Law School's program, except for use of a minority subcommittee, was narrowly tailored to achieve these interests?

2. Did the district court err in holding that use of a minority subcommittee violated the Constitution?

3. Did the district court properly conclude that Plaintiffs were entitled to no relief beyond nominal damages?

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

The Brief of Appellants accurately describes the course of proceedings, but not the disposition in the district court. The district court did not hold, as Plaintiffs contend, that all of "defendants" admissions practices violated . . . the Fourteenth Amendment." Br. 3. Only "the law school's use of the separate evaluative processes for minority and nonminority applicants in the discretionary zone violated the Fourteenth Amendment." 551 F. Supp. at 582. The court held that "the aspect of the law school's affirmative action program giving minority students a `plus' is lawful." 551 F. Supp. at 578. The court noted its concerns with the use of different presumptive denial lines for minority and nonminority applicants, but because "none of the plaintiffs in this lawsuit was affected directly by this aspect of the 1992 procedure," the court found that it "need not address the issue." 551 F. Supp. at 576.

(ii) Statement of Facts

"Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute." *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993), *cert. denied,* 114 S. Ct. 878 (1994); *id.* at 915 (King, J., dissenting). The district court found that discrimination is nowhere more pervasive than in education, perhaps the most important obligation a state owes its citizens. **Op. 3-11.** Were it only true, as Plaintiffs assert, that "the official 'past discrimination' to which the court below referred is discrimination that ended decades ago." Br. 27. In fact, it was not until 1983 - just eight years before Plaintiffs applied to the University of Texas School of Law (Law School) - that Texas even agreed, under threat of federal action, to an acceptable plan to desegregate its higher education system, including the Law School.

In 1977, the District Court for the District of Columbia ordered the Office for Civil Rights (OCR) of the United States Department of Health, Education and Welfare (HEW) (now the Department of Education or DOE) to investigate discrimination in Texas' system of higher education. **Op. 7-8**; D296. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), modified and *aff'd*, 480 F.2d 1159 (D.C. Cir. 1973), *dism'd sub nom*. *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). [1] Following a two-year investigation, OCR found in 1980 that Texas had failed to eliminate the vestiges of its segregated higher education system and was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. OCR also found significant underrepresentation of Hispanics in state institutions of higher education and insisted that any desegregation plan include enrollment goals for Hispanics as well as blacks. 551 F. Supp. at 556.

[2]

Texas submitted the Texas Equal Education Opportunity Plan for Higher Education (Texas Plan), which included a general commitment to equal educational opportunity and student body desegregation for both black and Hispanic students. 551 F. Supp. at 556; D237. In 1982, Assistant Secretary of Education Clarence Thomas informed Governor William Clements that the Texas Plan was deficient because the numeric goals for black and Hispanic enrollment in graduate and professional programs were insufficient to enroll these minorities in proportion to their representation among graduates of the state's undergraduate institutions. 551 F. Supp. at 556; D284. Texas submitted a revised plan that OCR again rejected, in part because it did not set targets for increasing minority enrollment at *each* institution instead of on a statewide basis. 551 F. Supp. at 556; D219.

By March 1983, the *Adams* court would no longer tolerate Texas' foot-dragging. Finding that "Texas has still not committed itself to the elements of a desegregation plan which in [DOE's] judgment complies with Title VI," it ordered enforcement proceedings to begin unless Texas submitted a fully conforming plan within 45 days. 551 F. Supp. at 556; D446. In response, OCR recommended, among other measures, that each Texas professional school reevaluate its admissions criteria and "admit black and Hispanic students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." 551 F. Supp. at 556; D220. In June 1983, OCR accepted the revised Texas Plan. 551 F. Supp. at 556. As OCR required, the Texas Plan included the commitment to "seek to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs." D238a at 7.

In November 1987, DOE contacted Governor Clements regarding the Plan's expiration in 1988. DOE instructed Texas officials to continue to operate under the Plan while OCR evaluated whether further action would be necessary to bring Texas into compliance with Title VI. 551 F. Supp. at 556; D323. The district court found that Texas officials concluded that Texas had not met OCR's goals and that they therefore adopted a successor plan ("Plan II") to avoid a federal mandate to negotiate another plan. 551 F. Supp. at 557. In January 1994, DOE notified Governor Richards that OCR continued to oversee Texas' desegregation efforts and would review the Texas system in light of *United States v. Fordice*, 112 S. Ct. 2727 (1992). 551 F. Supp. at 557. To this day, DOE has yet to determine that Texas' higher education system has come into compliance with Title VI and the Fourteenth Amendment. *Id.*

In 1983, as Texas was resisting a higher education desegregation plan, Plaintiffs Elliott and Rogers were students at the University of Texas. 551 F. Supp. at 557; P153; P171.[3] Plaintiff Carvell was attending Texas public schools. P151. As the district court found, during the 1980s most Texas students lived in school districts that courts and the United States Department of Justice had determined were still unconstitutionally segregated. **Op. 52**; D434. Over 70% of blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans. 19 Tr. 43; D378B. Many school districts were found to practice official discrimination against Mexican-American as well as black students. 551 F. Supp. at 554. In 1983, this Court found that Ector County "actually increased the segregation in its schools of both Blacks and Mexican Americans" and that its "violation of the Constitution was not only clear but egregious." *United States v. Crucial*, 722 F.2d 1182, 1184-85, 1188 (5th Cir. 1983). That same year the Court concluded that Dallas public schools not only were still segregated, but had "opposed any student desegregation, no matter how feasible or how minimal." *Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983). Fort Worth still was not unitary. *Flax v. Potts*, 567 F. Supp. 859, 861 (N.D. Tex. 1983).[4] Today, 40 years after *Brown v. Board of Education*, 347 U.S. 483 (1954), federal and private desegregation lawsuits are still pending against at least 40 Texas school districts. 551 F. Supp. at 554 ; D457.

The district court found that Texas residents who applied for admission to the Law School in fall 1992 would have spent most, if not all, of their precollege education in a school system suffering the effects of unconstitutional segregation. Op. 52. Plaintiffs, for example, graduated from high school in 1980 (Elliott, P153), 1981 (Hopwood, P145), 1982 (Rogers, P171), and 1987 (Carvell, P151). The evidence at trial of expert educators and social scientists, as well as the testimony of minority students, established that Texas' segregated schools were not only separate, but savagely unequal. Op. 4, 5, 6; D422; 22 Tr. 49; 23 Tr. 37-42. The court found that official discrimination had "handicapped the educational achievement of many

minorities." 551 F. Supp. at 573 Because the State of Texas required that 85% of the Law School's 1992 entering class be Texas residents, the court found that inferior education opportunity particularly affected the Law School's pool of qualified minority applicants. Op. 27, 5051.

It was undisputed that without affirmative action, the Law School's 1992 entering class of 514 students would have included at most only 9 blacks (1.8%) and 18 Mexican Americans (3.6%). 551 F. Supp. at 573 ; D441; Appellees RE Tab 2. These numbers are highly optimistic. They assume that minorities offered admission would choose to attend the Law School at the same rates as with affirmative action, despite their assured isolation and despite the message that abandoning affirmative action would send to Texas' black and Mexican-American communities. As the district court found, abandoning affirmative action would have a devastating effect on the Law School's minority recruiting efforts and reinforce its reputation as a "white" school. 551 F. Supp. at 573-574.

Graduates from Texas' undergraduate institutions in 1992 were 6.2% black and 12.8% Mexican-American. D430; Appellees RE Tab 8. The general population of Texas is 11.9% black and 25.3% Hispanic. The State Bar of Texas includes only 3.1% blacks and 7.6% Hispanics. D490; Appellees RE Tab 10. They are severely underrepresented among candidates eligible to serve in Texas judicial posts. *LULAC v. Clements*, 999 F.2d at 893.

Texas' legacy of educational discrimination continues at Thurgood Marshall School of Law at Texas Southern University (TSU), originally created to avoid integrating the University of Texas and the Law School. 551 F. Supp. at 555. In 1993, 62% of all black law students attending one of Texas' public law schools attended TSU. This percentage has actually increased from 59% in 1984, when the Texas Plan took effect. It was undisputed that without affirmative action, few minorities would attend Texas' historically white law schools, and nearly 77% of minority law students (and almost 90% of black law students) would attend TSU, whose student body would be over 85% blacks and Mexican Americans. D453; D454; 12 Tr. 44-45; Appellees RE Tabs 4, 5; *see* 551 F. Supp. at 573.

Pursuant to the 1983 Texas Plan, the Law School's Admissions Committee sought to enroll blacks and Mexican Americans in proportion to their graduation rates from Texas undergraduate institutions. 551 F. Supp. at 560. The district court, reviewing the statistics and evaluating the credibility of Admissions Committee members, found that the Law School's targets are not rigid quotas, but "are aspirations only, subject to the quality of the pool of applicants." 551 F. Supp. at 563. Since 1983, the combined enrollment of black and Mexican-American students in the Law School's entering classes has ranged from a high of 20.5% in 1984 to a low of 13.4% in 1987. 551 F. Supp. at 574 ; D71; Appellees RE Tab 6.

The district court found that the pool of qualified resident minority applicants was depressed not only by Texas' unconstitutional public school system, but also by the University and Law School's reputation as a "white" institution with an environment hostile to minorities. 551 F. Supp. at 572. The court found that, despite extensive recruiting efforts including generous scholarships, the Law School's legacy of discrimination has hindered efforts to attract qualified minority students. 551 F. Supp. at 572.

During the 1980s, the limited pool of minority applicants forced the Admissions Committee to admit all black and Mexican-American candidates who, as OCR recommended, "demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." D220; 551 F. Supp. at 556. The Committee spent considerable time debating whether individual minority candidates "could do passing work at the law school." 551 F. Supp. at 559. By the end of the decade, however, the pool of minority candidates improved. Instead of continuing to admit all minority applicants thought capable of succeeding, the Committee opted to be more selective - "to have more excellent minority students . . . perhaps in more limited numbers that would still constitute reasonable representation." 24 Tr. 33-35; 551 F. Supp. at 560.

The full Committee, comparing the pools of minority and nonminority applicants, annually debated and determined the number of offers to make to minorities. It largely delegated to a subcommittee the task of reviewing individual files and recommending which qualified minorities should receive offers. Op. 1920. Admissions Committee members testified without contradiction that this procedure more tightly controlled the weight given to race in the admissions process and better protected the interests of nonminorities than the alternative of leaving the decision to the silent discretion of faculty members reviewing mixed stacks of

minority and nonminority files. 24 Tr. 9-15; 9 Tr. 3; 5 Tr. 27; *see* Op. 16, 61. Through its annual reassessment of race as an admissions factor, the Law School continues its quest, as one Committee member testified, "to decrease the gap [in credentials between minority and nonminority students], little by little if we have to, but one day to the point where . . . we can truly have a race-blind system of admission. We're not there." 9 Tr. 32; 551 F. Supp. at 575.

The admissions process for Texas residents in 1992 began with an initial sorting of applicants into three categories: presumptive admission, discretionary zone, and presumptive denial.[5] Students whose Texas Index (a weighted composite of LSAT and undergraduate GPA) was above a certain number were presumptively admitted. Approximately 10% of applicants whose scores placed them in the presumptive admission zone were moved down to the discretionary zone if Professor Johanson, the chair of the Admissions Committee, felt that the Texas Index (TI) was inflated by high grades in a weak major or at a weak school. 551 F. Supp. at 561. Applicants in the presumptive admission zone who were not moved into the discretionary zone were offered admission to the Law School. Applicants whose TI fell below a certain number were presumptively denied admission. Their files were reviewed by one or two members of the Admissions Committee, and if the committee member felt that the TI understated the applicant's potential, the applicant was moved up into the discretionary zone. Otherwise the applicant was denied admission. *Id.* In the discretionary zone, the files were reviewed by members of the Admissions Committee. These reviewers focused less attention on the applicant's numbers, as all were relatively close, and instead carefully evaluated the applicant's qualifications as reflected by the entire file. *Id.*

Plaintiffs Elliott, Carvell, and Rogers had TI scores that placed them in the discretionary zone. Hopwood was moved from the presumptive admission zone to the discretionary zone, because her TI was inflated by a high GPA in unchallenging courses at less rigorous undergraduate institutions. 551 F. Supp. at 564.[6]

The Law School implemented its affirmative action plan in 1992 in the following ways: the presumptive admission and presumptive denial lines were set lower for blacks and Mexican Americans than for nonminorities, and minority applicants in the discretionary zone were reviewed by the minority subcommittee under the guidance of the full Committee. Op. 23. Nonminority applicants were reviewed in groups of 30 by subcommittees of three members of the Admissions Committee. Subcommittee members were given a total number of votes for each group of 30. If two or three members voted to admit an applicant, he or she was offered admission. If one member voted to admit, the applicant was offered a place on the waiting list. Applicants receiving no votes were denied admission. 551 F. Supp. at 562. The minority subcommittee included Professor Johanson, Assistant Dean Laquita Hamilton, Assistant Dean Susana Aleman, and several student members of the Admissions Committee. This subcommittee reviewed minority files and provided the full Committee with a summary of files believed to be good candidates for admission. Op. 26. The minority subcommittee met with the entire Admissions Committee throughout the admissions process to keep the committee apprised of the relative strength of the minority and nonminority pools. *Id.* Thus, although other Admissions Committee members did not review individual minority files, they were made aware of the relative strength of the minority pool at the same time they were evaluating nonminority applicants. *Id.* Johanson, Hamilton, and the student members of the minority subcommittee also reviewed files of nonminority applicants. 551 F. Supp. at 562.

The court found that only the use of the separate minority subcommittee was unconstitutional. Op. 5961. Plaintiffs failed to prove that any of them would have been admitted in 1992 but for the minority subcommittee. Op. 72. The court compared Plaintiffs' files with minority and nonminority files Plaintiffs placed in evidence and found no striking differences. Op. 7273. In considering the admissions statistics of nonminority residents, the Court found that 10 applicants with TIs higher than Hopwood were denied admission, while 19 with the same TI as the other Plaintiffs were denied admission. 551 F. Supp. at 580. On the other hand, 109 nonminority residents with TIs lower than Hopwood, and 67 with TIs lower than the other three Plaintiffs, were offered admission. 551 F. Supp. at 581.

The Law School revised its admissions procedure prior to trial. Beginning with the 1995 entering class, neither presumptive denial or admission cut-off scores nor a separate minority subcommittee will be used, although race is still given a plus. Admissions decisions will be handled largely by administrative personnel under the guidance of Professor Johanson, with policy decisions made by the Admissions Committee. 551 F. Supp. at 582; D363.

SUMMARY OF THE ARGUMENT

The district court did not clearly err in finding that Defendants had a strong basis in evidence for concluding that affirmative action was necessary to achieve two compelling interests: (i) remedying the continuing effects of discrimination by the State of Texas in the education of blacks and Mexican Americans at all levels, and (ii) creating a diverse student body, whose benefits are especially compelling in legal education. The evidence was undisputed that without affirmative action the Law School would include at most 1.8% blacks and 3.6% Mexican Americans - numbers grossly disproportionate to their college graduation rates in Texas and insufficient to obtain the benefits of diversity. It was further undisputed that were Texas to abandon affirmative action at its public law schools, it would revert to a starkly dual system in which few minorities attend Texas' historically white law schools, and nearly 77% of minority law students attend Texas Southern University, which was specially created to avoid integrating the Law School.

The district court properly concluded, based on careful fact findings, that except for use of a minority subcommittee, the Law School's program was narrowly tailored to meet its compelling interests. Other recruiting measures proved insufficient to secure meaningful inclusion of blacks and Mexican Americans. Confining the admissions targets to blacks and Mexican Americans is tailored to remedying the effects of Texas' official discrimination in the education of these minorities. It furthers the diversity objective of preparing future lawyers, judges, and legislators of all races to deal effectively with Texas' two largest minority communities. The Law School's target of admitting blacks and Mexican Americans in proportion to their graduation rates at Texas' undergraduate institutions is reasonable. The Law School's program is neither inflexible nor unlimited in duration. Its targets are just that; they are not rigid quotas, and the Law School's success in reaching them has varied from year to year, depending on the applicant pool. The Law School re-examines annually the weight given to race in the admissions process, with a view toward the day it can be eliminated entirely. The impact on third parties is minimal and diffuse - far less than with hiring preferences. Texas denied none of the Plaintiffs a legal education; all who applied were offered admission to other state law schools.

The district court clearly erred in finding that the Law School's use of a minority subcommittee was not narrowly tailored. Under the 1992 procedure, minority files were reviewed by a subcommittee that reported to and was directed by the full Committee, which constantly reevaluated, openly debated, and determined the weight to be given to race in the admissions process. The unrefuted testimony of Admissions Committee members was that this process more tightly controlled consideration of race and better protected the interests of nonminorities than the alternative of leaving the decision to the discretion of individual faculty members reviewing stacks of mixed minority and nonminority files.

Because the district court found that Plaintiffs proved only a defect in the Law School's procedures and did not prove any concrete injury to themselves, it correctly awarded only nominal damages. The court found credible Defendants' evidence that in all likelihood these Plaintiffs would not have been admitted under a constitutional procedure. Plaintiffs failed to show any actual harm to anyone from the minority subcommittee and failed to distinguish themselves from the other 700 white applicants affected by the procedures the court faulted. Ordering the admission of these Plaintiffs to the Law School would create a windfall, and the district court did not abuse its discretion in declining to do so. The court likewise properly declined to award compensatory damages to Plaintiffs, whose proof on the amount of damages was deficient both factually and legally. The district court did not abuse its discretion in not enjoining the Law School's future use of a minority subcommittee, when the Law School had already adopted a new streamlined administrative procedure that eliminated the subcommittee. Finally, because the record reflected only Defendants' good faith in attempting to fulfill DOE's mandate to remedy the vestiges of Texas' discrimination and to create a diverse body of first-rate students at the Law School, the district court did not abuse its discretion in declining to assess punitive damages.

STANDARD OF REVIEW

In the press, Plaintiffs' lawyers have vilified the district court and its opinion. *See* Hopwood: `A Perfect Mess of an Opinion', TEX. LAW., Nov. 7, 1994, at 4. In their brief, they tell this Court to give the opinion no weight, but to decide the case de novo. Br. 13. This is wrong. Although the law applied by the district court is reviewable de novo, its extensive findings of fact "shall not be set aside unless clearly erroneous." FED.

R. CIV. P. 52(a); *Sockwell v. Phelps*, 20 F.3d 187, 190 (5th Cir. 1994). The district court's decision not to grant an injunction or punitive damages is reviewed for abuse of discretion. *Lubbock Civil Liberties Union v. Lubbock Ind. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982) (injunction); *Sockwell*, 20 F.3d at 192 (punitive damages for civil rights violations).

ARGUMENT

I. THE LAW SCHOOL'S AFFIRMATIVE-ACTION PLAN IS NARROWLY TAILORED TO MEET COMPELLING GOVERNMENTAL INTERESTS.

The district court held that the Law School's affirmative action plan must be subjected to strict judicial scrutiny under *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989). It determined that the plan must therefore serve "a compelling governmental interest" and be "narrowly tailored to the achievement of that goal." 551 F. Supp. at 569 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)); *see Edwards v. City of Houston*, 37 F.3d 1097, 1112 (5th Cir. 1994). The Law School's plan meets that test.[7]

A. The Plan Meets Compelling Governmental Interests .

1. Texas' Compelling Interest in Remedying Past Discrimination and Eliminating the Vestiges of its Segregated Education System

"The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise*, 480 U.S. 149, 167 (1987). "[T]he trial court must make a factual determination that the [defendant] had a strong basis in the evidence for its conclusion that remedial action was necessary." *Edwards*, 37 F.3d at 1113 (quoting *Wygant*, 476 U.S. at 277-78). The district court made such a factual determination, based on the continuing effects of discrimination by the State of Texas in the education of blacks and Mexican Americans at all levels, including the University of Texas and the Law School. Op. 4751.

Defendants were not required to prove the continuing effects of discrimination with the same certainty as a plaintiff in a civil rights action against the State. *See Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) (challenge to affirmative action plan "does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination" and the court is not required to "make an actual finding of prior discrimination . . . before the . . . affirmative action plan will be upheld"). A "prima facie case" suffices. *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 274-75. This standard of proof not only recognizes that the plaintiff alleging discrimination ultimately bears the burden of proving his or her case, *Wygant*, 476 U.S. at 277-78; *Edwards*, 37 F.3d at 1113, it is also intended not to "unduly discourage voluntary efforts to remedy apparent discrimination." *Johnson v. Transportation Agency*, 480 U.S. 616, 640 (1987); *Id.* at 652 (O'Connor, J., concurring); *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring).

The "strict scrutiny" and "strong basis in evidence" standards are also designed to "smoke out" and prohibit improper "racial politics." *Croson*, 488 U.S. at 493. This case does not remotely resemble *Croson*, in which minority contract set-asides were enacted by a city council dominated by minorities. 488 U.S. at 495. The Law School's affirmative action plan was adopted by a faculty that was and remains overwhelmingly white, 21 Tr. 3, and the plan was intended to implement desegregation goals negotiated between the Reagan Administration DOE and the State of Texas under the administration of Governor William Clements.

Plaintiffs' principal argument is that Texas' discrimination in higher education ended so long ago that it could not still have effects that justify any affirmative action at the Law School. Unfortunately, "Texas' long history of discrimination against its black and Hispanic citizens" is not a relic of the distant past. When Texas, as late as 1983, resisted adoption of a plan to eliminate the vestiges of its segregated higher education system, it not only violated Title VI, but "remained[ed] in violation of the Fourteenth Amendment." *Fordice*, 112 S. Ct. at 2735. In *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), the court addressed affirmative action taken in Arkansas as a result of the Adams litigation.

> [T]he issue of whether the findings of past discrimination made by the District of Columbia District

court and HEW were adequate to justify a race-conscious remedy is not even close. Findings of previous statutory violations of Title VI by a district court and OCR justify the use of some type of race-conscious remedy by a state to serve its constitutionally permissible objective of remedying past discrimination.

654 F.2d at 509.

Plaintiffs erroneously assert that the OCR investigation and plan did not include the Law School. As the district court found, OCR insisted upon Texas' commitment to admit black and Hispanic students to Texas professional schools in proportion to their graduation rates from Texas undergraduate institutions and to adopt that goal at each institution, rather than on a statewide basis. Op. 9, 10. As the Plan approached its June 1988 expiration (less than four years before Plaintiffs applied to the Law School), Governor Clements was notified that "OCR will conduct on-site reviews at all institutions covered by the plan to determine the extent to which each institution has implemented the measures contained in the plan and whether progress toward desegregation has been made." D323 (emphasis added).

The district court also found that Texas has discriminated in the education of blacks and Mexican Americans in primary and secondary schools, and that the effects of that discrimination continue to impact the Law School's pool of minority applicants. Op. 45. Plaintiffs do not dispute the fact of Texas' official discrimination in the education of blacks and Mexican Americans in public schools, nor on appeal do they dispute its continuing effects.[8] Rather, they dismiss it as "amorphous societal discrimination" unrelated to the "governmental unit involved" in this case. Br. 28-29. This position is unsupported by history, law, or the record.

The lead Defendant is the State of Texas. It is the governmental unit whose affirmative action and discrimination in public education is under scrutiny. A single provision of the Texas Constitution mandated separate schools at all levels. TEX. CONST. art. VII, § 7 (1876, repealed 1969).[9] It was the fundamental law of the State of Texas, not the Law School's admissions requirements, that barred Heman Sweatt. *Sweatt v. Painter*, 210 S.W.2d 442, 443 (Tex. Civ. App. - Austin 1948, writ ref'd), rev'd, 339 U.S. 629 (1950). It was the State of Texas that was found to have engaged in official discrimination against blacks and Mexican Americans throughout its public school system. It was the State of Texas that ultimately negotiated with OCR the desegregation goals the Law School's affirmative action seeks to implement.

Nor did the district court rely on "amorphous societal discrimination" in its findings on Texas' discrimination against blacks and Mexican Americans in primary and secondary schools. The record focused on only unconstitutional official segregation, as found by this Court, federal district courts in Texas, and the United States Departments of Justice and Education. Op. 411. Defendants' evidence was not limited to events in Texas' distant past, but traced the continued discrimination in Texas public education up to the day trial began.

In *Croson*, the Court rejected as "too amorphous" defendant's invocation of findings of discrimination "in the construction industry nationally" to justify local contract set-asides, when "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry." 488 U.S. at 499500 (original emphasis). Plaintiffs misplace reliance on Justice O'Connor's dictum comparing Richmond's position to "the claim that discrimination in primary and secondary schools justifies a rigid racial preference in medical school admissions." *Id.* at 499. *Bakke* did not hold as a matter of law that a state's discrimination in its public school system cannot justify affirmative action in its professional school admissions policies. Rather, as in *Croson*, a majority found the proof of discrimination "on this record" too meager and too general to support remedial racial quotas at Davis Medical School. *University of California Regents v. Bakke*, 438 U.S. 265, 296 n.36 (1978) (Powell, J.) (original emphasis). Davis basically declined to produce evidence of discrimination at trial, *see id.* at 309, and California lacked Texas' legacy of pervasive discrimination in its education system. This left the justices who supported the asserted remedial interest nothing on which to rely but a general history of discrimination. *See id.* at 387-98 (Marshall, J.) (recounting the 350-year history of blacks in the United States); *id.* at 372 (Brennan, J.) (noting that minority applicants to Davis may have grown up in Southern states with segregated schools). Thus, as Justice O'Connor recounted in *Croson*, "Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions."

488 U.S. at 496. Here, unlike *Bakke* or *Croson*, the substantial evidence of discrimination was particularized to Texas, to unconstitutionally segregated education, and to its effects on the pool of resident applicants to the Law School in 1992.

In employment contexts, courts have recognized that discrimination at one level of the job market may affect the qualified pool at another level. *United Steel Workers v. Weber*, 443 U.S. 193, 198-99 (1979); *see Johnson*, 480 U.S. at 651 (O'Connor, J., concurring). This is no less true in public education. As the court explained in *Geier v. Alexander*, 801 F.2d 799, 80910 (6th Cir. 1986), in upholding affirmative action that included minority set-asides at the University of Tennessee Law School:

> Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted, they ordinarily must have been students for sixteen years. . . .
>
> The consent decree in this case does not seek to remedy some amorphous "societal" wrong. It is directed solely at the continuing effects of past practices that adversely affected black[s] as they moved through the public school systems and the higher education systems of the State. [10]

Against this background, the district court did not clearly err in finding that Defendants had a strong evidentiary basis for believing that remedial action is still necessary, because of the severe underrepresentation of minorities at the Law School and its continuing reputation as a "white" school with a hostile environment for minorities. 551 F. Supp. at 572.

Student enrollment statistics are the "critical beginning point" for determining whether the effects of discrimination in education continue. *Freeman v. Pitts*, 112 S. Ct. 1430, 1437 (1992). Significant statistical disparities in student enrollment can provide a strong basis for inferring past discrimination or demonstrating its continuing vestiges. A gross disparity itself may suffice, *see Croson*, 488 U.S. at 501 (*citing Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977)); *Hazelwood*, 433 U.S. at 307-08 & n.14 (gross statistical disparities alone may constitute prima facie proof of employment discrimination), and it may be presumed that continued minority underrepresentation at historically white schools is caused by prior official discrimination. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537-38 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971). Without affirmative action, the Law School would enroll only 1.8% blacks and 3.6% Mexican Americans. This is grossly disproportionate when they constitute 6.2% and 12.8% of the graduates from Texas' undergraduate institutions.

The district court's findings on the Law School's lingering reputation as a "white" school and on the perception of the Law School as having a hostile environment for minorities bolster the presumption raised by the numbers that Defendants had a strong basis for concluding that affirmative action is still needed to eliminate the vestiges of discrimination. 551 F. Supp. at 572. The factors must be considered together. *See Freeman*, 112 S. Ct. at 1449 ("[t]wo or more Green factors may be intertwined or synergistic in their relation"); *id.* at 1455 (Souter, J., concurring) (one vestige of discrimination may "act as an incubator" for other forms of resegregation); *id.* at 1457 (Blackmun, J., concurring) (racial identifiability affects family decisions, leading to further segregation).

An institution's negative reputation, based on a history of discrimination, will perpetuate minority underrepresentation long after discriminatory practices are abandoned. *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 449 (1986) (affirmative relief may be warranted after discriminatory conduct ceases because "[a]n employer's reputation for discrimination may discourage minorities from seeking available employment").[11] Texas may take action to increase minority representation at the Law School if its history of discriminatory "conduct was a `contributing cause' of the racially identifiable school[s]." *Freeman*, 112 S. Ct. at 1457 (Blackmun, J., concurring). The district court, evaluating the testimony of present and former faculty and administrators at the Law School and the University, as well as current and recently graduated students, found that the Law School still suffers a negative reputation that affects its ability to recruit and enroll minorities. 551 F. Supp. at 572. That reputation emanates not only from history books, but also from recent events evidencing continued racial hostility at the University and the Law School. *Id.* Moreover, the fact that Texas' legacy of discrimination is of such infamy to be the subject of history books[12] simply underscores the affirmative effort that Texas must make to overcome the vestiges of its past. *See Fordice*, 112 S. Ct. at 2736. Plaintiffs' argument that affirmative action is impermissible at the Law

School because it no longer actively discriminates against blacks and Mexican Americans (Br. 25) leads to this paradox: only an institution that continues to discriminate against minorities may pursue affirmative action to remedy that discrimination. Such nonsense reveals Plaintiffs' true position that affirmative action based on racial preferences is simply unconstitutional per se, a position for which they offered no legal support. *See* 551 F. Supp. at 582.

"Today, education is perhaps the most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).[13] States therefore have an especially compelling interest in remedying the effects of past discrimination in their education systems. *Fordice*, 112 S. Ct. at 2735; *see Croson*, 488 U.S. at 524 (Scalia, J., concurring) (distinguishing school desegregation cases from employment set-asides); *Hammon v. Barry*, 813 F.2d 412, 421 n.18 (D.C. Cir. 1987) (distinguishing employment set-asides from "the unique and sensitive area of education" and "the government's fundamental interest in education" that may "support the use of racial considerations"), *cert. denied*, 486 U.S. 1036 (1988). Indeed, states that operated officially segregated systems of higher education have a broad affirmative duty under both the Fourteenth Amendment and Title VI to dismantle those systems. *Fordice*, 112 S. Ct. at 273537. That duty is not satisfied merely by adopting race-neutral policies. Rather, the state must take affirmative steps to ameliorate practices and policies that perpetuate the dual system. *Id.* at 2736. That constitutional duty may require a state either to eliminate or to counteract and minimize to the extent possible strict reliance on test scores that effectively segregate white and minority students. *Id.* at 2738-39; *id.* at 2744 (O'Connor, J., concurring).

Without affirmative action, the Law School comes perilously close to the Supreme Court's warning in *Fordice*. First, the district court found that, as in *Fordic*e, strict reliance on TIs would have unquestioned segregative effects:

> Had the law school based its 1992 admissions solely on the applicants' TIs without regard to race or ethnicity, the entering class [of 514] would have included, at most, nine blacks and eighteen Mexican Americans.

551 F. Supp. at 571; *see Fordice*, 112 S. Ct. at 2739 ("[w]ithout doubt, these requirements restrict the range of choices of entering students as to which institution they may attend in a way that perpetuates segregation"); *Knight v. Alabama*, 14 F.3d 1535, 1541 (11th Cir. 1994) (maintenance of more stringent admissions for historically white institutions than for historically black institutions has the effect of discouraging or preventing blacks from attending historically white institutions).

> Second, the district court found:
>
> The ultimate effect of abandoning affirmative action at the law school would be to redirect minorities to the historically separate state law school at Texas Southern University, thereby resegregating the law school.

551 F. Supp. at 573. TSU, which was created to avoid integrating The University of Texas and the Law School (and is still called "The House That Sweatt Built"), today enrolls over half of all minority law students in Texas. Its student body is nearly 75% minorities. The evidence was undisputed that if Texas abandons affirmative action at its state law schools, it will return to a starkly dual system of legal education. Few minorities would attend the historically white law schools, while 77% of minority law students in Texas would attend TSU, whose student body would be 85% blacks and Mexican Americans. 12 Tr. 44-45; D452; D453.

This Court need not decide whether, under these circumstances, Texas and the Law School are constitutionally required to "counterac[t] and minimiz[e] the segregative impact" of strict reliance on TIs as an admissions criterion. *Fordice*, 112 S. Ct. at 2744 (O'Connor, J., concurring). Certainly nothing in *Fordice* nor in United States v. Louisiana, 9 F.3d 1159 (5th Cir. 1993), suggests, as Plaintiffs argue, that the Constitution forbids Texas from voluntarily taking steps to prevent resegregation of its law schools. It would be as if the Supreme Court instructed Mississippi it could not constitutionally admit any blacks to Ole Miss with ACT scores lower than whites denied admission.[14] "More importantly, [Defendants] had a strong basis in evidence to conclude that remedial action was necessary." *Edwards*, 37 F.3d at 1113 (*emphasis*

added).

2. Texas' Compelling Interest in Diversity at the Law School

The district court held (and Plaintiffs conceded) that under *Bakke*, seeking the educational benefits that flow from a diverse student body is a compelling governmental interest that justifies the Law School's affirmative-action program. Op. 4447. The district court properly declined Plaintiffs' invitation to repudiate *Bakke*.[15]

The fundamental interest in educational diversity was recognized long before Justice Powell wrote in *Bakke*. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (one of "the four essential freedoms" of a university, necessary "to provide that atmosphere which is most conducive to speculation, experiment, and creation" is "to determine for itself on academic grounds . . . who may be admitted to study") (citations omitted); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("school authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements"). In *Metro Broadcasting*, a majority of the Court agreed that "a diverse student body contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated." 497 U.S. at 568 (internal quotations omitted); *id.* at 60102 (Stevens, J., concurring) (noting the "unquestionably legitimate" interest in "diversity in the student body of a professional school"). Diversity in higher education is recognized as a compelling interest by those who reject it in other contexts. Compare *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) ("a state interest in the promotion of racial diversity has been found sufficiently `compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest") with *Metro Broadcasting*, 497 U.S. at 614 (O'Connor, J. dissenting) (disagreeing with extending it to broadcasting).

At trial, Defendants presented abundant evidence supporting the district court's findings on the benefits of diversity in the Law School classroom. *See* 551 F. Supp. at 571. Indeed, the ABA and American Association of Law Schools each require commitment to diversity in the student body as a prerequisite for membership or accreditation. 18 Tr. 26-28; D387; D389; D391; D395. Diversity is an especially compelling interest in legal education. No other discipline deals so fundamentally with the ordering of human relationships in our society, including racial and ethnic minorities who have been subjected to discrimination:

> [A]lthough the law is a highly learned profession, we are all aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the institutions and individuals with which the law interacts.

Sweatt v. Painter, 339 U.S. at 634; cf. *Croson*, 497 U.S. at 602 (Stevens, J., concurring) (noting public interest in integrated police force); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979) (need for racially diverse police force to deal with diverse population), *cert. denied*, 452 U.S. 938 (1981); *Talbert v. City of Richmond*, 648 F.2d 925, 928 (4th Cir. 1981) (same), *cert. denied*, 454 U.S. 1145 (1982).[16]

B. The Plan is Narrowly Tailored.

The Supreme Court has identified four factors for determining whether an affirmative-action program is "narrowly tailored" to further compelling state interests: (1) the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship between the program's numerical goals and the percentage of minorities in the relevant population; and (4) the impact of the program on the rights of innocent third parties. *Edwards v. City of Houston*, 37 F.3d 1097, 1113 (5th Cir. 1994) (*citing Paradise*, 480 U.S. at 17185). The district court found the Law School's affirmative-action program narrowly tailored, except for use of a separate minority subcommittee.

1. Efficacy of Alternative Remedies

The district court found that Defendants could not have accomplished their compelling purposes just as well

by means that were either completely race-neutral or made less extensive use of racial classifications. Op. 53; *see Croson*, 476 U.S. at 280 n.6. The court found that the Law School's extensive minority recruiting efforts, including generous scholarships, were insufficient to achieve meaningful representation of blacks and Mexican Americans. As in *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1558 (11th Cir. 1994), despite "extensive recruitment and outreach programs," selection based strictly on test scores would result in severe underrepresentation. Such token inclusion of blacks and Mexican Americans is insufficient to fulfill the Law School's duty to remedy past discrimination and fulfill OCR's desegregation mandate. Op. 55. Nor could the benefits of diversity be achieved with so few minorities, who would find themselves isolated and inhibited to speak out on controversial issues. 551 F. Supp. at 573; 9 Tr. 19; 22 Tr. 20-22; 18 Tr. 20; 17 Tr. 24-25. Plaintiffs fault Defendants for limiting the program to blacks and Mexican Americans, if true diversity is the interest. Br. 21. The record is clear that the Law School does give consideration to other racial and ethnic minorities, as well as to applicants' other attributes contributing to diversity. 1 Tr. 69-70; 4 Tr. 47-48; P47 at 3; P145; *see* 551 F. Supp. at 564 To be narrowly tailored to Texas' remedial interest, however, the admissions goals must be limited to the minority groups that have been victims of Texas' official discrimination in education. *See Croson*, 488 U.S. at 506 (Richmond's contract set-aside program not narrowly tailored because it included Orientals, Indians, Eskimos, and Aleuts.)[17] Further, *see*king more than trivial representation of blacks and Mexican Americans at the Law School furthers the diversity objective of preparing future lawyers, judges, and legislators of all races to deal effectively with Texas' two largest minority communities. *See Sweatt v. Painter*, 339 U.S. at 634.

2. Flexibility and Duration of the Relief

The district court found that the Law School maintained no racial quotas or set-asides. Op. 5657. Instead, the Law School's affirmative action plan simply established a "flexible goal" to be used as a benchmark for gauging the success of its efforts to eliminate discrimination. *Id.*; *Sheet Metal Workers*, 478 U.S. at 47778 (plurality); see *id.* at 48788 & n.4 (Powell, J., concurring). This case is nothing like *Bakke*, where Davis Medical School set aside exactly 16 out of 100 seats for minorities. Nor is there a "last seat" for which race may be the sole determining factor. 551 F. Supp. at 574; D445; Appellees RE Tab 6. This case also differs from *Croson*, where the city council required contractors to set aside exactly 30% of their subcontracts for minority-owned businesses. Between 1983 and 1993, enrollment of black students in entering classes ranged from 3.2% in 1987 to 9.3% in 1983 and was 8.0% in 1992. 551 F. Supp. at 574. Enrollment of Mexican-American students ranged from 10.0% in 1983 and 1993 to 14.3% in 1984 and was 10.7% in 1992.[18] *Id.* The plan does not require the admission of any unqualified minority students. *See Edwards*, 37 F.3d at 1114. Indeed, in 1992, the median LSAT score for minority students admitted to the Law School was in the top 25% of all persons taking the LSAT. D433.

The Court considered not just these statistics, but also the testimony of Admissions Committee members that the Law School's targets, though set by OCR, are "aspirations only, subject to the quality of the pool of applicants," 551 F. Supp. at 563, and that the goals were not met in some years because of the relatively weak minority applicant pools, 551 F. Supp. at 574. The district court did not clearly err in finding that the Law School's affirmative-action plan set flexible goals and did not impose a strict racial quota.

The district court also found that the Law School's plan is designed as a temporary measure to last only as long as is reasonably necessary to eliminate the effects of the particular discrimination it is designed to redress. Op. 57. *See Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring). It is not "timeless in [its] ability to affect the future." *Croson*, 488 U.S. at 498 (plurality). Although the Law School has not set a date for the termination of its affirmative-action plan, the court found that the Law School has continually adjusted and refined the plan so that, rather than continuing to increase the number of minority students admitted, the "gap" between the credentials of the minority students and the nonminority students is narrowed and eventually closed, with the ultimate goal that no consideration of race will be required. Op. 57 & 551 F. Supp. at 575. *See Johnson*, 480 U.S. at 639-41 (upholding plan with "no explicit end date," where weight given to race and gender was subject to annual adjustment). Each year the Committee determines the weight it will give race in admissions decisions, based on the number and the relative strengths of minority and nonminority applicants. The credentials of minority students at the Law School are significantly better than they were in the early 1980s. They are roughly equivalent to those of nonminority law students just a generation ago. Op. 58 & 551 F. Supp. at 575; D433. Although the gap is narrowing, it is not yet closed. Op. 57 & 551 F. Supp. at 575. Moreover, the state remains under

investigation by the OCR, which has not yet determined that Texas has eliminated the vestiges of its formerly dual system of higher education. 551 F. Supp. at 556. The district court did not clearly err in finding it reasonable for Defendants to continue an affirmative-action plan until the federal government, through the OCR, determines that Texas has eliminated those vestiges. Op. 58.

3. Relationship of Goals to Relevant Population

The district court found that the Law School's goal for minority representation was reasonably related to the percentage of minorities in the relevant pool of eligible candidates. 551 F. Supp. at 575. *See Paradise*, 480 U.S. at 187 (Powell, J., concurring). This goal is narrowly tailored because it does "not substantially exceed the percentage of [eligible] minority group members in the relevant population." *Paradise*, 480 U.S. at 19899 (O'Connor, J., dissenting). Pursuant to the OCR mandate, the Law School has sought "to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such schools." D238a at 7; 551 F. Supp. at 556. In 1992, blacks earned 6.2% of all bachelor degrees awarded by Texas public colleges and universities, while Mexican Americans earned 12.8% of all bachelor degrees. D470; Appellees RE Tab 8; D430. The student body at the Law School in 1992 included 7.3% blacks and 11.1% Mexican-Americans. Tying minority enrollment goals to the population of minority college graduates is sufficiently related to the relevant population to achieve the goal of diversity and adequately redress past discrimination by Defendants, particularly in light of Texas' discrimination against blacks and Mexican Americans at other levels of its education system. *See Weber*, 443 U.S. at 19899.

4. Impact on Third Parties

The district court found that the Law School's affirmative action plan, with the exception of the use of the separate minority subcommittee for evaluation of files in the discretionary zone, did not "impose an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182 (plurality); *see Fullilove*, 448 U.S. at 51415 (Powell, J., concurring). The Supreme Court has upheld affirmative action plans that burdened innocent individuals to some degree where those burdens were "relatively light" and "diffuse" ones "that foreclose[d] only one of several opportunities" and did not result in "serious disruption" of their lives or "settled expectations." *See Johnson*, 480 U.S. at 638; *Fullilove*, 448 U.S. at 484 (Burger, J.); *id.* at 515 (Powell, J., concurring); *Sheet Metal Workers*, 478 U.S. at 479 (plurality); *id.* at 488 (Powell, J., concurring); *Paradise*, 480 U.S. at 18283 (plurality); *id.* at 18889 (Powell, J., concurring).

Neither the "plus" given minorities nor the minority subcommittee imposed an "absolute bar" to admission of qualified nonminorities. Indeed, the Law School accepts nonminority applicants at a higher rate than it does minority applicants. In 1992, the Law School offered admission to 32.8% of all nonminority residents who applied, but to only 17.9% of black resident applicants and 25.9% of Mexican-American resident applicants. D444; Appellees RE Tab 7.

In the employment context, courts have recognized that third parties are far less burdened by affirmative action plans that rely on hiring goals rather than layoffs. *Johnson*, 480 U.S. at 638; *Weber*, 443 U.S. at 208. *See Paradise*, 480 U.S. at 183 (plurality); *Peightal,* 26 F.3d at 156162. Preferences in higher education admissions have significantly less impact than they do in employment decisions. *Geier*, 801 F.2d at 806. They do not distort economic markets. Unlike hiring and firing in stagnant sectors of the economy, admission to law school is not a "zero sum game." Fleming, PURSUING DIVERSITY IN LEGAL EDUCATION, 36 HOW. L.J. 291, 294-96 (1993). The record here proves the point. None of these Plaintiffs was denied a legal education by the State of Texas. All who applied were accepted at other Texas law schools.[19] "A state or local government may constitutionally require nonminorities to share the burden of remedying the effects of past identified discrimination." *Croson*, 37 F.3d at 1114 (citing *Fullilove*, 448 U.S. at 484). The burden here is minimal and clearly outweighed by Texas' compelling interests.

The district court concluded that only the use of the separate minority subcommittee imposed an unacceptable burden, because it might not allow for individual comparison of nonminority applicants in the discretionary zone with minority applicants in the discretionary zone. Op. 74-76. The court expressed its concern that the minority subcommittee created "the possibility . . . that the law school could select a

minority, who, even with a `plus' factor, was not as qualified to be a part of the entering class as a nonminority denied admission." 551 F. Supp. at 578. The evidence showed, however, that the minority subcommittee allowed the Law School to exercise greater control over the use of race as a plus factor to avoid the very outcome the district court feared. Without the controls imposed by the subcommittee, individual reviewers would be free to give whatever weight they chose to factors such as race or ethnicity.[20] The minority subcommittee, on the other hand, avoided such an outcome by allowing the full Committee to consider openly the relative strengths of minorities and nonminorities, decide what weight to give race, and admit only the best qualified minorities. 9 Tr. 37; 24 Tr. 1015. The subcommittee was thus a more narrowly tailored procedure than that suggested by OCR - the admission of minority students "who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." D220; 551 F. Supp. at 556. The record was clear that under the Committee's tight control, the subcommittee admitted no "unqualified minority in preference of a qualified nonminority." 5 Tr. 18; 24 Tr. 35; 20 Tr. 17, 63. *Croson*, 37 F.3d at 1114.

Nothing in *Bakke*, including Justice Powell's opinion, makes individual comparison of files a constitutional precondition to affirmative action in admissions decisions. Justice Powell found diversity the only compelling interest that justified affirmative action at Davis. His views on comparing individual files flow from his narrow focus on diversity, "which encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is a single though important element." 438 U.S. at 315. Even Justice Powell distinguished *Bakke* from cases in which affirmative action is used to remedy past discrimination. *Id.* At 307. In such cases, lack of direct comparison between individual nonminority and minority candidates is not fatal to the plan's constitutionality. *See Peightal*, 26 F.3d at 1559; Geier, 801 F.2d at 806 (affirming set-aside of 75 professional school seats). Particularly given the deference due to admission decisions at higher education institutions, *see Odom v. Frank*, 3 F.3d 839, 848 (5th Cir. 1993), a remedial program found otherwise narrowly tailored should not be subjected to such micromanagement. As in *United States v. City of Alexandria*, 614 F.2d 1358, 1366 (5th Cir. 1980), the court need not "protect the territory" of individual comparison "so zealously." To successfully walk the "tightrope" of competing interests in managing an affirmative action plan, Defendants "must have enough play to afford [them] some control." *Id.*

II. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' REQUESTED RELIEF.

As presented by Plaintiffs' brief, three of the four issues facing this Court concern the district court's denial of their requested relief. If, as Defendants have demonstrated, the use of the minority subcommittee was narrowly tailored to achieve Defendants' compelling purposes, then Defendants prevail and no issues concerning relief are presented to this Court. *See Levene v. Pintail Enters., Inc.*, 943 F.2d 528, 534 (5th Cir. 1991) (this Court can affirm the judgment on any appropriate ground), *cert. denied*, 112 S. Ct. 2274 (1992).

Even assuming this aspect of the Law School's affirmative action plan was unconstitutional, however, the district court correctly denied the relief requested by Plaintiffs. A plaintiff showing a procedural constitutional violation can "recover compensatory damages only if he proved actual injury caused by the denial of his constitutional rights." *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (*citing Carey v. Piphus*, 435 U.S. 247, 264 (1978)). *Carey* held that the common law of torts governs the award of compensatory damages in a Section 1983 action. Thus, Plaintiffs must prove not only that their constitutional rights were violated, but also that the violation caused the injury for which they seek compensation. *Carey*, 435 U.S. at 25465. In the absence of such proof, only nominal damages may be awarded. *Id.* at 26667. The district court here found that the Law School's use of the minority subcommittee did not cause injury to any Plaintiff. Plaintiffs are not entitled to damages, an injunction, or admission to Law School because they failed to demonstrate "concrete injury . . . effected by the very fact of unlawful government action." Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U.L. REV. 881, 895 (1983).

Although unnecessary under *Carey*, the district court applied the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). Under this scheme, when a plaintiff establishes a prima facie case of racial discrimination, the burden shifts to the Defendant to produce evidence that the challenged actions were taken for a "legitimate, nondiscriminatory reason." *St. Mary's*, 113 S. Ct. at 2747. Defendants met that burden.

Therefore, the McDonnell Douglas presumption "simply drops out of the picture." *Id.* at 2749. The "ultimate burden of persuasion" remains at all times with the plaintiff. [21] Moreover, although the court was not required to assess Defendant's credibility for the presumption to "drop out," the court here specifically found that Defendant's evidence was credible. Op. at 74.

The district court found that Defendants "met the burden of producing credible evidence that legitimate, nondiscriminatory grounds exist for the law school's denial of admission to each of the four Plaintiffs and that, in all likelihood, the Plaintiffs would not have been offered admission even under a constitutionally permissible process." Op. 74. The court considered evidence that 10 nonminorities with TIs higher than Hopwood's TI were denied admission, and that 19 nonminority applicants with the same TI as the other three Plaintiffs were denied admission. 551 F. Supp. at 580; P139. Similarly, 109 nonminority residents with TIs lower than Hopwood's TI were offered admission, and 67 nonminority residents with TIs lower than that of the other three Plaintiffs were admitted. 551 F. Supp. at 581; P139. In addition, the court reviewed Plaintiffs' files as well as files of other minority and nonminority applicants that were placed in evidence by Plaintiffs. The court found that none of the applicants whose files were reviewed were "so clearly better qualified . . . as to require that individual's selection over that of another in the group." 551 F. Supp. at 581. Indeed, the court found that of all the applications reviewed, "Hopwood's provides the least information about her background and individual qualifications and is the least impressive in appearance." 551 F. Supp. at 581. This Court has written that "unless disparities . . . are so apparent as virtually to jump off the page and slap [them] in the face . . . judges should be reluctant to substitute [their] views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field." *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993). The district court did not clearly err in these findings.

Plaintiffs' failure to prove that the use of the minority subcommittee was the cause of their denial of admission to the Law School defeats their claim for the requested relief. Awarding relief by focusing "not on compensation for provable injury, but on the . . . subjective perception of the importance of constitutional rights as an abstract matter . . . is impermissible." *Stachura*, 477 U.S. at 308. "It goes without saying that . . . damage must compensate for actual harm, not just for the intangible value of a constitutional right." *Henschen v. City of Houston*, 959 F.2d 584, 588 (5th Cir. 1992).[22] Where, as here, Plaintiffs failed to prove actual injury, the only permissible award is nominal damages.

A. The District Court Properly Denied Prospective Injunctive Relief.

The district court's denial of Plaintiffs' request for prospective injunctive relief was well within its discretion. *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983). Plaintiffs argue that without an injunction they would be required "to submit to constitutionally dubious practices by parties committed to constitutionally impermissible goals." Br. 31. This assertion is without support in the record. The district court found that the Law School's new admissions procedure "on paper and from the testimony" remedied any defect found in the 1992 admissions process. 551 F. Supp. at 582. This finding is supported by testimony that the new admission procedures for the 1995 entering class do not include a minority subcommittee or differential Texas Index cut-off scores to sort minority applications. D363; 6 Tr. 29, 3134.

The district court's articulation of three reasons for denying the injunction supports its exercise of discretion. First, the district court found that Plaintiffs failed to prove that the constitutional defect was the cause of their denial of admission, and therefore any injunction concerning the constitutional defect found by the district court could not benefit Plaintiffs. Op. 75. Second, the Court found that prospective relief was unnecessary because the Law School has already abandoned the only constitutional defects found by the court, and the Defendants currently are in full compliance with the district court's decision. Op. 7576. Any injunction would, therefore, be meaningless. Third, as the Plaintiffs admit in their brief, the court found that "practical application of the new procedure" was not before it. 551 F. Supp. at 582; Br. 31. Accordingly, any injunction would be speculative.

This case falls squarely within the holding of *Lubbock Civil Liberties Union*. There the district court found "that the past practices it declared unconstitutional had ceased, that no complaints had been received about the new policy and that the school district would make a good faith effort to enforce this new, and in

the trial court's view, constitutional policy." 669 F.2d at 1049. In upholding the denial of an injunction, this Court found that the district's court's findings were "not clearly erroneous" and were within the "broad discretion . . . to make a decision based on [the district court's] evaluation of the evidence." *Id.* (citation omitted). In light of the broad discretion granted the trial court, this Court would "not replace [its] judgment for that of the trial court." *Id.* The district court's findings here should be accorded the same deference.[23] The court not only reviewed the new policy, but also evaluated the credibility of the witnesses who testified about the Law School's practices. The court's determination that Defendants would make a "good faith effort" to enforce a constitutional policy is based on the court's evaluation of that evidence and is not clearly erroneous.

B. The District Court Properly Refused To Order that Plaintiffs Be Admitted to the Law School.

The Plaintiffs are not entitled to admission to the Law School. A plaintiff who proves that his constitutional rights were denied, but fails to prove that denial caused him actual injury, is entitled only to nominal damages, which these plaintiffs were awarded. *Carey*, 435 U.S. at 266-67. In seeking an order requiring their admission, Plaintiffs invite this Court to offer a windfall to litigants who happen to stumble upon a procedural defect in a state administrative process, with no requirement that they prove their entitlement to the benefits in question. If Plaintiffs are entitled to admission on this record, then the Law School would also be required to offer admission to the more than 700 resident nonminorities whose TIs were higher than the lowest TI of any minority offered admission. The absurdity of this result is a stark illustration of the requirement that specific relief must come from an affirmative showing by a Plaintiff of actual harm caused by the Defendants' unlawful conduct. Merely being subjected to an unconstitutional procedure is insufficient to warrant remedial relief; each individual must prove that he or she was an actual victim of the discriminatory practice. *Firefighters Local 1784 v. Stotts*, 467 U.S. 561, 57881 (1984) (holding that remedial relief awarded by district court in class action was not justified because court made no attempt to ascertain which individuals had actually been victims of unlawful discrimination). In other words, no relief is warranted unless the Plaintiffs prove that the challenged procedure had an impact on them. *Id.*

The rule requiring a plaintiff to carry his burden of showing that he was damaged by the constitutional violation rather than by any constitutional conduct of the defendant is especially applicable when a plaintiff claims entitlement to a benefit such as admission to law school. While Plaintiffs have a federal constitutional right to be considered for admission to the Law School without application of an unconstitutional procedure, it does not follow therefrom that they have the right to be admitted. *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *see Northeastern Fla. Contractors v. Jacksonville*, 113 S. Ct. 2297, 2303 (1993) (a member of a group has standing to challenge the constitutionality of a barrier to a benefit, though ultimately not entitled the benefit itself).

The district court's decision not to order Plaintiffs' admission to the Law School is in accordance with established Supreme Court authority. Plaintiffs received all the relief they deserved for showing that an abandoned procedure was unconstitutional: (1) a declaration of unconstitutionality; (2) a chance to be reconsidered without use of the defective procedure; and (3) nominal damages. Op. 7779; *Carey*, 435 U.S. at 26667.

C. The District Court Properly Refused To Award Compensatory Damages.

"In order to recover compensatory damages in a Section 1983 action, the Plaintiff must prove them." *Butler v. Dowd*, 979 F.2d 661, 671 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993) (citing *Carey*, 435 U.S. at 263). Whether a plaintiff proves damages in a civil rights case is a question for the district court, and "absent an error of law, the reviewing court will sustain the amount of damages awarded by the fact finder, unless the amount is clearly erroneous or so gross or inadequate as to be contrary to right reason." *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994); *Thompkins v. Belt*, 828 F.2d 298, 301 (5th Cir. 1987).

The court's finding that Plaintiffs were not entitled to monetary damages is neither clearly erroneous nor "contrary to right reason." *Sockwell*, 20 F.3d at 192.[24] First, the district court found, with ample support in the record, that Plaintiffs were not injured by the constitutional defect, i.e., the minority subcommittee. The court's refusal to award compensatory damages was compelled by its finding that no injury occurred.

Carey, 435 U.S. at 266-67; *Sockwell*, 20 F.3d at 192.

Second, the district court made the proper factual finding that Plaintiffs wholly failed to produce any proof at trial that in pursuing affirmative action at the Law School, Defendants acted with improper intent. Far from it, the district court made careful and detailed fact findings to support its conclusion that "defendants acted in good faith and made sincere efforts to follow federal guidelines and to redress past discrimination." Op. 4353; 551 F. Supp. at 583. Such benign intent is inconsistent with intentional discrimination against Plaintiffs, which is necessary for an award of compensatory damages. *See, e.g., Marvin v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1993) (damages not recoverable because evidence at trial showed that "defendants were sincerely attempting to follow state and federal guidelines"); *accord Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214, 1219-20 (11th Cir. 1992).

Finally, even if Plaintiffs had shown they were injured by use of the minority subcommittee and that such injury was the result of intentional discrimination by Defendants against Plaintiffs, Plaintiffs wholly failed to offer adequate proof of damages. As Plaintiffs admit, and as the court found, the only evidence about monetary damages "consisted of each plaintiff's testimony and speculation about the value of a law degree." 551 F. Supp. at 583; Br. 44. Elliott believed the average or median salary was "around $57,000 a year" upon graduating from law school. 551 F. Supp. at 583; 7 Tr. 30. Rogers, who flunked out of undergraduate school at the University of Texas, said that the Law School "had taken the top off my career" and requested some amount he could not quantify. 551 F. Supp. at 583; 11 Tr. 67.

The court correctly determined that Plaintiffs failed to establish monetary damages as required by the law and rules of this Circuit. Op. 78. "A damage award cannot stand when the only evidence to support it is speculative or purely conjectural." *Haley v. Pan Amer. World Airways*, 746 F.2d 311, 316 (5th Cir. 1984). Moreover, all the monetary damages sought by Plaintiffs are future damages, i.e., supposed future salaries as lawyers and diminished lifetime earning capacity. A plaintiff may not recover future damages in this Circuit unless he (1) offers expert testimony, *see, e.g., Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985); and (2) discounts to present value, *see, e.g., Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 664 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). On this record, Plaintiffs "may not be awarded damages based solely upon the abstract value or importance of the constitutional right violated." *Sockwell*, 20 F.3d at 192; *see* also *Russell v. Harrison,* 736 F.2d 283, 291 n.17 (5th Cir. 1984). Accordingly, the district court's judgment denying an award of compensatory damages was not clearly erroneous and should be affirmed by this Court.

D. The District Court Properly Declined To Assess Punitive Damages.

The district court applied the correct legal standard in denying Plaintiffs' claim for punitive damages. There is no factual basis to overturn that ruling on appeal. "[T]he trier of fact's decision whether to award punitive damages is discretionary." *Sockwell*, 20 F.3d at 192 (citing *Creamer v. Porter*, 754 F.2d 1311, 1319 (5th Cir. 1985)). "Under Section 1983, punitive damages may be awarded only if the official conduct is `motivated by evil intent' or demonstrates `reckless or callous indifference' to a person's constitutional rights." *Sockwell*, 20 F.3d at 192 (*quoting Smith v. Wade*, 461 U.S. 30, 55 (1983)). A reviewing court should not reverse a decision on punitive damages absent an abuse of discretion. *Creamer*, 754 F.2d at 1319. The question on appeal then is whether the district court's finding that "the defendants acted in good faith and made sincere efforts to follow federal guidelines and to redress past discrimination," 551 F. Supp. at 583, is supported by the record. *Creamer*, 754 F.2d at 1320. It is. The district court found that the "record contains no evidence that the defendants intended to discriminate against or to harm the plaintiffs." 551 F. Supp. at 583. Indeed, the opposite conclusion is mandated. *See* Op. 57-58, 551 F. Supp. at 575; Op. 76, 78-79. In the face of strong record evidence, it was not an abuse of discretion for the district court to deny an award of punitive damages, and there is no basis for this Court to reverse that decision.

CONCLUSION

It was first recognized in this Court that those who undertake affirmative action are on a "high tightrope without a net beneath them." *Weber*, 443 U.S. at 209-10 (Blackmun, J., concurring) (quoting *Weber*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting)). Defendants, buffeted by the crosswinds of competing interests, have exercised remarkable balance. They have taken measured steps to overcome

more than a century of official discrimination against blacks and Mexican Americans at all levels of public education in Texas. Many minorities, victims of that discrimination, understandably demand more. Defendants instead have conscientiously controlled the use of race in Law School admissions decisions, both to protect the interests of nonminorities and to decrease the credentials "gap" until "we can truly have a race-blind system of admissions." We're not there yet. To end Defendants' efforts now would return Texas to a dual system of legal education, leaving minorities out of the mainstream and a lily-white Law School producing lawyers, judges, and legislators ill-prepared to deal with a diverse Texas society.

The district court also acted with painstaking diligence and manifest balance. It recognized compelling interests still to be met, declared improper means where it saw them, and denied relief for injuries alleged but not proved. Although Defendants disagree with the district court's conclusion on the constitutionality of the minority subcommittee, they do not appeal the judgment awarding only nominal damages.

For the reasons set forth in this brief, the Judgment below should be affirmed.

February 10, 1995

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Footnotes:

1. As late as 1971 — 20 years after Heman Sweatt left the Law School humiliated by the taunts and threats of students and faculty — the Law School's entering class had no blacks. In 1974 only 10 of the Law School's 1600 students were black. 551 F. Supp. at 573..66. Back

2. Regulations implementing Title VI provide: "In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipients must take affirmative action to overcome the effects of prior discrimination." 45 C.F.R. § 80.3(b)(6)(i). As the district court noted,

> the regulations state further that even if a recipient has never implemented discriminatory policies, if its services and benefits have not been equally available to some racial or nationality groups, the recipient may "establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." 45 C.F.R. § 80.5(j).

551 F. Supp. at 555. Back

3. Hopwood was attending community college in California. P145. Rogers attended the University of Texas intermittently from 1982 until 1985, when he flunked out. He was first placed on scholastic probation effective spring semester 1983. P171. Back

4. Although Houston had been declared unitary, "70% of the black students in HISD still attend schools that are 90% minority, including as minorities black and Hispanic students." Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 226 27 (5th Cir. 1983). Back

5. State law prohibited the Law School from enrolling more than 15% nonresidents in 1992. 551 F. Supp. at 563. Nonresidents were considered separately from residents. Plaintiffs were all considered as Texas residents. Thus, the admissions procedure for nonresidents was not before the district court. Back

6. Hopwood's file contained no letters of recommendation, and her responses to the questions on the application were brief and did not elaorate on her background and skills. She provided no personal statement with her application despite the following statement on the application: "Please make any other comments about your college transcripts on your preparation for college (such as disadvantaged educational or economic background) that you believe will help the Admissions Committee in evaluating your application." P145; 551 F. Supp. at 564. Back

7. Because the Law School's plan was designed to achieve minority enrollment goals set by DOE, using methods recommended by DOE, it should be examined under the "intermediate scrutiny" standard applied to federal affirmative action under *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The Law School's affirmative action plan plainly serves important governmental objectives and is substantially related to the achievement of those objectives. *Metro Broadcasting*, 497 U.S. at 566. Moreover, when Texas is "merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the statute." *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 423 (7th Cir.) (Posner, J.), *cert. denied*, 500 U.S. 954 (1991). Back

8. At trial, Plaintiffs offered only the conclusory assertion of an out-of-state sociologist that there are no effects of educational discrimination anywhere in Texas. The district court specifically found him not credible. 551 F. Supp. at 571. Cf. Meredith v. Fair, 298 F.2d 696, 700 (5th Cir. 1962) (Wisdom, J.) (arguments that Mississippi has no segregated institutions of higher education are in "the eerie atmosphere of never-never land"). Back

9. The Texas Supreme Court declared the requirement of separate schools in article VII unconstitutional in 1955. McKinney v. Blankenship, 154 Tex. 632, 282 S.W.2d 691, 695 (1955). Back

10. The record focused on the direct impact felt by this generation of resident minority applicants attending unconstitutionally segregated schools in Texas. It was undisputed, moreover, that educational deprivations

suffered by the parents of today's minority applicants significantly affected their chances of success. See, e.g., 19 Tr. 45-47; 23 Tr. 51-52; D379. Even Plaintiffs' expert agreed that the educational attainment of one's parents is the strongest predictor of individual educational attainment. 11 Tr. 28-29. Other courts recognize the intergenerational effect of unconstitutional discrimination. Washington Legal Found. v. Alexander, 778 F. Supp. 67, 71 (D.D.C. 1991) ("The lack of equal educational opportunities for minority citizens leads ultimately to the inability to compete effectively in the job market. That, in turn, disadvantages future generations."), aff'd, 984 F.2d 483 (D.C. Cir. 1993). Back

11. See also Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir.) (en banc) ("since we are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi, on remand the District court should order that additional appropriate recruitment measures be taken to ensure that black applicants will be attracted to the force"), *cert. denied*, 419 U.S. 895 (1974); *Mims v. Wilson*, 514 F.2d 106, 111 (5th Cir. 1975) (instructing the district court on remand to "determine whether the black applicant flow is disproportionately small as a result of defendant's reputation in the community for hiring whites only, in which case affirmative efforts to dispel the effects of past discrimination would be indicated"). *Podberesky v. Kirwin*, 38 F.3d 147, (4th Cir. 1994), holding that a university's negative reputation cannot justify affirmative action, its at odds with the law in this Circuit. Back

12. See, e.g., JACK GREENBERG, Law Schools in the Supreme Court, CRUSADERS IN THE COURTS ch. 6 (1994); RICHARD KLUGER, The Spurs of Texas are Upon You, SIMPLE JUSTICE ch. 12 (1976). Back

13. Brown relied on prior decisions involving higher education. 347 U.S. at 495 (citing, inter alia, McLauren v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 29 (1950)). Back

14. In United States v. LULAC, 793 F.2d 636, 649 (5th Cir. 1986), the Court held that the scope of the Equal Educational Opportunity Act was limited to elementary and secondary education agencies and did not require Texas higher education officials to suspend use of a minimal skills test that applied equally to admissions at all Texas professional schools. It did not attempt to limit what Texas might do voluntarily. Reversing a preliminary injunction and ordering the case to trial on the merits, the Court specifically noted, "We do not here attempt to delineate the scope of remedial measures that may be taken to eliminate segregation or intimate that the remedy for desegregation is limited to elimination of the unconstitutional practice." It cautioned that court-ordered remedies "should generally be limited to the school system that was unconstitutionally conducted and should not extend to imposing affirmative obligations on other state agencies." Id. (emphasis added). But see Adams v. Richardson, 480 F.2d 1159, 1164-65 (D.C. Cir. 1973) (en banc) (discrimination remedies not limited to the university, school, or department responsible for the initial discrimination). Texas later voluntarily eliminated the test. Back

15. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) ("a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be"). Back

16. The district court rejected Defendants' contention that training future political leaders of the black and Mexican-American communities in Texas, and augmenting the number of black and Mexican-American members of the bench and bar is a compelling governmental interest. As this Court has recognized, because of Texas' long history of discrimination, blacks and Mexican Americans are woefully underrepresented in the Texas legal and judicial community. LULAC v. Clements, 999 F.2d at 893. Defendants continue to urge this as a compelling interest unique to legal education. Unlike the provision of medical services, these leadership roles in the black and Mexican-American communities cannot be filled by whites, no matter how well-intentioned. Compare Bakke, 438 U.S. at 310-311. Back

17. Narrow tailoring does not require that affirmative action be limited to individual victims of past discrimination. Sheet Metal Workers, 478 U.S. at 471 72 (employment); Geier, 801 F.2d at 805 (professional school admissions). Plaintiffs' complaint about preferences given to out-of-state minorities was

not before the court, as they and other resident applicants were not affected by any nonresident admissions decisions. Back

18. The record showed that minority enrollment at the Law School peaked in 1981, two years before the Texas Plan was adopted, at 21.9% (7.6% black and 14.3% Mexican-American). D445. Back

19. Hopwood did not apply to any other law school. She was, however, offered a place on the Law School's waiting list, which she declined. Back

20. Thus, without the controlled subcommittee, all minorities in a stack of thirty could be admitted, regardless of the relative qualifications of the thirty applicants, if two of the three reviewers simply chose to give race or ethnicity more weight than they gave other factors. Back

21. Plaintiffs' reliance on both Trans World Airlines v. Thurston, 469 U.S. 111 (1985), and Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274 (1977), is misplaced. Trans World held that the McDonnell Douglas analysis does not apply when a plaintiff presents direct evidence of discrimination. However, in Trans World, there was direct evidence that the individual plaintiffs suffered concrete injury by being forced to retire because of illegal discrimination on the basis of age. 469 U.S. at 117. Here, however, the court specifically found that Plaintiffs failed to prove that the consideration of race caused their denial of admission to the Law School. Op. 74-75. Likewise, the plaintiff in *Mt. Healthy* had shown that his constitutionally protected conduct was a substantial factor in the decision not to rehire him. 429 U.S. at 283. Plaintiffs here made no such showing. Back

22. The district court's concern with the minority subcommittee was fundamentally a matter of appearances. As the court recognized, two of the Plaintiffs' files in fact were reviewed by minority subcommittee members. 551 F. Supp. at 579. Back

23. See also Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 858 (9th Cir. 1985) (refusing to overturn district court's denial of an injunction because district court found "that the prison has in good faith formulated and complied with a constitutionally acceptable plan"). Back

24. Plaintiffs do not challenge under a clearly erroneous standard the district court's refusal to award damages. Br. 40. Back