Courts have decided a surprising number of college admissions cases in decisions that have turned largely but not exclusively on the American trope of race. Before the landmark 1978 Supreme Court case of Regents of the University of California v. Bakke, these cases included the postsecondary forerunners to Brown v. Board of Education and several college cases that followed Brown. In the post-Brown cases, intransigent whites actively resisted college desegregation, manipulated admissions criteria to deny college or professional school admissions to minority applicants, or claimed that Brown was limited to public elementary and secondary schools. Since DeFunis v. Odegaard, a case that was dismissed as moot by the U.S. Supreme Court in 1974, causing a well-known dissent by Justice Douglas, college admissions cases have largely concerned white challenges to practices that appear to favor minorities. The 1978 decision in Bakke has become an almost totemic holding, one that has been invoked in settings that range well beyond medical school admissions, from governmental set-asides for minority contractors and highway guardrails to 4H club membership rules. However, Bakke—which held that set-asides are unlawful in admissions but that race may be used as a “plus” factor—is still under assault, even though its holistic review procedures were affirmed by the Supreme Court in 2003’s Grutter v. Bollinger.

Many conservative commentators and a number of judges have acted as if Bakke had no continuing validity. In Hopwood v. Texas, a panel of the Fifth Circuit struck down a University of Texas Law School (UTLS) admissions program that had given preferences to black and Chicano applicants. The panel concluded that Bakke was no longer the law of the land and that it had been overruled sub silentio by the Supreme Court in a series of affirmative action cases. However, the Supreme Court had not overturned Bakke, notwithstanding its decisions in
a trio of affirmative action cases: *City of Richmond v. J. A. Croson Co.*, *Metro Broadcasting, Inc. v. Federal Communications Commission*, and *Adarand Constructors, Inc. v. Pena*. In a thorough review of these cases and of the argument contending that *Bakke* having been overruled explicitly or implicitly, Akhil Reed Amar and Neal Katyal summarized: “Since *Adarand* overruled *Metro Broadcasting* in part, and *Metro Broadcasting* relied upon *Bakke*, does this mean that the Court has overruled *Bakke*? No. The Court, we repeat, nowhere explicitly overruled *Bakke*, and so, under well established general principles, it clearly remains binding precedent for all lower courts, state and federal.”

By their reasoning, *Metro Broadcasting* was overruled by *Adarand* only insofar as it was “‘inconsistent’ with the holding that ‘strict scrutiny is the proper standard for analysis of all racial classifications, whether imposed by federal, state, or local actors.’” Although the *Adarand* court held that minority set-aside contracting programs enacted by Congress were subject to strict scrutiny, it did not address the diversity premise of *Bakke*. One member of the *Hopwood* panel who voted to strike down UTLS’s affirmative action admissions program demurred at considering *Bakke* to be lifeless: “If *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.” He may not have wanted to declare the 1978 ruling dead by saying so, even if he were clearly considering the decision to turn it into a corpse.

Exactly how far did *Bakke* reach? How had judges ruled in admissions cases since 1978? Inasmuch as *Bakke* endorsed the Harvard admissions program for achieving diversity, was affirmative action permissible under the right circumstances? After all these years, and after *Grutter* upheld the earlier case in the University of Michigan’s Law School admissions program, and after *Gratz*, which applied to the Michigan undergraduate program, it is still instructive to review *Bakke* and a sample of its progeny on this issue. In addition, a review of undergraduate admissions cases sheds light on the employment of standardized tests and other admissions measures in graduate and professional schools. Finally, looking carefully at these cases reveals how complex the admissions decision-making process is; many applicants and judges mistakenly assume that the process is simple, that individuals vie against other individuals in a joust-like tournament or that the use of modest racial criteria displaces many whites. My review reveals the complexities of the admissions process and shows how admissions criteria have been, and in some instances still are, racial gatekeepers to higher education.

In *Regents of the University of California v. Bakke*, white applicant Allan Bakke submitted his credentials for both the 1973 and 1974 hundred-member medical
school classes at the University of California at Davis (UC-D). After a review of his admissions portfolio and “benchmark scores,” which included his undergraduate grade point average, his standardized MCAT score, and his letters of recommendation, the UC-D committee chose to deny him admission both to the eighty-four general admissions places and to the sixteen affirmative action places reserved for applicants who were members of underrepresented groups.

After he was denied admission for the second year in a row, Bakke sued in California state court on the grounds that his equal protection rights had been violated and that UC-D had violated Title VI of the 1964 Civil Rights Act in maintaining the racially separate admissions policies. The trial court found for Bakke, holding that UC-D’s separate admissions process was an unconstitutional racial quota and that his federal and state constitutional rights had been violated, as had his Title VI rights. However, because he could not show that he would have been admitted even if the separate admissions program had not existed, the trial court did not order that he be admitted to the medical school.10

He then appealed to the California Supreme Court, which did not rule on his state constitutional or federal statutory rights but did find that the UC-D program had violated his equal protection rights. The court also shifted the burden of proof regarding admissions, finding that UC-D had failed to show that, even in the absence of the minority program, Bakke would not have been admitted. The court held that race could not be used as an admissions criterion, and he was ordered to be admitted to the medical school. 11

The U.S. Supreme Court granted certiorari and, in a complex and frustrating opinion, affirmed in part and reversed in part. The Court held that racial set-asides such as the UC-D sixteen-seat plan could not operate lawfully, but the Court also held that race could be used as one of several factors in admissions. Justice Lewis Powell’s opinion attracted the votes of Justices John Paul Stevens, William Rehnquist, and Potter Stewart and Chief Justice Warren Burger for the former holding, 12 and the votes of Justices William Brennan, Thurgood Marshall, Byron White, and Harry Blackmun for the latter. Justice Powell was the swing vote for each 5–4 holding, and he also affirmed that Bakke should be admitted to the UC-D medical school.13

The Bakke decision, particularly Part V-C, had lasted nearly two decades before Hopwood, and the Court’s view on the permissibility of racial factors in admissions had held sway in judicial opinions and institutional practice. Following its mid-1980s attempt to rule out minority scholarships, even the George H. W. Bush administration beat a hasty retreat, citing Bakke.14 Part V-C reads: “In enjoining [UC-D] from ever considering the race of any applicant, however, the
courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court’s judgment as enjoins [UC-D] from any consideration of the race of any applicant must be reversed.”

Further, Justice Powell identified the admissions criteria that could appropriately further this “substantial interest” in diversity: “The file of a particular black applicant may be examined without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”

In addition, the four Justices who joined Justice Powell in supporting racial criteria as one part of a comprehensive admissions plan would have upheld even the UC-D plan. The program “[did] not, for example, establish an exclusive preserve for minority students apart from and exclusive of Whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together.”

In their review of *Bakke* and more recent Supreme Court cases concerning affirmative action, Amar and Katyal concluded: “Our survey of the post-*Bakke* affirmative action cases will demonstrate an important distinction between contracts and schools. We want to persuade readers that a wall between these two domains exists, and that this wall—at the base of *Bakke*—has not collapsed under the weight of the various post-*Bakke* contracting cases.” Whether *Bakke* “hangs by a thread” or will have continued vitality and precedential value, it remains the touchstone case for college and graduate/professional school admissions, and its endorsement of racial and ethnic criteria as a part of selective admissions has driven this process since 1978 in public and private colleges and universities. If it were overruled, minority admissions and financial aid programs for nearly every college and graduate or professional school in the country would be affected.

As will become evident from the following review of other postsecondary admissions cases, no other criterion—even the alluring concepts of class and income preferences—delivers more efficacious racial results than does race itself. There is no good proxy, no more narrowly tailored criterion, no statistical treatment that can replace race. A movement away from *Bakke*, therefore, would have been likely to deracinate the admissions and financial aid processes, even in
communities where racial minorities have become the plurality or majority populations. Meanwhile, in some special settings such as historically black institutions of higher education, whites who find themselves to be racial “minorities” or “historically underrepresented” students have access to court-ordered scholarships at the same time that black-only or minority scholarships have been struck down by courts.19

In the 1970s and 1980s, Texas and other southern states had to follow the court order in *Adams v. Richardson* that required the federal government to monitor postsecondary institutions more aggressively and to enforce Title VI at the collegiate level.20 As a result of increased federal enforcement in the 1990s, Texas—like other *Adams* states—was required to produce a remedial plan that would increase the college enrollment of black and Latino Texans. UTLS’s efforts to recruit black and Latino applicants led directly to *Hopwood*.

In 1971, UTLS did not admit a single black applicant, and it admitted only a handful of Mexican Americans. In order to increase the number of minority applicants and to give “fuller consideration”—that is, a full-file review extending beyond the stark numbers of the undergraduate grade point average and LSAT score—UTLS began to read its applications from minority and white disadvantaged students separately. By 1992, UTLS was attracting more high-scoring minority applicants than it had in 1971 and had developed a complex system of review that functionally resembled the original UC-D admissions process in *Bakke*: two separate admissions processes—one for blacks and Mexican Americans and one for whites. UTLS assigned a different “presumptive admission” score for each process. For whites, that score was a combined LSAT/UGPA index of 192; for minority applicants, it was 179. Moreover, all minority applicants, regardless of their LSAT/UGPA index scores, were reviewed by the “minority subcommittee”—but some white applicants who fell below a certain LSAT/UGPA index score were not reviewed. Although there were no minority set-aside places, a provision that the *Bakke* Court had rejected, UTLS invited trouble by having a separate decisionmaking process for minority applicants and different admissions decisionmakers and standards for minority applicants than it was using for white applicants.

In 1992, Cheryl Hopwood and three other white plaintiffs applied for admission to UTLS. Hopwood’s UGPA of 3.8 and LSAT of 39 (83rd percentile) gave her a combined index score of 199, which placed her in the “presumptive admit” category. (By this time, the Law School Admissions Council had re-normed and re-numbered LSAT scores on a different scale.) However, because she attended an undergraduate institution that the chair of the admissions committee consid-
nered “non-competitive” (California State University-Sacramento), the chair moved her from the “presumptive admit” category to the “discretionary” category. When Hopwood did not receive enough committee votes to move her application higher in the queue of applicants, she was offered a place on the waiting list. She ultimately was not admitted from the waiting list, nor were the other three white applicant plaintiffs.21

The district court judge first held that Bakke was the controlling precedent: “Absent an explicit statement from the Supreme Court overruling Bakke, this Court finds, in the context of the law school’s admissions process, [that] obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications.”22 To the extent that the UTLS process accorded extra points to minority applicants, he found the process to be constitutional. However, because the four plaintiffs were compared only with other white applicants and not with the entire group of applicants, the judge found that the process was not narrowly tailored and thus violated the plaintiffs’ equal protection rights.

Although he struck down UTLS’s original admissions process, which UTLS changed after the start of the litigation, the judge declined to order UTLS to admit the plaintiffs. He found that white applicants had been admitted with very low indices, that many whites with indices lower than Hopwood’s had been admitted, and that the number of whites admitted in this fashion exceeded the total number of minorities admitted. He awarded one dollar in damages to each plaintiff and ordered that they be allowed to reapply without any charge the following year, noting: “The Court simply cannot find from a preponderance of the evidence that the plaintiffs would have been offered admission [even] under a constitutional system.”23

The Fifth Circuit panel saw it differently. Judge Jerry E. Smith, writing for the majority, rejected Bakke’s diversity rationale and called Justice Powell’s holding a “lonely opinion.”24 The majority opinion read Bakke as having no bearing on Hopwood: “Justice Powell’s view in Bakke is not binding precedent on this issue [of diversity as an acceptable goal]. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In Bakke, the word ‘diversity’ is mentioned nowhere except in Justice Powell’s single-Justice opinion.”25 Further, the panel interpreted the Supreme Court’s subsequent decisions in Adarand, Wygant, and Croson to mean that Bakke either “[did] not express a majority view” or that it was “questionable as binding precedent.”26 They then reached this sweeping conclusion, cleverly wording it as if their hands were tied: “Accordingly, we see the caselaw as sufficiently established
that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge." Thus, they ruled that even the revised UTLS program, which the district judge held to be constitutional, was unconstitutional for relying upon "diversity" as it did: "We do note that even if a ‘plus’ system were permissible, it likely would be impossible to maintain such a system without degeneration into nothing more than a ‘quota’ program."

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

Despite the clear invitation to do so and increase the chances of the Supreme Court to take up the affront, the Fifth Circuit declined to take up the case *en banc*, or as a whole. Yet the U.S. Supreme Court denied certiorari in 1996, with terse language from Justices Ginsburg and Souter declaring that the whole case had been moot because UTLS had abandoned the original program under which Hopwood and the others had been considered. This left the two-judge panel (with the concurring judge) as the authority for the Fifth Circuit.

The states of Louisiana and Mississippi, the other two Fifth Circuit states, were involved in litigation concerning the desegregation of their own public higher education institutions and so were not bound by *Hopwood*. Moreover, the Texas attorney general had advised his client colleges to expand *Hopwood*'s admissions decision to minority scholarships, leading public and private colleges as well as state agencies to dismantle or reorganize their minority scholarships and targeted financial assistance programs.

Was Judge Wiener correct? Did the two-judge panel overreach? Can a circuit court declare a Supreme Court decision overturned? The simple answer is that it cannot. First, neither a panel nor a full circuit can expressly overrule the Supreme Court; for *Hopwood* to have effect, it had to treat *Bakke* as explicitly or sub
silentio no longer in force. Second, to the extent that Hopwood might have controlled, it would have done so only in the narrow area of college admissions. There was no precedent to extend it to minority scholarships, as the Texas attorney general did, following Hopwood. Unlike the Texas attorney general in this instance, attorneys general in most states strive hard to narrow decisions and to contain damage done to state agencies or institutions, if any. Indeed, the Texas attorney general’s expansive reading of Hopwood led another state’s attorney general to apply Hopwood to his college clients even though the clients were in another circuit. It also prompted virtually every public and private college in Texas and also the state’s postsecondary agency (the Texas Higher Education Coordinating Board) to dismantle longstanding and legally unchallenged financial aid programs, including some established by the legislature with proper statutory foundation.

By selectively citing from Supreme Court opinions in Croson and Adarand, the Fifth Circuit panel of Judges Smith and DeMoss treated Bakke as either overruled or nonbinding. This is an incorrect reading of Bakke, and it poisoned the reasoning that flows from it. In Part V-C of Bakke, in which Justices Brennan, Blackmun, Marshall, and White joined, thus constituting a five-Justice majority, Justice Powell wrote: “In enjoining [UC-D] from ever considering the race of any applicant, . . . the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court’s judgment as enjoins [UC-D] from any consideration of the race of any applicant must be reversed.” In Part V-A, Justice Powell explained that the “substantial interest” was diversity; in Part IV-D, he asserted that admitting a “diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education. . . . [I]t is not too much to say that the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”

Although the two-judge panel treated the Bakke holding (derisively termed Justice Powell’s “lonely opinion”) as questionable precedent, the U.S. Supreme Court at that time had neither overturned Bakke nor accepted for review any higher education affirmative action case since its 1978 decision in Bakke. Justice O’Connor, in her concurring opinion in Wygant, noted that “although its precise contours are uncertain, 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.”
In the Fifth Circuit’s *Hopwood* opinion, Judges Smith and DeMoss simply omitted mention of Part V-C, the authentic, five-member central opinion, and ignored its “substantial interest” holding. Moreover, in *Adarand*, Justice O’Connor had held, “When race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.” These holdings hardly sounded like the death knell for well-crafted admissions programs, which proved to be the case in *Grutter* (in which the Court upheld the University of Michigan’s law school affirmative action plan) as well as in *Gratz*, which struck down another type of plan, but also revealed that nuance and narrow tailoring were being applied to different admissions approaches, even in the same institution.

While the *Hopwood* panel misread *Bakke* and struck down the UTLS racial admissions criteria, its opinion was even more curious for the criteria it *would* have allowed. In its laundry list of acceptable criteria, the panel judges would allow alumni privilege, which they termed the applicant’s “relationship to school alumni”; they also concluded that a college could consider “whether an applicant’s parents attended college” (a first-generation preference). In the context of UTLS, consider these two criteria: one that rewards applicants fortunate enough to have parents who were allowed to attend the law school, and one that rewards applicants who were fortunate enough, in this narrow sense, to have parents who did *not* attend college. If implemented at public institutions, the former criterion would likely exclude substantial numbers of African Americans, Mexican Americans, and Asians, whose families had not been welcomed in the colleges. At the University of Houston, which became a public institution in 1963–1964, the first black law student did not graduate until 1970; fewer than a dozen Mexican Americans had graduated before 1972. Even as recently as 1971, UTLS had enrolled no black students in its first-year class. Children of early 1970s UTLS minority graduates, if born while their parents attended law school, would now be eligible for the alumni preference—but they would be in competition with the thousands of white applicants who could also invoke the privilege. While it is true that the latter criterion—first-generation preferences—would more likely favor minority children whose parents were denied admission or were unable to attend college, many uneducated white parents would likewise be in a position to transmit this “advantage,” simply because there were so many Anglos in the population, including those who never attended college. A Texas Coordinating Board study group, which reviewed alternative admissions criteria, determined that there is no good proxy for race. Deracinating the racial criterion simply cannot work. In 1997, the first year under post-*Hopwood* procedures, minority ap-
plications to UTLS were down by more than 40 percent for blacks and by 15 percent for Mexican Americans; offers of admission fell from 65 to 5 for blacks and from 70 to 18 for Mexican Americans. Not a single black first year law student was scheduled to enroll at UTLS and only a handful of Chicanos—this despite their majority status in the Texas K–12 school system.

One of the *Hopwood* plaintiffs actually presented a letter of recommendation from a professor who described the student’s academic performance at his small college, where he graduated 98th in a class of 247, as “uneven, disappointing, and mediocre.” That such a student could obtain high scores on the UTLS index, which uses only UGPAs and LSAT scores, demonstrates why law schools should consider more than standardized scores and grades in assessing applicants. Any professional school would be wary of applications whose letters of recommendation singled out a student for “mediocre” performance.

To return to a question I raised before—the validity of *Bakke*—the answer is that even articulate critics of *Bakke* and race-based affirmative action, such as Professor Jim Chen, believed that *Bakke* remained good law after *Hopwood*. Until the Supreme Court accepted another such admissions case (as it declined to do following circuit decisions in *Podberesky* and *Hopwood*), *Bakke* governed admissions to professional schools and to other postsecondary institutions of higher education. Unfortunately, UTLS and other public law schools in Texas had to play upon a very uneven surface, as no other circuit had struck down *Bakke*’s holding in admissions. Of course, this situation changed in 2003, when the U.S. Supreme Court decided both *Gratz* and *Grutter*, the University of Michigan admissions cases, on the same day and upheld *Bakke*, allowing racial criteria when properly applied.

These cases, and many others that could have been analyzed, show that the distribution of scarce benefits remains a contentious issue, one that divides American society along fronts of race, class, ethnicity, gender, and other dimensions. Like immigration cases that define who we are as a polity or as a people, so do college admissions cases define us as a nation. Inasmuch as higher education is the great engine of upward mobility in our society, how we constitute our student bodies is an important consideration. Unfortunately, due to historical racism and unequal educational opportunity, race remains a fugue in postsecondary education to this day. Therefore, understanding the admissions process and the cases that form its common law is an important key to understanding our country’s complex racial history.

In the subtitle of this chapter, I quoted the *Hopwood* panel decision, which singled out students with special talents, even though I believe Judge Smith and
DeMoss used the articulate metaphors of talented athletes and musicians in a cynical fashion. Justice Blackmun, in his Bakke opinion, also was being cynical, but in the opposite direction, in noting that college admissions had historically been the preserve of the wealthy and powerful, even when the official story is that the criteria were meritocratic. Truth be told, selective admissions have always been the preserve of the advantaged. Had I been a UTLS faculty member, I am certain that I would have voted for Cheryl Hopwood, had I known her entire record. At the very least, I assuredly would not have marked her down for attending the California State University, a school that reserves its places for the top 25 percent of high school graduates in the state and enrolls many minority and working-class students.

The plaintiffs in Hopwood, as well as other white beneficiaries of admissions standards, assumed that they reached their station in life on their own merits and that members of minority groups have advanced only because admissions procedures have been bent to accommodate them. The friends and family of one plaintiff who was denied admission based on his 197 UTLS index were sure that a less worthy minority student had taken his place; the plaintiff’s father wrote the law dean accusatorily saying just that. However, blacks admitted to UTLS had a median UGPA of 3.3 and a median 158 on the LSAT; for Mexican Americans, the medians were 3.24 and 157, respectively, making them extremely qualified to do the work at UTLS and other elite law schools. Indeed, those indices would be medians for the entire student bodies at other very good law schools, then and today.

Yet critics of affirmative action, especially the conservative higher education purposive organizations, and many federal judges have become convinced that higher scores on tests translate into more deserving and more meritorious applications and that reliance on “objective” measures and statistical relationships constitutes a fair, race-neutral process. The evidence for this proposition is exceedingly thin; indeed, a substantial body of research and academic common practice refutes it. Heavy reliance on solitary test scores and cutoff marks and the near-magical properties accorded to them inflate the narrow, modest use to which any standardized scores should be put. Accepted psychometric principles, testing-industry norms of good practice, and research on the efficacy of testing all suggest that the uses of test scores should be limited, whether they are considered alone or in conjunction with other imperfect measures such as grades or class rank. Recognizing this, federal judges in Mississippi and Alabama, among others, have struck down the misuse of tests as cutoffs for admissions and as a method for determining an applicant’s fitness to become a teaching major.
Conservative organizations that challenged the Texas Percentage Plan have averred that a single criterion (rank in class after four years of schooling, often used as a marker of quality) was unfair, even as they touted the near-absolute reliance on high-stakes exam scores, taken on a Saturday morning and coachable, as meritorious. These critics have the burden of persuasion: How is one regime that they would dictate more effective or efficacious or fair than the other in use?

Also, importantly, the same standardized test score means different things for different populations. For example, careful studies of predictive validity consistently show that scores from standardized tests are less predictive of Latino college students’ first-year GPAs (both over-predictive and under-predictive) than the scores of white students. Similarly, the SAT measures less well for math ability and better for verbal ability for females than it does for males. If research consistently shows that test scores for one population predict differently and less effectively than they do for other populations, it could weaken the claim by affirmative action critics that the LSAT or other standardized tests should be given more weight in the admissions process.

The *Hopwood* plaintiffs and the Fifth Circuit panel treated the revised UTLS admissions procedures as though they allowed many undeserving students of color to take places that rightfully belonged to deserving whites. Law school enrollment data rebut this viewpoint. The number of white students studying law at the time of *Hopwood* was at an all-time high: in 1995–1996, more than 110,000 students, or almost 81 percent of the total enrollment in ABA-accredited law schools, were white. Blacks and other minorities, even including Puerto Ricans in the three Commonwealth law schools, then comprised approximately 20 percent of the total. The numbers have remained disproportionate: In 2010, white applicants took 60 percent of the LSAT exams administered and applied to law school—66 percent of those who were admitted and 66 percent of all new law students enrolled that year were white. Meanwhile, the figures for self-reported minorities constituted 28 percent of all applicants, 22 percent of all who were admitted, and 22 percent of those who eventually enrolled. That year, there were more LSATs administered—171,500—than at any other point in recent history. (The overall percentages changed due to new self-reporting for race, which allowed persons not to designate a racial category.) But there is an equilibrium evident among the white test takers, the white admitted applicants, and the white enrollees. There is no evidence of displacement here, no hint of unfairness. Further, no law school can afford to admit students who cannot do the work; the transaction costs are too high, and the spaces are too precious.
Moreover, in *Hopwood*, it was not “lesser-qualified” minorities who displaced the plaintiffs. At UTLS, the number of whites accepted from the waiting list exceeded the total number of all minority group students enrolled that year. Given the expense of applying and the self-selection factor, virtually all the applicants to UTLS could do the work that would be required of them as law students. This feature is surely evident in the undergraduate ranks, where there is tremendous compression and competition in such elite programs. At an elite college such as Harvard, after the original freshman class is carefully chosen, another full class could be admitted from the waiting list without losing a single digit on the mean GPAs and SAT scores. During this period, at UC-Berkeley, more than 9,000 students with GPAs of 4.0 or better (achievable by means of honors classes) vied for the 3,000 freshmen slots. And these are not static processes: California’s Proposition 209 and the University of California Regents action to deracinate admissions to the University of California, although initially put on hold pending court challenges to both actions, were allowed by the Ninth Circuit. Almost immediately, minority University of California applications and admissions dropped sharply. They have never fully recovered, especially after tuition rates increased sharply due to the state’s fiscal crisis in 2009–2011. The compression remains, especially at the elite institutions and law schools but also at the open-door, two-year colleges and other less elite schools.

At all colleges and professional schools, admissions procedures today are more thorough and better administered than ever. The survival of selective and open-door colleges depends on competence and fairness in the admissions process. The sheer crush of applicants—Georgetown Law School received more than 10,000 applications at the time of the *Hopwood* decision, Harvard College received 18,000 (including 2,900 valedictorians), and University of California-Berkeley received more than 25,000—allows admissions officers to choose from among thousands of exceptionally qualified people. Even with periodic fluctuations, the year 2009–2010 saw the greatest number of test takers and law school applications in history: over 602,000 applications were submitted by 87,500 persons. More than 51,000 One Ls enrolled in 2009–2010. This is a key point. When admissions committees choose from among thousands of applicants, nearly all of whom have the credentials to do the work, they are doing exactly what they are charged to do: They are assembling a qualified, diverse student body. *Bakke* and now *Grutter* sanction this approach; common sense dictates it; and no anecdotal horror stories or isolated allegations can change this central fact. There is no evidence that whites are displaced in the process, and those few who are affected likely have many alternatives. Using *Bakke* and *Grutter*
reasonably, the surprise is not that the system works fitfully, but that it works so well in light of the current crush of applicants and costs of applying.

Prior to the 2003 decisions, when I was asked if Bakke could survive, I answered that its longevity is proof that there is a God. Of course, I did not think so earlier, when the Court’s 1977 order that Allan Bakke be admitted to the UC-D Medical School led me to believe that he had won. He did win admission to medical school, but the carefully nuanced Powell opinion has proven surprisingly resilient and supple over the intervening decades, even with the attempts at revisionism by Fifth Circuit judges and unyielding conservative purposive organizations that characterize whites as hapless victims. Grutter’s rule of law ensures that affirmative action remains a vital tool in admissions. As demographic changes occur and historical discriminatory practices are changed, the argument that race preferences in admissions are necessary to combat the vestiges of racial discrimination will likely lose its force. Few legislatures are likely to confess racial prejudice or to acknowledge it in their state agencies. Thus, affirmative action must be theoretically and operationally grounded in the First Amendment, in academic freedom, and in the four tenets of autonomy, which include the freedom to choose students.58 To the extent that doing so will justify diversity as an admissions consideration, it will only do so in a modest way that uses race among a mix of other criteria.

However, Anglo plaintiffs and their organizations will not be appeased and will continue to make the unsuccessful argument that even the slight use of race is unconstitutional. As one of the responses to Hopwood, and in light of the enrollment damage evident to its undergraduate programs and professional schools, the Texas Legislature enacted a race-neutral program, the Texas Top Ten Percent Plan, in 1997. This plan allowed all graduates of the state’s high schools to attend any public college, provided that the applicant had graduated in the top 10 percent of his or her class. This provision broadened the number of schools that sent students to the state’s public colleges, particularly to the University of Texas at Austin, and all internal UT studies and other scholarship have revealed that full-time, first-time freshmen admitted under the Top Ten Percent Plan remained in school longer, performed better, and graduated in greater numbers than their nonplan counterparts.59 Indeed, the plan became so successful that it threatened to swamp the Austin campus. As a result, the legislature reluctantly granted an escape valve at UT-Austin to trim back admissions under the percentage plan to the top 7 percent of high school graduates in the state.60

Since its inception, this plan had no racial component; while it mitigated some of the earlier Hopwood losses, its participants were of all races, predominantly
white. Even so, in *Fisher v. University of Texas*, another generation of white applicants sued the university, arguing in a 2008 federal district court case and a 2011 circuit appeal that, with the percentage plan in use, the university should not be permitted to use the tools that *Grutter* had constitutionalized—the admissions practice occasioned by the many years of *Bakke*:

Appellants do not allege that UT’s race-conscious admissions policy is functionally different from, or gives greater consideration to race than, the policy upheld in *Grutter*. Rather, Appellants question whether UT *needs* a *Grutter*-like policy. As their argument goes, the University’s race-conscious admissions program is unwarranted because (1) UT has gone beyond a mere interest in diversity for education’s sake and instead pursues a racial composition that mirrors that of the state of Texas as a whole, amounting to an unconstitutional attempt to achieve “racial balancing”; (2) the University has not given adequate consideration to available “race-neutral” alternatives, particularly percentage plans like the Top Ten Percent Law; and (3) UT’s minority enrollment under the Top Ten Percent Law already surpassed critical mass, such that the additional (and allegedly “minimal”) increase in diversity achieved through UT’s *Grutter*-like policy does not justify its use of race-conscious measures.61

In other words, these white applicants claimed, the percentage plan has already been adopted, so further efforts to diversify were unnecessary, notwithstanding *Grutter*. If the Fifth Circuit had accepted this line of reasoning, it would have taken the polity back to *Hopwood*’s step one, where circuit judges were all but declaring *Bakke* dead. As it turns out, rumors of its demise were exaggerated. Ironically, the Texas Legislature’s race-neutral percentage plan would have been allowed to thwart the use of race by UT. The Fifth Circuit did not find for the plaintiff applicants, but the language of the decision reveals that the circuit has only grudgingly given ground to the Supreme Court in the intervening years since *Hopwood*:

In short, while the Top Ten Percent Law appears to succeed in its central purpose of increasing minority enrollment, it comes at a high cost and is at best a blunt tool for securing the educational benefits that diversity is intended to achieve. We cannot fault UT’s contention that the Top Ten Percent Law is plainly not the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies. We are keenly aware that the University turned to the Top Ten Percent Law in response to a judicial ruling. Yet we cannot agree that it is irrelevant. To the contrary, that the Top Ten Percent
Law, accounting for the vast majority of in-state admissions, threatens to erode the foundations UT relies on to justify implementing Grutter policies is a contention not lacking in force. “Facially neutral” has a talismanic ring in the law, but it can be misleading. It is here.62

This extraordinary concession is as disturbing for the circuit’s reasoning as it is for the tone, as in its earlier autopsies on Bakke. First, the ruling misconstrues the provenance of the plan itself, suggesting that it was a UT-Austin institutional initiative (“We are keenly aware that the University turned to the Top Ten Percent Law in response to a judicial ruling”), when it was a state statute, enacted, as all are, by the Texas Legislature. The statute required all the state’s public institutions to employ the plan, with no exceptions. After several years, it became clear that only UT-Austin, the state’s largest and most popular flagship campus, was affected to a major extent and filled such a substantial portion of its freshman class with these automatic admits. Indeed, UT-Austin accepted the plan at first, to its credit, but then chafed under the plan’s alleged inflexibility. After several years of special pleading, its leaders convinced the legislature to roll back its reach and reduce the effect of the plan.63

But more importantly, the Fisher applicants had never called into question the constitutionality of the percentage plan—nor could they do so on any racial fulcrum, inasmuch as it was entirely race-neutral—so the circuit’s back was up for no good reason. This factor caused Circuit Judge Carolyn Dineen King to “specially concur” but not to adopt the backhanded reference to the percentage plan: “I concur in the judgment and in the analysis and application of Grutter in Judge [Patrick] Higginbotham’s opinion. No party challenged, in the district court or in this court, the validity or the wisdom of the Top Ten Percent Law. We have no briefing on those subjects, and the district court did not consider them. Accordingly, I decline to join Judge Higginbotham’s opinion insofar as it addresses those subjects.”64

Not only were some members of the circuit distressed that the plan had been implemented; but in another special concurrence, Circuit Judge Emilio M. Garza wrote to show his special disdain even for Grutter: “Today, we follow Grutter’s lead in finding that the University of Texas’s race-conscious admissions program satisfies the Court’s unique application of strict scrutiny in the university admissions context. I concur in the majority opinion, because, despite my belief that Grutter represents a digression in the course of constitutional law, today’s opinion is a faithful, if unfortunate, application of that misstep. The Supreme Court has chosen this erroneous path and only the Court can rectify the
error. In the meantime, I write separately to underscore this detour from constitutional first principles." In this round of deciding the constitutionality of Texas public college admissions standards, the circuit was once again calling into question the legitimacy of the Supreme Court’s decisionmaking, as it had done in Hopwood, even as it followed its requirements in this instance. What is extraordinary is that no legal challenge to the percentage plan or even to Grutter was on the table. On their own gag reflexes, they choked.

To the extent that race is accounted for in the process, it should be one of many considerations: I have argued that Justice Powell’s opinion was the correct route for the Supreme Court to follow when it took up Bakke’s progeny, and Grutter has settled that issue for the foreseeable future. The use of affirmative action in college admissions has been the constitutional law of the land as determined by the U.S. Supreme Court at least since 1978. For consistency’s sake, I have not relied on race as the trump card in my own reading of admissions files. I use it as an asterisk, to highlight and add nuance. Someday, I hope even this consideration will not be necessary. But having conservatives, and especially federal judges, cursing the darkness does not help matters; one can only ask why white purposive organizations continue to litigate settled matters and to protest, me-thinks, too much. Under traditional rules of civil procedure, before one can go to court, there must be a demonstrable harm to be remedied, and the admissions evidence clearly shows that whites are not harmed by affirmative action in the aggregate. There are substantial civil penalties for litigants frivolously employing federal courts to bring unwarranted or inappropriate actions, and the jurisprudence of admissions challenges on race—Bakke in 1978, affirmed by Grutter in 2003—has been resolved to the point where these sanctions should be leveled at such claims. In Spring 2012, SCOTUS granted cert to the Fifth Circuit decision in Fisher, setting up this important subject matter once again. After I heard this from a reporter—and finished weeping—I cursed the darkness: Where was the Supreme Court in Hopwood, when there was a case in controversy, a circuit split, a quarter century of settled law, and disrespect from the circuit? Why now: when the case was moot (Fisher ended up enrolling elsewhere), no circuit split, and less than a decade since Grutter and more disrespect from the Circuit?