

September 1996

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Recommended Citation

Michael S. Greve, *Hopwood and Its Consequences*, 17 Pace L. Rev. 1 (1996)
Available at: <http://digitalcommons.pace.edu/plr/vol17/iss1/1>

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Articles

Hopwood and Its Consequences

Michael S. Greve*

The Fifth Circuit's March 1996 decision that the University of Texas Law School may not use race as a factor in student admissions sent shockwaves through the world of higher education.¹ In the wake of the United States Supreme Court's failure

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1. *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir.), *reh'g denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). For reactions to the case see, e.g., *A Stunning Blow*, CHRON. OF HIGHER EDUC., March 29, 1996 (majority of issue dedicated to the *Hopwood* decision and reaction to it); Tom Morganthau & Ginny Carroll, *The Backlash Wars*, NEWSWEEK, April 1, 1996, at 54 (Mark Yudof, Provost at the University of Texas, describing *Hopwood* as "the A-bomb"); Joan Biskupic, *Texas Diversity Policy Overturned; U.S. Appeals Court Rules Campus Admissions Plan Unconstitutional*, WASH. POST, March 20, 1996, A01, available in 1996 WL 3069879 (John C. Jeffries of the University of Virginia Law School calling *Hopwood* "incredibly big"); Linda Ponce Campbell, *UT Law School Case Fuels Affirmative Action Opposition*, FORT WORTH STAR-TELEGRAM, March 24, 1996, at 5, available in 1996 WL 5529109 (Sanford Levinson, University of Texas Law School, calling Fifth Circuit's decision "a full-scale declaration of war"); Todd Ackerman, *A&M Puts All Admissions Decisions on Hold*, HOUSTON CHRON., March 22, 1996, at 25, available in 1996 WL 5588475 (Barry Thompson, Texas A&M Chancellor, predicting that *Hopwood* "will have more impact than any other education opinion of the last 20 years").

to review the Circuit's opinion,² colleges and universities under the Fifth Circuit's jurisdiction will have to dismantle overtly race-conscious admissions programs. Elsewhere in the country, political pressures and threats of future litigation will prompt at least some universities to revise transparently discriminatory policies.³

Defenders of racial preferences have emphasized that *Hopwood* binds only institutions inside the Fifth Circuit and perhaps only the University of Texas Law School,⁴ and they have sought solace in the fact that the Supreme Court has yet to take the final step of explicitly and unequivocally disavowing the "diversity" rationale of Justice Powell's lone opinion in *Board of Regents v. Bakke*.⁵ But these efforts to keep hope alive will prove futile. Judge Jerry Smith's trenchant opinion for the

2. 116 S. Ct. 2581 (1996).

3. In November, 1996, the voters of California passed the California Civil Rights Initiative (CCRI), a state constitutional amendment prohibiting state agencies from administering race- or sex-based preferences in public employment, education, and contracting. The Attorneys General of Colorado and Georgia have urged public colleges in their states to dismantle racial preferences. See Patrick Healy, *California Colleges Will Stop Designing Some Classes For Specific Ethnic Groups*, CHRON. OF HIGHER EDUC., July 21, 1996 (Colorado Attorney General urging end to affirmative action in state higher education); *Georgia Colleges Ordered to Drop Racial Preferences*, WASH. POST, April 10, 1996 at A20, available in 1996 WL 3073481. See also Peter Van Tyle, *The Other Shoe Drops*, COMMUNITY C. J., June/July 1996, at 28, 31 ("Schools outside the Fifth Circuit would be wise to revisit their race-conscious admissions systems. The stakes are too great to do otherwise.").

4. Professor Laurence Tribe, counsel for the University of Texas in the *Hopwood* defendants' petition for Supreme Court review, has claimed that *Hopwood* has "no implications" for colleges outside Texas, Louisiana, and Mississippi." Douglas Lederman and Stephen Burd, *High Court Refuses to Hear Appeal of Ruling That Barred Considering Race in Admissions*, CHRON. OF HIGHER EDUC., July 12, 1996, at A25. In addition, Tribe has argued that if colleges within the Fifth Circuit "use the Fifth Circuit's dictum as an excuse to completely eliminate all uses of race, even as a factor, they will certainly be doing so of a matter of choice rather than compulsion." *Id.* See also Sanford Levinson, *Public Forum—What They're Saying . . . About the Supreme Court and Hopwood vs. UT Law School*; *High Court Puts UT at a Disadvantage*, AUSTIN-AM. STATESMAN, July 3, 1996, at A13, available in 1996 WL 3435206 (quoting Sanford Levinson of the University of Texas School of Law, "[o]ne can argue that its [Hopwood's] effect is limited to the University of Texas Law School, given that no other school was part of the litigation"); Ellen Bernstein, *Hispanic Educators Wrestle With Hopwood Case Fallout*, CORPUS CHRISTI CALLER-TIMES, July 9, 1996 (attorney for the Mexican-American Legal Defense and Education Fund said "that the ruling only applies to the admission system at the University of Texas Law School.").

5. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Fifth Circuit—arguably the first unambiguous, forthright judicial endorsement of official colorblindness in three decades—has blown a huge hole in the “diversity” defense on which racial preferences in higher education have been based. Perhaps even more fatefully, the *Hopwood* litigation itself—the issues it raised and the facts it brought to light—has undermined public support for affirmative action. This erosion will continue. A decade or so from now, *Hopwood* will be remembered as the beginning of the end of affirmative action in higher education.⁶

I.

Racial preference policies are supported by entrenched bureaucracies and by powerful interest groups. These constituencies have responded to *Hopwood* with a mixture of outrage, denial, and defiance. Higher education officials have urged institutions outside the Fifth Circuit to preserve racial preferences.⁷ Given the higher education establishment’s iron commitment to racial “diversity,” universities need no such encouragement; one must frankly doubt that they will readily comply with court-imposed restrictions on racial preference policies. Even institutions within the Fifth Circuit, which in the 1950s and 1960s tried to evade even the clearest judicial orders to cease discrimination,⁸ may prove willing and able to do so again—for example, by applying admissions criteria that, though not overtly racial, provide a proxy for prohibited racial classifications.⁹

6. Throughout, I use the terms “racial preferences” and “affirmative action” interchangeably. I perceive no constitutional objection to “affirmative action” that does not involve preferences based on race or other suspect classifications.

7. See Patrick Healy, *Education Department Urges Public Colleges to Keep Affirmative Action Programs*, CHRON. OF HIGHER EDUC., May 3, 1996, at A27; HIGHER EDUC. & NAT’L AFFAIRS July 29, 1996, at 1 (letter signed by President of American Council on Education and endorsed by over 30 higher education associations urges colleges and universities to maintain affirmative action programs).

8. See, e.g. *Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962), *aff’d* 83 S. Ct. 10 (1962) (unsuccessful petition for stay of court order to admit black student to segregated university).

9. Such strategies are unlawful: the Fifth Circuit’s opinion permits schools to consider factors that correlate with race *but not for the purpose of racial discrimination*. *Hopwood*, 78 F.3d at 946. However, reverse discrimination plaintiffs would find it expensive and difficult to prove a discriminatory purpose behind the use of ostensibly neutral criteria.

Even massive institutional resistance, however, cannot preserve racial preferences indefinitely. Bureaucratic recalcitrance and interest group opposition often suffice to ensure the survival of regulatory or entitlement programs. Affirmative action, however, is no ordinary policy. It stirs deep passions and raises profound questions of constitutional principle and American governance, and cannot be sustained without a credible public defense and explanation. The higher education establishment is perfectly aware of this fact.¹⁰ Certainly, the *Hopwood* defendants were aware of it: throughout the litigation, the University of Texas (UT) and its attorneys accompanied their legal strategies with a concerted public relations campaign to explain and defend the Law School's admission policies.

In orchestrating this campaign, UT invoked the standard defenses of affirmative action in higher education: historical discrimination and educational diversity. These twin pillars were shaky even before *Hopwood*. Arguably, they were never more than stage props designed to camouflage racial proportionalism. Outside the formerly segregationist South, remedial justifications for preferential admissions have always been suspect, and the general practice of extending systematic, sizeable preferences to selected racial minorities *but not to others* who might bring unique and underrepresented perspectives to the campus (say, religious conservatives), makes it doubtful that *racial* preferences were ever meant to enhance the educational, *intellectual* diversity celebrated in Justice Powell's *Bakke* opinion.¹¹ Still, the pillars of lingering discrimination and diversity *looked* sufficiently stable and imposing to deter a full-fledged assault on the affirmative action edifice.

As I will show, however, the *Hopwood* litigation brought the *reality* of racial preferences to public attention and into

10. See, e.g., Douglas Lederman, *College Leaders Plan Strategy to Defend Affirmative Action*, CHRON. OF HIGHER EDUC., May 31, 1996, at A24 (pending *Hopwood* litigation spurs Harvard conference of higher education officials discussing better ways of explaining benefits of racial diversity); Martin Michaelson, *A Time to Increase Public Understanding of Affirmative Action*, CHRON. OF HIGHER EDUC., July 19, 1996 ("Educators must make the case for affirmative action themselves; the courts are unlikely to do it for them.").

11. Needless to say, I do not mean to advocate preferences for intellectually "underrepresented" viewpoints or perspectives. See Eugene Volokh, *Diversity, Race As Proxy, And Religion As Proxy*, 43 UCLA L. REV. 2059 (1996).

sharp focus; and as the facts came to light, “discrimination” and “diversity” came tumbling down. Thus, without altogether disavowing these traditional rationales, UT officials and attorneys raised a third and, at the time, virtually unprecedented defense: they presented racial preferences as the only possible means of averting a “lily-white law school” and the “resegregation” of higher education.¹² In the wake of *Hopwood*, this line of argument—call it the “resegregation defense”—has become the education establishment’s last line of resistance. It is not a viable defense, however, and it may even hasten the demise of racial preferences.

II.

Cheryl Hopwood and her fellow-plaintiffs applied for admission to the University of Texas Law School’s incoming 1992 class. In that year, as in the years before and since, the Law School sought to enroll a class containing five percent black and ten percent Mexican-American students. In order to achieve this “aspiration,” the school administered drastically lower admissions standards for the preferred minorities than for all other applicants. The *Hopwood* litigation showed that the Law School’s policies cannot be justified either as an attempt to rectify past discrimination or as a means of ensuring “diversity.”

A. *Past Discrimination*

The Fifth Circuit categorically rejected the *Hopwood* defendants’ contention that the Law School’s past discrimination against blacks or Mexican-Americans led to the Law School’s current problems—in particular, the paucity of highly qualified minority applicants and recurrent racial tensions at the school.¹³ There is a certain symbolic quality in the fact that UT Law School, which ended segregation only under an order from

12. The school’s legal defense further asserted that the plaintiffs lacked standing, that the Law School’s racial enrollment “targets” were required by the Education Department’s Office for Civil Rights, and that the “targets” were necessary to secure the school’s accreditation by the American Association of Law Schools and the American Bar Association. *Hopwood v. Texas*, 861 F. Supp. 551, 567 & 570 n.56 (W.D. Tex. 1994). I will ignore these and other ancillary defenses. They do not go to the substantive merits of the Law School’s affirmative action program; they are plainly inadequate to build public support for affirmative action; and they were dismissed without much hesitation by the courts. *See id.*

13. *See Hopwood*, 78 F.3d at 953.

the Supreme Court,¹⁴ has become the first educational institution to be told that it must now cease decades of discrimination *in favor of* minorities.¹⁵ The ruling also has a definitive quality: if UT Law School with its notorious past cannot rely on historical discrimination as a predicate for preferential admissions, then no institution of higher learning (except possibly a few schools in the deep South) can rely on a remedial rationale for affirmative action.¹⁶

That said, though, the Fifth Circuit's decision on the inadequacy of the past-discrimination argument cannot have surprised the *Hopwood* defendants. The weakness of the remedial rationale has been obvious for at least a decade: as the history of segregation recedes further into the distant past, it becomes progressively harder to document its present effects. The *Hopwood* defendants could assert a remedial rationale only by defining "discrimination" (and its perpetrators and victims) so broadly as to render it virtually indistinguishable from the attenuated, "societal" discrimination that the Supreme Court has found time and again to be an impermissible predicate for race-conscious "remedies."¹⁷ By way of illustration, after more than two decades of discrimination *in favor of* preferred minorities, the claim that UT Law School still needs racial preferences to compensate for present effects of its own past discrimination was incredible on its face. The defense experts' testimony on

14. *Sweatt v. Painter*, 339 U.S. 629 (1950).

15. The symbolic quality of *Hopwood* has been noted in numerous news articles and feature stories. See, e.g., Bill Adler, *From Sweatt to Hopwood*, TEX. OBSERVER, April 5, 1996, at 4; William M. Adler, *Evening the Score*, ROLLING STONE, August 10, 1995; see also Brief for the United States as Amicus Curiae Supporting Petitioners, *Texas v. Hopwood*, (No. 95-1773), cert. denied, 116 S. Ct. 2581 (1996); Petition For Writ of Certiorari at 10-17, *Thurgood Marshall Legal Society and Black Pre-Law Association v. Hopwood*, 116 S. Ct. 2581 (1996).

16. See, e.g., *Affirmative Action Loses College Case*, MIAMI HERALD, March 20, 1996, A1 (quoting Allan Van Fleet, counsel for the *Hopwood* defendants, "If diversity cannot be a legitimate goal in Texas, given its past history, there is no place in the country for affirmative action.").

17. "... [A] state does not have a compelling state interest in remedying the present effects of past societal discrimination . . ." *Hopwood*, 78 F.3d at 949. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). See also, *Podberesky v. Kirwin*, 38 F.3d 147 (4th Cir. 1994) (funding single-race scholarship program found unconstitutional because perceived present "effects" such as school's bad reputation among minorities were not significantly related to past discrimination by the university).

the alleged present effects of past discrimination—such as the Law School's alleged reputation as a racist institution among potential minority applicants¹⁸—proved nothing except the trial lawyers' adage that one can find experts to testify to practically anything.¹⁹

In short, the remedial rationale was not a promising legal argument for the defendants. Furthermore, it did not provide a viable strategy to persuade the public of the continued necessity for racial preferences. The American public has long ceased to believe that the problems that plague black Americans are principally attributable to past or present discrimination, that race preferences are the answer to those problems, or that the sins of their fathers should be visited upon their sons and daughters.

B. *Diversity*

Throughout the *Hopwood* litigation, the defendants admitted, as they must, that the Law School took race into account in the interest of attaining a racially diverse student body. The defendants insisted, however, in public and in court, that the school was not administering racial "double standards," "unlawful preferences" or "quotas." This stratagem, of course, relied on Justice Powell's opinion in *Bakke*, which prohibited racial quotas and set-asides but permitted educational institutions to consider race a "plus" factor, in the same "individualized" manner that an applicant's extracurricular activities, home state, or other attributes may be taken into account.²⁰

In his *Hopwood* opinion, Judge Smith found that "diversity" was not a compelling state interest that would justify racial preferences, thus effectively declaring Justice Powell's *Bakke* opinion a dead letter.²¹ Without diminishing the significance of Judge Smith's much-debated opinion, however, even a contrary ruling would not have solved the *Hopwood* defendants' more fundamental problem: the diversity defense was untruthful to

18. *Hopwood*, 78 F.3d at 952-53; 861 F. Supp. at 572.

19. Consider only the obvious fact that institutions that have never discriminated are confronted with the same minority recruitment problems as is UT Law School.

20. See *Bakke*, 438 U.S. at 316-17.

21. *Hopwood*, 78 F.3d at 941-48 (Justice Powell's lone opinion in *Bakke* was never the law of the land, and recent Supreme Court decisions have confirmed that race-conscious policies must be strictly confined to remedial settings).

begin with. The facts showed that the school's admission preferences—in substance, if not in all procedural details, similar to those administered by comparable law schools²²—were quotas in all but name. The two charts shown below, along with a brief explanation, make the point.

Chart I is a breakdown of 1992 law school applicants from Texas by race and by the applicant's "Texas Index" ("TI"—left-hand scale).²³ The TI, a composite of the applicant's weighted GPA and LSAT scores, served as the school's principal (though not exclusive) admission criterion. For each of the three listed racial groups (Blacks, Mexican-Americans, and "Other," a category that included such minorities as Asians and non-Mexican-American Hispanics), the dean of admissions determined a "presumptive admit" score (Lines A) and a "presumptive deny" score (Lines B). These scores ensured virtually automatic admission or rejection, respectively, with only a cursory review of the files by a single admission officer. Applicant files in the "discretionary" zones (scores between Lines A and B) were reviewed in greater detail by faculty admission committees. The *Hopwood* plaintiffs' TI scores placed them at the upper end of the "discretionary" range; their files were reviewed, and their applications were rejected.²⁴

22. See *Hopwood*, 861 F. Supp. at 576 n.72 (characterizing expert testimony).

23. Texas residents comprised 85% of the incoming 1992 class, and all of the *Hopwood* plaintiffs were Texas residents. 861 F. Supp. at 564. The school's admission process for out-of-state applicants was substantially the same as for Texas residents, the major differences being that (a) the TI scores required for admission were higher for each racial group (Black/Mexican-American/Other) and that (b) the cut-off scores for Mexican-American applicants were substantially higher than those for blacks and in fact almost the same as for "others." See *Hopwood*, 861 F. Supp. at 561 n.22. In other words, while the resident system favored blacks and Mexican-Americans, the non-resident system was designed to benefit blacks alone. See *id.* There are two corresponding TI scales because one component of the TI, the LSAT, changed from one scoring system to another in the preceding year. Some applicants submitted "old," others a "new" LSAT score. *Id.* See 861 F. Supp. at 561 n.25.

24. Three of the plaintiffs had a TI score of 197. *Hopwood*, 862 F. Supp. at 564. Cheryl Hopwood had a TI score of 199, placing her in the "presumptive admit" group. *Id.* A cursory review of her file indicated that she earned her high GPA at undergraduate institutions the admission officer considered uncompetitive; along with a handful of other presumptive admits, her application was bumped down into the discretionary group. See 861 F. Supp. at 564-65. After further review, Hopwood was placed on a wait list and eventually declined a belated offer of admission. *Id.*

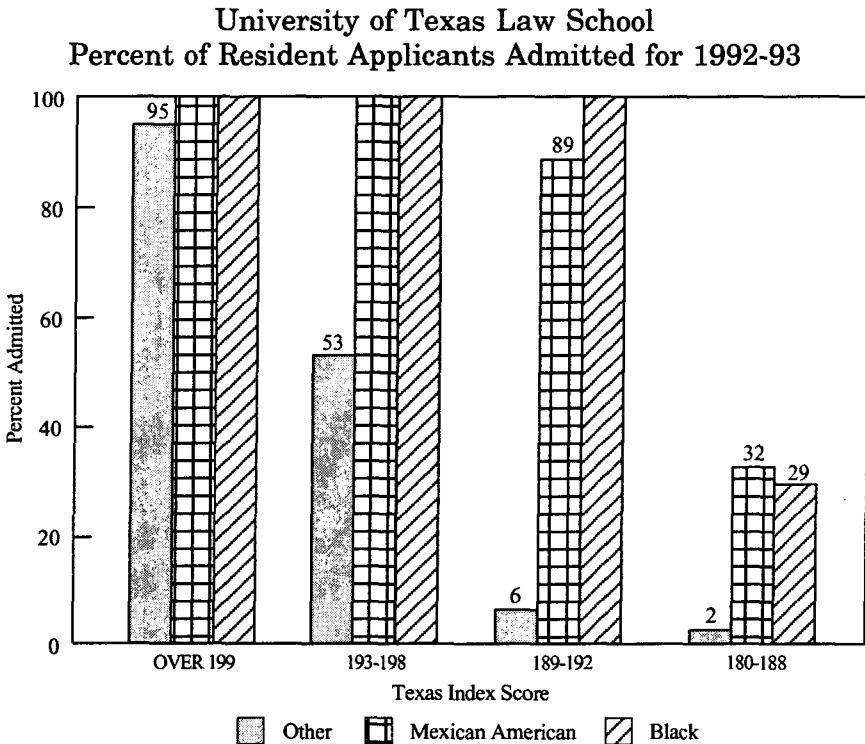
Admit/Deny by Texas Index and Race—Residents

TEXAS INDEX	WHITE & OTHERS			AFRICAN-AMERICAN			MEXICAN-AMERICAN		
	ADMIT No. Cum.	DENY No. Cum.	TOTAL No. Cum.	ADMIT No. Cum.	DENY No. Cum.	TOTAL No. Cum.	ADMIT No. Cum.	DENY No. Cum.	TOTAL No. Cum.
>214/95	13		13						
214	1		14						
213/95	3		17						
212	2		19						
211/94	9		28						
210	3		31						
209/93	14		45						
208	14		59						
207/92	25		84						
206	9		93						
205/91	23		116						
204	20	1	137						
203/90	33	1	170						
202	27	3	200						
201/89	48	5	253						
200/88	51	4	308						
199/87	A57	7	372	1		1			
198/86	34	15	49						
197/85	44	27	71	1		1			
196/84	29	44	106	1		2			
195/83	24	40	146	1		3			
194/82	15	498	64	1		4			
193/81	13	511	708	5		9			
192/80	10	521	780	9		9			
191/79	B 4	525	847	1		10			
190/78	5	530	923	1		11			
189/77	2	532	999	2		13			
188	1	533	1,064	A1		14			
187/76	3	536	1,122			1			
			1,180	14		14			
				14		14			
				4		4			
				7		7			
				13		13			
				5		5			
				47		47			
				60		60			

TEXAS INDEX	WHITE & OTHERS			AFRICAN-AMERICAN			MEXICAN-AMERICAN					
	ADMIT No.	DENY No.	TOTAL Cum.	ADMIT No.	DENY No.	TOTAL Cum.	ADMIT No.	DENY No.	TOTAL Cum.			
186/75	2	50	52	2	16	18	8	61	3	10	13	71
185/74	1	539	44	4	738	45	1,277	5	21	21	13	84
184		539	32	3	770	32	1,309	2	23	23	12	96
183/73		539	51	3	821	51	1,360	2	29	29	11	107
182/72	1	540	35	3	856	36	1,396	2	31	31	7	115
181/71		540	37	3	893	37	1,433	2	33	33	10	126
180/70	1	541	31	3	924	32	1,465	2	35	35	15	141
179/69		541	21	3	945	21	1,486	2	37	37	15	156
178		541	10	3	955	10	1,496	2	39	39	16	172
177/68		541	26	3	981	26	1,522	2	41	41	17	189
176		541	12	3	993	12	1,534	2	43	43	18	207
175/67		541	18	3	1,011	18	1,552	2	45	45	19	226
174		541	9	3	1,020	9	1,561	2	47	47	20	246
173/66		541	9	3	1,029	9	1,570	2	49	49	21	267
172		541	12	3	1,041	12	1,582	2	51	51	22	289
171/65		541	5	3	1,046	5	1,587	2	53	53	23	312
<170/65		541	42	3	1,088	42	1,629	2	55	55	24	336

Source: UT Law School Memo, "All Applicants With an Action"

As the chart shows, the Law School administered substantially lower “presumptive admit” scores for members of the preferred minorities. In fact, the presumptive admit score for the preferred minorities (189) was lower than the presumptive *deny* score for “Others” (192). This double standard was necessary to attain the “aspiration” of enrolling five percent black and ten percent Mexican-American students.²⁵ Chart II illustrates the effects of the differential standards on the Texas resident applicants’ chances of admission.²⁶



Note that “Other” applicants in the discretionary zone (TI 193-198) had roughly a one-in-two chance of admission, whereas *all* preferred minority candidates in the same range were admitted. In the range just below, the chances of admission were 100% for blacks and a mere six percent for “Others,” reflecting the already-noted fact that the “presumptive” admis-

25. See *Hopwood*, 861 F. Supp. at 563.

26. *Pl.’s Ex., P-142, Hopwood.*

sion score for black applicants was lower than the “presumptive” denial score for “Others.” Thus, applicants in the 189-192 TI range were admitted or rejected with only a passing glance at their applications, based solely on their race.

III.

As a member of the UT Law School faculty admitted in an unguarded moment, the admissions policy just described was “in essence, a quota system.”²⁷ The “aspiration” of enrolling five and ten percent blacks and Mexican-Americans, respectively, drove the entire process; notably, it compelled the racial differences in the presumptive TI scores that played such a large role in determining the chances of admission. Race was not a Powell-type “plus factor” or “tie breaker” in close cases; it made all the difference in case after case.²⁸

This revelation effectively forecloses the diversity gambit or “*Bakke* straddle” that has for almost two decades formed the core of the diversity defense. Relying on Justice Powell’s distinction between “quotas” and “plus factors,” the higher education establishment liberally interpreted Powell’s opinion in *Bakke* to mean that so long as there is no *formal* quota or set-aside, and so long as applicant files are not *physically* separated by race, race is a legitimate consideration. Even if the “plus factor” serves the purpose of producing a pre-determined number of minority admissions, and even if it is so large as to swamp every other variable.

The *Hopwood* defendants attempted precisely this maneuver. On the eve of the trial, the school changed its admission policy, jettisoning the race-based cut-off scores and the use of a separate minority admission subcommittee. The defendants then argued that the demise of these transparently discriminatory practices rendered the school’s admissions process consistent with Justice Powell’s opinion in *Bakke*. Whatever the legal

27. *Pl.’s Ex. P-22, Hopwood* (memorandum from faculty member to members of the law school admission committee).

28. I assume for the sake of the argument that Justice Powell’s distinction between a marginal “plus” and a “decisive” preference is meaningful. See *Bakke*, 438 U.S. at 317-18. If the distinction is meaningless (since even a small “plus” will be decisive in the marginal case), Justice Powell’s diversity argument is incoherent and the argument in the text is true *a fortiori*.

merits of this contention, though, the facts in *Hopwood* show that the school's last-minute policy changes were merely cosmetic: so long as the "targets" drive the admissions process, they will remain quotas in all but name.²⁹ The abolition of formal cut-off scores and of a separate minority admissions committee may make the admission process more arbitrary and the racial preferences more opaque, but it does absolutely nothing to reduce the scope of racial preferences. In other words, the distinction between "quotas" and "set-asides" on the one hand and "targets," "aspirations" and "plus factors" on the other is an empty formalism. Post-*Hopwood*, the distinction can no longer be relied upon to provide a plausible defense of racial admissions preferences.

Along with the diversity gambit, the facts of the *Hopwood* case vitiate all the other evasions that have for so long characterized the defense of affirmative action. For instance, affirmative action proponents often maintain that standardized admissions criteria, such as the TI, are a poor proxy for merit and an inadequate means of determining who would or would not make a good law student or lawyer.³⁰ This may be so.³¹ But there is no explanation other than rank discrimination for the

29. See *Hopwood*, 861 F. Supp. at 574 (sustaining minority "targets"). When the trial court upheld this position, the defendants gloated over their victory and described the changes in the Law School's admission procedures as "procedural rather than substantive. We've changed procedures and he's [Judge Sparks] indicated the new procedures pass constitutional muster." Ken Myers, *UT Admissions Plaintiffs Say Ruling Shortchanges Them*, NAT'L LAW J., September 5, 1994 (quoting UT Law School Dean Michael M. Sharlot). In one of the defense's numerous about-faces, UT officials, who first minimized the changes to the admissions procedures, suggested on appeal that the changes were meaningful. See Defendants' Amended and Annotated Proposed Findings of Fact and Conclusions of Law at 31, *Hopwood* (A-92-CA-563-55) (citing changes in admissions policy as basis for denying injunctive relief). They had it right the first time around.

30. See, e.g. Michael A. Olivas, *The Decision Is Flatly, Unequivocally Wrong*, CHRON. OF HIGHER EDUC., March 29, 1996, at B3 (arguing that test scores are poor indicators of minority performance); and Petition for Writ of Certiorari at 22-24. See Petition For Writ, Thurgood Marshall Legal Society (citing statement of Dr. Shapiro on the inadequacy of standardized tests in evaluating minorities).

31. Contrary to the *Hopwood* defendants' suggestions, the plaintiffs never suggested that law schools had to admit "strictly on the numbers." *Hopwood*, 78 F.3d at 946. Nor did the Fifth Circuit require such a policy. *Id.* (schools may take numerous factors into account, including factors that correlate race). Whatever the merits of a test score-driven admission policy might be, it is obviously not a constitutional requirement.

Law School's policy of attributing great significance to the TI for comparisons *within* each racial category (so that six points spelled the difference between virtually automatic acceptance and instant rejection) while treating the scores as meaningless in comparisons across racial groups.

Similarly, glib assurances that everyone admitted to the school was "qualified,"³² that non-minority applicants less qualified (numerically speaking) than the plaintiffs were offered admission,³³ and that minority preferences displaced "only" a handful of "Other" applicants, are no longer persuasive. There have always been ready responses to such claims.³⁴ The most devastating response, however, lies in the incontrovertible fact that *Cheryl Hopwood and her fellow-plaintiffs would have been admitted, had they been black.*³⁵

IV.

In the end, it is impossible to escape the conclusion that the Law School's preference policies served no other purpose than racial balancing for its own sake. Even assuming that past discrimination or diversity provided UT Law School with a "compelling" rationale, the school could not explain how its policies were tailored to either of these purposes. Why, for instance, did more than half of the beneficiaries of a policy ostensibly designed to remedy discrimination by the state of Texas come from outside Texas?³⁶ And what plausible conception of educational diversity would compel the enrollment of five percent blacks but twice as many Mexican-Americans (and utter indifference to the racial composition of the rest of the class)?³⁷

32. See, e.g. Douglas Laycock, "UT's Color-Conscious System," TEX. LAW. NOV. 29, 1993, at 20.

33. *Olivas*, supra note 30, at B3.

34. To mention only the most painfully obvious response: we would not even deign to discuss similar claims if they were made in defense of discrimination against minorities.

35. See *Hopwood*, 861 F. Supp. at 580-82.

36. See *Hopwood*, 78 F.3d at 955, n.50; Trial Testimony, Vol. 2, at 15.

37. [B]lacks and Mexican Americans are but two among any number of racial or ethnic groups that could and presumably should contribute to genuine diversity. . . . I concede that the law school's 1992 admissions process would increase the percentages of black faces and brown faces in that year's entering class. But facial diversity is not true diversity, and a system thus conceived and implemented is not narrowly tailored to achieve diversity.

It was probably in light of the glaring weaknesses of the remedial and diversity defenses that the *Hopwood* defendants decided to make a virtue of necessity and to come clean about the school's interest in ensuring racial balance. They asserted this interest in the most drastic possible form: as an imperative need to prevent "resegregation" and the specter of a "lily-white law school."

This was not a legal argument in any conventional sense. However murky civil rights law may be in many of its particulars, not only is racial balancing for its own sake not a compelling government purpose; it is *the* unconstitutional purpose *par excellence*.³⁸ No federal judge can ignore the numerous precedents to this effect.³⁹ The resegregation defense is at heart a *political* argument, designed for the political purpose of confronting courts and the public with the allegedly intolerable consequences of the demise of racial preferences.

Many affirmative action proponents still attempt to play the diversity gambit: concede that some schools (including UT Law School) may have gone "too far" in the direction of quotas, acknowledge the need for reform, but continue to defend ostensibly more modest efforts to promote "diversity" by "taking race into account." Mend it, don't end it (to coin a phrase). It is a measure of *Hopwood's* impact to have wrung even these concessions and the accompanying call for an "honest *Bakke* regime" from such liberal stalwarts as Anthony Lewis⁴⁰ and from an es-

Hopwood, 78 F.3d at 966 (Wiener, J., concurring). Judge Wiener correctly added that the defendants' "diversity" and "past discrimination arguments" contradicted each other. *Id.* at 966 n.24.

38. If [the university's] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

Bakke, 438 U.S. at 307.

39. Although the district judge presiding in *Hopwood* came close to doing so. See *Hopwood*, 861 F. Supp at 571 n.60.

40. Anthony Lewis, Q & A, SAN DIEGO TRIB., April 7, 1996, at G5 (promotes looking at whole person, rather than applying "mechanical" standard utilized by the University of Texas Law School). See also Peter Schrag, *Courts Will Do Much to Shape Future of Affirmative Action*, CIVIC CENTER NEWSOURCE, May 13, 1996; WASH. POST, *Decision on Diversity*, March 24, 1996, at C6 (calls for genuine diversity without using racial double standards).

establishment that had heretofore denied the very existence of quotas, while expressing unflinching opposition to such things. But *Hopwood* has done more: for reasons already suggested, it has rendered the diversity gambit inviable as a matter of public debate. The clear import of the *defendants'* argument in *Hopwood* was that modest "plus factors" will only marginally increase the number of minority admits.⁴¹ If "honest" plus factors do not produce "meaningful" diversity, we might as well go colorblind. Preferences with more-than-marginal effects on minority enrollment, on the other hand, will turn right back into the thinly disguised quotas the higher education establishment administered from *Bakke* to *Hopwood*.

This regime, however, is doomed. It always depended on secrecy and deceit: there had to be at least a half-way plausible pretense that racial preferences weren't double standards. Precisely for this reason, universities treated admissions data and statistics as closely guarded state secrets, to the point of persecuting whistleblowers.⁴² Of course, rumors leaked out, and anyone familiar with higher education knew the truth all along. But *Hopwood* has finally revealed the truth before the public and robbed the higher education establishment of the last shred of plausible deniability. Once the facts are known, the comparison of racial "diversity" preferences to the consideration of an

41. Chart I illustrates the following, rough calculation: There were eight black applicants in the discretionary range for "Others." The normal chance of admission in this range was about one in two, meaning that about four black applicants would have been admitted under a wholly race-blind system. The "honest" use of a racial "plus factor" or "tie breaker" would have resulted in offers of admission to the remaining four black applicants in the discretionary range. In the presumptive deny range below, no candidate had more than a very small chance of admission. In short, "honest" *Bakke*-type preferences would have produced no more than an additional four or five black admits from Texas and perhaps two or three more from out-of-state.

42. For example, when a student at Georgetown University Law School wrote an article on racial double standards in admissions policies, which he discovered while working for the admissions office, the school threatened to expel the student. See *Double Standard at Georgetown*, N.Y. POST, April 20, 1991; Robin Wilson, *Student's Article Roils Georgetown U. Law Center*, CHRON. OF HIGHER EDUC., April 24, 1994; *Georgetown Law Student Disciplined, Will Graduate*, CHRON. OF HIGHER EDUC., May 29, 1991. A similar incident occurred at the University of Miami School of Law, where a columnist for the student newspaper was disciplined for having admissions records, which he was going to use for an article on affirmative action. See Frances Robles, *Conservation Law Student Brings Furor to Forefront*, MIAMI HERALD, October 1, 1995, at 1B.

applicant's community service or trumpet-playing skills looks as preposterous in public as it has always been in fact.

Post-*Hopwood*, continued insistence on the *Bakke* defense is in effect a bet that the country can be fooled once more. Some like the odds on this bet.⁴³ But the higher education establishment does not, and for good reason: once the secret is out, there is no going back. Hence, the establishment has followed the path marked by the *Hopwood* defendants in the course of the litigation: having denied for decades that racial preferences play much of a role in admissions, the establishment now asserts that such preferences account for virtually all admissions of black and Hispanic applicants. For a notable example, when the Regents of the University of California moved to dismantle affirmative action in student admissions, university administrators fought back by pointing to the allegedly catastrophic effects on black and Latino student enrollment.⁴⁴ From a half-hearted defense of "plus factors," the establishment has moved to defending racial preferences of any size and under any name as the only alternative to "re-segregation" and "lily-white law schools."

This resegregation defense—the orthodox post-*Hopwood* defense of affirmative action in higher education—has an apparent strength, which lies in its almost brutal forthrightness: here, at long last, is the *true* rationale for racial preferences, shorn of all pretenses and prevarications. It is not entirely wrong to expect that the public will be uncomfortable with elite institutions that lack meaningful black and, to some extent, Hispanic representation. Squarely confronted with the specter, voters may prefer to be fooled once more and continue to acquiesce in racial preferences, at least so long as they remain opaque and limited. For several reasons, however, the resegregation defense will not rescue the *ancien regime* of affirmative action.

43. Among them is the President of the United States. See Memorandum on Affirmative Action, 31 WEEKLY COMP. PRES. DOC. 1245, 1264 (July 19, 1995).

44. See, e.g., University of California, Office of the President, *The Use of Socio-Economic Status in Place of Ethnicity in Undergraduate Admissions: A Report on the Results of an Exploratory Computer Simulation*, May 1995 [hereinafter *Computer Simulation*]. See also Douglas Lederman, *Colleges Forced to Consider Ending Use of Race in Admissions*, CHRON. OF HIGHER EDUC., July 19, 1996, at A27.

A. *Illegality*

The public defense of racial preferences on remedial and diversity grounds was by and large congruous with the *legal* defenses that were presumed to be available. Not so with the resegregation defense: as already suggested, the *Hopwood* defendants' aggressive assertion of a flagrantly unconstitutional government purpose was not a *legal* strategy. Instead, it was an attempt to confront the court with the purportedly unacceptable, "resegregationist" consequences of an adverse decision—and then to kick up a cloud of dust ("Diversity! Past discrimination!") to permit a moderately graceful escape from constitutional norms. Now and then, the resegregation scare may induce a district judge to shrink from applying constitutional norms.⁴⁵ In the end, however, and irrespective of future judicial appointments, it will be impossible to gain judicial endorsement of racial proportionalism as a compelling government purpose.

B. *Public Opposition*

Opinion polls conducted over almost two decades have shown a remarkably consistent and deep public resistance to racial preferences. While there is public support for "soft" affirmative action (such as outreach and recruitment efforts), this support dissipates (and hostility towards racial minorities increases) when explicit preferences enter the picture.⁴⁶ The resegregation defense relies precisely on a public disclosure of explicit racial preferences, and it supposes that the public will swallow preferences of *whatever* scope and description to avert the dreaded consequence of "lily-white schools." This supposition is clearly erroneous. In June 1996, in the midst of the *Hopwood* defendants' PR campaign about the specter of "resegregation," over eighty percent of Texas voters, including

45. See *Hopwood*, 861 F. Supp. at 570-71 n.60. The strategy is most likely to make an impression in district courts, especially if the defendant-university happens to be powerful, prestigious, and a dominant player in the local establishment. (Places like Charlottesville, Virginia and Columbus, Ohio come to mind.) The strategy is much less likely to work in appellate courts, which are somewhat more removed from the direct consequences of their decisions and which, owing to their higher institutional prestige, are less reluctant to confront establishment institutions.

46. See Jack Citrin, *Affirmative Action in the People's Court*, THE PUB. INTEREST, Winter 1996, at 40-41.

almost two-thirds of blacks and almost three-quarters of Hispanics, said that universities should *not* take race into account in student admissions.⁴⁷

C. *The Murray Problem*

The resegregation defense implicitly asserts that blacks cannot compete for admission to elite institutions without special preferences (and that not much can be done about the problem, at least for the foreseeable future). To put it polemically: it is difficult to raise the specter of "lily-white institutions" without sounding like Charles Murray (or, more precisely, without sounding the way Charles Murray has been understood by his harshest critics).⁴⁸ The President of Rutgers University, reflecting on the imperative need for racial preferences, was sufficiently careless to blurt out his regrets over the natural inferiority of blacks.⁴⁹ More circumspect education officials want to have it both ways: they want to play on—nay, stoke—public fears that blacks cannot compete *and* be the first to denounce such fears as deeply racist. This combination of nasty, inflammatory insinuation and righteous indignation is not a plausible defense of affirmative action.

D. *More Lies*

While the re-segregation defense *appears* honest and forthright, it ultimately leads to lies even more brazen than those that sustained the post-*Bakke*, pre-*Hopwood* regime. The proffered benefits of educational diversity—racial integration, harmony, and understanding—depend on at least a credible *pretense* of racial fairness and equity. *Hopwood*, however, has proven the long-standing suspicion that minority students are

47. Harte-Hanks Texas Poll, June 3-13, 1996. See also Mary Ann Roser, *Texas Against Race Factor In Admissions, Poll Says*, AUSTIN AMERICAN-STATESMAN, June 29, 1996, at B1; Anna M. Tinsley, *Poll: Few Want Quota For College*, CORPUS CHRISTI CALLER-TIMES, June 29, 1996; and Todd Ackerman, *Most Oppose Use of Race in Admissions But Poll Gives Boost to Affirmative Action*, HOUSTON CHRONICLE, June 29, 1996, at A29.

48. Murray has been said to hold the view that blacks are genetically inferior to whites and Asians. See RICHARD HERRNSTEIN AND CHARLES MURRAY, *THE BELL CURVE* (1994). His actual argument is far more complex and nuanced.

49. See Denise K. Magner, *Chief Under Fire at Rutgers*, CHRON. OF HIGHER EDUC., February 10, 1995, at A16.

admitted under substantially lower standards. Once this is known, the alleged benefits of diversity dissipate. Non-minority students are unlikely to accept minority students as equals; more likely, their attitudes will range from arrogant to condescending. Minority students, for their part, are unlikely to turn into cheerful ambassadors for racial integration. More likely, and understandably, they will tend to take umbrage at real or perceived slights. Most certainly, they will have to deal with the knowledge that they are expected to do worse than others.

To preserve the ostensible benefits of "diversity," then, the defenders of affirmative action must continue to deny the existence of racial double standards. To this day, University of Texas representatives accompany their clamor over "lily-white law schools" with indignant denials that there *were* ever any racial quotas or double standards at the UT Law School.⁵⁰ But one cannot in one breath affirm the imperative for expansive race preferences and, in the next breath, deny their existence. Something has got to give.

V.

The resegregation defense must admit the long-denied existence of the kind of "hard" affirmative action that is opposed by substantial majorities of voters. It exacerbates the duplicity and dishonesty that have always been the Achilles heel of affirmative action. Finally, the resegregation defense is unlikely to gain judicial endorsement and actually tends to expose the traditional, remedial and "diversity" rationales as pretexts for the impermissible goal of racial balancing. For all these reasons, the specter of "lily-white" institutions will fail to arrest the general trend towards colorblind norms and may even accelerate the erosion of public support for racial preferences. What are the consequences?

Affirmative action advocates are correct that the demise of racial preferences will (at least in the short term) reduce the

50. See, e.g., Laycock, *supra* note 32, at 20. The University of California at Berkeley has joined the jeremiad over colorblind "re-segregation," while proudly waving a "finding" by the Education Department's Office for Civil Rights that the school's admission policies—under which large numbers of black and Hispanic applicants gain admission—do not discriminate on the basis of race. See, e.g., Olivas, *supra* note 30, at B3.

number of blacks and, to a lesser extent, of Hispanics in elite institutions. They are also correct in criticizing conservative advocates of colorblindness who fail to confront this reality.⁵¹ To be sure, things are not remotely as bleak as the defenders of the existing quota regime maintain. The demise of racial preferences will occur only over a decade or more, thus dampening whatever “bleaching effect” an immediate implementation of colorblind practices would have. Universities will utilize facially race-neutral admission criteria that serve as proxies for the forbidden consideration of race. The beneficiaries of racial preferences, as heretofore administered, will not drop out of higher education; they will attend other institutions, where they are more likely to compete and succeed.⁵² While lower minority representation in elite schools may be a social loss, a reduction of the “diversity”-induced mismatch between minority students and institutions of higher learning would improve minority graduation rates,⁵³ and students and their prospective employers will be more confident that minority graduates are not “quota products.” But the basic dilemma remains: elite institutions will continue to confront a dearth of highly qualified black applicants, and they will continue to be torn between the constitutional demand for colorblindness and the perceived imperative to ensure “fair” minority representation or, as the case may be, a genuine desire to alleviate racial disparities in educational achievement.

Apart from protracted, acrimonious debate and litigation, the dilemma between constitutional colorblindness and “fair” minority representation may easily produce band-aid solutions and quack remedies, “need-based” or “class-based” affirmative

51. See, e.g., Stuart Taylor, Jr., *Affirmative Action and Doublespeak*, LEGAL TIMES, May 13, 1996.

52. A prominent member of one of the nation's premier law schools has suggested facetiously to this author that we should pass a constitutional amendment prohibiting the nation's top ten law schools from using racial preferences. No other school then would be in need of racial preferences to ensure the desired racial diversity.

53. See, e.g., BOB ZELNICK, BACKFIRE: A REPORTER'S LOOK AT AFFIRMATIVE ACTION 132-34, 155 (minority admission requirements similar to those for whites and Asians tend to produce higher minority graduation rates than admission systems with sizeable race preferences).

action being a prime example.⁵⁴ But the urgency of the dilemma *also* offers an opportunity and an incentive to re-examine the premises that currently underpin the discussion about affirmative action and higher education—in particular, the respective roles of private and public institutions.

A. *Give Choice a Chance*

The most urgent need is to increase the number of highly qualified minority applicants to college, in other words, to enhance the achievement level of minority youths. According to recent studies, private school choice and vouchers provide a promising—perhaps, a singularly promising—way of doing so.⁵⁵ It is true that institutional reforms are no cure-all for deep-seated social pathologies or pervasive societal racism. Moreover, there are plausible arguments against (and for) school choice that have nothing to do with racial considerations. Still, the teachers' unions, the higher education establishment, and civil rights groups are not doing anyone a favor by trying to choke off institutional reforms that may well produce a substantial improvement in minority student achievement.

In the *Hopwood* litigation, the State of Texas insisted that the paucity of highly qualified minorities to the Law School was in large part attributable to the atrocious state of K-12 education. It then cheerfully portrayed the Law School's practice of setting aside some 25 seats—two-thirds of which went to out-of-state applicants—as a “remedy” for tens of thousands of black children trapped in the K-12 system. Having failed in selling the courts and the public on this absurd and offensive theory, the Texas establishment and its civil rights cheerleaders would do well to support institutional reform experiments that may actually redress the injuries which the state, by its own admis-

54. This would not be the first time: the hurry to close the gap between the colorblind language of the 1964 Civil Rights Act and integrationist aspirations drove America into racial preferences three decades ago. See Andrew Kull, *The Color-Blind Constitution* (1992). “Need” or “class” will fail to produce the desired racial composition in elite institutions (unless these factors are manipulated to serve as a proxy for race). See ANDREW HACKER, *TWO NATIONS* (1992); *Computer Simulation*, *supra* note 44.

55. See Jay P. Greene and Paul E. Peterson, *School Choice Data Rescued From Bad Science*, WALL ST. J., August 14, 1996, at A12.

sion, continues to inflict on students, especially in the inner cities.

B. *Representation Versus Elitism*

Throughout the *Hopwood* litigation, UT's representatives invoked the school's democratic, representational pedigree. In so doing, they displayed brazen disingenuousness. Supporters of UT's affirmative action policy argued that because the school is subsidized "by the taxpayers of our state, the UT Law School ought to serve all of the racial and ethnic groups that make up the state's population."⁵⁶ Evidently, this is best done by extending racial preferences to some "taxpayers" while discriminating against others. Similarly, UT Law professor Douglas Laycock warned that

[a]ny system of admissions that again produced a substantially all-white law school would look like a return to Jim Crow. No amount of explaining . . . would ever convince minority voters and taxpayers that their kids were getting a fair shot in our admissions process. A public law school must serve all the people of Texas; equally important, it must be seen to do so.⁵⁷

To paraphrase, Texas minority voters will prefer a flimsy veneer of non-discrimination to the real thing. Moreover, they are too ignorant to see through a transparent lie and too dense to have the matter explained to them. Especially from a scholar of Professor Laycock's integrity and distinction, this is an astounding argument.

Laycock et al. *are* correct to insist on UT's representational obligations since, after all, it is a taxpayer-funded institution. But the problem lies not in squaring representation with racial integration and fairness; it lies in squaring representation with elitist aspirations. For all the *Hopwood* defendants' wailing that UT Law School would become "lily-white" under race-neutral norms, the school could easily meet its racial diversity goals by, for example, holding a lottery among all qualified appli-

56. Barbara Aldave and Al Kauffman, *Our Institution Should Offer Equal Opportunity*, HOUSTON CHRON., March 28, 1996.

57. Douglas Laycock, *UT's Color-Conscious System*, TEX. LAW., Nov. 29, 1993, at 20.

cants.⁵⁸ However, UT Law School, now among the top twenty law schools in the country, wants to be among the "Top Ten," and *this* ambition requires enrolling the very best students. Since few of these are members of the preferred minorities, UT turned to double standards as a means of ensuring "meaningful" racial representation while still maintaining its elitist aspiration.

This aspiration was the law school's *real* interest in the *Hopwood* litigation. The defendants, however, failed to articulate it, and for good reason: an institutional ambition to compete with Duke, Stanford, and Columbia is hardly a "compelling" state interest that would justify racial discrimination.⁵⁹ Especially if racial diversity is as important as the University of Texas has made it out to be, let state institutions be diverse and representative and let other, private institutions pursue an elitist mission if they so choose.

C. *Private Versus Public*

In the wake of *Hopwood*, the University of Texas had to inform donors of race-exclusive minority scholarships that their grants might be illegal.⁶⁰ And after some initial confusion, private universities under the Fifth Circuit's jurisdiction decided that they, too, were bound by *Hopwood*.⁶¹ Just so. These results, however, flow not from *Hopwood* but from Title VI of the Civil Rights Act,⁶² which, in its current form, subjects all but a

58. See Michael E. Rosman, *Race-Conscious Admissions In Academia and Race-Neutral Alternatives*, 1 NEXUS L. REV. 66 (1996). The legitimacy of a lottery as a race-neutral selection device was recognized recently by the Third Circuit in *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996): "Those wiser than we have advised that 'the lot puts an end to disputes and is decisive in a controversy between the mighty.'" *Id.* at 1551 n.4 (quoting *Proverbs* 18:18).

59. It may not even be a plausible state interest, for reasons that have nothing to do with race. For instance, public support for elite institutions probably redistributes income from average taxpayers to the already or future privileged. Perhaps, first-rate public research universities produce sufficient social benefits to justify such a practice. But it's not obvious that they do, or that privately funded institutions would fail to provide similar benefits. The case has to be made.

60. See Jim Phillips, *Morales: Race Can't Be a Factor*, AUSTIN AMERICAN-STATESMAN, July 3, 1996, at B6, available in 1996 WL 3435276.

61. See Anna M. Tinsley, *Impact of Ruling Widens*, INSIDE MEDIA, June 29, 1996 (citing Texas Att'y General Dan Morales who stated that the *Hopwood* ruling applied to private universities which accept federal funding).

62. 42 U.S.C. §2000d (1996).

handful of educational institutions to anti-discrimination norms.

The time may have come to re-think the scope of Title VI. It is easy to think of reasons why the federal government must not lend direct financial support to discriminatory programs or institutions, as the original Title VI provided. It is much harder, however, to think of a reason why the law should provide, as it now does, that federal student loans to individuals who voluntarily sort themselves into various institutions subject each of these institutions to the full rigmarole of civil rights law.⁶³ And why should we prevent *private* donors from bestowing their beneficence on *private* recipients who wish to attend the University of Texas? Perhaps, reducing the scope of Title VI—for example, by restoring its pre-1987 contours⁶⁴—is a radical proposal. But it does have an appealing political symmetry.⁶⁵ And surely, a re-examination of Title VI should not seem

63. Of course, the state itself may not discriminate on the basis of race. But the usual “argument” that we must not tolerate *private* discrimination begs two questions. First, it begs the question of why state-created entitlements or disabilities should trump private rights of contract and association. If the answer seems clear, consider *Berea College v. Kentucky*, 211 U.S. 45 (1908) (state law mandating segregation trumps private rights of contract and association). Second, the slogan of “no discrimination anywhere” begs the question of what we should do when “non-discrimination” means color blindness to some and racial proportionalism to others. Over the past three decades, the Left has successfully “solved” this problem by imposing its version of “non-discrimination” on everyone else. In the post-*Hopwood* era, the Right may decide to pursue the same strategy. See, e.g., TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE*, 189-90 (1996) (arguing for enforcement of uncomprising colorblindness against private parties). Either way, though, the attempt to impose universal rules on private actors is a prescription for perennial strife. See generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* (1992).

64. Title VI owes its expansive reach chiefly to the 1987 Civil Rights Restoration Act, 42 U.S.C. 2000d-4a (1996), which, by expanding the definition of the “program or activity” that will trigger the requirements of the Act, “restored” civil rights to what they had never been before.

65. Liberals would get to keep private affirmative action. Conservatives, at least those with libertarian leaning, could rejoice over the curtailment of a seemingly impregnable statist regime. Admittedly, reducing the scope of Title VI as suggested in the text would enable the funding of a whites-only scholarship. But so what? Should we really hold thousands of foundations, corporations, and individuals, who wish to bestow gifts on minority students without fear of legal complications, hostage to a few racist “crackpots”? I will also admit that it is possible and even likely that universities would solicit private funds to shield otherwise unconstitutional practices. But there are ways of limiting such abuses. In any event, I

radical to the State of Texas and to Professor Lawrence Tribe: they consider Title VI partially unconstitutional.⁶⁶

School choice, at least on an experimental basis. A greater emphasis on the representational function (as opposed to the elite aspiration) of state institutions. And restrictions on the scope of Title VI, as it applies to private universities and the private funding of higher education. In combination, these reforms would avert the (in any event, overblown) menace of "resegregation" in the wake of *Hopwood*.

I harbor no illusion that this benefit will be enough to procure the education establishment's support. Since all of the steps just suggested would endanger the education establishment's power, prestige, and resources, the establishment will oppose such reforms regardless of their merits. Education leaders and civil rights advocates continue to serve the god of diversity, and they have set their faces like flint. But they may yet be put to shame—perhaps, as follows:

You have a choice. You can heed the popular and constitutional demand for official colorblindness, re-consider your dogmatic commitment to racial preferences, and help us go about the difficult business of achieving genuine racial diversity and integration. Or else, you can engage in massive resistance to defend "diversity," as you understand it. America has a soft spot for lost causes, and she will let you fight for "Preferences Now, Preferences Forever." But the American people do not like to be lied to, and after years of administering quotas in drag, you no longer possess the credibility to get away with half-truths, denials, and obfuscation.

Have it your way.

would gladly pay this price in exchange for a step towards limiting civil rights laws to the public sector.

66. See Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 22-25, *Texas v. Hopwood*, *supra* note 15. Judge Sparks dismissed this claim on remand. *Hopwood v. Texas*, No. A92-CA-56355 (W.D. Tex. Nov. 12, 1996).