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Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge

Gerald Torres
Cornell Law School, gt276@cornell.edu

GRUTTER V. BOLLINGER/GRATZ V. BOLLINGER: VIEW FROM A LIMESTONE LEDGE

*Gerald Torres**

June 22, 2003 was a typically sultry summer day in Austin. The kids were swimming; white clouds with no promise of rain moved slowly across the sky. The sky itself was that bleached-out blue that it gets as summer starts to envelop the hill country and life seems to slow down to match the climate. I was sitting with one colleague watching our kids swim, and we were visiting with a former colleague who was in town connecting with old friends and shepherding his children around to see their friends. We were discussing the cases still pending before the Supreme Court and especially the Michigan cases. We had all listened to the oral arguments and had participated in the drafting of amicus briefs for this organization or that one. We each had our view about how the Court would decide and what the breakdown would be—typical academic speculation.

Of course, in Texas our speculation was a little more grounded. Since 1996, we had been living with the elimination of affirmative action, and we had been prohibited from using any consideration of race in any of our admissions programs. We knew what lay in store for the country if the Court decided that there was no basis for upholding Michigan's modest program. We also knew that the stakes were different for the Law School than for the undergraduate college. What had come to be called the Texas Top 10% Plan (Top 10% Plan) had effectively kept the undergraduate college integrated, but it did not and probably could not be made to apply in any sensible way to the Law School or to any other graduate or professional schools.

We wondered what the impact would be if the Court accepted the argument that the plaintiffs were advancing and, if not, what the basis would be for rejecting it. In *Hopwood v. Texas*,[1] the Fifth Circuit had already held that Justice Powell's rationale in *Regents of the University of California v. Bakke*[2] was no longer binding and that the decay of the Supreme Court's commitment to racial justice in cognate cases in employment, contracting, and government services had rendered the opinion a dead letter. The *Hopwood v. Texas* decision was breathtaking in its disdain for the Supreme Court's educational equal protection jurisprudence. That

* H.O. Head Centennial Professor of Real Property Law, University of Texas School of Law. The title of this piece is a reference to a book by John Graves, From a Limestone Ledge (1980). The book is subtitled: Some Essays and Other Ruminations About Country Life in Texas. It is a naturalist's book, but it is mainly about the changes (and continuities) of life in the hill country of Texas. I would like to thank my colleagues, especially Willy Forbath, Karen Engle, and Tamara Piety, for suggestions on an earlier draft. I would also like to thank Meredith Vera for her research assistance.

1. 78 F.3d 932, 944–50 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996).

2. 438 U.S. 265 (1978).

disdain was combined with the in terrorem proviso against academic administrative skullduggery in which the Fifth Circuit threatened individual liability if race were smuggled back into the decisionmaking process. This was reinforced by the then Texas Attorney General's opinion that the case was rightly decided and should be interpreted expansively to cover recruiting, financial aid, and the like.

Since that decision, we had witnessed a precipitous decline in African American and Mexican American enrollment at the University of Texas Law School. To the dismay of many in our community, we were seeing the destruction of a legacy the Law School had established since it was desegregated by Heman Sweatt in 1947. Since that time, Texas had enrolled and graduated more African American and Mexican American lawyers than any non-minority law school in America.[3] At one point, one out of every eleven Mexican American lawyers was a graduate of the University of Texas Law School.[4] The year after the *Hopwood* decision, African American enrollment dropped to 0.9% of the incoming class and Mexican American enrollment fell to 5.6%—the lowest levels for both groups since affirmative action started at the University in 1983.[5] The prospect of continuing declines was disquieting, and we knew that should the enrollment fall any further the University would lose the link that kept it a real option for the people in those communities. We knew, in other words, that the idea of critical mass that the University of Michigan had been advancing was not a makeweight or a dodge, but an important sociological fact that affected the learning environment. It also determined whether the Law School would be a place members of underrepresented communities might want to attend. We also knew that the kinds of drops in enrollment that we were experiencing would seriously compromise our ability to perform our mission as the flagship state law school. The heterogeneous composition of the state required that the Law School make a meaningful effort to enroll students from the disparate communities that make up Texas. The Law School had long served as a gateway institution in the elite social, political, legal, and economic life of the state. A resegregation of the Law School would have reverberations that would be felt across many institutions.

As we relaxed on that warm Sunday afternoon, we knew that whatever the Supreme Court did, the consequences for the rest of country as well as for Texas would be substantial. We were surprised when the

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3. Interview with M. Michael Sharlot, former Dean, University of Texas School of Law, in Austin, Tex. (Sept. 15, 2003) (discussing calculation based on census data and school records indicating number of Mexican American graduates).

4. Id. (relying on historical data from University of Texas Law School records and total number of law school graduates).

5. Minority Enrollment for Entering First Year Classes at the University of Texas School of Law, 1983–2002 (Oct. 30, 2002), available at http://www.law.utexas.edu/hopwood/minority.html (on file with the *Columbia Law Review*).

decisions in *Grutter v. Bollinger*[6] and *Gratz v. Bollinger*[7] were released that Monday. We would have a chance to test our speculation and to begin to see what lay in store for higher education.

For those of us in Austin, what was most striking was the repudiation of the Fifth Circuit's decision in *Hopwood*. We could now take a deep breath with the realization that colleges and universities in Texas, Louisiana, and Mississippi would once again be permitted to use race-conscious admissions policies that are expressly designed to achieve the now constitutional goal of diversity. The truth also hit us that state law in the large and polyglot states of California and Florida, as well as Washington, would prohibit state universities from using race-conscious admissions policies. Yet, Justice O'Connor was clear that mere constitutional *permission* would not translate into a constitutional *obligation*.[8] Still, the Court's having preserved the chance to take race into account in the fashioning of educational goals meant that the idea could now be on the agenda of all schools. The form that accounting would take and how it might happen would still present considerable challenges. Could schools just keep doing what they had been doing, or would this be an opportunity to rethink both means and ends? We also knew integrating race into the admissions policies in Texas would be more difficult than just importing the Michigan plan. In Texas, the University had been using the Top 10% Plan to achieve its goals of maintaining a diverse learning environment and keeping its promise to serve all of the people of the state. We wondered how the chance to take race into account would allow us to incorporate what we had learned from our time in the wilderness.

The decision in *Grutter*, drawing as it did on Justice Powell's opinion in *Bakke*,[9] demonstrated that strict scrutiny is not always "strict in theory, but fatal in fact."[10] In the companion *Gratz* case, the Court rejected the Michigan undergraduate admissions policy as too mechanistic.[11] The holdings and reasoning in these cases are important for clarifying the methodology the Court will apply in assessing race-conscious programs within the context of higher education.[12] In stressing the differences in the Court's equal protection cases, Justice O'Connor was direct: "Context matters when reviewing race-based governmental action under the

6. 123 S. Ct. 2325 (2003).

7. 123 S. Ct. 2411 (2003).

8. *Grutter*, 123 S. Ct. at 2338.

9. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

10. *Grutter*, 123 S. Ct. at 2338 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 257 (1995)).

11. *Gratz*, 123 S. Ct. at 2428–30.

12. Of course, the bitter debates that served as a prelude to the Michigan cases have morphed into bitter debates over the meaning of the cases. It seems clear that caution is the appropriate response. See, e.g., Curt A. Levy, Colleges Should Take No Comfort in the Supreme Court's Reprieve, Chron. Higher Educ., July 18, 2003, at B11; Martin Michaelson, The Court's Pronouncements Are More Dramatic and Subtle than the Headlines, Chron. Higher Educ., July 18, 2003, at B11.

Equal Protection Clause,"[13] and because context matters, "strict scrutiny must take 'relevant differences' into account."[14]

Of course, the Court did not make clear what those relevant differences would be across the range of cases it might consider. Nonetheless, the decisions were important for more than their vindication of the use of race in a well-constructed comprehensive evaluation of candidates for admission. Given the compelling nature of that interest, the Court's reasoning can logically be extended to the constellation of activities universities undertake in the construction of their entering classes. Activities like outreach, recruitment, and financial aid are critical to a university in making a diverse student body possible. In fact, the narrow tailoring requirements that led the Court to strike down the Michigan undergraduate admission plan might depend on the capacity of the university to assemble a complex and diverse pool of applicants from which to choose a class. The tools for constructing the pool of potential applicants are indissolubly linked to the goal of constructing a diverse learning environment.

This reflection on means and ends should cause us to focus on what we have done at the University of Texas since 1996. In 1996, the Fifth Circuit in *Hopwood* changed our understanding of the relationship between our goals and how we might achieve them. It led us to scrutinize public education as a system. Elite public higher education might be at one end, but it is intimately connected with how the state provides education more generally. The permission to use race that the *Grutter* decision admits should not lead us to forget the lessons *Hopwood* forced us to learn. Perhaps the most important lesson is that racial, economic, and geographic diversity cannot be achieved without a frank and determined commitment to that goal.

The response that has received the most attention is the Top 10% Plan, passed by the Texas legislature in House Bill 588.[15] Percent plans, like HB 588, have come in for some heavy sledding both by opponents of affirmative action who try to place more weight on these plans than they can carry and by proponents of affirmative action who suggest that these types of plans can never work.[16] What both camps have in common is an

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13. *Grutter*, 123 S. Ct. at 2338.

14. Id. (quoting *Adarand*, 515 U.S. at 228).

15. Tex. Educ. Code Ann. § 51.803 (Vernon Supp. 2003).

16. The amicus briefs in the Michigan cases were littered with criticism of the plans, and Justice O'Connor rightly suggested that application of such plans to graduate and professional schools is inapposite. See *Grutter*, 123 S. Ct. at 2345 ("The United States does not . . . explain how such plans could work for graduate and professional schools."). Much has also been made of my participation in a brief filed by the author of the Top 10% Plan, the late and much missed Representative Irma Rangel. See Cheryl I. Harris, Mining In Hard Ground, 116 Harv. L. Rev. 2487, 2517–38 (2003) (criticizing percent plans as way to address racial inequality). This article, like the briefs and the other commentary, misrepresents what the plan was aimed at and the efforts that have to be taken in support of the plan to make it work.

unwillingness to note the differences in genesis, construction, and operation of the various percent plans. More than that, they have failed to see how what the University of Texas itself did was crucial for the positive effects of the plan on undergraduate admissions.

Creating a student body that reflects the racial, economic, and geographic diversity that is Texas was made increasingly difficult, and many said impossible, after the *Hopwood* decision of 1996 ended all race-based affirmative action plans at Texas public universities.[17] To mitigate the effects of *Hopwood,* in 1997 the Texas Legislature, under the leadership of African American and Mexican American representatives, enacted HB 588, granting high school seniors graduating in the top 10% of their class automatic admission to the state university of their choosing.[18] Most thoughtful observers knew that this alternative to affirmative action would on its own be insufficient to restore pre-*Hopwood* racial and ethnic diversity. We would have to take the legislature's effort as an invitation to do more. We knew that implementing HB 588 successfully would require other initiatives aimed at encouraging a racially, ethnically, economically, and geographically diverse enrollment.

The results of these efforts are these: Since 1997, the University of Texas has essentially restored pre-*Hopwood* ethnic and racial diversity to the undergraduate college. This diverse student body has higher retention rates than previous classes, and its members are performing as well in college as their pre-1996 affirmative action counterparts.[19] The University of Texas has created a more racially, geographically, and

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17. David Montejano, Access to the University of Texas at Austin and the Ten Percent Plan: A Three-year Assessment, at http://www.utexas.edu/student/research/reports/admissions/Montejanopaper.htm (last updated Jan. 13, 2003) (on file with the *Columbia Law Review*). The stated legislative purpose of HB 588 was to give the best students of each high school in the state of Texas an opportunity to attend the flagship universities; the flagship universities have an obligation to serve all areas of the state. In this way, HB 588 was designed to broaden significantly the ranks of "feeder" schools to the University, and it has done just that. Larry Faulkner, President of the University of Texas at Austin, Performance and Access in Texas, Now and in the Future, Remarks to the Southern University Presidents at San Antonio, Texas (Mar. 15, 2003), at http://www.utexas.edu/president/speeches/univconf.html (on file with the *Columbia Law Review*); see also Marta Tienda et al., Closing the Gap? Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action 18 (Office of Population Research Princeton Univ. Working Paper No. 2003-01, Jan. 21, 2003), available at http://www.opr.princeton.edu/papers/opr0301.pdf (on file with the *Columbia Law Review*) (noting that enrollment probabilities did not decline, therefore attesting to success of new outreach strategies).

18. Press Release, University of Texas at Austin, Enrollment of First-Time Freshman Minority Students Now Higher than Before *Hopwood* Court Decision (Jan. 29, 2003), available at http://www.utexas.edu/opa/news/03newsreleases/nr_200301/nr_diversity030129.html (on file with the *Columbia Law Review*) [hereinafter Press Release, Minority Enrollment].

19. Gary M. Lavergne & Bruce Walker, Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin: Demographic Analysis Fall 2002 (2002), available at http://www.utexas.edu/student/research/reports/admissions/HB588-Report5.pdf (on file with the *Columbia Law Review*).

socioeconomically diverse class, and it has expanded the number of feeder high schools yielding an academically successful student body.[20] Historically, about 10% of the state's high schools accounted for 50–75% of each freshman class.[21] Our efforts to implement HB 588 effectively changed that, and those efforts have begun to shape new feeder school patterns. How did this happen?

Comparing the demographic breakdown of the population of Texas and that of the University of Texas student population in 2001 reveals the type of struggle the University still faces in creating a student population that even remotely resembles the state's population.[22] Population projections through 2015 also convey the rapidly changing demographics of the Texas population.[23] In 2001, Latino/Hispanics made up about one-third of the population, African Americans 13%, and the non-Latino/Hispanic population barely a majority. Demographers claim that within 5 years Texas will be a no-majority state, and that by 2015, the Latino/Hispanic population will grow to about 37%, and the white population will decline to about 44%.[24] Almost half of Texas first-graders today are Latino/Hispanic.[25] The growth of the nonwhite portion of the population is substantial, and the University must accommodate the demographic realities of the state.

Every affirmative action program involving race/ethnicity as a factor in admissions at Texas public universities ended in June 1996.[26] The University had to adapt to this court-imposed bar on race-conscious affirmative action by seeking realistic alternatives to help achieve the goal of enrolling a racially, ethnically, economically, and geographically diverse student body. That, according to President Faulkner, had to be the ultimate goal of a public flagship institution.[27] What turned out to be absolutely critical was that the *Hopwood* decision in no way altered the aims of the University of Texas, only the methods of achieving them.

The Fifth Circuit Court of Appeals forced the University to think about how it would assemble a diverse pool of potential students.[28] Critics of the Top 10% Plan often lump it with the California and Florida

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20. A school is a feeder school if it traditionally sends applicants to the University of Texas. We discovered that there was a limited set of high schools in Texas that sent the University of Texas the bulk of its applicants. If we were going to diversify the student body and make the Top 10% Plan work the way the legislature intended, we would have to break the old patterns and start to create new ones district by district.

21. Interview with Augustine Garza, Deputy Director of Admissions, University of Texas at Austin, in Austin, Tex. (Mar. 2002).

22. Faulkner, supra note 17, fig.2.

23. Id. fig.1.

24. Id.

25. Id.

26. Press Release, Minority Enrollment, supra note 18.

27. Faulkner, supra note 17.

28. Faulkner noted, "[W]e have to invent other, race-neutral, methods, and we have tried hard to do exactly that." Id.

plans and frequently mischaracterize it as an assault on affirmative action. That may be true in California and Florida, but in Texas the legislation was created by African American and Latino legislators who were historically the principal advocates of racial, ethnic, economic, and geographic diversity. They were joined by farseeing rural white conservatives who saw in the Top 10% Plan a chance to enroll a robustly diverse class at the flagship universities of the University of Texas and Texas A & M.[29] The University of Texas has been aggressive in implementing the plan.[30]

The University of Texas has proven that an institution in a state like Texas can, in its undergraduate program, build a diverse class on the basis of the Top 10% Plan.[31] The plan has also forced the admissions administrators to recognize that the University's traditional admission schemes were causing it to miss students with the academic potential to prosper at the university level. Finally, and perhaps most importantly, the Top 10% Plan has allowed the University to broaden its service to the state of Texas by drawing its freshman class from more high schools and school districts than ever before. As a result, the University is "doing a better job of what a flagship state university is supposed to do for the communities of the state."[32]

The overall enrollment of first-time freshman minority students (African Americans, Latino/Hispanics, and Asian Americans) is now higher than before the *Hopwood* decision. The University's Office of Institutional Research reports that in 1996 there were 266 African American, 932 Hispanic, and 942 Asian American first-time freshmen.[33] While these numbers dropped drastically after *Hopwood*, the Office's report reveals that enrollment for all 3 groups was numerically greater in 2002 than in 1996, with 272 African Americans, 1,137 Hispanics, and 1,452 Asian Americans.[34] In proportional terms, African American and Latino/Hispanic students respectively made up 4.1% and 14.5% of the entering freshman class in 1996; by last fall, those percentages had returned to 3.4% and 14.3%, up from their low points of 2.7% and 12.6% in the immediate aftermath of *Hopwood*.[35] By building upon the Top 10% Plan, the University has succeeded in achieving an overall enrollment of Asian American and Latino/Hispanic students that is greater in absolute terms than it was during the last pre-*Hopwood* year.[36] While the percentage of African American and Latino/Hispanic students remains slightly lower than pre-*Hopwood* levels, these numbers still represent an improvement over the low point post-*Hopwood*.[37]

29. Lavergne & Walker, supra note 19 (describing HB 588).
30. Faulkner, supra note 17.
31. Id.
32. Id.
33. Press Release, Minority Enrollment, supra note 18, at tbl.S12A/B.
34. Id.
35. Id.
36. Id. at tbl.S4A/B.
37. Id.

The University of Texas has compensated for the loss of race-conscious affirmative action at the undergraduate level by using HB 588 to provide a basis for recruiting and provision of financial aid.[38] Because of the composition of Texas communities, this recruiting and financial aid mechanism reached a significant number of nonwhite students.[39] Concerning the success of the University of Texas's implementation of the Top 10% Plan, President Faulkner has noted:

> [I]t has seemed to me that not many people have been very interested in the truth. The proponents of affirmative action have not been willing to admit [the] strengths or positives of what we have been able to accomplish in Texas, and those who are supporting the anti-Michigan position have not been willing to admit the strengths or positives of affirmative action.[40]

In the view of admissions officials, the *Grutter* and *Gratz* opinions will give the University more tools to assemble an entering class that reflects the mission of the University.[41] Ironically, one potential roadblock to the increased consideration of race in the admissions process is the percentage of the entering class that is filled by students admitted under the Top 10% Plan. The University's preliminary fall 2003 enrollment figures show that automatic admissions via the Top 10% Plan would account for 69% of the freshman class as a whole and 75% of the incoming freshmen listed as Texas residents. Because the percentage of those automatically admitted via HB 588 could rise to as high as 85% or 100% in the next few years, the University is seeking legislative approval for a cap on the percentage of automatically admitted Texas residents at not more than 60%.[42] As noted, the current admissions statistics reveal that in only about 31% of the class may the University consider race as a factor in admissions.

Despite the misgivings about relying on a single factor, admissions officials are convinced that, from the standpoint of admissions as a sci-

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38. Press Release, University of Texas at Austin, The University of Texas at Austin's Experience with the "Top 10 Percent" Law (Jan. 16, 2003), available at http://www.utexas.edu/admin/opa/news/03newsreleases/nr_200301/nr-toptenpercent030116.html (on file with the *Columbia Law Review*) [hereinafter Press Release, UT Austin's Experience].

39. Id.

40. Faulkner, supra note 17. President Faulkner has mentioned on several occasions that should the Supreme Court allow the University of Texas to consider race as a factor, the University would incorporate it to some extent. Both President Faulkner and Gary Lavergne, University of Texas Director of Admissions Research, support Faulkner's statement that "[t]he inability to consider any factors other than the single criterion of high school rank is unhealthy for an institution of higher education." Press Release, University of Texas at Austin, The University of Texas at Austin Reacts to the Supreme Court's Affirmative Action Decisions (June 23, 2003), available at http://www.utexas.edu/opa/news/03newsreleases/nr_200306/nr_affirmativeaction030623.html (on file with the *Columbia Law Review*) [hereinafter Press Release, Reaction].

41. Interview with Gary Lavergne, Director of Admissions Research, Office of Admissions, University of Texas at Austin, in Austin, Tex. (July 10, 2003).

42. Press Release, Reaction, supra note 40.

ence, there is a place for automatic admissions policies based on GPAs.[43] Research on the students admitted under HB 588 reveals what many educators already know but what those who are committed to standardized testing are loathe to admit: High school performance is a better indicator of college performance than are standardized test scores.[44] Top-ten percenters make much higher grades in college than non-top-ten percenters; in fact, these students (who in many cases would *not* have been admitted any other way *because of* their lower entrance exam scores) are now performing as well in college as their non-top-ten-percent counterparts who scored 200–300 points higher on the SAT.[45] What this has meant for Texas is that, because students of color have historically had lower standardized test scores than whites, these successful minority students would not have made it into the University of Texas without the combination of HB 588 and the efforts of the University to make it work.

In addition to evidence of the academic success of the top-ten percenters, since implementing the law the University has seen retention rates improve from 87% to 92%.[46] Based on the two most important indicators of academic success (college grades and return rates), the efforts of the University of Texas to implement HB 588 have yielded a more qualified entering class of students than conventional admissions programs and conventional affirmative action policies.[47]

Proportionally, these entering classes are almost as racially and ethnically diverse as pre-*Hopwood* classes, and they are even *more* socioeconomically diverse and come from a larger number of Texas communities and high schools than ever before in the University's history.[48] This diversity of region, economic class, social background, as well as race, and the increased number of high schools that now send students to the University are a direct result of the efforts to maintain a racially, ethnically, economically, and geographically diverse class after *Hopwood*. Success in achieving these goals is largely a result of the Longhorn Scholars Program, which employs a race-neutral algorithm for scholarship aid that was developed in response to the *Hopwood* decision. Because most students of color in Texas tend to come from poor high schools, poor school districts, and poor families with less-educated providers, the scholarship program has successfully increased the number of African American and Mexican American applicants.[49]

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43. Interview with Gary Lavergne, supra note 41.

44. Id.

45. Lavergne & Walker, supra note 19.

46. Id.

47. Interview with Gary Lavergne, supra note 41. Lavergne has also noted that no institution has seen as dramatic an improvement in retention rates over a five-year period as that experienced by the University of Texas. Id.

48. See Montejano, supra note 17.

49. See Gary Hanson & Lawrence Burt, Responding to Hopwood: Using Policy Analysis Research to Re-design Scholarship Criteria, at http://www.utexas.edu/student/research/reports/Hopwood/Hopwood.html (last modified June 23, 1999) (on file with

The Longhorn Scholars Program uses HB 588 to define a potential admissions pool. The University then focuses on those students who could not take advantage of their top-ten-percent status without receiving financial aid. Instead of targeting individuals, the scholarship program mathematically targets underprivileged high schools and school districts. These are often inner-city schools selected because of the schools' historically low percentage of SAT scores reported to the University of Texas and because the average family income for each high school's district is below a certain threshold.[50] The University offers a scholarship for every 10 SAT scores in deficit relative to the statewide submission rate to the University of Texas. For example, if the statewide submission rate is 50 SAT scores sent to the University of Texas, but the target school has historically sent only 20, that school would be eligible for 3 four-year scholarships. In addition to these automatic scholarships, the University also considers each school individually, looking at factors such as average family income, and may provide additional scholarships based on these figures. Thus, the University is able to put much more financial aid into these school districts than the few scholarships put on the table to trigger applications. This multiplication effect is the "magical aspect" of the Longhorn Scholars Program that has boosted the African American presence in the freshman class by 40%. Also, because this program was designed to be consistent with the *Hopwood* criteria, well-deserving white applicants from these schools and communities also receive the benefits of the program.

In addition to the Longhorn Scholars Program for top-ten percenters, other University of Texas scholarship programs first implemented in 1997 used similar policy analyses to develop criteria that resulted in more awards for students of color without taking race into account.[51] With these programs, points are assigned to each adversity indicator based on the percentage of students falling within certain data distribution values.[52] By repeated iterations of assigning points, re-examining the data distributions, and adjusting the number of points assigned, a balance can be achieved between the subcomponents of family, socioeconomic, school, and peer-performance indicators, and awards can be offered based on the individual's level of adversity.[53] These scholarship programs, most notably the Longhorn Scholars Program, have played the biggest role in creating a broad and deep version of diversity post-*Hopwood*.

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the *Columbia Law Review*) (discussing Presidential Achievement Scholarships, part of Longhorn Scholars Program).

50. Faulkner, supra note 17.

51. E.g., Hanson & Burt, supra note 49 (discussing Presidential Achievement Scholarship Program, awarded to students from economically disadvantaged backgrounds who academically excelled in high school).

52. Id.

53. Id.

The University has used another method to implement HB 588 that has helped maintain a racially, ethnically, economically, and geographically diverse class by expanding the University's admissions policy to include a detailed consideration of the living environment of individual students as well as academic and leadership skills.[54] Beginning in 1997, the University of Texas assessed each applicant using both an Academic Index and a Personal Achievement Index that allowed the admissions officers to put each candidate into a detailed socioeducational context.[55] The emphasis on factors other than SAT/ACT scores has enabled the admissions office to assemble a diverse and successful class that reflects the diversity of Texas while being consistent with the dictates of *Hopwood*.

The combination of HB 588, the Longhorn Scholars Program, and the enhanced admissions criteria allowed the University to target those schools that had not traditionally sent students to the University of Texas.[56] As recently as 2000, the distribution of the University of Texas entering class continued to be skewed towards relatively few high schools. Nonetheless, a change is evident. The number of high schools sending students to the University of Texas increased from 622 in 1996 to 792 in 2000, a 27.3% increase.[57] Importantly, most of this increase occurred among high schools that had historically sent few applicants, indicating a greater overall access to the University of Texas. A profile of these new feeder schools reveals new clusters of inner-city high schools in Dallas-Ft. Worth, Houston, and San Antonio, and rural white high schools in East and Northeast Texas. There is also the beginning of an additional cluster of minority and "mixed" rural schools in West and South Texas. These results show that HB 588 has broadened the high school feeder pattern to the University of Texas, with the University now being more accessible to the best high school students from across the state, regardless of race, economic standing, or residence.[58]

HB 588 affected every public university in Texas, but most notably the flagship universities of the University of Texas and Texas A & M. The comparison between the University of Texas and Texas A & M is instructive. Texas A & M has not been nearly as successful as the University of Texas, nor have any other public institutions in the state of Texas. This

54. See Lavergne & Walker, supra note 19.

55. The Academic Index (AI) consists of high school record, class rank, completion of University of Texas required high school curriculum, extent to which students exceed the University of Texas required units, and SAT/ACT score. The Personal Achievement Index (PAI) consists of scores on two essays, leadership, extracurricular activities, awards/honors, work experience, service to school or community, special circumstances including socioeconomic status of family, single parent home, language spoken at home, family responsibilities, socioeconomic status of school attended, and average SAT/ACT of school attended in relation to student's own SAT/ACT. Id.

56. Montejano, supra note 17.

57. Id.

58. Id. "New feeder schools" are those that sent students to the University of Texas in 2000 but did not do so in 1996 and 1997.

difference is due largely to failures in implementing and building upon the percent plan as aggressively and as well as the University of Texas admissions staff has done. As Marta Tienda has pointed out, however, "In 2002, A & M implemented the Century Scholars Program, modeled after the UT Longhorn Scholars, which provides full scholarships to high performing students from 20 targeted lower achieving high schools each in Dallas and Houston—the state's two largest cities."[59] However, this program is not as aggressive as the Longhorn Scholars Program, which is broader and targets the entire state of Texas. The University of Texas demographers/statisticians worked closely with the admissions office. In fact, the criteria for revamped scholarship criteria came directly from policy analysts such as Gary Hanson and Lawrence Burt.[60] Unfortunately, most public colleges and universities did not use *Hopwood* as a spur to push forward and aggressively use HB 588 to build racial, ethnic, economic, and geographic diversity.

A similar situation exists in California and Florida, the two other states that have implemented automatic admission percent plans. In addition to not guaranteeing admission to the flagship campuses, neither of these schemes involve such carefully researched and implemented plans as the Longhorn Scholars Program, through which the University of Texas studied the students of Texas in an attempt to build a diverse student body that was also the most likely to succeed. In addition to not building off the percent plans as aggressively and effectively as the University of Texas, the schools' specific percent plans and demographics are also different. For example, HB 588 guarantees Texas students admission to their campus of choice, while the California and Florida systems guarantee admission only to the main state university system (not to any particular campus).[61] Even so, the benefits that automatic-admit percent plans offer are still evident. For example, in response to a statewide ban on affirmative action in 1996, the nine-campus University of California system implemented a program that automatically admitted the top 4% of each high school graduating class. This program has enhanced the geographic diversity of the University of California system, benefiting students from rural high schools the most. The percent plan itself is enhancing ethnic diversity (especially for Latino/Hispanics), but the results are relatively small, and the plan is not enhancing the African American presence much at all.[62] The same is true of Florida's implementation of their top 20% automatic-admit plan. The results are not nearly as suc-

59. Tienda et. al., supra note 17, at 13–14 (internal citations omitted).

60. See Hanson & Burt, supra note 49 (discussing criteria).

61. Catherine L. Horn & Stella M. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences 22 (2003).

62. Jeffrey Selingo, The U. of California's 4-Percent Plan Helps Hispanic and Rural Applicants Most, Chron. Higher Educ., May 14, 2002, available at bttp://alianzas.us/pdffiles/The%20Chronicle%20of%20Higher%20Education.pdf (on file with the *Columbia Law Review*).

cessful as those in Texas, but the effects of targeting all high schools and communities is still broadening the feeder school number and geographic range.[63]

Hopwood forced us to reexamine our goals with clarity and honesty. What does our responsibility as a flagship institution demand? The answer is in many ways consonant with the one expressed by Justice O'Connor—that education is unique in our society because it is "the path to leadership."[64] That is even truer where particular institutions serve as historical gateways to state leadership. The flagship campuses in Texas have traditionally served that role. We had to be concerned about our capacity to serve every geographic region of the state of Texas, along with every community, every school district, and every socioeconomic level. By weaving considerations of race into our admissions policies without forgetting the lessons we have learned since 1996, we will be better able to serve the entire state as well as the students on campus.

Our second response to *Hopwood* was to accept the reality that HB 588 on its face was not the whole answer either. Affirmative action brought us students of color, but we were not expanding our feeder school base or our representation of socioeconomic groups. Moreover, we were missing some of the most qualified, neediest students of color and those who would be most likely to succeed and to return after their freshman year. Therefore, finally, *Hopwood* forced us to build a student body that was truly more diverse—not just more racially and ethnically representative, but also more geographically and socioeconomically representative of the state. Sadly, I think we would not have rolled up our sleeves and made the effort of doing the math and trudging into the neglected high schools and neglected districts had it not been for *Hopwood.*

The truth is that it is not a criticism of percent plans to say they must be properly and aggressively implemented in order to work. *In fact, that is the point.* There is no magic bullet for the problems of educational inequality. What affirmative action and percent plans both reveal is that there is a large and unpaid debt owed to the K–12 systems and that there is a need for universities to reexamine their goals and codify them into admission, retention, recruitment, and financial aid policies.

The relationship of elite institutions of higher education to K–12 has begun to be transformed by the shock treatment that *Hopwood* represented. It is clear that the path the University of Texas has taken with the incentive of the Top 10% Plan has begun to transform the kind of promise that can be made to each child as they enter kindergarten: Keep your shoulder to the wheel and play by the rules and the public system will be open to you and your ambitions. It does not matter that politicians still squabble over how to achieve the state's constitutionally mandated goal

63. See Horn & Flores, supra note 61, at 57–59 (discussing outreach efforts and results of Florida plans).

64. Grutter v. Bollinger, 123 S. Ct. 2325, 2341 (2003).

of equal investment in education across the state. We will not let their failures be visited on you. We will try not to let the circumstances of your birth or where your parents could buy a house determine your access to what the state can provide.

As we sat around the pool that day in June, it did not escape our notice that our privilege would redound to our children who played, carefree, in the pool that day. We knew the data. There is a higher correlation between test scores and socioeconomic status data than between test scores and success in college. Our children would be beneficiaries of the subsidies poor and working-class people make to support higher education for the middle and upper classes. What we also knew is that the Top 10% Plan, now assisted by affirmative action, had for the first time given a chance to other kids to walk the path to leadership.

There is, of course, a strong dose of local knowledge contained in the lessons of HB 588 and how it has worked as implemented by the University of Texas. We know that all of the lessons will not be able to be generalized beyond Texas. We know that segregated housing patterns have contributed to the success of the plan and integration at the college level, just as they have contributed to the integration of state and local legislative bodies. What we have learned in Texas is that the insights that lead to policy change will be informed by the specifics of the neighborhoods we live in. It just turns out that Texas looks a lot like the neighborhood the United States is becoming.