# The Hopwood Decision in Texas as an Attack on Latino Access to Selective Higher Education Programs

Jorge Chapa et al.*
Lyndon B. Johnson School of Public Affairs
The University of Texas at Austin

## Abstract

This paper begins with a review of the Hopwood decision which has prohibited Texas colleges and universities from making any consideration of race or Latino origin in admissions or financial aid decisions. One of the immediate effects of the Hopwood decision was to decrease the number of Latino who applied and were admitted to many of the most selective publicly-funded higher education programs in the state. The amount of financial aid available to Latino students was also drastically decreased because of Hopwood. The next section of the paper argues that the Texas Higher Education Coordinating Board, the Texas Legislature and the top administrators in the public higher education systems have taken actions that can be seen as largely supportive of increasing Latino access despite Hopwood. Public opinion is generally supportive of diversity but critical of racial preferences. The paper concludes that the strongest opposition to Latino access is found in the legal establishment; i.e., the courts, the Texas Attorney General and some law school faculty.

## Introduction

The rapid growth of the Latino population is one the key features of the American landscape in the last part of the twentieth century. During the 1970s, the Latino population of the U.S. grew by 57%. During the 1980s, it grew by 54%. These rates stand in sharp contrast to the rates for the Anglo (i.e. white non-Latino) population which grew by 1% during the'70s and 4% during the'80s. In Texas between 1970 and 1990, the Latino population grew by 45% each decade. Now more than one of every four Texans is Latino. All population projections show that the Hispanic population will continue to grow rapidly. Under some assumptions, they could become the largest part of the state's school age within a decade. It is difficult to believe that there is not a relationship between the growing Latino population and the growing attacks on Latino civil rights.

Latino civil rights have faced severe restrictions since the mid-nineteenth century. Observers of that period saw that the Mexican-origin residents of Texas were subject to prejudice and contempt. This ignominious beginning of restricted Latino civil rights in the U.S. was the foundation for other gross civil rights violations in the twentieth century such as blocked access to the ballot box, de jure segregation into inferior schools, residential segregation and widespread employment discrimination (MALDEF, 1996; Montejano, 1987).

Such violations of civil rights are not only part of Latino history. There are several instances of recent social science research that provide very strong evidence of present-day discrimination against Latinos in many areas. For example, Holmes et al. (1993) found that while Hispanic judges give similar sentences to Anglo and Hispanic convicts, Anglo judges give much more severe sentences to Hispanics than they do to Anglos. A number of matched-pair "audits" where Anglos and Latinos with substantively identical credentials apply for jobs, housing or mortgage

loans convincingly show a high degree of discrimination against Latinos. (See Kenney and Wissoker, 1994; Fix and Struyck, 1993.)

The end of affirmative action and continued discrimination against Latinos would be bad news in any case. However, it is tragic in the face of the fact that even with the enhanced opportunities offered by affirmative action, Latinos are far from attaining equal access to higher education. Since the early 1970's, the Latino proportion of the U.S. college-aged population, those between 18 through 24 years old has more than doubled. However, the proportion of Latinos among all B.A. degree recipients has increased at a much lower rate. Similarly, the percentage of Latino high school graduates ever enrolled in college has decreased since the mid-1970s. In 1975 the proportion of Latino high school graduates attending college was within two percent of that for the total U.S. population. Since that time, the Latino proportion has decreased so that 15% fewer Latino high school grads went to college than was true for the total U.S. population (Chapa, 1991 ). At each successive step or level, the higher education pipeline is increasingly leaky, and it is losing or leaving out larger numbers and proportions of the rapidly growing Latino population. In spite of increased opportunities that may have resulted from earlier lawsuits to increase Latino access to public education like the Edgewood and LULAC suits, the low levels of Hispanic parental educational attainment, high poverty levels and a number of other demographic characteristics all work to create barriers to rapid increase in future Latino educational success. The low levels of attainment and high school completion are not merely artifacts of high levels of immigration. U.S. Latinos have much lower educational levels than non-Latinos. This is true even when different generations among the U.S: born are distinguished and analyzed separately. (See Bean, et a1,1994; and Chapa, 1989, 1990, 1992).

While de jure segregation may have been eliminated from Texas higher education by the mid-1960s, de facto segregation has continued to this day. In 1980, the Office of Civil Rights (OCR) of the U.S. Department of Education found that "Texas had failed to eliminate the vestiges of its segregated higher education system and was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. In 1983, just eight years before Cheryl Hopwood applied to the University of Texas Law School, the state of Texas agreed, under threat of federal action, to formulate a plan to desegregate its higher education system, including the UT Law School. According to Coordinating Board Commissioner Kenneth Ashworth, various affirmative action programs resulted in an additional 85,000 Hispanic students and 22,000 Black students being admitted to Texas colleges and universities since 1983. Despite improvements made by race-based admissions policies, scholarships, and outreach, recruitment and retention programs, minorities have been and continue to be underrepresented at Texas public colleges and universities. (House Research Report No. 75-14) At the time the Hopwood case was filed and decided, the publicly-funded educational opportunities available to minorities were vastly inferior to those offered to majority students (Jones and Kauffman, 1994). Yet the specifics of the Hopwood case resulted in rulings that ignores the great disparities of opportunity and prevents the use of most effective means to minimize them. Ironically, the legal law which ultimately laid the basis in Hopwood for the end of affirmative action in Texas was the Law School's outlawed, unconstitutional implementation of the admission system it adopted under pressure to desegregate its student body.

The fact that Latinos have faced restricted civil rights throughout their history in the U.S. and that they are still subject to racial discrimination would be reason enough to be pessimistic about Latino civil rights in the future. The U.S. Fifth Circuit Court's Hopwood decision banning the consideration of race in higher education admissions and financial aid decisions in Texas is an indication that whatever progress Latinos have made towards full participation in higher education is under fierce attack.

## Hopwood v. State of Texas

Almost two years ago, a three-judge panel of the United States Court of Appeals issued its opinion in Hopwood v. Texas, the University of Texas Law School's "reverse discrimination" lawsuit filed by four white students who claimed that they had been denied admission in 1992 in favor of less qualified minorities. Since it was handed down, Hopwood has ended affirmative action in Texas higher education. Higher educational policy is still in flux. The legislature and education administrators have made many changes in response to Hopwood and they are considering many more.

The Hopwood case was first tried before federal district court in Austin before Judge Sam Sparks without a jury during May 16-25, 1994. On August 19, 1994, Judge Sparks issued his ruling which was technically a victory for the plaintiffs. The U.S. District Court ruled that the University of Texas Law School's affirmative action admissions program was unconstitutional. The judge found that "while certain types of race-conscious admissions are constitutionally justified at the law school, the 1992 admissions policy under which the plaintiffs were considered and rejected was not `narrowly tailored' and was therefore unlawful" (Sparks, 1994, p. 553). The dual admissions procedure instituted for minority applicants was identified as the major culprit. In the face of a federal mandate to admit more minority students and the need to process a large number of applications, the UT Law School had instituted a dual admissions system. In this dual system, the files of minority applicants would get a more careful and considered reading. In contrast, the admission decisions for non-minority applicants were based on the heavily formulaic consideration of the Texas Index (TI) score. The TI score was the result of multiplying the grade-point average by ten and adding it to the LSAT score. By 1994, the law school had long since abandoned that specific admissions procedure. Moreover, the District Court decision was a resounding reaffirmation of the need of race-conscious affirmative action to mitigate past and recent if not present-day discrimination in Texas. Judge Sparks' decision was clear and compelling. On the claim of "reverse discrimination," he found that:

> The plaintiffs have contended that any preferential treatment to a group based on race violates the Fourteenth Amendment and, therefore, is unconstitutional. However, such a simplistic application of the Fourteenth Amendment would ignore the long history of pervasive racial discrimination in our society that the Fourteenth Amendment was adopted to remedy and the complexities of achieving the societal goal of overcoming the past effects of that discrimination (p. 554).

On the justification of affirmative action Sparks wrote:

> The reasoning behind affirmative action is simple--because society has a long history of discriminating against minorities, it is not realistic to assume that the removal of barriers can suddenly make minority individuals equal and able to avail themselves of all opportunities. Therefore, an evaluation of the purpose and necessity of affirmative action in Texas' system of higher education requires an understanding of past discrimination against blacks and Mexican Americans, the minorities receiving preferences in this cause, and the types of barriers these minorities have encountered in the educational system (p. 554). Court finds, in the context of the law school's admissions process, obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications (p. 571).

Sparks found that the law school's procedure of giving minority applications separate consideration was flawed:

> The Court holds that the aspect of the law school's affirmative action program giving minority applicants a "plus" is lawful. But the failure to provide comparative evaluation among all individual applicants in determining which were the best qualified to comprise the class, including appropriate consideration of a "plus" factor, created a procedure in which admission of the best qualified was not assured in 1992. Under the 1992 procedure, the possibility existed that the law school could select a minority, who, even with a "plus" factor, was not as qualified to be a part of the entering class as a non-minority denied admission. Thus, the admission of the non-minority candidate would be solely on the basis of race or ethnicity and not based on individual comparison and evaluation. This is the aspect of the procedure that is flawed and must be eliminated (p. 579).

On the plaintiffs central claim; i.e., that they were not admitted in favor of less qualified minority applicants, Judge Sparks said:

> What the chart [of Texas Index or TI scores] does not prove, however, is that race or ethnic origin was the reason behind the denial of admission to the plaintiffs. Although the plaintiffs had higher TIs than the majority of minority applicants offered admission, the evidence shows that 109 non-minority residents with TIs lower than Hopwood's were offered admission. Sixty-seven non-minority residents with Tls lower than the other three plaintiffs were admitted...Additionally, the Court has reviewed the Fles of the four plaintiffs as well as the files placed in evidence of other applicants reviewed in the discretionary zone, both minority and non-minority....
> In fact, of all the applications the Court reviewed, Hopwood's provides the least information about her background and individual qualifications and is the least impressive in appearance, despite her relatively high numbers (p. 581).

The plaintiffs sought and won damages, but all that Sparks gave each was one dollar and the right to reapply to the law school without paying any additional application fees. Not content with their very small victory, the Plaintiffs' appealed the district court's judgment.

## The Fifth Circuit Court of Appeals Decision

The day of Judge Sparks Hopwood decision was released in August 1994 may also mark the high-water mark of affirmative action in Texas and the U.S. Since then the tides of have receded rapidly and the climate has turned very chilly. While Hapwood was being appealed, there were several other related decisions that had a very different tenor than district court decision. In October 1994, the U.S. Fourth Circuit Court of Appeals decided in Podberesky v. Kirwan that the University of Maryland's Banneker Scholarship for African-Americans was unconstitutional. This program used race as the sole determinant of eligibility. In a further foreshadowing of the eventual fate of Hopwood, the U.S. Supreme Court refused to hear Podberesky thereby letting the Fourth Circuit Court of Appeals ruling stand. In June 1995 the U.S. Supreme Court issued Adarand v. Pena which limited minority preferences in contracting, but was also read by some as limiting federal affirmative action programs.

On March 18, 1996 the Fifth Circuit court released an opinion that was a complete and stunning reversal of Judge Sparks' decision. Not only did the three-judge panel reverse Sparks, they also

overturned U.S. Supreme Court Justice Powell's statement of the Bakke decision that had been the established law of the land for eighteen years. The circuit court opinion opens as follows:

> With the best of intentions, in order to increase the enrollment of certain favored classes of minority students, the University of Texas School of Law ("the law school") discriminates in favor of those applicants by giving substantial racial preferences in its admissions program. The beneficiaries of this system are blacks and Mexican Americans, to the detriment of whites and non-preferred minorities. The question we decide today in No. 94-50664 is whether the Fourteenth Amendment permits the school to discriminate in this way. We hold that it does not. The law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the whole some purpose of correcting perceived racial imbalance in the student body (Fifth Circuit, 1996, pp. 2-3).

The core of the appellate decision is that diversity is not and can never be, in itself, a compelling state interest and thus, the law schools admissions process was constitutionally flawed:

> We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment (p. 25).

Furthermore, the Circuit Court panel decreed that Bakke was no longer the law of the land. Because of the multi-faceted aspect of that Supreme Court decision, the appellate panel decided, that everyone else had been wrong in their reading.

> Justice Powell's view in Bakke is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale (p. 25).

The Circuit Court judges supported their radical revisionism with selective references to the recently Podberesky and Adarand.

The bulldozer that the Circuit Court drove through long-accepted precedent and practice did not change the entire landscape in which admission decisions could be made. Indeed, it seemed that the goal was to change nothing other than completely rooting out any consideration of race from the admissions process, as the following statement shows.

> While the use of race per se is proscribed, state-supported schools may reasonably consider a host of factors some of which may have some correlation with race in making admissions decisions. The federal courts have no warrant to intrude on those executive and legislative judgments unless the distinctions intrude on specific provisions of federal law or the Constitution. A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background (p. 28).

The Fifth Circuit not only severely proscribed any consideration race in admissions, they also placed a severely limited the scope of any possible remedy. If a person could indeed show that he

or she had suffered racial discrimination, that individual could receive special consideration at the institution where the had suffered the discrimination:

> No one disputes that Texas has a history of racial discrimination in education. [However] the Croson Court unequivocally restricted the proper scope of the remedial interest to the state actor that had previously discriminated. The district court squarely found that "[i]n recent history, there is no evidence of overt officially sanctioned discrimination at the University of Texas."

As a result, past discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions. The Fifth Circuit panel had rewritten accepted constitutional law to settle the complaints of four law school applicants regarding an admissions system at the UT law school that had since been discarded. It was not a class action. Several of the applicants had even been offered admission to the law school as it went down the waiting list. The appellate court did reverse the rules under which the plaintiffs could collect damages. Now the law school had the burden to show that the plaintiffs would not have been admitted if their application had been considered in a race neutral system. The reason that the Fifth Circuit's Hopwood decision had such a widespread impact not because of its specific judgment regarding the fate of Cheryl Hopwood and the other plaintiffs, but because the decision was filled with extremely expansive opinions enforced by the threat of potential punitive damages to anyone who might ignore them. The administrative response at the University of Texas and the Texas A&M Systems was to place a freeze on the entire fall 1996 admissions process then in full swing. The appellate court decision was stayed until the Supreme Court ruled on the issue. The stay permitted Texas colleges and universities to largely complete their admissions decisions under their pre-Hopwood rules.

## Implementing Hopwood: The Role of Texas Attorney General Dan Morales

It was widely expected that the U.S. Supreme Court would accept the case if only to address the Fifth Circuit panel's arrogance in declaring Bakke dead. Therefore, when the Supreme Court denied the cert. petition, the shock was profound and widespread. On July 1, 1996, the panel's opinion became binding precedent in the Fifth Circuit states; Texas, Louisiana and Mississippi. But what did the law say? Of course, that is a matter of interpretation. The possibilities ranged from to most narrow; i.e., applying Hopwood only at the UT Austin law school and removing any consideration of race from the admissions process to the most broad; ordering the elimination of all race-conscious affirmative action programs from all public and private higher education institutions in Texas. The interpreter of law for all Texas public institutions is the Attorney General and Dan Morales chose the broadest possible interpretation.

If the Fifth Circuit did not kill affirmative action in Texas' higher education, they did blind, gag and shackle it, put it in a box, nail the box shut and throw the box into a hole in the ground. Seemingly to ensure that no one would ever try to emancipate it, the Fifth Circuit raised the possibility that anyone who would ever try to practice race-conscious affirmative action could be held personally liable for actual and punitive damages. It is Texas Attorney General Dan Morales that many consider responsible for finally burying affirmative action in Texas by filling the hole into which the Fifth Circuit had thrown affirmative action with very quick-setting concrete.

Besides extending Hopwood to cover all colleges and universities in Texas, Dan Morales immediately extended the scope of the Hopwood dicta prohibiting the consideration of race in

admissions to include financial aid and later to retention and recruitment programs. While none of these topics were mentioned much less addressed in Hopwood, one consideration that may have compelled the Attorney General to take this stance may well have been fear of further lawsuits. The strong language of Hopwood and the possibility of punitive damages provided a great incentive for further suits in each of these areas. For whatever reasons he chose them, the guidelines that Morales ultimately promulgated did bury student affirmative action in Texas higher education.

On February 5, 1997, Morales issued Opinion L097-001, which states that Hopwood prohibits the use of race in admissions decisions, financial aid, scholarships and student and faculty recruitment and retention. The opinion also stated that the provisions of Hopwood also apply to private institutions that accept federal funding. Although Morales' interpretation of Hopwood banned the use of race in higher education admissions and programs, he did allow, based on the Fifth Circuit's opinion in Hopwood, that race could be used if certain conditions were met. Morales' opinion offered that race could be used in certain cases if a three-pronged legal test was satisfied: ( 1 ) an institution or the Legislature found that an institution had discriminated in the recent past, or if the institution had been a passive participant in acts of private discrimination; (2) that the present effects of past discrimination are due to specific institutional discrimination, not to general societal discrimination; and (3) that the resulting affirmative action program is narrowly tailored to remedy these effects. In practice, it is extremely difficult to meet these conditions. So, in Texas, affirmative action may still be alive, but it has to be extracted from concrete.

## The Effects of Hopwood on Higher Education in Texas

Texas has thirty-seven, four-year Bachelor degree granting public colleges and universities. At three of these, UT Austin, Texas A&M, and Texas Tech, the admissions process is very competitive. There are typically several applicants for each ultimate matriculant. Admissions to five additional state undergraduate programs are moderately competitive. Most but not all applicants are admitted. The remaining institutions are largely seen as having open admissions in which any qualified applicants is admitted. The qualifications include a high school diploma and successful completion of varying numbers of high school math, English and other courses. The proportion of Latino students for fall 1997 at all of the state's undergraduate programs combined have actually increased to 18.8% from 18.5% in fall 1996 (Brooks, 1997). One effect of Hopwood that we can expect is that the more competitive the admissions process, the more we can expect to see a decrease in African American and Latino students. Competition for each opening in the publicly funded professional programs, such as medical school, law school, etc., is far greater than that found at any of the public undergraduate programs and therefore we can expect even larger decreases.

Table 1 presents the composition of the fall 1996 and 1997 entering classes for UT Austin's undergraduate program and law school. The fall 1997 entering class is the first that applied and was admitted after the Hopwood guidelines were promulgated. Besides presenting the number and percent of each group in each year’s class, this table also presents the ratio of the 1997 percent representation of each group to the 1996 percentage. For example, African Americans were 2.9% of the freshman in 1996 and 2.5% in 1997. Calculating one ratio for each group, in this case, 0.837, makes it is easier to compare with the magnitude of the change in other groups. The data presented in Table 1 does show a decrease in the number of minorities entering UT's freshman class and it shows a far greater decrease on the number of minorities in UT's law school entering class. Table 2 shows that there were significant decreases in all of the state's public law

schools and medical schools. While far from presenting a comprehensive survey, these tables do show that there has been a significant decrease in minority enrollments in programs with competitive admissions.

In addition to admissions, financial aid is another scarce and widely sought educational resource. In response to OCR's finding that Texas higher education was still segregated, many Texas universities had developed scholarships for African American and Mexican American students. The Attorney General's guidelines extended the Fifth Circuit's ban on the consideration of race in admissions to financial aid, thus making students of any race eligible for these funds. While it is very difficult information to obtain with complete reliability, Table 3 presents our preliminary estimates of the effect of Hopwood on the redistribution of funds that were previously reserved for underrepresented minorities. The pattern shown had to be expected. It was inevitable that the percent of this aid going to minorities would decrease once all students became eligible. An important part of the picture that we have not yet developed, is how Latino students have fared in terms of getting a fair share of all financial aid resources. One observed behavioral correlate of having financial aid set-aside for minorities is that financial aid administrators would usually consider minority students for those funds only. In some cases, this would work to the financial disadvantage of Latino students.

## The Texas Higher Education Coordinating Board's Advisory Committee on Alternate Criteria for Diversity

Determined to find ways to address the expected decrease in minority enrollments at Texas institutions of higher education, Dr. Kenneth Ashworth, Commissioner of the Coordinating Board, commissioned a study by 16 demographers, sociologists and other professors from various Texas colleges and universities to study ways to achieve racial and ethnic diversity on college campuses without using race. In a letter to prospective members of the Advisory Committee on Criteria for Diversity Texas Higher Education Coordinating Board Commissioner Dr. Kenneth Ashworth asked the committee to develop guidelines for use by colleges and universities in admissions and financial aid decisions that would "achieve diversity among our student bodies and to ensure that we achieve adequate representation of minorities and other groups of our citizens to be certain that our work force, professional practitioners, and general population are prepared for the future and representative of our state as a whole." (P. I-2, Alternatives Diversity Criteria: Analyses and Recommendations)

The group, called the Higher Education Coordinating Board Advisory Committee on Criteria for Diversity and informally referred to as the "Gaston Study" after the Committee's chair, Dr. Jerry Gaston of Texas A&M University at College Station, spent several months developing a report titled Alternative Diversity, ~ Criteria: Analyses and Recommendations. The report included a list of "factors" that corresponded to characteristics or traits of "educationally and economically disadvantaged" segments of the Texas population with the purpose of identifying methods to improve minority admissions. The committee conducted a quantitative analysis to determine the outcome of using certain factors to identify prospective students for admission. The report recommended that the criteria could be used to improve admissions of educationally undeserved segments of the Texas population, including significant numbers of minorities.

Among other tasks, the committee determined the racial and ethnic diversity that would result if various socio-economic factors were given a positive consideration in the admissions process. For example, giving students from low-income backgrounds an opportunity for success has always been part of the appeal for subsidizing higher education. If students from families with incomes

less than 200% of the poverty level were given a preference, that would also give an indirect preference to minorities. The report noted that 62.3% of Texans under 25 years of age in 1990 with family incomes less than 200% of the poverty level were underrepresented minorities. The study further found that this same criteria "captured" 63.9 percent of all minorities under 25 years of age in 1990. The population under age 25 years was a proxy for potential (current and future students. This and three other such factors are presented in Table 4.

In addition to recommending the use of the admission factors studied in the report, the committee also made several recommendations for consideration by the Coordinating Board, the Legislature, the higher education community, and the public education system. Recommendations to the Coordinating Board included eliminating the use of SAT/ACT scores as a major criteria for scholarship and financial assistance awards; eliminating standardized test scores as a sole screening factor for admissions; and placing discretionary financial aid into a need-based program to ensure that economically disadvantaged students would have financial assistance. Recommendations to the Legislature included requiring the Coordinating Board and the Texas Education Agency (TEA) to share information to track patterns of enrollment of Texas graduates to determine the impact of Hopwood and new criteria for admissions; providing additional funding for the Educational Opportunity Services formula to allow for "performance bonuses" as an incentive for universities to enroll disadvantaged students; and providing additional funding for need-based scholarships to increase access to higher education for disadvantaged students. Recommendations to higher education institutions included using admissions factors that would improve admission of disadvantaged students; improving relationships with public school systems to improve the academic achievement in applicant pools and increase retention and graduation rates; providing a multicultural learning environment to improve minority student academic achievement; improving access to minorities of financial resources and academic support services; and improving outreach and recruitment efforts to minority students.

Recommendations to K-12 public schools included eliminating procedures that act as barriers to minority academic success and designing college preparatory courses to benefit minority and undeserved students.

The committee's preliminary findings and recommendations were delivered to the Coordinating Board in late fall and the final report was published and officially distributed in January of 1997. The report concluded that Texas has not historically promoted access to higher education for underserved segments of the population and that a holistic approach of improving financial assistance, recruitment and retention programs, public education, and using the factors identified in the report was necessary to improve minority and other undeserved population participation in higher education. However, the report went on to say:

> "Although numerous criteria (such as income, parents' education and school district wealth) may be useful in identifying segment of the population in need, no single criterion or combination of criteria will result in the same level of minority participation as occurred under criteria used prior to Hopwood." (I-12, Alternative Diversity Criteria: Analyses and Recommendations)

## Overview of the Texas Legislature's Response to Hopwood

Faced with possible reductions to the already low minority enrollment numbers due to the Hopwood decision, some Texas Legislators introduced bills designed to reduce the impact of the 5th Circuit's ruling during the 75th Texas Legislative Session. Legislative initiatives introduced

during the session included uniform admission policies proposing preferential admissions for "educationally and economically disadvantaged" students; additional scholarship funds for students; and legislation directly challenging Hopwood by asserting that race should continue to be used in admissions decisions. However, growing controversy over affirmative action policies, flagging public support for preferential treatment of minorities, and a shift in political power from Democrats, who have traditionally supported affirmative action programs, to Republicans, who have traditionally opposed such programs, promised that the controversial issue of minority admissions policies would be hotly debated during the legislative session.

When the 75th Legislature convened in January of 1997, the Texas political climate was markedly different from previous sessions. For the first time since Reconstruction, the Texas Senate was controlled by a majority of Republicans and the margin in the Democratically controlled House had narrowed considerably. Although both houses were presided over by Democrats -- Speaker of the House Pete Laney and Lieutenant Governor Bob Bullock- Republican Governor George Bush held veto power and the fact that Republicans controlled the Senate meant that no legislation could pass without Republican support.

Debate over university admissions policies was drawn along partisan, ideological, racial and ethnic lines. Many Republicans, eager to test their new found legislative power and the limits of the Hopwood decision, vowed to eliminate affirmative action policies for hiring preferences, state contracts for Historically Underutilized Businesses (HUBs) and education programs. They argued that affirmative action policies were unfair to Anglos who were denied business contracts, higher education admissions, and jobs in favor of less qualified minorities. Affirmative action, they argued, had outlived its usefulness and it was time to replace race-based policies with "color-blind" or "race-neutral" policies. To support their position, opponents of affirmative action policies pointed to Hopwood and the Texas Attorney General's interpretation of the ruling, saying that race-based policies were unconstitutional. Proponents of affirmative action argued that such policies were still necessary to bring about racial parity in education and employment in a state with a long history of racial and ethnic discrimination. They believed that Hopwood should only apply to the University of Texas at Austin School of Law, and that the Attorney General's interpretation was overly broad and politically motivated. They further argued that the growing minority population in Texas meant that the educational disparity between minorities and non-minorities needed to be eliminated so that Texas could remain economically competitive and prevent exacerbation of racial and ethnic strife.

The political reality was that neither side could achieve a total victory. Before legislation could be considered by either chamber, it first had pass from two ideologically divergent committees. The Senate Education Committee, Chaired by Republican State Senator Teel Bivins of Amarillo had a majority of Republicans opposed to affirmative action policies. The House Higher Education Committee, Chaired by State Representative Irma Rangel of Kingsville, had a Democratic majority supportive of such policies. Rangel was the author of one of the admissions proposals, HB 588, and several other bills designed to address Hopwood. Chairman Bivins had an ambitious agenda of higher education reforms, all of which would have to be reported from Representative Rangel's Committee. Likewise, Rangel needed Bivins support to get her bills through the legislative process. Furthermore, any admissions related legislation would have to pass both chambers and gain the governor's approval.

Early in the session, it became apparent to legislators eager to challenge Hopwood directly by making a legislative finding of past discrimination and the present effects of that discrimination -- thereby satisfying the Fifth Circuit's test for race-based policies --that race based policies had little opportunity of passing during the 75th Legislature. The support simply did not exist. The

Republican majority in the Senate and the Governor's veto virtually guaranteed that no race-based policies would prevail. What followed was a divisive battle that threatened to shutdown the legislative session on more than one occasion. However significant compromise from proponents of race-based policies ultimately yielded a statewide admissions plan, which the Governor signed into law prior to the end of the legislative session.

## House Bill 588 By Rangel: Relating to uniform admission and reporting procedures for institutions of higher education

Popularly referred to as the "Ten Percent Plan," the compromise on a uniform higher education admission plan, passed as HB 588, allowed automatic admissions for students who graduated in the top 10 percent of their high school class and gave "educationally and economically disadvantaged" students to have preferential admissions treatment. Under the plan, educationally and economically disadvantaged students would be identified by certain factors developed by a group of sociologists and demographers from various Texas universities that was commissioned by the Texas Higher Education Coordinating Board. This compromise allowed opponents of race-based policies to claim victory for abolishing affirmative action policies while providing some assurance that minority admissions would not drop to predicted post-Hopwood levels because minority populations are over-represented among the educationally and economically disadvantaged. Opponents of race-based policies were also able to claim victory for changing minority scholarship, recruitment, and retention programs to race-neutral programs that award scholarships based on educationally and economically disadvantaged criteria.

HB 588, and its Senate companion, SB 177 by Barrientos, was originally developed by an informal working group of university administrators, legal scholars, and minority legislators. The bill established a uniform admissions policy for freshman admissions at all public colleges and universities. Also known as the "Top Ten Percent Plan," the bill requires public universities to automatically admit students who graduate in the top 10 percent of their class. The intended effect of the automatic admissions policy, which does not allow standardized test scores or other criteria to be used in admissions, is for ethnic and racial minorities who attend schools with high concentrations of minorities to be admitted. The legislation further requires higher education institutions to consider factors in admissions decisions that identify students as being economically or educationally disadvantaged. Examples of such factors include: a student's socioeconomic background; whether a student is the first in his or her family to attend or graduate from college; whether a student speaks a language other than English; and whether a student attended a low performing high school.

In addition to requiring universities to follow specific admission guidelines, the bill requires institutions to develop and offer recruitment and retention programs to bring qualified students to institutions and assist them with academic deficiencies and ongoing tutoring. The bill also requires the Texas Higher Education Coordinating Board to collect demographic information relating to students admitted to universities and report findings to the 76th Legislature. The various provisions of the bill are summarized in the following:

**HB 588** (As signed into law by the Governor on May 20, 1997.)

- Automatic Admission: requires admitting institution to admit students who graduate in the top ten percent of their high school class regardless of performance on standardized tests.

- Retention Programs: requires admitting institution to determine if student needs additional college preparation work and provide remedial assistance.
- Additional Automatic Admissions: requires admitting institution to determine each year if the institution should add an additional tier of automatic admissions for students in who graduate in the top 25 percent of their high school class.
- List of Admissions Factors: requires institutions to consider "all, any, or some combination of the following factors:

  1. the applicant's academic record;
  2. the applicant's socioeconomic background;
  3. Whether the applicant would be the first generation of the applicant's family to graduate from an institution of higher education;
  4. the applicant's bilingual proficiency;
  5. the financial status of the applicant's school district;
  6. the performance level of the applicant's school as determined by the school accountability criteria used by the Texas Education Agency;
  7. the applicant's responsibilities while attending school, including whether the applicant has been employed, has helped to raise children, or other similar factors;
  8. the applicant's region of residence;
  9. whether the applicant is a resident of a rural or urban area or a resident of a central city or suburban area in the state;
  10. the applicant's performance on standardized tests;
  11. the applicant's performance on standardized tests in comparison with that of other students from similar socioeconomic backgrounds;
  12. whether the applicant attended any school while the school was under a court-ordered desegregation plan;
  13. the applicant's involvement in community activities;
  14. the applicant's extracurricular activities;
  15. the applicant's commitment to a particular field of study;
  16. the applicant's personal interview;
  17. the applicant's admission to a comparable accredited out-of state institution; and
  18. any other consideration the institution considers necessary to accomplish the institution's stated mission.

The debate will continue when the 76th Texas Legislature convenes in January of 1999. One provision proponents of race-based policies were able to include in HB 588 requires the Texas Higher Education Coordinating Board to collect data on higher education admissions under the new admissions standards. This data, which some opponents of race-based policies argued would only prolong the debate, will be used by Legislators and other policy makers to determine how well the new admissions policy is working and if additional changes are necessary.

Similarly, a rider to the state budget, the Legislature also ordered the Comptroller of Public Accounts to:

> [P]repare a disparity study to determine whether past acts of discrimination by institutions of higher education of this state have created any present effects of such past discrimination. The study shall address student recruitment, admissions, retention and financial aid.

Research and debate on the effects of Hopwood and affirmative action will continue to be a major feature of politics and policy in Texas.

## Other Developments and Conclusion

The appellate court judges who have, so far, had the last word on Hopwood, also ignored the fact that The University of Texas Law School does not only offer an environment hostile to minority students, but one that had been actively hostile to affirmative action as well. An example of the hostility to minority students can be seen in the remarks of UT law professor, Lino Graglia. He made national news in September of 1997 because of his thoughts on the reasons for minority under-representation in higher education recounted as follows:

> He [Graglia] said that the only reason UT had given `racial preferences' to minorities was because `blacks and Mexican Americans are not competitive with whites in selective institutions.' Asked why, he said that they come from cultures in which `failure is not looked upon in disgrace.' ... [He later said] that he did not see benefits for white schoolchildren mixing with `lower classes' because lower socioeconomic classes `perform less well in school and tend towards greater violent behavior'(Roser, 1997).

However, the law school was hostile to affirmative action when it established unconstitutional dual admission process for minorities and when Graglia's frequent lectures against affirmative action inspired his former student, Steven Smith, to search for white applicants who had been denied admissions to the law school. He obtained the names and addresses of these applicants and solicited their participation. After writing to all of such applicants from several years of applications, Smith found Cheryl Hopwood and the other plaintiffs. In testimony before the Texas House of Representatives Higher Education Committee, Smith said he several of his former professors at the UT law school assisted him in preparing his Hopwood briefs (Hearing, 10-23-97).

The recent defeat of Proposition A in Houston shows the importance of language in framing the debate and determining the outcome. Often portrayed as an analog of California's Prop 209, Proposition A would have ended Houston's minority contracting program. However, the city council changed the ballot language from the initially proposed ban on "preferential treatment" to the more explicit question of banning affirmative action. To clarify the confusion, the Houston Chronicle ran the following story quoted in its entirety:

> Polls have found some confusion among voters about the wording of Proposition A on Tuesday's ballot.
> A vote for Proposition A is a vote to end the city's affirmative action program.
> A vote against Proposition A is a vote to continue the city's current program to help women and minority-owned businesses win city contracts. (Houston Chronicle, 1997).

Another factor in the 55 percent to 45 percent defeat of Prop A was an extremely high turnout of African American voters (Howe Verhovek, 1997).

The importance of choice of language in framing the issues of the debate is confirmed by the results of the October 1997 Texas Poll show in Table 5. This random sample of 1,000 Texas residents shows 48 % favor affirmative action while 42% oppose it. However, 72% percent oppose giving preferences to minorities in the workplace and 69 percent oppose preferences in higher education.

It would be a mistake to read too much about the future of affirmative action into the defeat of Prop A. The week following the ballot initiative's defeat at the polls, a U.S. District Court judge

in Houston struck down the minority contracting program of the Metropolitan Transit Authority of Harris County (Hughes, 1997).

Perhaps the only lesson we can draw for the nation from Texas' experience on affirmative action is that the controversy and complexity of the issue is sure to increase. Unlike California, Texas does not have a state-wide ballot initiative process. For now, there is a balance of power in the Texas Legislature that has prevented an outright victory by either the proponents or opponents of affirmative action. However, as can be seen in the extremely aggressive and radically revisionist attacks on affirmative action by the Fifth Circuit panel that wrote Hopwood and by Judge Hughes' in the very recent Houston Contractors case, the judiciary can apparently wreak havoc on affirmative action in Texas without check or balance. These judges were nurtured and are now aided and abetted by Lino Graglia and his ilk. Many would have hoped that Attorney General Morales would have put up a better fight in defense of affirmative action and Latino civil rights. Perhaps the other lesson that Texas can offer the nation, is that we all should start thinking about other means to attain and maintain full civil rights for Latinos.

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## FOOTNOTES

* Acknowledgments: Some of the material used in this paper was produced by the students.

**TABLE 1: Racial/Ethnic Composition of First-Year Undergraduates and First-Year Law Students at the University of Texas at Austin, 1996 and 1997**

| **First Year Undergraduates** | | | | |
|---|---|---|---|---|
| | **1996** | **1997** | **1996** | **1997** |
| **Anglo** | 3657 | 4461 | 66.1% | 67.1% |
| **African American** | 162 | 163 | 2.9% | 2.5% |
| **Hispanic** | 772 | 807 | 14.0% | 12.1% |
| **Asian** | 814 | 1078 | 14.7% | 16.2% |
| **American Indian** | 27 | 33 | 0.5% | 0.5% |
| **International and Other** | 97 | 103 | 1.8% | 1.6% |
| **Total** | 5529 | 6645 | 100% | 100% |
| | | | | |
| **First Year Law Students** | | | | |
| | **1996** | **1997** | **1996** | **1997** |
| **Anglo** | 370 | 391 | 75.8% | 83.5% |
| **African American** | 31 | 4 | 6.4% | 0.9% |
| **Hispanic** | 42 | 26 | 8.6% | 5.6% |
| **Asian** | 30 | 39 | 6.1% | 8.3% |
| **Native American** | 8 | 3 | 1.6% | 0.6% |
| **Other** | 7 | 5 | 1.4% | 1.1% |
| **Total** | 488 | 468 | 100% | 100% |

**TABLE 2: Racial and Ethnic Composition of First-Year Students in Texas Public Law Schools and Medical Schools, 1996-97**

| **First Year Law Students** | | | | |
|---|---|---|---|---|
| | **1996** | **1997** | **1996** | **1997** |
| **Anglo** | 831 | 806 | 62.8% | 64.1% |
| **African American** | 207 | 159 | 15.6% | 12.6% |
| **Hispanic** | 163 | 132 | 12.3% | 10.5% |
| **Asian** | 79 | 60 | 6.0% | 4.8% |
| **Native American** | 15 | 7 | 1.1% | 0.6% |
| **Other** | 29 | 93 | 2.2% | 7.4% |
| **Total** | 1,324 | 1,257 | 100% | 100% |
| | | | | |
| **First Year Medical Students** | | | | |
| | **1996** | **1997** | **1996** | **1997** |
| **Anglo** | 726 | 790 | 58.1% | 62.5% |
| **African American** | 65 | 40 | 5.2% | 3.2% |
| **Hispanic** | 183 | 142 | 14.7% | 11.2% |
| **Asian** | 243 | 263 | 19.5% | 20.8% |
| **Native American** | 13 | 9 | 1.0% | 0.7% |
| **Other** | 19 | 21 | 1.5% | 1.7% |
| **Total** | 1,249 | 1,265 | 100% | 100% |

**TABLE 3:Preliminary Estimates of the Distribution of Race-based Scholarships before and after the Hopwood Decision**

| **University of Texas at Austin** | **1996** | **1997** |
|---|---|---|
| African American & Latino | 100% | 55% |
| Anglo & Asian | | 45% |
| | | |
| **University of Houston** | **1996** | **1997** |
| African American & Latino | 50% | 30% |
| Anglo & Asian | 50% | 70% |

**TABLE 4: Results for Selected Socio-Economic Criteria as Alternative Criteria for Diversity**

| CRITERIA | Number of Persons Eligible Using Criteria | Percent Eligible Persons Who are Minority | Percent of Eligible Minority Population |
|---|---|---|---|
| ($23,350 for a family of four) | 3,133,779 | 62.3% | 63.9% |
| Income less than $35,000 | 4,110,671 | 58.6% | 75.5% |
| Parental Education less than B.A. | 4,011,918 | 56.7% | 71.3% |
| School district with residential property value less than $70,000 per student | 1,510,388 | 62.7% | 42.7% |

Note: Total potential eligible persons for these criteria are those under age 25 living in Texas in 1990.
Source: Alternative Diversity Criteria: Analyses and Recommendations
Table prepared by committee member Dr. Steven Murdoch.

**TABLE 5: Responses to Questions on Affirmative Action, October 1997 Texas Poll**
Affirmative Action programs are designed to provide underrepresented minorities with equal opportunities in such areas as getting jobs and promotions, obtaining contracts and being admitted to schools.

In general, how much do you favor or oppose affirmative action programs?

| | Frequency | Percent |
|---|---|---|
| Strongly Oppose | 168 | 16.8 |
| Oppose | 252 | 25.2 |
| NEUTRAL | 55 | 5.5 |
| Favor | 368 | 36.8 |
| Strongly Favor | 111 | 11.1 |
| Don't Know | 44 | 4.4 |
| Refused | 2 | 0.2 |
| TOTAL | 1000 | 100 |

Please tell me how much you agree or disagree with the following statements.

Affirmative Action programs give unfair advantage to minorities in the workplace and higher education?

| | Frequency | Percent |
|---|---|---|
| Strongly Disagree | 40 | 4 |
| Disagree | 292 | 29.2 |
| NEUTRAL | 55 | 5.5 |
| Agree | 397 | 39.7 |
| Strongly Agree | 156 | 15.6 |
| Don't Know | 64 | 6.4 |
| Refused | 2 | 0.2 |
| TOTAL | 1000 | 100 |

We should make an additional effort to improve the position of minorities in the workplace even if it means giving them preferential treatment.

| | Frequency | Percent |
|---|---|---|
| Strongly Disagree | 199 | 19.9 |
| Disagree | 521 | 52.1 |
| NEUTRAL | 22 | 2.2 |
| Agree | 194 | 19.4 |
| Strongly Agree | 31 | 3.1 |
| Don't Know | 31 | 3.1 |
| Refused | 2 | 0.2 |
| TOTAL | 1000 | 100 |

We should make an additional effort to improve the position of minorities in schools even if it means giving them preferential treatment.

| | Frequency | Percent |
|---|---|---|
| Strongly Disagree | 178 | 17.8 |
| Disagree | 506 | 50.6 |
| NEUTRAL | 29 | 2.9 |
| Agree | 219 | 21.9 |
| Strongly Agree | 35 | 3.5 |
| Don't Know | 29 | 2.9 |
| Refused | 4 | 0.4 |
| TOTAL | 1000 | 100 |

Now I'd like to ask you about a federal court ruling in a case called Hopwood. The ruling prohibits universities from using race as a criterion for admission. The Attorney General said it applies to all public and private universities that accept public money.

How much do you favor or oppose the Hopwood court ruling?

| | Frequency | Percent |
|---|---|---|
| Strongly Oppose | 62 | 6.2 |
| Oppose | 230 | 23.0 |
| NEUTRAL | 47 | 4.7 |
| Favor | 404 | 40.4 |
| Strongly Favor | 179 | 17.9 |
| Don't Know | 74 | 7.4 |
| Refused | 4 | 0.4 |
| TOTAL | 1000 | 100 |