# *Hopwood:* A Plea to End the "Affirmative Action" Fraud

Lino A. Graglia*

"Affirmative action," insofar as it is controversial, is a deceptive label for racial discrimination. Like the name itself, everything about it—its beginning, its continuation, and most important its purported justifications—is based on deceit. Truth may be the first casualty of war, but it is not even allowed onto the field of "affirmative action." Racial preferences in admission to institutions of higher education, at The University of Texas School of Law and elsewhere, were established under the facade of programs for the "culturally and educationally deprived," though they were and are based only on race.[1]

As the purely racial basis of such programs became increasingly apparent, the claim was made that the ordinary law school admission criteria—Law School Admission Test ("LSAT") scores and college grade point average—are "culturally biased" against blacks and Mexican-Americans. If this were true, no question of racial discrimination would be involved in applying lower standards to blacks and Mexican-Americans; it would simply be a matter of making the predictors of academic performance more accurate. There was and is, however, no basis for the claim. There is no evidence or reason to believe that blacks and Mexican-Americans as groups outperform what the standard criteria predict. Indeed, as if to make the baselessness of the claim more apparent, blacks and Mexican-Americans do not do as well in general as their scores would predict.[2]

Racially preferential admissions were begun at this law school in the late 1960s in order to grant admission to more black applicants, very few of whom, especially in light of the then rapidly increasing admission standards, would otherwise have been eligible for admission. Blacks had suffered, it was pointed out, the disadvantages first of slavery and then of segregation. Slavery, however, had ended more than a century earlier, and *Brown v. Board of Education*'s[3] constitutional prohibition of segregation in 1954 had been

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* A. Dalton Professor of Law, The University of Texas School of Law.

1. *See* Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970).

2. *See* ROBERT KLITGAARD, CHOOSING ELITES 159-60 (1985). Klitgaard, a former admissions officer at Harvard, reports that in order to make them truly unbiased predictors, it would be necessary to deduct 240 points from the combined SAT scores (maximum of 1600) and 110 points (old 200-800 scale) from the LSAT scores of blacks. *Id* at 163.

3. 347 U.S. 483 (1954).

made effective by the 1964 Civil Rights Act.[4] Nonetheless, it was argued, present-day blacks suffered from the "vestiges" of past discrimination and particularly from the school racial segregation (though not known to be educationally harmful)[5] that continued into the 1960s. This is the "remedy"—need to compensate for past disadvantage—justification for racial preferences. The relevance and validity of this purported justification can be gauged from the fact that preferences were and are equally granted to blacks from out-of-state and resident blacks under the age of 30, none of whom ever attended a school racially segregated by law.[6] It can also be gauged from the further fact that no black or Mexican-American has ever been denied preferential admission to the law school on the ground that he or she was not disadvantaged, or was, indeed, as is typical, exceptionally advantaged. In any event, it would be difficult to imagine a less apt "remedy" for educational inadequacies, however caused, than simply to pretend that they don't exist.

The irrelevance of the "vestiges" argument is also shown by the fact that racially preferential admission has been granted from the beginning of the program not only to blacks but also to Mexican-Americans. Mexican-Americans, it inconveniently happens, were never segregated by law in Texas and never excluded from The University of Texas School of Law; they were in attendance from the beginning. The "history of slavery and segregation" argument, however, is simply one to be used for its emotional appeal when it is available and ignored when it is not.

Racial preference on the basis of a claim of victimization has, of course, made achievement of a recognized victim status a valuable asset. One of the most pernicious effects of racial preferences, indeed, is that it provides a strong inducement, perhaps even a necessity as a matter of self-defense, for other groups to assert victim status. The combination of all such "specially protected" victim groups today makes up well over 100% of the American population.[7] Mexican-Americans were quick to claim that they, too, were victims of discrimination—why else, indeed, were there so few of them at the

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4. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1971, 1975, 2000a to 2000h-5 (1994)).

5. *See* JAMES S. COLEMAN, ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) (finding that, contrary to popular belief, predominantly black schools were not underfunded in comparison to predominantly white schools).

6. The fact that preferences are granted to out-of-state blacks also demonstrates the invalidity of the claim that the preferences are meant to correct an "underrepresentation" in the law school of blacks whose taxes help support a state institution.

7. Italian-Americans, for example, are a recognized disadvantaged group at the City College of New York, entitling members of the group to preferential treatment in admissions. This is the only place in the country where they are so recognized, however, because New York City is the only place where they are sufficiently politically powerful to have themselves declared oppressed. I hasten to add that I got into and out of City College before Italian-Americans were recognized as oppressed, when I had to do it as if I were, like almost everyone else, merely Jewish.

law school?—and they had sufficient political power to make the claim difficult to deny. Mexican-Americans were able simply to piggyback on the black claim of a history of official oppression. Indeed, they not only piggybacked, they leapfrogged, achieving an admissions set-aside at the law school (ten percent) twice that of blacks.[8]

Another fraudulent claim always made when racial preference programs are first instituted is that they are intended to be only temporary. The law school, for example, it was argued, needed to overcome its history of exclusion of blacks by demonstrating that now they were more than welcome. Such programs have now been in effect, however, for more than a quarter of the century, becoming ever more widespread and more deeply entrenched. As the furor over *Hopwood v. Texas*[9] illustrates, far from receding in importance or scope, they have achieved the status, at least in the perception of the racially preferred, of an entitlement.

The receding of the era of segregation into the ever more distant past—and the embarrassing academic success of members of other once-disadvantaged racial groups—makes the remedy justification for racial preferences ever more obviously untenable. A new justification became necessary, and it was found in the claim that racial preferences provide institutions of higher education with a needed and otherwise unobtainable "diversity." Diversity became the preferred euphemism for racial discrimination as a result of the Supreme Court's famous 1978 decision, *Regents of the University of California v. Bakke*,[10] the facts of which, I'm sure, require no restatement here. The most important—for proponents of racial preferences, shocking—result of *Hopwood* is its flat rejection of the diversity justification.

*Bakke* should not have been a constitutional case in the first place, because federal statutory law, Title VI of the 1964 Civil Rights Act,[11] clearly prohibits all racial discrimination against any "person" not only by state institutions, but also by any institution that, like nearly all colleges and universities, receives federal funds.[12] In *Bakke*, however, only four of the Justices saw an obligation to read Title VI in good faith, as meaning what it says and what it was intended to mean.[13] They, therefore, found all racial discrimination by the University of California at Davis Medical School prohibited by the statute, obviating any need to reach a constitutional

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8. Hopwood v. Texas, 78 F.3d 932, 937 (5th Cir.), *reh'g denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996); *see also Hopwood*, 861 F. Supp. 551, 560 n.19 (W.D. Tex. 1994).

9. *Id.*

10. 438 U.S. 265 (1978).

11. 42 U.S.C. § 2000d (1994).

12. *See Bakke*, 438 U.S. at 408-21 (Stevens, J., concurring in part and dissenting in part).

13. *Id.* Justice Stevens joined by Chief Justice Burger, Justice Stewart, and then Justice Rehnquist.

question.[14] Four other Justices, however, exercising the lawyerly arts, professed great difficulty in understanding the word "person," and concluded that it was not meant to include whites equally with blacks.

Justice Powell, typically, decided to have it both ways.[15] Whites are every bit as much protected as blacks by the statute and the Constitution, he said, except that just a little bit of discrimination against whites is permissible. While setting aside a specific number of seats in an entering class for non-whites is prohibited, discrimination against whites is permissible if race is used merely as a "plus factor" and all applicants are made to compete for all available seats.[16] This was because institutions of higher education have a "compelling interest" derived from the First Amendment, he found, in educational "diversity,"[17] even though discrimination on the basis of race will produce diversity in nothing but race.

*Bakke* was little more than an invitation to fraud. The only reason we have "affirmative action" is that blacks (and Mexican-Americans) are not academically competitive, or close to competitive, with whites. The gap in qualifications is so large[18] that the goal of making a selective school's entering class, say, five percent black, as is the objective of the law school, cannot be achieved except by making race not a "plus factor" but the determining factor and making sure that black applicants do not compete with whites.

*Bakke*'s invitation to fraud was nowhere accepted with greater enthusiasm than at The University of Texas School of Law. Both the district court and the Fifth Circuit in *Hopwood* mentioned the school's "good faith" in practicing racial discrimination.[19] Indeed, District Judge Sam Sparks found that the faculty never even intended to discriminate against whites;[20] he apparently thought that they disfavored white applicants by accident or on the basis of some misunderstanding. The fact is that the Texas law faculty operates on so high a moral plane, at least in their own minds, as to make the ordinary requirements of honesty and good faith irrelevant. Their contempt for the interests, not to mention the constitutional and statutory rights, of whites could hardly have been more total or more proudly proclaimed. The

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14. *Id.* at 421.
15. *See id.* at 269 (opinion of Powell, J.).
16. *Id.* at 316, 318.
17. *Id.* at 314.
18. The median LSAT score for whites nationally is at about the 65th percentile; for Mexican-Americans, it is at about the 30th percentile, and for blacks it is at about the 22nd percentile. Law School Admission Services, National Statistical Report 1988-89 through 1992-93, at 3. As Richard J. Hernstein and Charles A. Murray point out in THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 449-50 (1994), "data about the core mechanism of affirmative action—the magnitude of the values assigned to group membership—are not part of the public debate."
19. *Hopwood*, 861 F. Supp. at 583; *Hopwood*, 78 F.3d at 957.
20. *Hopwood*, 861 F. Supp. at 583.

essence of the *Hopwood* decision is the Fifth Circuit's recognition that there is no way this situation can be changed except by very clear and stern measures.

Far from even pretending to use race as only a "plus factor" in making admission decisions, the law school created a "minority" subcommittee of the Admissions Committee to pass separately on applications from self-declared blacks and Mexican-Americans.[21] Applicants of Chinese, Vietnamese, Asian, or Asian Indian ancestry are not "minorities" for this purpose. The reason, of course, is that they are academically competitive with whites. Far from pretending to compare black and Mexican-American applicants with whites, the school adopted a "race-norming" procedure whereby applications were put in separate piles by race and applicants were selected by simply picking from the top of each pile until the desired racial proportions were reached.[22] In further defiance of the *Bakke* requirement that all applicants be made to compete, the law school adopted an automatic admission score for blacks and Mexican-Americans that was *lower* than the score adopted for the automatic *rejection* of whites and others,[23] thus guaranteeing that few blacks and Mexican-Americans would be in the same academic ballpark with whites. It was obvious, therefore, that good faith compliance with a ruling merely limiting the use of race was not to be expected from the law school. Good faith is simply inconsistent with the whole point of "affirmative action" in that it would result in the admission of very few black and Mexican-American applicants. Ordering the law school to comply with *Bakke* by using race only as a "plus factor" in making admission decisions was futile, the Fifth Circuit noted, because "it likely would be impossible to maintain such a system without degeneration into nothing more than a 'quota' program."[24] An absolute prohibition backed by the sanction of substantial damages was clearly necessary.

The use of race as merely a "plus factor" would seem to permit its use, at the most, only in making decisions among applicants within the ordinary "discretionary zone" -that, among applicants who are neither automatically admitted nor automatically rejected. Such a limitation could be defeated by the law school, however, by simply expanding the discretionary zone. Similarly, a limitation that no racially preferred applicant be admitted with a score lower than that of the lowest white admittee, as has been suggested, could be defeated by the school simply admitting one or a few whites with very low scores. Finally, a court might order that the median LSAT score of

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21. *Hopwood*, 78 F.3d at 937.
22. *Hopwood*, 861 F. Supp. at 562-63.
23. *Hopwood*, 78 F.3d at 936.
24. *Id.* at 948 n.36.

the racially preferred be not more than, say, five percentile points lower than the median score of admitted whites, as the "plus factor" notion would seem to require. This, however, would involve an undesirable and inappropriate degree of judicial administration and supervision of the admissions process. There seemed, therefore, no way of avoiding the fact that if allowed to use race at all, the law faculty, anxious to demonstrate its commitment to bringing about a more just social order, would find ways to make race decisive.

The basic question before the Fifth Circuit in *Hopwood*, therefore, was whether the *Bakke* fraud should be permitted to continue. Affirmance of the district court decision would have not only permitted it to continue, but would have made it even more invulnerable than before to successful challenge. The Fifth Circuit decided, to its credit, to introduce an element of honesty and integrity into the law of racial discrimination by frankly recognizing the fraudulence of the "remedy" and "diversity" rationales for racial preferences. Racial preferences exist in higher education for no other reason than the purely racial one of substituting blacks and Mexican-Americans for highly qualified whites in order to make it appear that they are academically competitive with whites. The Fifth Circuit correctly perceived that the time has come to terminate this pernicious fraud.

The incredulity with which liberals greeted the *Hopwood* decision is a function of their understanding that they are not supposed to lose in courts. What, after all, is the purpose of constitutional law if not to produce liberal victories, as has been almost uniformly the case for the last four decades? Discriminating against whites in the cause of racial equality is simply the cause of justice, as they see it, and is not justice the sum of what the Constitution requires?

Liberals have accordingly experienced great difficulty in understanding, or at least accepting, *Hopwood*'s prohibition of all racial discrimination by the law school. One is reminded of the feminist slogan, "What part of 'no' don't you understand?" It is just unimaginable to them that students will ever again actually be admitted to institutions of higher education on the basis of academic ability rather than skin color. What would become, then, of the central academic enterprise of fostering "basic social change," which is entirely dependent on constantly beating the drums of race? What of the gains in raised racial consciousness—illustrated, for example, by the Los Angeles riots and the jubilant reaction of black college students to the O.J. Simpson verdict—that thirty years of beating these drums has achieved? We may just have to live, it seems, in a society in which government and intellectual leaders do not insist on the centrality of race and racial victimization, even if the result is lessened racial hostility and diminished hopes for social upheaval.

The Supreme Court's refusal to review the Fifth Circuit's decision[25] has, of course, occasioned further dismay and claims of confusion by proponents of racial preferences. Surely it cannot be, they see some glimmer of hope in proclaiming, that there will be one law for the Fifth Circuit (Texas, Louisiana, and Mississippi) and a different law for the rest of the country. The difference, however, is not likely to be or long remain nearly as great as they would like to imagine.

Two years ago in *Podberesky v. Kirwan*,[26] a unanimous panel of the Fourth Circuit (Virginia, North Carolina, South Carolina, Maryland, and West Virginia) reached a decision very similar to *Hopwood*, disallowing all use of race-based scholarships by the University of Maryland. The Fourth Circuit, like the Fifth, emphatically rejected as baseless the claimed needs to overcome "vestiges" of former segregation[27] or a "hostile" campus atmosphere.[28] In that case, too, the university appealed to the Supreme Court and the Court permitted the decision to stand.

In California, the practice of racial discrimination by state institutions of higher education is to end next year by the voluntary decision of the Board of Regents.[29] If the California Civil Rights Initiative is adopted by the people of California, as seems likely, all official racial discrimination will come to an end.[30] In Georgia, the attorney general has advised that all race-based policies will be terminated.[31] Moves against racial discrimination have been made or are underway in other states.[32]

Most important, *Hopwood* and *Podberesky* would seem to indicate, at the least, that public colleges and universities would be well-advised to take seriously *Bakke*'s insistence that the consideration of race in admissions decisions is permissible only as a "plus factor" in order to "tip the balance"[33] in close cases, with all applicants competing for every seat. The difficulty with this use of race is that it can not come close to producing the results that proponents of racial preferences seek to obtain. The gap in academic

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25. *Hopwood*, 116 S. Ct. 2581 (1996) (denying certiorari).

26. 38 F.3d 147 (4th Cir.), *reh'g denied*, 46 F.3d 5 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

27. *Podberesky*, 38 F.3d at 155.

28. *Id.* at 155.

29. *See* Amy Wallace & Dave Lesher, *UC Regents, in Historic Vote, Wipe Out Affirmative Action Diversity*, L.A. TIMES, July 21, 1995, at A1.

30. *See* Dave Lesher, *Preference Ban Qualifies For Fall Ballot*, L.A. TIMES, April 17, 1996, at A3.

31. *See* Mark Sherman & Reagan Walker, *Ga. colleges face scrutiny on race*, ATLANTA JOURNAL AND CONSTITUTION, April 10, 1996, at 1C.

32. *See, e.g.*, Karen Brandon, *Preference Policies Live Despite Attacks On Them*, CHICAGO TRIBUNE, Jan. 15, 1996, at 3; *Push To Scale Back Affirmative Action Is In Works In Many States*, ARIZONA REPUBLIC, July 31, 1995, at A4; Carol Innerst, *Affirmative action under siege in states*, WASH. TIMES, July 26, 1995, at A1.

33. *Bakke*, 438 U.S. at 323 (opinion of Powell, J.).

qualifications between applicants of the preferred races and applicants of other races is much too large, as noted above, to be bridged by any plus factor.

It is for this reason, of course, that the law school—like all schools with an aggressive "affirmative action" program—never followed *Bakke* in good faith. The law school could not begin to make each entering class five percent black and ten percent Mexican-American without the blatant race-norming it practiced, admitting students from the top of the preferred piles who would be at the bottom of the disfavored white pile. The dilemma faced by racially discriminatory public colleges and universities (and private as well, under Title VI of the 1964 Civil Rights Act[34]) after *Hopwood* is that to continue the blatant race-norming that nearly all have engaged in for almost three decades is certainly to invite litigation and well-founded charges of bad faith. On the other hand, to abandon race-norming and require blacks and Mexican-Americans to compete academically with whites is, as a practical matter, to abandon "affirmative action," the whole point of which is to avoid such competition.

In sum, *Hopwood* may prove a major turning point away from the racist policies and practices long favored by academics, but which will never be accepted by the American people and which are little more than a prescription for racial polarization and conflict.

34. 42 U.S.C. § 2000d (1994).