Hopwood: Some Reflections on Constitutional Interpretation by an Inferior Court

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One scarcely has to look hard to find denunciation of the egregious decision of the Fifth Circuit in *Hopwood v. Texas*.[1] All one has to do, for example, is to read the eloquent, biting opinions of Chief Judge Politz and Judge Stewart dissenting from the failure of the majority to grant a rehearing *en banc* of the panel's opinion in that case.[2] As the Chief Judge emphasizes, the *Hopwood* opinion "goes out of its way to break ground that the Supreme Court itself has been careful to avoid and purports to overrule a Supreme Court decision, namely, *Regents of the University of California v. Bakke*."[3] Furthermore, the *Hopwood* opinion "is a text book example of judicial activism" and "judicial legislating,"[4] going almost infinitely beyond the specific issues raised by the instant case to attempt to foreclose any affirmative action wherever it is found. Chief Judge Politz concludes his opinion with the altogether accurate summary that "[t]he majority of the panel overruled *Bakke,* wrote far too broadly, and spoke a plethora of unfortunate dicta."[5] *Hopwood* is an example of the so-called imperial judiciary run riot.

Even if one opposes affirmative action, or, to be more precise, a race -sensitive admissions policy[6]—I do not, but I concede that persons of good will

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1. Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *reh'g denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

2. *See Hopwood*, 84 F.3d 720 (5th Cir. 1996) (denying rehearing). Six judges, including Judge Stewart, joined in Chief Judge Politz's dissent.

3. *Id.* at 722 (Politz, J., dissenting from denial of rehearing) (citing Regents of the University of California v. Bakke, 438 U.S. 265 (1978)).

4. *Hopwood*, 84 F.3d at 722 (Politz, J., dissenting from denial of rehearing).

5. *Id.* at 724 (Politz, J., dissenting from denial of rehearing).

6. It is vitally important to distinguish between affirmative action and race-sensitive admissions. If "affirmative action" is defined, for example, as a deviation from strictly meritocratic admissions—assuming, for the moment, that one can in fact agree on what counts as "merit"—then the most important "affirmative action" policy in operation at The University of Texas School of Law is the preference for Texas residents, who by law are the beneficiaries of a quota system whereby a full 80% of the seats available at the institution are reserved for Texans. There can be no serious doubt that many Texans now admitted under this restrictive system would in fact be denied a place were they forced to compete in a competitive process that treated in- and out-of-staters equally. Almost no objection has been raised to the Texas resident affirmative action plan. (Nor, incidentally, is concern expressed about Texas residents being stigmatized by the fact that many, though certainly not all, of them owe their presence at the Law School to the fortuity of state residence.) Nor does the Fifth Circuit hesitate to endorse as constitutionally acceptable an even more pernicious affirmative action system whereby the children of alumni are preferred over non-alumni children. *See Hopwood*, 78 F.3d at 946 ("An admissions process may also consider an applicant's home state or relationship to school

can do so—there is almost no reason to believe that the Constitution speaks with any great clarity on the issue. Indeed, there are many reasons to believe that it does not, beginning with the fact that the Congress that proposed the Fourteenth Amendment explicitly rejected attempts to write "color-blindness" into the text[7] and adopted instead a text that calls upon the reader to reflect, without the slightest additional guidance, on the meaning of "equal protection of the laws."[8]

There is also no reason, to put it mildly, to believe that the political process cannot adequately handle the issue. Affirmative action is under attack throughout the country and at all levels of government; if the majority truly wants to do away with it, it seems to know how to do it. The Board of Regents of the University of Texas could, like its counterparts in California, simply order it to end;[9] even more to the point, the Texas Legislature could easily order that admissions to state universities be based on entirely race-neutral grounds. It has not done so. Indeed, it has done just the opposite.[10] One might well remind the Fifth Circuit of then-Justice Harlan Fiske Stone's statement, in an earlier era featuring extreme judicial overreaching, that "[c]ourts are not the only agency of government that must be assumed to have

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alumni."). State residence is at least somewhat under the control of an applicant; "relationship to school alumni" is, of course, totally out of the hands of an applicant, a truly "immutable" characteristic. Only racial preference generates the ire of the Fifth Circuit, however.

7. See the very important book, ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

8. *Id.* at 69.

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

10. TEX. EDUC. CODE ANN. § 70.08 (Vernon 1991) provides:

> Sec. 70.08 Undergraduate Admissions. (a) The board of regents of The University of Texas System may provide for the admission and enrollment of not more than 2,000 entering freshman students at the University of Texas at Dallas . . . .
>
> (d) It is the intent of the legislature that minority students be full participants in the educational opportunities created by the admission of lower-division undergraduates to The University of Texas at Dallas. . . . Therefore, until the minority student populations at The University of Texas at Dallas are fully representative of the state's minority populations, the board shall cause to be set aside for each academic year from among the enrollments targeted by the academic plan for that academic year a number of enrollments equal to not less than five percent of the targeted number, and those enrollments are to be reserved exclusively for admission of minority students.

There is some reason to believe that the "exclusive" reservation for minority students would bring this provision into violation with *Bakke*, but that is scarcely the point. The Texas State Legislature, scarcely identified with runaway liberalism, seems quite clearly to have mandated a race-sensitive admissions program. I assume that the legislature could decide, should it wish to, that this is a terrible idea and thus repeal Section 70.08. To my knowledge, they have not done so. Just as important, I believe, is the fact that the recently elected Republican Governor George W. Bush has raised no questions about the affirmative action policies of the Texas government. His silence has been almost deafening in the weeks following *Hopwood*. One can easily imagine an array of other Republican governors who would have seized on the opportunity to embrace the Fifth Circuit's views. I personally believe that his failure to do so speaks exceedingly well of Governor Bush.

capacity to govern.[11]

But strong—and dogmatic—governance is clearly the aim of the *Hopwood* panel. It is this overreaching that led Judge Weiner, the third member of the panel, only to concur in the judgment. Indeed, he explicitly takes issue with the majority's "conclusion that diversity can never be a compelling governmental interest in a public graduate school," though he "conclude[s] that the admissions process here under scrutiny was not narrowly tailored to achieve diversity."[12] Dissenting from the Fifth Circuit's refusal to rehear the case *en banc*, Judge Stewart denounces what he regards as a "travesty" of judicial (mis)conduct[13] and notes a stunning contrast between the Supreme Court's opinion in the earlier case involving admissions policies at The University of Texas School of Law, *Sweatt v. Painter*,[14] and the panel's opinion in *Hopwood*. The earlier opinion took great pains to limit its scope to the fairly narrow facts before it. Indeed, it emphasized its adherence to the "principle of deciding constitutional questions only in the context of the particular case before the Court" and drew its decision "as narrowly as possible."[15] As Judge Stewart writes,

> If there ever were [sic] a time to end legalized segregation, that was the time. The Court was in a position to paint with a broad brush and eliminate the very regime which denied civil rights to Sweatt and other blacks. Chief Justice Vinson's opinion for the Court, however, resisted calls to wax on "[b]roader issues . . . urged for our consideration."[16]

There is, of course, no such modesty on the part of Judge Smith and his

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11. *See* United States v. Butler, 297 U.S. 1, 87 (1936) (Stone, J., dissenting, joined by Brandeis and Cardozo, JJ.). *Butler*, of course, was one of the most egregious examples of the attempt by the Supreme Court to stop the New Deal dead in its tracks. It is, incidentally, the judicial-activist aspect of *Hopwood* that I would hope my colleague Lino Graglia might be worried about, given his reminders over the years about the limited capacity of courts to perform a useful role either in giving meaning to a basically indeterminate constitutional text or in providing practical solutions to significant social problems. *See, e.g.*, Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996); Lino A. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 HARV. L. REV. 1331 (1985) (book review). Graglia might well reply that it is odd to see judicial restraint so avidly embraced by persons like myself, who in the past had been more than willing to defend a host of "activist" decisions by the Supreme Court (and by "inferior courts" as well). This reply, though, would require conceding the basic point about the Fifth Circuit's activism and the trouble this should cause for someone with Graglia's general views.

12. *Hopwood*, 78 F.3d at 962 (Weiner, J., concurring specially).

13. *See Hopwood*, 84 F.3d at 725 (Stewart, J., dissenting from denial of rehearing).

14. 339 U.S. 629 (1950).

15. *Id.* at 631, *quoted in Hopwood*, 84 F.3d at 725 (Stewart, J., dissenting from denial of rehearing).

16. *Id.* at 725 (Stewart, J., dissenting from denial of rehearing), *quoting Sweatt*, 339 U.S. at 631.

colleague Judge DeMoss. The caution and, indeed, "deliberate speed"[17] (which in fact meant decades) tolerated by the Supreme Court in regard to overcoming a legacy of racial oppression are to be replaced with extraordinary speed in dismantling a system of affirmative action policies that, rightly or wrongly, are believed by many thoughtful Americans to be "necessary and proper"[18] to "establish justice"[19] for all of its citizens.

Indeed, at least for the University of Texas School of Law, the issue goes well beyond the abstractions of social justice. I note as well—and perhaps equally importantly—the fact that legal education in my own experience is far better if the classrooms are made up of diverse rather than racially or ethnically (or, for that matter, regionally) homogeneous student bodies. As someone who regularly teaches courses involving the great issues of American society, I can testify to the importance of such diverse classes in generating acute, even if at times uncomfortable, discussions. The interpretive confidence of the Fifth Circuit panel is matched only by its consummate ignorance of the way that law schools actually work.

Fairness compels me to add, however, that this "diversity" rationale for supporting race-sensitive admissions, the legal crux of the *Hopwood* case, might not be applicable even to the entire University, let alone American institutions across the board. I regard the law school as being at one end of a spectrum in depending upon the quality of classroom discussion for the overall quality of the educational enterprise (and, in turn, benefitting from a diverse student body in assuring the maximum quality of that discussion). That is, the strongest argument for "diversity" as a rationale for admission is that such diversity increases the quality of the product—in this instance, the legal education dispensed by the University of Texas to its students. But I doubt that this argument has much validity, for example, in regard to graduate education in mathematics or physics. I cannot imagine that persons bring their experience as members of racial or ethnic groups to bear on controversies concerning Fermat's last theorem or the charm of certain quarks. Indeed, it's not clear that a diverse classroom is all that important in several technical areas of law; I happen to teach courses on constitutional law and on the legal profession, and I am convinced that the classes are better because of racial and ethnic (and gender) diversity in the classroom. If I taught international business taxation or copyright, I doubt that it would be so important. Any doubts would be multiplied in regard to constructing buildings or putting up highway signs.[20]

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17. Brown v. Board of Education, 349 U.S. 294, 301 (1955).
18. *See* U.S. CONST. art. I, § 8, cl. 18.
19. *See* U.S. CONST. pmbl.
20. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v.

It may be that concerns for social justice, including adherence to some (controversial) theory of distributive justice or remedial theory regarding past injustices in American society, would lead one to support race-sensitive procedures in assigning construction or highway contracts. My major point, though, is that such rationales are *entirely* different from the one that emphasizes the actual contributions that diversity can make to the quality of what is produced by the institution in question. What this means, among other things, is that even if the Supreme Court had reversed *Hopwood* and accepted, as it should, the law school's argument that the quest for a racially and ethnically diverse student body justifies its admission procedures, this still would have left under a cloud many thousands of affirmative-action policies that are based more on social justice considerations. What one knows is that a decision upholding *Hopwood*[21] would in fact have invalidated almost every one of the literally thousands of racial and ethnic preferences that dot the American public policy landscape. But it is essential to recognize that most of them will continue to be vulnerable, even if *Hopwood* is eventually overruled, unless the Supreme Court goes well beyond the relatively modest step of upholding the legitimacy of the "diversity" rationale and instead gives governmental institutions relative *carte blanche* in deciding what social justice requires in regard to the explicit use of race in assigning public benefits.

I offer two further observations in regard to the *Hopwood* opinion. First, judicial activism is scarcely unprecedented in the Fifth Circuit. It has answered with a resounding "no" the memorable questions asked in the pages of *The New Republic* by the distinguished member of the Seventh Circuit Court of Appeals, Richard Posner: "What Am I? A Potted Plant?"[22] And there is nothing at all new in its refusal to accept potted plant status. Indeed, I want to suggest that what made that circuit truly great in the 1950s and '60s was precisely its willingness to go well beyond an often hesitant and cautious Supreme Court in first addressing and then attempting to fashion remedies in regard to the realities of racial injustice pervading the states of the old Fifth Circuit, which at that time stretched from Georgia to Texas. John Minor Wisdom, Richard Rives, Elbert Tuttle, and John Y. Brown, to name only four of the giants who served on the court during those roiling years, took responsibility to give content to what Justice Robert Jackson called the "majestic generalities"[23] of the Fourteenth Amendment, and they were

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Pena, 115 S. Ct. 2097 (1995).

21. And, of course, denial of certiorari is by no means such a validation of the Fifth Circuit's opinion.

22. Richard Posner, *What Am I? A Potted Plant? The Case Against Strict Constructionism*, THE NEW REPUBLIC, Sept. 28, 1987, at 23.

23. Fay v. New York, 332 U.S. 261, 282 (1947).

properly praised for doing so.[24]

More recently, the activism of the Fifth Circuit has been well exemplified, for better or worse, in cases involving the removal of barriers to state administration of the death penalty,[25] the legitimacy of prayers in public school ceremonies,[26] and the reach of the Commerce Clause. In the last instance, for example, the circuit scarcely behaved in a restrained fashion when, in *United States v. Lopez*,[27] it invalidated the Gun-Free School Zones Act of 1990 as being beyond Congress' power under that Clause. As it happened, the Circuit "guessed right," as it were, and was vindicated by the five-to-four decision in which the Supreme Court, for the first time in almost 60 years, struck down a Commerce Clause-based regulation of private parties as being beyond congressional authority. But, surely, a more restrained "inferior Court"[28] might well have expressed its unhappiness at the apparent drift of the Supreme Court's Commerce Clause doctrine but, nonetheless, have written that the thrust of that doctrine counseled deference to the judgment of the United States Congress that the national interest in a vibrant economy justified the regulation in question. Instead, Judge Garwood, writing for the circuit panel, took the bull by the horns—or perhaps one should say the gun by the handle—and unequivocally anticipated the Supreme Court's new

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24. *See generally* JOHN M. SPIVACK, RACE, CIVIL RIGHTS AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT (1990); JACK BASS, UNLIKELY HEROES (1981); J.W. PELTASON, FIFTY-EIGHT LONELY MEN (1961).

25. *See, e.g.*, Stringer v. Black, 503 U.S. 222, 237 (1992) (Kennedy, J., for Court) ("Fifth Circuit made a serious mistake" in its interpretations of existing precedents). Only the Fifth Circuit has been repeatedly reversed by the present Supreme Court for going too far in *protecting* the state's right to execute criminal defendants. *See*, in addition to *Stringer*, Kyles v. Whitley, 115 S. Ct. 1555, 1565 (1995) (Louisiana violated the Constitution by failing to disclose potentially favorable evidence to a criminal defendant in capital murder case, leading Judge King, who dissented from Fifth Circuit's refusal to grant relief, to say that "[f]or the first time in my fourteen years on this court . . . I have serious reservations about whether the State has sentenced to death the right man.") (quoting 5 F.3d 806, 820 (5th Cir. 1993)).

26. *Compare* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *reh'g denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) (invocation offered by student volunteer constitutional if content of invocation is selected by students) *with* Lee v. Weisman, 505 U.S. 577 (1992) (prayer unacceptable from clergy at least when clergy is selected by school official). I am one of those who would read *Lee* as forbidding making an audience listen to any prayer by someone selected for that purpose as the price of admission to a public school ceremony. For me, therefore, *Clear Creek* is a patent attempt to evade the relatively clear meaning of the Supreme Court's decision. Needless to say, it did not help matters for those seeking predictability in the law that the Supreme Court refused to grant certiorari in *Clear Creek*. Further confusing matters is the Fifth Circuit's later decision in Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir.), *cert. denied,* 117 S. Ct. 388 (1996), which limited *Clear Creek* to the high school graduation context and otherwise struck down a Mississippi statute that would have authorized student-selected prayers in a variety of contexts.

27. 2 F.3d. 1342 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

28. I hasten to point out that "inferior court" is the Constitution's term and not my own invention. *See* U.S. CONST. art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

turn in constitutional analysis.[29] Why, then, should one be altogether surprised that Judges Smith and DeMoss would act in a quite unrestrained way? Chief Judge Politz accurately quotes from a variety of Supreme Court and Fifth Circuit decisions counselling loyal adherence to established doctrine,[30] but that scarcely captures the reality of the Fifth Circuit's actual behavior over many decades.

I must emphasize, however, that my own criticism of the *Hopwood* panel is not based on its "overreaching." Indeed, Judge Stewart's argument above cuts two ways. It does no credit to the Supreme Court in *Sweatt* that its opinion was so modest and that, overall, it was so cautious in implementing Brown. If one agrees with the Fifth Circuit that racial preferences are both dreadfully unjust and unconstitutional, then one might well applaud the panel for its willingness to declare that the objectionable practices should end as soon as possible. Barry Goldwater was on to something some three decades ago when he cautioned that "moderation in the pursuit of justice is no virtue."[31] Judges have their independence, at least in part, precisely to be able to speak constitutional truth to those with power and to force them to adhere to the commands of the Constitution. Consider in this context the widespread liberal admiration of Judge William Wayne Justice, who has scarcely been a shrinking violet in his willingness to use the powers at his command in behalf of his vision of constitutionally-compelled justice.

If this means a a certain latitudinarianism in regard to interpreting Supreme Court decisions, so be it. As I have argued elsewhere,[32] there is much to be said for adopting Andrew Jackson's argument that the opinions of the Supreme Court should "have only such influence as the force of their reasoning may deserve."[33] The judicial oath of office, after all, is to the

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29. One might wonder, incidentally, if the Court would have granted certiorari had the Fifth Circuit adopted the more restrained posture outlined in the text. After all, most constitutional "experts" have been teaching for years that Congress has basically plenary power under the Commerce Clause, and a decision upholding the Act would have simply been another example of how much power Congress indeed has. Perhaps four Justices would have found a decision upholding the Act cert.-worthy, but one can wonder. Instead, the Fifth Circuit in effect compelled the Court to take the case by invalidating a federal statute. Similarly, in *Hopwood*, it was astonishing indeed that the Court did not grant the University of Texas' petition for a writ of certiorari, given the actual opinion in the case, whereas it might have been more understandable for the Court to take a pass on the case had the opinion been more moderate. Whether the extreme tone of *Hopwood* was adopted in order to provoke review can be known only to Judges Smith and DeMoss (and their clerks). It seems obvious, for example, that had the majority opinion been written in the considerably cooler voice of Judge Weiner, its prospects for certiorari would have been significantly weaker.

30. *Hopwood*, 84 F.3d at 722-23 (Politz, J., dissenting from denial of rehearing).

31. THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1964 261 (1965).

32. *See especially* Sanford Levinson, *On Positivism and Potted Plants: 'Inferior' Judges and the Task of Constitutional Interpretatation,* 25 CONN. L. REV. 843 (1993).

33. Andrew Jackson, Veto Message [of the Renewal of the Second Bank of the United States] (July 4, 1832), *reprinted in* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING

Constitution of the United States,[34] not to what is said about the Constitution by the Supreme Court. I not only believe this as an abstract proposition; I also greatly admire judges like the titans mentioned above who displayed sometimes awesome courage in giving meaning to the Constitution at a time when the Supreme Court was considerably more circumspect.

My objection to *Hopwood*, then, lies almost infinitely more in the actual analysis profferred by Judges Smith and DeMoss rather than in the fact that they were not adequately deferential to the *Bakke* opinion. If I believed that that case were "bad law" and unfaithful to the Constitution's mandate, then I would have little hesitation in praising the panel for acting (and writing) as it did.

I turn now to my second observation regarding the majority opinion in *Hopwood.* For all of their clear disdain of *Bakke*, Judges Smith and DeMoss do not simply forthrightly denounce it and say that their judicial oaths compel them to strike down UT's admission system (and all other governmentally enforced affirmative action). Instead, in what is a remarkable display of vulgar legal realism, the panel in effect counts the noses of the current Court and suggests that the votes now exist there to consign *Bakke*, especially if that is thought to refer to Justice Powell's opinion in the case, to the trash heap it presumably richly deserves.[35] The *Hopwood* opinion is a mixture of appeal to high principle—that our society should be "color-blind"—and pure Holmesian prediction[36] about the likely response of the current Supreme Court to affirmative action.

As it happens, I believe that the panel's realism is extraordinarily inept in addition to being rather vulgar. I think it fair to say that the positions of seven of the nine Justices are eminently predictable in this case. Of these seven, it seems crystal clear to me that four of them—Justices Ginsburg, Breyer, Stevens, and Souter—are extraordinarily unlikely, given their dissents in earlier cases like *Shaw v. Reno*,[37] *Miller v. Johnson*,[38] and *Adarand Constructors, Inc. v. Pena*,[39] to agree with the panel opinion or anything reasonably close to it. Similarly, it seems quite likely that Chief Justice

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49, 50 (3d ed. 1992).

34. *See, e.g.*, U.S. CONST. art. VI.

35. *Hopwood*, 78 F.3d at 944-48.

36. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 173 (1920).

37. 509 U.S. 630 (1993); *see* 509 U.S. at 658-75 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); 509 U.S. at 676-79 (Stevens, J., dissenting); 509 U.S. at 679-87 (Souter, J., dissenting).

38. 115 S. Ct. 2475 (1995); *see* 115 S. Ct. at 2497-99 (Stevens, J., dissenting); 115 S. Ct. at 2499-507 (Ginsburg, J., dissenting, joined by Stevens and Breyer, JJ., and in part by Souter, J.).

39. *Adarand*, 115 S. Ct. at 2120-31 (Stevens, J., dissenting, joined by Ginsburg, J.); 115 S. Ct. at 2131-34 (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.); 115 S. Ct. at 2134-36 (Ginsburg, J., dissenting, joined by Breyer, JJ.).

Rehnquist and Justices Scalia and Thomas, given *their* votes in these and other cases, would be quite likely to adopt a position basically similar to, even if a smidgen more moderate than, the Fifth Circuit. That leaves, of course, Justices Kennedy and O'Connor. Both, of course, signed the (in)famous opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[40] on the importance of adhering to precedent where the Court has spoken on issues of supreme national importance and where a great deal of reliance has been placed on what the Court said. It is hard to see *Roe v. Wade*[41] as more clearly rooted within our doctrinal landscape than *Bakke*, and it seems clear beyond argument that far more governmental institutions have in fact relied on *Bakke* in believing they were in a safe harbor in adopting race-sensitive hiring or admission policies. The fact that some of these policies might in fact have gone beyond *Bakke's* limits, including, arguably, the specific policies in force at UT at the time that Cheryl Hopwood filed her suit, does not invalidate the general argument about institutional reliance.

Even if Justice Kennedy decides that his commitment to precedent is weaker here than in *Casey,* that leaves the Court's most notorious waffler, Justice O'Connor. Quite bluntly, the question might come down to whether she has the willingness—some might even say courage—to pull the trigger and put to death, as a practical matter, thousands of affirmative action policies in place across the nation. I see no reason to believe that Justice O'Connor will do so. Not only would it violate her predisposition to waffle and require her, as well, to reject the strongly precedent-oriented arguments in *Casey*; it would also seemingly require her to forget everything she has written in recent years about the importance of reinvigorating state and local institutions and deferring to their own sense of how best to resolve their social problems.[42] It is true that she wrote for the Court in striking down Richmond, Virginia's minority set-aside program in *City of Richmond v. J.A. Croson Co.*,[43] but it is true as well that she emphasized in that case possible elements of "self-dealing"; the majority black city council could well have been viewed as overreaching on behalf of its preferred constituencies in requiring that thirty percent of all city contracts be set aside for minority-owned enterprises.[44] Whatever else may be the case in regard to the University of Texas system or, beyond that, the Texas Legislature, only the most deluded fantasist would view either as being controlled by members of racial minorities.

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40. 505 U.S. 833, 843-901 (1992).

41. 410 U.S. 113 (1973).

42. *See, e.g.*, her joining of the concurring opinion in United States v. Lopez, 115 S. Ct. 1624, 1634-42 (1995) (Kennedy, J., concurring).

43. 488 U.S. at 476-511.

44. *Id.* at 495-96.

Normally, such exercises in nose counting are somewhat unseemly, at least in the pages of law reviews. Here, though, the *Hopwood* panel has invited its readers to do so, given their own zeal to predict the present distribution of opinion on the Supreme Court. The Court's startling failure to grant certiorari has, as a practical matter, only encouraged further speculation about the likely divisions of opinion on the Court (and the unwillingness of either the "liberals" or "conservatives" to risk finding out what O'Connor will in fact do).[45]

Conclusion

Like most members of the faculty of The University of Texas School of Law, I regard the panel opinion in *Hopwood* as an egregious display of ideological zealotry on the part of an emboldened, right-wing-dominated Fifth Circuit. This is harsh, to be sure, but it is a different kind of criticism from one that emphasizes the purported impropriety of the panel's going beyond the lines marked out by the Supreme Court in *Bakke* and its progeny. I do not denigrate the willingness of "inferior courts" to think for themselves as to what the Constitution requires. It would be a terrible shame if critics of *Hopwood* pile on the panel for coming to its own conclusions as to constitutional meaning instead of focusing on the substantive inadequacies of the actual conclusions reached by Judges Smith and DeMoss.

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45. Needless to say, few accept as dispositive the strained argument offered by Justices Ginsburg and Souter that *Hopwood* is now, in effect, moot because the litigation dealt only with the 1992 admissions program, the defense of which has been abandoned even by the Law School's own lawyers. Both the district court and the Fifth Circuit, though, in fact assessed the current admissions procedures, Judge Sparks finding them acceptable, the Fifth Circuit strongly denouncing them and indicating, in no uncertain words, that it fully expected the University to comply with the sentiments exhibited in the panel opinion. See, e.g., the extraordinary paragraph in which the Court threatened to hold personally liable, and award punitive damages against, University administrators (and their lawyers) whom they deemed recalcitrant in obeying the Fifth Circuit's mandate. *Hopwood*, 78 F.3d at 959. And, of course, following the denial of certiorari, the Attorney General of Texas was quick to cite Hopwood as requiring the dismantling of most affirmative action programs. *See, e.g.*, Mary Ann Roser, *College panel grapples with race issue*, AUSTIN AMERICAN-STATESMAN, July 19, 1996, at B1; Mary Ann Roser, *Texas hit hard by Hopwood decision*, AUSTIN AMERICAN-STATESMAN, July 11 1996, at B1. Only those living in some fantasyland can see Hopwood as relating only to the 1992 program. Had four members of the Supreme Court wished to hear the case, they had ample grounds to do so.