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Texas after Hopwood: Revisiting Affirmative Action

In 1991, the University of Texas School of Law developed a new admissions policy that set different standards for minority versus Anglo students in an effort to increase minority enrollment at the school. Under this policy, the school denied admission to some Anglo applicants who had higher test scores than minorities who were admitted. In 1994, four of these students, among them Cheryl Hopwood, sued the school on the grounds of reverse discrimination. The case eventually reached the Fifth U.S. Circuit Court of Appeals. On March 18, 1996, the court struck down the law school's affirmative action program in Hopwood v. Texas, 78 F.3d 932. Although the law school's separate admissions policy was no longer in effect by the time of the decision, the court's ruling broadly challenged use of any affirmative action program other than as a narrowly tailored remedy for clearly demonstrated discrimination and established the legal basis for possible monetary damages against the state.

On June 1, 1996, the U.S. Supreme Court declined to review the Fifth Circuit's *Hopwood* decision. Texas Attorney General Dan Morales issued an opinion that would apply the standards enunciated in *Hopwood* to all state universities and a range of state affirmative action programs, not just those dealing with admissions to the UT School of Law. Others, including federal authorities, have interpreted the *Hopwood* decision less broadly.

The *Hopwood* decision and the attorney general's opinion have fueled a growing debate over affirmative action policies. In the Legislature, the debate has generated proposals to redefine university admissions criteria and reevaluate contracting procedures that now encourage state contracts with businesses that historically have been underutilized because of the race or gender of the business owners.

The *Hopwood* Decision

Texas has wrestled for years with the issue of minority enrollment in its universities (see page 2). During this time, many of its educational institutions developed their own plans to encourage increased minority participation in higher education. In 1991, the UT School of Law developed an affirmative action plan that included separate admissions committees to evaluate minority and Anglo applicants. This program was successfully challenged by the plaintiffs in *Hopwood* on the grounds that it

Contents

Legal Developments Pre-*Hopwood*

In 1950, the U.S. Supreme Court changed the way minorities were admitted to Texas universities in *Sweatt v. Painter*, 339 S.Ct. 629. In the *Sweatt* decision, issued four years before *Brown v. Board of Education* (347 U.S. 483) initiated the widespread integration of public education, the court ruled that the University of Texas had violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution by establishing a separate law school for black students. The court ordered the school to admit Sweatt and all other qualified black applicants.

In 1978, the U. S. Department of Health, Education and Welfare through its Office of Civil Rights (OCR) threatened legal action against Texas, alleging that segregation of blacks and under-representation of Hispanics affected students, faculty and staff at Texas institutions of higher education. That same year, the Supreme Court used a California case to outlaw the use of quotas or set-asides in affirmative action programs, but affirmed diversity as a justifiable goal for affirmative action programs in *Regents of the University of California v. Bakke*, 483 U.S. 265. The court determined that quotas violated the equal protection clause of the Fourteenth Amendment.

In 1983, OCR accepted the "Texas Equal Educational Opportunity Plan for Public Higher Education" developed by the Higher Education Coordinating Board. Known in summary form as the "Texas Plan," it introduced minority enrollment goals for higher education. A Texas Plan II was adopted in 1989 without a federal mandate.

In 1992, the Supreme Court in *U.S. v. Fordice*, 112 S.Ct. 2727, ruled that although Mississippi's higher educational system no longer applied race-based policies that discriminated against minorities, it employed some race neutral policies that "substantially restrict a person's choice of which institution to enter and contribute to the racial identifiability of the public universities." The court ordered that such policies be eliminated.

In 1994, the U. S. Department of Education notified Texas Governor Ann Richards that OCR was evaluating the state's progress in eliminating vestiges of segregation in light of *Fordice*. Later that year, the coordinating board adopted a voluntary, six-year plan, *Access and Equity 2000*. The plan's goals for higher education in Texas included increasing: the graduation rates of black and Hispanic undergraduates to parity with the rate of white students; the numbers of black and Hispanic graduate and professional school students; the numbers and proportion of black and Hispanic faculty, administrators and professional staff to gradually achieve parity with their proportional representation in the population; and the numbers of minorities and women on the governing boards of Texas public institutions of higher education.

Higher Education Coordinating Board Chairman Ken Ashworth has said these various programs have resulted in an additional 85,000 Hispanic and 22,000 black students enrolling in Texas institutions of higher education since 1983. Despite these gains, however, the coordinating board reported in 1995 that minorities were still under-represented in Texas higher education.

violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. In deciding for the plaintiffs, however, the Fifth Circuit elaborated a constitutional standard for reviewing such programs:

> 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 . . . . The issue before the Court is whether the affirmative action program employed in 1992 by the law school in its admissions procedure met the legal standard required for such programs to pass constitutional muster. The Court . . . finds that it did not.

An affirmative action program in higher education, the court declared, must serve a "compelling governmental interest" and be "narrowly tailored" to respond directly to a specific instance or instances of discrimination. The court stated that "the record provides strong evidence of some present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole." However, UT failed the application of the "narrowly tailored" standard. The court determined that the 1992 admissions process "could select a minority, who, even with a 'plus' factor [of race], was not as qualified to be a part of the entering class as a nonminority denied admission. . . . [T]he Court finds the procedure violated the Equal Protection Clause of the Fourteenth Amendment."

(For additional background on *Hopwood*, see House Research Organization Focus Report Number 74-19, *Affirmative Action Issues Face Texas*, March 6, 1996, and HRO Interim News Number 74-3, *Affirmative Action Ruling Fallout Felt*, April 5, 1996.)

The Attorney General's Opinion

On June 1, 1996, the U.S. Supreme Court declined to grant Texas' petition for writ of certiorari to review the Fifth Circuit decision. Texas universities looked for guidance to Attorney General Morales, who issued guidelines advising universities that, under *Hopwood*, race-based admissions and financial aid policies would have to be discontinued or else the state would face potential monetary damage awards by plaintiffs successfully challenging such policies. The guidelines stated that as long as admissions processes were race-neutral, recruitment of minority students would still be permissible. Morales suggested, however, using other criteria, such as a student's socioeconomic and educational background, which, he said, are substantially correlated with race and would help maintain educational diversity.

In January 1997, Chancellor Bill Hobby of the University of Houston System asked the attorney general to clarify his interpretation of *Hopwood* with a formal opinion. Hobby said that until Morales acted, the University of Houston system would continue to award race-based scholarships and financial aid. The following month, Morales issued a formal opinion and appeared before a joint hearing of the House Higher Education and Appropriations committees to explain his interpretation of the *Hopwood* ruling.

Morales' February 5, 1997, opinion, LO97-001, applies the *Hopwood* decision not only to admissions but also to financial aid, scholarships, and student and faculty recruitment and retention. According to Morales, the opinion applies as well to private universities that accept federal dollars for research or student loans.

Morales reasoned that if race-based admissions policies do not meet the standards required by the Fifth Circuit, neither would the disbursement of financial aid and scholarships as well as recruitment and retention of faculty and students. Neither his formal opinion nor the *Hopwood* decision, Morales said, would preclude any future use of race-based criteria in these activities as long as an affirmative action program met a rigorous three-pronged standard. That standard requires: (1) a factual showing by an institution or the Legislature that the institution had discriminated in the not too distant past against the group benefitted by the preference or that the institution had been a passive participant in acts of private discrimination by specific private actors against the benefitted group; (2) that present effects of past discrimination are not due to general societal discrimination; and (3) that the program is narrowly tailored to remedy these effects.

Morales further stated that promotion of diversity is not sufficient justification for race-based policies. Morales acknowledged that this conclusion may appear to contradict the *Bakke* decision, the most often cited of recent affirmative action cases, which held diversity to be a justifiable goal. Morales said: "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or in any other case. . . . Justice Powell's view in *Bakke* is not binding precedent on this issue."

Morales said the opinion of the Fifth Circuit is law not only for Texas but also for Louisiana and Mississippi, also part of the Fifth Circuit, and that lower federal courts are bound as well by *Hopwood*. Officials in Louisiana and Mississippi, however, have said they will not follow the ruling, citing the precedence of *Bakke* and separate federal mandates ordering desegregation in higher education in those states.

Advocates of affirmative action have said Morales' opinion is too broad. Some say *Hopwood* should only apply to admissions; still others say it should be limited to the UT School of Law and to the specific set of policies that already have been abandoned. They note that *Sweatt* did not cause the integration of all institutions of higher education in Texas but was confined to the UT School of Law; *Hopwood* likewise should apply only to the UT School of Law since its unique policies were the only ones at issue in the case.

Critics of the opinion say Morales has been selective in reconciling *Hopwood* with the *Bakke* decision. They point out that while Morales relied in his analysis on the equal protection clause of the Fourteenth Amendment, his opinion nonetheless quoted *Bakke*'s Justice Powell: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."

From *Sweatt* to *Hopwood*: 50 Years of Debate over Affirmative Action

In the 1950 *Sweatt* decision, the U.S. Supreme Court ruled that the University of Texas School of Law had violated constitutional guarantees against discrimination by setting up a separate school for blacks and other minorities.

In the 1996 *Hopwood* case, the U.S. Supreme Court declined to review a Fifth U.S. Circuit Court of Appeals ruling that the UT School of Law had violated constitutional guarantees against discrimination by giving preference in admissions decisions to minorities over Anglo applicants with the same test scores.

In the half-century between the *Sweatt* and *Hopwood* rulings, Texas institutions of higher education made considerable progress in using affirmative action programs in an effort to eradicate lingering effects of past discrimination. So much so, say some observers, that affirmative action programs are no longer needed in Texas colleges and universities. They cite the *Hopwood* decision as clear judicial concurrence that affirmative action, absent evidence of present discrimination, amounts to illegal reverse discrimination. Segregation and other discriminatory practices were outlawed long ago, and most minorities have never felt their effects. It is wrong to insist that present generations still pay for the wrongs of the past, say critics of affirmative action.

Others, however, say affirmative action programs are just as necessary today as they were 50 years ago in order to address the inequities that still exist because of the socioeconomic repercussions of discrimination and segregation. Societal discrimination perpetuates the effects of past economic and educational segregation. Bias in the higher education admissions process continues to exist because of such factors as alumni legacy, social networks, family connections, wealth, seniority, and social class. These factors all affect admissions decisions, but have no more validity in determining educational aptitude than does race.

Others disagree with Morales' assertion that *Bakke* is not binding precedent. The deans of St. Mary's Law School, South Texas College of Law, Southern Methodist University Law School and more than 50 law professors have signed a petition declaring that they are "firmly of the opinion that *Bakke* . . . remains the law of our land. . . . When a jurisdiction has on its books two conflicting decisions, the decision of the superior court prevails."

Both supporters and opponents of affirmative action agree that Texas must educate its minority students well, if only out of self interest. Today, more than 50 percent of all Texans under 25 are minorities. By 2008, minorities will constitute the majority of the population in Texas. This demographic fact has pressed lawmakers toward compromises that attempt to maintain the high quality of higher education for all Texas students.

Admissions Proposals

In the wake of *Hopwood* and the Morales interpretation of the decision, Texas universities have reexamined their admissions policies. The University of Houston, for example, has already changed how it weights numerical standards, such as grade point averages and law school admission test results. Now it is granting "full file review" to about two-thirds of the applications, up from 30 percent. This review takes into account alternative factors, including students' socioeconomic status.

The Legislature is considering a variety of responses to reduce the effect of the changes on minority students in Texas. Three bills, each passed by one house thus far, seek to provide Texas with its first-ever set of statewide admissions policies for public higher education:

- SB 1419 by West et al. proposes to create a statewide admissions process whereby 50 percent of students would be admitted by traditional, numerical academic standards, including automatic eligibility for the top 10 percent of high school graduating classes; 40 percent by additional factors, including applicants' socioeconomic and educational histories and family responsibilities; and 10 percent by such factors as students' potential for success, leadership skills, and contributions to the academic community, to be determined through personal interviews. The bill passed the Senate April 10 and has been referred to the House Higher Education Committee.

- HB 588 by Rangel et al. would take a slightly different approach. The bill provides for automatic admission for the top 10 percent of high school graduating classes for students graduating in the last two years. Schools could decide whether to automatically admit the top 25 percent of graduates. For the remaining admissions, schools could consider other factors, such as a student's academic record, socioeconomic background, community involvement and responsibility, and extracurricular activities. HB 588 passed the House on April 16.

- HB 858 by Goolsby would require that most universities use an open enrollment process for a portion of their admissions. Open enrollment, which is now practiced by Texas Southern University and University of Houston Downtown, admits any student with a high school diploma or equivalency. HB 858 would require institutions with total enrollment of 30,000 or more students to admit one percent of undergraduates through open enrollment. Institutions with enrollments of fewer than 30,000 students would have to admit two percent. The bill passed the House April 15.

Affirmative action supporters fear, however, that race-neutral criteria will not maintain adequate participation of minority students. A recent study by the Higher Education Coordinating Board found that alternative criteria would affect only half the number of students who would be reached by affirmative action programs. To reach 100 percent effectiveness, supporters say, the Legislature would have to double funding for need-based tuition scholarships. Such a funding increase would benefit not only minority students but also disadvantaged Anglo students. Title 11 of both the House and Senate appropriations bills, the "wish list" of unfunded program requests, would double funding for need-based scholarships.

Recent college application numbers are an early indication of problems with race-neutral admissions policies, say critics. Since the *Hopwood* decision, applications by minority students to Texas public universities have declined. UT has seen a 17 percent drop in applications from Hispanics and 21 percent from blacks, compared to a 9 percent drop among Anglos. At Texas A&M, the declines total 7 percent

for Hispanics and 15 percent for blacks, compared to a 3 percent drop for Anglos. The greatest decline, however, has been at the UT School of Law, which has registered a 15 percent drop in applications for Hispanics and a 42 percent drop for blacks, in contrast to a decline of 8 percent for Anglos. The figures reverse a long trend toward more applications from minorities.

Admissions figures are down as well, although less drastically. UT undergraduate admission offers for the 1997-98 school year include 12.5 percent Hispanic students, down from 15 percent a year ago, and 2.9 percent black students, down from 4 percent. But should the declines continue, affirmative action supporters say, the result could be a devastating brain drain, whereby top minority students are lured out of state and others are discouraged from applying because of a real or perceived hostile environment in Texas universities.

Some advocates of affirmative action hope this scenario can be avoided if Texas meets the standard required by *Hopwood* and alluded to by Morales: a legislative finding that would outline "past discrimination" and "present effects" in order to justify the use of affirmative action in Texas institutions of higher education. HB 3418 by Rangel would establish that past discrimination and present effects of that discrimination exist in Texas higher education institutions and would permit schools to consider ethnicity in admissions decisions if a school's minority population rate was below the high school graduation rate of blacks and Hispanics. For graduate school admissions, undergraduate matriculation rates would apply. HB 3418 is pending in the House Higher Education Committee; its companion, SB 1868 by Barrientos, has been referred to the Senate Education Committee.

HB 3058 by Berlanga would require the comptroller to study the history of discrimination in Texas higher education and determine whether present effects are due to general societal discrimination and if programs over the past decade have been narrowly tailored to remedy present effects of past discrimination. The Higher Education Committee has recommended HB 3058, as substituted, for the Local and Consent Calendar. The bill contains language similar to that of a rider in HB 1 by Junell, the House version of the general appropriations bill, which also calls for a disparity study. The Senate version of the appropriations bill does not contain a similar provision.

HB 2146 by Maxey, which passed the House on April 18, would require the coordinating board to collect data on the participation of members of racial and ethnic groups in public higher education in Texas, and to conduct a study analyzing the effects of *Hopwood* and subsequent admissions policy changes on application and admission rates of minority students.

HB 986 by Maxey, referred to the House Higher Education Committee, would require that due regard be given to race or ethnicity of applicants in awarding scholarships and financial aid. HB 589 by Rangel, scheduled for House floor debate April 23, would indemnify higher education officials and students involved in the admissions process from personal liability in reverse discrimination lawsuits.

Some proposals address other factors that may come into play in admissions decisions, including family connections and athletic ability. HB 597 by Maxey, pending in the House Higher Education Committee, would prohibit schools from considering legacies or connections to public officials or donors in admissions decisions. HB 3001 by Wilson, referred to the House Higher Education Committee, would establish minimum academic standards for student athletes. HB 2238 by Dutton, referred to the House Civil Practices Committee would declare that schools discriminate by having minority representation on their football teams that is 10 percent greater than their representation in the school at large.

Federal Action

Fueling the debate over affirmative action in Texas institutions of higher education is the question of whether by conforming to *Hopwood* Texas could jeopardize its compliance with federal antidiscrimination statutes and risk losing almost $2 billion in federal student, work-study, and research grants from the U.S. Department of Education. That question in

and of itself has generated considerable differences of opinion.

Norma Cantu, assistant secretary of education for civil rights, initially disagreed with the Texas attorney general's interpretation of *Hopwood*. In a letter to Morales, she cited the continued precedence of *Bakke* and *Fordice*, and asserted that *Hopwood* did not invalidate "narrowly tailored" affirmative action policies in Texas schools and that its application should be limited to the UT School of Law. Subsequently, Cantu backed away from her earlier stance, writing Sen. Rodney Ellis that the federal government "would not require or encourage" affirmative action programs in Texas that would conflict with the *Hopwood* decision.

U.S. Education Secretary Richard Riley has written Morales that Texas would not lose federal funds by eliminating race-based admissions policies at state

Hopwood and HUBs

Some opponents of affirmative action believe that *Hopwood* could be used to challenge programs intended to increase the participation of historically underutilized businesses (HUBs) in state contracting. In 1991, the Legislature enacted HB 799 by Dutton, setting up the historically underutilized business program to encourage state agencies to contract with female- and minority-owned firms.

This session, SB 31 Ratliff et al. would shift the focus of state contracting programs from racial or gender hardship to economic hardship. The bill would focus on "place, not race," steering government contracts toward businesses located in economically distressed areas or facing other economic hardship. SB 31 passed the Senate on April 4, with an attached statement of legislative intent by Sen. Royce West specifying that race and gender remain part of the definition of "economically disadvantaged person" used in the bill.

The House Appropriations Committee substitute for SB 31 would require that all state agencies and institutions of higher education make a good-faith effort to increase purchasing and contracting with HUBs. The committee used the definition of HUBs outlined in Article IX of HB 1, the general appropriations bill, which addresses socially rather than economically disadvantaged individuals but retains race- and gender-based criteria for defining a HUB.

On March 20, Attorney General Morales met with the Joint Select Committee on HUBs to discuss the issue. Morales indicated that the legality of HUBs would continue to be judged by the standards of past discrimination and present effects invoked in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a U.S. Supreme Court decision that ruled minority hiring goals must be supported by evidence of both past discrimination against such firms and present effects of that discrimination in order to be constitutional. The decision in *Croson* also stipulated that a state may take measures to keep from being a passive participant in a system of discrimination.

In the wake of *Croson*, the state General Services Commission (GSC) conducted a disparity study and found both statistical and direct evidence indicating a pattern of discrimination against female- and minority-owned businesses. In 1995, GSC adopted rule changes meant to enable the state's HUB program to withstand a challenge on *Croson* grounds. Supporters of the HUB program say the GSC findings, combined with *Fordice* and *Croson*, establish grounds for legal challenge if the state instituted race-neutral contracting procedures.

The implications of dismantling a HUB program can be far-reaching. The Houston Metropolitan Transit Authority learned in January 1997 that it would not be eligible for future federal grants unless it restored an acceptable affirmative action program that it dismantled after a lawsuit from the Houston Contractors Association. Metro could lose more than $350 million in Federal Transit Administration dollars over the next few years unless a compromise is reached. A lawsuit similar to the one that ended Houston Metro's HUB program is now pending in Austin.

colleges and universities. However, Riley also said, "The Department of Education fully expects that Texas voluntarily would remedy any current effects of past discrimination that are found." A delegation of federal investigators arrived in Austin in mid-March for an extended study to determine whether vestiges of discrimination do remain in Texas institutions of higher education.

In the meantime, U.S. Justice Department officials have said they believe the *Hopwood* decision was "fundamentally erroneous." Twelve Democratic state senators have written President Clinton to oppose the narrow interpretation of the *Hopwood* decision, citing "an unprecedented free fall of minority applicants and admissions in Texas public universities."

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