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My task is to assess the implications of the *Podberesky*[1] and *Hopwood*[2] decisions for the future of race-based preference programs, that is, the future of "affirmative action." *Podberesky* involved a challenge to a lush financial aid scholarship program at the University of Maryland for which only blacks were eligible. The university adopted the program under pressure from the Office of Civil Rights of the Department of Education to "desegregate" the university by taking steps to increase black enrollment. Segregation, of course, ended long ago at the University of Maryland, but to professional civil rights enforcers, "desegregation" has long meant compulsory integration. Purporting to enforce Title VI of the 1964 Civil Rights Act,[3] which *prohibits* racial discrimination by institutions that receive federal funds, the Office of Civil Rights insists, with the aid and support of federal courts and the Department of Justice, that such institutions *practice* racial discrimination. I mention this in passing because it is the source of the racial conflicts on our campuses and elsewhere that are threatening to tear our society apart.

In *Podberesky*, Federal District Judge J. Frederick Motz--a Reagan appointee, I am sad and embarrassed to say--had no difficulty in upholding the scholarship program as a means to remedy the effects of past discrimination. Black enrollment at the University of Maryland was as high as sixteen percent, but Judge Motz, on the basis of his educational expertise, thought it was still too low. Judge Motz, at least as gullible as he was self-righteous, had no difficulty believing that the reason that there are not

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1. Podberesky v. Kirwan, 764 F. Supp. 364 (D. Md. 1991), *rev'd and remanded*, 956 F.2d 52 (4th Cir. 1992), *on remand*, 838 F. Supp. 1075 (D. Md. 1993), *vacated and remanded*, 38 F.3d 147 (4th Cir. 1994) (en banc), *reh'g denied*, 46 F.3d 5 (4th Cir. 1994), *and cert. denied*, 115 S. Ct. 2001 (1995).

2. Hopwood v. State of Texas, 861 F. Supp. 551 (W.D. Texas 1994), *rev'd and remanded*, Nos. 94-50569, 94-50664, 1996 WL 120235 (5th Cir. 1996).

3. 42 U.S.C. §§ 2000d-2000d5 (1988).

more black students at the University of Maryland is that it has a "poor reputation" among blacks, and the reason so many black students drop out of law school is the existence of "a hostile racial attitude on campus"--after all, how else could low black enrollment and retention be explained?

A Fourth Circuit panel made up of Judge Emory Widener, a Nixon appointee, and Judges William Wilkens and Clyde Hamilton, Reagan appointees, took a very different view of the matter.[4] The university came before the court, Judge Widener wrote for a unanimous panel, with a presumption that its race-based program cannot be sustained. The court rejected the "poor reputation" and "hostile racial climate" claims out of hand as insufficient to support racial preferences. It rejected the district judge's finding that blacks were "underrepresented" at the university as based on an improper comparison, and doubted that there was any underrepresentation needing remedy.

The truth, of course, is that blacks are not underrepresented, but greatly overrepresented at institutions of higher education once IQ scores are taken into account. "After controlling for IQ," Hernstein and Murray point out, "larger numbers of whites than blacks graduate from college and enter the professions."[5] With an IQ in this range, a black applicant's chances of getting into an institution of higher education are about ten times better than a white applicant's.

The Fourth Circuit rejected the race-based program on every ground. It found that the program had not been shown either to meet any compelling need or to be narrowly tailored to any such need. On the narrow tailoring issue, the court noted, for example, that most of the recipients of the scholarships came from outside Maryland, making it difficult to see how the program could be justified as a remedy for supposed injuries to Maryland residents. This is a point of general importance. The University of Texas Law School's "affirmative action" program is also largely filled with out-of-state black students. Such programs simply bid black students away from other states in order to fill racial quotas in the bidding state. The Fourth Circuit ordered that the scholarship program be made available to all applicants without regard to race. The Supreme Court denied certiorari.

Hopwood v. Texas[6] is a challenge to the admission practices of the University of Texas Law School by rejected white applicants who would have been automatically admitted had they been of a preferred race: that is,

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4. Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).

5. RICHARD S. HERNSTEIN AND CHARLES MURRAY, THE BELL CURVE 317 (1994).

6. Hopwood v. State of Texas, 861 F. Supp. 551 (W.D. Texas 1994), *rev'd and remanded*, Nos. 94-50569, 94-50664, 1996 WL 120235 (5th Cir. 1996).

black or Mexican-American. In the 1978 *Bakke*[7] case, four justices said that Title VI of the 1964 Civil Rights Act prohibits discrimination against whites equally with discrimination against blacks, four justices said it did not, and Justice Powell broke the tie by deciding to have it both ways. He said in effect, discrimination against whites is prohibited by Title VI and the Constitution every bit as much as discrimination against blacks, except that just a little bit of it would be acceptable. Setting aside a number of seats exclusively for blacks is therefore prohibited--every applicant for admission to a school must compete with every other applicant--but using an applicant's minority race as a "plus factor," along with many other factors, in order to "tip the balance" in close cases was permissible.

This, of course, was little more than an invitation to fraud. Powell included in his opinion a table showing the huge gap in qualifications that existed between the specially admitted and the regularly admitted students at the University of California at Davis Medical School. In 1973, for example, an average MCAT score for regularly admitted students was at the seventy-sixth percentile, while for specially admitted students it was at the twenty-forth. It was obvious that no question of tipping the balance in close cases was involved in what the school was doing.

The reason "affirmative action" programs exist in higher education, as Powell's table showed--the inability of blacks and Mexican-Americans to compete academically with whites and others--is also the reason the programs cannot possibly be expected to succeed. At Berkeley, to take another example, the median combined SAT score for blacks is 288 points lower than the score for whites, a difference in academic preparation of about four and one-half years. The difference between the blacks and the Asian students was even larger. What can admitting a racially identifiable group of students not in the same academic ballpark as other students be expected to produce except frustration, humiliation, and resentment? Inability to play the game being played necessarily results in demands that the game be changed, and thus are born demands for black studies and multiculturalism. Nothing could be more discomfiting than an open and specific discussion of a school's racially preferential admissions policies, and thus are born "hate speech" codes, sensitivity training requirements, and insistence on political correctness.

Bakke's invitation to fraud was, of course, gratefully and eagerly accepted by the highly moral seekers of a more just society, that is to say liberals, who constitute academia. This was certainly true at the University of Texas Law School, where the faculty saw no need to make even a

7. Regents of University of California v. Bakke, 438 U.S. 265 (1978).

pretense of complying with the *Bakke* limitations. The law school simply created a separate minority admissions committee to pass on applications from blacks and Mexican-Americans, and to grant them admission until the desired numbers were reached. Instead of all applicants being made to compete, the school set automatic *admission* scores for blacks and Mexican-Americans that were lower than the automatic *rejection* score for whites.

The *Hopwood* case was heard by federal district judge Sam Sparks, a Democrat sponsored by Senator Phil Gramm and appointed by President Bush. He is, along with Judge Motz in Maryland and many others, a living testimonial to Republican incompetence in the selection of judges and to the havoc wreaked on the country as a result. Judge Sparks is a graduate of the University of Texas Law School, he lives and works in Austin, and has University of Texas Law School faculty members as close friends. The unfortunate *Hopwood* plaintiffs could have hardly drawn a less favorable arbiter.

Judge Sparks held, as he had to, that the Law School had indeed violated the plaintiffs' constitutional and statutory rights. He could hardly restrain himself, nonetheless, in his expressions of admiration and approval for what the Law School had done and which he in effect authorized it to continue to do. He declined to order plaintiffs admitted or to give them money damages or any other substantial relief. The Law School, he explained, did not *intend* to violate the plaintiffs' rights--apparently he thought the faculty discriminated against them by accident. Or maybe he merely meant that the well-intentioned but unsophisticated law faculty--including some of the nation's leading authorities on constitutional law--just didn't understand the law.

The University of Texas Law School represented to the judge that it had changed its admissions practices during the *Hopwood* litigation. It had abolished the separate special admissions committee, it said, and would thenceforth process all applications through a single committee. This was enough to convince Judge Sparks that the Law School had mended its ways, and would cease its constitutional and statutory derelictions without need of further restriction or guidance from him. The judge purported to believe that thereafter all applicants would compete with one another and that race would be used only to tip the balance in close cases. However, he also explicitly and enthusiastically approved of the Law School's determination to make each entering class approximately ten percent Mexican-American and five percent black, even though there is no way that can be done, as he had to know, if black and Mexican-American applicants have to compete with white applicants. The quotas he approved, that is, can only be achieved, as they will be, by precisely the practices he purported to condemn.

What are the implications of these decisions for "affirmative action?" The clearest meaning of *Podberesky*, I'm tempted to say, is that you had better not try to defend racial preferences before that particular panel of the Fourth Circuit. I know Emory Widener; he was a visiting professor at the University of Texas, and he is an exceptionally able judge. Unfortunately, there are not many judges that strong; the federal bench is full of Motzes and Sparkses and Souters. Law plays no part in these race preference decisions, as a comparison of Widener's opinion with Motz's and Sparks's opinions should make clear. Everything depends on the judge and will continue to be this way until the Supreme Court renders a definitive opinion or, better, a series of definitive opinions, one way or the other. All we can say for sure about *Podberesky* is that if other judges approached attempts to justify racial discrimination with the same skepticism, realism, and honesty as Widener, the era of racially discriminatory programs would be over. That, however, is more than can be expected of judges who, like Motz and Sparks, believe that judicial appointment authorizes them to advance their notions of social progress and are willing to make whatever fanciful factual findings that entails.

The effect of *Hopwood* depends, of course, on what happens on appeal. Its affirmance would mean that schools can continue to play the *Bakke* charade with even greater impunity, free of all concern about a successful legal challenge. I think there is a good chance, however, better than even, that Sparks will be reversed by the Fifth Circuit--if I could pick the panel, I could guarantee it--and that the reversal will be sustained by the Supreme Court.[8]

The Fifth Circuit is not authorized, unfortunately, to reverse *Bakke* and restore Title VI, that is, to simply rule that all racial discrimination is prohibited. It might, however, tell the University of Texas that it must take *Bakke* seriously, end race-norming, and require all applicants to compete. That, too, would be the end of "affirmative action," if it were followed. But it will not be followed; as long as schools are permitted to use race at all, they will find ways to make race determinative, because there is no other way to admit large numbers of blacks.

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8. *See* Hopwood v. State of Texas, Nos. 94-50569, 94-50664, 1996 WL 120235 (5th Cir. 1996) (reversing and remanding). The decision was issued subsequent to writing this essay. In effect, the Fifth Circuit did reverse *Bakke* as it was commonly understood, holding that "diversity" was not a "compelling interest" justifying the use of racial preferences. The court correctly pointed out that the diversity rationale had never been acceptance by any Justice other than Powell and that later decisions seem to make clear that remedying past discrimination--but only by the particular governmental unit involved--is the only interest that can be considered compelling.

This brings me to what may be the most important piece of our puzzle, the Supreme Court's decision in *Adarand v. Peña*.[9] The Court reversed the lower court decisions upholding a federal race-based set-aside program in public contracting on the ground that the lower courts applied an incorrect legal standard. Explicitly overruling *Metro Broadcasting, Inc. v. Federal Communications Commission*,[10] Justice Brennan's last contribution to the nation's welfare, the Court held, though only by a bare five-to-four majority, that the "strict scrutiny" test applies to federal as well as to state race-based programs. In a sense, the question the Fifth Circuit will have to decide in *Hopwood* is: "What is the message of *Adarand*?" *Adarand* is bad news for racial preferences, but how bad is hard to say.

We now know that federal as well as state race-based programs require a showing of a "compelling interest," but "compelling" is, even more than beauty, in the eye of the beholder. On the one hand, the Court, in an opinion by Justice O'Connor, declined to overrule *Fullilove v. Klutznick*,[11] which upheld an extremely questionable federal set-aside program, and refused to enter judgment for the discriminated-against plaintiff-contractor. Instead, the Court merely remanded the case for reconsideration under the correct standard. It also insisted that "strict scrutiny" does not mean "strict in theory, fatal in fact," and asserted that there remains plenty of racial discrimination and its effects still to be "remedied." As a result, Justice Souter was able to argue that essentially nothing had happened. He saw no reason why the lower courts could not simply reaffirm their earlier decisions with just a little change of language.

On the other hand, the Court repeatedly insisted that any use of racial preferences must be treated with "skepticism" and given "a most searching examination," and emphasized the stigma and evils resulting from "affirmative action." Skepticism, as *Podberesky* shows, is the one thing racially preferential programs cannot survive. To the extent that such programs claim to be concerned with remedying past discrimination or with "diversity" or anything other than race, the claim is patently false. No black applicant has ever been refused admission to the University of Texas Law School, for example, because he was too advantaged or too typically middle class; it is always quite sufficient that he is black. Souter notwithstanding, it seems safe to say that the Court did not take the case and reverse the lower courts for no reason. The least *Adarand* means is that lower courts will not be faulted for looking at race-based programs with a healthy

9. 115 S. Ct. 2097 (1995).
10. 497 U.S. 547 (1990).
11. 448 U.S. 448 (1980).

skepticism. If this message is understood and followed by the Fifth Circuit in *Hopwood*, as I expect, it could mean the end or at least some real limits on racially preferential admissions at the University of Texas Law School and elsewhere.

As a final word, in my opinion the era of racial preferences is rapidly coming to an end regardless of what happens in *Hopwood*. For more than a quarter of a century, the main support and protection of "affirmative action" programs--discrimination against whites--has been the ability of their proponents to intimidate opponents into silence. Opponents had to live with the knowledge and fear that they could be attacked at any moment with the devastating charge of "racism," even though they were opposing treating people by race. Recent developments, however, such as the California Civil Rights Initiative and the 1992 election, have brought discussion of racial preferences into the open and made opposition respectable. Racial preference programs are a fungus that can thrive only in the dark, covered by evasion and deceit; the light of open discussion and criticism is more than they can survive. This appears to be illustrated by the just-announced decision of the regents of the University of California to terminate racial preferences in admission. The battle is far from over. Liberal academics can be expected to subvert any policy they strongly oppose, but we have reason to hope that from now on, justification of racial preferences will be an uphill fight.