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Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality

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ESSAY

AFFIRMATIVE ACTION AND TEXAS' TEN PERCENT SOLUTION: IMPROVING DIVERSITY AND QUALITY

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I. INTRODUCTION

As the federal courts become increasingly hostile to traditional affirmative action programs in higher education, it appears that racial diversity at colleges and universities will suffer greatly. Indeed, in the wake of *Hopwood v. Texas*[1] in the U.S. Court of Appeals for the Fifth Circuit, minority enrollment at the University of Texas School of Law has declined dramatically. Progress toward a more integrated society may not only be slowed but even reversed.

This conservative shift in public policy may have a surprisingly radical effect, however. As universities in Texas and other states search for legally acceptable alternatives to the rejected affirmative action programs, they may end up with approaches that are less effective at promoting racial diversity in the short run but that may prove equally effective in the long run. By generating unexpected benefits for another critical problem in the United States—the poor quality of many primary and secondary public schools—the alternative approaches may do as much as traditional affirmative action programs to

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1 78 F.3d 932 (5th Cir. 1996) (rejecting the affirmative action program at the University of Texas School of Law).

overcome some of the causes for lower academic achievement by minorities.

In this article, I will focus on one alternative approach that holds considerable promise. In 1997, the Texas legislature ordered each of the state's public undergraduate institutions to admit all applicants whose grade point averages were in the top ten percent of their high school's graduating class.[2] This strategy has been touted for its ability to encourage minority enrollment from high schools that have an overwhelmingly minority student body. What has gone unnoticed is the fact that the approach may do much to improve the public primary and secondary schools by altering incentives for school quality. Current incentives encourage politically influential parents of school-age children to prefer a two-tiered educational system in which their children attend the stronger schools and the children of politically weak parents attend the poorer schools. Under the Texas approach, parents have less to gain from concentrating their children at stronger schools and more to gain from dispersing their children over a larger number of schools. Accordingly, Texas' ten percent policy may lead to a public school system with smaller disparities in quality from school to school.

II. THE *HOPWOOD* DECISION

As a result of the Fifth Circuit's *Hopwood* decision, public and private universities in Texas,[3] and private universities in Louisiana and

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2 According to 1997 Texas General Laws 155,

> Each general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated in one of the two school years preceding the academic year for which the applicant is applying for admission from a public or private high school in this state . . . with a grade point average in the top 10 percent of the student's high school graduating class.

TEX. EDUC. CODE ANN. § 51.803 (West 1998).

3 Because *Hopwood* was brought under both the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the decision arguably applies not only to public institutions but also to private institutions that receive federal financial assistance. *Hopwood*, 78 F.3d at 938, 957. Accordingly, many private universities in the Fifth Circuit have dismantled their affirmative action programs in the wake of *Hopwood*. Personal communication, Shirley Redwine, General Counsel, Rice University (March 5, 1998).

To be sure, there is some disagreement whether *Hopwood* should be read as applying to private institutions, but it is being read that way. Title VI claims have been brought successfully against public institutions other than the University of Texas. *See, e.g.*, Regents of the University of California v. Bakke, 438 U.S. 265, 287 (1978) (holding that Title VI proscribes racial discrimination that would be proscribed by the

Mississippi,[4] are almost entirely precluded from employing racial "preferences"[5] in their admissions policies. In addition, the universities can almost never take race into consideration in other ways in the admissions process.

Although the *Hopwood* decision is strictly limited to the Fifth Circuit, its reasoning may be influential outside the Fifth Circuit. The *Hopwood* judges rested their logic on their interpretation of recent Supreme Court decisions on affirmative action. If their interpretation is consistent with the views of the Court's majority, *Hopwood* may be a bellwether of future Supreme Court jurisprudence.

In *Hopwood*, the court discussed and rejected two types of race-conscious admissions policies. As to the first type, a racial preference policy, the court reviewed a two-track system for ranking applicants. The University of Texas School of Law had placed its applicants into the categories of "presumptive admit," "presumptive deny," or a middle "discretionary zone."[6] This initial categorization was based on a weighted average of high school grade point average (GPA) and score on the Law School Aptitude Test (LSAT).[7] It was a two-track system because minority applicants fell into the "presumptive admit" or "discretionary zone" categories with lower scores than did nonminority applicants. Indeed, the presumptive admit score for minority appli-

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Fourteenth Amendment). Title VI has also been used successfully on occasion against a private university. *See* Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) (finding race-based financial aid to violate Title VI under some circumstances).

4 Louisiana and Mississippi are still under court orders to complete the desegregation of their public universities, and affirmative action policies are part of the efforts to eliminate the effects of their prior systems of segregated higher education. *See* United States v. Fordice, 505 U.S. 717 (1992) (holding that Mississippi had not yet eliminated the effects of its prior system of segregated higher education); United States v. Louisiana, 751 F. Supp. 621 (E.D. La. 1990) (discussing Louisiana's obligations to achieve a desegregated system of higher education).

5 By racial "preferences," I mean policies in which an admissions committee admits minority applicants when they would deny admission to nonminorities with the same credentials. For example, in *Hopwood*, the court was troubled by systems in which minority applicants can be admitted with grades and achievement test scores that would result in a denial of admission for nonminority applicants.

6 *Hopwood*, 78 F.3d at 935.

7 The grade point average was given 40% of the weight, and the LSAT score was given 60% of the weight. *See id.* at 935 n.1. By the time of the appellate court's decision, the law school had actually stopped using a two-track system. *See* Hopwood v. Texas, 861 F. Supp. 551, 582 n.87 (W.D. Tex. 1994) (noting that, starting with the 1995 entering class, the school dropped its approach of using presumptive admission and presumptive denial scores).

cants was lower than the presumptive deny score for nonminority applicants.[8]

The second type of admissions policy reviewed by the *Hopwood* court was the *Bakke* type of policy in which racial diversity is viewed as a "plus" in the admissions process. In his opinion for the court in *Regents of the University of California v. Bakke*,[9] Justice Lewis Powell had written that universities could take race into account in the same way that they take into account other measures of diversity of their students, such as home states, athletic skills, and musical talent.[10] Thus, under *Bakke*, it is permissible for universities to seek a racially diverse student body, just as it is permissible for them to seek a geographically, athletically, or musically diverse student body.[11]

According to the *Hopwood* court, racial preferences and race as a "plus" could be used only as a means to remedy past discrimination and only if the past discrimination had been committed by the University of Texas School of Law itself. Relying on the U.S. Supreme Court's affirmative action decisions,[12] the *Hopwood* court held that race-conscious admission policies could not be justified by efforts to remedy general societal discrimination, to remedy discrimination in the state's primary and secondary public schools, or to achieve racial diversity in the student body.[13] The court further held that the Law School had not shown that its race-conscious admissions policies were sufficiently related to the goal of remedying past discrimination.[14] In-

8 Minorities were presumptively admitted with a score of 189 or higher. White applicants were presumptively rejected with a score of 192 or lower. *Hopwood*, 78 F.3d at 936.

9 438 U.S. 265 (1978).

10 See *id.* at 315–19.

11 The *Hopwood* court and some legal scholars have argued that this part of Justice Powell's opinion is not a holding of the Supreme Court since he spoke only for himself. *See Hopwood*, 78 F.3d at 944. However, inasmuch as four other justices were willing to permit racial preferences, it is fair to assume that those four justices were also willing to permit race as a plus in the admissions process.

12 The *Hopwood* court cited *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (striking down racial preferences for layoffs of teachers who were hired under an affirmative action program designed to remedy past discrimination), *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (striking down a set-aside program for subcontractors on city construction projects), and *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995) (striking down a financial incentive for contractors to hire minority subcontractors on federal highway construction projects). For a recent critique of the Supreme Court's affirmative action jurisprudence, see Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997) (arguing that the Court has misapplied the Equal Protection Clause's strict scrutiny level of review in the context of affirmative action).

13 *See Hopwood*, 78 F.3d at 940–52.

14 *See id.* at 952–55.

asmuch as the University of Texas School of Law once did deny admission to African-Americans,[15] its inability to use that history to defend its affirmative action policies indicates that it will be difficult for other universities to justify an affirmative action policy in terms of the goal of remedying past discrimination.[16]

Of particular concern is the *Hopwood* court's rejection of the *Bakke* type of policy. If race cannot be considered at all, it will be very hard for universities to maintain a racially diverse student body. Schools might try to take into account an applicant's socioeconomic deprivation, thereby replacing race-conscious preferences with class-conscious preferences.[17] However, giving preferences to students who are from families that are disadvantaged socially and economically will probably still result in an overwhelmingly white student body. At all income levels, white students outperform minority students on achievement tests and in terms of grades.[18] As Professor Michael Olivas has observed, alternatives to considering race can help improve racial diversity, but "[i]n the end, race is the only proxy for race."[19]

After the *Hopwood* decision, all of the public and many of the private universities in Texas abandoned their affirmative action programs, and minority admissions dropped substantially at the state's leading institutions of higher education. In the first year after *Hopwood*, the entering class at the University of Texas School of Law had four African-Americans compared with thirty-one in the previous year. The drop-off in Latinos was not as dramatic. Their numbers fell from forty-two to twenty-six.[20] Among entering freshmen at undergraduate

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15 *See* Sweatt v. Painter, 339 U.S. 629 (1950) (requiring the University of Texas School of Law to admit black students).

16 For another decision employing a strict standard for universities to demonstrate that they are remedying past discrimination, see *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994). Still, even in the Fifth Circuit, there is some room for affirmative action. As mentioned earlier, Louisiana and Mississippi are under court orders to dismantle their prior systems of segregated higher education. *See supra* note 4.

17 *See* RICHARD KAHLENBERG, THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION (1996).

18 *See* K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 138–42 (1996); *see also* Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 464–71 (1997) (discussing why affirmative action for economically disadvantaged students will not be successful at achieving racial equality in higher education).

19 Peter Applebome, *Seeking New Approaches for Diversity*, N.Y. TIMES, Apr. 23, 1997, at B7 (quoting Professor Olivas).

20 *See* William E. Forbath & Gerald Torres, *The 'Talented Tenth' in Texas*, THE NATION, Dec. 15, 1997, at 20, 21. Since the first-year class at the law school has 475 students, *Quick Facts and Statistics*, <http://www.utexas.edu/law/admissions/facts.html> (last modified Sept. 10, 1997), the percentage of African-American students

colleges in Texas, there was a decline in African-American enrollment of about thirty-eight percent at University of Texas at Austin, thirty-seven percent at Texas A&M University, and forty-two percent at Rice University.[21] Latino freshmen admissions at the three schools dropped by about four percent, twenty-four percent, and twenty-one percent, respectively. The declines in minority enrollment resulted partly because of fewer minority admissions, partly because of diminished interest by minorities in attending a heavily white school, and partly because of less generous financial aid for minority students.[22]

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dropped from more than 6% to less than 1% of the class, and the percentage of Latino students declined from nearly 9% to less than 6% of the class. According to 1994 estimates from the U.S. Bureau of the Census, African-Americans make up 12% of the population and Latinos 27% of the population in Texas. *See* U.S. Bureau of the Census, *Statistical Abstract of the United States: 1997* at 34 (117th ed. 1997).

California has had a similar experience recently. As a result of Resolution SP-1 which was passed by the Board of Regents in 1995, and Proposition 209, which was approved by voter referendum on November 5, 1996, public universities in California may no longer employ affirmative action in admissions (or hiring) decisions. *See* CAL. CONST. art. I, § 31(a). The impact on admissions at the law schools at UC Berkeley and UCLA has been as profound as the impact of the *Hopwood* decision at the University of Texas School of Law. The number of African-Americans who were admitted for the first-year classes dropped by 80% at each of the two schools, with only one African-American student matriculating at Berkeley and ten at UCLA in their 1997–98 entering classes. Latino admissions dropped by 50% at Berkeley and 25% at UCLA. *See* Danny Feingold, *Test Tube for a Changing Political Climate*, LOS ANGELES TIMES, October 6, 1997, at E1. For a discussion of Proposition 209, see Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335 (1997). For the Fall 1998 entering class at UC Berkeley Law School (Boalt Hall), nine African-American students enrolled (still down from the twenty in the Fall 1996 entering class). *See New Black Students at Berkeley Climb to 9*, N.Y. TIMES, Aug. 19, 1998, at A20. For a discussion of affirmative action at UC Berkeley and UCLA, see Michael W. Lynch, *Affirmative Action at the University of California*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139 (1997).

An empirical study of law school admissions nationally indicates that, if other law schools eliminated race as a consideration in admissions decisions, their acceptance rate for minority students would also plummet. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997).

21 *See* Lydia Lum, *Freshman Fallout; Minority Enrollment: How to Stop the Hemorrhaging?*, HOUSTON CHRON., Aug. 24, 1997, at A19 (comparing enrollment in fall 1996 with final projected enrollment for fall 1997).

22 The abandonment of racial preferences in awarding scholarship aid may have as much to do with declining minority enrollments as the abandonment of racial preferences in admissions. *See* Sylvia Moreno, *Senate Backs Bill to Boost Colleges' Minority Ranks; Some Officials Skeptical, Say State Must Increase Aid to Achieve Goal*, DALLAS MORNING NEWS, May 9, 1997, at A1.

The *Hopwood* decision has been much criticized, especially its rejection of the standard interpretation of *Bakke*, according to which race can be taken into account as a "plus" in the admissions process. Although I share the concerns about the *Hopwood* decision, it is not my goal to address them here. Rather, my point is to show how the response to the decision may have important, unexpected benefits for society. In other words, although I believe *Hopwood* was wrongly decided, there may be a silver lining in the Fifth Circuit's decision.

III. THE TEXAS TEN PERCENT APPROACH

In response to *Hopwood* and its impact on minority admissions, the Texas legislature adopted its "ten percent solution" in May 1997. As mentioned, the Texas law requires each of the public undergraduate colleges in the state to admit all applicants who graduated in the top ten percent of their high school class. The law was pushed by African-American and Latino lawmakers, and it seems especially well-suited for Texas. Residential segregation in the state's cities is high, so the majority of students attend schools that are highly racially segregated.[23] Accordingly, accepting the top ten percent of high school graduates is an effective way for the racial makeup of admitted students to more closely mirror the racial makeup of high school graduates in the state.

In its first year, however, the law appears to be having limited effect. At the University of Texas at Austin, for example, somewhat less than fifty percent of the freshman class will probably come through the automatic admissions of students who were in the top ten percent of their high school class, a percentage that is consistent with recent years.[24] However, over time, the law is expected to have a substantial impact. Indeed, the University of Texas at Austin could easily fill its entering freshman class with students who finished in the top ten percent of their high school graduating class.[25]

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23 *See* Forbath & Torres, *supra* note 20, at 20.

24 Before the new Texas law, 94% of applicants from the top 10% of class rank had been admitted as undergraduates at University of Texas at Austin. The absence of an effect of the Texas law in its first year of operation likely reflects the fact that many students either were unaware of the law or did not realize that it applied to all undergraduate programs in the state's system of higher education. Personal communication, Bruce Walker, Director of Undergraduate Admission, University of Texas at Austin (March 6, 1998).

25 There were 6,645 freshman who enrolled in the fall of 1997, and there are more than 17,000 students who will qualify for automatic admission under the ten percent law. *See* Moreno, *supra* note 22 (noting that 16,828 of high school students in Texas who took the SAT were in the top 10% of their class). Of course, many of the

A. Policy Implications

Much of the debate about the Texas law has centered around its ability to generate racial diversity in the state's public colleges and on whether it is appropriate to give so much weight to grades and so little weight to achievement test scores in admissions decisions. These are important questions.[26] Nevertheless, my focus will be on another important issue that has not received much, if any, attention. I will explore the possibility that approaches like the Texas law can have an unintended, but critical, impact on the quality of public schools. This will be the case particularly if the country's elite private colleges were to adopt the Texas model.[27]

Briefly, the argument works as follows. The Texas policy has the potential to generate important improvements in the quality of public schools because it changes the incentives of parents in choosing their children's schools. Under the current system, parents believe their children are better off if they attend a relatively strong high school, so middle and upper income parents prefer a two-tiered system in which there are some stronger schools and some weaker schools. Under the Texas approach, the benefits of attending a stronger high school are reduced, so middle and upper income parents may prefer a system in which quality is more evenly distributed across high schools.

1. Incentives Under the Traditional System

Traditional standards for admission to college encourage middle and upper income parents to concentrate their resources on only some school districts and to send their students to schools in those districts. If students attend higher quality schools, they will receive a

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top ten percent students will prefer to go to other colleges, either in Texas or out of state. In addition, the Texas Higher Education Coordinating Board has given public colleges permission to limit the admissions of top ten percent applicants if their numbers become very large. *See* Lydia Lum, *Law Schools May Rework Admissions; Efforts Could Increase Enrollments of Minorities*, HOUSTON CHRON., Oct. 17, 1997, at A33.

26 For example, while some commentators believe that achievement tests, like the SAT, are valuable in assessing college applicants, the tests have been criticized as being racially biased and as being weak indicators of academic ability. *See, e.g.*, Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996). It has also been argued that consideration of SAT scores actually favors minorities since data indicate the scores *over*predict the freshman grades of African-American college students.

27 Because *Hopwood* was also decided as a Title VI case, *see supra* note 3, private universities in the Fifth Circuit have the same need as public universities under *Hopwood* to find alternatives to traditional affirmative action programs.

were attending one of the "weaker" schools, the parents would push for improvements in the quality of the school. The upper and middle socioeconomic classes might still focus their attention on the schools that their children attend, but the number of such schools would have increased. The gap in quality between the top public schools and the bottom schools would narrow, and school quality would become more uniformly high.

Moreover, the Texas policy could avoid a common problem seen with other changes in educational policy that affect public primary and secondary schools. The changes often fail to have the desired effect because parents opposed to the new policies can send their students to private schools.[33] However, just as the advantages of a strong public school diminish under a Texas-like approach, so do the advantages of a strong private school. If students are admitted to a top college from private high schools only if they finish in the top one, five, or ten percent of their class, the private high schools confer less of a benefit in terms of college placement. In other words, under a Texas-like admissions policy, it is hard for families to circumvent the potential effects of the policy on public primary and secondary schools by exiting the public school system entirely.

The effects on school quality would have a secondary effect on minority student representation. Currently, minority students suffer in the college admissions process because they often attend weaker schools where the education is of poorer quality. If the Texas approach improved school quality more broadly, minority students would be less disadvantaged by having to attend weak schools. They would receive higher quality educations, and they would be better prepared for college. As a result, colleges would see stronger applications from minority students. Accordingly, although in the short run a Texas-like policy would probably not generate as high a minority student representation in universities as have traditional affirmative action policies, the Texas approach might be as successful in the long run at raising minority student representation in higher education.

There is, then, a plausible argument that a Texas-like approach may be more than just a silver lining. If it can address some of the root causes of social inequality, it may be a powerful vehicle for addressing socioeconomic disparities in this country, perhaps one that is as successful as traditional affirmative action programs. Moreover, to

33 The availability of an "exit" option can easily frustrate changes in policy. For example, efforts to racially integrate the public primary and secondary schools have been undermined by the freedom of parents to send their children to private schools or to move to a different public school system.

the extent that affirmative action has primarily benefited the more privileged members of minority groups,[34] an approach that has broader impact would be desirable. The Texas approach is also attractive because it can avoid some of the criticisms of affirmative action. For example, minorities who are accepted to college because they are at the top of their class need not feel stigmatized by a sense that they have received special treatment.[35] Similarly, there is no "reverse discrimination" at work since all persons are eligible to finish in the top ten percent of their class.

The Texas approach has considerable potential because it establishes an important link between the fortunes of the well-to-do and the less fortunate in society. As indicated, in the traditional system, middle and upper income parents can protect the interests of their own children while neglecting the needs of other children. Indeed, children of the well-to-do may be better off in an educational system with two tiers of quality since fewer students will receive the education necessary to make them competitive in the college application process. The Texas approach drives middle and upper income parents toward a system that is closer to a single tier of quality.

The analogy to public benefit programs is instructive. Programs like Social Security and Medicare have been fairly successful in meeting the needs of the poor because they cover everyone regardless of wealth. The more prosperous beneficiaries can protect their stake in the programs only if they also protect the stake of the poor. Other programs, like public housing and Medicaid, have been less successful because they cover only the indigent and suffer from their beneficiaries' lack of political power.[36] When the well-to-do vote against increased funding for public housing or Medicaid, they are not harming their own interests. Indeed, they are serving their own economic interests by preventing the redistribution of their wealth.[37]

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34 Although the income gap between African-American men and white men narrowed between 1969 and 1976, the gap has since widened. *See* BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 36–38 (1996).

35 *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991) (discussing the stigmatization effect of affirmative action).

36 For arguments discussing the advantages of "universal" rather than "targeted" social programs, see THEDA SKOCPAL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 250–74 (1995); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 118–24 (1987).

37 To be sure, there is an argument that everyone is better off if there is not an indigent class. Nevertheless, that argument requires a long-term perspective that most people lack.

better education. In addition, they will do better in the college application process. The students will be better prepared for entrance examinations like the SAT and the American College Testing examination (ACT), and college officials will dip deeper down the schools' class rank in making admissions decisions. A student in the top fifth of a strong high school will often be viewed as a stronger candidate than a student in the top twentieth or even hundredth of a weaker school.[28]

This concentration of school quality can seriously disadvantage minority students. Primary and secondary public schools are stronger in communities with greater wealth and greater political power, but minorities are more likely to live in communities that have little wealth and little political power. As middle and upper income parents pursue the interests of their children, they neglect the needs of children from lower income families.

Concentrating school quality has another important feature. The more classmates that a child has who will go on to an elite college, the better the connections that the child will have for career advancement. Hiring decisions depend on impersonal measures of "merit," but they also depend very much on personal relationships.[29]

To be sure, if parents were operating behind a "veil of ignorance,"[30] they would prefer a system of roughly equal school quality. Behind the veil of ignorance, parents would not know whether their children would be among the better off who could attend a stronger school or among the worse off who would attend a weaker school. Accordingly, parents would want to ensure that all schools were of

28 Personal communication, Arthur Thomas, Director of College Counseling, Lawrenceville School, Lawrenceville, New Jersey (February 26, 1998) (observing that the elite colleges will accept students in the top fifth of the class from strong high schools while often rejecting even the valedictorians from the weak high schools). Of course, the student accepted from the stronger high school may have higher SATs than the student rejected from the weaker high school, but even if they had the same SAT scores, the student from the stronger school would not need as high a grade point average to be admitted. Moreover, as mentioned in the text, SAT scores are affected by where the student attends high school.

29 *See* Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360, 1371 (1973) (observing that people "find out about new jobs more through personal contacts than by any other method"). This is not to say that it is inconsistent with a merit-based system for personal connections to play an important role. In many jobs, smooth interpersonal relations are critical to success. In addition, it is not always feasible for employers to rely solely on objective measures in hiring. If there is a large pool of qualified candidates, turning to friends or colleagues can be an efficient way to sort through the pool quickly.

30 I am referring to an analytical device developed in JOHN RAWLS, A THEORY OF JUSTICE 11–16 (1991).

good quality. However, parents do not operate behind a veil of ignorance. Parents with wealth and political power can use those advantages to create a system of unequal quality in which their children will end up in the stronger schools.

2. Incentives Under the Texas Approach

If colleges start admitting the top students from all high schools equally, students attending the "stronger" schools suddenly lose their advantage in the admissions process. Finishing in the top ten percent of any school may be preferable to finishing just below the top ten percent at the stronger schools. Many students, then, will be better off at the "weaker" high schools in terms of where they will attend college.[31] Parents will recognize that they can enhance their childrens' future academic prospects by transferring them to schools or moving to school districts where their children are more likely to finish in the top ten percent of the class rank. This will be the case especially if private universities follow the lead of public universities in measuring academic ability solely in terms of the applicant's class rank.[32]

If parents adjusted their choices of school districts, the wealthier and more influential among them would spread their wealth and political influence over a wider range of schools. Once their children

31 Clearly, a single college cannot accept all students from even the top 1% of the class rank at all high schools. There are nearly 25,000 public and private high schools in the United States. *See* COLLEGE ENTRANCE EXAMINATION BOARD, THE COLLEGE BOARD GUIDE TO HIGH SCHOOLS v (2d ed. 1994). It is sufficient that the colleges give equal consideration to all high schools of significant size and that they rotate their admissions across those high schools from year to year.

32 For example, if Ivy League colleges admitted students only if they finished in the top one or two percent of their class, many parents would make very different choices for their children when selecting high schools.

In terms of actual numbers, the eight Ivy League universities fill their freshman undergraduate classes each year with about 1.2% of all freshmen at four-year colleges. The 44 most selective and prestigious colleges and universities in the United States fill their freshman undergraduate classes with about 4.6% of all freshmen at four-year colleges (the 44 schools include all of the most prestigious colleges and universities that accept no more than 46% of their applicants). Among all undergraduate freshmen at *private* four-year colleges and universities, 3.3% attend an Ivy League school, and 9.3% attend one of the 40 most selective and prestigious private colleges and universities. The data on the number of college freshmen each year come from U.S. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 191 (1997). The data on institutional prestige and selectivity come from *Best Colleges 1998*, U.S. NEWS & WORLD REPORT, at 75, 80. The data on class size at individual colleges and universities come from PETERSON'S GUIDE TO FOUR-YEAR COLLEGES 1998 (28th ed. 1997).

While I have presented an optimistic scenario about the effects of the Texas ten percent policy, there are important questions regarding the likelihood that the scenario would unfold as I have suggested. In addition, there is the possibility that the policy could have undesirable effects. Finally, even if the policy would work as I have suggested, it may fail in the face of a challenge to its constitutionality. It is to these issues that I now turn, beginning with an analysis of the constitutionality of the policy.

III. QUESTIONS AND CONCERNS

A. Constitutional Considerations

Undoubtedly, there will be a constitutional challenge to the Texas law. Opponents of affirmative action will view the law as an effort to circumvent the *Hopwood* decision. However, even with an interpretation of Supreme Court precedents that is most unfavorable to affirmative action, it is unlikely that the ten percent solution constitutes unlawful affirmative action. None of the three potential claims of "reverse" racial discrimination should succeed against the Texas law.

1. Disparate Treatment

The first potential claim would be that the law is facially discriminatory against whites in Texas. Laws that expressly involve racial distinctions—laws that cause disparate treatment on the basis of race—are difficult to defend as constitutionally valid, even when they are employed for seemingly good purposes. Indeed, the Supreme Court has consistently rejected affirmative action programs in recent years.[38] Similarly, in its voting rights cases, the Court has struck down reapportionment plans that create majority-minority Congressional districts.[39]

38 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (adopting a strict scrutiny standard of review for affirmative action programs undertaken by the federal government); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (invalidating Richmond's minority set aside program for municipal construction projects).

39 In a majority-minority district, members of a racial minority constitute the majority of voters in the district. The Supreme Court has been hostile to the creation of majority-minority districts. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996) (rejecting the creation of three majority-minority districts in Texas' reapportionment plan); Shaw v. Hunt, 517 U.S. 899 (1996) (rejecting one of two majority-minority districts in the reapportionment plan in North Carolina from *Shaw v. Reno* and dismissing a challenge to the second majority-minority district because appellants lacked standing to challenge the district); Miller v. Johnson, 515 U.S. 900 (1995) (rejecting a reappor-

Drawing on these precedents, plaintiffs might argue that the Texas law is unconstitutional because it involves a racial preference or a racial gerrymandering of the admissions process. According to this view, the Texas law amounts to a reconfiguring of the admissions process along racial lines.

This claim should not succeed because the Texas law does not include any facially discriminatory components. The law does not treat minority students different from other students, nor does it treat students at mostly African-American or Latino high schools any differently than it treats students at mostly white high schools.

2. Disparate Impact

Plaintiffs might argue instead that the Texas law is unconstitutional because of a disparate racial *effect.* That is, even though the law is not written in discriminatory terms, it arguably disadvantages whites in its impact.[40] Because a law can unfairly disadvantage a racial group even though the law is racially neutral on its face, Fourteenth Amendment doctrine prohibits some laws that have a racially disparate impact. Under *Washington v. Davis,*[41] a "neutral" law that has a disparate impact is constitutionally suspect if the law was adopted with a racially discriminatory purpose.[42]

Although there was clearly a racially discriminatory purpose behind the Texas law (i.e., to decrease the percentage of whites in Texas public colleges), it is highly unlikely that whites will be able to show a

tionment plan in Georgia that included three majority-minority districts); Shaw v. Reno, 509 U.S. 630 (1993) (holding in a challenge to North Carolina's reapportionment plan that conscious efforts to create majority-minority districts may violate the equal protection clause).

40 As an example of laws with a disparate racial impact, consider laws that require people to pay a filing fee when suing for divorce. Under these laws, African-Americans will be relatively disadvantaged because they will be less able than whites to afford the fee. *See* Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that states cannot deny a divorce to couples unable to pay court fees, but decided on the basis of a due process right of access to the courts rather than on grounds of discrimination against African-Americans or indigent persons).

41 426 U.S. 229 (1976).

42 *Id.* at 239–42 (upholding a qualifying test for police officers despite its racially disparate impact because there was no racially discriminatory purpose behind the adoption of the test). *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (holding that the racially discriminatory purpose need not be the only purpose for the law; it need only be a "motivating factor in the decision"). However, a racially disparate law can be saved by a showing that the law would have been adopted even if the racially discriminatory motive had not been present. *See id.* at 270–71 n.21. Disparate impact can be unlawful not only under the Fourteenth Amendment but also under Title VII of the Civil Rights Act of 1964.

racially disparate impact. In general, white students have higher grade point averages than African-Americans and Latinos.[43] More than ten percent of whites will probably finish in the top ten percent of high school class ranks, while fewer than ten percent of African-Americans and Latinos will probably finish in the top ten percent of high school class ranks.[44] The Texas law is therefore most likely to favor white students in the application process, despite the fact that the racially discriminatory purpose was to favor African-American and Latino students.[45] In sum, a disparate impact claim would fail because any discriminatory effects of the law could not be linked to a discriminatory purpose.[46]

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43 In California, for example, high school students are eligible for admission to college at the nine University of California campuses if they have at least a B+ average or if they can compensate for lower grades with a good SAT score. While 13% of white high school graduates in the state meet the University of California academic criteria, only about 5% of African-American students and 4% of Latino students meet the criteria. Among admitted students at UCLA, whites have an average GPA of about 4.0, and African-Americans have an average GPA of 3.5. *See* Christopher Shea, *Under UCLA's Elaborate System Race Makes a Big Difference*, THE CHRON. OF HIGHER EDUC., April 28, 1995, at A12 (noting that GPAs can be above 4.0 because of extra weight given to grades in high school honors courses). Similarly, the median college GPA for white students in the 1992 first-year class at the University of Texas School of Law was 3.56 compared to 3.30 for African-American students and 3.24 for Latino students. *Hopwood*, 78 F.3d at 937 n.7.

44 If the state's high schools were fully segregated by race, the law would not result in a disparate impact. Ten percent of white high school graduates, 10% of African-American high school graduates, and 10% of Latino high school graduates would be eligible for automatic admission to the state's public colleges. However, the state's high schools, though highly segregated, are not fully segregated. The presence of some integration allows for the possibility of a racially disparate impact of the ten percent policy if whites (or minorities) are more likely to finish in the top 10% of their class rank.

45 This result seems odd at first glance, but it makes sense in the following way. Although the Texas ten percent policy will favor whites (i.e., it will result in a higher ratio of whites to minorities among University of Texas students than among Texas high school students), it will favor them less than would the alternative admission policies permitted by *Hopwood*. Or, to put it another way, traditional affirmative action would result in the highest percentage of minority students, the ten percent policy would result in a somewhat lower percentage, and other admissions policies would result in an even lower percentage of minority students at the University of Texas.

46 Note that the conclusion would not change with a more or less refined disparate impact analysis. One could say that we should be comparing the racial make-up of admitted applicants either with the racial makeup of all high school graduates or with the racial makeup of only the high school graduates who apply to four-year colleges. With either comparison, the ten percent policy would probably favor white students. Among high school graduates who go on to a four-year college, white stu-

Plaintiffs challenging the Texas law could make a disparate impact claim by arguing for a different way to frame the analysis. I have argued that there is no unfair disparate impact on white high school graduates since they are likely to constitute a higher percentage of those admitted than of those who apply (or could apply). Plaintiffs might say that, instead of comparing the racial composition of applicants admitted under a ten percent policy with the racial composition of Texas high school graduates who apply, we should compare the racial composition of admitted applicants under the ten percent policy with what the racial composition of admitted applicants would be in the absence of the ten percent policy. That is, they would say, the operative question is what impact the law actually brings about compared to when the law did not exist. Since the law is likely to decrease the representation of whites in Texas public colleges, there is, in this view, a racially disparate impact against whites.

This alternative framing has some appeal, but it is unlikely to be successful. First, it requires a major change in disparate impact analysis. Courts have not considered disparate impact doctrine in this way. Second, the alternative framing assumes that the "correct" racial balance in the public college student body is different from the racial balance among applicants for admission to the student body. This in turn assumes that courts can identify when such a difference exists. How courts would do that is unclear. Indeed, to decide on a "correct" racial balance for the student body, the court would have to settle on the "correct" criteria for admissions. Courts have traditionally deferred to colleges and universities on these kind of educational policy decisions,[47] and it is unlikely they would want to abandon that deference. As long as an admissions policy is reasonably designed to sort candidates, the courts are likely to uphold the policy. Although people can differ on the question whether class rank is the best way to

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dents are still more likely than minority students to finish in the top 10% of their class rank.

As to legal precedent on this question, the Supreme Court has generally identified the relevant comparison pool as those who actually apply for the position (or service) in question, but it has also identified the relevant pool as those who are either actual *or* potential applicants since the application process itself can discourage potential applicants from applying. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

47 *See* Board of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78, 92 (1978) (upholding medical school expulsion and observing that "[c]ourts are particularly ill-equipped to evaluate academic performance").

make admissions decisions, it is undoubtedly a reasonable way to do so.[48]

3. Race-Based Motive

There is a third challenge that could be made to the Texas law. Even if the law does not involve unlawful disparate treatment or disparate impact, it does involve a policy that is motivated by considerations of race. In its recent affirmative action decisions, the Supreme Court has expressed great skepticism about "governmental action based on race."[49]

Still, the existence of a race-based motivation to state action has not been sufficient alone to make the action unconstitutional. The Supreme Court has permitted racially motivated policies that neither involved a racial classification nor had a racially disparate impact. In *Palmer v. Thompson*,[50] the Court permitted a city council to close its municipal swimming pools following court-ordered desegregation even though the closure was driven by a desire to avoid interracial swimming. Since there was a neutral effect to the council action—no one had access anymore to municipal pools—and since there was no racial classification at work, the racially invidious motive was not a sufficient reason to condemn the closure of the pools. As the Court observed, even if it had struck down the law, the legislature could reenact the law and announce a nonracial purpose.[51] Similarly, other legislatures could camouflage their racial motivation when enacting racially neutral laws with no racially disparate impact.

B. Policy Considerations

Although the ten percent approach would very likely survive a constitutional challenge, there are still important questions about my argument that need to be addressed. For example, will parents really respond to Texas-like admissions policies by changing where they send their children to high school? Is it really such a good idea to

48 The absence of disparate treatment or disparate impact would also doom a Title VI challenge to the Texas law, as well as to similar initiatives by other states or private universities.

49 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

50 403 U.S. 217 (1971).

51 *See id.* at 225. I am not suggesting that I think *Palmer* was correctly decided. I agree with the four dissenters who would have found a constitutional violation. I cite *Palmer* to show that a less defensible action than the Texas ten percent law has been upheld by the Supreme Court.

place so much emphasis on class rank? I will now turn to these policy-oriented questions and concerns.

1. The Impact of the Incentive

It is clear that the ten percent approach will change parental incentives, but will it change parental behavior? Parents seek a quality education for their children not only as a means to better college admissions but also as an end in itself. Moreover, weaker schools may be schools where there is a higher risk of violence, and concerns about safety will discourage parents from sending their children to those schools. Although parents will have greater incentives to choose weaker high schools for their children, it is not clear that the incentives will actually affect school choice.

Given the importance to a person's future of where the person attends college, there is reason to think that parents will respond to a change in incentives at least to some extent. A student's opportunities for graduate or professional education and for immediate and long-term employment are greatly helped by attending a prestigious college. Indeed, parents already choose elite private high schools because of their high placement rate in the leading colleges. If a private school's higher placement rate affects school choice now, a public school's higher placement rate under the Texas policy could also affect school choice.[52]

To put the incentives argument of the Texas policy another way, the current college admissions process encourages parents to push for more of a two-tiered system in the primary and secondary schools than they otherwise would desire. By removing this incentive from the college admissions process, the Texas ten percent policy ought to make parents less likely to favor a two-tiered system. In addition, the new incentive of the ten percent policy could lead parents to push for more of a one-tiered system than they otherwise would desire.

52 Under the current system, there is evidence of parents making major changes in the lives of their families to enhance their child's chances of admission to an outstanding college. Cases occur in which foreign national families move from the United States back to their home countries for a child's senior year of high school to exploit the fact that, while admissions of domestic applicants are need-blind, admissions of overseas applicants are not. That is, the chances of admission from overseas depend in part on the applicant's ability to pay the cost of tuition and living expenses. Applicants from wealthy families therefore can increase their chances of admission if they apply from their home country rather than from the United States, where their ability to pay gives them no advantage in the application process.

2. Strength of the Incentive

Although there might be some effects on school choice from a Texas-like policy, an important question is whether the effects would be very significant. In most states, students turn primarily to private colleges when seeking an elite institution for higher education, so they are not influenced by a change in admissions standards at the state's public colleges. In a few states like Texas, California, Michigan, or Virginia, in which there is an outstanding public university system, the effect will be more pronounced than in a state in which the public university system has less to offer. Still, even in those states, it is not clear how a ten percent policy will affect behavior. On one hand, because the state university offers an outstanding education at a relatively low cost, there is likely to be some effect on high school choice at the margins, particularly for families whose budgets would be stretched by having to pay one or more tuitions at private colleges. If, however, a ten percent admissions policy results in a perception (or reality) of diminished quality at the public university, many of the strong students would probably respond to the policy by opting for private colleges in or out of state.

For the incentive of a ten percent policy to be sufficiently meaningful then, it would probably be necessary for the country's elite private institutions to follow the lead of Texas. Adoption of a Texas-like policy by the leading private colleges could affect incentives for high school choice throughout the country. The colleges could decide to accept applicants only if they finished in the top one, five, or ten percent of their high school class rank.[53]

Policies of the elite colleges and universities can have a profound effect on behavior at the precollege level. At one time, Harvard administered entrance examinations in Latin, history, literature, and several other topics as part of its admissions process. Many secondary schools had to teach the tested topics and found that their curricula were tightly constrained. Harvard then adopted a more flexible ad-

53 Of course, all schools cannot draw only from the top one, five, or ten percent of the class rank. It is only necessary, however, that each school establish its cutoff at the highest feasible point, whether that be at the top one, ten, or thirty percent.

Currently, 90% or more of students at schools like Harvard and Princeton come from the top 10% of their high school class, roughly 45% of students at schools like Oberlin and the University of Texas come from the top 10%, and roughly 20% of students at schools like the University of Nebraska come from the top 10%. *See* COLLEGE ENTRANCE EXAMINATION BOARD, THE COLLEGE HANDBOOK 774, 966, 1005, 1261, 1581 (35th ed. 1998).

missions policy, in large part to give high schools more freedom in establishing their curricula.[54]

3. Private Colleges and Universities

To be sure, it is highly questionable whether the elite private institutions would adopt a Texas-like admissions policy. That approach is attractive only in a context in which traditional affirmative action programs are forbidden. As long as private colleges and universities can consider race in the admissions process, they would have little reason to switch to a process focused on high school class rank. Moreover, if any one of the schools followed the lead of Texas alone, the school would worry that the overall quality of its student body would decline. If Harvard used a Texas-like approach, for example, the other Ivy League universities could attract a stronger student body from outstanding applicants who did not finish at the very top of their high school's class rank because they attended one of the more competitive high schools. If the apparent quality of Harvard's student body declined, it would make the school less attractive to many applicants, faculty, and donors, and would likely create problems with many alumni. Colleges and universities are well aware of the belief that the City University of New York (CUNY) lost much of its prestige as a result of a more open admissions policy.[55]

There is one potential scenario under which leading private colleges and universities might adopt a Texas-like admissions policy. If the Supreme Court were to take the same view of affirmative action in higher education as the *Hopwood* court, and to do so for Title VI as well as for the Fourteenth Amendment, private institutions throughout the country would have the same need as the Texas legislature to find alternative ways of maintaining or increasing minority enrollment. The colleges and universities might then agree among themselves to admit applicants who finish in the top five or ten percent of their high school class. By agreeing to adopt such a policy jointly, the

54 *See* ROBERT KLITGAARD, CHOOSING ELITES 75–76 (1985). At the time of the entrance examinations, most students did not go on to college so they were arguably denied the classes that would have given them the most useful preparation for their post-graduate lives.

55 *See* Karen W. Arenson, *With New Admissions Policy, CUNY Steps Into the Unknown*, N.Y. TIMES, May 28, 1998, at A1 (discussing the history of CUNY's admissions policies and the recent decision to employ more rigorous standards). Similarly, it is believed that open admissions policies at universities in other countries have led to a deterioration in quality in the high schools because students have a diminished incentive to show high achievement. *See* KLITGAARD, *supra* note 54, at 78 & n.35.

schools could avoid the problem of their competitors taking advantage of the change in admissions.[56]

Would the private institutions turn to a Texas-like approach if they were prohibited from considering the race of applicants in the admissions process? The Texas approach is simple and cheap to employ, but it does not allow for the nuanced, more individualized process that the elite schools prefer. They would likely search for more sophisticated ways to maintain the racial diversity of their student bodies. Since they would be prohibited from considering race, they would look for other characteristics, or "proxies" for race, that might favor minorities in the admissions process. As already discussed, however, it is very difficult to find effective proxies for race.[57] An obvious alternative to racial preferences would be preferences for economically disadvantaged applicants, but such a preference would result in an overwhelmingly white student body. At every income level, whites outperform minorities on measures of academic achievement.[58] Because of the long history of racial deprivation and discrimination in this country, it is very difficult to capture a person's race without relying directly on race to do so.

In their search for proxies for race, the elite schools would likely end up with approaches similar to the Texas ten percent policy. Indeed, there is an important example from the *Hopwood* experience to suggest this result. After *Hopwood*, Southern Methodist University

56 There might be some antitrust concern with such an agreement, but the agreement would likely survive a legal challenge on antitrust grounds. The most important precedent here is the litigation over agreements by Ivy League and other leading schools to share financial aid information and offer the same level of aid to each student (i.e., although different students might receive different levels of aid, no student could obtain more aid from one of the schools than from the other schools). Although many of the schools signed a consent decree with the Justice Department, MIT went to court, and the Third Circuit's decision in the case suggests that courts might be sympathetic to a common admissions policy modeled upon Texas' ten percent approach. *See* United States v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993) (observing that universities may be given more freedom under the Sherman Act if their concerted action broadens accessibility to higher education because "[i]t is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education"). In addition, the consent decree only prohibited common action on decisions about financial aid, tuition and fees, and faculty salary levels. *See* United States v. Brown Univ., 805 F. Supp. 288 (E.D. Pa. 1991). Since antitrust law is more concerned about price-fixing than with other kinds of concerted action, agreements about financial aid, tuition, and faculty salaries are going to be more difficult to sustain than agreements about admissions criteria.

57 *See supra* text accompanying notes 17–19.

58 *See supra* text accompanying note 18.

(SMU), one of the top private universities in Texas, searched for a way to maintain the racial diversity of its undergraduate student body, and it adopted something like the state's ten percent policy for public universities. For admissions to the undergraduate freshman class, SMU now employs a preference for students coming from the school districts of Dallas, El Paso, Houston, and San Antonio, with particular emphasis on Dallas[59] and on the magnet high schools in the four cities. This "geographic" preference includes more intensive recruiting efforts, an advantage in the admissions process,[60] and more generous financial aid packages.[61] With its approach, SMU has been able to maintain the racial diversity of its entering undergraduate classes because the students in the city school districts are overwhelmingly African-Americans and Latinos.[62] The nation's elite private institutions could achieve the same effect if they gave preference to the graduates of high schools in heavily minority school districts throughout the country (e.g., inner-city school districts). Although this is not quite the same as giving preference to the students in the top of their high schools' class rank, it would create similar incentives for school choice and school quality. Parents would improve their childrens' chances for acceptance to an elite school by enrolling them in a heavily minority school district, where school quality now is likely to be relatively weak.[63]

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59 SMU is located in Dallas, Texas.

60 Applicants are judged on several factors in the admissions process, and graduation from a high school in Dallas, El Paso, Houston, or San Antonio improves the applicant's chances for admission.

61 Personal communication, Stanley Katz, Princeton University Professor and Southern Methodist University Trustee (June 29, 1998); Everett Winters, Executive Assistant to the President and Director, Affirmative Action, Southern Methodist University (Sep. 10, 1998).

62 For the pre-*Hopwood* entering classes, the percentages of African-American and Latino students were 13.4% for Fall 1994, 14.5% for Fall 1995, and 16.7% for Fall 1996. The post-*Hopwood* percentages were 15.1% for Fall 1997 and 16.0% for Fall 1998. The source of this information is the Office of Institutional Research, Southern Methodist University. (Sept. 30, 1998) (copy of written communication on file with author).

The absence of a fall-off in minority admissions at SMU compared with minority admissions at the University of Texas, Texas A&M, and Rice after *Hopwood*, *see supra* text accompanying note 21, may reflect in part the fact that SMU is not as selective in its undergraduate admissions as the other three universities. *See* PETERSON'S GUIDE TO FOUR-YEAR COLLEGES 1999, at 1094, 1097, 1101, 1113 (29th ed. 1998).

63 Wealthy parents might be able to exploit an SMU-like approach more than a Texas-like approach because they could create special, elite high schools for their children within a heavily minority school district.

To this point, I have discussed the *likelihood* that the elite private colleges and universities would follow the Texas approach. And, as I have indicated, they are almost certainly not going to do so in the absence of a Supreme Court decision requiring them to abandon traditional affirmative action policies. Still, there is the question whether they *should* change their admissions policies in the direction of the Texas ten percent policy. I turn to that question now.

4. Two-Tiered vs. Single-Tiered Schools

Even if private colleges and universities are able to maintain their normal affirmative action policies, there is still an important moral argument that they should adopt something like the Texas ten percent policy to complement their affirmative action policies. Because college and university admissions policies encourage disparities in funding among different school districts, institutions of higher education bear some moral responsibility for the funding disparities and the accompanying disparities in educational quality among the different school districts.[64] Although there may be some room for disparities, the magnitude of the disparities in this country has left many of our urban public schools overrun by violence and with crumbling infrastructures, overcrowded classrooms, inadequate textbooks and supplies, and low graduation rates.[65] By adopting a Texas-like admissions policy, private colleges and universities would create incentives for a more equitable educational system rather than a less equitable one.

A more equitable educational system is valuable for several reasons. Most importantly, it bring us closer to a country in which all children have equal opportunities for achievement and satisfaction in their personal and professional lives. We should minimize the disad-

64 The direct cause of funding disparities lies in the practice of states relying heavily on local property taxes for school funding. However, we still need to explain why the states favor that practice rather than a more equitable method of funding. Part of the explanation is that college and university admissions policies encourage politically influential parents to support relatively inequitable methods of school funding.

65 *See, e.g.*, JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991); Jane Gross, *Los Angeles Schools: Hobbled and Hurting*, N.Y. TIMES, Feb. 16, 1993, at A1. According to a 1995 report by the U.S. General Accounting Office, the nation's existing schools faced 112 billion dollars in pressing construction needs while school districts were spending five billion dollars a year to repair and expand the country's schools. *See* Peter Applebome, *Enrollments Soar, Leaving Dilapidated School Buildings Bursting at the Frayed Seams*, N.Y. TIMES, Aug. 25, 1996, at A24

vantages that people have when they begin their adulthood.[66] Both because children lack full decision-making capacity and because their fate is determined in large part by their parents, we do not want to hold children as responsible for their fate as we hold adults.

It is also in the interest of society for all of its citizens to be well educated. As the Supreme Court observed, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."[67] Inadequate education leads to substantial social costs in the form of financial dependency, lost taxes, delinquency, and incarceration costs; these are many times higher than the cost of a decent education.[68]

To be sure, society may benefit from primary and secondary schools of great quality,[69] and it is not possible for all schools to achieve such a level of attainment.[70] Although there is some merit to this view, the argument for disparities in quality is more persuasive for universities than for primary and secondary schools. Advances in science and other areas of scholarship seem to be much more dependent on the existence in society of outstanding universities than on the existence of outstanding primary and secondary schools. In addition, to the extent that equalizing school quality diminishes the incentive of students to achieve, the advantages of attending an elite college should provide sufficient incentive for students to work hard during their primary and secondary education. In any event, it may be sufficient to reduce disparities in public school quality without eliminating them entirely.

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66 *See* George Sher, *Justifying Reverse Discrimination in Employment, in* AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION? 227, 230 (Francis J. Beckwith & Todd E. Jones eds., 1997).

67 Plyler v. Doe, 457 U.S. 202, 221–22 (1982) (finding a constitutional right to a free public education for children of illegal aliens).

68 *See* Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required,* 52 MD. L. REV. 1137, 1146–47 (1993).

69 Having some outstanding schools might be justified under the "difference" principle of John Rawls. According to Rawls, inequalities should be eliminated unless the least well off are benefited by the inequalities. *See* RAWLS, *supra* note 30. Thus, for example, a capitalist system in which there are economic disparities is permissible on the ground that the opportunity to amass wealth is necessary to provide sufficient incentive for productivity. Arguably, the poor are better off absolutely in a capitalist system like the U.S. than in a socialist state like the former Soviet Union even though they may be worse off relative to the wealthy in the society.

70 Great quality requires, among other things, outstanding principals and teachers, and, unless teaching salaries are raised dramatically, it is not possible to attract outstanding teachers for all teaching positions.

Note that the leading private colleges and universities need not suffer from a Texas-like admissions policy, at least in the long term. They will worry that such a policy will result in a weaker entering class since the top students at some schools are not as strong as lower ranking students at other schools. However, if the policy has the effect of changing school choice for high school students, then the elite schools will still be able to fill their classes with the same kinds of students that they have always admitted. The only difference is that the students will come from a wider range of high schools.

5. The Role of Class Rank

Even if private colleges and universities were to adopt a Texas-like admissions policy, there is still some question whether so much emphasis should be placed on class rank in the admissions process. Many good students do not perform well in school, and a diversity of measures allows schools to account for other abilities that cannot be measured adequately by grades. Although these are legitimate points, it is important not to overestimate their strength. Grades measure not only academic abilities but also a student's work ethic.[71] In addition, because students take courses in a wide variety of disciplines, including art, literature, biology, and mathematics, grades measure a diversity of abilities.

Still, we can concede that it would be a bad idea to base college admissions solely on class rank and preserve the helpful incentives of a Texas-like policy. If colleges want to give consideration to factors other than class rank, they can do so without undermining the tendency of Texas-like approaches to narrow disparities in high school quality. The colleges need only ensure that, when they admit students on the basis of other criteria, they spread those admissions broadly across different high schools. Thus, for example, if students are accepted because of strong artistic, athletic, or musical ability, the colleges could ensure that they give equal consideration to the top artists, athletes, and musicians at all high schools. If they do so, parents will still have the same incentive to look for the "weaker" schools for their artistically, athletically, or musically inclined children. Only this time, they will be looking at a school's artistic, athletic, or musical strength rather than its academic strength.[72]

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71 *See* Forbath & Torres, *supra* note 20, at 21.

72 Under the current system, of course, many high schools recruit students for their interscholastic athletic teams, and parents are undoubtedly enticed by the possibility that their child's chances for college admission and aid on the basis of athletic

There is an additional concern about Texas' emphasis on class rank. Even if nonacademic criteria are used in the admissions process, there is arguably a problem with judging academic ability on the basis of class rank. Colleges might reject grades as the sole measure of academic skills, observing that they use achievement test scores to correct for differences in quality among different high schools. An "A" grade at some high schools may be the academic equivalent of a "B" at other high schools. However, the need to correct for such differences is an artifact of a system of uneven educational quality. In a system in which schools are of more even quality, class rank will be a more reliable measure of academic achievement.

6. Tracking

The adoption of a Texas-like system for measures of academic and nonacademic skills could be compromised by parents trying to "game" the system. Parents might try to undermine the effects of a Texas-like approach in narrowing differences in school quality by insisting on special classes for "gifted" students or separate tracks for stronger students in the schools. If school resources became disproportionately devoted to the students in the higher tracks, then disparities in educational quality would exist between tracks rather than between schools.

It is difficult to know how serious a problem this would be. Many attributes of a school, including its physical facilities and its principal, cannot be divided among different tiers of students. In addition, teachers' unions require uniform compensation for teachers throughout a school, whether they are instructing the higher or lower tracks.[73] The lower-track students would also benefit from their personal relationships with the upper-track students. Although there might not be close friendships between the upper and lower-track students, research has suggested that people often gain more in terms of employment and other social opportunities from their "weak" connections to other people than from their "strong" connections.[74] Thus, while students are probably made worse off by being placed in a lower track

skills will be enhanced by enrolling at a high school with an outstanding athletic program.

73 There is some evidence, however, that the better teachers are assigned to the higher-track classes. *See* Jeannie Oakes et al., *Curriculum Differentiation: Opportunities, Outcomes, and Meanings, in* HANDBOOK OF RESEARCH ON CURRICULUM 570, 583 (Philip W. Jackson ed., 1992).

74 *See* Granovetter, *supra* note 29, at 1367–73; MARK S. GRANOVETTER, GETTING A JOB: A STUDY OF CONTACTS AND CAREERS 51–55 (1974) (explaining this phenomenon as a result of the facts that weaker connections tie individuals to wider networks of

than in a higher track,[75] they may be better off in a lower track at a stronger school than in a nontracked class at a weaker school.[76]

More importantly, parents as a group may in fact oppose tracking if elite private universities accept students only from the very top of the class. In a tracked school, some parents could game the system by keeping their child in a lower track to ensure that the child will finish among the top students in the school's class rank. Eliminating tracking can avoid that problem. In other words, the use of tracking in the schools is an extension of the two-tiered school system that current college admissions policies foster. Under the current system, parents have a strong incentive to create tiers both between schools and within schools. Under a Texas-like system, that incentive is diminished.

Students might also try to game a Texas-like system by taking easier courses in high school to boost their class rank. Colleges can avoid this problem if they require (rather than simply recommend) a minimum number of classes in fields that make up the core curriculum, including English, foreign language, history, mathematics, and science. Colleges can also correct for students whose teachers grade generously by asking high schools to adjust each student's grade point average in terms of the grades given in the courses taken by the student.[77]

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people than do stronger connections and that individuals may be reluctant to impose on close friends for help in finding a job).

75 *See, e.g.*, JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (1985); Adam Gamoran & Robert D. Mare, *Secondary School Tracking and Educational Inequality: Compensation, Reinforcement, or Neutrality?*, 94 AM. J. SOC. 1146 (1989); Oakes, *supra* note 73, at 590–93. *But see* Frederick Mosteller et al., *Sustained Inquiry in Education: Lessons from Skill Grouping and Class Size*, 66 HARV. EDUC. REV. 797, 812 (1996) (finding that there has not been the kind of rigorous study needed to determine whether tracking has a positive or negative impact on students' learning).

76 There is some empirical support for this view. In a study comparing the effects of tracking at public schools with the effects of tracking at Catholic schools, the author found that students in the Catholic school had higher overall academic achievement and that tracking was less detrimental to the lower track students in the Catholic schools than in the public schools. *See* Adam Gamoran, *The Variable Effects of High School Tracking*, 57 AM. SOC. REV. 812, 825–26 (1992). Of course, these results could also occur if the Catholic schools started with a stronger student body such that the lower track students in the Catholic school began with a higher level of academic achievement than the students in the public schools.

77 Thus, for example, a B+ in a course where the average grade was a B would mean more than in a course where the average grade was a B+. Class rank would be calculated on the basis of adjusted grade point averages.

7. Housing Choice

Parents might resist the incentive to change their children's schools if it would affect their choice of where to live, but that concern can be alleviated by allowing choice within or across school districts. If parents could send their children to different high schools without having to move to a less desirable residential area, they would be more likely to change high schools. Under the current educational system, wealthier parents prefer to link their choice of schools with their choice of housing. By doing so, they can better preserve a two-tier system in housing and education in which they and their children occupy both upper tiers. Under a Texas-like approach to college admissions, well-to-do parents will have more reason to prefer independence between their choice of schools and their choice of housing, and they may therefore push for more choice within and across school districts.[78] In other words, moving toward more of a single-tiered educational system would be easier if parents were not also pushed toward a single-tiered housing system.

8. Perverse Incentives

My argument is essentially based on potentially positive incentives from an admissions policy that emphasizes class rank. However, it is important to consider whether the policy will also have undesirable incentives. One concern is whether such a policy would intensify the competitiveness among students for top grades. Under the policy, students would recognize that only the one or two students at the top of their high school class rank could gain admission to a college like Harvard or Princeton, so there could be intense competition for the one or two slots. In contrast, under the current system, it is theoretically possible for a few or even several students at a particular school to gain admission to Harvard or Princeton. Moreover, students currently do not necessarily have to end up with the highest grade point averages in their class.[79]

78 People may not like involuntary school busing, but they are less troubled by busing when it is voluntary and it offers real advantages to their children.

To be sure, there are advantages to having children attend school close to home. It cuts down on travel time, and it makes it easier for children to play with their friends from school outside of school hours. Accordingly, some parents may decide that proximity to home is more important than a better chance of admission to a leading college.

79 In support of this argument, it has been argued that admissions policies based on vague criteria create stronger incentives for high school students to work hard at their studies or extra-curricular activities. If criteria for admissions are unclear, the stronger students cannot assume that they will do very well in the admissions process,

There may be something to this argument, but the Texas admissions policy is not likely to have an important effect on the intensity of competition. Students already believe they must have the very best grades to be admitted to a place like Harvard or Princeton.[80] In addition, a Texas-like admissions policy does not require that admissions be based solely on class rank. As mentioned, it would be consistent with the policy to consider other factors, like artistic talent, athletic ability, or even whether the applicant's parents are alumni of the college, as long as admissions based on these other criteria are spread evenly across high schools in the United States.[81]

A Texas-like policy could also discourage many students from working as hard as they otherwise might. Most students will recognize that they have no chance to finish among the very top students in class rank and therefore have no chance for acceptance at one of the elite colleges or universities.[82] In contrast, under the current system, students without very high grades can still hope that they can compensate for lower grades with other achievements that will impress college admissions officers. "Relative deprivation" theories are relevant here as well. According to these theories, people may be discouraged from competing if their likelihood of success is low.[83] If a Texas-like policy leads to weaker schools attracting brighter students, the other students in those schools may end up working less hard. Although this concern is important to consider, it too would probably not make a real impact. The ability of colleges under a Texas-like policy to admit students on the basis of artistic, athletic, and other skills would help motivate students who lack stellar grades. If there are students who do not think they are outstanding in any particular area, such students are likely to already believe that they have no chance of acceptance by an elite college or university. In addition, there is evidence that African-American students are more likely to attend college when they

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so they will expend the extra effort to ensure acceptance. Similarly, the weaker students need not assume that they will do poorly in the admissions process, so they also have a greater incentive to expend extra effort than with clear criteria. *See* KLITGAARD, *supra* note 54, at 78–79.

80 Bruce Weber, *Inside the Meritocracy Machine*, N.Y. TIMES, Apr. 28, 1996, § 6 (Magazine), at 44.

81 *See supra* text accompanying note 72.

82 This will be the case especially after students receive their first year of grades in high school, and the students with many non-A grades see that, even with all A's in their remaining years of high school, they would not be able to move all the way up the class rank.

83 *See* Christopher Jencks & Susan E. Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, *in* INNER-CITY POVERTY IN THE UNITED STATES 111, 116 (Laurence E. Lynn, Jr. & Michael G.H. McGeary eds., 1990).

attend high schools whose students have a higher socioeconomic status and/or higher standardized test scores.[84] Similarly, African-Americans finish more years of schooling when they live in more affluent neighborhoods.[85]

IV. CONCLUSION

Rejecting traditional affirmative action is very troubling in many ways. It suggests a serious weakening of our society's critical goal of eliminating the effects of racial prejudice and giving real meaning to the promise of equal opportunity for all citizens. There is reason, however, to see a silver lining in the effort to find alternatives. If the universities treat the top students at every high school as equally strong candidates for admission, parents with sufficient wealth and political power to influence school quality will have a stronger incentive to ensure that every student attends a school that provides a high quality education. Such a change could promise a substantially improved education for minority students. It also might lead to greater racial diversity in higher education as minority students come to the college application process with stronger academic preparation.

84 *See id.* at 129-30.
85 *See id.* at 135-37.