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Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions

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Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions

JENNIFER L. SHEA *

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*"You can be diverse and not have affirmative action. But the kind of diversity that you get from bringing oboe players and stamp collectors together is different."*¹

INTRODUCTION

For the first time since its 1978 ruling in *Regents of the University of California v. Bakke*, the Supreme Court recently decided to hear two cases challenging the use of racial preferences in the admissions process at the University of Michigan.² Although the Court has declined to consider the issue for over two decades, controversy over the consideration of race in admissions policies has plagued a number of public

* Juris Doctorate/Master of Public Affairs Candidate, Indiana University—Bloomington. Thank you to my family for their love and support, especially my fiancé, Robert E. McCracken, who encouraged me throughout all three years of law school. Thanks to Professor Daniel O. Conkle, Robert H. McKinney Professor of Law at Indiana University—Bloomington, for helping me develop an interesting and surprisingly timely topic for my Note.

1. Adam Cohen, *Coloring the Campus*, TIME, Sept. 17, 2001, at 48 (quoting a statement by Richard Black, U.C. Berkeley's Associate Vice Chancellor for admissions and enrollment, in response to a question regarding the effectiveness of ensuring campus diversity without taking a candidate's race into account).

2. 438 U.S. 265 (1978); Peter Schmidt & Jeffrey Selinger, *A Supreme Court Showdown: The Justices Take Up Two Michigan Cases and the Debate Over Affirmative Action in Admissions*, CHRON. HIGHER EDUC., Dec. 13, 2002, at A20.

universities. The use of affirmative action by public universities in their admissions policies was eliminated in California, Florida, Georgia, Texas, and Washington.³ Elimination of these programs occurred in three different forums: in the courts,⁴ in the voting booth,⁵ and by executive order.⁶ Fearing drastic declines in minority enrollment on college campuses, higher education officials have been pursuing race-neutral alternatives for preserving diversity in the absence of affirmative action.⁷ In particular, California, Florida, and Texas have each instituted percentage plans guaranteeing admission to students who meet the state's class rank requirement.⁸ This Note evaluates the effectiveness of these percentage plans on ensuring student body diversity at public colleges and universities.

Before undertaking an evaluation of the percentage plans implemented in these individual states, it is important to understand the impetus behind their enactment. Part I of this Note reviews the current attacks on affirmative action by the courts, the voters, and the governor of Florida. In analyzing the position of the courts on affirmative action, Part I discusses *Bakke*,⁹ the Supreme Court's most recent precedent on affirmative action in college admissions, as well as the latest decisions on this issue in the Fifth, Sixth, Ninth, and Eleventh Circuits. In Part II, this Note outlines the benefits of learning in a diverse environment in order to demonstrate why college administrators are fiercely trying to preserve campus diversity in the absence of affirmative action. Part III evaluates the effectiveness of percentage plans in California, Florida, and Texas as race-neutral attempts to maintain campus diversity. Finally, Part IV of this Note highlights the emerging shortcomings of percentage plans and compares the effectiveness of percentage plans to affirmative action. This Note concludes that percentage plans do not serve as an adequate substitute to affirmative action for the preservation of educational diversity.

I. ATTACKS ON AFFIRMATIVE ACTION IN THE COURTS, IN THE VOTING BOOTH, AND BY EXECUTIVE ORDER

Before examining the implementation of percentage plans as a race-neutral alternative to affirmative action, it is important to consider the status of affirmative action in college admissions. The use of affirmative action in college admissions policies has come under attack in three critical areas. First and foremost, the federal courts have seen an increasing number of challenges to admissions policies at public universities where racial preferences are utilized in the admissions process.¹⁰ Second, affirmative action programs have been repealed by voters in both California and Washington through the passage of ballot initiatives prohibiting the use of racial

3. See *infra* Part I.

4. See *infra* Part I.A.

5. See *infra* Part I.B.

6. See *infra* Part I.B.

7. See *infra* Part III.

8. See *infra* Part III.

9. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

10. See *Federal Court Rules Against University of Georgia Admissions Policy*, HIGHER EDUC. & NAT'L AFF., Sept. 10, 2001, at 1, available at www.acenet.edu/hena/issues/2001/09-10-01/georgia.cfm.

preferences in public education.¹¹ Lastly, the governor of the state of Florida unilaterally forbade the use of affirmative action and racial preferences in admissions by promulgating an executive order to that effect.¹² In this Part, the attacks on affirmative action in college admissions are discussed further.

A. In the Courts: The Future of Affirmative Action

Recently, most attacks on affirmative action have taken place in the federal courts. In particular, white applicants who were denied admission to state universities have challenged the use of racial preferences in admissions policies as a violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.¹³ Within the past five years, the Fifth, Sixth, Ninth, and Eleventh Circuits have each considered admissions policies that granted preferences during the admissions process to students of color.¹⁴ In the Fifth and Eleventh Circuits, the admissions policies at the University of Texas Law School and University of Georgia, respectively, were declared unconstitutional for failing to satisfy the test of strict scrutiny for the use of classifications based upon race.¹⁵ In the Sixth and Ninth Circuits, the admissions policies at the University of Washington Law School and the University of Michigan Law School, respectively, were found to satisfy the test of strict scrutiny based on student body diversity as a compelling government interest.¹⁶ All four of these decisions relied heavily upon interpretations of *Bakke*, the Supreme Court's only case dealing with the constitutionality of racial preferences in college admissions.¹⁷ Therefore, it is imperative to examine the major holdings that emerged from the Court's splintered opinion in *Bakke* before examining each of these lower court decisions individually.

1. The Supreme Court Doctrine: *Regents of the University of California v. Bakke*¹⁸

Twenty-five years ago, the Supreme Court considered the use of affirmative action in university admissions in *Bakke*.¹⁹ This case was brought by Allan Bakke, a white applicant who was denied admission twice from the Medical School of the University of California at Davis.²⁰ Bakke alleged "the Medical School's special admissions program [designed to ensure admission of a certain number of minority students] operated to exclude him from the school on the basis of his race."²¹ In a fragmented

11. See *infra* Part I.B.

12. See *infra* Part I.B.

13. 42 U.S.C. § 2000d (2000).

14. See *infra* Part I.A.2.

15. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

16. See *Smith v. Univ. of Wash., Law Sch.*, 233 F.3d 1188 (9th Cir. 2000); *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

17. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

18. *Id.*

19. *Id.*

20. *Id.* at 276.

21. *Id.* at 277-78.

opinion, a majority of the Court affirmed the California Supreme Court's ruling that the admissions policy violated the Fourteenth Amendment, and ordered Bakke's admission to the University of California at Davis Medical School.²² However, a different majority of the Court reversed the California Supreme Court's prohibition of any consideration of race in the admissions process.²³

Justice Powell's majority opinion analyzed the admissions policy at the University of California at Davis Medical School as "undeniably a classification based on race and ethnic background."²⁴ In considering the extent of its analysis, the Court stated, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."²⁵ Therefore, the Court applied a test of strict scrutiny, and examined whether the admissions policy was "precisely tailored to serve a compelling government interest."²⁶

The Court first evaluated the interests advanced by the University of California to justify their use of racial preferences in admissions.²⁷ The Court held that the University's interest in assuring "some specified percentage of a particular group [be admitted] merely because of its race or ethnic origin . . . must be rejected not as insubstantial but as facially invalid."²⁸ From this general premise, the Court went on to reject the interest of remedying the effects of societal discrimination by characterizing it as "an amorphous concept of injury that may be ageless in its reach into the past."²⁹ However, the Court did hold that states had "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of *identified* discrimination."³⁰ The Court emphasized that remedial efforts for past discrimination must be supported by judicial, legislative, or administrative findings of constitutional or statutory violations.³¹ The University of California failed to establish in the record that the admissions policy was a response to identified discrimination.³² Therefore, the Court rejected each of the asserted compelling interests, and held that the school's admissions policy did not satisfy the test of strict scrutiny required for classifications based on race.³³

In addition to the principal holdings above, there is another portion of the *Bakke* opinion that still receives its share of debate today. The concurring opinion written by Justice Brennan supported Justice Powell's opinion reversing the California Supreme Court's prohibition of race as a consideration in the admissions process.³⁴ However,

22. *Id.* at 271, 320; *id.* at 421 (Burger, C.J., Stewart, Rehnquist, & Stevens, JJ., concurring in part and dissenting in part).

23. *Id.* at 272, 320; *id.* at 379 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part).

24. *Id.* at 289.

25. *Id.* at 291.

26. *Id.* at 299.

27. *See id.* at 305-06.

28. *Id.* at 307.

29. *Id.*

30. *Id.* (emphasis added).

31. *See id.*

32. *Id.* at 309-10.

33. *Id.* at 319-20.

34. *Id.* at 326 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting

Justice Brennan and Justice Powell disagreed on what type of consideration constitutes a compelling interest in satisfaction of the Court's test of strict scrutiny on racial classifications.³⁵ For Justice Brennan, the Fourteenth Amendment "does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination."³⁶ In addition, Justice Brennan would use a somewhat less stringent standard than strict scrutiny to evaluate this remedy.³⁷ He states, "to justify such a classification an important and articulated purpose for its use must be shown."³⁸ Therefore, Justice Brennan disagreed with Justice Powell's reliance solely upon identified past discrimination as a compelling government interest, and would further allow for the remedy of societal discrimination. While Justice Brennan takes a much broader view of what constitutes a compelling government interest, he did not join or concur with the portion of Justice Powell's opinion that concludes student body diversity can be a compelling interest.³⁹

In sum, the fractured nature of the Court's opinion has caused a great deal of confusion as lower courts have tried to interpret *Bakke*.⁴⁰ While Justice Powell authored the opinion for the Court and provided the important swing vote, he created a majority on two very distinct issues: (1) affirming the California Supreme Court's holding that the admissions policy violated the Fourteenth Amendment, and (2) reversing the California Supreme Court's prohibition of race as a factor in the admissions policy. In addition, a substantial portion of his opinion was without support from either majority. In particular, no one joined the part of his opinion on student body diversity, which concluded that "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."⁴¹ As addressed below, each and every court confronts the question of whether student body diversity is a compelling government interest, as it considers the legality of affirmative action in university admissions.

2. The Future of Affirmative Action in the Court of Appeals

In four recent cases, the Court of Appeals for the Fifth, Sixth, Ninth, and Eleventh Circuits had the task of using *Bakke* to examine the constitutionality of the admissions policies at the University of Texas Law School, the University of Michigan Law School, the University of Washington Law School, and the University of Georgia undergraduate program.⁴² Each of these suits focused on admissions formulas that

in part).

35. *See id.* at 328.

36. *Id.*

37. *Id.* at 361-62.

38. *Id.* at 361.

39. *See id.* at 324-80 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part).

40. *See infra* Part I.A.2.

41. 438 U.S. at 314.

42. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002); Smith v. Univ. of Wash., Law Sch., 233 F.3d 1188 (9th Cir. 2000); Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001).

denied white students admission while granting preferences to students of color.⁴³ In addition to the resemblances between the admissions policies employed by these universities, the compelling government interest of preserving student body diversity advanced before each court was similar.⁴⁴ Despite the commonalities among these cases, the courts each used a different analysis to arrive at their holdings.⁴⁵ In fact, the decisions of the Sixth and Ninth Circuits to uphold the admissions programs were opposite from the holdings of the Fifth and Eleventh Circuits, which declared the admissions policies unconstitutional.⁴⁶ Therefore, it is important to examine each of these cases individually in order to fully understand the current state of affirmative action in the courts.

a. The Fifth Circuit: *Hopwood v. Texas*⁴⁷

In *Hopwood v. Texas*, the Fifth Circuit prohibited the University of Texas Law School from continuing to use race as a factor in its admissions policy.⁴⁸ Four white residents of Texas who were denied admission to the law school in 1992 alleged they were subject to unconstitutional racial discrimination by the school's admissions process.⁴⁹ The admissions process in question established a lower range of LSAT and GPA requirements for African American and Mexican American candidates, and maintained separate application evaluations and waiting lists for these candidates.⁵⁰ The Fifth Circuit analyzed the law school's admissions process using a test of strict scrutiny because "any governmental action that expressly distinguishes between persons on the basis of race [must] be held to the most exacting scrutiny."⁵¹

The court outlined the strict scrutiny analysis with two questions: "(1) Does the racial classification serve a compelling government interest, and (2) is it narrowly tailored to the achievement of that goal?"⁵² The court began its analysis by directly addressing two of the purposes the law school purported to serve with its admissions policy: obtaining the benefits of a diverse student body and remedying the effects of past discrimination.⁵³ The court looked to the *Bakke* opinion to determine whether ensuring student body diversity was a compelling government interest.⁵⁴ Because the

43. See *infra* Part I.A.2.a-d (discussing the specific challenges to the admissions policies in greater detail).

44. See *infra* Part I.A.2.a-d (describing preservation of student body diversity as the compelling interest advanced by the government in each of the four cases).

45. See *infra* Part I.A.2.a-d (analyzing the reasoning for the holdings of the four different U.S. court of appeals decisions).

46. Compare *infra* Part I.A.2.a and Part I.A.2.b with *infra* Part I.A.2.c and Part I.A.2.d.

47. 78 F.3d 932 (5th Cir. 1996).

48. *Id.* at 934.

49. *Id.* at 938.

50. *Id.* at 936-38.

51. *Id.* at 940.

52. *Id.*

53. See *id.* at 941. Relying on *Bakke*, the Fifth Circuit dismissed the other two purposes advanced by the law school: "Justice Powell reasoned that the second and third justifications—remedying societal discrimination and providing role models—were never appropriate." *Id.* at 942.

54. See *id.* at 941-45.

portion of Justice Powell's opinion on student body diversity as a compelling government interest was never adopted by a majority of the Court in *Bakke*,⁵⁵ the Fifth Circuit dismissed this purpose and prohibited the use of race as a factor to ensure student body diversity.⁵⁶ The court explained that student body diversity is "simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."⁵⁷ The Fifth Circuit then concluded that "the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs."⁵⁸

The remainder of the court's opinion in *Hopwood* focused on whether the law school satisfied its burden of proving a "strong basis in the evidence for its conclusion that remedial action was necessary."⁵⁹ The Fifth Circuit explained that the Supreme Court requires "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."⁶⁰ The Fifth Circuit rejected the law school's argument that the University of Texas system was the "appropriate governmental unit for measuring a constitutional remedy."⁶¹ Instead, the court held that in order for the law school to remedy past wrongs with a racial preference program, the wrongs must have occurred at the law school itself.⁶² Because the law school provided no evidence that it was remedying past wrongs occurring at the law school, the court held that "the law school has failed to show a compelling state interest in remedying . . . past discrimination sufficient to maintain the use of race in its admissions system."⁶³ Therefore, the court found it unnecessary to determine whether the law school's admissions program was narrowly tailored in the absence of any compelling state interest.⁶⁴

In sum, the Fifth Circuit's opinion in *Hopwood* leaves very little room for state universities in Texas to maintain an admissions policy based on racial preferences. The court rejected all but one compelling government interest—remedying past identified discrimination by a particular governmental unit. This is a difficult standard for most college admissions policies to meet, and has led some to conclude that "it is unlikely that any affirmative action program at a Texas public university will be able to withstand *Hopwood*-level scrutiny."⁶⁵

55. See *supra* notes 40-41 and accompanying text.

56. *Hopwood*, 78 F.3d at 945-46, 948.

57. *Id.* at 945 (quoting *Metro Broad., Inc. v. Fed. Communications Comm'n*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting)).

58. *Id.* at 944.

59. *Id.* at 948 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (plurality opinion)).

60. *Id.* at 949 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion of Powell, J.)).

61. *Id.* at 951.

62. *Id.* at 952.

63. *Id.* at 955.

64. *Id.*

65. Danielle Holley & Delia Spencer, Note, *The Texas Ten% Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 251 (1999).

b. The Eleventh Circuit: *Johnson v. Board of Regents of the University of Georgia*⁶⁶

In *Johnson*, the Eleventh Circuit took a different approach than the Fifth Circuit in *Hopwood* by striking down the University of Georgia admissions policy because it was not narrowly tailored to meet a compelling state interest of student body diversity.⁶⁷ Three white female Georgia residents who were denied admission to the freshman class at the University of Georgia (“UGA”) for the fall of 1999 brought this case.⁶⁸ They alleged that the admissions policy granted numerical points to non-white and male applicants that were not given to female applicants.⁶⁹ While the Eleventh Circuit affirmed the lower court’s holding that the admissions program was unconstitutional, the court did so for a different reason than the lower court.⁷⁰ Similar to the Fifth Circuit in *Hopwood*, the lower court held that student body diversity is not a compelling state interest sufficient to withstand the strict scrutiny required of racial classifications.⁷¹ The Eleventh Circuit, however, refused to resolve the question of whether student body diversity is a compelling interest. The court felt “it [was] important to underscore that the constitutional viability of student body diversity as a compelling interest is an open question, and ultimately . . . warrants consideration by the Supreme Court.”⁷² Therefore, the court assumed for the sake of argument that student body diversity was a compelling interest, and rejected the UGA admissions policy because it was not narrowly tailored to serve that interest.⁷³

In considering whether the UGA admissions policy was narrowly tailored to serve the compelling interest of student body diversity, the Eleventh Circuit utilized the *Paradise* factors adopted by the Supreme Court in an employment case involving a challenged affirmative action program.⁷⁴ The Eleventh Circuit also looked to a recent case challenging a race-conscious admissions policy in a kindergarten program in which the Fourth Circuit modified the *Paradise* factors when applying them to the challenged admissions policy.⁷⁵ Using the basic framework from both of these cases,

66. 263 F.3d 1234 (11th Cir. 2001).

67. *Id.* at 1246.

68. *Id.* at 1237.

69. *Id.* After the filing of the lawsuit but before the district court determined its liability, the University of Georgia announced that gender would no longer be a factor in the numerical calculus used to determine automatic acceptance or rejection. *Id.* at 1242.

70. *Id.* at 1264, 1270.

71. *Id.* at 1239.

72. *Id.* at 1245.

73. *Id.* at 1264, 1270.

74. *Id.* at 1252 (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion)).

75. *Id.* In *Tuttle v. Arlington County Sch. Bd.*, the Fourth Circuit used the following factors to review whether a state racial classification is narrowly tailored:

- (1) the efficacy of alternative race-neutral policies,
- (2) the planned duration of the policy,
- (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force,
- (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and
- (5) the burden of the policy on innocent third parties.

the Eleventh Circuit created a list of four factors for measuring whether the admissions policy was narrowly tailored:

(1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity.⁷⁶

Using these four factors, the Eleventh Circuit concluded that the UGA admissions policy was not narrowly tailored to achieve its goal of student body diversity.⁷⁷

The court considered the first and second factors together finding the admissions policy was inflexible by mechanically awarding bonus points to each non-white applicant and excluding race-neutral factors that would reflect a candidate's potential contribution to diversity.⁷⁸ The court illustrated its point by stating, "[a] white applicant from a disadvantaged rural area in Appalachia may well have more to offer a Georgia public university such as UGA—from a standpoint of diversity—than a non-white applicant from an affluent family and a suburban Atlanta high school."⁷⁹ The court recognized the amount of time individual evaluation of applicants would require at a large institution like the University of Georgia.⁸⁰ However, the court had little sympathy stating, "if UGA wants to ensure diversity through its admissions decisions, and wants race to be part of that calculus, then it must be prepared to shoulder the burden of fully and fairly analyzing applicants as individuals and not merely as members of groups when deciding their likely contribution to student body diversity."⁸¹

Next, the court considered the third factor and concluded that "UGA's policy is not only rigid and incomplete, the benefit it awards each and every non-white applicant is wholly, and concededly arbitrary" and disproportionate.⁸² UGA conceded that there was no statistical basis for use of a 0.5-point figure to reflect an applicant's race in the admissions formula.⁸³ In addition, the court held that it was disproportionate to the

195 F.3d 698, 706 (4th Cir. 1999).

76. *Johnsen*, 236 F.3d at 1253.

77. *Id.* at 1254.

78. *Id.* at 1254-55.

79. *Id.* at 1253.

80. *Id.* at 1256. The court quoted UGA's President as stating, "I know that the difference between the way we have to do it because of size and the way everybody else does it is so dramatically different that that's part of the problem. I would guess that every other institution in the state is probably able to read individual files." *Id.* In 2002, the University of Georgia received 12,800 applications and offered acceptance to 8200 applicants. The University of Georgia, First Year Admissions, <http://www.admissions.uga.edu/freshman-adm/index.html> (last visited Nov. 7, 2002).

81. *Johnson*, 236 F.3d at 1256.

82. *Id.* at 1257.

83. *Id.* (The court quotes UGA's admissions director as acknowledging that "the choice of a particular point bonus for race [was] made 'out of the blue.'").

other diversity related factors because only one other factor in the formula—a Scholastic Aptitude Test (“SAT”) score, or American College Test (“ACT”) equivalent, between 1200-1600—is worth more than race (1.0 as compared to 0.5).⁸⁴ The final factor the court examined was whether UGA considered race-neutral alternatives before employing their race-based admissions policy.⁸⁵ The court found the very opposite was true as “the record [was] clear that UGA has been committed, and remains committed to using race in its freshman admissions process until it is precluded from doing so.”⁸⁶

Finally, the court noted that UGA “makes little serious effort to defend its policy under *Paradise* or any other narrowly tailoring test.”⁸⁷ Instead, the court says “UGA tries to analogize its policy to the Harvard plan and thereby bring its policy under Justice Powell’s opinion in *Bakke*.”⁸⁸ Justice Powell originally used the Harvard plan in *Bakke* as an example of an admissions policy that considers race as well as other race-neutral factors while individually evaluating applicants.⁸⁹ However, the Eleventh Circuit rejected this argument concluding, “his discussion of the Harvard Plan was entirely dicta.” Even using the Harvard plan, the Eleventh Circuit felt that UGA’s plan failed to withstand scrutiny because it is not “flexible enough to consider all pertinent elements of diversity”⁹⁰ and assess each applicant “fully and fairly as an individual.”⁹¹

Although the Eleventh Circuit’s holding in *Johnson* prevents UGA from further consideration of race in its admissions process, it does not unconditionally forbid the consideration of race in college admissions like the Fifth Circuit in *Hopwood*.⁹² Instead, the Eleventh Circuit established a framework for considering whether an admissions policy was narrowly tailored to serve the goal of ensuring a diverse student body.⁹³ The court’s holding would not prohibit an admissions policy carefully designed to individually evaluate each applicant’s contribution to diversity using race in addition to other race-neutral factors. However, the university must also prove it considered race-neutral alternatives prior to establishing a race-conscious admissions policy.⁹⁴

c. The Ninth Circuit: *Smith v. University of Washington, Law School*⁹⁵

In *Smith v. University of Washington, Law School*, the Ninth Circuit used a much different interpretation of *Bakke* than the Fifth and Eleventh Circuits.⁹⁶ This case involved a challenge by three white applicants who were each denied admission to the

84. *Id.*

85. *Id.* at 1259-60.

86. *Id.* at 1259.

87. *Id.* at 1261.

88. *Id.*

89. *See Bakke*, 438 U.S. at 316-18.

90. *Johnson*, 263 F.3d at 1262 (quoting *Bakke*, 438 U.S. at 317).

91. *Id.*

92. *See supra* notes 52-65 and accompanying text.

93. *See supra* notes 76-91 and accompanying text.

94. *See supra* notes 85-86 and accompanying text.

95. 233 F.3d 1188 (9th Cir. 2000).

96. *See id.*

University of Washington Law School during 1994 and 1996.⁹⁷ The applicant who was denied admission in 1996 reapplied and was accepted in 1999, after the law school terminated its race-based admissions policy.⁹⁸ While the case was in the district court, the voters of the state of Washington passed an initiative banning preferential treatment on the basis of race in public education.⁹⁹ The procedural history of this case is unusual because the case appeared before the Court of Appeals after the admissions policy was eliminated.¹⁰⁰ Thus, the court dismissed the petitioners' request to enjoin the law school from operating a preferential admissions program because "that part of the controversy had become moot."¹⁰¹

The court did address the district court's finding that "under Supreme Court precedent race could be used as a factor in educational admissions decisions, even where that was not done for remedial purposes."¹⁰² In considering whether *Bakke* permitted the use of student body diversity as a compelling state interest, the court surmised, "[t]he difficulty with which we are presented is . . . none of the other Justices fully agreed with Justice Powell's opinion, so we are left with the task of deciding just what the Supreme Court decided."¹⁰³ The Ninth Circuit looked to the Supreme Court for guidance on interpreting this fractured opinion. The Ninth Circuit, citing *Marks v. United States*, explained, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."¹⁰⁴ It is with this guidance that the Ninth Circuit arrived at its conclusion that "educational diversity is a compelling government interest that meets the demands of strict scrutiny of race-conscious measures."¹⁰⁵

By combining both Justice Powell's opinion and Justice Brennan's concurrence, the Ninth Circuit concluded that "[a] majority would have allowed for some race-based considerations in educational institutions, both under Title VI and under the Fourteenth Amendment. Thus, a race-based possibility must be taken to be the actual rationale adopted by the Court."¹⁰⁶ The Ninth Circuit deduced that while "Justice Brennan did not specifically say that 'race' could be used to achieve student body diversity . . . there was no need for him to do so in light of his view about past societal discrimination."¹⁰⁷ Thus, the court surmised that Justice Brennan would have agreed with Justice Powell's opinion that student body diversity is a compelling state interest. The court concludes its opinion with an acknowledgement that "since *Bakke* . . . the [Supreme] Court has not looked upon race-based factors with much favor."¹⁰⁸ However, the Ninth Circuit defends its departure from the Court's rationale by quoting

97. *Id.* at 1191-92.

98. *Id.*

99. *Id.* at 1192. The ballot initiative, Washington Initiative Measure 200, is codified at Wash. Rev. Code § 49.60.400(1) (1998).

100. *Smith*, 233 F.3d at 1192.

101. *Id.* at 1193.

102. *Id.* at 1196.

103. *Id.* at 1198.

104. *Id.* at 1199 (quoting *Marks*, 430 U.S. 188, 193 (1977)).

105. *Id.* at 1201.

106. *Id.* at 1199.

107. *Id.* at 1200.

108. *Id.*

the Court's advice: "[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overturning its decisions."¹⁰⁹ In fact, the Ninth Circuit points out that the "flaw" in the *Hopwood* decision "stem[s] from its failure to properly apply the teachings of *Marks*."¹¹⁰

In sum, the Ninth Circuit took the Court's advice and used Justice Brennan's concurrence to construct a favorable holding for student body diversity as a compelling government interest. In its interpretation of *Bakke*, the Ninth Circuit went even further than the Eleventh Circuit by allowing student body diversity as a compelling state interest in college admissions policies. Although an injunction against the University of Washington's admissions program became moot with the passage of Washington Initiative Measure 200 prohibiting racial preferences,¹¹¹ the Ninth Circuit's holding is still an important decision on affirmative action in college admissions.

d. The Sixth Circuit: *Grutter v. Bollinger*¹¹² and *Gratz v. Bollinger*¹¹³

In December of 2001, the Sixth Circuit, sitting en banc, heard two lawsuits challenging the University of Michigan's use of affirmative action¹¹⁴—one case involving undergraduate admissions¹¹⁵ and the other involving law school admissions.¹¹⁶ At the district court level, the two cases resulted in completely opposite holdings based on different reasoning from separate judges.¹¹⁷ In *Grutter v. Bollinger*, U.S. District Court Judge Bernard A. Friedman ruled that the law school's use of affirmative action was unconstitutional because racial diversity was not a compelling state interest, and the law school's admissions policy was not narrowly tailored to achieve that interest.¹¹⁸ In *Gratz v. Bollinger*, U.S. District Court Judge Patrick J. Duggan ruled that the use of affirmative action in undergraduate admissions was constitutional and justified by the educational benefits of diversity.¹¹⁹

In May 2002, the Sixth Circuit released its opinion in the law school admissions case;¹²⁰ however, it failed to decide the undergraduate admissions case.¹²¹ Some

109. *Id.* (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

110. *Id.* at 1200 n.9.

111. *Id.* at 1193.

112. 288 F.3d 732 (6th Cir. 2002).

113. 122 F. Supp. 2d 811 (E.D. Mich. 2000).

114. See generally Peter Schmidt, *Full Appeals Court Will Consider U. of Michigan Affirmative-Action Case*, CHRON. HIGHER EDUC., Nov. 2, 2001, at 32, available at <http://chronicle.com/weekly/v48/i10/10a03201.htm> (summarizing the issues raised by the University of Michigan cases).

115. *Gratz*, 122 F. Supp. 2d 811. The Sixth Circuit has yet to decide this case on appeal. See *infra* notes 120-23 and accompanying text.

116. *Grutter*, 288 F.3d 732.

117. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001); *Gratz*, 122 F. Supp. 2d 811.

118. 137 F. Supp. 2d at 872.

119. 122 F. Supp. 2d at 820.

120. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

121. See Peter Schmidt, *Next Stop, Supreme Court?*, CHRON. HIGHER EDUC., May 24, 2002, at A24, available at <http://chronicle.com/weekly/v48/i37/37a02401.htm>.

commentators speculated that the Sixth Circuit would reach the opposite result in the undergraduate admissions case.¹²² While the Sixth Circuit concluded in a five-four decision that the law school's admissions policy was constitutional as a means of maintaining diversity, the admissions policy used by the undergraduate program could potentially be perceived as a larger "plus factor" than envisioned by Justice Powell's opinion in *Bakke*.¹²³

In *Grutter*, the majority began its analysis by looking at *Bakke* to determine whether the law school has a compelling interest in achieving a diverse student body.¹²⁴ The majority held that Justice Powell's opinion was binding upon the Sixth Circuit under *Marks* and that *Bakke* remains precedent until the Supreme Court decides otherwise.¹²⁵ Similar to the Ninth Circuit,¹²⁶ the majority found that "the rationales supporting the Court's judgment need not overlap on essential points in order to provide a holding that binds lower courts."¹²⁷ The Sixth Circuit held that Justice Powell's strict scrutiny and Justice Brennan's intermediate scrutiny of racial classifications taken together were evidence that Justice Powell's opinion was *Bakke's* narrowest holding.¹²⁸ The court added that Justice Brennan's approval of Justice Powell's Harvard plan in a footnote provided support for determining that a majority of the Court was in favor of diversity as a compelling interest.¹²⁹ In addition, the court relied upon the Supreme Court's subsequent use of *Bakke* under *Metro Broadcasting, Inc. v. Federal Communications Committee*.¹³⁰

Having determined that the University of Michigan's law school had a compelling interest in achieving a diverse student body under *Bakke*, the second part of the majority's analysis focused upon whether the law school's admissions policy was narrowly tailored to meet that compelling interest.¹³¹ The Sixth Circuit extracted two guidelines for evaluating race-conscious admissions policies from Justice Powell's reasoning in *Bakke*: "(1) segregated, dual-track admissions systems utilizing quotas for under-represented minorities are unconstitutional; and (2) an admissions policy modeled on the Harvard plan, where race and ethnicity are considered a 'plus,' does not offend the Equal Protection Clause."¹³² In evaluating whether the law school's

122. *Id.*

123. *See id.* The undergraduate admissions policy grants a twenty-point bonus on a 150-point scale to applicants who are African American, Hispanic, or American Indian, which is the equivalent to raising an applicant's G.P.A. by an entire letter grade. *Id.*

124. 288 F.3d at 738.

125. *Id.* at 739.

126. *See supra* notes 104-10 and accompanying text.

127. *Grutter*, 288 F.3d at 740.

128. *Id.* at 741-42 (citing *Bakke*, 438 U.S. at 304-07 (opinion of Powell, J.)).

129. *Id.* at 742-43 (citing *Bakke*, 438 U.S. at 326 n.1 (Brennan, J., concurring)).

130. 497 U.S. 547, 568 (1990), *overruled on other grounds by* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The Sixth Circuit pointed out that Justice Brennan's opinion for the Court in *Metro Broadcasting* cited *Bakke* for the proposition that "'a diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which race-conscious university admissions programs may be predicated." *Grutter*, 288 F.3d at 743 (quoting *Metro Broadcasting*, 497 U.S. at 568 (quoting *Bakke*, 438 U.S. at 311-13 (opinion of Powell, J.))).

131. *Grutter*, 288 F.3d at 744.

132. *Id.* at 745-46.

admissions policy was an unconstitutional quota system or a constitutional policy like the Harvard plan, the Sixth Circuit began by comparing the law school's policy to the Harvard plan.¹³³ The court found the law school's consideration of race in its admissions policy "virtually indistinguishable from the Harvard plan Justice Powell approved in *Bakke*."¹³⁴ In particular, the court noted that the law school maintains a single admissions program with no separate process for minority applicants.¹³⁵ The law school's admissions policy "considers more than an applicant's race or ethnicity" as a component of diversity, taking into consideration factors such as leadership, work experience, unique talents or interests, and the student's letters of recommendation.¹³⁶

The Sixth Circuit rejected the plaintiff's contention that the law school's pursuit of a "critical mass" of minority students is the "functional equivalent" of a quota system because the law school does not have fixed goal or target.¹³⁷ In addition, the Sixth Circuit dismissed the reasons offered by the District Court in determining that the consideration of race and ethnicity was not narrowly tailored.¹³⁸ After rejecting the District Court's rationale, the Sixth Circuit upheld the University of Michigan's law school admissions policy as narrowly tailored to achieve the compelling interest of a diverse student body.¹³⁹ The court concluded, "the Law School intends to consider race and ethnicity to achieve a diverse and robust student body only until it becomes possible to enroll a 'critical mass' of under-represented minority students through race-neutral means."¹⁴⁰

The strongly worded dissent of Judge Boggs rejected the majority's notion that Justice Powell's educational diversity rationale in *Bakke* was binding on the Sixth Circuit.¹⁴¹ Instead, the dissent addressed the diversity rationale on the merits using the Supreme Court's holding in *Adarand* to determine if the use of race in admissions satisfies a compelling government interest and if the law school's admissions policy was narrowly tailored to serve that interest.¹⁴² The dissent concluded that student body diversity was not a compelling government interest based upon the lack of an adequate definition of diversity¹⁴³ and a logical stopping point for the use of racial preferences at

133. *See id.* at 746-47.

134. *Id.* at 747.

135. *Id.* at 746.

136. *Id.* at 747.

137. *Id.* at 747-48.

138. *Id.* at 749-52. The District Court held that

(1) the Law School did not define "critical mass" with sufficient clarity; (2) the apparent lack of a time limit on the Law School's consideration of race and ethnicity; (3) the admissions policy was "practically indistinguishable" from a quota system; (4) the Law School did not have a logical basis for considering the race and ethnicity of African-Americans, Native Americans and Puerto Ricans; (5) the Law School did not "investigate alternative means for increasing minority enrollment."

Id. at 749 (quoting *Grutter*, 137 F. Supp. 2d at 850-52).

139. *Id.* at 752.

140. *Id.*

141. *See id.* at 776-88 (Boggs, J., dissenting).

142. *Id.* at 788.

143. *Id.* at 789-93.

the University of Michigan's law school.¹⁴⁴ In deciding that the admissions policy was not narrowly tailored, the dissent viewed the admissions policy as a quota system.¹⁴⁵ In addition, the dissent criticized the law school for failing to seek race-neutral alternatives and consider factors other than race and ethnicity that contribute to diversity.¹⁴⁶

In addition to the conflicting opinions between the majority and dissent on the issue of affirmative action in admissions, they were also sharply divided on the procedural context in which the Sixth Circuit heard both the University of Michigan cases.¹⁴⁷ In a procedural appendix to his dissenting opinion, Judge Boggs asserts that the majority manipulated the court's scheduling and procedures to ensure a favorable ruling for the law school.¹⁴⁸ In particular, he alleges that the majority failed to hear the case until two judges critical of affirmative action had gone into semi-retirement and were unable to hear the case.¹⁴⁹ A lengthy concurrence by Judge Nelson refutes Judge Boggs's allegations and describes them as "nothing short of shameful."¹⁵⁰

On the heels of this bitterly divided Sixth Circuit opinion, controversy surrounded the issue of whether the Supreme Court would decide to hear the University of Michigan cases together, separately, or not at all. In their petition for certiorari, the plaintiffs for *Grutter v. Bollinger* stated, "[T]here can be no serious doubt that the use of racial preferences in university admissions presents an issue of great national importance."¹⁵¹ The plaintiffs for *Gratz v. Bollinger*—the undergraduate case—asked the Supreme Court to take up their case despite the fact that the Sixth Circuit was still in the process of deciding it.¹⁵² Both plaintiffs argued that the two cases taken together would give the Court a "more substantial record within which to consider and rule upon the common principles."¹⁵³ On the other hand, the University of Michigan argued that the Supreme Court should let the Sixth Circuit's ruling stand.¹⁵⁴

144. *Id.* at 793-95.

145. *Id.* at 800-03.

146. *Id.* at 806-08.

147. *See id.* at 810-14 ("Procedural Appendix" written by Judge Boggs); *id.* at 752-58 (concurring opinion of Judge Nelson responding to the "Procedural Appendix").

148. *See Grutter*, 288 F.3d at 810-14. *See also* Peter Schmidt, *High Court Gets Case on Affirmative Action*, CHRON. HIGHER EDUC., Sept. 13, 2002, at A25, available at <http://chronicle.com/weekly/v49/i03/03a02501.htm>.

149. *See Grutter*, 288 F.3d at 812 n.44. Judge Boggs's assertions received the attention of U.S. Representative, F. James Sensenbrenner, Jr., chairman of the House of Representatives Judiciary Committee, who, in his capacity to review judicial misconduct, asked the Sixth Circuit to provide the committee with documents related to the court's handling of the case. *See Key Congressman to Examine U.S. Appeals Court's Procedures in Deciding U. of Michigan Case*, CHRON. HIGHER EDUC., July 26, 2002, at A25, available at <http://chronicle.com/weekly/v48/i46/46a02502.htm>.

150. *Grutter*, 288 F.3d at 753.

151. Schmidt, *supra* note 148, at A25.

152. Peter Schmidt, *Plaintiffs in Michigan Undergraduate-Admissions Case Ask U.S. Supreme Court for Speedy Recovery*, CHRON. HIGHER EDUC., Oct. 2, 2002, available at <http://chronicle.com/daily/2002/10/2002100201n.htm>.

153. *Id.*

154. Michael Arnone, *U. of Michigan Will Ask U.S. Supreme Court Not to Hear Appeal of Affirmative-Action Ruling*, CHRON. HIGHER EDUC., Sept. 20, 2002, available at

On December 2, 2002, the Supreme Court announced that it would hear both of the University of Michigan cases.¹⁵⁵ In the two months that followed, the Court received an abundance of amicus briefs both supporting the plaintiffs and defending the University of Michigan.¹⁵⁶ The Court is expected to hear oral arguments on April 1, and render a decision by July.¹⁵⁷ While the public eagerly awaits the Court's decision, this Note does not seek to predict the Court's decision in the University of Michigan cases. Instead, this Note provides an analysis of the current federal appellate case law solely as background for considering whether percentage plans are an effective substitute for affirmative action.

3. The Split of Authority Among the Circuits

The four cases appearing before the U.S. Court of Appeals on the use of affirmative action in college admissions policies illustrate the various ways of interpreting the Supreme Court's fractured opinion in *Bakke*. In *Hopwood*, the Fifth Circuit dismissed student body diversity as a compelling government interest, and concluded that the only compelling government interest approved by the Supreme Court was remedying past discrimination.¹⁵⁸ Alternatively, the Eleventh Circuit in *Johnson* left the question of whether student body diversity is a compelling government interest unanswered, and instead found that the admissions policy was not narrowly tailored to serve a compelling government interest.¹⁵⁹ The Ninth Circuit in *Smith* upheld an admissions policy by combining Justices Powell and Brennan's opinions, and reasoning that

<http://chronicle.com/daily/2002/09/2002092001n.htm>. The thirty-eight education associations, who cosigned an amicus brief supporting the University of Michigan before the Sixth Circuit, also support the University's current request that the Supreme Court not hear the case. *Id.* Sheldon E. Steinbach, Vice President and General Counsel of the American Council on Education, believes it would be foolish for the University to risk losing their win in the appellate court. *Id.* "They have a Big Ten victory, and there's no reason to go for an NCAA championship." *Id.*

155. Peter Schmidt, *U.S. Supreme Court Agrees to Hear Two Key Affirmative-Action Cases from Michigan*, Dec. 2, 2002, available at <http://chronicle.com/daily/2002/12/2002120206n.htm>.

156. See Peter Schmidt, *Bush Briefs in Michigan Cases Leave Little Room to Use Race in Admissions*, CHRON. HIGHER EDUC., Jan. 31, 2003, at A23; Peter Schmidt, *Dozens of Supreme Court Briefs Show Widespread Support for U. of Michigan's Admissions Policies*, CHRON. HIGHER EDUC., Feb. 18, 2003, available at <http://chronicle.com/daily/2003/02/2003021801n.htm>. The most notable of the briefs on behalf of the plaintiffs were the briefs by the Bush administration urging "an extremely narrow view of when colleges should be able to consider race in admissions." Schmidt, *Bush Briefs*, *supra*, at A23. Over sixty briefs were submitted defending the University of Michigan. Schmidt, *Dozens of Supreme Court Briefs*, *supra*, available at <http://chronicle.com/daily/2003/02/2003021801n.htm>. The authors of these briefs included members of Congress, attorney generals of twenty-two states, sixty-four Fortune 500 companies, twenty-nine former top-ranking officers and civilian leaders of the military, civil rights groups, public and private colleges, and education associations. See *id.*

157. Schmidt, *Dozens of Supreme Court Briefs*, *supra* note 156.

158. See *supra* Part I.A.2.a.

159. See *supra* Part I.A.2.b.

student body diversity was a compelling government interest.¹⁶⁰ Finally, the Sixth Circuit upheld the University of Michigan's law school admissions policy based upon the compelling state interest to preserve diversity; however, the Sixth Circuit failed to determine whether the admissions policy utilized by the University of Michigan's undergraduate program is constitutional.¹⁶¹ The wide range of holdings among just four circuits of the U.S. Court of Appeals exhibits the lack of clarity that will continue to plague this issue.¹⁶² Accordingly, it is imperative that the Supreme Court reconsiders this issue and clarifies once and for all that student body diversity is a compelling government interest capable of surviving strict scrutiny so long as the admissions policy is narrowly tailored to serve that interest.

B. The Ballot Initiative and the Executive Order

In addition to the courts, other attacks on affirmative action have taken two powerful political forms in recent years: the ballot initiative and the executive order. In 1996, California voters were the first to adopt a ballot initiative to eliminate discrimination and "preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."¹⁶³ The voters of the state of Washington adopted a similar initiative two years later.¹⁶⁴ While the ballot initiative is often referred to as the most direct form of democracy, some question whether it is an accurate measure of public opinion on issues, especially in the area of civil rights.¹⁶⁵

Opponents of ballot initiatives believe that they are often successful because their language misleads and confuses voters.¹⁶⁶ In civil rights initiatives, the wording is often "politically compelling but ambiguous language of liberty and equality," so voters are not aware of the total impact their vote will have.¹⁶⁷ Despite their support for these initiatives, data shows that the majority of Americans support the preservation of diversity.¹⁶⁸ According to a national survey by the American Council on Education,

160. See *supra* Part I.A.2.c.

161. See *supra* Part I.A.2.d.

162. See Sara Hebel, *U. of Georgia Won't Ask Supreme Court to Reverse Decision Striking Down Use of Race in Admissions*, CHRON. HIGHER EDUC., Nov. 12, 2001, available at <http://chronicle.com/daily/2001/11/2001111201n.htm> (explaining that University of Georgia officials believed that the University of Michigan lawsuits would "present a stronger defense of racial preferences before the Supreme Court").

163. Cal. Prop. 209 (Nov. 5, 1996), available at <http://vote96.ss.ca.gov/Vote96/html/BP/209text.htm> (last visited Oct. 25, 2002). Proposition 209, once adopted by voters in California, became a part of the California Constitution. See CAL. CONST. Art. I, § 31.

164. Wash. I-200 (Nov. 3, 1998), available at http://www.secstate.wa.gov/elections/1998/i200_text.aspx (last visited Oct. 25, 2002). The measure is now codified at Wash. Rev. Code § 49.60.400(1) (1998).

165. See, e.g., Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AMER. J. POL. SCI. 245, 246 (Jan. 1997) (arguing that the political majority has used "its direct legislative powers to deprive political minorities of their civil rights").

166. See, e.g., *id.*

167. *Id.* at 249.

168. See BUSINESS-HIGHER EDUCATION FORUM, *INVESTING IN PEOPLE: DEVELOPING ALL OF AMERICA'S TALENT ON CAMPUS AND IN THE WORKPLACE* 31-32 (2002), available at

88% of Americans agreed with having “students of different races, cultures, and backgrounds in elementary, secondary, and higher education.”¹⁶⁹ Also, “[m]ore than three-quarters of the respondents agreed with the statement that universities should be allowed to take action to ensure diversity in their student bodies.”¹⁷⁰

Given that the overwhelming majority of the public believes that ensuring diversity at colleges is important, unilateral efforts to end affirmative action in college admissions should be viewed as even more suspect than ballot initiatives. In 1999, the Governor of Florida, Jeb Bush, promulgated such a unilateral effort by executive order.¹⁷¹ The executive order prohibited “the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education.”¹⁷²

In addition to the courts, these two political actions, referenda and executive orders, have eliminated the use of affirmative action in university admissions in California, Florida, and Washington. Higher education leaders have become increasingly concerned that the racial composition of their campuses will be drastically changed in the absence of affirmative action.¹⁷³ Therefore, university officials are fighting for affirmative action and other ways to preserve diversity on their campuses to counteract the efforts to eliminate these programs by the courts in Texas and Georgia, the voters in California and Washington, and the governor in Florida.¹⁷⁴ Before examining the percentage plans in California, Florida, and Texas, it is important to understand why preserving race as a component of diversity is such an important goal that universities are searching for creative ways to maintain racial diversity in the absence of affirmative action.

II. THE IMPORTANCE OF PRESERVING STUDENT BODY DIVERSITY

Over the last ten years, the minority population in the United States increased by thirty-five percent.¹⁷⁵ The proportion of students of color attending college, however, “continue[s] to lag behind” the proportion of whites.¹⁷⁶ In 2000, 28% whites completed a bachelor’s degree compared to only 17% of African Americans and 11% of Hispanics.¹⁷⁷ According to the Educational Testing Service, “[a]mong minority groups, only Asian youth will be attending college in numbers roughly proportionate to their share of the U.S. college-age population.”¹⁷⁸ When releasing a recent report, *Investing in People: Developing All of America’s Talent on Campus and in the Workplace*, a coalition of corporate chief executives and university presidents declared, “[t]he

http://www.acenet.edu/bookstore/pdf/investing_in_people.pdf (last visited Oct. 25, 2002) [hereinafter INVESTING IN PEOPLE].

169. *Id.* at 32.

170. *Id.*

171. Fla. Exec. Order No. 99-281 (Nov. 9, 1999), available at http://www.state.fl.us/eog/executive_orders/1999/november/eo99-281.html (last visited Oct. 25, 2002).

172. *Id.* § 3.

173. Cohen, *Coloring the Campus*, *supra* note 1, at 48.

174. *Id.*

175. INVESTING IN PEOPLE, *supra* note 168, at 13.

176. *Id.* (referring specifically to African American and Hispanic students).

177. *Id.*

178. *Id.* at 26.

United States faces a social and economic crisis if diversity in higher education isn't drastically improved."¹⁷⁹

This report outlined several ways in which ethnic and racial diversity benefits democratic society, learning, and business.¹⁸⁰ First, students' exposure to diverse perspectives on campus enhances their participation in democratic society, including involvement in community and volunteer efforts, politics, and activities that promote racial understanding.¹⁸¹ Second, students who are exposed to diversity are better critical thinkers and have greater social and interpersonal skills than students who are not exposed to diversity.¹⁸² Finally, many of these benefits are displayed in the work environment where college graduates exposed to diverse perspectives exhibit an "improved ability to think critically, to understand issues from different points of view, and to collaborate harmoniously with co-workers from a range of cultural backgrounds."¹⁸³

It is important to remember that the benefits of learning in a diverse environment "accrue to both white and minority students who come into contact with people of diverse backgrounds and with diverse ideas and information."¹⁸⁴ In addition, education of all people benefits the national economy. The Educational Testing Service "estimates that 'if Hispanics and African Americans had the same education and commensurate earnings as whites,' there would be 'an upsurge in national wealth' of \$113 billion annually for African Americans and \$118 billion for Hispanics."¹⁸⁵ In the wake of September 11, Robert T. Jones, the President of the National Alliance of Business, has argued, "[d]iversity is another form of national security. . . . As we fight to eradicate terrorism and maintain safety on our shores, we must protect our economic stability by investing in our most valuable resource, our diverse citizenry."¹⁸⁶

The report offers several recommendations for investing in a diverse society, including three recommendations targeted at institutions of higher learning.¹⁸⁷ First, the report challenges policy makers to "increase financial aid to students who need it."¹⁸⁸ The report illustrates the importance of this recommendation by stating, "a low income student who scores in the top quartile on standardized tests is no more likely to attend

179. Alex P. Kellogg, *Lack of Diversity in Higher Education Could Result in Worker Shortage, Report Says*, CHRON. HIGHER EDUC., Jan. 11, 2002, available at <http://chronicle.com/daily/2002/01/2002011101n.htm> (last visited Jan. 12, 2002); see also INVESTING IN PEOPLE, *supra* note 168.

180. INVESTING IN PEOPLE, *supra* note 168, at 14.

181. *Id.* at 29-30.

182. *Id.* at 30-31.

183. *Id.* at 14.

184. *Id.* at 31. See also AAU Diversity Statement on the Importance of Diversity in University Admissions, Association of American Universities Website (Apr. 14, 1997), available at <http://www.aau.edu/issues/Diversity4.14.97.html> (last visited Oct. 5, 2002) (A statement by over sixty leading research universities expressing their "strong support for continued attention to diversity in university admissions").

185. *Id.* at 15.

186. Press Release, America Council on Education, Corporate, Higher Education Leaders Warn: U.S. Must Focus on Diversity or Face Decline in Competitiveness (Jan. 10, 2002), available at http://www.acenet.edu/news/press_release/2002/01january/bhef.html.

187. See INVESTING IN PEOPLE, *supra* note 168, at 37-42.

188. *Id.* at 39.

college than a high-income student who scores in the lowest quartile.”¹⁸⁹ Second, the report challenges university officials to “create campus environments that value diversity and provide support that helps all students complete their studies.”¹⁹⁰ Third, the report challenges university officials to “intensify efforts to develop and implement thoughtful, innovative, and results-orientated approaches to enrolling greater numbers of minority students, despite the uncertainty resulting from recent court rulings and referenda.”¹⁹¹ It is with these recommendations and the uncertain future of affirmative action in higher education admissions in mind that the rest of this Note evaluates the viability of percentage plans as a race-neutral approach to ensuring diversity on college campuses in California, Florida, and Texas.

III. ANALYSIS OF PERCENTAGE PLANS IN CALIFORNIA, FLORIDA, AND TEXAS

In light of the important benefits that a diverse student body brings to a college education, “[b]arring these institutions from considering race directly . . . [has brought] forth ingenious efforts to minimize the consequent loss of diversity by adopting seemingly race-neutral policies.”¹⁹² One of the race-neutral strategies employed by California, Florida, and Texas has been percentage plans, which guarantee admission to a state university to students graduating within a certain% of their high school class.¹⁹³ The remaining sections of this Note individually evaluate each of these percentage plans by considering the impetus behind the adoption of the plan and the plan’s impact on enrollment of students of color compared to the enrollment under affirmative action. In addition, this analysis will consider whether the percentage plan has been successful recruiting students of color and whether the state has needed to implement additional programs to ensure diversity in the absence of affirmative action.

A. California’s Four Percent Plan

The University of California was forced to abandon affirmative action in its admissions policies when the voters of California enacted Proposition 209, which forbade the state to discriminate or grant preferential treatment on the basis of race.¹⁹⁴ The year after Proposition 209 was enacted, enrollment of African American students dropped 17% in the entire University of California system, and more than 50% at the University’s most selective campuses of Berkeley and Los Angeles.¹⁹⁵ In order to maintain the diversity of its student body, the Board of Regents adopted a plan to admit all students who graduated within the top 4% of their high school class. While qualifying students were not guaranteed admission to the school of their choice, they

189. *Id.*

190. *Id.* at 40.

191. *Id.* at 41.

192. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 289 (1998).

193. *See infra* Part III.A-C.

194. For an up-to-date chronology of the events following the passing of Proposition 209, see the Affirmative Action and Diversity Project Website, available at <http://aad.English.ucsb.edu/pages/Prop-209.html> (last visited Nov. 15, 2001).

195. Cohen, *Coloring The Campus*, *supra* note 1, at 49.

were guaranteed admission to one of eight campuses in the University system.¹⁹⁶ At the announcement of the Four Percent Plan, California's governor, Gray Davis, stated, "[w]hat we're going to get now are high achievers with guts and heart, people who have flourished maybe not in the best of surroundings."¹⁹⁷

In the first year of the Four Percent Plan, the effect on minority enrollment was mixed. The admission of African American, Hispanic, and American Indian students accounted for 18.6% of in-state students, which was lower than the 18.8% admitted in 1997 under affirmative action.¹⁹⁸ While the number of applications from African American students did increase, African Americans still represented only 4% of the total number of applications compared to their 7% share of California's high school graduates.¹⁹⁹ The 2002 enrollment levels for students of color are 19.1%, which finally surpasses the number admitted under affirmative action.²⁰⁰ While some critics of affirmative action declare these numbers a success,²⁰¹ it is difficult to tell whether the increase is a direct result of the Four Percent Plan or the University's increased outreach and recruitment of students of color.

After administrative problems prevented many students at some high schools from taking advantage of the Four Percent Plan during its first year,²⁰² the University proposed several creative alternatives to increase its enrollment of students from high schools in low-income areas. The Board of Regents approved a new program extending the Four Percent Plan to students who rank between 4 and 12.5% in their high school class.²⁰³ These students would be offered provisional admission to a U.C. campus contingent upon their completion of an approved two-year course of study at a community college.²⁰⁴ According to the Office of the President's website, this program will be instituted as soon as funding for the program is secured.²⁰⁵

In September 2001, the Board of Regents gave preliminary approval to a plan broadening their admissions criteria for all applicants and eliminating admissions decisions based entirely on academic factors.²⁰⁶ The current admissions process uses a

196. *California's Four Percent Plan Results in Record Number of Black, Hispanic Applicants at Berkeley*, BLACK ISSUES IN HIGHER EDUC., Mar. 1, 2001, at 14.

197. Ben Gose, *Obstacles Hinder U. of California in Plan to Admit Top High-School Graduates*, CHRON. HIGHER EDUC., Jan. 12, 2001, at A25, available at <http://chronicle.com/weekly/v47/i18/18a02501.htm>.

198. Peter Schmidt, *U. of California Officials Credit Admissions Change for Increase in Minority Enrollments*, CHRON. HIGHER EDUC., Apr. 5, 2001, available at <http://chronicle.com/daily/2001/04/2001040505n.htm>.

199. *California's Four Percent Plan Results in Record Number of Black, Hispanic Applicants at Berkeley*, *supra* note 196, at 14.

200. Piper Fogg, *U. of California, for First Time, Admits More Minority Student than It Did Under Affirmative Action*, CHRON. HIGHER EDUC., Apr. 8, 2002, available at <http://chronicle.com/daily/2002/04/2002040801n.htm>.

201. *Id.*

202. Gose, *supra* note 197, at A25.

203. *Id.*

204. *Id.*

205. See University of California Office of the President, *What's New in UC Admissions?*, available at <http://www.ucop.edu/news/expanding/new.htm> (last visited Dec. 11, 2001).

206. Jeffrey Selingo, *U. of California Regents Poised to Adopt Broader Admissions Criteria*, CHRON. HIGHER EDUC., Nov. 15, 2001, available at <http://chronicle.com/daily/2001/11/>

two-tiered approach where one-half to three-quarters of applicants are selected based solely on academic criteria while the rest are accepted using both academic and other factors, including special talents and experiences with adversity.²⁰⁷ The new comprehensive plan would judge all applicants based on “a single set of criteria”²⁰⁸ including academic factors and personal attributes such as “success in overcoming economic and educational disadvantages.”²⁰⁹ Although some members of the Board of Regents challenged the revised admissions plan, it was approved with the addition of a statement that the policy prohibits the use of racial preferences in reviewing applications.²¹⁰

In the spring of 2002, the regents began considering a proposal to eliminate the Scholastic Aptitude Test I (“SAT”) as a requirement of admission based on a recommendation by the President of the University of California, Richard C. Atkinson.²¹¹ Atkinson’s concerns about reliance on the SAT in admissions culminated with a visit to his granddaughter’s private school where he discovered twelve-year-old students were spending hours each month studying verbal analogies.²¹² He concluded, “America’s overemphasis on the SAT is compromising our educational system.”²¹³ While critics argue that colleges “need a common yardstick in an era of grade inflation,”²¹⁴ Atkinson believes that the university should “look at applicants in a comprehensive, holistic way” rather than “narrowly defined quantitative formulas” based on standardized test scores.²¹⁵ In addition, “[a]n intended effect of the change is to attract more minority students.”²¹⁶ Given the mean SAT for African Americans in the year 2000 was 198 points below that of whites, more underrepresented students of color may be admitted to U.C. campuses without the SAT as a central requirement in the admissions process.²¹⁷

While these efforts created a gain in the number of students of color admitted to the University of California system over affirmative action levels, Four Percent Plan applicants are still only guaranteed admission to one of the university’s eight

2001111502n.htm.

207. *Id.*

208. *Id.*

209. Barbara Whitaker, *University of California Moves to Widen Admissions Criteria*, N.Y. TIMES, Nov. 15, 2001, at A26.

210. Selingo, *supra* note 206.

211. Andrew Goldstein, *Is This the End for the SAT?: A Call for the University of California to Drop the 75-year-old Test Could Have Far-reaching Effects*, TIME, Feb. 26, 2001, at 62. A new test may be in effect in 2006 as the University of California designs a new achievement test to evaluate prospective students based upon curriculum taught in California high schools. Wendy Lee, *UC Readies Curriculum-based SAT Replacements for 2006*, DAILY CALIFORNIAN, Feb. 21, 2002, available at <http://www.dailyca.com> (last visited Oct. 25, 2002).

212. *Id.*

213. *Id.*

214. *Id.*

215. Richard C. Atkinson, *Standardized Tests and Access to American Universities*, The 2001 Robert H. Atwell Distinguished Lecture delivered at the 83d Annual Meeting of the American Council on Education (Feb. 18, 2001), available at <http://www.ucop.edu/ucophome/commerv/sat/speech.html> (last visited Oct. 27, 2002).

216. Goldstein, *supra* note 211, at 62.

217. *See id.*

campuses. Thus, minority students who once qualified for admission at the top U.C. campuses before the elimination of racial preferences have been redistributed to less selective campuses.²¹⁸ At Berkeley, the university's most selective campus, enrollment of African American students fell 57% and Hispanic students dropped 34% between 1997 and 1999.²¹⁹ At Riverside, the university's least exclusive campus, admissions during the same time period rose 54% for African American students and 66% for Hispanic students.²²⁰ Therefore, the numbers suggest that the absence of affirmative action has led to a two-tiered system in the university.²²¹ Some critics of the current system argue that the declining numbers of students of color at the upper levels impact the whole system.²²² In particular, students are deprived the opportunity to learn in the type of diverse environment they will experience when they graduate.²²³

The most recent enrollment figures for 2002 still have the most competitive campuses admitting fewer students of color than those admitted under affirmative action.²²⁴ In particular, only 15.9% of Berkeley's students are students of color today compared to 22% before affirmative action was prohibited in California.²²⁵ In addition, the first two years of the program helped Hispanic students and students from rural schools more than African American students according to an analysis by the university system's Board of Regents.²²⁶ These recent findings indicate that California's high schools may be less segregated than state officials originally realized.²²⁷ All groups except for African American and American Indian students gained in enrollment under the Four Percent Plan.²²⁸ Students admitted from rural schools improved from 6.4% of the traditional applicant pool to 14% under the percentage plan.²²⁹ Hispanic students comprised 17.3% of students guaranteed admission under the percentage plan compared to 15.7% of the traditional pool.²³⁰ However, only 2.8% of African American students were automatically admitted under the percentage plan compared to 4.7% of the overall statewide pool.²³¹

While the University of California system has attempted to preserve diversity at its campuses by implementing a percentage plan as a race-neutral alternative, the university is still not satisfied with the extent of its results. University officials continue to investigate and implement additional ways of impacting diversity on their campuses

218. Adam Cohen, *When the Field Is Level*, TIME, July 5, 1999, at 30.

219. *Id.*

220. *Id.*

221. Barbara Whitaker, *Minority Rolls Rebound at University of California*, N.Y. TIMES, Apr. 5, 2000, at A16.

222. *See, e.g., id.*

223. Cohen, *When the Field Is Level*, *supra* note 218, at 33.

224. Fogg, *supra* note 200.

225. *Id.*

226. Jeffrey Selingo, *California Policy Most Helps Hispanic and Rural Applicants*, CHRON. HIGHER EDUC., May 31, 2002, at A21, available at <http://chronicle.com/weekly/v48/i38/38a02102.htm>.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

in the absence of affirmative action.²³² In a short time, the university has expanded its percentage plan, revised its admissions policy, and contemplated dropping the SAT requirement.²³³ These innovative efforts exhibit that the University of California is still struggling to find a race-neutral alternative that generates the same diversity results as affirmative action.

B. Florida's Talented 20 Program

In 1999, Florida eliminated affirmative action and the use of racial preferences by an executive order as part of Governor Bush's One Florida Initiative.²³⁴ At the same time, Florida instituted the "Talented 20" program, guaranteeing admission to a state university in Florida to students in the top 20% of their high school senior class.²³⁵ The program also provides a twenty million dollar increase in the state's need-based financial aid—an increase of 43 percent.²³⁶ Remarking that Florida's state university system is now 32% minority, Governor Bush announced that it was time to replace race-based admissions policies with achievement-based ones, "and that this can be done while still improving and enhancing the diversity of [the] university system."²³⁷

Governor Bush's statement that the state university system would be able to sustain its student body diversity under the percentage plan was challenged by enrollment figures a year after the plan went into effect.²³⁸ In the last year students were admitted using racial preferences, African American students comprised nearly 12% of the freshman class at the University of Florida, the state's most elite public university.²³⁹ In 2001, one year later, the freshman class was only 6 to 7% African American under the state's new percentage plan.²⁴⁰ The Provost believed the decline would have been worse if the university had not changed its application process and increased minority recruitment efforts.²⁴¹ At the other public universities, minority enrollments stayed the same or were slightly higher.²⁴²

The most recent enrollment figures for 2002 show that the proportion of minority

232. See *supra* notes 202-16 and accompanying text.

233. See *id.*

234. Fla. Exec. Order 99-281 (Nov. 9, 1999). See also STATE OF FLORIDA GOVERNOR'S OFFICE, GOVERNOR BUSH'S EQUITY IN EDUCATION PLAN 12 (Nov. 9, 1999), available at www.flgov.com.

235. One Florida Initiative—Education (2002), available at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/education.html (last visited Oct. 25, 2002).

236. GOVERNOR BUSH'S EQUITY IN EDUCATION PLAN, *supra* note 234, at 12.

237. *Id.* at 10. However, "the numbers are skewed by Florida A&M University, the historically black university that in 1998 claimed a 99% minority student body. In contrast, the state's oldest and most selective college, the University of Florida, is only 5.5% black and 9% Hispanic." Grace Frank, *Regents Likely to OK One Florida*, TAMPA TRIB., Feb. 2, 2000, available at 2000 WL 5572954.

238. See Associated Press, *Ban Likely to Cut Black Enrollment*, Aug. 12, 2001, available at 2001 WL 26178842.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

students has remained unchanged.²⁴³ After the dramatic declines in minority enrollment during the first year of the program, the University of Florida's enrollment of African American students increased by 43 percent.²⁴⁴ Among Florida's other public schools, Florida Gulf Coast University increased minority enrollment by 58% (144 students); Florida Atlantic University increased 13% (947 students); and Florida International University also increased 13% (2,256 students).²⁴⁵ However, Florida A&M University, the New College of Florida, and the University of West Florida all experienced declines in enrollment of students of color, by 10 percent, 6 percent, and 18 percent, respectively.²⁴⁶

The President of the University of Florida, Charles E. Young, was a strong critic of Governor Bush's decision to end affirmative action.²⁴⁷ Young issued a statement responding to the release of the 2002-2003 enrollment figures by the Governor's Office; he said: "The numbers speak for themselves and underscore our commitment to diversity. We intend to continue these efforts and hope we will be even more successful in bringing minority students to campus in years to come."²⁴⁸ The university also attributed the increases to a "variety of techniques, including: fostering closer ties with three low-performing high schools and offering scholarships to their top graduates; expanding the staff of the admissions office; holding student-recruitment conferences; offering additional scholarships; and purchasing a telephone system that automatically places calls to prospective students."²⁴⁹

While the impact on enrollment may not have been as dramatic as critics expected, they still have concerns with the Talented 20 program. A report by the U.S. Commission on Civil Rights charged that the plan did not account for the poor quality of the state's K-12 schools.²⁵⁰ Because of inadequate course offerings at their high schools, students graduating from low-performing schools might not have the nineteen pre-collegiate credits required by the state university system.²⁵¹ However, the second component of Governor Bush's Equity in Education Plan may help to alleviate some of

243. See Vincent Kiernan, *Affirmative-Action Rollback in Florida Has Not Hurt Minority Admissions, State Figures Indicate*, CHRON. HIGHER EDUC., Sept. 9, 2002, available at <http://chronicle.com/daily/2002/09/2002090901n.htm>.

244. *Id.* See also Press Release, Lt. Governor Brogan Announces Increase In Minority Enrollment at the University of Florida (Sept. 6, 2002), available at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/enrollment-9-6-02.html (last visited Oct. 4, 2002). For a detailed analysis of the enrollment figures by the Governor's Office, see State University System Enrollment Statistics 2002-2003, available at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/documents/minority_enrollment.xls (last visited Oct. 4, 2002).

245. Kiernan, *supra* note 243.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. U.S. COMM'N ON CIVIL RIGHTS, TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS IN HIGHER EDUCATION: ARE THEY EFFECTIVE SUBSTITUTES FOR AFFIRMATIVE ACTION?, ¶ 13 (2000), available at www.usccr.gov/percent/stmnt.htm [hereinafter TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS].

251. *Id.*

the disparity between the state's schools.²⁵² The Governor's K-12 initiatives are "designed to enhance performance among minority and low-income students in [Florida's] failing schools."²⁵³ These initiatives include funding for mentoring and tutoring programs and funding for every tenth grade student to take the preliminary SAT ("PSAT").²⁵⁴ In addition, the state plans to expand the availability of Advanced Placement ("AP") courses and college preparatory courses as well as to create alliances with colleges and universities.²⁵⁵ These initiatives were implemented at the same time affirmative action was replaced with Florida's Talented 20 program.²⁵⁶ Therefore, they will not have an impact on the quality of high schools that college-bound students are attending.²⁵⁷

Even in its early stages, it was evident that the Talented 20 program implemented in Florida was not as well designed as the percentage plan in California. Administratively, the program has been criticized for not clearly outlining how students can participate and whether they will have to pay multiple application fees if they are applying to more than one state institution.²⁵⁸ Like the percentage plan in California, Florida's program has been attacked for guaranteeing students a spot at a state university not the university of the student's choice.²⁵⁹ Most importantly, Florida's plan is flawed by the poor quality of public schools that many students of color attend. Although the governor is implementing changes to reduce the inequities among Florida's public schools, current students of color will not benefit from these changes. Thus, they may not be eligible to take advantage of the percentage plan, which severely impedes the success of the plan as an alternative to affirmative action.

C. The Texas Plan

Following the Fifth Circuit's ruling in *Hopwood v. Texas*,²⁶⁰ minority enrollment at the state's flagship universities, the University of Texas-Austin and Texas A&M, plummeted. At the University of Texas-Austin, the number of African American freshmen enrolled dropped 34 percent, and the number of Latino freshman fell 4.3 percent.²⁶¹ At Texas A&M, the number of African American freshman dropped 29 percent, and the number of Latino freshman fell 13 percent.²⁶² In order to curtail these declining enrollments, the state implemented the "Texas Plan," which guaranteed admission to any Texas state university for students graduating in the top 10% of their high school class.²⁶³ The Texas% plan is unique because it guarantees admission to the

252. See GOVERNOR BUSH'S EQUITY IN EDUCATION PLAN, *supra* note 234, at 7-10.

253. *Id.* at 7.

254. *Id.* at 7, 9.

255. *Id.* at 8-9.

256. See *id.*

257. See TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS, *supra* note 250, at ¶ 13.

258. *Id.* at ¶ 18.

259. *Id.* at ¶ 16. See also GOVERNOR BUSH'S EQUITY IN EDUCATION PLAN, *supra* note 233, at 12-15.

260. 78 F.3d 932 (8th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

261. Judy Mann, *Bush on Bush: A Tall Tale from Texas*, WASH. POST, Oct. 25, 2000, at C15.

262. *Id.*

263. Tex. Educ. Code § 51.803 (2000).

state university of the student's choice rather than admission to *one* of the state's universities like the Florida and California plans.²⁶⁴

The 1999 figures show a "negligible impact" for the percentage plan at the University of Texas-Austin.²⁶⁵ Respectively, African American and Hispanic students account for 14 and 4% of enrollment, as they did in 1996 before racial preferences were eliminated.²⁶⁶ A report by the U.S. Commission on Civil Rights stated that in addition to the percentage plan, the increase in diversity could be attributed to various factors aimed at encouraging minority students to attend the University of Texas-Austin.²⁶⁷ Some of these efforts included alumni-sponsored minority scholarships, new scholarships targeted at students in the top 10% of their graduating class, and a law requiring that posters explaining the top 10% plan and how to apply be displayed in every high school.²⁶⁸

Both Texas A&M and the University of Texas have attempted to increase utilization of the percentage plan by students of color. The University of Texas has offered scholarships to students from seventy high schools in heavily African American and Latino areas.²⁶⁹ Texas A&M tried to go even further by conditionally approving a plan that would offer admission to students in the top 20% of 250 low-performing high schools as long as those students meet the university's minimum admissions standards for courses and test scores.²⁷⁰ Opponents, however, charge that the plan is "an effort to circumvent *Hopwood*" by using low-performing schools as a substitute for high schools comprised of mostly minorities.²⁷¹ Thus, these opponents urged the Attorney General to declare it illegal.²⁷² The designers of the plan argue, "the schools were identified without taking race into account."²⁷³ Instead, they were chosen using a combination of eight factors including high dropout rates, limited English proficiency, and low passage on the statewide achievement test.²⁷⁴ While the plan was awaiting review by the State Attorney General to determine whether it would withstand *Hopwood*-level scrutiny, the university decided to withdraw the program.²⁷⁵ The

264. Jeffrey Selingo & Patrick Healy, *U.S. Civil-Rights Panel Blasts Statewide Admissions Policies Based on Class Rank*, CHRON. HIGHER EDUC., Apr. 21, 2000, at A40, available at <http://chronicle.com/weekly/v46/i33/33a04001.htm>.

265. "Percentage Plans" for College Admissions, American Council on Education, available at www.acenet.edu (last visited Jan. 23, 2002).

266. *Id.* See also University of Texas-Austin, Office of Admissions, Implementation and Results of HB 588, available at www.texas.edu/student/research/reports/ (last visited Nov. 15, 2001).

267. TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS, *supra* note 250, at ¶ 8.

268. *Id.*

269. Cohen, *Coloring the Campus*, *supra* note 1, at 48.

270. Jeffrey Selingo, *Critics of Affirmative Action Try to Head off Texas A&M's New Admissions Policy*, CHRON. HIGHER EDUC., Dec. 19, 2001, available at <http://chronicle.com/daily/2001/12/2001121903n.htm>.

271. *Id.*

272. *Id.*

273. Jeffrey Selingo, *Texas A&M Seeks to Admit More Students from 250 Low-Performing High Schools*, CHRON. HIGHER EDUC., Dec. 14, 2001, available at <http://chronicle.com/daily/2001/12/2001121403n.htm>.

274. *Id.*

275. See Jennifer K. Ruark, *Texas A&M U. Withdraws Admissions Proposal that Was*

university maintains that the program is not racially based and explains that the withdrawal was prompted by the possibility of changes in the program.²⁷⁶

Similar to California, Texas has continued to search for ways to impact enrollment of students of color at its state universities in the wake of *Hopwood*. The percentage plan has only had a minor impact on student body diversity. In addition, university officials are concerned that students from the state's poorer high schools are still not utilizing the program. To aggressively target declining enrollments by students of color, the state universities have expanded their outreach and recruitment efforts and increased their scholarships. Therefore, similar to the situations in California and Florida, it is difficult to know how much credit to attribute to the percentage plan for maintaining student body diversity given the other factors at work.

IV. ARE PERCENTAGE PLANS BETTER THAN AFFIRMATIVE ACTION?

After examining the percentage plans in California, Florida, and Texas, three major problems emerge that inhibit the success of these programs. First, and most importantly, the percentage plans exploit the poor quality of K-12 education for minority students in these states. Related to this problem, percentage plans also often displace high minority achievers with minority students from less academically challenging high schools who may not be as well prepared to attend college. Lastly, percentage plans do not address declining minority enrollment within the states' graduate and professional schools. Therefore, a race-neutral indicator such as class rank is not an adequate substitute for affirmative action, which evaluates minority applicants upon a more individualized basis.

A. Poor Quality of Secondary Schools

The poor quality of K-12 education for African American and Hispanic students has become a "national problem."²⁷⁷ The disparity between the public high schools attended by African American and Hispanic students and those attended by mostly white students is a central problem in the use of admissions policies based upon class rank to ensure diversity. These disparities are present in each of the three states, which implemented percentage plans as an alternative to affirmative action. In Florida, schools are ranked on a scale ranging from "A" to "F". Of the sixty-five Florida schools ranked at the D and F levels, 72% of the enrolled students are African American and Hispanic compared to only 26% of which are white.²⁷⁸ Students in these schools are more likely to be "assigned to less-qualified teachers, have had fewer curriculum opportunities, and have been expected to achieve less than students at higher-performing schools."²⁷⁹

In California, the inequities in public high schools become apparent by considering the number of Advanced Placement ("AP") classes offered at various high schools.

Criticized as Race-Based, CHRON. HIGHER EDUC., Mar. 4, 2002, available at <http://chronicle.com/daily/2002/03/2002030401n.htm> (last visited Mar. 5, 2002).

276. *See id.*

277. TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS, *supra* note 250, at ¶ 30 n.39.

278. GOVERNOR BUSH'S EQUITY IN EDUCATION PLAN, *supra* note 234, at 2-4.

279. TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS, *supra* note 250, at ¶ 14 n.15.

According to the State Education Department, 129 public high schools do not offer any AP classes.²⁸⁰ In addition, African American and Hispanic students comprise 45% of the high school population, but only 13% of AP test takers.²⁸¹ Therefore, the educational quality and opportunities available at schools attended by students of color are substantially different than those available at mostly white schools. In Texas, one critic of the Texas Plan remarked that the “very success [of the percentage plan] to produce a diverse student body depends on continuing the de facto segregation of Texas high schools.”²⁸² These inequities are segregated among public high schools in poor urban areas that are mostly minority, which leads critics to conclude that percentage plans further exploit these inequities by relying upon them to ensure diversity on college campuses while doing nothing to improve the quality of secondary education.²⁸³

B. Displacement Effects of Percentage Plans

Another troubling phenomenon occurring from the substitution of affirmative action with percentage plans is the displacement effects.²⁸⁴ The displacement effect occurs when minority students, who attended competitive high schools but did not meet the class rank requirement, are turned down even though they would have been admitted under affirmative action.²⁸⁵ Instead, these students have to compete for fewer available “at large” places despite the fact that they have greater academic ability than many students from less competitive high schools who meet the class rank requirement.²⁸⁶ Although the percentage plan may ensure the same level of minority enrollment as affirmative action, the primary difference is the quality of the minority students who are admitted. Given the disparity among public high schools discussed above, many of the minority students admitted under the percentage plan may not be as prepared for college as those students admitted under affirmative action.²⁸⁷

California limited their percentage plan to students in the top 4% in order to avoid such a displacement effect.²⁸⁸ While California does not collect data on student grades

280. *Id.* at ¶ 30 n.39 (citing Louis Sahagun & Kenneth R. Weiss, *Bias Suit Targets Schools Without Advanced Classes*, L.A. TIMES, July 28, 1999, at A1).

281. *Id.* (citing Brent Staples, *California Schools, After Affirmative Action*, N.Y. TIMES, Aug. 23, 1999, at A14).

282. Speech, Robert M. Berdahl, *Policies of Opportunity: Fairness and Affirmative Action in the 21st Century*, Mar. 21, 2000, ¶ 22, available at www.cio.chance.berkeley.edu/chancellor/sp/opportunity.htm [hereinafter *Policies of Opportunity*].

283. Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution'*, CHRON. HIGHER EDUC., June 2, 2000, at A31, available at <http://chronicle.com/weekly/v46/i39/39a03101.htm> [hereinafter *Selingo, X-Percent Solution*]. See also Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729, 1730 (2001) (asserting that “percentage plans function effectively to diversify higher education only if secondary education remains firmly racially segregated”).

284. See *Policies of Opportunity*, *supra* note 280, at ¶ 24.

285. BOWEN & BOK, *supra* note 192, at 148.

286. *Id.*

287. Selingo, *X-Percent Solution*, *supra* note 283, at A31.

288. *Policies of Opportunity*, *supra* note 282, at ¶ 24.

from individual high schools, a *Chronicle of Higher Education* study conducted over two-dozen interviews with highly ranked students attending weak high schools.²⁸⁹ The results found that while these students maintain close to A averages in mostly college-preparatory classes, their SAT scores are substantially lower than their peers at more competitive high schools.²⁹⁰ At seventy-five of 570 high schools in Florida, students with a C+ average still ranked in the top 20% of their class in 1997-1998.²⁹¹ Thus, students from less competitive schools may have the required class rank to benefit from percentage plans. However, it is likely that these students are replacing students from more competitive and integrated schools who may be unable to obtain the required class rank and take advantage of the percentage plan. Because the percentage plans in Texas and Florida guarantee admission to a much greater% of high school graduates, a greater number of students from competitive and integrated high schools will be impacted by the displacement effect.

In comparing percentage plans to affirmative action, one administrator at a competitive high school in Florida remarked that affirmative action programs helped minority students at her school who scored above the national average on the SAT and took rigorous courses, but had low GPAs and class ranks as a result.²⁹² She explained that “[t]hese are the kids that succeeded in college because of where they went to high school, not because of where they ranked in their senior class.”²⁹³ Therefore, it is ironic that “while the end of affirmative action was intended to reward individual merit in college admissions, the effort to attain the over-riding moral objective of racial justice through other means may have actually weakened the merit-based system of admissions.”²⁹⁴

C. The Absence of a Solution for Graduate and Professional Schools

Percentage plans only address enrollment at the undergraduate level. They do nothing to impact the declining enrollment of students of color at graduate and professional programs.²⁹⁵ In California, the most dramatic effects of ending affirmative action were experienced by graduate enrollment.²⁹⁶ At UCLA’s law school, African American enrollment dropped from 6.2% to less than one% between 1996 and 1999.²⁹⁷ During this same time period, Hispanic enrollment at the law school dropped from 14.8% to 6.2 percent.²⁹⁸ At U.C. Berkeley’s law school, enrollment of African American students declined from 7.6% to 2.6% between 1996 and 1999.²⁹⁹ Hispanic enrollment at the law school also fell from 10.6% to 5.9% during these years.³⁰⁰ These

289. Selingo, *X-Percent Solution*, *supra* note 283, at A31.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. Policies of Opportunity, *supra* note 282, at ¶ 24.

295. TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS, *supra* note 250, at ¶ 26 n.35.

296. *See id.* at ¶ 19 n.28.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

dramatic drops threaten the future diversity of the legal profession. In addition to law schools, declining enrollments are echoed by other graduate and professional programs in California, such as medical and business schools.³⁰¹ The potential for similar effects on graduate and professional school enrollment as a result of the elimination of racial preferences in admissions policies is possible in both Florida and Texas. Therefore, “[t]he decline of access of minority students to outstanding legal and medical education may, over the long run, be one of the greatest social costs of ending affirmative action.”³⁰²

Given the problems of substituting percentage plans for affirmative action discussed above, it is apparent that class rank is not an adequate substitute for affirmative action. Although percentage plans have maintained minority enrollments, the academic quality of the minority students admitted has declined. The primary reason for this decline is the vast inequities among public high schools attended by African Americans and Hispanics and those attended by mostly white students. The quality of minority students admitted under percentage plans will not improve until the public school systems in poor minority areas improve. With the inequities among the nation’s public schools, percentage plans are not an effective alternative to affirmative action because they do not admit the same caliber of minority students as the use of race as a component of diversity in admissions policies.

CONCLUSION

One of the major catalysts behind the enactment of percentage plans was the attacks on affirmative action through the courts, the ballot box, and the executive order. The ballot initiative in California³⁰³ and the executive order in Florida³⁰⁴ are definitive prohibitions on the use of racial preferences in college admissions. However, the status of race-based admissions policies in the courts is surrounded by greater uncertainty. In particular, a majority of the Supreme Court has yet to answer the question of whether race as a criterion of student body diversity is a compelling government interest satisfying strict scrutiny.³⁰⁵ While the Fifth, Sixth, Ninth, and Eleventh Circuits have each weighed in with different opinions,³⁰⁶ there is a need for greater clarification by the Supreme Court on the future of student body diversity. In particular, the Court must directly confront whether diversity is a compelling government interest justifying the use of affirmative action programs in college admissions.

With the lack of certainty on this issue, states have pursued race-neutral alternatives for preserving student body diversity on their campuses. One of the most popular measures has been the percentage plan.³⁰⁷ However, an analysis of the percentage plans in California, Florida, and Texas demonstrates that these plans are not an adequate substitute for affirmative action. Most importantly, these plans threaten to weaken the academic quality of state universities. Under percentage plans, the minority students

301. TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS, *supra* note 250, at ¶ 26.

302. Policies of Opportunity, *supra* note 282, at ¶ 26.

303. *See supra* Part I.B.

304. *See supra* Part I.B.

305. *See supra* Part I.A.1.

306. *See supra* Part I.A.2.

307. *See supra* Part III.

admitted are less prepared for college than their peers admitted under affirmative action. Race-neutral strategies like percentage plans attempt to measure whether a student will succeed in college based on one factor, class rank. They do not generate the same results as admissions policies that individually evaluate a student's contribution to campus diversity based on a range of factors including race. Therefore, the best way to ensure campus diversity is to consider race as "one element in a range of factors . . . in attaining the goal of a heterogeneous student body," as Justice Powell wrote in *Bakke*.³⁰⁸ Before Justice Powell's vision can become a reality, a majority of the Supreme Court must decide once and for all that student body diversity is a compelling government interest.

308. *Bakke*, 438 U.S. at 314.