The Broader Case for Affirmative Action:
Desegregation, Academic Excellence, and
Future Leadership

Douglas Laycock

This Article reviews a range of arguments for affirmative action in the wake of the United States Supreme Court's decision in Grutter v. Bollinger, reviews the experience with race-neutral means, and identifies an important new policy initiative embedded in the generally unsuccessful experiments with race-neutral means.

Grutter greatly expands the meaning of diversity, from a free-speech interest in vigorous classroom debate to an equal-protection interest in integrating American leadership. The Court also holds that schools with selective admissions need not sacrifice academic excellence to achieve these compelling interests. These holdings incorporate into the Court's reasoning many of the arguments for affirmative action that have traditionally been distinguished from diversity.

Affirmative action has been an essential means by which selective universities in the southern and border states fulfilled their duties to desegregate; diversity is just the opposite of racial identifiability. Affirmative action preserves selective admission standards by ameliorating their segregative effects. Affirmative action is essential to educating a diverse future leadership. That goal is especially important in southern and southwestern states where disadvantaged minorities make up a majority or near majority of the college age population. And affirmative action in college admissions is a partial remedy for the social consequences of past and present discrimination in public education.

Racial diversity cannot be achieved in selective schools with race-neutral means. All race-neutral means work by deemphasizing academic criteria for admission and substituting a proxy for race. Most of these proxies are weak, admitting more white and Asian students than minority students. To improve minority enrollment by these means, the proxy criteria must be applied to all seats in the class, not just a few. Race-neutral means thus inherently produce less diversity and do greater damage to academic excellence.

The most prominent proxy, high school class rank, has been generally ineffective. Minority enrollment is down in Texas and California, and modest gains in Florida appear unrelated to that state's twenty-percent plan. Minority enrollment in Texas appears to have resulted more from aggressive recruiting at minority high schools than from the percentage plan.

Most other proxies are even weaker, and the weakest proxies are equivalent to lottery admissions. There are few strong proxies, and the one important strong proxy in actual use—Texas geography as a proxy for Hispanics—has been both less effective and more academically

* Alice McKean Young Regents Chair in Law, University of Texas at Austin. I am grateful to Samuel Issacharoff, to the late Charles Alan Wright, to Gregory Coleman, former Solicitor General of Texas, and to Harry Reasoner, Betty Owens, and the other dedicated members of the Vinson & Elkins litigation team in the Hopwood case. We worked through many of these issues together. I am also grateful to Jason Coutant for research assistance.

I am and have been part of the legal team representing the University of Texas on affirmative action issues, and I represented the American Law Deans Association as amicus curiae in Grutter v. Bollinger, defending affirmative action at the University of Michigan Law School. This Article is written in my personal capacity and does not necessarily represent the views of the State of Texas, the University of Texas System, the University of Texas at Austin, or the American Law Deans Association.
costly than affirmative action. With proxy admissions, schools cannot admit the strongest minority applicants. They have to admit the ones that fit the proxy.

But experimentation with percentage plans has revealed one unanticipated benefit. The guarantee of admission to a number of students from each high school has powerful motivational effects in low-performing high schools. This school-specific guarantee can be separated from the percentage plans that spawned it. This would permit most admissions to be based on the full range of academic predictors, while preserving the motivational benefits of a guarantee to each high school.

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“Diversity” is the Supreme Court’s chosen ground for upholding race-based affirmative action in admissions to higher education.\(^1\) “Diversity” has multiple meanings, and the United States Supreme Court’s opinion in *Grutter v. Bollinger* substantially expanded those meanings and shifted their base.\(^2\) But however defined, diversity is not the only reason for affirmative action, and perhaps not the best label for what diversity has grown to include. In this Article, I review the dramatic growth in the Supreme Court’s understanding of diversity (Part I), and I review other reasons for affirmative action, some of which have special relevance for public colleges and universities in the South.

Affirmative action has been the most effective method, and generally the only effective method, of desegregating schools with highly selective admission standards (Part II). Perhaps least

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2. *See id.* at 327-33.
understood of all the reasons for affirmative action, directly considering race preserves selective admission standards and thus protects academic excellence (Part III). Affirmative action is needed to create a leadership class for a diverse American future, including the rapidly approaching time when some states will be led by their minority populations (Part IV). Affirmative action is a partial remedy for the effects of past and present discrimination in public elementary and secondary education (Part V). And no race-neutral means work nearly as well, either at increasing diversity or protecting academic standards (Part VI). Affirmative action that directly considers race is the one effective method that has enabled highly selective schools to simultaneously maintain their selectivity while achieving some degree of diversity.

"Diversity" is the settled judicial rationale for affirmative action, and the diversity label has the great virtue of applying throughout the country. But scholarly analysis and political argument are not confined to the rationales adopted judicially. The Court's opinion should not cause policy makers to lose sight of other powerful reasons for affirmative action, or of affirmative action's special value in the South.

The examination of race-neutral means in Part VI gives thorough attention to the experience with percentage plans. Despite their negative side effects and limited contributions to diversity, these plans contain one valuable new idea. Guaranteeing that some number of students from each high school will be admitted to the flagship campuses has been a powerful motivator for students in low-achieving high schools. It is possible to disentangle that guarantee from the percentage plans that spawned it, preserving the benefits of the guarantee while avoiding most of the costs of percentage plans.

I. Diversity

In his controlling opinion in Regents of the University of California v. Bakke, Justice Powell chose diversity as the ground for upholding race-based affirmative action in university admissions.\(^3\) In a system based on precedent, his solo choice created powerful incentives a quarter-century later for the lawyers representing the University of Michigan in Grutter v. Bollinger and Gratz v. Bollinger,\(^4\) and a prominent path of least resistance for justices

\(^3\) 438 U.S. 265, 311-12 (1978).
\(^4\) 539 U.S. 244 (2003).
inclined to uphold affirmative action in those cases. Whatever each justice’s personal reasons for upholding affirmative action, there were powerful advantages to putting those reasons under the heading of diversity. And so the law is that affirmative action in university admissions is permissible because diversity in higher education is a compelling governmental interest.

For Justice Powell, diversity meant diversity of background and experience within the classroom, for the purpose of improving the educational experience in that classroom. This was explicitly a First Amendment interest in the “robust exchange of ideas.” His brief discussion contained just a passing hint about improved race relations; combining thoughts from the first and last sentences of a paragraph suggests that studying with racially diverse medical students might help future doctors “serve a heterogeneous population . . . with understanding.”

For the majority in Grutter, diversity starts with Justice Powell’s opinion and includes Justice Powell’s meaning. But diversity in Grutter is a much broader concept, anchored more in racial justice and the values of the Equal Protection Clause than in the First Amendment. In the longer and more elaborated discussion in Grutter, diversity is about promoting racial tolerance and understanding; developing workers, citizens, and leaders for a racially diverse society; and preserving the legitimacy of American government. Diversity in Justice Powell’s sense is a plausible reason for affirmative action in admissions; diversity in Grutter’s sense is a much better reason.

Both for Justice Powell and for the Grutter Court, diversity includes the full range of traits and experiences that distinguish and individualize human beings in ways that might be relevant to the educational experience. Diversity is emphatically not confined to racial and ethnic diversity. If a university’s admissions process considers race, it must also “meaningfully” consider “all factors that may contribute to student body diversity.” But the Court twice pointed out that the university need not give equal weight to all diversity factors, and it upheld a Michigan program that gave special weight to “one particular type of diversity, that is, racial and ethnic

6. Id. at 313.
7. Id. at 314.
10. Id. at 337.
11. Id. at 334, 337 (quoting Bakke, 438 U.S. at 317 (opinion of Powell, J)).
diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers. Racial and ethnic diversity cannot be considered in isolation from other forms of diversity, but racial and ethnic diversity can be given special weight for reasons that sound in past discrimination and continuing underrepresentation.

Racial and ethnic diversity in the classroom has obvious relevance to full discussion in some disciplines. Law schools are a familiar example. Our nation’s history has made racial questions central to much of constitutional law. Perspectives related to race are often important in criminal law, criminal procedure, family law, poverty law, statutory discrimination law, and other courses. A moment’s reflection on the nation’s polarized reaction to the trial of O.J. Simpson, or the controversy over racial profiling, or the many judicial decisions on racially polarized voting, reveals the importance of race to disagreements over legal and public policy issues. To ignore this reality in the name of colorblindness is indeed to act blindly. Exploring these differing perspectives in class discussion is equally relevant both to Justice Powell’s understanding of diversity and to Grutter’s.

It is equally important for students to learn that these disagreements among the races are only statistical tendencies—that on any given issue, and even when there are sharp racial disparities in the opinion polls, many minority individuals will not hold the presumed or stereotypical minority position, and many white individuals will not hold the presumed or stereotypical white position. The differences within each racial group are as important as the differences between racial groups, but students cannot experience either set of differences without genuine racial diversity in the classroom. One or two black students in a classroom are cast, or feel as though they are cast, as representatives of their race. Larger numbers of black students in a

12. Id. at 316 (internal quotations omitted).
classroom can feel freer to disagree with each other in the presence of whites. Only then does the classroom begin to seriously erode racial stereotypes and reveal the full individuality of students of other races. In some disciplines, race has less discipline-specific relevance. I doubt that there are significant racial perspectives on differential equations, although there may be different learning styles in mathematics, and these learning styles may have some correlation with race and ethnicity. But the Court in Grutter emphasized another important task of American higher education, equally relevant in all disciplines. American higher education prepares young people to function as workers and citizens in a highly diverse society. Racial stereotypes are an important barrier to knowledge and understanding, and communication across racial lines is essential to America's future. Diversity in the classroom "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"  

Justice Scalia belittled this as a "lesson . . . learned by . . . people three feet shorter and twenty years younger than [law students]." But of course these skills and insights are not learned in kindergarten, in part because so many kindergartens remain de facto segregated, and in part because the lesson becomes very different, and more challenging, as students mature and develop views on a vastly broader range of issues.

The Grutter Court’s emphasis on students learning to work with other students of all races is still focused on the student experience at the university, thus preserving one important similarity with Justice Powell’s conception of diversity in Bakke. But the Grutter Court’s next steps abandon that similarity as well. For the Grutter Court, the label “diversity” includes the education of a diverse set of future leaders. This is how the Court uses the much-noted military brief. The Court cites that brief not for the claim that military officers need to have been educated in a diverse classroom, but for the much broader claim that the officer corps must itself be “highly qualified and racially diverse.”  

17. Id. at 331.  
18. Id. at 330 (alterations in original) (quoting App. to Petition for Certiorari 246a).  
19. Id. at 347 (Scalia, J., dissenting).  
23. Grutter, 539 U.S. at 331 (emphasis in original).
The Court then expands this point from the military and national security to the population generally.\textsuperscript{24} It notes "the overriding importance of preparing students for work and citizenship" and says that education has "a fundamental role in maintaining the fabric of society."\textsuperscript{25} "[E]ducation ... is the very foundation of good citizenship."\textsuperscript{26} "For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."\textsuperscript{27} "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."\textsuperscript{28}

Then the Court extends this reasoning to the nation’s leadership class.\textsuperscript{29} "[U]niversities[] and . . . law schools [are] the training ground for a large number of our Nation’s leaders."\textsuperscript{30} This is especially so of "highly selective law schools."\textsuperscript{31} And so we get to the question of political legitimacy:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.\textsuperscript{32}

These passages go vastly beyond Justice Powell’s conception of diversity.\textsuperscript{33} They are not about more effective learning in the classroom. They are not about informal interactions on the campus, or even about breaking down racial stereotypes. These comments are about access; they are about bringing more minority young people into the most selective schools and into positions of leadership. They are about the legitimacy of selective institutions of higher education and the legitimacy of the nation’s leadership. They are about the perceptions of the minority community, which “must have confidence” in the openness of the system. The label, “diversity,” is

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\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id. (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
\textsuperscript{27} Id. (emphasis added).
\textsuperscript{28} Id. at 332 (emphasis added).
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
the same, and retaining that label had rhetorical advantages for the Court, but the meaning has fundamentally changed.

Critics of affirmative action have argued that race is a crude proxy for diversity of ideas.34 This argument was always aimed at a straw man; no serious supporter of affirmative action ever claimed that all blacks think alike. But the argument is obviously inapplicable to the Court’s concerns in Grutter; race is the very factor at issue when minority parents doubt whether the system is open to their children. Indeed, race ceases to be a proxy as soon as Justice Powell’s focus is expanded even a little bit, to include breaking down racial stereotypes. Then race matters directly, for diversity within and among racial groups is part of the lesson to be taught.

Nor does the focus on racial diversity imply that no one cares about other kinds of diversity. Race may be uniquely important in light of our history, and racial exclusion is often much more visible than other kinds of exclusion. And no doubt there are voting members of faculties who value minority representation but not intellectual diversity—who would be happy to exclude students and faculty they disagree with. But no university would take that position as an institution, and special attention to racial diversity does not depend on anything like that position. Race is far from the only important source of diverse experiences and perspectives, but it is one important source, and it is one of the few sources that is largely eliminated by the workings of the ordinary admission process.

Selective universities need make no special efforts to admit men and women, Democrats and Republicans, liberal arts majors and science majors, or Protestants, Catholics, Jews, and nonbelievers. These and many other sources of diversity are distributed throughout the pool of applicants. But a few important sources of diversity tend to be systematically excluded. Rural students, low-income students, and students from disadvantaged racial and ethnic minorities are large demographic groups that are grossly underrepresented in the applicant pool of most selective schools. Formally or informally, whether pursuant to long tradition or to a written policy adopted in the wake of controversy, admission committees give special consideration to talented applicants from these groups.

Special attention to underrepresented groups not defined by race has not been the subject of litigation, and thus has not been lawyerized;

34. See, e.g., Hopwood v. Texas, 78 F.3d 932, 946 (5th Cir. 1996) (collecting quotations on the theme).
it often remains informal. A more formalized example is illustrated by the Michigan undergraduate plan, which gave the same bonus—twenty points—to minority applicants and to applicants of low socioeconomic status.35 (A low-income minority student received only one award of twenty points, not two.)36 The bonus for geography, awarded to applicants from underrepresented rural counties, was six points, more than what was awarded for most factors other than race or socioeconomic status.37 This plan was struck down as too mechanical, so we are not likely to see such quantification again.38 But the relative magnitude of these bonus points reflects the relative scarcity of the respective categories in the qualified applicant pool.39

The Court requires that universities take into account a broad range of diversity factors.40 So far as I am aware, all universities with individualized admissions systems have done so, and some of those with mechanical admissions systems have done so as well. But the Court has not required that all these diversity factors get the same weight as race.41 The tendency of ordinary admission criteria to exclude minorities makes race special even as to intellectual diversity. And the Court's other reasons for upholding consideration of race—especially the importance of a diverse future leadership and keeping

39. A recent simulation suggests that elite undergraduate schools actually enroll slightly fewer students of modest income than if they enrolled from the national pool based on grades and test scores alone. Anthony P. Carnevale & Stephen J. Rose, Socioeconomic Status, Race/Ethnicity, and Selective College Admissions, in RICHARD D. KAHLENBERG, ED., America's Untapped Resource: Low-Income Students in Higher Education 101, 142 (2004). The study uses data sets that sample all high school graduates without regard to real applications. See id. at 103-04, 138-39. The study reports widespread agreement among admission officers, id. at 115-16, and the general public, id. at 120-22, that low-income students deserve special consideration, and, in my limited experience at two highly selective law schools, members of admissions committees are strongly and naturally attracted to such applicants. But many more schools report special efforts to recruit minorities than to recruit disadvantaged students. Id. at 118-19 & tbl. 3.5. So the problem may be less recruitment and fewer applications rather than the response of admission offices to applications received. More generally, because affirmative action for moderate-income students has remained uncontroversial and informal, it may have remained passive, unorganized, and less effective than has been generally assumed. Certainly the case for racial preferences is stronger, both legally and morally, when admission officers take account of other forms of disadvantage as well.
41. Id. at 334, 337.
the pathway to leadership visibly open to all races and ethnicities—are directly about race.42

Neither supporters nor critics of affirmative action should be fooled by the Court's adherence to the diversity label. The Court's understanding of that label has expanded; it now includes some, but not all, of the other reasons for affirmative action. These alternative rationales remain important politically, and they remain important to future litigation under the much expanded rubric of diversity.

II. DESEGREGATION

Affirmative action that directly considers race has been essential to the efforts of selective institutions in the South to meet their desegregation obligations. After the period of massive resistance, and after the period of passive resistance and deliberate foot-dragging, one of the greatest remaining obstacles at the historically white schools was selective admission standards. Across-the-board changes in admission standards threatened to destroy the mission of selective institutions. Affirmative action enabled selective institutions to maintain their admission standards, to admit greater numbers of minority students, and to select the best minority students as evaluated on the same criteria applied to all other applicants. I review the legal background in this Part and elaborate on the unique practical advantages of affirmative action in achieving desegregation in Parts III and VI.

For a generation, progress toward desegregation was measured principally by "racial identifiability."43 Once a school district, or a university system,44 was found to be segregated, it incurred an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."45 States and districts were required to "convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."46 Past deliberate segregation was generally

42. See id. at 332; see also Cynthia Estlund, Taking Grutter to Work, 7 GREENBAG 215, 218 (2004) ("Grutter thus stands for two diversity rationales: a familiar Powelssque appeal to the instrumental value of differences within an institution devoted to learning, and a newer integration argument that is informed by both history and the needs of civil society.").
43. See, e.g., United States v. Fordice, 505 U.S. 717, 728 (1992) ("Thus we have consistently asked whether existing racial identifiability is attributable to the State . . .").
44. Id. at 727 ("Nor is there any dispute that this obligation applies to its higher education system.").
46. Id. at 442.
undisputed, and the burden of disproving causation was generally impossible, so litigation and negotiation centered on racial identifiability and on the adequacy of the steps taken to eliminate it. States and school districts were obliged to “make every effort to achieve the greatest possible degree of actual desegregation.” This obligation “necessarily” required efforts at “elimination of one-race schools” and “a presumption against schools that are substantially disproportionate in their racial composition.” Findings of widespread racial identifiability were generally fatal; on occasion, the Court appeared to equate racial identifiability with proof of unconstitutionality. As Justice Rehnquist read one of these opinions, “racial imbalance at the time the complaint is filed is sufficient to support a systemwide, racial balance, school busing remedy if the district court can find some evidence of discriminatory purpose prior to 1954.” This body of law was part of a larger pattern; in the same period, in a wide variety of contexts, the Court held that substantial underrepresentation of minorities was prima facie proof of discrimination.

This judicial measure of desegregation has an obvious relation to the Court’s rationale for affirmative action—racial identifiability is simply the lack of racial diversity. Conversely, a school with substantial racial diversity is not racially identifiable. Where racial identifiability is at issue, the concept of diversity need not be expanded, as in Grutter and in Justice Powell’s opinion in Bakke, to include nonracial forms of diversity. Racial diversity as such is the proof that the Court’s standard measure of desegregation has been

50. See, e.g., Penick, 443 U.S. at 461 (“[A]t the time of trial most blacks were still going to black schools and most whites to white schools. Whatever the Board’s current purpose with respect to racially separate education might be, it knowingly continued its failure to eliminate the consequences of its past intentionally segregative policies.”); Green, 391 U.S. at 441 (concluding that where all white children chose to attend historically white school, and eighty-five percent of black children chose to attend historically black school, “the school system remains a dual system”).
51. Penick, 443 U.S. at 492 (Rehnquist, J., dissenting) (emphasis in original).
achieved. "Diversity’ should be thought of as another way of talking about integration." ⑤3

Yet the desegregation cases and the affirmative action cases have been remarkably disconnected from each other. Indeed, most of the affirmative action cases have been written as though the desegregation cases never happened. This is partly because California and Michigan, the two states whose cases reached the Supreme Court, were never de jure segregated and thus were under no legal obligation to desegregate; the same was true in Washington, which also had a high-profile case.⑤4 The constitutional law of racial identifiability did not apply in these states. It is partly because university attorneys and state attorneys general, embroiled in all the risks of litigation with white plaintiffs, were afraid to suggest that racial minorities might also have some continuing legal claim.⑤5 It is partly because conservative judges may have shared the fear of renewed claims from racial minorities, and those judges strongly inclined to strike down affirmative action were not about to let the desegregation cases stand in their way. The Fifth Circuit’s conclusory claim that Texas’s desegregation duties were both factually and legally irrelevant⑤6 is perhaps the most aggressive and least defensible passage in an opinion with several strong candidates for that title. And it is partly because the details of desegregation were often buried in unreported orders, consent decrees, and negotiated plans, and the obligation to use affirmative action to achieve desegregation was sometimes clouded in euphemisms and circumlocutions. Yet history is clear that affirmative action was a principal means of desegregation at selective schools in the South.


⑤4. Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000). This case is again pending before the Ninth Circuit. Smith v. Univ. of Wash. Law Sch. (No. 02-35676). The plaintiffs seek damages on the ground that the affirmative action plan at the law school in the mid-1990s violated the standards laid down by the United States Supreme Court in 2003. The district court rejected this claim in an unreported judgment. For information about the pending appeal, from the plaintiffs’ perspective, see Center for Individual Rights, Smith v. University of Washington Information Page, available at http://www.cir-usa.org/recent_cases/smith_v_washington.html (last visited June 18, 2004).

⑤5. Thus, Georgia failed to make any desegregation or past discrimination claim, despite the state’s history. See Johnson v. Bd. of Regents of the Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1369 n.5 (S.D. Ga. 2000), aff’d, 263 F.3d 1234 (11th Cir. 2001).

⑤6. See Hopwood v. Texas, 78 F.3d 932, 955-56 & nn.48-50 (5th Cir. 1996). For further explanation, see infra note 130.
In administrative and judicial enforcement proceedings beginning with *Adams v. Richardson,* southern and border states came under continuing obligations to desegregate their public systems of higher education. Black students attending segregated schools sued the Secretary of Health, Education, and Welfare (HEW), alleging that the Nixon Administration had systematically failed or refused to enforce Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in institutions receiving federal financial assistance. The background remedial law gradually changed, and this lawsuit was eventually dismissed on the ground that Congress had never created a private right of action against the agency for inadequate enforcement. But in the meantime, this litigation had greatly invigorated enforcement of Title VI, and the Department of Education (successor to HEW) had largely adopted the judicially imposed enforcement standards as its own. Furthermore, the higher education part of the litigation had been split off into separate administrative and judicial proceedings, unaffected by the dismissal of the parent litigation.

The first higher education order came in the first final judgment, ordering prompt enforcement actions against higher education systems in ten states. The Office for Civil Rights (OCR) (the relevant office within the Department of Education) subsequently initiated similar actions against additional states with a history of deliberately segregated higher education. These orders led to enforcement proceedings and protracted negotiations with all the affected states.

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61. *See id.* at 746-47 n.4 (describing the spin off of the higher education cases); Adams v. Bell, 711 F.2d 161, 165-71 (D.C. Cir. 1983) (resolving issues pertaining to the division of responsibility among HEW, the District of Columbia court, and the North Carolina court in higher-education enforcement proceedings against North Carolina).
Enforcement against Texas, which is illustrative, is reviewed in the first district court opinion in *Hopwood v. Texas*. In 1980, OCR found that Texas "had failed to eliminate vestiges of its former de jure racially dual system of public higher education," that Hispanics were significantly underrepresented, and that investigation of discrimination against Hispanics would continue.65

The state submitted a proposed compliance plan, which OCR rejected as inadequate.66 The Assistant Secretary of Education who rejected this plan was the same Clarence Thomas67 who repeatedly and sarcastically describes desegregated higher education as a mere "aesthetic" preference in his *Grutter* dissent.68 Then Assistant Secretary Thomas first rejected the plan because the numeric goals for black and Hispanic enrollment were insufficient.69 He rejected a revised plan because it set black and Hispanic enrollment goals on a statewide basis, instead of separately for each institution, and did not project achievement dates for the stated goals.70 In 1983, in an unreported order, the *Adams* court ordered enforcement action against Texas unless the state submitted a fully complying plan within forty-five days.71

At this point, OCR submitted thirty-seven suggested measures for increasing black and Hispanic enrollment.72 One of these "suggestions" was that schools reevaluate their admission criteria and "admit black and Hispanic students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements."73 Texas amended its plan to comply with OCR's demands, and, in June 1983, OCR accepted the plan, contingent on adequate funding and actual performance.74 As the 1988 expiration of this plan approached, OCR notified Texas that it was reviewing the

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65.  Id. at 556 (internal quotations omitted).
66.  Id.
67.  Id.
70.  Id. Thomas made similar aggressive demands for affirmative action in Alabama, where he personally testified at trial. See *Knight v. Alabama*, 787 F. Supp. 1030, 1048, 1363-64 (N.D. Ala. 1991), aff'd in part, rev'd in part, on other grounds, 14 F.3d 1534 (11th Cir. 1994), and no doubt in other states.
72.  Id.
73.  Id.
74.  Id.
state’s compliance and that Texas should continue to operate under the plan pending further evaluation.\textsuperscript{73} The state’s own officials determined that Texas had not yet achieved the plan’s goals and adopted a second plan in hopes of avoiding a further federal mandate.\textsuperscript{76} In January 1994, on the eve of trial in \textit{Hopwood v. Texas}, OCR notified Governor Richards that it was still reviewing the state’s compliance with its desegregation obligations.\textsuperscript{77}

In 1997, \textit{after} the Fifth Circuit had banned any consideration of race in university admissions, and after the Supreme Court had denied certiorari, OCR briefly threatened to cut off federal funding to Texas if the state abandoned affirmative action.\textsuperscript{78} In OCR’s view, \textit{Hopwood} applied only to facts “identical” to those found in the law school, and the state remained under “a clear legal obligation” to consider race in its efforts to completely desegregate its system.\textsuperscript{79} More reasonably, OCR wrote Governor Bush to request additional information needed to evaluate the state’s compliance with its desegregation obligations.\textsuperscript{80} As of this writing early in 2004, OCR has still not found that Texas has eliminated all vestiges of its prior dual system of higher education.

During the Carter Administration, OCR embodied its negotiating position in regulations that have remained in effect, with only technical amendments, through the Reagan, Bush, Clinton, and second Bush Administrations.\textsuperscript{81} These regulations provide that “[i]n administering a program regarding which the recipient [of federal funds] has previously discriminated . . . , the recipient \textit{must} take affirmative action to overcome the effects of prior discrimination.”\textsuperscript{82} A recipient that has never discriminated “\textit{may} take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”\textsuperscript{83} These general principles are elaborated in “Illustrative Applications.”\textsuperscript{84}

\begin{footnotesize}
\begin{verbatim}
75.  Id.
76.  Id. at 557.
77.  Id.
79.  Id.
82.  34 C.F.R. § 100.3(b)(6)(i) (2003) (emphasis added).
83.  Id. § 100.3(b)(6)(ii) (emphasis added).
84.  Id. § 100.5 (emphasis added).
\end{verbatim}
\end{footnotesize}
steps" to fulfill the requirement of affirmative action "might take the
form, for example, of special arrangements for obtaining referrals or
making selections which will insure that groups previously subjected
to discrimination are adequately served." And even in the absence of
past discrimination, where a racial population is underserved, a
university might "establish special recruitment policies . . . and take
other steps to provide that group with more adequate service." After
exhausting the possibility of recruitment, the obvious "other step" is of
course affirmative action in admissions; the "other steps" in this
paragraph are the same as the "additional steps" in the preceding
paragraph.

There was also a more detailed Notice, published in the Federal
Register in 1978. This document contains many of the demands that
OCR made in its negotiations with Texas. States were required to
adopt "specific numeric goals" and "timetables for sequential
implementation" to achieve equal matriculation rates for black and
white high school graduates and a fifty-percent reduction in the black-
white disparity in enrollment at historically white four-year and upper-
division schools. These goals would require changed admission
standards: Schools "may need to broaden definitions of potential; to
discount the effects of early disadvantage on the development of
academic competence; and to broaden the talents measured in
admissions tests." But the Notice solemnly affirmed that these
changes would not mean lower admission standards.

The protracted negotiations in Texas were paralleled in other
states. And in some states, there was reported litigation, brought by
the United States, private plaintiffs, or both. After sixteen years of
litigation, the United States District Court for the Middle District of
Tennessee approved a consent decree directing Tennessee officials to
"insure the achievement of non-racially identifiable institutions of
higher education in Tennessee." Among the steps ordered to achieve
this goal were race-based enrollment targets, "alternative admission
standards," race-based scholarships, evaluation of all administrators on

85. Id. § 100.5(h) (emphasis added).
86. Id. § 100.5(i) (emphasis added).
88. Id. at 6662.
89. Id. at 6659-60.
90. Id. at 6660.
91. See Geier v. Alexander, 801 F.2d 799, 809 (6th Cir. 1986).
799 (6th Cir. 1986).
the basis of their "progress in affirmative action," evaluation of all candidates for administrative positions based on their "degree of commitment to affirmative action," and a program to identify and mentor seventy-five black sophomores each year to prepare them for professional schools.93 The United States was a plaintiff in the case; on appeal, now represented by the Reagan Justice Department, it objected only to the program to prepare individual black students for professional school.94 The United States Court of Appeals for the Sixth Circuit upheld the decree.95

The United States sued Louisiana in 1974, and a federal district court approved a consent decree in 1981.96 This decree is not published, but it changed "the processes of admissions and recruitment" and provided "specific goals and timetables for increasing other race participation in every aspect of the university system's life."97 A later opinion described this consent decree as requiring that Louisiana "begin affirmative action."98 The decree was to expire by its terms on December 31, 1987, unless plaintiffs moved for further proceedings to determine the extent of compliance and whether the state's system of higher education had become unitary.99 The United States—again, the Reagan Justice Department—so moved.100

A three-judge district court that included John Minor Wisdom held that an open admissions system perpetuated segregation.101 The reasons for this finding are not clearly stated in the published opinions, and the court's principal concern seemed to be that open admissions led to appallingly low graduation rates.102 But wholly open admissions may have also eliminated a principal nonracial basis for choosing which university to attend.

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93. Id. at 1269-72.
94. See Geier, 801 F.2d at 799, 802.
95. Id. at 810.
97. Id. at 515.
98. United States v. Louisiana, 9 F.3d 1159, 1162 (5th Cir. 1993).
100. Id.
The court’s proposed remedy was selective admissions with affirmative action. The court ordered Louisiana to create a selective admissions system at five of its universities, and it further ordered that “[e]ach state institution shall have fifteen percent of its entering class set aside for admissions exceptions.” Two-thirds of these “exceptions” (ten percent of admissions) were to be used to admit students who would be of an underrepresented race at the campus to which they were admitted; one-third (five percent of admissions) would be available for “other institutional interest students such as athletes, students with other talents and alumni children.” The Fifth Circuit ultimately vacated the order on the ground that the case had been decided on summary judgment, and there was a disputed issue of fact about the connection between Louisiana’s open admissions policy and its prior system of de jure segregation. The court vacated the entire order, but it did not discuss the affirmative action portion of the order (the “admissions exceptions”).

On remand, the case settled in an unreported decree. The centerpiece of this decree was substantial funds committed “to race-based scholarships and recruiting efforts” to attract students to schools where they would be in the racial minority. Both Southern University, a historically black school, and Louisiana State University (LSU), a historically white school, adopted modestly selective admissions. The decree did not set racial enrollment goals, and I infer from the absence of any mention in press accounts that it did not require racial preferences in admission. But LSU appears to have found that its new selective admissions policy required such preferences; among the factors it now considers in its admission decisions is “membership in groups under-represented in the student

103. Id. at 517.
104. Id.
105. Id. The district court subsequently vacated this order in light of an intervening decision of the Fifth Circuit, United States v. Louisiana, 751 F. Supp. 606, 608 (E.D. La. 1990), but reinstated the order when that Fifth Circuit decision was reversed in the Supreme Court, United States v. Louisiana, 811 F. Supp. 1151, 1152-53 (E.D. La. 1992). The intervening appellate decisions were Ayers v. Allain, 914 F.2d 676, 692 (5th Cir. 1990) (holding that adoption of race-neutral admissions policies discharged the state’s duties to desegregate higher education), vacated sub nom. United States v. Fordice, 505 U.S. 717 (1992).
106. United States v. Louisiana, 9 F.3d 1159, 1170 (5th Cir. 1993).
body."^{108} I have not been able to determine precisely when LSU began this consideration of race, but I would guess that it was very early in LSU's efforts to implement the consent decree.

Alabama's desegregation decree also relied principally on race-based scholarships to encourage students to attend state universities where they would be in the racial minority.^{109} Alabama's litigation had less focus on affirmative action in admissions, principally because most Alabama institutions had already created ways to bypass their admissions standards. The University of Alabama imposed admissions requirements in the 1950s, first on selected students (i.e., black students), and then on all students, for the purpose of excluding black applicants and thus evading desegregation requirements.^{110} But by the time of trial in 1991, a federal district court held that Alabama's continued use of the American College Test (ACT) was statistically valid, nondiscriminatory, and served legitimate educational purposes.^{111} The court noted that any testing requirement would disproportionately exclude black students,^{112} principally because of the failures of Alabama's elementary and secondary education system.^{113} The court upheld the use of the ACT, including cutoff scores for regular admission, at all Alabama schools except Auburn.^{114}

How was Auburn different? The other Alabama schools had conditional admissions programs that allowed weaker students to attend, take a lighter load, receive some modest degree of special help, and continue if they succeeded.^{115} The main campus at Auburn had no such program.^{116} The court invalidated the Auburn system and ordered Auburn to implement an admissions policy that "in good faith, Auburn believes will not have, and in fact does not have a disproportionate impact on black applicants."^{117} Neither side appealed on the admissions issues.^{118}

111. Id. at 1153-56.
112. Id. at 1164.
113. Id. at 1165.
114. Id.
115. Id. at 1159-61.
116. Id. at 1161.
117. Id. at 1379 (stating remedial decree).
118. See Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994).
The Alabama decree is thus consistent with the general experience that desegregation required changes in admission standards. But because Alabama’s universities had lowered admission standards for everybody—the conditional admissions programs came close to open admissions—no race-based differentials in admission standards were required.

I come at last to the Mississippi litigation, the only one of these cases decided on the merits in the Supreme Court. In *United States v. Fordice*, the Supreme Court generally confirmed the broad view of desegregation in the cases just discussed, although not the details of any particular decree.\(^{119}\) For starters, the Court rejected the Fifth Circuit’s view that race-neutral admission policies satisfy a state’s desegregation obligation:

> We do not agree . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system.\(^{120}\)

The Court also held that higher admission standards at historically white schools than at historically black schools were a present vestige of past segregation that perpetuated the dual system of higher education.\(^{121}\) Applicants could attend any of the three white flagships with an ACT score of 15; they could attend the three historically black schools with an ACT of 13.\(^{122}\) White high-school seniors in Mississippi scored 15 or higher at more than twice the rate of black seniors.\(^{123}\) Not surprisingly, the Court found that the difference in required ACT scores restricted student choice and helped to perpetuate segregation.\(^{124}\) Eight justices joined in this opinion,\(^{125}\) and even Justice Scalia agreed that Mississippi’s ACT requirements “need further review.”\(^{126}\)

The Mississippi requirements were especially suspicious because Mississippi first required a minimum ACT score at the undergraduate level in 1963,\(^{127}\) just one year after federal troops were needed to secure


\(^{120}\) *Id.* at 729.

\(^{121}\) *Id.* at 733-34.

\(^{122}\) *Id.* at 734-35.

\(^{123}\) *Id.* at 735.

\(^{124}\) *Id.* at 733-35.

\(^{125}\) *Id.* at 720.

\(^{126}\) *Id.* at 749 (Scalia, J., dissenting in part).

\(^{127}\) *Id.* at 734.
the enrollment of James Meredith, the University of Mississippi's first black student. But many schools initiated or increased admission requirements in the 1960s, because explosive growth in enrollment increased the need to ration seats. And once there are any admission standards at all, admission standards at flagship programs will be higher than at historically black public colleges and universities, most of which were created as separate and unequal institutions. Without regard to the date of their adoption, differential admission standards are always part of the difference between an historically white selective institution and historically black institutions in the same state. The separate existence of the two institutions, their racial identities, and the greater funding and political support that raise the quality of the white institution and make more selective admission standards possible—at the very least, all of these facts are rooted in the prior dual system. And the more selective admission standards at the historically white school undeniably tend to exclude minority applicants and thus to maintain or increase the racial identifiability of those schools. A court bent on reading Fordice narrowly could do so—the Hopwood court

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130. It is well known that the Fifth Circuit in Hopwood refused to follow Bakke. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) ("Justice Powell's view in Bakke is not binding precedent."). That court's dismissive distinction of Fordice is less well known, but even less defensible. See id. at 955 ("Fordice does not overrule Croson."). Apart from refusing even to acknowledge that Fordice was based on the state's affirmative duty to desegregate, apart from the fact that City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), was a government contracting case and not an education case, the Fifth Circuit painted itself into the absurd position of acknowledging that a state agency could act to remedy the effects of private discrimination, but not the effects of discrimination by other state agencies. Hopwood, 78 F.3d at 954-55 & n.49. It dismissed the federal government's longstanding demands for affirmative action at Texas as factually irrelevant (because the law faculty had undertaken its desegregation efforts before OCR and the governor finally agreed to a plan), and legally irrelevant (because OCR could not authorize a violation of the Constitution). Id. at 962, 967.
succeeded—but the logic of Fordice in fact applies to all previously segregated systems.

The Supreme Court in Fordice said the state must eliminate all “policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities if those policies can practicably be eliminated without eroding sound educational policies.” Differences in admission standards do indeed serve sound educational policies, even though no state should want those differences to correlate with race. Unless some schools have noncompetitive admissions, many young people will be excluded from higher education. And unless one or more other schools have highly selective admissions, the state cannot have a flagship that competes with the best schools nationally, supports research at the highest level, attracts students, faculty, and other resources from out of state, and attracts business and investment to centers of excellence. The biggest question left open after Fordice is whether these educational interests would serve to justify admission standards that perpetuated segregation.

Justice Scalia thought the Court in Fordice had imposed an “effectively unsustainable burden.” He noted that in the Court’s elementary and secondary education cases, it had been effectively impossible either to rebut the inference that “existing racial identifiability is attributable to the state” or to justify as necessary any challenged practice that tended to perpetuate segregation. His view of the Court’s cases (to which he objected) was that the state’s only defense “is to eliminate extant segregation, i.e., to assure racial proportionality in the schools.” Justice Thomas agreed that the Court’s presumption that past discrimination caused present racial imbalance had been “often irrebuttable in practice,” but he hoped that the possibility of educational justifications might be interpreted broadly enough to permit a continued role for historically black colleges. Neither he nor the Court addressed the possibility of justifying more selective admission standards.

Justice O’Connor did address the question of justification. She wrote separately “to emphasize that it is Mississippi’s burden to prove

131. Fordice, 505 U.S. at 743.
132. Id. at 749 (Scalia, J., dissenting in part).
133. Id. at 753 (quoting the opinion of the Court).
134. Id. at 753-54 (Scalia, J., dissenting in part).
135. Id. at 753.
136. Id. at 745, 747-49 (Thomas, J., concurring).
that it has undone its prior segregation, and that the circumstances in which a State may maintain a policy or practice traceable to de jure segregation that has segregative effects are narrow.”  

And then she said that even if a state justified such a practice, the case was not over:

[I]f the State shows that maintenance of certain remnants of its prior system is essential to accomplish its legitimate goals, then it still must prove that it has counteracted and minimized the segregative impact of such policies to the extent possible. Only by eliminating a remnant that unnecessarily continues to foster segregation or by negating insofar as possible its segregative impact can the State satisfy its constitutional obligation to dismantle the discriminatory system...  

In this short opinion, Justice O’Connor lays out all the elements of the desegregation case for affirmative action, without stating the conclusion. Because selective schools have important educational reasons for selective admission standards, schools may keep those standards, but they must negate the segregative impact of those standards insofar as possible.  

This implication of Justice O’Connor’s opinion came to the fore in Grutter v. Bollinger. Justices Scalia and Thomas, dissenting, argued at length that the problem was selective admissions. Michigan had no compelling interest in running an excellent law school; Justice Thomas argued that forty-six states had been unable or unwilling to build an excellent law school, so excellent public law schools must not be very important. If Michigan would lower its admission standards across the board, the diversity problem would solve itself without any need to consider race. Justice O’Connor for the majority responded that Michigan did not have to choose between excellence and diversity. It could have highly selective admission standards, and it could negate the exclusionary effect of those standards with affirmative action.

Michigan was under no affirmative obligation to desegregate, but the policy conflict it faced was indistinguishable from that facing Texas. Selective admission standards tend to segregate; selective admission standards are educationally justified; to keep the good effect

137. Id. at 744 (O’Connor, J., concurring).
138. Id. at 744-45 (O’Connor, J., concurring) (emphasis added).
139. Id. (O’Connor, J., concurring).
141. Id. at 347 (Scalia, J., dissenting); id. at 355-62, 367-71 (Thomas, J., dissenting).
142. Id. at 360 (Thomas, J., dissenting).
143. Id. at 361-62 (Thomas, J, dissenting).
144. Id. at 339-40.
and mitigate the bad, Michigan could consider race in admissions.\footnote{Id.} This reasoning from the Court is the same reason that the Office for Civil Rights, and courts in desegregation litigation, demanded affirmative action in admissions.

Most northern and western schools were never subject to the Court’s desegregation decisions, but there was a brief attempt to hold them to similar standards, at least with respect to employment, under the affirmative action regulations applicable to federal contractors. I vividly recall, as a very junior assistant professor at Chicago, being interrogated by a lawyer for the Office of Federal Contract Compliance. He wanted to know (with a senior representative of the university sitting across the table from me) if I understood the tenure standards. The point of this line of questioning was that fuzzy or subjective standards could be used to discriminate. In retrospect I plainly did not understand the tenure standards well enough to explain them; I was a hesitant, nervous, and ineffectual witness. This investigation resulted in a report, of which I remember only one telling passage. Chicago had not discriminated, and it had exercised affirmative action in building the pool, but it had not exercised “affirmative action in selection.” This is the same usage that appeared in the OCR regulations about the same time; schools might have to “make selections” that increased minority enrollment.\footnote{See 34 C.F.R. § 100.5(h) (2003).} The OFCCP rules were not repealed, or even significantly amended,\footnote{The OFCCP regulation, 41 C.F.R. § 60 (2003), appears to be little changed since 1978 and still requires most federal contractors to “develop and maintain a written affirmative action program.” Id. § 60-1.40.} but enforcement pressure faded away in the Reagan years.

Desegregation enforcement did not fade away nearly so much; the higher education opinions described above are all from the 1980s and 1990s. And much of the public came to adopt and internalize the most visible element of the Supreme Court’s definition of segregation. If admission standards that exclude minority applicants are evidence of discrimination and segregation in the South, then similar admission standards with similar segregative effects appear to policy makers and ordinary citizens to be evidence of discrimination and segregation in the North and West. Much of the public has fully accepted the Court’s view that the best evidence of desegregation and nondiscrimination is the visible presence of reasonable numbers of minority students. Racially identifiable schools are perceived as discriminatory, no matter
how neutral their admission process. The admission process is private, hidden, and arcane; the results of that process are public, highly visible, and easily understood. Racially identifiable elementary and secondary schools can often be explained, legally, politically, and in practical reality, as the natural consequence of racially identifiable neighborhoods.\textsuperscript{148} But racially identifiable universities appear to the public as the result of discretionary choices by admission officers.

Gross underrepresentation of minorities is widely viewed as evidence of discrimination, segregation, and institutional racism. Thus, whether or not there is an imminent threat of further legal action, the legacy of the Court’s desegregation cases is an environment in which selective institutions lose their legitimacy if minority students are substantially excluded. Southern and border-state schools have a compelling interest in complying with their desegregation obligations, and all schools have an interest, nearly as compelling, in avoiding the appearance of deliberate racial exclusion.

Elizabeth Anderson has offered a more positive version of this argument, emphasizing integration as a moral and political ideal and the route to a more just society, without attempting to tie it either to a legal obligation to desegregate or to a public inference of discrimination from the absence of integration.\textsuperscript{149} I fully agree with her emphasis on integration as a positive value. I think there is also force in recognizing that pursuit of that positive value is a legal obligation in much of the country, and that failure to achieve at least a modest measure of integration can delegitimate a public institution among large portions of public opinion. Both versions of the argument share the essential insight that affirmative action is a principal means to the goal of desegregation. And that goal is a powerful component of any attempt to explain the actual workings of most affirmative action programs.

But the Court did not make this connection in \textit{Grutter}. It talked repeatedly about underrepresentation,\textsuperscript{150} and it twice noted that

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\item[148.] See \textit{Freeman v. Pitts}, 503 U.S. 467, 494-96 (1995) (stating that “[i]t is beyond the authority and beyond the practical ability of the federal courts to try to counteract” large racial shifts in housing patterns); \textit{Belk v. Charlotte-Mecklenburg Bd. of Educ.}, 269 F.3d 305, 320-23 (4th Cir. 2001) (quoting the lower court’s opinion in stating that “there can be no doubt that demography and geography have played the largest role in causing imbalance” in racial composition of certain public schools).
\item[149.] \textit{Anderson}, supra note 53, at 1195-1228. For legal strengths and weaknesses of the desegregation argument before \textit{Grutter}, see Samuel Issacharoff, \textit{Can Affirmative Action Be Defended?}, 59 Ohio St. L.J. 669, 679-81 (1998). This Article and Professor Issacharoff’s have obvious common roots.
\end{itemize}
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Michigan linked this underrepresentation to past discrimination. But it did not cite *Fordice*, and it made no explicit connection to the law of desegregation.

III. SELECTIVE ADMISSIONS

Affirmative action that considers race is the one successful method that has enabled selective schools to significantly reduce their racial identifiability. Each school can apply the predictors of academic success that work best for it, and it can apply those selective admission standards across the board to all applicants. Such schools can then consider race at the margin, giving special consideration to those minority applicants who have already demonstrated strong academic qualifications under the usual standards. This marginal consideration of race is essential to negate the segregative impact of highly selective admission standards.

This marginal consideration of race is equally essential to hold back the political assault on selective admission standards. It is always hard to hold the votes for admission standards that only a small fraction of the populace can meet. A school that admits only the top ten percent of high school seniors, or a professional school that selects from the top five percent of college graduates, is of course saying that ninety or ninety-five percent of the population need not apply. This is a hard policy to sustain in a public institution subject to democratic control. Selective academic requirements inevitably exclude far more potential students than they admit. The benefit to those admitted is direct, obvious, and concentrated; those not admitted get only their diffuse and nonobvious share of the benefits that accrue to the state from having a distinguished university.

It may be that selective admissions are politically sustainable principally because of limitations of institutional size. No matter the admission standards, not many more students could attend most flagship state universities. If students were not selected on some basis

151. *Id.* at 316, 319.
152. For an earlier version of this argument, see Issacharoff, *supra* note 149, at 682-89.
of merit, they would have to be selected randomly, or on the older bases of wealth, social and political connections, and who their daddies were. Those alternatives are too unattractive to displace meritocratic admissions.

But if meritocratic admissions have the effect of excluding racial minorities who have long suffered from discrimination, and if that exclusion is to a grossly disproportionate extent, the political calculus changes. It is very difficult for highly selective admissions to carry the political burden of justifying the appearance of racial exclusion. And if much of the public has come to view disproportionately white institutions as presumptively discriminatory, then the selective admission standards themselves appear to many people to be presumptively discriminatory. Affirmative action that reduces the exclusionary effects of these standards protects the admission standards themselves; ending affirmative action would have created inexorable pressure to distort and reduce those standards.

This fear is not just theoretical; it was demonstrated in a series of Texas statutes modifying admission standards in response to *Hopwood v. Texas*. Graduate and professional schools are forbidden to use standardized test scores unless they compare those scores “with those of other applicants from similar socioeconomic backgrounds;” they are forbidden to rely on any test score, no matter how low, as a “sole” or “primary” criterion that ends consideration of an applicant. The legislature also provides a laundry list of factors that “may” be considered in graduate and professional school admissions, and a similar list that “shall” be considered for undergraduate applicants not in the top ten percent. Many of the items on these lists are socioeconomic factors with little or no capacity to predict academic achievement, but which the legislature hoped might have some correlation with race.

Similar changes occurred, less visibly, inside admission offices. Undergraduate admissions offices at Berkeley, and law school admissions at Berkeley and at Texas, all quit calculating academic indexes based on a combination of grades and test scores; they substituted more impressionistic assessments of each applicant’s

154. 78 F.3d 932 (5th Cir. 1996).
156. Id. § 51.842(b).
157. Id. § 51.842(a).
158. Id. § 51.805(b).
159. § 51.842(a)(2) (“socioeconomic background”); § 51.842(a)(6) (“region of residence”); § 51.842(a)(7) (“involvement in community activities”).
academic strength. Prominent scholars report that in 1996, Berkeley admitted ninety-four percent of the applicants in the top six percent of Academic Index Scores; by 2001, it admitted less than sixty-six percent of these applicants. The law school at Berkeley quit reporting LSAT scores to the admissions committee; all LSAT scores are partitioned into intervals, and only the intervals are reported. Berkeley also quit adjusting grade point averages for the quality of undergraduate institution attended.

When affirmative action is done right, a school selects admission criteria, based on its own experience, academic judgment, and institutional needs, to produce the best student body for its programs. In a large undergraduate institution, these criteria might be a simple matrix of grades and test scores, although that must change after Grutter at any school that wishes to engage in affirmative action. In graduate and professional admissions, the criteria are nearly always more complex and more dependent on human judgment. But whatever those criteria are, they can be applied to applicants of all races, and the school can identify the very best applicants of each race, as judged by the same criteria.

Some schools have at times disagreed, but in my experience a successful affirmative action plan will admit only those minority applicants who fall in the same part of the distribution on these criteria as white and Asian students who are being admitted with no consideration of race or other diversity factors, or who are not substantially different on these criteria from the lower end of the distribution of white and Asian students being admitted. When I say I base this point on experience, I mean principally the difference between affirmative action at The University of Texas Law School in the early 1980s, when the effects of going too low in the pool were visible and disruptive in the classroom and a source of racial tension, and affirmative action at the same school in the early 1990s, when we had deliberately reduced the racial gap in academic credentials and the

160. As to Berkeley, see Jimmy Chan & Erik Eyster, Does Banning Affirmative Action Lower College Student Quality?, 93 AM. ECON. REV. 858, 866 (2003). As to Texas, I rely on a conversation with the Assistant Dean for Admissions.
161. Id. at 868.
program had become largely uncontroversial among the faculty—save for one outspoken dissenter. At a further extreme, the point is illustrated by the decision of the Texas faculty in 1971 to withdraw from the CLEO program. 165 CLEO (the Council on Legal Education Opportunity) provided summer training for minority applicants to law schools. The Texas faculty found that CLEO "had shifted its focus from students who were just below the level where law schools would seriously consider them for admission to students who were significantly below that level." 166

This distinction—between "just below" and "significantly below"—makes an enormous difference to the effectiveness and legitimacy of an affirmative action program. It is important both to the academic success of the minority students admitted and to the program's benefits for education and race relations. As Elizabeth Anderson has pointed out:

Integrative affirmative action imposes an inherent limit on the permissible degree of racial preference. Because its point is to empower agents of integration, it will fail if it recruits people who cannot perform in that role... This means that affirmative action can compromise valid meritocratic standards only at the margin. 167

Lino Graglia revels in describing the minority students who have not achieved academically, 168 but a well run affirmative action program admits minority students who have succeeded academically, nearly as well as the other students admitted and as judged by the same criteria.

The workings of such a system will vary with the nature of the institution; I will illustrate it with law school data. A combination of size and selectivity places severe pressure on racial diversity in law school enrollment. Law school admissions are far more selective than most undergraduate admissions, but law schools admit far more students from far larger applicant pools than most graduate schools, and thus necessarily rely more heavily on objective predictors of academic success. At most law schools, undergraduate grades and LSAT scores get substantial weight in admission decisions. Defending

166. Id. at 557.
167. Anderson, supra note 53, at 1215; see also Issacharoff, supra note 149, at 690-91 (arguing for "modest" preferences "on the margin of established selection criteria," thus preserving "the customary returns to achievement, perseverance, and merit").
those predictors is beyond the scope of this Article, but I am confident that substantial differences in these two measures predict substantial differences in law school performance. These predictions are of course imperfect, but they are better than those based on any other predictors; if better predictors were available, some faculty would have adopted them.

Despite the importance of grades and test scores, no law school relies on these predictors alone. At nearly all law schools, admission officers go on to review the entire application file. A recent study found that, nationwide, grades and LSAT scores explain about seventy percent of the variance in law school admission decisions for white applicants, and large but somewhat smaller fractions of the variance for minority applicants. This analysis was conducted separately for each racial group, so the remaining variance has nothing to do with race. Instead, it presumably derives from factors that are not subject to ready quantification, but which are familiar to all persons with experience in law school admissions. Most of this remaining variance is presumably explained by subjective assessments of other academic predictors: quality of undergraduate institution; rigor of undergraduate curriculum; recommendations; essays and writing samples; other activities and accomplishments that show initiative, perseverance, creativity, or other skills; and random error in the selection process. Some of the remaining variance is explained by considerations of socioeconomic and geographic diversity, some by other factors important to the missions of particular law schools.

169. See, e.g., Linda Wightman, Beyond FYA: Analysis of the Utility of LSAT Scores and UGPA for Predicting Academic Success in Law School 15-18 & tbl. 4 (2000) (Law School Admission Council Research Report 99-05) (finding, with data from 142 schools, that LSAT and UGPA predict both first-year and cumulative law school grades, that LSAT predicts better than UGPA, and that both together predict better than either alone); Richard O. Lempert, David L. Chambers, & Terry K. Adams, Michigan's Minority Graduates in Practice: The River Runs Through Law School, 25 L. & SOC. INQUIRY 395, 459-67 (2003) (finding “a strong, statistically significant relationship between LSAT and UGPA, on the one hand, and grades at the end of three years of law school on the other,” at the University of Michigan Law School). All such studies inevitably underestimate the predictive value of the LSAT and UGPA, because most students at any given school come from a sharply constricted range on each variable. If modest differences within the constricted range have predictive power, the much larger differences over the full range should have much more predictive power. See, e.g., Bradley E. Huitema & Cheri R. Stein, Validity of the GRE Without Restriction of Range, 72 PSYCHOL. REP. 123 (1993) (documenting much greater predictive power for Graduate Record Examination in a Ph.D program that admitted students without regard to GRE scores).


171. Id. at 240.
The mix of these factors undoubtedly varies from school to school. But whatever mix a school uses, it can apply its system to all applicants, considering race only at the margins. This is apparent even in the grids of which Barbara Grutter's attorneys made so much. At Michigan, grades and test scores were powerful predictors of minority admissions as well as of white admissions; as one moves from left to right on the grids, or from bottom to top on the grids, the chances of admission steadily increase for all races. The correlation of admission decisions with grades and test scores was imperfect for all races, because the more subjective predictors of academic achievement influenced admission decisions for all races but were not reflected in the grids. Admission was extended to minority applicants with academic credentials equal to and slightly less than those of white applicants admitted in high percentages—as measured by the same criteria.

It was of course undisputed that minority applicants were admitted with weaker grades and test scores than white and Asian applicants. Grutter's attorneys' attempted to magnify the difference by emphasizing the odds of admission for different races at the border between high and low chances of admissibility. But this showed only that there was a preference, not that it was large. Even if race were used only as a literal tiebreaker among applicants with identical scores, Grutter would have been able to calculate a large ratio—possibly an infinite ratio—between the admission chances of minority and white applicants at the marginal score where ties were broken.

173. Id. at 7.
174. Id.
175. Id. at 8-10.
176. To illustrate: Suppose a school rank ordered all applicants by grades and test scores, and offered admission to 1000 applicants purely by the numbers and strictly in rank order. Suppose it had made 990 offers when it finished with those applicants with a 3.4 and a 156. And suppose there were 29 applicants—9 minorities and 20 whites—with a 3.4 and a 155. If the school used race to break this tie, it would admit all 9 of the minorities and 1 of the whites. Within this cell, the minority chance of admission would be 9/9, or 100%. The white chance of admission would be 1/20, or 5%. According to Grutter's expert, the relative odds of admission in this cell would favor minorities by 20:1. Note too that however many seats were left to be filled from the last cell, if race was the tie breaker, then either the minority admission rate from that cell would be 100%, or the white admission rate would be 0%. Yet all but 29 of the school's applicants would have been treated in a completely color-blind manner, and the only effect of race would have been to break ties. There are many things wrong with this hypothetical admissions plan; it is mechanical and it gives too much
The real measure of the preference is the difference between the marginal minority applicants admitted and the marginal white applicants rejected. This comparison focuses on the range in which race is determinative. It avoids an important distortion in comparing all admitted applicants. Even in a purely colorblind system, the mean grades and test scores of disadvantaged minority groups would be significantly lower than those of other groups, because a larger proportion of those minority students above the threshold for admission would be only a little bit above it, in the lower ranges of the class.\textsuperscript{177}

The proper measure, the difference at the margin, is generally small. LSAT scores range from 120 to 180, and undergraduate GPA generally ranges from 2.0 to 4.0. Grutter showed thirty-six cells of 2 and 3 points on the LSAT and .25 points of GPA. She emphasized a much smaller number of cells in the middle of this portion of the grid, cells where her lawyers believed that race mattered greatly.\textsuperscript{178} If she had shown the whole grid in this way, it would be at least 176 cells: 8 cells tall and at least 22 cells wide. (The uncertainty results from her irregular use of 2-point cells.) Michigan's preference for minority applicants was thus confined to a small part of the range of the principal academic predictors. The standard error of the LSAT is 2.6 points, meaning that if a student scores 160, there is a 68% chance that her "true score" is between 157.4 and 162.6, and a 95% chance that her "true score" is between 154.8 and 165.2.\textsuperscript{179} Looked at impressionistically, which is the way Grutter presented it, Michigan's racial preference was about the size of the statistical confidence belt around the test scores. What the trial judge found in the Texas case was equally true at Michigan: "the applicants selected for admission come from a relatively narrow band within the full range of scores."\textsuperscript{180}

weight to small differences in scores. But whatever else might plausibly be said, the preference for minorities in this illustration is not large.

\textsuperscript{177} This important point is explained, and illustrated with data, in William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions 37-38 (1998).

\textsuperscript{178} Petitioner's Brief, 2003 WL 164185, at *7.

\textsuperscript{179} William C. Kidder, Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education, 12 Yale J.L. & Feminism 1, 19 (2000); Law School Admission Council, What Is a Score Band?, available at http://www.lsacnet.org/lSac/publications/Scorebands.pdf (last visited June 21, 2004). The "true score" may be thought of as the score on a hypothetical test that contained no measurement error. \textit{Id}.

A larger and more sophisticated study of affirmative action at selective schools produced similar results. Linda Wightman identified minority students who would have been denied admission if admission had been based solely on grades and test scores. She then identified the bottom ten percent of white students, ranked on grades and test scores, at the same schools. She assumed that these white students would be more comparable to the still weaker white applicants who would have been admitted if the school had not admitted the minority students identified in her study. She found mean differences ranging from half a point to 4.8 points of LSAT score (on the 10 to 48 scale used for a time in the 1990s), and zero to a quarter point of undergraduate GPA. Preferences were larger for blacks than for Hispanics, and larger at less elite schools than at more elite schools, but generally well under a standard deviation.

In affirmative action plans like those at Texas and Michigan, and like those suggested by the Wightman data, race is considered only at the margin and affects only a small number of offers of admission. These offers have no significant effect on the quality of the student body, because they are so few and because the best minority applicants are selected on the same criteria as all the other applicants. But each student who benefits from consideration of race contributes fully to the compelling interest in diversity, because every such applicant is a member of a disadvantaged minority group. Thus, a properly administered affirmative action program makes the maximum contribution to diversity with the minimum effect on academic excellence.

Critics sometimes wonder how a small preference can make a large difference in minority enrollment. The key to the explanation is that at schools where minorities are seriously underrepresented, there are so many more white applicants than minority applicants. In the range of academic talent at the margin between admission and nonadmission, the number of minorities is often substantial when compared to the number of minorities already admitted, but small when compared to the number of white and Asian applicants in the same range. If all admissions must be colorblind, only a small fraction

182. Id. at 19 tbl. 3.
183. See Peter H. Schuck, Diversity in America: Keeping Government at a Safe Distance 182 (2003).
of the minority applicants in this range will be admitted. But if a school can directly consider race, it can admit all or most of the minority applicants in this range, thus significantly increasing minority representation in the student body, without significantly changing the range from which students are admitted.

Primary reliance on each school's preferred selection criteria, applied to applicants of all races, serves important interests. It preserves high academic standards, it preserves the distinctive missions of different schools, and it preserves incentives to hard work and academic achievement on the part of potential applicants. Explicit consideration of race, confined to a relatively narrow band as measured by established race-neutral selection criteria, preserves these criteria and the interests they serve. If explicit consideration of race were ended, all the interests in diversity and desegregation would remain, and at least in some states, the political pressure would become overwhelming to reduce or abolish selective admission standards across the board.

IV. FUTURE LEADERSHIP

The academic goals of excellence in teaching and research require flagship schools to be academically selective in their admission of students. At the same time, these schools are public institutions that must serve, and be seen to serve, all the communities of their respective states. And they must educate a disproportionate share of the future leaders of the state and of the nation.

Failure to educate a leadership class among disadvantaged minority populations would be a permanent threat to equality and social stability. In some states, this threat is imminent and large. Across the southern tier of the country, from California to Florida, historically disadvantaged minorities are now a majority or near-majority of the college-age population. The following table lists eight states, containing a third of the nation's population, where more than forty percent of the college-age population comes from the three disadvantaged minority groups most commonly preferred in affirmative action programs—blacks, Hispanics, and Native Americans.

184. "Hispanics" of course lumps together a broad range of ethnic groups with different histories and different degrees of disadvantage—Mexican-Americans, Puerto Ricans, and Cubans most obviously and most numerous, but also Guatemalans, Salvadorans, and immigrants and their descendants from nearly all the rest of Latin America. For better or worse, this is how most of the readily accessible statistics are kept.
College-Age Population (18-24) by State and Race (2000)\textsuperscript{185}

<table>
<thead>
<tr>
<th>State</th>
<th>Black</th>
<th>Hispanic</th>
<th>Native American</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>3.5%</td>
<td>34.9%</td>
<td>5.9%</td>
<td>44.3%</td>
</tr>
<tr>
<td>California</td>
<td>6.7%</td>
<td>42.4%</td>
<td>1.1%</td>
<td>50.2%</td>
</tr>
<tr>
<td>Florida</td>
<td>20.0%</td>
<td>22.1%</td>
<td>.4%</td>
<td>42.5%</td>
</tr>
<tr>
<td>Georgia</td>
<td>32.0%</td>
<td>10.3%</td>
<td>.3%</td>
<td>42.6%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>37.1%</td>
<td>3.0%</td>
<td>.6%</td>
<td>40.7%</td>
</tr>
<tr>
<td>Mississippi</td>
<td>42.4%</td>
<td>2.1%</td>
<td>.5%</td>
<td>45.0%</td>
</tr>
<tr>
<td>New Mexico</td>
<td>2.3%</td>
<td>49.0%</td>
<td>11.5%</td>
<td>62.8%</td>
</tr>
<tr>
<td>Texas</td>
<td>12.3%</td>
<td>40.0%</td>
<td>.6%</td>
<td>52.9%</td>
</tr>
</tbody>
</table>

In all these states, the minority population is younger than the non-Hispanic white population. It is therefore reproducing more rapidly and dying more slowly. And Hispanic population growth is fueled by continued immigration. For all these reasons, the minority percentage of the population is growing rapidly. The three states with the largest absolute population growth between 1990 and 2000 also experienced large increases in the black, Hispanic, and Native American fraction of the college-age population: from 44.2% to 50.2% in California, from 32.3% to 42.5% in Florida, and from 44.6% to 52.9% in Texas.\textsuperscript{186}

\textsuperscript{185} In at least three other states—Maryland, New York, and South Carolina—these three minority groups totaled more than thirty-eight percent of the college-age population in 2000 and may well be more than forty percent today. All numbers were calculated from data in the 2000 Census. United States Census Bureau, \textit{Census 2000, Summary File 2, Quick Table QT-P1}. Age Groups and Sex: 2000, \textit{at} \url{http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=DEC&_lang=en} (last visited June 20, 2004). I used data for “Black or African American alone” and “American Indian and Alaska native alone,” which somewhat understates the minority population by excluding persons of mixed-race descent. I used data for “Hispanic or Latin (of any race),” which somewhat overstates the minority population by including black Hispanics and Native American Hispanics who were also counted in another category. Apart from deliberately choosing to make errors offset in this way, I did not attempt more sophisticated adjustments to the readily available data.

\textsuperscript{186} For 2000 data, see \textit{id}. Data from 1990 were calculated from United States Census Bureau, \textit{1990 Summary Tape File 1, Quick Table QT-P1A}. Age and Sex for the Total Population: 1990; \textit{id}, Quick Table QT-P1B. Age and Sex for the American Indian, Eskimo, or Aleut Population: 1990; \textit{id}, Quick Table QT-P1D. Age and Sex for the Black Population: 1990; \textit{id}, Quick Table QT-P1E. Age and Sex for the Hispanic Origin Population: 1990, all \textit{at} \url{http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=DEC&_lang=en} (last visited June 20, 2004). In these tables, the Census Bureau made the choices about racial classification of the data.
Projections for the future are even more dramatic than these data suggest. Steve Murdock, the State Demographer of Texas, projects that in 2040 Texas will be fifty-nine percent Hispanic, nine percent black, twenty-four percent white, and eight percent other races.\textsuperscript{187} The median age of the Hispanic population will still be nearly twelve years younger than the median age of the white population;\textsuperscript{188} even apart from immigration, the Hispanic increase as a percentage of the state’s population will not yet have peaked.

States with such large “minority” populations cannot be indifferent to the educational success of those populations. Most of their future workers and most of their future voters are members of minority groups that have been historically disadvantaged. Unless there are radical changes in ethnic voting patterns, most of their future government officials are members of such groups. In the second half of the twenty-first century, the University of Texas at Austin will almost certainly be a predominantly Hispanic institution. If it aspires to still be “a university of the first class,”\textsuperscript{189} then it must aspire to raise Hispanic achievement levels sufficiently to maintain that status. To maintain highly selective admission standards without regard to racial and ethnic consequences is to put the state on track to a Third-World future, with a wealthier and more educated white minority trying to protect its privileges from a poorer and less educated black and brown majority. Any attempt to reserve a grossly disproportionate share of elite positions for the white population is madness, whether done in the name of old-fashioned racism or of unbending commitment to colorblindness.

All of this is but to elaborate the Court’s point in \textit{Grutter}. The pathway to future leadership must be visibly open to talented citizens of all races and ethnicities. If we want our future leadership to be both highly qualified and ethnically diverse, then we must educate more minority students at the highest levels. Some states, and some opponents of affirmative action, may believe they can have a


\textsuperscript{188} \textit{Id.} at 27.

\textsuperscript{189} The Texas Constitution requires the legislature to maintain, support, and direct “a University of the first class, to be located by a vote of the people of this State, and styled, ‘The University of Texas.’” \textit{Tex. Const.} art. VII, § 10.
leadership class that is highly qualified and not diverse. But in much of the South and Southwest, and in other states with minority populations only slightly smaller, that choice is not available. Future leadership will inevitably be diverse; the ordinary workings of democracy will see to that. The question is whether we can fix our educational systems in time to ensure that those leaders are also highly trained and highly qualified.

V. PAST AND PRESENT DISCRIMINATION

Average differences in academic skills and entering credentials have multiple and complicated causes, but the public education system is necessarily one of the causes. The overwhelming majority of minority children are educated in public schools. The persistent differences in academic skills that plague admissions to higher education are thus largely the product of the public education system at lower levels.

Even de jure segregation persists. At the time of the 1994 trial in *Hopwood v. Texas*, desegregation litigation continued in more than forty Texas school districts, and a majority of the in-state applicant pool to the University of Texas Law School attended public schools that were still held to be de jure segregated by federal courts. Children who entered kindergarten in a segregated public school in 1994 will be law school applicants in 2011 and later.

De facto segregation not only persists, but is actually increasing. Nationwide, 72% of blacks and 76% of Hispanics attend schools where a majority of the students are from a minority group. About 37% of each group attends schools that are more than 90% minority, and 18% of blacks and 11% of Hispanics attend schools that are more than 99% minority. These problems are not confined to the South or any other part of the country. By one important

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191. Id. at 573 (finding continued impact on the applicant pool and citing to further details in trial record).
192. All data in this paragraph are from Erica Frankenberg, Chungmei Lee & Gary Orfield, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (2003), available at http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (last visited June 18, 2004). The authors argue that de facto segregation in schools has increased to a level unseen for the past three decades due to termination of desegregation orders.
193. Id. at 33.
194. Id. at 28 fig. 4.
195. Id.

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measure, Michigan has the most segregated public schools in the country, with 62.5% of its black children attending schools that are more than 90% minority. 196

With or without segregation, American public schools educate minority students far less effectively than they educate white students. Racial gaps in educational achievement and attainment remain serious at every level, from reading and math scores in elementary school, to rates of high school graduation, college attendance, and college graduation. 197

The complexities of causation and of collective governmental motivation make it impossible to know how much of public school segregation is unconstitutional under the Court’s standards, or how much of the racial and ethnic achievement gap is caused by differential neglect or other forms of discrimination. Universities cannot prove how the credentials of their applicants would be distributed if there were no discrimination in public education. But difficulties of proof should not lead policy makers to draw the implausible inference that the states bear no responsibility for the racially uneven consequences of their elementary and secondary education systems, or the even more implausible inference that no state agency can accept any responsibility for those consequences. Affirmative action in admissions is not a response to mere “societal” discrimination; public universities are parts of educational systems, each extending under state supervision, coordination, and funding from early childhood to young adulthood. 198

196. Id. at 50 tbl. 16.
198. See Geier v. Alexander, 801 F.2d 799, 809 (6th Cir. 1986):

Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted they ordinarily must have been students for sixteen years....

The consent decree in this case does not seek to remedy some amorphous “societal” wrong. It is directed solely at the continuing effects of past practices that adversely affected black Tennesseans as they moved through the public school systems and the higher education system of the state.

The Fifth Circuit in Hopwood went to the opposite extreme, holding that the law school was the relevant unit, forbidden to consider any past or present discrimination by the State of Texas or its school districts, or the University of Texas System, or other units at the University of Texas at Austin, and holding further that the principal remaining effect of the law school’s past discrimination—perceptions of the law school in the minority community—could not be considered because they might last too long and prove too much. Hopwood v. Texas, 78 F.3d 932, 949-54 (5th Cir. 1996).
Universities cannot ignore the unequal output of the earlier stages of the systems of which they are a part.

Judicial reaction to this reality should depend on the reason for addressing the question. Difficulties of proof create uncertainty, and uncertainty is a reason for courts to proceed cautiously. It is one thing to say that causation is so uncertain, and the efficacy of judicially manageable remedies is so uncertain that courts will no longer order burdensome efforts to combat racial segregation in public schools. It would have been quite different to say that courts will forbid educational institutions from taking any cognizance of the problem, or any voluntary steps to alleviate it. Recognizing that the public educational system has poorly served many minority students in earlier years, public universities can attempt to reduce the damage by preferentially admitting those minority applicants who have achieved despite the system and who appear to be capable of academic success at the next level.

Of course the minority students admitted to universities, and especially to the most selective schools, will never be the students who suffered most from discrimination or inadequate education in elementary and secondary school. The students who suffered most have been rendered incapable of competing at higher levels, even with preferential admissions and remedial help. They and their successors deserve a remedy, in the form of dramatic improvement in elementary and secondary education, and where it is too late for that, in the form of further education in junior colleges, nonselective four-year colleges, vocational training programs, adult literacy programs, and other efforts that meet the needs of the victims. But their remedy will not come in selective institutions, and affirmative action at such institutions will not help them.

Affirmative action at the university level addresses the consequences of past and present discrimination, at the level of groups and the level of social consequences, by alleviating its effects on racial and ethnic representation. The shortage of highly qualified minority students, which threatens future leadership and threatens segregation of selective universities, is in substantial part a large-scale consequence of past and present discrimination in public education. We cannot remedy the effects of discrimination in elementary and secondary education by transporting students from the bottom of the distribution to the top. But we can move many minority students one or two steps up on the competitive escalator. The individual benefits flow to those minority students who are most deserving on traditional meritocratic
criteria, to those who have achieved the most despite the state's educational failures. But the social benefits flow more broadly in increased diversity in all its senses, in desegregation, in educating leaders, and in preserving selective admission standards. Affirmative action is a form of group remedy for past and present discrimination, but, more fundamentally, past and present discrimination is why affirmative action is needed for all the other interests it serves.

The private universities do not bear the same responsibility for the performance of public education, but they are equally dependent on the public educational systems for their applicant flow. They should not be required to passively accept whatever racial inequalities public schools send their way, or to render those inequalities more permanent by ignoring them. Both public and private universities should be permitted to respond to the racial inequalities in public education that affect their applicant pool. This constitutional permission has been granted under the Court's expanded conception of diversity; responding to past and present discrimination is an important part of the Court's full explanation of affirmative action.

VI. THE MYTH OF RACE-NEUTRAL MEANS

Almost no one wants to be responsible for resegregating the best American colleges and universities. Nor do many people admit to wanting to destroy the quality of our best colleges and universities, although some of the dissenting judges in the Michigan cases came out strong for mediocrity. Most opponents of affirmative action claim to want diversity, and academic excellence, and color blindness. The result is a desperate desire to believe in some magic bullet that will produce all three. This is the myth of "race-neutral means" of achieving diversity.

Defenders of affirmative action have also promoted the plausibility of race-neutral means every time they claimed that their affirmative action programs did not actually make decisions on the

199. I say "almost" because my colleague Lino Graglia belittles that consequence as insignificant. But most opponents of affirmative action, at least in public, say resegregation would be unfortunate. See, e.g., SCHUCK, supra note 183, at 182 ("nightmare ... deeply repellant ... appalled"); Grutter v. Bollinger, 137 F. Supp. 2d 821, 869 (E.D. Mich. 2001) ("unfortunate").

basis of race. When defenders claimed that they were just applying a broader definition of merit, a definition that was equally valid or even better than more traditional definitions, they in effect claimed that they had found race-neutral means of promoting diversity. If schools were not really basing admissions on race, then it must not be necessary to do so. And of course the people who attack standardized tests especially, and who attack all measures of academic achievement more generally, implicitly or explicitly suggest that affirmative action might be unnecessary if we took a wholly different approach to admitting students. But the round of litigation that culminated in the Michigan cases made it harder and harder to sustain the false claim that affirmative action plans do not actually consider race, and when the possibility of race-neutral means was offered as a reason to invalidate such plans, defenders of affirmative action sensibly admitted that they were considering race and argued that it is essential to do so.

The Bush Administration has become the most prominent promoter of race-neutral means, beginning with its amicus briefs on behalf of the United States in the Michigan cases. The United States effectively conceded that states have a compelling interest in racial and ethnic diversity in their universities, but it insisted that this diversity could be achieved without considering race or ethnicity. If that were true, the case for considering race would largely evaporate. But it isn’t true. If there were a magic bullet that preserved academic excellence and produced diversity without considering race, many schools would have begun using it long ago, avoiding all the controversy and the risk and expense of litigation.

The United States urged reliance on selection criteria chosen not for their contribution to academic excellence or to any mission objective other than diversity but principally for their presumed ability to increase minority enrollment. It especially recommended the percentage plans in California, Florida, and Texas, under which undergraduate admission is guaranteed to some applicants on the basis

201. See, e.g., Revised Criteria, 43 Fed. Reg. 6658, 6659-60 (Feb. 15, 1978). The most widely publicized example was Georgetown’s attempt to claim that racial differences in its law students’ undergraduate grades and LSAT scores were explained by soft variables in the application files. See Issacharoff, supra note 149, at 672 n.9 and sources there cited.


203. U.S. Brief, supra note 202, at 13 (describing diversity as a “paramount government objective”).

204. Id. at 13-18.
of class rank in high schools. It also urged admission on the basis of a laundry list of mostly subjective factors—soft academic measures, such as interviews and activities, and socioeconomic factors with no apparent connection to academic achievement. Lower court judges in *Grutter* urged similar alternatives, including even admission by lottery.

Essentially the United States recommended that law schools identify proxies for race. Proxy selectors would be race-neutral admission criteria that benefit minority applicants disproportionately. Such proxy selectors avoid the explicit consideration of race, but that is their only virtue. In every other way, they are far inferior to the direct consideration of race. They achieve far less diversity and do far more damage to admission standards. This is for quite general reasons inherent in the basic approach.

For most of these proxies, the correlation with race is weak. This means that most offers of admission based on a proxy selector do not go to applicants from disadvantaged minority groups. It is therefore ineffective to use these weak proxies at the margin of a school's other selection criteria. Rather, to achieve substantial diversity through proxies, the proxies must be used across the board. They must displace standard selection criteria rather than supplement them at the margin. Inherently, therefore, they damage admission standards far more broadly than affirmative action does.

Many of the proxies suggested have no known correlation with race; they are not really proxies at all. The United States recommended admission on the basis of "communication skills" and "extracurricular activities," but there is no reason to believe that minority applicants generally outperform other applicants on these criteria, and no reason to believe that primary reliance on such soft measures would select an academically strong class. These soft academic predictors get some weight when they are present (or absent) to a marked degree; variations in the broad middle of the range have little predictive value.

The only reason for giving such predictors greater weight is the hunch that they would *not* correlate with grades or test scores, the hard academic predictors that tend to exclude minority applicants. That is, greater reliance on soft predictors is suggested for the *purpose* of

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205. *Id.* at 14-17.
206. *Id.* at 19-20.
displacing better academic predictors and thus eroding academic standards. The minority applicants selected in this way would on average be weaker students than the minority applicants admitted under a system of properly weighted academic predictors with race considered at the margin. And the far more numerous white applicants admitted in this way would also on average be weaker than those admitted under a system of properly weighted academic predictors. Heavy reliance on criteria with weak predictive value is in fact a disguised way of implementing the suggestion that schools admit applicants by lottery.

The costs of race-neutral means follow logically from the way proxies and lotteries work: they require greater departures from admission standards based on academic criteria, and many of these departures substitute a weaker white student for a stronger white student, adding nothing to diversity. These conclusions have been stated mathematically by two teams of economists. A team from Johns Hopkins and Oxford modeled a plan in which some admissions are based on a colorblind assessment of the academic merits and the remaining admissions are based on a lottery above some threshold.208 They concluded that “affirmative action [by which they mean considering race] maximizes total student quality for any level of diversity.”209 “Affirmative action minimizes the cost of [diversity] by replacing the least-qualified majority candidates with the most-qualified minority candidates who otherwise would not be admitted.”210 With race-neutral means, “the admissions office may admit candidates who are less qualified than all minority candidates admitted under affirmative action, or reject candidates who are better qualified than some majority candidates admitted under affirmative action.”211

A second team, from Harvard and Boston University, carried the analysis further.212 They modeled admission preferences based on proxies rather than lotteries,213 and they went beyond purely mathematical models to simulations with real data. Using data on real applicants at seven selective schools, they simulated admissions based

208. See Chan & Eyster, supra note 160, at 863.
209. Id. at 859.
210. Id. at 864.
211. Id. at 859.
213. Id. at 3-4 & n.6.
on academic predictors plus parents' education and median income in the applicant's Zip Code. For each of the seven schools, "color-blind policies perform less well than do color-sighted policies." Elaborating further:

If an admissions office attempts to devise a system for achieving a desired degree of racial diversity while avoiding the explicit consideration of race, it would be significantly less effective at selecting students of all races who are anticipated to be high academic performers. The short-run efficiency losses (relative to Laissez-faire [indifference to diversity]) from using race-neutral polices to pursue race-conscious goals are four to five times greater than the losses incurred when the same goals are pursued via explicitly race-sighted policies.

To avoid these problems with weak proxies and nonproxies, the search for race-neutral means of achieving diversity requires strong proxies—selection criteria that correlate strongly with race and favor disadvantaged minority groups. There are few such strong proxies, and the ones that exist invite legal challenge. Opponents of affirmative action not constrained by any need to run for reelection tend to believe that proxy criteria are unconstitutional, and the stronger a proxy's correlation with race, the more likely it is to be challenged as a sham.

A. Percentage Plans—The Most Prominent Weak Proxy

1. The Problems with Percentage Plans

The State of Texas has guaranteed admission to its undergraduate programs to any student who graduates in the top ten percent of his or her high school class. California and Florida have adopted similar programs administratively. The Texas program

214. Id. at 13-14.
215. Id. at 15.
216. Id. at 16. By "Laissez-faire," they mean an admissions policy that selects purely on the basis of academic merit with no effort to achieve greater diversity. Id. at 9. The study also argues for a longer-term harm: because race-neutral means require a greater departure from measures of academic merit, they cause a greater reduction in incentives to achieve. Id. at 5.
219. See Fla. ADMIN. CODE ANN. r. 6-6C-6.002(5) (2004); University of California, ELC and Statewide Eligibility and Admissions, at http://www.ucop.edu/sas/ele/eligibilityinfo.html (last visited June 16, 2004).
guarantees admission to any public university the student chooses, including the flagships. California guarantees that the top four percent of each high school class will be admitted to some campus of the University of California, but not to any particular campus. Florida guarantees that the top twenty percent of each high school will be admitted to some public university, but not to any particular university. Independently of the state's twenty-percent plan, the University of Florida has guaranteed admission to any student in the top five percent of her high school class.\footnote{Patricia Marín & Edgar K. Lee, Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida 34 (2003), available at http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf (last visited June 20, 2004).} None of the plans appears to guarantee admission to a particular major. There are also differences in how and when the qualifying percentage of each class is identified. What the rules have in common is a promise of admission to the best students in each high school, as distinguished from the best students in the state.

These are commendable efforts with unanticipated advantages, but they are far inferior to a combination of race and the best academic predictors. Percentage plans were expected to serve as a weak proxy for race, because many high schools are highly segregated. In heavily minority high schools, all or most of the top ten percent will be minority. Of course admission is equally guaranteed to the top ten percent of mostly white high schools and to whites who may be disproportionately represented in the top ten percent at integrated high schools. And students at strong high schools with a tradition of college attendance—which are generally \textit{not} highly segregated minority high schools—are more likely to learn of the percentage plan and more likely to take advantage of it. If it had been employed simply as an admission criterion, the Texas ten-percent plan would have had little effect on minority enrollment. But when combined with aggressive recruiting, financial aid, and retention programs, all targeting students from minority high schools, percentage plans can help ensure that some minority applicants are admitted and retained.

At the University of Texas at Austin, from 1982 to 1995, black enrollment as a percentage of entering freshmen ranged from 4.1\% to 6.2\%, dropping below 4.7\% only twice (in 1986 and 1987).\footnote{For 1986-95, see Univ. of Tex. at Austin Office of Institutional Research, Statistical Handbook 1995-96, at tbl. S12b (1996) [hereinafter UT Statistical Handbook 1995-96], available at http://www.utexas.edu/academic/oir/statistical_handbook/95-96s12b.html (last visited June 17, 2004). For 1982-85, see Univ. of Tex. at Austin...
a year partially affected by *Hopwood v. Texas*; black enrollment again dropped to 4.1% of the freshman class. In 1997, with no consideration of race and no percentage plan, blacks dropped to 2.7% of the freshman class, or about half the range from 1988 to 1995. The ten-percent plan was enacted in 1997, and first affected admissions in 1998. Not much happened; blacks as a percentage of the freshman class in 1998 rose to 3.0%. From 1999 to 2003, with the help of substantial recruiting, financial aid, and retention efforts, black enrollment as a percentage of the freshman class ranged from 3.4% to 4.1%. So the highest black enrollment in these years just equals the lowest levels achieved with affirmative action; the best years since *Hopwood* are lower than any year from 1988 to 1995.

The experience with Hispanics is superficially better, but in some important ways worse. With affirmative action from 1982 to 1995, Hispanic enrollment ranged from 11.1% to 16.1% of the freshman class, and did not drop below 13.7% in any year after 1988. Hispanic enrollment held approximately steady, at 14.5%, in the transitional year of 1996, and dropped to 12.6% with no consideration of race and no percentage plan in 1997. With the ten-percent plan from 1998 to 2002, Hispanic enrollment ranged from 13.2% to 14.3%, in the bottom half of the 1988-95 range. In 2003, Hispanic enrollment ticked up to 16.3%, the highest level yet achieved.

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222. 78 F.3d 932 (5th Cir. 1996). The opinion came down March 18, at the height of the admission season. The mandate was stayed on April 19, in an unreported order. *Hopwood v. Texas*, No. 94-50664 (5th Cir. 1996). The stay expired by its terms when certiorari was denied on July 1. *Texas v. Hopwood*, 518 U.S. 1033 (1996).


224. Id.


227. Id.

228. For 1986-95, see UT Statistical Handbook 1995-96, supra note 221, tbl. S12b. For 1982-85, see UT Statistical Handbook 1988-89 supra note 221, tbl. E13. There is the same disparity in how the data were kept before 1986. See discussion supra note 221.


230. Id.

231. Id.
time will tell whether this is a random variation, an effect of the weak labor market, or the beginnings of a modest permanent improvement. But there is every reason to believe that percentage plans have achieved all their easy gains, and that further improvement will be much harder.

These simple comparisons of minority percentages in the freshman class conceal the extent to which Texas is falling further behind in the effort to educate its minority population. From 1990 to 2000, as the Hispanic fraction of the freshman class declined from 16.1% to 13.2%, the Hispanic fraction of the college-age population increased from 30.9% in 1990 to 40% in 2000.\textsuperscript{232} Hispanic representation in the freshman class as a percentage of Hispanic representation in the college-age population thus declined from 52% (16.1/30.9) to 33% (13.2/40). The record high Hispanic enrollment in 2003, at 16.3%, is only 41% of Hispanic representation in the college-age population in 2000, and undoubtedly a smaller percentage in 2003. Texas in the twenty-first century is doing considerably worse at enrolling Hispanics with the ten-percent plan and aggressive targeted recruitment than it did in 1990 with affirmative action.

Blacks were doing worse even before \textit{Hopwood}, and they have also lost ground since, but not as much. Principally because of the explosive growth in the Hispanic population, blacks as a percentage of the college-age population have declined slightly, from 13.3% in 1990 to 12.3% in 2000.\textsuperscript{233} In 1990, blacks were 5.0% of the freshman class, or 41% of their percentage in the college-age population; in 2000, they were 3.9% of the freshman class, or 32% of their percentage in the college-age population. The 4.1% black enrollment in 2003 is 33% of the black percentage of the college-age population in 2000.

I compare minorities in the freshman class to minorities in the college-age population as a crude measure of the degree of underrepresentation. I do not use high-school graduates, college applicants, or college applicants with controls for credentials, because no one seriously claims that the university now discriminates against minority applicants, and I am not testing that hypothesis. Nor do I assume that the goal of affirmative action is racial balance, which in any event would not be remotely achievable in the foreseeable future. Rather, these comparisons follow \textit{Grutter} in assuming that gross underrepresentation is a legitimate measure of the need for affirmative

\begin{footnotesize}
\begin{enumerate}
\item Calculated from United States Census Bureau, \textit{supra} notes 185-186.
\item Calculated from United States Census Bureau, \textit{supra} notes 185-186.
\end{enumerate}
\end{footnotesize}
action. The *Grutter* opinion is pervasively concerned with "underrepresented" minority groups,\(^{234}\) this focus is directly relevant to the goals of desegregation, educating future leaders, and making the university visibly open to talented persons of all races and ethnicities. Despite the University's best efforts with the ten-percent plan, the largest minority groups in Texas are more grossly underrepresented at UT-Austin today than they were in the era of affirmative action.

The limited "success" of the ten-percent plan is just that it is better than nothing—minority enrollment with the ten-percent plan is somewhat better than in 1997, when we had no affirmative action and no second-best alternative in place. But even this limited success did not flow primarily from the ten-percent plan. To achieve some degree of diversity under the ten-percent plan, the flagship schools in Texas developed recruiting, financial aid, and retention programs that deliberately targeted minority high schools. The University of Texas Longhorn Opportunity Scholars program selected these schools on the basis of low application rates and low parental income.\(^ {235}\) In combination, these criteria are a strong proxy for identifying minority high schools. Texas A&M's Century Scholars program targeted many of the same high schools, without announcing its criteria.\(^ {236}\)

These targeted programs have been essential to making the ten-percent plan work. Of course there had been minority recruiting programs during the affirmative action years, but the ten-percent plan required the addition of these new and more elaborate efforts to produce a lower level of diversity. UT-Austin developed these programs sooner and more effectively than Texas A&M. Fewer data are available, at least to me, but for the three classes entering in 2001-03, black enrollment at Texas A&M ranged from 2.5% to 3.0% of the freshman class, and Hispanic enrollment ranged from 9.7% to 10.5%.

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of the freshman class. A&M has told a reporter that its minority enrollment will increase substantially in the class entering in 2004, as a result of greatly increased recruiting and financial aid. Both Texas and Texas A&M have had the ten-percent plan since 1998, but making it work has required effective recruiting, financial aid, and retention programs that pursue minority students.

I have used Texas as the primary example, because that is what I know best. But the experience in California and Florida is no more encouraging. Black and Hispanic enrollment in the freshman class at Berkeley and UCLA dropped significantly after 1997 and has not recovered. Black freshmen at Berkeley declined from the 7-8% range in 1995-97 to the 4% range in 1998-2001; Hispanic freshmen declined from the 15-17% range to the 8-11% range. These ranges do not overlap. There was no significant change in 2002 or 2003, and the percentage of offers to underrepresented minorities appears to have dropped further in 2004. UCLA has had more Hispanics than Berkeley, both before and after the end of affirmative action, but the pattern of change over time is substantially the same. Both schools report aggressive recruitment and financial aid programs targeting underrepresented minorities.


240. Id.


243. The sources cited in notes 239-242 report the same data, in the same formats, for UCLA.

244. See HORN & FLORES, supra note 239, at 55-57.
Florida publishes data on total enrollment instead of data on freshmen, which makes it difficult to track the Florida schools’ admissions record.245 A Harvard study found that minority freshmen held relatively steady at Florida and Florida State,246 except for a significant drop in black freshman at Florida in 2001, the first year without affirmative action in admissions.247 The total enrollment data show steady growth in total enrollment and modest but fairly steady growth in the percentage of minority students at Florida248 and in the percentage of Hispanics at Florida State.249

But school officials give little credit to Florida’s twenty-percent plan. The President of the University of Florida attributed the school’s minority enrollment in 2002 to “very active outreach, recruitment, and support programs.”250 Florida State officials also credited increased recruiting and retention programs targeting minorities.251 Florida State retained its explicitly race-based scholarship program,252 but Florida announced at the beginning of the 2001 school year that it “would no longer award scholarships based on race.”253 The Florida schools could choose between using race explicitly, or using proxies to reach minority students disproportionately, because the Governor’s Executive Order applied only to admissions, and not to retention or financial aid.254

At least in the early years, when the Harvard scholars studied it closely, the Florida twenty-percent-plan was largely irrelevant to admissions. Universities are required to “use class rank as determined by the Florida Department of Education,”255 but they were not given the

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245. See Univ. of Fla., Table IX-2, State University System Fall 2003 Minority Enrollment, and the same table for earlier years, at http://www.ir.ufl.edu/minority/enroll.htm (last visited June 20, 2004).
246. See HORN & FLORES, supra note 239, at 51 tbl. 30.
247. Id. (showing decline from 11.8% in 2000 to 7.2% in 2001).
248. Total minority enrollment at Florida grew from 6.1% black in 1996 to 7.5% black in 2003, and from 9.0% Hispanic in 1996 to 10.5% in 2003. Calculated from data in Univ. of Fla., supra note 245. These tables do not give enough data to calculate separate percentages for graduate students and undergraduates.
249. Total Hispanic enrollment at Florida State grew from 6.3% in 1996 to 8.9% in 2003. Id. Black enrollment climbed from 10.7% in 1996 to a peak of 12.9% in 1999, then declined to 11.5% in 2003. Id. Florida State voluntarily abandoned consideration of race in admissions after 1999. MARIN & LEE, supra note 220, at 35.
251. Id. at 36.
252. HORN & FLORES, supra note 239, at 58.
254. See FLA. ADMIN. CODE ANN. r. 6-6C-6.002(7) (2004).
255. FLA. ADMIN. CODE ANN. r. 6-6C-6.002(5) (2004).
list of students until the admissions season was over or well advanced.\footnote{256} No school was obliged to admit any student in the top twenty percent; the guarantee is only of admission somewhere in Florida’s State University System. Because the plan guarantees nothing at the flagships, and requires nothing of them, in a very real sense it does not apply to them. But if a top-twenty-percent student is admitted nowhere—a fairly unlikely event if she knows to apply to the less selective campuses—the remedy is a clumsy and little publicized administrative appeal through the state’s Office of Equity and Access.\footnote{257}

As in Texas, California and Florida have very large and rapidly growing minority populations.\footnote{258} In the face of such extraordinary rates of growth in the disadvantaged minority population, to say that minority enrollment has dropped only slightly, or even that it has remained about the same, is to say nothing. As in Texas, the already serious underrepresentation of minority students in California and Florida has gotten worse. And minority enrollments in these states imply nothing about what percentage plans would achieve in states with smaller minority populations.

The details of the plans and their results vary, but the basic pattern is clear. Minority enrollment at the flagship schools in percentage-plan states has declined in California and Texas and, at best, slowly increased in Florida. At no flagship campus has minority enrollment come close to keeping pace with the growth in the minority population. And what has been achieved is attributable more to minority outreach programs than to percentage plans. As the Harvard study of percentage plans concluded, the plans “seem to have the least impact on the most competitive campuses,”\footnote{259} where of course the need is greatest. And the limited success they do have depends on “systems of openly or loosely veiled race-attentive outreach, recruitment, support programs, and financial aid that enhances the likelihood of application, admission, and enrollment for some students.”\footnote{260}

In addition to not working very well, percentage plans have serious costs. Most obviously, they require serious departures from academic admission standards. Class rank is one important predictor of academic achievement, but only one. Pure percentage plans require

\footnote{256}{MARIN & LEE, \textit{supra} note 220, at 37.}
\footnote{257}{\textit{Id.} at 20.}
\footnote{258}{\textit{See supra} note 186 and accompanying text.}
\footnote{259}{HORN & FLORES, \textit{supra} note 239, at 59.}
\footnote{260}{\textit{Id.}}
universities to ignore everything else they know about an applicant. Test scores, high school curriculum, recommendations, writing samples, and other activities and accomplishments all become irrelevant. Class rank is based on grades relative to the grades of classmates, but the absolute level of grades is irrelevant: it makes no difference whether a student in the top ten percent has a 4.0 or a 2.8. No affirmative action plan that considers race would ignore all these predictors, and no affirmative action plan that considers race would give anyone a guarantee of admission no matter how weak the rest of the file. But percentage plans make no difference if they provide no guarantee and if they admit only students whose class rank is consistent with other predictors of academic success. One of their principal functions is precisely to guarantee admission to applicants who would be rejected if the full file were considered.

Texas has a pure percentage plan; nothing matters beyond class rank.\(^\text{261}\) A student who graduates in the top ten percent need not have taken a college preparatory curriculum, or anything at all beyond what his high school requires for graduation, to be guaranteed admission to any public university in the state. The Texas legislation provides that after a student is admitted, universities may then consider whether the student is "prepar[ed] for college-level work" or whether it must require and offer "additional preparation."\(^\text{262}\) But the guarantee need not be that sweeping. Florida requires nineteen specified high school units, including four years of English and three years each of math and science, to be eligible for the guarantee.\(^\text{263}\) California requires eleven specified units to be completed by the junior year, and requires a 2.8 grade point average in those courses.\(^\text{264}\) California gives extra weight to honors courses in calculating class rank,\(^\text{265}\) and Florida appears to do the same, although the regulation is not perfectly clear.\(^\text{266}\)

\(^{261}\) See TEX. EDUC. CODE §51.803(a) (Vernon Supp. 2004).

\(^{262}\) TEX. EDUC. CODE ANN. § 51.803(b) (Vernon Supp. 2004).

\(^{263}\) See FLA. ADMIN. CODE ANN. r. 6-6C-6.002(3)(a), (5) (2004).


\(^{265}\) Id.

\(^{266}\) The rule guaranteeing admission to the top twenty percent states: "The State University System will use class rank as determined by the Florida Department of Education." FLA. ADMIN. CODE ANN. r. 6-6C-6.002(5) (2004). Another rule, providing for admission on the basis of grade point average, states: "In computing the high school grade point average for purposes of admission to a state university, additional weights will be assigned to grades in Honors, International Baccalaureate, and Advanced Placement courses." FLA. ADMIN. CODE ANN. r. 6-6C-6.002(3)(a) (2004). This seems to imply, but never quite says, that the Department of Education will use grade point average as calculated under § (3)(a) to determine class rank under § (5).
restrictions do not vitiate the most important feature of the guarantee: it still runs to four percent or twenty percent of each high school, and students in each high school compete only among themselves.

In *United States v. Fordice*, "the United States insist[ed] that the State's refusal to consider information which would better predict college performance than ACT scores alone is irrational." It was irrational not to consider "high school grades and other indicators along with standardized test scores." Yet in *Grutter* and in post-*Grutter* enforcement statements, the United States is urging reliance on percentage plans that consider class rank alone and ignore all other information, in the case of Texas, and much other information in the case of California and Florida. The United States was right the first time. Whatever lone predictor is chosen, reliance on a single predictor to the exclusion of all others is irrational as a means of selection.

But even in Texas, the academic experience with percentage plans has been better than one might reasonably expect from these conceptual problems. Relatively few students with very low SAT scores have chosen to attend UT-Austin, and less than one percent of the entering class failed the Texas Academic Skills Program, an undemanding test of college preparation that focuses on "minimal skills." The top-ten-percent students who have chosen to attend have done relatively well. If the admission guarantee is set at a level where most applicants benefiting from the guarantee would have gotten in anyway, and if there are retention services for those who would not have gotten in anyway, students admitted even under a pure percentage plan can perform reasonably well.

Holding other things equal, class rank is a powerful predictor of academic success. Admission officers defending their own performance under the ten-percent plan have emphasized that top-ten-percent students have higher first-year college grades than bottom-ninety-percent students with SAT scores as much as two hundred

268. Id.
270. Id. tbl. 5.
points higher. This is merely another way of stating the unsurprising fact that class rank has predictive power after controlling for test scores. It is equally true that test scores have predictive power after controlling for class rank. Among the top-ten-percent students, and also among the bottom-ninety-percent students, first-year grades rise uniformly and substantially with each hundred-point increment in test scores.

Any school attempting to admit the strongest possible class would consider both—class rank and test scores, or grades and test scores. There are many students in the second ten percent and below with strong test scores and strong high school curricula who would reasonably be predicted to outperform students in the top ten percent with low test scores and weaker high school curricula. The freshman class at Texas has not gotten weaker as compared to earlier years, but there can be little doubt that Texas admits a weaker class under the ten-percent plan than it could admit today if it considered a full range of predictors. And because the weaker students guaranteed admission come from all races, not just underrepresented minorities, there is little doubt that Texas admits a weaker class than it could admit if it considered a full range of predictors and gave preferences to applicants from underrepresented minority groups.

As the ten-percent plan has become better known, more and more high school graduates have claimed its guarantee. At UT-Austin, the fraction of the class guaranteed admissions under the ten-percent plan has risen every year, from around forty percent in 1998 to nearly seventy percent in 2003. From the beginning, there were complaints

<table>
<thead>
<tr>
<th>SAT</th>
<th>Top 10%</th>
<th>Bottom 90%</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;900</td>
<td>2.46</td>
<td>2.16</td>
</tr>
<tr>
<td>900-990</td>
<td>2.69</td>
<td>2.43</td>
</tr>
<tr>
<td>1000-1090</td>
<td>2.89</td>
<td>2.66</td>
</tr>
<tr>
<td>1100-1190</td>
<td>3.08</td>
<td>2.80</td>
</tr>
<tr>
<td>1200-1290</td>
<td>3.24</td>
<td>2.94</td>
</tr>
<tr>
<td>1300-1390</td>
<td>3.49</td>
<td>3.06</td>
</tr>
<tr>
<td>1400-1490</td>
<td>3.67</td>
<td>3.25</td>
</tr>
<tr>
<td>1500-1600</td>
<td>3.77</td>
<td>3.32</td>
</tr>
</tbody>
</table>

271. For the class that entered in 2002, first-year grades at UT-Austin were as follows:

272. Id. tbl. 6.

273. Despite much attention to this problem, the University does not precisely report the fraction guaranteed admission. The Statistical Handbook reports all enrolled freshmen in the top ten percent of their high-school class, including nonresidents who are not guaranteed admission. See UT STATISTICAL HANDBOOK 2003-04, supra note 223, tbl. S16. Lavergne and Walker report applicants guaranteed admission for most ethnic groups, but not all; they do not report a total. LAVERGNE & WALKER, supra note 269, tbl. 2. And because they rely on the
from strong high schools that talented students in their second ten percent were being squeezed out. These complaints were largely self-serving and baseless at first; there was little evidence of such an effect in the early years. But such an effect is inevitable as the fraction of the class committed to guaranteed admissions grows, and as the fraction available to discretionary admission decisions correspondingly shrinks.

One measure of the squeeze on strong students in the second ten percent is SAT scores. SAT scores for enrolled freshmen in the top ten percent have gradually, but steadily, declined, from 1253 in 1996, when they were not guaranteed admission, to 1243 in 1998, when they were guaranteed admission but not so actively recruited, to 1223 in 2003, as the plan became more effective and reached deeper into the talent pool. By contrast, the SAT scores of enrolled freshmen from the bottom ninety percent have steadily risen, from 1197 in 1996 to 1257 in 2003. This shows that competition in the second ten percent is becoming more and more intense; students who would have been admitted in the early years of the ten-percent plan are now being rejected.

As this squeeze becomes more intense, it has greater and greater costs. The safe thing to do in a state with a percentage plan is to be sure you graduate within the guarantee. Don’t do anything that puts your class rank at risk: don’t take challenging courses beyond what is required, and certainly don’t go to a magnet public school or a selective private school; if necessary, transfer from your competitive public high school to one that is less so. These negative incentives remained

Statistical Handbook for the total number of offers, id. tbl. 1, they inadvertently offer a numerator that excludes nonresidents and a denominator than includes them.

274. See MARIA TIENDA & SUNNY NIU, FLAGSHIPS, FEEDERS, AND THE TEXAS TOP 10% PLAN 8 (2003) (preliminary publication, Princeton University), available at http://www.texasstop10.princeton.edu/publications.htm (last visited June 20, 2004) (reporting that as late as 2002, nearly three-quarters of second-ten-percent students whose first choice was Texas or Texas A&M enrolled there). This is helpful but not squarely to the point. The problem is emerging at UT-Austin, not at A&M, and the sharpest increase in the percentage of seats taken by the top ten percent at Austin came in 2003. See sources cited supra note 273.

The sharp increase in 2003 resulted in part from a substantial drop in the size of the entering class, from 7935 in 2002 to 6544 in 2003. See UT Statistical Handbook 2003-04, supra note 223, tbl. S12. But this was still more than the 6430 who entered in 1996. Id. After Hopwood, the university expanded the size of the entering class, first to mitigate the reduction in absolute numbers of minority students, and later to mitigate the squeeze caused by the ten-percent plan. As total enrollment reached unmanageable levels, these unsustainable class sizes had to be abandoned.

275. LAVERGNE & WALKER, supra note 269, tbl. 3.
276. Id.
modest as long as the university could honestly say that students with strong records in the second and third ten percent would still get in through the discretionary part of the admissions process. But that path to admission is gradually closing, and UT-Austin faces the growing prospect of rejecting strong students who have worked hard and achieved much but finished in the second ten percent of strong high schools.

Inevitably, some students will respond to these incentives by attempting less, and thus achieving less, but securing their place in the top ten percent. That incentive structure is a serious cost of the ten-percent plan. There is also a serious cost to fairness: students are penalized if they take tough courses at a competitive high school and finish in the second ten percent.

The squeeze on discretionary admissions also makes it hard to admit students with other kinds of talent. Any university with a college of fine arts, or with an athletic program, admits some students more because of their talents as actors, artists, musicians, or athletes than because of their general academic credentials. Out-of-state and international students add their own form of diversity, broaden the college experience for everybody, and are often (because of the admission preference for in-state students) among the strongest students academically.

The other important group that gets squeezed out is strong minority students not in the top ten percent. Percentage plans are mechanical and color blind; no affirmative action is permitted within the bounds of the percentage plan. But in considering applicants outside the guarantee, *Grutter* now permits the flagship campuses to consider race as part of a holistic and individualized review. The fewer seats available in the discretionary part of the admission process, the less room there is for consideration of race, and the more intense the competition for the seats where race can be considered. This shrinking of affirmative action may deny much of the benefit of *Grutter* to minority students in the bottom ninety percent of integrated or predominantly white high schools.

All these disparate applicant pools—the gifted musicians from the middle of their high school class, the academic stars from other parts of the country, the Advanced Placement students from the eighty-ninth percentile of strong private high schools, the middle class minority student doing well but not great in a suburban high school, and the many variations on each example—compete for the shrinking number of seats outside the guarantee. Squeezing them out creates
bad incentives for strong high school students; it treats those students unfairly; and it admits a weaker class than the university could attract. No sound educational policy would require that the freshman class be indefinitely expanded to accommodate the guarantee, and it is neither fair nor politically sustainable for top ten percenters to drive out all other applicants, no matter how strong as assessed by other criteria.

There is no limit to the process of squeezing out these other kinds of students. A percentage plan will swamp the more selective schools unless the percentage guaranteed admission is set at a level where most of those guaranteed admission would have been admitted anyway, and unless the guarantee is then periodically adjusted in light of experience. In California, students guaranteed admission now exceed the schools’ capacity. As of March 30, 2004, 7600 applicants who were guaranteed admission to the University of California System, 277 and 3800 who were guaranteed admission to the California State system, 278 had been rejected. These students were diverted to community colleges with a promise of a guaranteed right to transfer later. The promise of readmission later would seem to merely postpone the problem and be equally irredeemable, but, for now, California officials are claiming that this surplus is a consequence of the state’s budget crisis, and thus perhaps a temporary problem. Rejecting these students is a breach of faith with those who were told they were “guaranteed” admission. 279 It would also seem to be an absolute bar to any applicant outside the scope of the guarantee, although California apparently has not interpreted it so rigidly.

Percentage plans have other costs as well. The dependence on segregated high schools puts state policy at war with itself. Any measure that reduces segregation at the high school level becomes a bad thing, because it reduces the effectiveness of the percentage plan. Magnet schools are a problem because the students in the integrated magnet program tend to dominate the top ten percent, depriving neighborhood students in the same school of their perceived


279. “California high school students who attain eligibility in the statewide context or eligibility in the local context are both guaranteed a space at the University of California, though not necessarily the campus or major of choice.” Univ. of Cal., supra note 220. This website has added a box warning that “we may no longer be able to guarantee admission to all eligible students.” Id.
entitlement under the percentage plan. So Texas authorized magnet schools to declare (for this purpose only) that they are really two separate high schools that happen to operate in the same building, and thus to certify two top-ten-percent lists.\textsuperscript{280} Choosing this option deprives many of the magnet students of their perceived entitlement under the percentage plan, and thus discourages attendance at the magnet programs.

The dependence on segregated high schools also means that percentage plans are useless for admission to graduate and professional schools. There are not nearly as many predominantly minority colleges as there are predominantly minority high schools. Moreover, graduate and professional schools admit applicants to each program, not to the university as a whole. The percentage of college students admitted to law school or any other particular program is tiny compared to the percentage of high school students admitted to college. No law school could workably guarantee admission to the top \( x \) percent of college graduates, no matter the level of \( x \). That a Texas legislator actually introduced a top-ten-percent bill for graduate and professional school admissions\textsuperscript{281} is a measure either of legislative desperation or of open hostility to academic excellence. The bill would have required a lottery among all students eligible for the guarantee. Applicants not selected could reenter the lottery, apparently forever or until they lost interest. Popular programs would soon have years’ worth of applicants competing in each annual lottery.

Percentage plans have been over promoted. They are hyped by opponents of affirmative action willing to offer any race-neutral alternative as a reason to end direct consideration of race. And they have been hyped by hard-pressed admission officials, forbidden to directly consider race and desperate to show that they were still doing their job and enrolling minority students. The truth is that percentage plans produce less diversity, and do far more harm to academic standards, than admitting the very best students of each ethnic group. No percentage plan can substitute for selecting the very strongest minority applicants based on a full assessment of their qualifications. No percentage plan can maintain minority enrollment without strong and race-conscious recruiting and financial aid programs, so the claim of colorblindness is more formal than real. And it appears so far that

\begin{itemize}
\end{itemize}
even with such programs, no percentage plan can achieve substantial gains in minority enrollment.

2. Saving the One Clear Strength of Percentage Plans

Despite all these problems, percentage plans have had one unanticipated benefit that is very much worth saving. The school-specific guarantee of admission turns out to be an important aid to recruiting and motivating minority students. The guarantee enables officials of a flagship university to go to a minority high school, speak to an assembly, and promise seats in the freshman class. In a community that may mistrust the university and disbelieve promises of fair treatment or even of affirmative action, the guarantee enables university officials to say, in effect, “You don’t have to trust us. You are not competing with rich kids from the suburbs. Your competition is in this room, and fifty of you are guaranteed admission. The seats are reserved, and we will provide financial aid.”

At least at Texas, this has been an effective recruiting pitch. It does not always work, and how well it works may depend on follow up by faculty and administration at each high school. But in many cases, such recruiting efforts have resulted in a flow of applications from high schools that had not previously sent applicants. A closely related benefit, not confined to minority high schools, is evidence that students who have heard about the top-ten-percent plan are much more likely to plan on going to college.282

The key to these benefits is the school-specific guarantee. It is essential that the guarantee run to individual schools, and it is probably important that the guarantee be simple to explain. But it is not important that the guarantee be any particular percentage, or that it be based on class rank. What seems to be critical is that the competition is within each school, and that every school’s student body understand that it will have winners who get admitted to the flagship campuses.

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282. See Marta Tienda, Kalela Cortes & Sunny Niu, College Attendance and the Texas Top 10 Percent Law: Permanent Contagion or Transitory Promise? (2003) (preliminary publication, Princeton University), available at http://www.texastop10.princeton.edu/publications.htm (last visited June 21, 2004). Of course it may be that students planning to apply to college pay more attention to information about the ten-percent plan. The authors attempted to test this possibility with a survey question asking how long each respondent had planned to go to college. Knowledge of the ten-percent plan powerfully predicted planning to go to college after controlling for answers to that question, controlling for class rank, and controlling for family socioeconomic status. Id. at 7. Causation remains uncertain, but the timing control suggests that at least causation runs in both directions.
This essential guarantee can be separated from the percentage plan that first produced it, and this suggests possibilities for reform that would keep the benefit of the guarantee and reduce the costs of percentage plans. The simplest and most important change would be to put a cap on the guarantee, so that students guaranteed admission never took up more than half the freshman class at any campus. The top ten percent would be guaranteed admission to most state schools, and some smaller percentage would be guaranteed admission to the flagship. This would greatly reduce the squeeze on strong students in the bottom ninety percent, and that would greatly reduce the costs of the program. If full-file admission standards are allowed to operate for a substantial fraction of the class, there is less distortion of admission standards, less unfairness to strong students in the second ten percent, and less incentive for high-school students to avoid tough courses and tough competition.

A more ambitious reform would be to offer the guarantee only to high schools with an historically low rate of applications to the flagship campuses. These schools would be selected on a color-blind basis, but they would disproportionately include minority high schools and rural and small-town high schools. This would offer the guarantee to the schools that need it most, and it would ensure that graduates of these schools would be admitted in reasonable numbers without having to compete against graduates of stronger high schools. But it would not distort academic standards or incentives at high schools that already have a strong history of college applications. Applicants from those high schools would be subjected to full-file review, and thus would have the full the incentive to take challenging courses.

Either of these changes could be coupled with choices from another set of possible reforms. Whether extended to all schools or to selected schools, the guarantee need not be based solely on class rank. What is critical is that the guarantee run to each school individually; it matters far less how students are selected within each school. Requiring certain courses undermines the guarantees, especially if not all high schools offer the whole list of required courses. But rewarding ambitious courses within a school-specific guarantee would encourage students to take as much as their school offered. If a school had no honors sections or AP courses, its students would not be penalized for that; they would be competing only among themselves. But if it had one, or a few, or many such courses, students who took them would not be penalized by an exclusive focus on class rank.
Ideally, we could select students within high schools for purposes of the guarantee based on the same criteria used to evaluate students outside the guarantee. But there are workability limits. From the university’s perspective, the guarantee requires a bright-line rule, so that all the students in a high-school senior class can easily be ranked ordered. To see why, consider a graduating class of five hundred, forty of whom apply to the flagship campus. How does the university know whether these forty, or which of these forty, is in the top ten percent of that senior class based on full file review? To find out would require a full file review of all five hundred in the graduating class. Full-file review of every applicant is burdensome; full-file review of every graduating senior is impossible.

But there is an in-between solution. A school might use a bright-line rule to identify a pool of students eligible to be considered under the guarantee, and then use broader criteria, or full-file review, to select among those students. This approach might be especially attractive at schools that are forced to cap the guarantee. Suppose that Texas continues to guarantee admission to the top ten percent of each high school class, based on class rank, to every public university in the state, except that no university has to award more than fifty percent of the seats in its freshman class to students admitted under the guarantee. And suppose it works out that at UT-Austin, the top five percent of every high school fills half its class.

One thing the university might do is admit the top five percent based on class rank. But it might also select from applicants within the top ten percent on the basis of somewhat broader criteria. It might consider class rank, high-school curriculum, and test scores to choose the best half of the top ten percent that had been identified by class rank.

Perhaps best of all, it could select the best half of the top ten percent on the basis of the same criteria now applied to students not in the top ten percent. The admissions criteria a university applies when it is free to choose its own criteria are presumably the criteria that it believes are best. If it is choosing a subset out of the top ten percent of each high school, there is no reason to apply different criteria of choice than when it chooses from the whole state or national pool. Rather than draw an arbitrary line between the students with the twenty-fifth and twenty-sixth highest grade point averages, which might differ only at the third or fourth decimal place, a university could focus its attention on applicants from the top fifty based on class rank, and
within that pool select the twenty-five strongest students based on a broader range of criteria, or even based on full-file review.

A school willing to invest the effort in full-file review within each high school's qualifying class rank would get another important benefit: it could consider race within the scope of a percentage plan. At the margin, it could prefer an underrepresented minority student with a record about as good as his white classmate, as judged in an individualized and holistic review. Or it might prefer a white student who had the unusual experience of attending a heavily minority high school. Individualized and holistic selections within the top ten percent would recover much of the benefits of race-based affirmative action, admitting the best students within each high school while taking account of the university's interest in diversity.

_Grutter_ and _Gratz_ should not be interpreted to prohibit such a plan. _Grutter_ prohibits "separate admissions tracks" for minority students. 283 A school-specific guarantee creates a separate admissions track for each high school, but these tracks are not defined by race. These tracks are defined by district boundaries and attendance zones, and the percentage plans have already turned each high school into a separate admissions track. Some of these high schools are overwhelmingly of a single race, but some are not, and in a high school predominantly of a single race, any preference for applicants of that race would make little sense and little difference to the results. _Grutter_ also has two sentences, quoted from Justice Powell's opinion in _Bakke_, about "comparison with all other candidates." 284 In the current environment, with an organized movement constantly threatening litigation against any school that operates under _Grutter_, risk-averse schools might fear the argument that these two sentences preclude affirmative action within each high school, as distinguished from affirmative action in a single pool of all other candidates.

In context, the reference to "all other candidates" does not preclude affirmative action within specific high schools, or within any other pool of candidates not defined by race. The reference appears in a sentence about what cannot be done, and is immediately followed by a clearer explanation of can be done:

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other

284. _Id._ (quoting _Regents of the Univ. of Cal. v. Bakke_, 438 U.S. 265, 315 (opinion of _Powell, J._)).
applicants.” Instead, a university may consider race or ethnicity only as a “plus” in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”

The most important thing to note about this passage is that it was not remotely directed to the question whether a large pool of applicants can be divided into subpools not defined by race. It is concerned with whether minority candidates can be “insulated” from competition. But if we parse the language for unintended statements about a possibility the Court was not considering, we find that both references to “all” other applicants or candidates are in the negative. Minorities “cannot” be insulated from all other applicants; the admissions system must work “without” insulating them from competition with all other candidates. Candidates within a high school are insulated from competition with some other candidates—those at other high schools—but they are not insulated from competition with all other candidates. And there is no affirmative statement that each applicant must compete with all other applicants. The affirmative requirement is that the process must consider “all pertinent elements of diversity in light of the particular qualifications of each applicant.”

Minorities competing under full-file review within their own high school compete with the applicants of all races within that high school. Subdividing part of the competition to individual high schools does not implicate any of the concerns that underlie the requirement of individualized and holistic review, and it makes possible a school-specific guarantee that serves the valuable educational function of motivating students to aspire to college education. This school-specific guarantee is color blind. Fears about plaintiffs’ lawyers quoting two sentences out of context should not preclude selecting applicants from within high a school on the same criteria used to select applicants from across the state.

Such a plan could work in one of two ways. The university might proceed with a percentage plan that selects on broader criteria in the same order as under percentage plans that rely exclusively on class rank. It would select the five percent to be admitted under the

285. Id. (internal citations omitted) (alterations in original).
guarantee to each high school, then fill the rest of the class from all the applicants that remained.

But the other order would probably be better. The university would admit some substantial fraction of the class from a single state-wide pool, the exact fraction to be determined by trial and error. Then it would examine the results for individual high schools. At any high school where there were applicants from the top ten percent not yet admitted, and where fewer than five percent of the graduating class had been admitted, the university could select enough additional students from that high school to honor the guarantee. This would require a smaller number of files to be examined twice. It would more closely resemble a standard admissions process in which every applicant competes against every other. And for the highly risk-averse university administrator, the school-specific part of the process at the end could be color blind, thus avoiding any issue under the language about “comparison with all other candidates.” But in the first part of the process, the university would get the benefits and efficiencies of affirmative action across the entire pool of applicants.

Whatever choices a university makes among these options for reform, an expansion beyond class rank alone would reduce the bad incentives in the existing Texas ten-percent plan. Then when the president of the university went to a high-school assembly, his message would have an additional point. He could still say you don’t have to trust us, you don’t have to worry about rich kids in the suburbs, your competition is in this room, and fifty of you are guaranteed admission. In a full-file review system, he could add:

Take the strongest courses your school offers. You’ll be better prepared for college if you do. And when we choose the fifty kids who get the guaranteed offers out of this class, we will look at everything you did in high school. We’ll look at your grades and class rank; we’ll look at your test scores; we’ll look at the courses you took. And we’ll look at any hardships you might have faced and challenges you overcame. You are competing only with your classmates, but you are competing partly on how hard you worked and how far you have come. You’re competing on effort, and not just grades.

The experiment with percentage plans enabled us to discover something new. A school-specific guarantee of admissions to the flagship campus is a powerful motivator. That is the point to take away from percentage plans. We should think about how to maximize the benefit of that motivator while minimizing the distortion of admission standards. This Part has suggested some possibilities.
B. Lottery Admission and Its Equivalents

The district judge in Grutter suggested that Michigan admit by a lottery conducted among all qualified applicants.\(^{286}\) Such a procedure would achieve quite limited diversity and would be devastating to academic excellence. No school would adopt such a program, but the possibility is worth investigating because it models other recurring suggestions.

Consider Michigan’s 1995 admission data.\(^{287}\) In the part of the grid highlighted by Grutter’s attorneys, there were 2664 applications and 901 offers of admission; 33.8% of the applicants were offered admission. To model the effect of a lottery in this part of the grid, multiply the number of applications in each cell by .338. Or more simply, divide each cell by three.

Changing to such a lottery would harm the interest in diversity; admission offers to applicants from underrepresented minority groups would drop from 138 to about 82, or about 9% of offers. The effect on the interest in selective admissions would be vastly greater: a wholesale shift from the upper right to the lower left parts of the grid. Offers to applicants with LSATs at 170 and above and GPAs at 3.75 and above would drop from 127 to about 45; offers to applicants with LSATs between 148 and 150 and GPAs between 3.00 and 3.24 would rise from 2 to 17. Marginal consideration of race shifts a small number of offers slightly down and to the left; a lottery would shift large numbers of offers much further down and to the left. Two-thirds of the strongest applicants would be rejected, and one-third of the weakest applicants above some threshold would be admitted. There would be no rewards to undergraduate achievement above the threshold for entry into the lottery; if many schools went to lottery admissions, incentives to excel would be generally eroded.

But of course, all of this greatly understates the consequences. If highly selective schools admitted by lottery, they would be swamped with applications from weaker students. Today, with selective admissions and consideration of race, applicants in the lower-left corner of the grid have very small chances of admission, and potential applicants generally have a reasonable understanding of these odds. But in a lottery, they would have the same chance as everybody else.


\(^{287}\) See Appendix.
The increased applicant flow from weak students would further devastate the compelling interest in academic excellence.

Proponents of race-neutral means also suggest deemphasizing grades and test scores and relying on other predictors with less relationship to academic success.\textsuperscript{288} A school that carried this suggestion to its logical conclusion would not use grades and test scores at all. It would rely exclusively on factors that have no correlation with grades and test scores, and, consequently, little tendency either to exclude minority applicants or to predict academic success. Carried to this extreme, reliance on such criteria would be the equivalent of a lottery; it would admit on the basis of random factors. As with an explicit lottery, it would not achieve diversity and it would seriously harm selective admissions.

More conceivable programs that give somewhat less weight to grades and test scores would have less impact on academic excellence, but would also contribute much less to diversity. Some of the full-file but color-blind admission programs that overweight soft variables are of this kind. Full-file admissions matter at the margin; they help bring in different kinds of students who may contribute to experiential diversity, and they may even bring in somewhat more minority students, although it is not apparent that many of these factors correlate with race. There is no reason to expect dramatic contributions to diversity from considering soft factors without considering race.

Nor is it any general solution to give less weight to test scores and more to grades. Like percentage plans, this might help a little at the undergraduate level, where many applicants come from segregated high schools. It would help much less at the graduate and professional level. Examining the top rows of the Michigan grid introduced in \textit{Grutter} shows only twenty-four applicants from disadvantaged minority groups with averages at 3.75 or above, compared to 614 white and Asian applicants.\textsuperscript{289} Grades as well as test scores tend to exclude minority applicants.

Thus, to the extent that alternative selection criteria are feasible, they make only marginal contributions to diversity. The more such criteria approach lottery admissions, the more diversity they create, and the more they harm academic standards. At the extreme, they achieve modest diversity and wreak havoc on academic standards. No


\textsuperscript{289} See Appendix.
point along this continuum serves both the interests in diversity and the interest in selective admissions.

C. Strong Proxies and Private Assistance

Percentage plans are useless to graduate and professional schools, quite possibly useless at the undergraduate level in states with small minority populations, and of marginal benefit at the undergraduate level in states with large minority populations. Full-file admissions help only a little. Lotteries are unthinkable. Schools forbidden to consider race looked for strong proxies, and they sought help from the private sector. Their successes were both limited and risky.

The University of Texas Law School publicized its efforts to rebuild minority enrollment in the wake of *Hopwood v. Texas*, but the rebound was limited. With consideration of race from 1985 to 1995 (and for part of 1996), black enrollment in the entering class ranged from 3.3% to 8.1%;\textsuperscript{290} it fell below 4.4% only once, in 1987.\textsuperscript{291} Without consideration of race from 1997 to 2002, black enrollment ranged from 0.9% to 3.8%.\textsuperscript{292} With consideration of ethnicity, Hispanic enrollment ranged from 9.7% to 12.5%,\textsuperscript{293} without consideration of ethnicity, Hispanic enrollment ranged from 6.7% to 9.8%.\textsuperscript{294} These ranges barely overlap; for each group, enrollment matched only the lowest levels achieved in one outlier year of the twelve affirmative action years.\textsuperscript{295}

In 2003, the Texas Law School climbed further into the pre-*Hopwood* range. Black enrollment at 5.8% remains slightly below the mean for the affirmative action years; Hispanic enrollment at 16.8% is,

\textsuperscript{290} UT STATISTICAL HANDBOOK 1995-96, supra note 221, tbl. S12b.
\textsuperscript{291} Id.
\textsuperscript{292} UT STATISTICAL HANDBOOK 2003-04, supra note 223, tbl. S12b.
\textsuperscript{293} UT STATISTICAL HANDBOOK 1995-96, supra note 221, tbl. S12b.
\textsuperscript{294} UT STATISTICAL HANDBOOK 2003-04, supra note 223, tbl. S12b.
\textsuperscript{295} These data somewhat understated the point, because the law school's pre-*Hopwood* affirmative action plan gave preferences only to Mexican-Americans, not to all Hispanics. Mexican-American enrollment in 1997-2002 did not overlap with any of the fourteen affirmative action years for which the law school had data. University of Texas at Austin, Minority Enrollment for Entering First Year Classes at the University of Texas School of Law: 1983-2002, at http://tarlton.law.utexas.edu/hopwood/minority.html (last visited June 20, 2004). I now report data on Hispanics, rather than Mexican-Americans, partly because the Hispanic data are in a more permanent source, but also because of *Grutter*'s elaboration of diversity. The law school's earlier focus on blacks and Mexican-Americans depended on a past discrimination rationale; *Grutter*'s integration of past discrimination and diversity directs attention to all underrepresented groups.
at least for 2003, the highest for which comparable data is available.\textsuperscript{296} Of course, this is against the background of much larger increases in the Hispanic fraction of the college-age population.\textsuperscript{297}

The experience of 2003 does not appear to represent a new status quo that can be reliably replicated. Nonfarm employment peaked in February 2001, and total employment declined more or less continuously from then until the arrival of the class entering in 2003.\textsuperscript{298} Such weak economic conditions limit the job opportunities of new college graduates, reduce the opportunity costs of continued education, and thus lead to higher application rates and higher yield rates. Applications from whites and blacks increased sharply in 2002, and modestly further in 2003 (but black applications still remain well below their range in the affirmative action years). Applications from Mexican-Americans increased sharply in 2003. Yields (the percentage of offers of admission accepted) increased for all ethnic groups, but most dramatically for underrepresented minorities. The 2003 yields for both blacks and Mexican-Americans exceed any level ever seen in the sixteen years for which the Law School has yield records; in the case of blacks, the 2003 yield exceeded the previous high by a large margin.\textsuperscript{299} These very high yields presumably reflect the economy; there is no reason to believe that either the application rate or the yield rate will continue at these high levels once the economy improves.

To accomplish this limited degree of diversity after \textit{Hopwood}, Texas engaged in intensive recruitment of potential minority students, using both law school personnel and volunteers from the private sector. A private association raised substantial funds for privately administered minority scholarships. Before the difficulties in the airline industry after September 11, 2001, two alumni persuaded airlines to offer free trips to Austin for admitted minority applicants.\textsuperscript{300}

\textsuperscript{296} The district court found Mexican-American enrollment of 14.3\% in 1984. \textit{Hopwood v. Texas}, 861 F. Supp. 559, 574 n.67 (W.D. Tex. 1994). Hispanic enrollment would have been somewhat higher, but the \textit{Statistical Handbook}, which reports data on Hispanics, did not break out the law school in that era. In any event, 1984 is probably not a fair comparison; the enrollment data suggest that 1984 was the last year of the more aggressive affirmative action practiced in the early 1980s but not defended in this Article. \textit{See supra} note 164-165 and accompanying text.

\textsuperscript{297} \textit{See supra} notes 164-165 and accompanying text.


\textsuperscript{299} Univ. of Tex. Law Sch., Admission Office Data (on file with author).

\textsuperscript{300} These efforts are described in University of Texas at Austin, \textit{UT Law Leads Nation in Private Initiatives for Recruiting}, at http://tarlton.law.utexas.edu/hopwood/private. html (last visited June 28, 2004).
Texas also emphasized geographic diversity, taking advantage of the possibly unique circumstance of a vast region of the state with an overwhelmingly minority population. Along the Rio Grande from El Paso to Brownsville are cities and counties with huge Hispanic populations: 78% in El Paso County, 84% in Cameron, 88% in Hidalgo, 97.5% in Starr, and similar numbers in less populated counties.\(^{301}\) The Law School has funded and assisted pre-law programs at undergraduate schools in these counties, guaranteed offers of admission to graduates of these schools, and taken other steps to address the underrepresentation of these counties in the Law School.\(^{302}\) This proxy obviously could not be used for the whole class; no one wanted to reject all applicants from counties not along the Rio Grande. But because this proxy was so strong, it could help increase Hispanic enrollment even when applied, like race-based affirmative action, to only a few seats.

Few other states, maybe none, could duplicate this program. Geography is not so strong a proxy for Hispanics in other states; it may not be a proxy for blacks in any state, unless the geographic areas are defined by neighborhoods or Zip Codes. Even for Texas Hispanics, the effect of heavy reliance on geography has been limited. The combined effect of this very strong proxy, heavy recruiting, privately funded minority scholarships, and surging growth in the state’s minority population, could not restore Mexican-American enrollment to even the lowest level achieved in any year when ethnicity could be considered—at least not without an additional boost from a nearly three-year halt in employment growth.

California experienced a similar drop when affirmative action ended.\(^{303}\) From 1993 to 1996, combined black enrollment at the Berkeley, Davis, and UCLA Law Schools ranged from 6% to 11.5%; since 1996, it has ranged from 1.9% to 4.7%. From 1993 to 1996, Hispanic enrollment ranged from 12.3% to 14.5%; since 1996, it has ranged from 6.7% to 11.9%. In California as in Texas, blacks and Hispanics make up a rapidly growing majority of the college-age

\(^{301}\) U.S. Census Bureau, \textit{State and County QuickFacts}: Texas, at \url{http://quickfacts.census.gov/qfd/states/48000.html} (last visited June 28, 2004).

\(^{302}\) University of Texas at Austin, \textit{supra} note 300. For the admission guarantees, see Ron Nissimov, \textit{Detouring Toward Diversity}, \textit{Houston Chron.}, May 5, 2002, \textit{available at} 2002 WL 3260919.

\(^{303}\) Data in this paragraph are from University of California, \textit{University of California’s Law Schools}, at \url{http://www.ucop.edu/acadadv/datamgmt/lawmed/lawper.pdf} (last visited June 17, 2004).
population, and the partial recovery in minority enrollment came only in the recent economic downturn.

California and Florida have published less about their methods, but they have relied on similar elements of intensive minority recruitment, minority scholarships, and strong proxies. The Dean of the University of Florida Law School says that minority admissions there depend on “look[ing] hard at individual essays and life experiences,” and that “good recruiting and the continuation of minority scholarships were crucial.”304 A system that retained minority scholarships did not experience the full effects of colorblindness. Public law schools in California have emphasized intense minority recruiting and reduced emphasis on grades, test scores, and quality of undergraduate institution.305

Hardships overcome and similar experiential criteria may be very weak or very strong proxies for race, depending on how they are administered. All articulate applicants can think of (or embroider, or invent) some interesting life experience and some challenge overcome. Some of these essays reveal special insights, strong writing skills, or unusual achievement in the face of serious obstacles. But in the broad middle of the distribution, there is no reason to believe that subjective assessment of such essays is either a good predictor of academic success or a measure on which minority applicants will outperform white applicants. By contrast, if admission committees were to give credit for any experience of racial discrimination, or for any race-based experience, they would have a proxy that nearly any minority applicant could trigger simply by writing the proper essay. Plaintiffs would claim that this was a sham, and they might be right.

Low income has some correlation with race, but the correlation is not strong in the pool of plausible applicants to selective universities.306 Successful affirmative action requires the admission of successful minority students, who tend disproportionately to come from the minority middle class and above; within each ethnic group, socioeconomic status is negatively correlated with academic achievement.307 No doubt this correlation is partly attributable to the

305. See, e.g., News Release, supra note 162; Chan & Eyster, supra note 160, at 866-68.
307. Id. at 451.
quality of public education in neighborhoods with low- and moderate-income populations, but that does not make it any less intractable for college admissions.

A simulation using population data, by scholars highly sympathetic to enrolling more low-income students, found that color-blind affirmative action based on socioeconomic status would not increase the proportion of underrepresented minorities admitted. A simulation by economists, using data from actual applicant pools, found that class-based affirmative action would require departures from academic merit four-to-five times greater than those required to achieve the same level of racial diversity with race-based affirmative action. A Texas A&M official reports the failure of a program there based principally on family income; the program could not reach the middle-income minority families that had produced many of high-achieving minority students previously admitted to A&M. Low-income applicants are themselves scarce and already receive special admission consideration at many schools; considering low income would not be a change that could replace consideration of race. More recruiting of low-income students would be a good thing without regard to race, and might even have modest benefits for racial diversity, but there is no basis to expect substantial racial effects.

D. A Simple Example

All the so-called race-neutral means pursue the goal of increasing minority enrollment indirectly, and thus less efficiently. They require greater departures from academic standards to produce less diversity. This is true even of the strongest proxies; the difference between strong and weak proxies is one of degree.

To make this abstract point concrete, consider the following stylized hypothetical. Consider a year after Hopwood and before Grutter, when the University of Texas Law School is using geography as a proxy for ethnicity. In the last stages of the admission process, suppose the Director of Admissions is comparing two candidates. One is a strong minority candidate from Dallas County, who after full deliberation, falls just short of being admissible on a colorblind basis. The other, from El Paso County, is considerably weaker but probably capable of succeeding at the Law School. The El Paso candidate is

310. HORN & FLORES, supra note 239, at 54.
likely to be Mexican-American but may be white or black or Asian. That candidate’s race is irrelevant to the illustration. We would admit the weaker candidate from El Paso, without regard to race or ethnicity, and we would reject the stronger candidate from Dallas. We cannot consider the Dallas candidate’s race, and we cannot do affirmative action for Dallas County, because the minority population there, while large, is not large enough to make Dallas County a strong proxy for race.

Repeat that example enough times, and it is entirely possible to produce a bigger racial disparity in entering credentials with colorblind admissions than with affirmative action. That happened at Texas; in the later post-Hopwood years, the credential gap exceeded what it had been pre-Hopwood. And it may have happened at Berkeley. Michigan’s lawyer reported at oral argument in Grutter that the credential gap at Berkeley, with colorblind admissions, was equal to the credential gap at Michigan with affirmative action. This result was predicted by economists simulating admissions partly based on lottery. This is the effect of proxies and their inefficiencies. Schools using proxies cannot admit the strongest minority applicants; they must admit the applicants who fit the proxy.

E. The Legal Objection to Race-Neutral Means

The most vigorous opponents of affirmative action oppose race-neutral means as well as direct consideration of race. They believe that race-neutral means of increasing racial diversity are also unconstitutional. Curt Levey condemned the Texas ten-percent plan for “using a race-based double standard to engineer a specific racial mix. Such an intent is unlawful under the U.S. Constitution and federal law.” If Grutter had been decided the other way, some school somewhere would now be in court defending the race-neutral alternatives now urged as substitutes for considering race.

The argument is simply that any admission criterion adopted for its tendency to increase minority enrollment is adopted for a racial motive, and any racial effects are therefore subject to the same strict

311. University of Texas Law School, Admissions Office Data (on file with author).
scrutiny as express consideration of race. The argument is potentially strongest against the strong proxies that actually help. But even a weak or ineffectual proxy might be unconstitutional if selected for racial motives. Certainly the Court would not permit law schools to gerrymander admission criteria for the purpose of reducing minority enrollment. Insistence that there is no compelling reason to consider race in admissions ultimately leads to the conclusion that no government can take any step, however modest, for the conscious purpose of assisting disadvantaged racial minorities.

The Court would have ultimately reached that same conclusion, unless it held that some efforts to help disadvantaged minorities are justified by a compelling interest. It was far better to uphold carefully limited consideration of race, which does most to address the exclusion of minority students at the least cost to other goals of fairness and meritocracy. It would have been far worse to strike down explicit consideration of race and to rely on inefficient proxies that harm admission standards across the board.

VII. CONCLUSION

Carefully limited consideration of race, in conjunction with the full range of academic predictors, serves important interests in experiential and racial diversity, in avoiding resegregation and the appearance of deliberate racial exclusion, in serving state populations and producing future leaders, in alleviating the consequences of discrimination in earlier stages of public education, and in preserving selective admission standards and academic excellence. No alternative means are available to serve this combination of interests. If the Court had prohibited consideration of race, that would have led first to substantial resegregation in American higher education, and then to substantial erosion of academic standards to avoid that resegregation. Different states might allocate the harm among these interests in different proportions, but both diversity and academic standards would be substantially reduced.

No race-neutral means can achieve both diversity and academic excellence. But experiments with percentage plans have revealed the motivational power of guaranteeing that some students from each high school can be admitted to the flagship campuses of the state.

university system. This is a discovery worth preserving, and it can be combined with a well-designed affirmative action program.

The case for affirmative action that considers race is much broader and deeper than a simple commitment to diversity as Justice Powell used that concept in *Bakke*. Parts of this the Court understood; parts it did not. But many of these concerns were captured in the Court’s expansion of the concept of diversity. Preparing a diverse set of leaders for the next generation, without diluting academic excellence, is the most compelling reason for affirmative action. And it is part of the holding in *Grutter*. 


APPENDIX

1995 Final LSAT & GPA Admission Grid\textsuperscript{316}

Selected Minorities
(African-Americans, Native Americans, Mexican Americans)

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Caucasian Americans

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Asian/Pacific Island Americans

316. These grids were prepared by counsel for Barbara Grutter; Michigan did not use them in the admissions process. In each cell, the first line is total applications, the second line is total admissions. The third line, which I have added to Grutter's grids, is the top line divided by three and rounded to the nearest integer—the projected number of admissions from that cell in a lottery with a threshold for entry set at a 148 LSAT and a 3.0 UGPA. To minimize the effect of rounding error in cells with small numbers, the likely minority admissions stated in text were calculated after combining all cells in the minority grid, and the likely admissions from the most and least qualified cells were calculated after combining the three grids.
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