

# Chapter Five

## The Percentage Plans

**In 1995, Texas** found its race preference programs in higher education struck down by the federal appellate court. The following year, Proposition 209, a California ballot initiative, banned such preferences in education and state employment and contracting. Then Florida Governor Jeb Bush's "One Florida" executive order decreed policies similar to California's. In each state, education officials responded with one version or another of what came to be known as "percentage plans." These plans were guarantees that high school students graduating in the top reaches of their respective classes—4 percent in California, 10 percent in Texas, and 20 percent in Florida—would find places in the state university system. Like officials everywhere, political and educational leaders in the three percentage plan states had their eyes on the University of Michigan, where a confrontation involving that school's race preference programs was gathering steam. Not only might their own programs be affected by the result, but their experiences operating in what were legally preference-free regimes would

likely be inspected closely by the interested parties in the Michigan case.

The state of Florida was the only state in the nation to file an amicus brief against the University of Michigan race preference programs. Apart from an abstract interest in affirmative action law, the state's apparent purpose for using the brief was to trumpet the "One Florida" alternative—also known as the "Talented 20 Plan"—implemented by Governor Jeb Bush.<sup>1</sup> Bush moved not under the lash of court edict but rather under the threat posed by Ward Connerly, the California Board of Regents race preference foe who was still riding high after his 1996 Proposition 209 victory that abolished race preferences in state employment, contracting, or college or university admissions.<sup>2</sup> (Prop 209 is discussed in more detail later in this chapter.) Connerly had come to Florida promising to enact a similar referendum. Bush, who regarded Connerly's presence as incendiary, was also facing a legal challenge to Florida's race-conscious programs. To blunt both, Bush came forward in October 1999 with his own version of the ban on race preferences, implemented by executive order.

In terms of higher education, the plan guaranteed admission into the state's higher-education system, which consisted of eleven universities, to any student graduating in the top 20 percent of his or her high school class.<sup>3</sup> (This guarantee was not to any particular school in the system.) A more restrictive threshold of 10 or 15 percent was rejected by the governor's advisors because that number would not yield

1. Brief for the State of Florida as Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

2. See Cal Ed Code § 87100 (2003).

3. Brief for the State of Florida, at 8–10.

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enough minorities. “Florida has provided alternative but race-neutral means of admission to those students who are striving for excellence, but who may have been disadvantaged by a lack of educational opportunities,” reads the brief. “Respect for the principle of nondiscrimination need not come at the expense of maintaining racially and ethnically diverse institutions of higher learning.”<sup>4</sup> Connerly’s effort was defeated by a decision of the Florida Supreme Court, which held that his ballot initiative failed to meet the clarity standards of the state’s constitution.<sup>5</sup>

In Texas, the percentage plan was spurred by the 1996 ruling of the Fifth Circuit Court of Appeals in the *Hopwood*<sup>6</sup> case, which held that all race preferences in university admissions were in violation of the Fourteenth Amendment’s equal protection clause. The court concluded that in the famous *Bakke* case, Justice Powell, in permitting race to be used as a plus factor for diversity purposes, had written only for himself. The Supreme Court had long since moved beyond Powell’s “lonely opinion.”<sup>7</sup> More recent Court decisions made it clear that race is no more rational “than would be decisions based upon the physical size or blood types of applicants.”<sup>8</sup> The laws in Texas, Louisiana, and Arkansas, the three states over which the Fifth Circuit presided, followed suit. The University of Texas Law School at Austin had invited so sweeping a ruling by baldly maintaining what had been separately maintained, color-coded applicant files for whites and minorities, with different presumptively admit, presumptively reject, and discretionary files all

4. *Id.* at 2.

5. *Id.*

6. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 2000).

7. *Id.* at 945.

8. *Id.*

pegged to something very close to admissions quotas for whites, blacks, and Hispanic Americans.<sup>9</sup> In addition to lowered academic admissions standards, the school also maintained segregated waiting lists. In 1992, the year Hopwood and her fellow plaintiffs applied to the law school at Austin, 55 Hispanics and 41 blacks were among the 514 students admitted. Without race preferences, the corresponding numbers would have been 18 and 9.<sup>10</sup> In response to the decision, a group of Democratic state legislators drafted a bill guaranteeing qualified applicants admission to any of the thirty-five state universities of their choice. The universities were permitted, under the legislation, to extend the option to the top 25 percent within each high school and to consider any of eighteen other factors in determining admissions policies.<sup>11</sup> Governor George W. Bush signed into law the measure, which had no purpose other than maintaining minority admissions at levels as close to the pre-*Hopwood* days as could be achieved by “race-neutral” means.

In California, Proposition 209, also known as the California Civil Rights Initiative, was adopted by voters in November 1996. In anticipation of its passage, the Board of Regents had the previous year voted to abolish the consideration of race or ethnicity in admission to the state’s nine research universities and twenty-three regional universities, beginning with the 1997–98 academic year.<sup>12</sup> Under a plan adopted in 1960, the top 12.5 percent of high-school graduates had

9. *Id.* at 936.

10. *Id.* at 937.

11. Sylvia Moreno, *House OKs Measures on Admissions*, DALLAS MORNING NEWS, Apr. 16, 1997, at A17.

12. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: Comparative Analysis of Three States’ Experiences* (available at [www.civilrightsproject.harvard.edu](http://www.civilrightsproject.harvard.edu)) (2003).

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been guaranteed admission to one of the nine research schools, and the top 35 percent had qualified for regional or specialty schools. In the heyday of affirmative action, the flagship schools in the system went to extraordinary lengths to maintain the desired mix of black and Hispanic students. In 1998, for example, the combined SAT scores of blacks at Berkeley, most of whom had been admitted before the ban on preferences, were 288 points below those of whites.<sup>13</sup> Early in his first term, Governor Gray Davis introduced legislation guaranteeing the top 4 percent of each high school graduating class admission to one of the research universities comprising the University of California. The plan was in short order approved by the Board of Regents and became known as Eligibility in Local Context (ELC). Davis also proposed putting more weight on SAT 2 scores, which measure proficiency in three subjects of the student's choice, as opposed to SAT 1, which tends to measure more abstract intellectual abilities and which is regarded by educators as a far more reliable indication of a student's college potential.<sup>14</sup> Richard Atkinson, president of the University of California, threatened to scrap the SAT 1 test altogether, again despite its documented value in predicting first-year grades, the likelihood of completing undergraduate school, and the probability of pursuing graduate studies.<sup>15</sup> Atkinson's threat brought results as the Educational Testing Service (ETS) promised to at least review its product for hidden bias. Like Florida, but unlike Texas, California universities require

13. Yvonne Daley, *Berkeley Recruits Minorities*, BOSTON GLOBE, May 2, 1999, at A12.

14. Michelle DeArmond, *California Governor Proposes 4 Percent Solution*, ASSOCIATED PRESS, Jan. 5, 1999.

15. John Leo, *An Unfair Ticket to College*, U.S. NEWS AND WORLD REPORT, Feb. 18, 2002, at 59.

from their high school students a number of specific academic courses in such subjects as English, math, science, and foreign language. All three programs demand that SAT or ACT scores be submitted, though technically those scores do not count toward qualification.

Before examining the specifics of implementation of the percentage plans, it would be useful to note a few of their generic qualities. First, as a matter of principle, the plans may or may not meet the Fourteenth Amendment problem that critics of affirmative action had with previous admissions policies. Standing alone, a simple ELC-type plan could probably pass muster. Adorned with enough legislative jewelry to make sure this “race neutral” approach produces the appropriate racial results, however, the effort may begin to resemble the assortment of “freedom of choice,” or pupil assignment, schemes used by the South to thwart integration two generations ago.

Second, in terms of education, depending on the design of the plans, they may abort the very result that many opponents of race preferences thought would be quite useful—the redistribution of minority beneficiaries of affirmative action from the most elite schools, where many were guaranteed to finish in the lower percentiles of their class, to lower first-tier or higher second-tier schools where minorities’ academic credentials would make them highly competitive. Scholars have debated whether affirmative action stigmatizes or perpetuates negative stereotypes with respect to its intended beneficiaries.<sup>16</sup> Whatever the case, elemental good sense suggests that a college applicant should, in most cases, be paired

16. See Andrew F. Falaby, *An Analysis of the Supreme Court's Reliance on Racial Stigma as a Constitutional Concept in Affirmative Action Cases*, 2 MICH. J. RACE & L. 235.

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with an institution at which he or she will feel intellectually compatible.

Third, from the university's perspective, percentage plans replace an efficient way of selecting minority students with a terribly imprecise method. Forced to choose between acknowledged or concealed affirmative action plans, one suspects that most admissions officers would choose something akin to race-norming, whereby white students and minorities are considered separately but each on the basis of academic merit, as the term is traditionally employed. Percentage plans, on the other hand, unless modified, can easily result in students from failing secondary schools with unchallenging curricula qualifying for automatic admission, while far better prepared students who fall just below the cut-off are denied admission. In practice, this can mean substituting inner-city blacks from segregated academic environments for well-prepared middle- and upper-middle-class blacks—86 percent of the African Americans who attend elite universities fall in one of these latter two categories—from more integrated settings.<sup>17</sup>

Fourth, to achieve their barely concealed function of providing the substance of affirmative action without the name, the percentage plans depend on the continuing bank of virtually segregated secondary schools.

Fifth, the plans have no applicability to graduate schools.

Sixth, the plans work best with less-competitive universities, where a majority of the 4, 10, or 20 percenters would have gotten in anyway. This drives home the fact that the heart of the affirmative action debate has always been over the access of blacks and other minorities to elite schools. A

17. Justin Ewers, *A Glimpse of Life Without Affirmative Action*, U.S. NEWS AND WORLD REPORT, Mar. 31, 2003, at 48.

very large number of colleges and universities where fine educations can be obtained are far from highly selective in their admissions practices.

Seventh, the plans have no applicability to out-of-state students.

Finally (and fatally), by ignoring such standardized tests as the SAT and ACT, the plans purport to discard a highly predictive indicator of future academic success in such areas as grades, graduation rates, and the likelihood of continuing on to graduate school.

The initial impact of ending racial preferences was a decline of black and Hispanic applicants to the more selective California and Texas institutions and a far milder drop in Florida, even in the flagship schools—the University of Florida at Gainesville and Florida State University in Tallahassee. Black student applications to the University of Texas Law School fell by 42 percent; Hispanic applications, by 12 percent. In 1997, 10 black students were admitted to UT-Law for the fall semester, compared with 65 the previous year; 4 blacks and 26 Hispanics entered UT-Law as first-year students, compared with 31 blacks and 42 Hispanics in 1996, which was the last year of affirmative action. University-wide at Austin, black applications declined by 26 percent and those from Hispanics fell by 23 percent.<sup>18</sup>

California experienced the same sort of shock. In 1997, even before the ban on affirmative action was fully in place, undergraduate black applications to the University of California system dropped by 8 percent, while those from Hispanics fell 4 percent. Meanwhile, 17 percent fewer minority students were admitted to the graduate schools at UC-Berke-

18. Renee Sanchez, *Minority Admissions Fall with Preferences Ban*, WASHINGTON POST, May 19, 1997, at A1.



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ley, and Boalt Hall Law School at UC-Berkeley admitted 80 percent fewer black students and 50 percent fewer Hispanics than it had a year earlier. Only a single African American student enrolled in that first-year Boalt Hall class. Other graduate programs also experienced a drop in minority candidates. The Haas Business School saw black student admissions drop 52 percent, and Hispanic admissions, 54 percent. In graduate engineering programs, Hispanic admissions dropped 43 percent, from 50 to 29, and black admissions dropped 18 percent, from 28 to 23.<sup>19</sup>

“I think those are shocking numbers,” said Andrea Guerrero, a UC-Berkeley law student. “Berkeley has lost its place of pre-eminence and prominence by allowing this to happen.”<sup>20</sup>

Jerome Karabel, long a force for race preferences at the University of California at Berkeley, called the anti-affirmative action trend “the biggest negative redistribution of educational opportunity in the history of the country.”<sup>21</sup>

“The solution is to bring into the university admissions process a sufficient pool of black, Chicano and Latino high-school students from which we can draw, and not to label us bad guys for revealing the cancer in the K–12 system,” said Bruce E. Cain, acting director of Berkeley’s Institute of Governmental Studies.<sup>22</sup>

Scarcely noticed in the early cries of doom was the fact

19. Renee Koury, *Report Says 17 Percent Fewer Minority Students Admitted at California-Berkeley Graduate Schools*, SAN JOSE MERCURY NEWS, June 26, 1997, at B1.

20. *Id.*

21. James Traub, *The Class of Prop. 209*, NEW YORK TIMES MAGAZINE, May 2, 1999, at §6, 44.

22. Patrick Healy, *Berkeley Struggles to Stay Diverse in Post-Affirmative Action Era*, CHRONICLE OF HIGHER EDUCATION, May 29, 1998, at A31.

that minority enrollment at some of the less-competitive campuses—Riverside, Irvine, and Santa Cruz, for example—was increasing, precisely the sort of “cascade” phenomenon critics of race-conscious admission policies had predicted. The new reality was captured brilliantly by James Traub, a contributing writer to the *New York Times Magazine*, who found black and Hispanic students productively working toward graduation and advanced degrees without the unremitting academic pressure that would have been their lot at one of the state’s two supercompetitive universities. “I think I am more prepared in terms of graduate school than I would have been had I gone to U.C.L.A.,” volunteered one African American student. “Some of the professors there are not necessarily as humble as they are here.”<sup>23</sup> Traub reported candidly that the central problem in California was the underperformance of black elementary and secondary school students relative to others. Some 30 percent of all Asians qualify for the state university system, 12.7 percent of whites, 3.8 percent of Latinos, but only 2.8 percent of blacks—an appalling 547 during 1996.<sup>24</sup> In addition, few of the students Traub interviewed thought diversity a small virtue to be discarded in a fair contest with merit. Most saw it as a “piety” rather than something real. “Most of the white and Asian students I spoke to felt quite cut off from the black and Latino students. Social life was largely Balkanized by ethnic identity. Only a few classes were small enough for the kind of sustained discussion that would feature the black or Latino ‘view.’ And the number of minorities in such upper level classes was very small.”<sup>25</sup> Ward Connerly saw the distribution or cascading of

23. Traub, *The Class of Prop.* 209, at 44.

24. *Id.*

25. *Id.*

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minority students to the less-selective state universities as a positive thing. “I’m extremely heartened by the numbers,” he said. “Minority students are saying ‘I’m disappointed I didn’t get into Berkeley, but I proved I can get into Riverside or Santa Cruz on my own.’ It means one has to wonder how these kids got onto campus.”<sup>26</sup>

However, the University of California quickly tailored its procedures to the perceived need to reach minorities without using formal race-conscious policies. UC-Berkeley, for example, adopted strategies such as the following: high school GPA weighted by the academic quality of courses taken, scores on required standardized test, participation in academic-enrichment programs, additional evidence of intellectual or creative achievement, extracurricular activities, leadership and other personal qualities, and likely contribution to the intellectual and cultural vitality of the campus, perhaps a code term for contribution to diversity. The school also paid attention to “personal struggle” and “difficult personal and family situations or circumstances.” Similar considerations have since been appropriated by the UC graduate schools. UCLA Law School, for example, came up with an affirmative action plan for low-income students that includes assessing the poverty of the applicant’s neighborhood and the accumulated wealth of the applicant—two criteria concentrated among black and Latino candidates. The school also gave special consideration to students agreeing to major in critical race theory, a radical legal ideology that states such doctrines as equal protection are disguised tools of racism.

However, even with all the crafty non-race-conscious ways to restore the racial balance of the mid-1990s, the situation, from the university’s point of view, is mixed. The per-

26. *Id.*

centage of blacks in the university system is still below the affirmative action years, but the percentage of admitted Hispanics is up a bit. Both are down if measured by first-year enrollees—Hispanics from 13.8 percent in 1996 to 13.5 percent in 2001; blacks from 3.8 to 3.0 percent in the same two years.<sup>27</sup> Things are even tighter at the two flagship schools. In 1996, 6.5 percent of enrolled first-year students at UC-Berkeley were black, as were 6.3 percent of the same class at UCLA. The corresponding figures for Hispanics were 15.7 percent at UC-Berkeley and 19.0 percent at UCLA. In 2001, the numbers were 3.9 percent blacks at UC-Berkeley and 3.4 percent at UCLA. The Hispanic numbers were 10.8 percent at UC-Berkeley and 14.4 percent at UCLA. At Boalt Hall, in 2002, Hispanics held 13 percent of the first-year places, up 2.4 percent from 1996. Blacks remained well below their 1996 number of 7.6 percent. Perhaps most tellingly, in the fall of 2003, Boalt Hall, with its “holistic” admissions gimmicks, succeeded in enrolling fourteen black students in its first-year law class. However, nine of those black students averaged nine points below entering white first-year law students, which is identical to the average gap during the affirmative action years.<sup>28</sup> At the core of black underrepresentation lies the real problem, black underachievement.

Some of the early Texas reaction to the *Hopwood*-induced drop in minority representation at flagship schools bordered on panic. “There is no way I can go on competing successfully in drawing qualified minorities if things continue this way,” predicted Dean Michael Sharlot, of the University of Texas

27. Horn & Flores, *Percent Plans in College Admissions*, at 55.

28. *Id.*

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Law School.<sup>29</sup> Critics of *Hopwood* feared that the black law students who were forced to go elsewhere to seek education would not return to Texas to practice. Dallas Mayor Ron Kirk, an African American graduate of the law school at Austin, warned, “The way you have judges who are people of color ten years from now is to have graduates coming out of the law school now.”<sup>30</sup> On the other hand, such less-selective schools in the Texas system as Prairie View, Houston, and Texas Tech saw minority applications increase substantially. A note contrary to Mayor Kirk’s was sounded by Edward Blum, the Texan who headed the Campaign for Color Blind America. Blum maintained that weeding out those who are less qualified academically is no disservice to education. At schools like Rice, he noted, the SAT gap was a hefty 271 points, but more than 25 percent of the blacks dropped out compared with just over 10 percent of the whites. (At Berkeley, the SAT gap was 288 points, and the respective dropout rates were 42 percent for blacks and 16 percent for whites.) Blum further noted that more than half the blacks who graduated from the University of Texas Law School flunked the bar exam on their first try, and a high percentage of those failed it the second time as well. “UT’s pass rate on the exam was lower than Baylor’s,” he claimed, “owing to affirmative action.”<sup>31</sup>

Saying all that, however, in seven years the UT system witnessed a 15 percent increase in African American stu-

29. Lydia Lum, *Applications by Minorities Down Sharply*, HOUSTON CHRONICLE, Apr. 8, 1997, at 1.

30. Jayne Noble Suhler, *1 Black Set to Enroll So Far As New Law Student at UT; Dean Blames Ban on Race-Based Admissions*, DALLAS MORNING NEWS, May 21, 1997, at A1.

31. Edward Blum, *Hopwood May Raise Minority Graduation Rates*, DALLAS MORNING NEWS, Dec. 14, 1997, at J6.

dents and a 10 percent jump in Hispanics.<sup>32</sup> Taken as a whole, the thirty-five institutions of higher learning became more regionally diverse, increasing the representation of rural areas and inner cities. Top 10 percenters were doing as well at the University of Texas as their non-top 10 percent peers. “Believe me,” declared Bruce Walker, director of admissions at UT-Austin, “every day of the week, I wake up wishing I could have affirmative action back. But this is the dish we got served and we’re making the best of it.”<sup>33</sup>

As Walker’s words imply, Texas essentially defined “making the best of it” by attempting to bring the percentage of minority enrollment back to pre-*Hopwood* levels using means that were technically non-race-conscious and thus at least arguably within the law. In 1997, the first post-*Hopwood* year, UT-Austin revamped its admission policy to include not only the traditional academic index, but also a personal achievement index (PAI), consisting of leadership, scores on two essays, extracurricular activities, awards and honors, work experience, service to school or community, and “special circumstances.” This latter category included the socioeconomic status of the family, whether the student came from a single-parent home, the language spoken at home, the applicant’s family responsibilities, socioeconomic status of the school attended, and the average SAT/ACT scores of the school attended relative to the applicant’s own scores. Although many of these PAI items can be used as proxies for race, the political mandate from Austin was to restore the pre-*Hopwood* racial balance, the fruits of a system to which most faculty and administration had been deeply committed

32. *Id.*

33. Kenneth J. Cooper, *Colleges Testing New Diversity Initiatives*, WASHINGTON POST, Apr. 2, 2000, at A4.

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but which now had—temporarily at least—become illegal. In the fifth in its series of reports on the Implementation and Results of the Texas Automatic Admissions Law, released in fall 2002, UT-Austin cited approvingly the call by University of California System President Richard Atkinson for this “holistic approach,” including his call for reducing the emphasis on test scores. The approach had succeeded in restoring most of the pre-*Hopwood* racial balances, though total black enrollment was still 7 percent below 1996 levels. Students admitted under the 10 percent program maintained slightly higher SATs than those admitted through regular procedures—1226 versus 1222.<sup>34</sup> African American representation continued to experience problems at the graduate level, which was beyond the reach of the top 10 plan. For example, although the representation of Hispanic Americans at UT-Law had returned to pre-*Hopwood* levels, the percentage of African American law students had dwindled from 6.4 percent to 3.6 percent of the entering class. Black representation was also down sharply in other graduate programs, including medicine. By 2003, throughout the entire Texas system, the number of blacks had increased about 15 percent since *Hopwood*, and the number of Latinos was up to about 10 percent. Overall at UT-Austin, however, black enrollment was down 17 percent since *Hopwood*, and Latino enrollment was down 5 percent. At Texas A&M, black enrollment was down 14 percent, and Latino enrollment, 1 percent.<sup>35</sup> For Texas to do even this well it took hard work, including proac-

34. Gary M. Lavergne & Bruce Walker, *Academic Performance of Top 10% and Non-Top 10% Students: Academic Years 1996–2001* (available at [www.utexas.edu/student/research/reports/admissions/HB588-Report5.pdf](http://www.utexas.edu/student/research/reports/admissions/HB588-Report5.pdf)).

35. Mitchell Landsberg, Peter Y. Hong, & Rebecca Trouson, *Race-Neutral University Admissions in Spotlight*, LOS ANGELES TIMES, Jan. 17, 2003, at Metro 1.

tive recruiting in new areas, aggressive distribution of scholarships, and establishment of academic relationships in parts of the state and individual towns that had previously drawn few minority applicants. Such programs do little to inform the preference debate because they are not unique to percentage plans, they are supported enthusiastically by both supporters and opponents of race preferences (one possible exception being race-conscious scholarship awards), and they will no doubt become an even more important tool for colleges and universities regardless of future changes in the law of affirmative action.

### The Florida Plan

In its brief opposing the University of Michigan race preferences, the state of Florida declared that in One Florida, it had found a “better” way: “Florida’s plan is better in that it no longer accepts the lack of quality in the public schools that serve our underprivileged children; better because it recognizes the need to provide mentoring, tutoring, and other extra attention to those underprivileged children and their teachers; better because it encourages all students regardless of race or economic status to aspire to post-secondary education; better because it no longer accepts a separate standard on the basis of race; better because it focuses on providing all races with the opportunity to meet common standards; and finally, [better] because it looks forward to a day when racial classifications and separate standards are no longer deemed necessary by anyone.”<sup>36</sup>

This soaring rhetoric amounts to something of an unsupported boast for a system that, at the time the brief was

36. Brief for the State of Florida, at 19.



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submitted, had been in full operation for fewer than three years. To the contrary, the record to date could better support the following statements about One Florida:

1. The plan is an inherently poor test of the efficacy of race-neutral college admission systems, because applying a very tolerant top 20 eligibility requirement on a system where the two most selective state universities already admit more than 60 percent of all applicants is a bit like testing a foul shooter's accuracy by having him toss basketballs into a lake. An estimated 99 percent of students admitted under the Talented 20 Plan would have been admitted even had no such plan been in existence.
2. Many of the programs Florida maintains to make its system work, such as mentoring high-school students and encouraging greater numbers of students to take the PSAT, are not truly alternatives to affirmative action. Rather they are useful efforts to improve the academic performance of high-school students—something that would be worth trying regardless of the college admissions system involved.
3. A handful of the programs that are designed to sweeten the mix of college applicants with greater numbers of minorities are themselves race preference programs vulnerable to legal challenge.
4. Certain adjustments in the state's admissions standards are thinly veiled substitutes for race preferences and would be vulnerable to the extent that the initial program was.

The Talented 20 Plan casts a wide but porous net. Of the 11,539 who enrolled at state universities, fewer than 200 had maintained high-school GPAs of 3.00, traditionally the min-

imum requirement for admission to the state system. Another 10,933 did not enroll at state schools. The change in minority numbers throughout the system was negligible, with the exception of the state's most selective school, the University of Florida at Gainesville, where the average SAT score is just short of a lofty 1300 and where the percentage of black first-year students fell from 11.8 to 7.2 percent, and the number of Latinos from 12 to 11 percent in 2001, the first year of One Florida's operation.<sup>37</sup> University of Florida Provost David Colburn said, "The minority students that we can accept are also being recruited by Harvard, Princeton and the University of California."<sup>38</sup>

University officials acknowledged the black presence would have been even more modest had the school not revised its admissions criteria. The *St. Petersburg Times* reported that under the new standards, "A high SAT score, for example, now counts no more toward admission at UF than two years of attendance at a high school in a low income neighborhood."<sup>39</sup> Membership in the National Honor Society counted less than having grown up in a high-crime neighborhood. It could not have surprised many when black enrollment surged during the second year of the program's operation. With something of a flair for understatement, the *Los Angeles Times* reported, "In fact although the policies are legally race-neutral, the explicit goals are to achieve ethnic and racial diversity."<sup>40</sup>

Opponents of traditional race preferences find themselves divided over the question of race-neutral alternatives

37. Barry Klein, *Black UF Freshman Numbers Plummet*, ST. PETERSBURG TIMES, Aug. 12, 2001, at A1.

38. *Id.*

39. *Id.*

40. Brief for the State of Florida, at 19.

designed to achieve the same ethnically balanced end. Roger Clegg, of the Center for Equal Opportunity, argued, “I don’t think any institution—a legislature or a bowling club—has to have a particular ethnic or racial mix.”<sup>41</sup> On the other hand, Terrence Pell, a senior counsel at the Center for Individual Rights, which led the legal battle against Michigan, considered diversity a legitimate goal as long as the right means are used to achieve it. “Schools ought to be free to experiment with a variety of strategies that serve their educational purposes and missions,” he told the *Washington Post*. “The Michigan legislature has the right to expect that the University of Michigan serves the residents of Michigan, all residents of Michigan. It’s a public university.”<sup>42</sup> In California, Tom Wood, the father of Prop. 209, and Ward Connerly, its most prominent advocate, also split on the issue. Had *Grutter v. Bollinger* gone the other way, it is not at all clear that affirmative action opponents would have been able to maintain a united front in opposition to the norms of evasion that would quickly have spread across the nation’s campuses.

Although most race consciousness in the percentage plan states is disguised, One Florida continues an overt program designed to spur black interest in and eligibility for the state university system. UF-Gainesville and others offer specific scholarships to minority students that are not available to whites. Governor Jeb Bush sought and received a steep increase in funding for the College Reach-Out Program (CROP), which identifies promising minority students and helps them prepare for college through tutors, “homework clubs,” and in-school academic strategy sessions. CROP has also established a partnership with the college board to

41. Cooper, *Colleges Testing New Diversity Initiatives*, at A4.

42. *Id.*

increase minority participation in advanced placement (AP) courses, PSAT testing, and SAT preparation. The administration has also paid a great deal of attention to student performance on the Florida Comprehensive Assessment Test (FCAT), which records performance in a variety of subjects in grades 3–10, and has backed both public and private alternatives to so-called failing schools. As effective as these measures may be, however—and whether or not they are race conscious—they all have their roots in the affirmative action era, and all, or most, would have continued in one form or another regardless of how the Michigan decision came down. The core of the percentage plans involves seeking to maintain or restore diversity where race preferences have been done away with. On the incomplete evidence to date, California, Texas, and Florida offer little to cheer about.

### Doctoring Economic Affirmative Action

In March 2003, Anthony P. Carnevale and Stephen J. Rose published a Century Foundation Paper titled *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, which used data from two longitudinal studies published by the National Center for Education Statistics to make the case for affirmative action programs that pay primary attention to the applicant's socioeconomic status (SES)—a figure that combines family income with the education and occupation of the parents. They found that the underrepresentation of low SES students at 146 of the “most selective” four-year institutions—defined by the Barron's Guide—was far more severe than the underrepresentation of blacks and Latinos. For example, blacks and Latinos, representing 15 and 13 percent of the college-age population, respectively, each had about 6 percent of the entering class. By contrast, 74 percent

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of the students at the top 146 colleges came from families in the top SES quarter, whereas 10 percent came from the bottom half of the SES scale, and only 3 percent from the bottom quartile.<sup>43</sup> There are four times as many black and Hispanic students as there are students from the lowest SES quartile. In fact, with colleges busy admitting legates, football players, and favored racial and ethnic groups, those in the lower reaches of SES fare worse than would be the case if GPAs and standardized test scores—the traditional determinants of merit—were the sole considerations of admissions offices.<sup>44</sup>

Apart from conceptual unfairness, the current state of affairs strikes a blow against social and economic mobility. It is well documented that, all other things being equal, going to a top-tier school enhances one's chances of graduating and attending graduate school. Most studies also suggest that top-tier attendance carries at least a modest advantage in terms of future income.

In their advocacy of race preferences, *The Shape of the River*, authors William Bowen and Derek Bok argued, "The problem is not that poor but qualified candidates go undiscovered, but that there are simply too few of these candidates in the first place."<sup>45</sup> Carnevale and Rose argue, however, that "[t]here are large numbers of students from families with a low income and low levels of parental education who are academically prepared for bachelor's degree attainment, even in the most selective colleges."<sup>46</sup> Richard Kahlenberg,

43. Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, at 11 (available at [www.equaleducation.org](http://www.equaleducation.org)) (March 2003).

44. *Id.*

45. Ethan Bronner, *Study Strongly Supports Affirmative Action in Admissions to Elite Colleges*, *NEW YORK TIMES*, Sept. 9, 1998, at B10.

46. Carnevale & Rose, *Socioeconomic Status*, at 38.

of the Century Foundation, who endorses affirmative action on the basis of income rather than race, noted, “Only 44 percent of low SES students who score in the top quartile academically attend a four year college.”<sup>47</sup> Carnevale and Rose refer to this group as “low hanging fruit” for selective schools.<sup>48</sup> Kahlenberg also cited research by Donald Heller, of Pennsylvania State University, who suggested that many prestige schools could increase their commitment to educating SES-disadvantaged students. For example, Pell Grant recipients, who generally come from the bottom 40 percent SES, make up 32 percent of the student body at UC-Berkeley and 24 percent at Smith, but only 7 percent at Princeton and Harvard.<sup>49</sup>

Critics of affirmative action pegged to economic status maintain that the plans fall into one of two categories: those that would benefit whites or Asian Americans—say children of recently divorced or unemployed parents or recently arrived immigrants, or those that are thinly disguised race preference programs. Not only are there more poor whites than blacks in absolute terms, but even the lowest-income whites tend to score higher on standardized tests than do blacks of any strata.<sup>50</sup> With some tweaking, however, the beneficiary configuration can change. Carnevale and Rose noted that although blacks average 12 percent of the students at those schools diligently practicing affirmative action and would constitute only 4 percent at selective schools where academic merit alone was the standard, they would bounce back to 10 percent under the current SES standard, which

47. Richard Kahlenberg, *Economic Affirmative Action in College Admissions*, at 4 (available at [www.tcf.org](http://www.tcf.org)).

48. Carnevale & Rose, *Socioeconomic Status*, at 39.

49. Kahlenberg, *Economic Affirmative Action*, at 6.

50. *Id.* at 42.

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includes family income, education, and occupation.<sup>51</sup> Add accumulated wealth and quality of the neighborhood, or even single parenthood, and schools would be able to maintain minority representation at current levels, or even above, albeit with many of the current core of economically comfortable blacks replaced by those from less-privileged backgrounds. (For reasons not evident from their scholarship, the authors recommended keeping a separate race-conscious affirmative action program in place.) Carnevale and Rose urged that qualifying SAT scores be kept in the 1000–1100 area, about where they are for current affirmative action beneficiaries. They cited data indicating that students who attend the tier-one schools and who had SAT scores in the 1000–1100 range graduate at an 86 percent rate.<sup>52</sup>

There is little doubt that low-SES students are being penalized by race-conscious affirmative action. Not only are some of their potential places taken by blacks and Latinos, but also the dollars expended on affirmative action are dollars not available to assist low-income students. It is also quite clear that many among the nation's leading institutions of higher learning attach low priority to the recruitment or admission of low-SES individuals. It would seem, however, that by the time the low-SES plan authors get through tweaking economic affirmative action programs to wring out any possibility that preferred minorities will suffer a net loss, we once again will have a disguised race-conscious program. Whether the beneficiaries are white, black, or polka dot, by reaching down to the 1000–1100 SAT level at our most prestigious colleges, we would be perpetuating the annual crea-

51. *Id.*

52. *Id.* at 34.

tion of an academic underclass of students destined for the low percentiles of achievement.

Underlying the notion of economic affirmative action, as with that of racial affirmative action, is the sense that the nation's social and economic classes should remain fluid, open to newcomers, and rich with plausible examples of upward mobility in this society. As long as access is based on merit, this is the role public and even private colleges and universities have played and will continue to play. Over the years, we have watched one immigrant group after another arrive as wretched masses yearning to breathe free. All experienced poverty, all felt the sting of discrimination, some felt the violence of the nativist, the demagogue, the rabble rouser. All—Irish, Italian, Jew, Pole, and others—eventually thrived, their communities lifted by the assimilation made possible by quality elementary and secondary school education. University education came later, earned by the diligence of the newcomers, the guidance of their elders, and the commitment of society to provide opportunity for those deserving of it. In more recent years, Filipinos, Chinese, Vietnamese, and other Asians followed suit, with traditionally good results. One expects that Hispanics, the latest group to arrive in massive numbers, will participate in a similar upward mobility through education with or without affirmative action.

However, our colleges are institutions of learning, not social alchemy. The problem is that there are simply not enough competent African American students to work with. Deprived as a race of the immigrant experience, subjected to enslavement, abuse, and scorn beyond the imagination of the others, many of the younger generation resist the broad cultural assimilation that was at the root of all others' success. For this condition, there is guilt enough to share, but the issue is not guilt, it is sound policy. The nation must choose



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between one policy set that offers equal opportunity on a playing field as fair as our society can make it and a second that offers entitlement by color, reward by race, preference through gimmick and contrivance. If too few students low on the SES scale are attending the most selective colleges, the likely solution involves identifying those with potential early in their K–12 experience and providing them with the educational resources to maximize their talent. If blacks and Hispanics are underrepresented at the elite institutions, the same applies—intervene early enough and effectively enough to provide real options for those involved. Affirmative action that begins as race preferences in college admissions is a testament to a failed policy, not the road map to a successful one.