
WHAT PRICE *GRUTTER*?

WE MAY HAVE WON THE BATTLE, BUT ARE WE LOSING THE WAR?

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INTRODUCTION

Since the implementation of the first race-based affirmative action program, many battles regarding the constitutionality, fairness, and necessity of such programs have been fought between those who favor and oppose their use. While proponents of affirmative action have employed theoretical weapons such as the present effects of past discrimination¹ and the importance of racial diversity² to justify the use of race-based affirmative action, opponents of affirmative action have armed themselves with the Equal Protection Clause of the Fourteenth Amendment in their efforts to eliminate such programs.³

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1. See Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001) (defending affirmative action as a means to remedy past and ongoing discrimination); Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097, 2112 (2004) (“Affirmative action supporters consider the conditions resulting from discriminatory practices from the perspective of those who have been injured by an elaborate system of racial exclusion. They believe that affirmative action promotes equality and advances the unfinished process of desegregation.”); Abraham L. Wickelgren, *Affirmative Action: More Efficient Than Color Blindness*, 10 TEX. J. C.L. & C.R. 165 (2005) (defending past discrimination as a justification for affirmative action).

2. See Kenneth L. Karst, *The Revival of Forward-looking Affirmative Action*, 104 COLUM. L. REV. 60 (2004) (discussing affirmative action as a forward-looking means to integrate and diversify American institutions); Mexican Am. Legal Def. and Educ. Fund et al., *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz*, 8 HARV. LATINO L. REV. 33 (2005) (relying on diversity rationale to advocate for the reintroduction of race-based affirmative action at Texas institutions of higher education).

3. See *Grutter v. Bollinger*, 539 U.S. 306, 348–49 (2003) (Scalia, J., concurring in part and dissenting in part) (arguing that “racial preferences in state educational institutions are impermissible” on the ground that “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception”). See also *id.* at 378 (Thomas, J.,

The grounds on which these battles are being fought have taken many different forms. Ballot initiatives such as Proposition 209 in California⁴ and Initiative 200 in Washington⁵ have been used to eliminate the use of racial preferences in government contracts, employment, and public education. Executive orders like the one issued by Governor Jeb Bush in Florida have also been employed to prohibit racial preferences, racial set-asides, and the consideration of race and ethnicity in college and university admissions.⁶ Perhaps the most frequent battles between opponents and proponents of race-based affirmative action have taken place within the judicial system, including many cases concerning the use of race-conscious admissions policies in public education.⁷

As consistently recognized by the Supreme Court, public education is one of the most important institutions in our society.⁸

concurring in part and dissenting in part) (characterizing race-based affirmative action as “a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause”).

4. Cal. Const. art I, § 31(a) (formerly Proposition 209, enacted in 1996).

5. Wash. Rev. Code § 49.60.400(1) (formerly Initiative 200, enacted in 1998).

6. See Press Release, Governor Bush Announces His One Florida Initiative (Nov. 9, 1999), available at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/articles/gov_announces_one_fl_init.html.

7. See generally *Grutter*, 539 U.S. 306 (rejecting challenge to the University of Michigan Law School’s race-conscious admissions procedures); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (upholding challenge to the race-conscious admissions procedures used by the University of Michigan undergraduate program); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (upholding challenge made against a set-aside program that required prime contractors who had been awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more minority businesses); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (upholding challenge made against a collective bargaining agreement that stated that regardless of seniority, minority teachers would be retained over non-minority teachers in layoff decisions in an effort to provide minority role models for minority students); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (upholding challenge made against the University of California at Davis Medical School admissions program, which employed a quota system and a separate admissions track for minority applicants); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (upholding challenge made to the University of Maryland merit scholarship program for which only African-American students were eligible); *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 263 F.3d 1234 (11th Cir. 2001) (upholding challenge made against the University of Georgia race-based admissions policies); *Farmer v. Ramsay*, 43 F. App’x 547 (4th Cir. 2002) (rejecting challenge made against the University of Maryland School of Medicine race-conscious admissions program); *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (D. Mass. 1996) (upholding challenge made against the Boston School Committee admissions policy of setting aside 35% of the seats available at three Boston public schools for African-American and Latino students); *Univ. & Cmty. Coll. Sys. of Nev. v. Farmer*, 930 P.2d 730 (Nev. 1997) (rejecting a challenge to the state university system affirmative action plan).

8. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“Public education is not a ‘right’ granted to individuals by the Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.”) (citations omitted); *Grutter*, 539 U.S. at 331 (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our

[Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.⁹

Although these words were written by Chief Justice Earl Warren more than fifty years ago, their applicability today is undeniable. Most people in our society view education as the gateway to career, financial, and life opportunities.¹⁰ In light of this view, it is no surprise that providing racial and ethnic minority students access to educational opportunities serves as a fundamental goal underlying the use of race-based affirmative action in higher education.¹¹ Many proponents of race-based affirmative action believe that “[i]f undergraduate and graduate institutions are not open to all individuals and broadly inclusive to our diverse national community, then the top jobs, graduate schools, and the professions will be closed to some.”¹² Fueled by this belief, proponents of race-based affirmative action are engaged in the war to effectively provide minority students access to educational opportunities.

In the case of many wars, numerous battles must be fought before a victor is ultimately determined; the war over affirmative action is no different. Opponents of race-based admissions procedures declared victory after the Fifth Circuit’s decision in *Hopwood v. Texas*¹³ effectively eliminated the use of race-based programs in Louisiana, Mississippi, and Texas higher education admissions procedures.¹⁴ In finding that racial and ethnic diversity was not a compelling state interest to justify the use of race in admissions decisions,¹⁵ the Fifth Circuit

political and cultural heritage’ with a fundamental role in maintaining the fabric of society.” (quoting *Plyler*, 457 U.S. at 221)).

9. *Brown*, 347 U.S. at 493.

10. See Brief for the United States as Amici Curiae Supporting Petitioner at 13, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 176635 [hereinafter Brief for the United States] (“A university degree opens the doors to the finest jobs and top professional schools, and a professional degree, in turn, makes it possible to practice law, medicine, and other professions.”); Karst, *supra* note 2, at 60 (stating that “universities are gateways to leadership in American institutions”).

11. See *Grutter*, 539 U.S. at 331–32 (acknowledging that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective” (quoting Brief for the United States, *supra* note 10, at 13)) (emphasis added). See also *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting) (acknowledging “the networks and opportunities . . . opened to minority graduates” of “colleges and universities [that] seek to maintain their minority enrollment” following the Court’s decisions in *Grutter* and *Gratz*).

12. Brief for the U.S., *supra* note 10, at 13.

13. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

14. See The Center for Individual Rights, *Hopwood* Ends Affirmative Action in 5th Circuit, <http://www.cir-usa.org/cases/hopwood.html> (last visited Nov. 19, 2005) (declaring *Hopwood* to be a landmark victory for the Center for Individual Rights against affirmative action and noting that the Court’s denial of certiorari effectively banned affirmative action in admissions in Texas, Louisiana, and Mississippi).

15. *Hopwood*, 78 F.3d at 944–48.

departed from the Supreme Court's apparent holding to the contrary in *Regents of the University of California v. Bakke*.¹⁶ Twenty-five years passed before the question of whether "student body diversity is a compelling state interest that can justify the use of race in university admissions" was unequivocally answered in the affirmative.¹⁷

At first glance, the *Grutter* Court's sanctioning of race-based affirmative action in higher education may be viewed as a victory in the effort to provide minority students access to higher education opportunities. Indeed, the decision does provide an immediate benefit for those seeking to provide opportunities to minority students. Permitting colleges and universities to consider an applicant's race or ethnicity in their admissions decisions affords them the opportunity to enroll a "critical mass" of minority students,¹⁸ an opportunity that, in all likelihood, would be severely hindered were they not permitted to do so.¹⁹

Notwithstanding the apparent advantages derived from the *Grutter* decision, one must also consider the potential costs it imposes. Ultimately, the Court's decision may prove to be a detriment rather than a benefit for those attempting to provide minority students with meaningful access to higher education opportunities. By reaffirming race-based affirmative action, the Court sanctions admissions policies that focus on the narrow goal of granting preferences to minority students to increase minority enrollment rather than broader goals of providing guidance, resources, and assistance to such students. In taking that step, the Court's decision may serve not as a gateway to educational opportunities but rather as a barrier to such access.

By sanctioning the use of race-based preferences, the Court reaffirms the status quo as it relates to college and university methods for achieving racially and ethnically diverse student bodies—a status quo that arguably has neither produced optimal levels of diversity in higher education,²⁰ nor successfully addressed the

16. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 311–12, 320 (1978).

17. *Grutter*, 539 U.S. at 325.

18. *Id.* at 316–20. Although the Court does not define the term "critical mass," it can be inferred from the opinion that the term relates to the enrollment of a meaningful or significant number of minority students such that their presence contributes to a diverse learning environment.

19. See *infra* Part II.B–C (discussing the impact termination of race-based affirmative action has had on racial and ethnic diversity levels at colleges and universities in California and Texas).

20. For example, in 1996, prior to the Fifth Circuit's decision in *Hopwood*, the University of Texas at Austin (UT), one of the state's flagship universities, maintained an African-American and Hispanic freshman enrollment of 4% and 14%, respectively. GARY M. LAVERGNE & BRUCE WALKER, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN, DEMOGRAPHIC ANALYSIS FALL 2003, ACADEMIC PERFORMANCE OF TOP 10% AND NON-TOP 10% STUDENTS ACADEMIC YEARS 1996–2002 4 (2003), available at <http://www.utexas.edu/student/admissions/research/HB588-Report6-part1.pdf>. One could argue that such diversity levels are low considering UT is located in a state that maintained an African-American population of 12% from 1990–2000 and a Hispanic population of 26%–32% during the same years. See Proportion of the Population in Each Race/Ethnicity Group in 1980, 1990, and 2000, Numerical Change 1980 to 1990 and 1990 to 2000 by Race/Ethnicity, and Proportion of Net Change from 1980 to 1990 and 1990 to 2000 by

potentially defeating challenges confronting disadvantaged minority students, including a lack of guidance and encouragement regarding educational goals.²¹ Since the Court's decision in *Bakke*, institutions of higher education have utilized race-based admissions procedures as primary methods for achieving diverse student bodies. As recognized by the Court in *Grutter*, "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."²² In fact, after the *Bakke* decision, "most universities adopted programs taking race into account in all undergraduate, graduate school, and professional school admissions, and today racial diversity has become a hallmark of the university scene."²³

Unfortunately, in their reliance on *Bakke* and utilization of race-based affirmative action, colleges and universities have traditionally neglected to afford serious consideration to race-neutral measures that do not consider applicants' race or ethnicity in admissions decisions. As admitted by Gerald Torres when discussing race-neutral diversity efforts at the University of Texas at Austin (UT) following *Hopwood*, "Sadly, I think we would not have rolled up our sleeves and made the effort of doing the math and trudging into the neglected high schools and neglected districts had it not been for *Hopwood*."²⁴ This neglect has greatly hindered the development of effective race-neutral alternatives.

[B]ecause everyone has taken *Bakke* as his guide, these [race-neutral] experiments are not nearly as far along as they would have been had the Court foreclosed race consciousness in 1978. Thus, society today is not as far along the road to finding effective race-neutral means of accomplishing racial diversity as it would have been²⁵

Race/Ethnicity in the State of Texas, available at http://txsdc.utsa.edu/data/census/2000/redistrict/pl94-171/desctab/re_tab2.txt (last visited Nov. 19, 2005). See also Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools,"* 7 AFR.-AM. L. & POL'Y REP. 1, 9 (2005) (arguing that "decades of affirmative action have not significantly diminished the problem of African-American underrepresentation in universities").

21. See *Grutter*, 539 U.S. at 372 & n.11 (Thomas, J., concurring in part and dissenting in part) (criticizing the University of Michigan Law School's affirmative action policies for not "address[ing] the real problems facing 'underrepresented minorities,'" such as the underperformance and underrepresentation of African-American men at the Law School).

22. *Grutter*, 539 U.S. at 323 (citing Brief for Amici Curiae Judith Areen et al. in Support of Respondents at 12-13, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 554398 (stating that law school admissions programs employ "methods designed from and based on Justice Powell's opinion in *Bakke*"); Brief of Amherst College et al., Amici Curiae, Supporting Respondents at 27, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 399075 ("After *Bakke*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion . . . and set sail accordingly.")).

23. Robert A. Sedler, *Affirmative Action, Race and the Constitution: From Bakke to Grutter*, 92 KY. L.J. 219, 226 (2003).

24. Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View From a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1608 (2003).

25. Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 549 (2003).

Reliance on race-based programs has led many institutions and proponents of such programs to argue that they will not be able to achieve the educational benefits that are derived from having a diverse student body without the use of race-based affirmative action.²⁶ The Court appears to accept this argument, as indicated by its decision to permit educational institutions to continue using such preferences in their admissions decisions. As a result, the Court allows colleges and universities to continue employing measures that traditionally exclude the serious consideration and development of race-neutral alternatives, many of which extend beyond mere admissions decisions to providing necessary resources and assistance to disadvantaged students.²⁷ Without such race-neutral efforts, the ability of many colleges and universities to provide minority students with meaningful access to educational opportunities will be severely hindered.

Now that race-based affirmative action has been sanctioned by the Court, what incentives do educational institutions have to explore, develop, and implement effective race-neutral measures? This article attempts to answer that question.

Part I begins with a discussion regarding the meaning of the term “race-neutral alternatives.” Contrary to some theories, race-neutral measures do not necessitate a color-blind approach to achieving the goal of providing meaningful educational opportunities to minority students.²⁸ Effective race-neutral programs can and do consider race and ethnicity to increase and diversify the pool of applicants; such programs, however, do not consider an applicant’s race or ethnicity when selecting from that pool.

Part II analyzes the *Grutter* opinion to extract reasons why colleges and universities should immediately begin to develop and implement race-neutral admissions procedures. Realities set forth in the opinion regarding the constitutional standard—a standard that requires narrowly-tailored practices and places durational limits on race-based programs—should encourage institutions of

26. See Transcript of Oral Argument at 41–43, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 1728613 (discussing the necessity of the Law School taking race into account to achieve its educational goals); Brief for the NAACP Legal Defense & Educational Fund, Inc. & the American Civil Liberties Union as Amici Curiae in Support of Respondents at 4–5, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 398820 (discussing race-based affirmative action as “one of the sole avenues” for achieving “social and educational benefits” resulting from “racial interaction in our nation’s schools and interaction between individuals from diverse backgrounds”).

27. For evidence of the reluctance of colleges and universities to consider race-neutral alternatives following the *Grutter* opinion, see Barbara Lauriat, Note, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L. Rev. 1171, 1191–92 (2003) (“Several weeks after the [*Grutter/Gratz*] decisions, the leaders of forty-eight colleges, including the University of Michigan, met at Harvard to discuss the opinions. Apparently, the academic leaders had little interest in pursuing race-neutral alternatives to affirmative action, and [s]everal of those present said they planned to focus on finding ways to shield race-conscious admissions policies against future legal challenges, rather than experimenting with . . . alternatives to affirmative action” (quoting Peter Schmidt, *College Leaders Discuss Ways of Preserving Affirmative Action*, CHRON. HIGHER EDUC., July 17, 2003, available at <http://chronicle.com/daily/2003/07/2003071702n.htm> (last visited Oct. 28, 2003))).

28. See, e.g., Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827, 846 (Feb. 2004) (implying that because race-neutral measures do not consider race, they “cannot identify applicants who have the relevant life experience” for which race serves as a marker).

higher education to begin or continue their development and implementation of race-neutral programs. Part II also considers the aftermath of *Grutter* to further demonstrate the immediate need for consideration and utilization of race-neutral alternatives.

Part III proposes a redefinition of “affirmative action” that would expand contemporary understanding to include the provision of resources and assistance to disadvantaged minority students both before and after an admissions decision has been made. Such expansion is critical to accomplish the broader goal of providing meaningful educational access and opportunities to minority students. Because traditional race-based preferences narrowly focus on the number of minority students admitted to an institution, such methods fail to most effectively accomplish this goal.

Part IV examines currently employed race-neutral measures such as percentage plans, class-based affirmative action, and outreach programs to identify the advantages and weaknesses of those measures. Although programs like percentage plans and class-based affirmative action are race-neutral measures, they suffer from the same shortcoming as race-based affirmative action: the failure to broaden the scope of assistance provided to disadvantaged minority students beyond the admissions decision itself. When employed in conjunction with other race-neutral measures—like outreach and financial aid—such programs most effectively achieve the ultimate goal of providing meaningful educational opportunities and access to racial and ethnic minority students. Therefore, colleges and universities that are truly committed to the provision of higher education opportunities and access to racial and ethnic minority students should not rest on the race-based laurels of *Grutter*. Rather, they should undertake the important and necessary task of developing and implementing effective race-neutral affirmative action programs.

Part V concludes with suggestions and recommendations regarding race-neutral programs that are ripe for immediate use and development in college and university efforts to provide meaningful educational access and opportunities for racial and ethnic minority students.

I. THE MEANING OF “RACE-NEUTRAL ALTERNATIVES”

A common criticism launched against race-neutral admissions measures is that they are not race-neutral at all. Rather, the charge is that they are “just as race conscious”²⁹ as traditional race-based affirmative action because their goal is “to maintain and hopefully increase racial diversity in the various public institutions.”³⁰ Therefore, “they present no comparative advantage in terms of

29. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting).

30. Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools et al. in Support of Respondents at 22, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 554393 [hereinafter Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates].

their race neutrality” over traditional race-based procedures.³¹ Such comments fail to recognize the potential benefits derived from the use of race-neutral rather than race-based programs. Those arguments also fail to reflect the heart of the race-neutral versus race-based debate, which primarily concerns the *methods* by which the stated goals are accomplished rather than the goals themselves.

It can be inferred from the aforementioned comments that “true” race-neutral programs are “color-blind” and do not consider race in any respect. This is not the case. Race-neutral measures are programs that seek to provide educational opportunities to a diverse group of students without the use of racial or ethnic classifications. These programs do not classify or designate applicants based on their race or ethnicity. Under race-neutral affirmative action, an applicant’s racial or ethnic classification is not a factor in the actual admissions decision; it *is* a factor under a race-based affirmative action scheme.³² It is not necessary, however, for such programs to neglect or ignore race and the influence of race on certain students in order to be considered race-neutral. It is only necessary that they do not allow applicants to be classified and/or selected based on their race or ethnicity.³³

Race continues to be a critical aspect of American society. As the Court recognized in *Grutter*, “in a society, like our own . . . race unfortunately still matters.”³⁴ Many continue to experience the past and present effects of racial discrimination, which have led to stark disparities between racial groups.³⁵ As

31. *Id.*

32. See David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court’s Approval in Gratz and Grutter of Race-based Decision-making by Individualized Discretion*, 56 FLA. L. REV. 483, 530 (2004) (noting that alternatives to traditional race-based affirmative action “do not . . . require categorizing individuals by race for the purpose of granting them more or less of the State’s benefits on a person-by-person basis”); Memorandum from Walter Dellinger, Assistant Attorney Gen., U.S. Dep’t of Justice to Gen. Counsels (June 28, 1995), available at <http://clinton2.nara.gov/WH/EOP/OP/html/aa/adarand3.html> (last visited Nov. 19, 2005) (noting that in the government contracting context, acceptable race-neutral measures do not consider race or ethnicity in the actual decision to award a contract).

33. See Dellinger, *supra* note 32, at 7 (“In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants or bidders to include minorities, not to use race or ethnicity in the actual decision.”).

34. *Grutter*, 539 U.S. at 333.

35. See R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1046 (2001) (“American society permits gross disparities among groups in the opportunities and resources that promote achievement.”); Susan Low Bloch, *Looking Ahead: The Future of Affirmative Action*, 52 AM. U. L. REV. 1507, 1510 (2003) (quoting Justice Marshall as urging Americans to “[f]ace the simple fact that there are groups in every community which are daily paying the cost of the history of American injustice” (citing Annual Judicial Conference Second Judicial Circuit of the United States, 115 F.R.D. 349, 352–53 (1987))); Curt A. Levey, *Racial Preferences in Admissions: Myths, Harms, and Alternatives*, 66 ALB. L. REV. 489, 502 (2003) (discussing “racial disparity in standardized test scores and grades”); Glenn C. Loury, *Affirmed . . . For Now*, BOSTON GLOBE, June 29, 2003, at D1 (recognizing “the dramatic underrepresentation of blacks and Hispanics among top academic performers”); Keith R. Walsh, *Color-blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD

detailed by Justice Ginsburg in her dissenting opinion in *Gratz v. Bollinger*:

In the wake “of a system of racial caste only recently ended,” large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. “Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.”³⁶

Race-neutral measures, such as consideration of an applicant’s socioeconomic status, acknowledge these disparities and attempt to remedy them by providing educational opportunities and preferences to those students who have been adversely affected by such circumstances.³⁷ Although “motivated by race-conscious concerns,” such measures are “race-neutral in their operative provisions” because they do not classify or provide preferences based on race or ethnicity.³⁸

Neither the Constitution nor modern equal protection jurisprudence requires admissions programs to be color-blind.³⁹ As recognized by Justice Ginsburg, “the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.”⁴⁰ Such effects are evident in the many

L.J. 443, 449–51 (2004) (discussing disparities between Blacks and Whites regarding levels of education and performance on standardized tests).

36. *Gratz v. Bollinger*, 539 U.S. 244, 299–301 (2003) (Ginsburg, J., dissenting) (footnotes and citations omitted).

37. See, e.g., Daria Roithmayr, *Direct Measures: An Alternate Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 14–15 (2001) (arguing that an admissions program that grants preferences to applicants based on their experiences of discrimination is race-neutral because “it does not at all focus on racial identity or require that the applicant belong to a particular racial group”).

38. Karst, *supra* note 2, at 73.

39. See *Gratz*, 539 U.S. at 305 n.11 (Ginsburg, J., dissenting) (“In my view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race.”); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994) (discussing efforts such as strengthening recruitment of African-Americans and actively encouraging them to apply for jobs as permissible race-neutral measures); *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1557–58 (11th Cir. 1994) (describing high school and college recruiting programs, solicitation of firefighter applications from minorities, and outreach programs spearheaded by minority firefighters as permissible race-neutral measures); *Shuford v. Ala. State Bd. of Educ.*, 897 F. Supp. 1535, 1553 (M.D. Ala. 1995) (stating that “affirmative recruitment is a neutral measure”). For a discussion of constitutional implications related to race-neutral alternatives see Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000) and Roithmayr, *supra* note 37, at 14–30.

40. *Gratz*, 539 U.S. at 302 (Ginsburg, J., dissenting) (citing *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966)).

disparities that continue to exist between racial groups. Many race-neutral efforts, such as recruiting and outreach, target those students who have experienced and overcome discrimination and disadvantage. Institutions that employ race-neutral measures distribute resources and grant preferences based on applicants' "historical experience of discrimination"⁴¹ and their ability to contribute underrepresented viewpoints to classroom discussions.⁴²

By relying on an applicant's experiences rather than on his or her racial classification, race-neutral measures overcome a criticism often made against traditional race-based affirmative action. Many opponents of race-based affirmative action argue that such programs fail to help those individuals who truly need assistance because they grant preferences on the basis of race, without regard to whether an individual has actually experienced discrimination or has an underrepresented viewpoint to contribute.⁴³ As discussed by Daria Roithmayr, a race-neutral program that affords preferences based on "an applicant's experiences, viewpoints and commitments without regard to racial identity" will "prefe[r] the White applicant who fulfill [sic] the relevant criteria to the Black applicant who does not."⁴⁴

Because of this advantage, many opponents of traditional race-based affirmative action have embraced and encouraged the use of race-neutral alternatives to provide minority students educational opportunities. Curt Levey, the former Director of Legal and Public Affairs at the Center for Individual Rights, the law firm that represented the plaintiffs in *Gratz* and *Grutter*, has supported colleges and universities that grant preferences based "on something other than race, such as socioeconomic class, or coming from an under-performing high school, or writing an essay about how you are disadvantaged."⁴⁵ Similarly, President George W. Bush, who opposes preferences based on racial or ethnic classifications, has said that he supports institutions that "affirmatively tak[e] action to get more minorities in their schools."⁴⁶

Race-neutral measures should not be dismissed as insufficient alternatives to race-based affirmative action simply because they do not completely ignore the importance of race in our society. Rather, institutions of higher education should develop and implement programs that do not classify or select applicants based on

41. Roithmayr, *supra* note 37, at 19.

42. *Id.* at 6–8.

43. See Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 35 (1992) (questioning how "blacks living today who are not the descendants of the victims of past racial discrimination [can] be 'owed' the compensation of affirmative action") (footnote omitted). See also Forde-Mazrui, *supra* note 39, at 2372 (noting that many opponents of race-based affirmative action resent the way in which it "appears to give preferential treatment to some privileged racial minorities who do not deserve it").

44. Roithmayr, *supra* note 37, at 2, 26. See also Forde-Mazrui, *supra* note 39, at 2371–72 (noting that race-neutral measures that are based on disadvantage "award a preference to individuals who have been identified as suffering from a tangible disadvantage and deny such a preference to those not suffering from that disadvantage").

45. Levey, *supra* note 35, at 499.

46. Kristen Mack, *Bush: Colleges Should End 'Legacy' Admissions*, HOUSTON CHRON., Aug. 7, 2004, at A3.

their race or ethnicity in their efforts to achieve diverse student bodies and to provide minority students access to educational opportunities.

II. DEVELOPMENT AND IMPLEMENTATION OF RACE-NEUTRAL ADMISSIONS PROGRAMS IN HIGHER EDUCATION: WHY ACT NOW?

Given that the Court has sanctioned the use of race-based affirmative action in higher education, one may question the need for educational institutions to immediately develop and employ race-neutral programs. Why not wait to consider race-neutral alternatives until such time in the future if and when race-based programs are required to be terminated? This section explores three reasons why the immediate development and implementation of race-neutral programs are necessary endeavors.

First, although the *Grutter* opinion sanctions the use of race-based affirmative action in higher education, it also requires educational institutions that employ such measures to engage in “serious, good faith consideration” of race-neutral alternatives to satisfy constitutional scrutiny.⁴⁷ Specifically, colleges and universities that wish to utilize racial preferences in their admissions decisions must also consider race-neutral approaches to maintain admissions programs that are narrowly tailored to achieve their diversity and educational goals.

Second, as required by *Grutter*, race-based affirmative action must have a “termination point.”⁴⁸ In light of this reality, institutions of higher education should immediately begin to develop and employ race-neutral approaches in their efforts to avoid severe declines in minority enrollment similar to those experienced by schools in California and Texas following their state-wide elimination of race-based programs.

Finally, the development and use of race-neutral measures will assist diversity efforts at institutions that decide not to employ race-based admissions programs post-*Grutter*. Race-neutral advancements will also benefit colleges and universities in states such as California and Washington where *Grutter* has no influence due to state laws prohibiting racial preferences. The greater the number of institutions that experiment with race-neutral measures, the more effective such measures will be in helping all institutions provide educational opportunities to minority students.

A. *Grutter* and Its Call for Consideration of Race-neutral Alternatives

In 2003, the *Grutter* decision marked the Court’s return to the fragmented and passionate debate surrounding the constitutionality of race-based affirmative action in higher education. In this case, a Caucasian applicant who was denied admission to the University of Michigan Law School (Law School) argued that the Law School’s race-conscious admissions policies violated her rights under the Equal Protection Clause of the Fourteenth Amendment.⁴⁹ At issue in the case was the

47. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

48. *Id.* at 342.

49. *Id.* at 317.

constitutionality of the Law School's admissions program that sought to establish and maintain racial and ethnic diversity in the student body by considering an applicant's race or ethnicity as a factor in its admissions decisions.⁵⁰ Reasoning that racial and ethnic classifications are inherently suspect under the Equal Protection Clause and, thus, subject to strict scrutiny, the Court held that the Law School's goal of creating a racially and ethnically diverse student body "is a compelling interest that can justify the narrowly tailored use of race" in admissions decisions.⁵¹ Finally, in holding that the Law School's admissions policies were sufficiently narrowly-tailored to be permitted under the Constitution,⁵² the Court provided one reason why colleges and universities should begin to include race-neutral programs in their admissions policies.

The Court set forth several tests and requirements that race-based admissions programs must meet in order to survive the narrowly tailored prong of strict scrutiny. Among these tests is a prohibition against establishing quota systems⁵³ and a flexible consideration of race or ethnicity as well as other diversity factors to ensure individualized consideration of each applicant.⁵⁴ Another factor that the Court considered in its examination of whether the Law School's admissions program was narrowly tailored was whether it considered race-neutral alternatives to race-based programs. While the Court rejected the petitioner's and United States's argument that "the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks,"⁵⁵ the Court did hold that "narrowly tailoring does, however, *require* the *serious, good faith* consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."⁵⁶ Therefore, colleges and universities that wish to consider race and ethnicity in their admissions decisions must also consider race-neutral alternatives to maintain a constitutional program.

Unfortunately, the Court did not engage in a detailed discussion regarding which actions or measures may constitute "serious, good faith consideration" of race-neutral alternatives.⁵⁷ The Court rejected the District Court's finding that the

50. *Id.* at 316.

51. *Id.* at 322, 326–33.

52. *Id.* at 333–41.

53. *Id.* at 334 ("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 applicants.'" (quoting *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 315 (1978))).

54. *Id.* at 336–37 ("When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."). See *Gratz*, 539 U.S. at 271–72 (holding that the narrow tailoring requirement was not met by a race-based admissions program that awarded twenty predetermined bonus points based on race or ethnicity because it was not flexible and did not afford individual consideration of all aspects of an applicant's application).

55. *Grutter*, 539 U.S. at 339.

56. *Id.* (emphasis added).

57. See *generally* Crump, *supra* note 32, at 520–23 (criticizing the Court's analysis (or lack

Law School's admissions program was not narrowly tailored because it failed to consider race-neutral policies such as a lottery system or lower admissions standards.⁵⁸ The opinion, however, failed to discuss the implications of the Law School's failure to consider other race-neutral alternatives such as class-based affirmative action, outreach programs, and partnerships with other institutions.⁵⁹

Although the Court did not indicate whether "serious, good faith consideration requires experimentation with race-neutral methods," a recent case suggests that "it requires, at very least, a formal on-the-record evaluation of such methods."⁶⁰ In *Parents Involved in Community Schools v. Seattle School District, No. 1*, the Ninth Circuit held that a school district's practice of using race as a tiebreaker in assigning students to oversubscribed high schools was not narrowly tailored to accomplish the district's diversity goals because the district failed to seriously consider race-neutral alternatives.⁶¹ The court reasoned that, while it was not requiring the district to implement specific race-neutral measures, "there is no question but that the Board should have *earnestly appraised* such . . . [programs'] costs and benefits."⁶² The Ninth Circuit found that the school board's refusal to formally evaluate and study⁶³ how certain race-neutral efforts would impact school diversity did not comply with the narrowly tailored requirement set forth in *Grutter*.⁶⁴

Presently, it is unclear whether an institution's mere discussion and contemplation of race-neutral alternatives will satisfy strict scrutiny or if more formal action is required. If other circuits follow the Ninth Circuit's holdings, institutions of higher education may be required to engage in formal evaluations or studies of race-neutral alternatives before rejecting their usefulness. Such

thereof) of the "narrowly tailored" requirement); L. Darnell Weeden, *Employing Race-neutral Affirmative Action to Create Educational Diversity While Attacking Socio-economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT. 297, 330 (2005) (observing that "[t]here is virtually nothing in the *Grutter* opinion to suggest that the University of Michigan had actually implemented in good faith a race-neutral plan that failed to generate the desired intellectual diversity").

58. *Grutter*, 539 U.S. at 340.

59. See Crump, *supra* note 32, at 494 (arguing that "for this reason, Justice O'Connor's apparent conclusion that narrower alternatives were not appropriate is unpersuasive"). See generally *infra* Parts IV and V (discussing currently employed race-neutral programs and recommendations for implementation of such programs).

60. Curt A. Levey, *Troubled Waters Ahead for Race-Based Admissions*, 9 TEX. REV. L. & POL. 63, 67 (2004).

61. 377 F.3d 949, 970–75 (9th Cir. 2004), *reh'g granted*, 395 F.3d 1168 (9th Cir. 2005).

62. *Id.* at 970–71.

63. *Id.* at 972 ("Matters not formally evaluated cannot be 'rejected' in a constitutionally-relevant sense: Such appraisal—whether with regard to the need for race-based action, or to the shape such action is to take—must be conducted 'on the record.'") (citations omitted).

64. *Id.* at 975. More specifically, the court stated:

While it may be the case that educational institutions need not *exhaust* every conceivable alternative to the use of racial classifications to satisfy strict scrutiny, narrow tailoring at least demands that schools *earnestly consider* using race-neutral and race-limited alternatives in order to provide for the kind of diversity that, properly constituted, can further compelling educational and social interests. *Id.*

evaluations may require actual implementation of race-neutral programs to assess their impact on diversity levels. As correctly hypothesized by Justice Scalia, these and other issues related to the “contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs”⁶⁵ will most likely be answered in future lawsuits challenging race-based affirmative action.⁶⁶

Despite the uncertainty regarding which actions constitute “serious, good faith consideration” of race-neutral alternatives, one thing is certain: institutions of higher education that wish to employ racial preferences in their admissions decisions must afford significant consideration to workable race-neutral alternatives. Failure to do so will result in the invalidation of race-based programs by the federal courts. To avoid such results, colleges and universities should make a concerted effort to begin or continue researching, developing, and examining race-neutral admissions programs to assess their utility in assisting institutions to reach and maintain their diversity and educational goals.

Faculty, administrative committees, or external consultants could carry out these exercises in development. Regardless of who develops an institution’s race-neutral alternatives, the findings and recommendations should be discussed among and considered by members of the faculty and administration. While it is uncertain whether the Court requires educational institutions to actually employ or implement race-neutral admissions programs to satisfy strict scrutiny, the next section argues why institutions of higher education should engage in such endeavors.

B. *Grutter’s* Call for Durational Limits of Race-based Affirmative Action

Although the *Grutter* opinion allows the use of race as a factor in admissions decisions, the opinion also foreshadows the eventual termination of race-based affirmative action in higher education. In light of this impending reality, institutions of higher education that wish to continue providing educational

65. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

66. *Id.* at 348–49 (Scalia, J., concurring in part and dissenting in part) (discussing how the *Grutter-Gratz* split will produce future lawsuits ranging from whether a particular admissions program affords sufficient individualized consideration to each applicant without establishing separate admissions tracks forbidden by *Bakke* to “whether, in the particular setting at issue, any educational benefits flow from racial diversity”). *See also* *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005) (discussing whether school district that wished to employ a race-conscious transfer policy considered race-neutral alternatives so as to satisfy strict scrutiny as set forth in *Grutter*); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 861 (W.D. Ky. 2004) (finding that school board’s race-conscious student assignment plan was narrowly tailored as evidenced by the board’s consideration and implementation of race-neutral approaches); *Lauriat*, *supra* note 27, at 1200 (“One can add to this list claims that an institution has not considered race-neutral alternatives in good faith . . .”). *See generally* *Virdi v. DeKalb County Sch. Dist.*, 135 F. App’x 262, 268 (11th Cir. 2005) (finding that school district’s Minority Vendor Involvement Program, which included minority participation percentage goals, was unconstitutional because the district failed to consider race-neutral alternatives for tracking its activities); *Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305, 1330–31 (S.D. Fla. 2004) (finding that “County’s failure to at least explore a [race-neutral program] *in practice* indicates that the [Hispanic Business Enterprise] program is not narrowly tailored”) (emphasis added).

opportunities to minority students should immediately begin to implement effective race-neutral admissions programs.

Recognizing that a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,” the *Grutter* Court held that “race-conscious admissions policies must be limited in time.”⁶⁷ Unlike its discussion—or lack thereof—about what action constitutes “serious, good faith consideration” of race-neutral alternatives, the Court did provide guidance regarding its intended meaning of “limited in time.” First, the Court explicitly required race-based admissions programs to “have a logical end point.”⁶⁸ The Court imposed durational limits and termination points in an attempt to curb the potentially dangerous consequences that are inherent in all racial classifications.⁶⁹ Second, the Court provided recommendations regarding which practices may meet the durational requirement. “In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”⁷⁰ The Court, however, did not appear to state a specific time or date when such sunset provisions should become effective.

Generally, the Court has held that colleges and universities should cease using racial preferences when they have determined that such measures are no longer necessary to achieve diversity and educational goals. At first glance, it appears that the Court defers to the individual schools to make this determination.⁷¹ The Court, however, may have imposed its own determination regarding the continued need for race-based programs when it announced its expectation that, in twenty-five years, institutions of higher education will no longer need to use race-based affirmative action to further their diversity and educational goals.⁷²

Whether the Court intended, as Justice Thomas asserted, for this announcement

67. *Grutter*, 539 U.S. at 341–42 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

68. *Id.* at 342.

69. *See id.* at 326 (noting that “a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))). *See also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (stating that “[c]lassifications based on race carry a danger of stigmatic harm”); Forde-Mazrui, *supra* note 39, at 2376 (arguing that because racial classifications “discriminate on racial grounds, these classifications plausibly reflect illegitimate racial beliefs and may cause harms that must be clearly justified”).

70. *Grutter*, 539 U.S. at 342.

71. *See id.* at 328 (stating that the holding in *Grutter* stays within “our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits”). *See also id.* at 343 (“We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”). *But cf.* Lauriat, *supra* note 27 (discussing schools’ reluctance to engage in consideration of race-neutral alternatives following *Grutter*).

72. *See Grutter*, 539 U.S. at 343 (stating that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today”); *id.* at 377 (Thomas, J., concurring in part and dissenting in part) (characterizing “the imposition of a 25-year time limit only as a holding that the deference the Court pays to the Law School’s educational judgments and refusal to change its admissions policies will itself expire”).

to be a “holding that racial discrimination in higher education admissions will be illegal in 25 years” is subject to debate.⁷³ While some scholars appear to agree with the plausibility of Justice Thomas’s declaration,⁷⁴ others contend that the Court was merely expressing its hope that the future state of American society and education will be such that racial preferences in admissions will no longer be necessary.⁷⁵

Without further clarification from the Court, it is impossible to know the intended meaning of its statement. Nor is it possible to know whether twenty-five, thirty, or fifty years from now the Court would uphold or strike down an admissions program that considered an applicant’s race or ethnicity. This lack of knowledge, however, does not diminish the immediate need to explore and implement race-neutral alternatives in higher education.⁷⁶ Because the Court has required all race-based admissions measures to have a termination point, the elimination of race-based affirmative action in higher education appears to be inevitable.⁷⁷ To ensure the continual provision of educational opportunities for

73. *Id.* at 351 (Thomas, J., concurring in part and dissenting in part).

74. See Amar & Caminker, *supra* note 25, at 542 (hypothesizing that Justice O’Connor’s comment “may connote some kind of a warning about the evolution of the law—that she (or her counterpart on a future Court) would not vote to uphold the law school’s program on the same facts in the year 2028”); Crump, *supra* note 32, at 494 (characterizing the Justice O’Connor’s comment as “install[ing] an eye-popping durational limit”); Sheryl G. Snyder, *A Comment on the Litigation Strategy, Judicial Politics and Political Context which Produced Grutter and Gratz*, 92 KY. L.J. 241, 260 (2003–2004) (noting that the Court “basically gave higher education one more generation to use race-conscious admissions before race-neutral admissions would be the command of the Fourteenth Amendment” and “Justice O’Connor’s majority flatly states that it will tire of affirmative action—even at elite law schools—after another twenty-five years”); Walsh, *supra* note 35, at 466–67 (commenting on “Justice O’Connor’s forecast, that affirmative action will end in another twenty-five years”) (emphasis added).

75. See *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring) (“[O]ne may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”). See also Mexican Am. Legal Def. & Educ. Fund, *supra* note 2, at 44 (“This sentence [regarding the twenty-five years] should be construed as the Court’s dictum expressing, by reference to the passage of time since the *Bakke* decision, its aspiration—and not its mandate—that there will be enough progress in equal educational opportunity that race-conscious policies will, at some point in the future, be unnecessary to ensure diversity.”) (citation omitted) (emphasis added); Amar & Caminker, *supra* note 25, at 542 (“[Justice O’Connor] may have been trying to express nothing more than her (and the Court’s) fervent desire that the number of minority law school candidates with top grades and test scores would naturally increase so dramatically over the next quarter century that racial diversity in all competitive law schools would exist even if it were not pursued as a distinct admissions goal, or if it were pursued only in a race-neutral way.”).

76. See Glenn C. Loury, *Affirmed . . . For Now*, BOSTON GLOBE, June 29, 2003, at D1 (“Although the legal significance of such speculation is uncertain, the fact that this statement appears in the opinion at all should serve as a clear warning to supporters of affirmative action. We must not rest on our laurels. This recent victory may well be our last, and the benefits may be short-lived.”).

77. *Grutter*, 539 U.S. at 342 (noting that “[w]e see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point”). See also Adela de la Torre & Rowena Seto, *Can Culture Replace Race? Cultural Skills and Race Neutrality in Professional School Admissions*, 38 U.C. DAVIS L. REV. 993, 996 (Mar. 2005) (stating that “Current . . . Supreme Court case law, reflect[s] the ultimate future goal

minority students following the termination of race-based affirmative action, institutions of higher education must develop and implement effective, race-neutral alternatives.⁷⁸

Grutter, in fact, instructed colleges and universities to engage in this endeavor now, while employing race-based programs, and it alluded to race-neutral efforts currently used by institutions in states where state laws have prohibited race-based affirmative action.⁷⁹ The Court noted that “[u]niversities in other States can and *should* draw on the most promising aspects of these race-neutral alternatives as they develop.”⁸⁰ Moreover, *Grutter* encouraged institutions to “perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”⁸¹ In so doing, educators and administrators ought to go beyond mere consideration of race-neutral programs and further examine their current race-based policies to determine ways in which they can successfully incorporate race-neutral measures. Experimenting with race-neutral alternatives through actual implementation will afford institutions the opportunity to assess the effects of such programs on their educational goals, rather than relying on hypothetical results that may or may not be accurate. Actual implementation will also reveal potential shortcomings that can be modified to maximize a measure’s utility.

Employing both race-based and race-neutral approaches also achieves the important goal of gradually moving away from race-based affirmative action—as necessitated by the eventual termination of such programs—and toward the exclusive use of race-neutral alternatives. This goal is evident in the *Grutter* Court’s instruction for institutions to implement sunset provisions in their race-based policies and to conduct periodic reviews to determine the ongoing necessity of employing racial preferences to achieve their diversity and educational goals.⁸² The Court also “take[s] the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”⁸³ One might speculate that

of eliminating race and ethnic considerations in admissions criteria. Thus, race is an acceptable admissions criterion only in the short-term”) (footnote omitted); Kerstin Forsythe, Note, *Racial Preference and Affirmative Action in Law School Admissions: Reactions from Minnesota Law Schools and Ramifications for Higher Education in the Wake of Grutter v. Bollinger*, 25 HAMLIN J. PUB. L. & POL’Y 157, 187 (Fall 2003) (acknowledging that the Court “indicated that race-conscious decision making must inevitably end”).

78. See Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 496 (2004) (concluding that the development and implementation of race-neutral admissions programs “may be necessary in the future, for it is possible that the Court will no longer permit the use of racial preferences twenty-five years from the date of the decision in *Grutter*, that is, in the year 2028”).

79. *Grutter*, 539 U.S. at 342. See *infra* Part IV (discussing use of race-neutral admissions programs).

80. *Grutter*, 539 U.S. at 342 (emphasis added).

81. *Id.* at 342 (Kennedy, J., concurring (citing *United States v. Lopez*, 514 U.S. 549, 581 (1995))).

82. *Id.*

83. *Id.* at 343 (quoting Brief for Respondents at 34, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 402236).

the Court itself would “like nothing better” than to see this occur at all institutions of higher education currently considering race or ethnicity in their admissions decisions. As theorized by Vikram Amar and Evan Caminker, “Justice O’Connor seems to want to structure a constitutional transition period, i.e., she’s using the next quarter century as a planned transition to what she perceives to be a constitutionally preferable state of affairs.”⁸⁴ A “gradual weaning”—rather than “an abrupt about-face”—from dependence on race-based affirmative action will help mitigate potentially negative effects on diversity levels following the termination of race-based programs.⁸⁵

In their transition from race-based affirmative action to race-neutral policies, colleges and universities should aggressively implement race-neutral measures to guard against dramatic declines in diversity levels such as those experienced at institutions in California and Texas immediately following the termination of race-based affirmative action. In 1995, the University of California, Berkeley (Berkeley) and the University of California, Los Angeles (UCLA) enrolled 24.3% and 30.1% of “underrepresented minorities,” respectively, using racial preferences.⁸⁶ In 1998, following the termination of race-based affirmative action, the percentages decreased to 11.2% and 14.3%, respectively.⁸⁷ In 1996, prior to *Hopwood*’s termination of racial preferences, African-American and Hispanic students constituted 3.6% and 11.2%, respectively, of the freshman class at Texas Agricultural and Mechanical University (Texas A&M).⁸⁸ In 1998, the percentages declined to 2.7% and 9.1%, respectively.⁸⁹ The University of Texas School of Law also experienced similar decreases. Between 1996 and 1999, enrollment of African-American students dropped from 7% to 1%, while Latino enrollment fell from 14% to 9%.⁹⁰

The stark declines were due, in part, to the abrupt termination of race-based affirmative action without the availability of developed, viable race-neutral alternatives to take its place. As previously discussed, reliance on race-based measures has historically resulted in the neglect of race-neutral programs.⁹¹

84. Amar & Caminker, *supra* note 25, at 550–51.

85. *Id.* at 549–50 (noting that “a cold-turkey disestablishment of race-conscious programs would lead to a stark and highly visible resegregation of higher education, with a likely delayed effect being the resegregation of public and private sector leadership positions”).

86. “Underrepresented minorities” refers to African-American, American Indian, and Chicano/Latino students. UNIV. OF CALIF. STUDENT ACADEMIC SVCS., UNDERGRADUATE ACCESS TO THE UNIVERSITY OF CALIFORNIA AFTER THE ELIMINATION OF RACE-CONSCIOUS POLICIES 1 n.3, 20, 22, available at http://www.ucop.edu/sas/publish/aa_final2.pdf (last visited Nov. 20, 2005) [hereinafter UNDERGRADUATE ACCESS].

87. *Id.* at 22.

88. See Gaiutra Bahadur, *Top 10% Admissions Rule Praised; Students Who Were Admitted under Law to Counter Hopwood are Doing Well, Colleges Say*, AUSTIN AM.-STATESMAN, May 24, 2000, at B1.

89. See *id.* From 1996 to 1997, the African-American freshman enrollment at UT declined from 4% to 3%, and Hispanic enrollment fell from 14% to 13%. See LAVERGNE & WALKER, *supra* note 20, at 4.

90. Bahadur, *supra* note 88.

91. See *supra* text accompanying notes 22–25.

Moreover, reliance on the race-based admissions model set forth in *Bakke* has significantly delayed efforts to explore and develop effective race-neutral alternatives. In 1997 and 1998, this delay greatly hindered the ability of institutions in California and Texas to achieve their diversity goals following the termination of race-based affirmative action mandated by the laws of those states.⁹² Institutions of higher education should not make the same mistake with respect to the model set forth by the Court in *Grutter*. If, in their reliance on *Grutter*, institutions of higher education fail to currently develop and implement effective race-neutral programs, colleges and universities will once again experience severe declines in minority enrollment once race-based affirmative action has reached its endpoint.

In light of the Court's forewarning of the eventual termination of race-based affirmative action, colleges and universities should take advantage of this transition period that affords them the opportunity to employ both race-based and race-neutral measures simultaneously. "As we move slowly from where we are today to a" more preferable state "where we use means other than race consciousness to attain" diversity and educational goals,⁹³ taking a proactive (rather than reactive) approach is critical to ensuring that institutions of higher education are equipped with the means necessary to effectively provide educational opportunities for minority students following the termination of race-based affirmative action.

C. Aftermath of *Grutter*

In the post-*Grutter* world in which we now find ourselves, the future of race-based affirmative action in higher education remains questionable.⁹⁴ As noted by Charles Ogletree:

If affirmative action is safe for the moment, it is so by the narrowest of margins and for reasons that retain, rather than eliminate, the problems of a system geared toward an attempt to remedy educational inequality that occurs too late to do any good to the majority of the population.⁹⁵

Although colleges and universities are permitted to use race and ethnicity as factors in their admissions decisions, not all institutions will do so. For some, the decision to refrain from using racial preferences may be a choice, and for others, refraining from such action may be mandated by state law or executive order.⁹⁶

92. *But see infra* Part IV (discussing improvements in minority enrollment due to development and implementation of race-neutral approaches over several years).

93. Amar & Caminker, *supra* note 25, at 551.

94. *See* Flagg, *supra* note 28, at 827 (discussing fear that the Court's holding in *Grutter* "marks at best a partial and perhaps temporary victory in the struggle for racial justice") (emphasis added); Forsythe, *supra* note 77, at 187 (noting that the *Grutter* "decision leaves the future status of race-conscious admissions programs open and undetermined").

95. CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 256 (2004).

96. *See supra* notes 4–6 and accompanying text (discussing California's Proposition 209 and Washington's Initiative 200, and Governor Jeb Bush's One Florida Initiative).

Because race-based affirmative action will not be implemented at all institutions following the *Grutter* Court's decision, there remains an immediate need for all colleges and universities to develop and employ effective race-neutral measures in their efforts to provide educational opportunities for minority students. Not only will those institutions that do not consider race in their admissions decisions benefit from such endeavors, but those institutions that must consider race-neutral alternatives to maintain constitutional race-based programs will benefit as well.

While some institutions reinstated or amended their affirmative action programs to conform to the standards set forth in *Gratz* and *Grutter*,⁹⁷ others—where racial preferences had previously been eliminated due to judicial holdings—decided not to reinstate such programs. One institution that made the latter choice is Texas A&M. Following the Fifth Circuit's ruling in *Hopwood*, race-based affirmative action was eliminated at all public colleges and universities in Texas, Louisiana, and Mississippi.⁹⁸ When *Grutter* overruled *Hopwood*, institutions such as Texas A&M were free to reestablish their race-based programs. While neighboring institutions such as the University of Texas quickly acted to reintroduce consideration of race and ethnicity in their admissions procedures,⁹⁹ Texas A&M President Robert Gates made the controversial decision not to do so.¹⁰⁰ Instead of considering race and ethnicity, Gates introduced a new admissions policy that would use race-neutral measures, including consideration of “whether an applicant has overcome socioeconomic disadvantage and other obstacles.”¹⁰¹ Such measures—combined with other race-neutral programs—resulted in an increase in Texas A&M's minority student enrollment. During the Fall 2004 semester, the number of African-American freshmen increased by 35% from the prior year.¹⁰² Hispanic freshman enrollment increased by 26%.¹⁰³ Although such increases mark “only the beginning” for Texas A&M, they demonstrate the potential of race-neutral measures as viable tools for helping colleges and universities achieve their diversity and educational goals.¹⁰⁴

97. See Doug Lederman, *Upturn for Minority Students at Michigan*, INSIDE HIGHER ED, June 7, 2005, available at <http://www.insidehighered.com/news/2005/06/07/mich> (discussing the University of Michigan's revision of its undergraduate admissions policies to include individualized review of applicants as mandated by *Grutter*).

98. *Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir. 1996).

99. See Erik Rodriguez, *UT Regents to Allow Consideration of Race*, AUSTIN AM.-STATESMAN, August 8, 2003; *The University of Texas at Austin Reacts to the Supreme Court's Affirmative Action Decisions*, June 23, 2003, available at http://www.utexas.edu/opa/news/03newsreleases/nr_200306/nr_affirmativeaction030623.html.

100. Marc Levin, *Texas A&M Slaps Down Reverse Discrimination*, FRONTPAGEMAGAZINE.COM, Dec. 11, 2003, available at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=11252>.

101. *Id.*

102. *Fall Enrollment Figures Show Significant Gains*, AGGIE DAILY, Sept. 15, 2004, available at <http://www.tamu.edu/univrel/aggiedaily/news/stories/04/091504-9.html>.

103. *Id.*

104. *Id.* Other institutions, including those that currently use race-based measures, should consider Texas A&M's efforts when developing their own race-neutral programs. As instructed by the Court in *Grutter*, institutions of higher education that currently use race-based admissions programs “can and *should* draw on the most promising aspects of these race-neutral alternatives

The immediate development of race-neutral measures is essential, not only because of decisions not to reinstate race-based programs, but also because of *Grutter*'s impact on the political climate surrounding race-based affirmative action. Following the Court's ruling, scholars correctly predicted that "*Grutter* is likely to motivate those who oppose any form of racial preferences to redouble their efforts to prohibit such preferences through new state ballot initiatives or legislation as they already have done in California, Florida and Washington."¹⁰⁵

Less than a month after the Court sanctioned the narrowly tailored use of race-based admissions programs in higher education, Ward Connerly and other opponents of race-based affirmative action began an attempt to include the Michigan Civil Rights Act (the "Act") in the November 2004 ballot.¹⁰⁶ The Act was patterned after California's Proposition 209 and Washington's Initiative 200, which prohibit racial preferences in public education, employment, and contracting.¹⁰⁷ Although Connerly was not successful in placing the Act on the ballot, polling data suggest that it would have passed. According to a 1998 poll commissioned by *The Detroit News*, 53% of voters opposed race-based affirmative action in employment and other areas, while only 40% supported it.¹⁰⁸ That same year, the *Detroit Free Press* commissioned another study that concluded that 66% of respondents opposed racial preferences in admissions policies, while 23% supported them.¹⁰⁹

Connerly has indicated that his efforts to abolish racial preferences in public education will not end with a ballot initiative in Michigan. He is exploring the feasibility of similar initiatives in states such as Utah, Colorado, and Arizona.¹¹⁰ The potential reemergence of state initiatives banning the use of race-based admissions programs makes the immediate consideration and implementation of race-neutral alternatives necessary endeavors.

as they develop." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (emphasis added).

105. David Schimmel, *Affirming Affirmative Action: Supreme Court Holds Diversity to be a Compelling Interest in University Admissions*, 180 EDUC. LAW REP. 401, 408 (2003). See also Flagg, *supra* note 28, at 827 (suggesting that "the societal battle over whether [race-conscious] programs actually will continue now shifts in large part to the legislatures and popular electoral processes, as already has taken place in California, Washington, and Florida").

106. Ward Connerly, *Taking It to Michigan—Announcing the "Michigan Civil Rights Act,"* NAT'L REV. ONLINE, July 8, 2003, available at <http://www.nationalreview.com/comment/comment-connerly070803.asp>.

107. *Id.*

108. Peter Schmidt, *Foes of Affirmative Action in Michigan Plan to Take Their Battle to the Ballot*, CHRON. HIGHER EDUC., July 9, 2003, available at http://www.utwatch.org/oldnews/chron_affaction_7_9_03.html.

109. *Id.* See also Schimmel, *supra* note 105, at 408 n.37 (discussing the findings of a "Gallup poll released a day after the *Grutter* decision [indicating] that 49% of adults supported 'affirmative action programs,' but 69% say college applicants 'should be admitted solely on the basis of merit, even if that results in fewer minority students being admitted,'" (quoting Gail Heriot, *U.S. Supreme Court Affirmative Action Rulings*, THE SAN DIEGO UNION-TRIB., June 29, 2003, at G-1)).

110. Steve Miller, *Connerly Expands Fight Against Race Preference*, THE WASH. TIMES, July 10, 2003, at A07, available at <http://www.washingtontimes.com/national/20030709-110059-4670r.htm>.

As demonstrated by the drastic decline in diversity levels at colleges and universities in California immediately following the passing of Proposition 209, it is extremely difficult, if not impossible, for institutions to reach and maintain their diversity goals without the use of race-neutral alternatives once race-based affirmative action has been prohibited. A comparison of African-American and Hispanic enrollment at the University of California's law schools in 1997 and 2003 suggests that such drastic declines may have been avoided if the universities had previously developed and employed race-neutral methods. In 1997, the first year in which race-based affirmative action was prohibited, the African-American and Hispanic enrollment decreased from 6.0% and 12.3% to 1.9% and 7.2%, respectively.¹¹¹ In 2003, with the assistance of race-neutral measures such as consideration of applicants' socioeconomic status,¹¹² the number of African-American law students increased to 4.7%, and the number of Hispanic law students increased to 11.9%.¹¹³

Once again, such increases demonstrate the utility of race-neutral measures. Race-neutral measures can help colleges and universities achieve their diversity and educational goals without the use of racial preferences.¹¹⁴ However, it is evident in the gradual increase in diversity levels over the course of several years that the development and implementation of effective race-neutral admissions policies can take a considerable amount of time. Success cannot be achieved overnight. Effective measures may take years of experimentation to develop.¹¹⁵ As more institutions begin to experiment with race-neutral measures, they will learn from each other's experiments, thereby improving the development and effectiveness of such measures across the board.

In light of the realities set forth by *Grutter* and the political resistance that continues to confront race-based affirmative action, institutions of higher education that currently employ race-based affirmative action should explore alternative methods to achieve their diversity and educational goals. To do this effectively, colleges and universities should first expand their affirmative action goals as they

111. UNIVERSITY OF CALIFORNIA, OFFICE OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA'S LAW SCHOOLS: APPLICATIONS, ADMISSIONS, AND FIRST-YEAR CLASS ENROLLMENTS BETWEEN 1993-2005 BY ETHNICITY (2005), available at <http://www.ucop.edu/acadadv/datamgmt/lawmed/lawnos.pdf> [hereinafter APPLICATIONS, ADMISSIONS, AND FIRST-YEAR CLASS ENROLLMENTS].

112. See Michael A. Fletcher, *Wider Fallout Seen From Race-neutral Admissions: Fewer Minority MDs, Lawyers May Be Result*, April 19, 2003, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A53554-2003Apr18?> (discussing use of race-neutral admissions policies at California medical and law schools).

113. APPLICATIONS, ADMISSIONS, AND FIRST-YEAR CLASS ENROLLMENTS, *supra* note 111.

114. See Schimmel, *supra* note 105, at 412-13 ("[T]here is a reasonable chance that an innovative, race-neutral point system might be devised that could enroll a significant number of minority students and have several additional advantages: it would be more transparent, inexpensive, and less controversial and also might head-off intensely polarizing legislative proposals or ballot initiatives to abolish any consideration of race in admissions.")

115. See, e.g., *infra* Part IV.A (comparing diversity levels at Texas colleges and universities immediately following the implementation of the Texas Ten Percent Plan to the diversity levels achieved in later years).

relate to providing meaningful opportunities and access for minority students. Then, they should develop and implement race-neutral approaches that will most effectively achieve their goals.

III. MOVING BEYOND *GRUTTER*: A PROPOSAL TO REDEFINE AFFIRMATIVE ACTION AND ITS GOALS

Although jurists and scholars have defined (or attempted to define) “affirmative action” in many different ways,¹¹⁶ contemporary concepts of race-based affirmative action in higher education often relate to the provision of racial preferences in favor of underrepresented minority students in attempts by colleges and universities to enroll a “critical mass” of minority students into each matriculating class.¹¹⁷ Often in higher education, the goals of preference programs narrowly focus on increasing the number or percentage of minority students enrolled at a particular institution.¹¹⁸ Such programs begin and end with the admissions decision. Preferential programs may also focus on benefiting individual students who apply to particular institutions rather than providing

116. See generally John Valery White, *What Is Affirmative Action?*, 78 TUL. L. REV. 2117, 2118 & n.2 (2004) (discussing proposed definitions of “affirmative action”). See also Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 142 n.72 (2000) (noting that “[t]here simply is no generally accepted definition of affirmative action”).

117. See *Grutter v. Bollinger*, 539 U.S. 306, 316–20, 342–43 (2003) (referring to racial preferences in the context of race-conscious admissions policies); *Gratz v. Bollinger*, 539 U.S. 244, 249–50 (2003) (deciding whether the University of Michigan violated the Constitution by its use of racial preferences in undergrad admissions); Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 120 n.3 (2003) (defining affirmative action “as minority-mindedness in decisionmaking resulting in . . . a preference”); Howard T. Everson, *A Principled Design Framework for College Admissions Tests: An Affirming Research Agenda*, 6 PSYCHOL. PUB. POL’Y & L. 112 (2000) (referring to racial preferences in the context of affirmative action in higher education); Michael W. Lynch, *Affirmative Action at the University of California*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 139 (1997) (broadly defining affirmative action programs “as those programs that seek to give racial and ethnic minorities . . . an institutional preference in . . . university admissions”); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 954 n.100 (2005) (defining “affirmative action” as “the act of considering the race of underrepresented racial minorities as a plus factor in hiring and recruitment”); Peter Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 5 (2002) (“By affirmative action, I mean a program in which people who control access to important social resources offer preferential access to those resources for particular groups that they think need special treatment. In this context, then, I use the terms ‘affirmative action’ and ‘preferences’ interchangeably.”) (footnotes omitted).

118. See Brief Amici Curiae of Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists in Support of Respondents at 9, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 539178 [hereinafter Brief Amici Curiae of Veterans of the Southern Civil Rights Movement] (characterizing “conscious efforts to increase minority enrollments . . . [as] affirmative action in one form or another”); Michael Boucai, *Caught in a Web of Ignorances: How Black Americans are Denied Equal Protection of the Laws*, 18 NAT’L BLACK L.J. 239, 247 n.50 (2004–2005) (discussing use of “affirmative action to increase minority enrollment” at institutions of higher education); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 542 (2003) (noting that the intent of affirmative action policies based on racial classifications “is to increase minority enrollment”).

assistance to racial groups as a whole. Once an underrepresented minority student has been admitted to and enrolled in an institution that employs racial preferences, the goals of present-day affirmative action have been accomplished.

Rarely do preferential admissions programs address other pertinent issues that confront minority students and their communities and impact their access to educational opportunities and development. For instance, modern concepts of race-based affirmative action do not call for the provision of resources, such as mentoring and guidance, to disadvantaged minority students who may not have considered applying to college. Such concepts also fail to provide assistance and guidance to minority students regarding course selection, internships, etc., once they begin their undergraduate or graduate careers, which could curtail their access to educational opportunities.

Modern race-based affirmative action narrowly focuses on quantitative rather than qualitative approaches to providing opportunities and access for minority students. While using racial preferences to admit greater numbers of minority students ensures racial representation,¹¹⁹ that approach fails to address challenges that many minority students must face and overcome to apply, enroll, and successfully matriculate at an undergraduate or post-graduate institution. Such failure prevents traditional race-based affirmative action programs from most effectively contributing to the educational advancement of minority students and their communities.¹²⁰ In light of these deficiencies, the following section urges institutions to look beyond the numbers if they wish to accomplish the ultimate goal of providing minority students and minority groups with meaningful access to educational opportunities and advancement of their educational and social development.

B. Removing the Band-Aid: Provision of Resources Prior To Admissions Decision

Decisions to embrace a narrow, quantitative approach to affirmative action have greatly hindered the ability of colleges and universities to achieve the ultimate goal of contributing to the educational and social advancement of minority students and the racial groups to which they belong. Many argue that contemporary models of race-based affirmative action simply place a band-aid over the wounds attributable to decades of slavery, oppression, and discrimination rather than engaging in the more difficult task of attempting to heal such wounds.¹²¹ As argued by Shelby

119. See Brief Amici Curiae of Veterans of the Southern Civil Rights Movement, *supra* note 118, at 8 (noting that race-based affirmative action has helped the number of African-American college graduates increase from less than 5% in 1960 to approximately 7.5% in 2000 and the number of African-American law students increase from 1% in 1960 to 7.4% in 1996) (footnotes omitted).

120. See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 116 (1990) (“Racial representation is not the same thing as racial development, yet affirmative action fosters a confusion of these very different needs.”).

121. See *supra* note 21. See also Tomiko Brown-Nagin, *A Critique of Instrumental Rationality: Judicial Reasoning About the “Cold Numbers” in Hopwood v. Texas*, 16 *LAW & INEQ.* 359, 412 (1998) (arguing that “[t]ruly equal opportunity might require reconstruction of

Steele:

[T]he essential problem with [applying racial preferences] is the way it leaps over the hard business of developing a formerly oppressed people to the point where they can achieve proportionate representation on their own (given equal opportunity) and goes straight for the proportionate representation. This . . . does very little to truly uplift blacks.¹²²

The forty-year reliance on racial preferences has proven insufficient to adequately address the disparities that continue to exist between racial groups.¹²³ “Fewer blacks go to college today than ten years ago; more black males of college age are in prison or under the control of the criminal justice system than in college. *This despite racial preferences.*”¹²⁴ Regarding gaps in educational achievement:

Black and Hispanic students are much more likely to be enrolled in vocational, technical, or business schools than white or Asian students, and are less likely to be enrolled in graduate schools Post-secondary completion rates also differ by race. Asians are much more likely to have a bachelor’s degree (40 percent) than whites (26 percent), blacks (14 percent), Native Americans (11 percent), or Hispanics (10 percent) Indeed, recent data indicate that, if America had reached racial equity in education, blacks would have more than two million

testing and application procedures . . . rather than band-aids like policies that allow for admission of African-Americans and Latinos with lower test scores than Whites”); Martin D. Carcieri, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-Based Reforms*, 9 SETON HALL CONST. L.J. 459, 498 n.152 (1999) (“[Race-based affirmative action is] a cosmetic substitute for the real work it would take to close the gap between the achievement of racial groups ‘Affirmative action is, at bottom, a dodge. It allows us to put off the far harder work: ending the isolation of young black people and closing the academic gap that separates black students—even middle-class black students—from whites.’” (citing James Traub, *Testing Texas*, THE NEW REPUBLIC, Apr. 6, 1998, at 21)); Okechukwu Oko, *Laboring in the Vineyards of Equality: Promoting Diversity in Legal Education Through Affirmative Action*, 23 S.U. L. REV. 189, 212 (1996) (noting that “[w]hile the band-aid cosmetically masks the wound, it does nothing to prevent the cancer from ultimately devouring its victim”).

122. STEELE, *supra* note 120, at 115.

123. See *Grutter*, 539 U.S. at 377–78 (Thomas, J., concurring in part and dissenting in part) (arguing that because racial preferences may impede the narrowing of achievement gaps, such gaps will continue to exist in twenty-five years); *supra* notes 35–36 and accompanying text. See also A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1752–71 (2004) (noting significant racial gaps in unemployment and employment rates, income, wealth as indicated by home ownership, personal assets and business ownership, and education); OGLETREE, *supra* note 95, at 251 (noting that affirmative action has done little to change the existence of two Americas, “separated by race, income, and opportunity”).

124. STEELE, *supra* note 120, at 124 (emphasis added). See also Johnson & Onwuachi-Willig, *supra* note 20, at 9 (noting that “more young black men reside in prison than attend college”); David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 U.C. DAVIS L. REV. 1141, 1196 n.175 (2005) (noting that “[t]here are now 39.8% more black men in the criminal justice system than in higher education”).

more high school and college degrees.¹²⁵

To most effectively achieve the goals of educational and social development for minority students and communities, colleges and universities must expand their affirmative action concepts and programs to encompass more than admissions and enrollment. Institutions must develop and incorporate affirmative action programs that address the challenges facing disadvantaged students that impede their access to educational opportunities and achievement.¹²⁶

One such challenge is the perceived devaluation of education in minority communities.¹²⁷ While students in majority communities are often labeled as “nerds” and “geeks” if they achieve academically, minority students who achieve similar successes are often branded with the accusation that they are “acting White.”¹²⁸ Inherent in such accusations are the beliefs that academic achievement is not expected or respected within certain minority communities and, thus, should not be pursued by minority students. Students who encounter such ridicule must possess the fortitude to reject such beliefs in order to achieve their educational goals. Otherwise, they may decide not to complete high school or attend college. Such beliefs may also cause minority students to “bypass opportunities to take advanced courses in math, computers, or other difficult and college-relevant areas, and thus reduce future opportunities in remunerative career paths.”¹²⁹

Other challenges affecting minority students’ access to educational development are their lack of awareness about educational opportunities and the lack of encouragement to pursue such opportunities. Although often presumed, many disadvantaged minority students are not aware of the actions they must take to adequately prepare for applying to a college or university. A student may

125. Dickerson, *supra* note 123, at 1769–70 (footnotes omitted).

126. See STEELE, *supra* note 120, at 125 (concluding that “the goals have not been reached, and the real work remains to be done”); Oko, *supra* note 121 (concluding that “[o]ur quest for increased minority representation in legal education will be a mirage unless we systematically identify and methodically address the underlying reasons for poor academic qualifications possessed by minority applicants to law schools”).

127. See Eleanor Brown, *Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308, 335–36 (2000) (discussing negative consequences resulting from the devaluation of academic achievement by gang-affiliated Black youth); Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 806 (1989) (noting how “confront[ing] peers who devalue education” can negatively impact minority students’ academic achievement); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 728 & n.162 (2004) (discussing the “emergence of an ‘oppositional culture’” in disadvantaged African-American communities, which “tends to devalue academic achievement”).

128. See George W. Dent, Jr., *Race, Trust, Altruism, and Reciprocity*, 39 U. RICH. L. REV. 1001, 1027 & n.158 (2005); Forde-Mazrui, *supra* note 127, at 688 n.10; Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls For Brown?*, 103 MICH. L. REV. 1507, 1530 n.110 (2005).

129. NAT’L HISPANIC CAUCUS OF STATE LEGISLATORS & THE THOMAS RIVERA POLICY INST., CLOSING ACHIEVEMENT GAPS: IMPROVING EDUCATIONAL OUTCOMES FOR HISPANIC CHILDREN 12 (2003), available at <http://www.naleo.org/AC2003/cag.pdf> [hereinafter CLOSING ACHIEVEMENT GAPS].

possess the desire to attend college, but not be aware of necessary strategies to accomplish his or her goal. For instance, although studies show that Hispanic students who take two or more Advanced Placement classes in high school are three times more likely to attend college than those that take none,¹³⁰ Hispanic students are less likely to enroll in such classes.¹³¹ In many cases, minority parents, especially those who have little income or educational background themselves, are not aware of such college preparatory opportunities or their importance for college or university admission.¹³² Therefore, they do not encourage their children to take advantage of such opportunities.

The failure of minority students to make academically optimal choices regarding their commitment to academics, course selection, and participation in college preparatory courses negatively impacts their access to future educational opportunities. To help avoid such outcomes, institutions of higher education should expand their traditional models of affirmative action to include programs that actively and effectively address the challenges hindering minority students' academic achievement. As noted by Steele, "preferential treatment does not teach skills, or educate, or instill motivation."¹³³ To achieve these goals and thereby most effectively contribute to the educational advancement of minority students and communities, institutions must take a more comprehensive approach to affirmative action.

Implementing programs that provide resources, guidance, and assistance to disadvantaged students *prior to* their decision to apply to a particular college or university will aid in this endeavor.¹³⁴ Undergraduate institutions should partner with high schools to establish mentoring programs to assist disadvantaged students who may be interested in attending college.¹³⁵ Student or administrative mentors could meet with students and parents to discuss the importance of attending college and the processes by which to do so.¹³⁶ Such meetings could positively affect a

130. See Richard W. Riley, U.S. Sec'y of Educ., *Excelencia Para Todos—Excellence for All: The Progress of Hispanic Education and the Challenges of a New Century*, Remarks at Bell Multicultural High School (Mar. 15, 2000), available at <http://www.ed.gov/Speeches/03-2000/000315.html>.

131. See CLOSING ACHIEVEMENT GAPS, *supra* note 128, at 12.

132. *Id.* See also Jennifer C. Vergara, *New Study Probes Lack of College-bound Latino Students*, THE TIDINGS, July 19, 2002, available at http://www.the-tidings.com/2002/0719/college_text.htm (discussing study's findings linking Latino students' low matriculation rate in post-secondary institutions to Latino parents' lack of knowledge regarding college preparation).

133. STEELE, *supra* note 120, at 121.

134. See *infra* Parts IV.C, V (discussing outreach measures designed to improve minority students' access to educational opportunities).

135. See Alvin W. Cohn, *Juvenile Focus*, 68 FED. PROBATION 64, 67 (2004) (citing improvements in educational achievement as a benefit of mentoring programs for disadvantaged youths).

136. See Harold McDougall, *School Desegregation or Affirmative Action?*, 44 WASHBURN L.J. 65, 80 n.96 (2004) (noting that "the single most effective way to increase minority enrollment is to increase the number of minorities applying to college. That means improving educational opportunity at every level, beginning in the early school years." (citing Curt Levey, Dir. of Legal & Pub. Affairs, Ctr for Int'l Rights, Testimony before the Texas Senate

student's desire to attend college as well as encourage and motivate him or her to take advantage of opportunities that will enhance his or her potential of being accepted into an institution, such as enrolling in college preparatory and other academically rigorous courses.¹³⁷

Providing such encouragement and motivation would help reach the countless disadvantaged minority students who are raised in families or cultures that do not value or support academic achievement. Instead of being "left behind" by a decision to drop out of high school,¹³⁸ or not to continue their education beyond high school,¹³⁹ students who receive guidance and encouragement concerning their academic careers are more likely to make more beneficial choices.

Other measures that colleges and universities should implement are those that help close the information gap regarding college preparation that exists in non-English speaking communities.¹⁴⁰ One proposed measure is to print and disseminate recruitment materials in languages other than English. Institutions interested in bridging the information gap for Hispanic students and parents should print and distribute their materials in Spanish to encourage non-English speaking parents to read and discuss the materials with their children. The University of Georgia has gone a step further by instituting Spanish websites in the course of their efforts to educate parents and students about their programs.¹⁴¹ By moving beyond individual racial preferences to distribute information that may encourage and empower students and parents to seek and take advantage of educational opportunities, such affirmative action measures have the potential to benefit a greater number of minority students and their communities. Institutions that employ such measures are not only opening the door to minority students but also

Subcommittee on Higher Education (June 24, 2004), *available at* http://www.cir-usa.org/legal_docs/grutter_v_bollinger_levy_test.pdf).

137. An example of such program is the Student Ambassador Program implemented at St. Mary's College in Los Angeles, where students return to their inner-city high schools to serve as peer educational counselors. By serving as role models to other students, the ambassadors encourage students to complete high school, enroll in necessary courses to prepare them for college, and continue their education beyond high school. The ambassadors often interact with the parents as well to bridge the information gap regarding college preparation for their children. *See Vergara, supra* note 132.

138. In 2002, the drop-out rates for African-Americans and Hispanics, age 16–24, were 11.3% and 25.7%, respectively, compared to 6.5% for Whites. Since 1984, there has been no measurable change in the gap between African-Americans and Whites, and there has been no measurable change in the gap between Hispanics and Whites since 1972. *See* NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2005, STATUS DROPOUT RATES BY RACE/ETHNICITY (2005), *available at* http://nces.ed.gov/programs/coe/2005/pdf/19_2005.pdf.

139. In 2003, the percentages of African-Americans and Hispanics between the ages of 25–29 that had not completed at least some college were 48.8% and 68.9%, respectively, as compared to 34.5% of Whites. *See* NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2005, EDUCATIONAL ATTAINMENT tbls. 23-2, 23-3 (2005), *available at* http://nces.ed.gov/programs/coe/2005/pdf/23_2005.pdf.

140. *See supra* note 132 and accompanying text.

141. *See* News Release, UGA Office of Public Affairs, Spanish-language Web Site Launched by UGA College of Family and Consumer Sciences (Feb. 17, 2005), *available at* <http://www.uga.edu/news/artman/publish/050215facswbsite.shtml>.

encouraging them to walk through it.

Furthermore, the expansion of affirmative action to include programs designed to provide minority students with greater access to educational opportunities should not be limited to secondary education. Because a disproportionate number of minority students fail to enroll in postgraduate programs, such measures are also needed at undergraduate institutions.¹⁴² Mentoring relationships could be established between graduate and undergraduate students through which minority students could obtain information regarding graduate programs and the application process. The mentors could also assist students in preparing for graduate entrance exams such as the Graduate Record Exam (GRE) and the Law School Admissions Test (LSAT). Graduate institutions may also consider awarding stipends or scholarships to disadvantaged students to allow them to enroll in entrance exam preparatory courses.¹⁴³ Such courses may be effective in improving an individual's standardized test scores, which, in turn, can provide him with more (and better) educational opportunities.¹⁴⁴ The awarding of exam preparatory stipends or scholarships could be conditioned upon completion of a formalized graduate school preparation program through which minority students receive advice and guidance regarding graduate programs.¹⁴⁵ Undergraduate institutions could also provide graduate school advisors to help educate minority students and encourage them to apply to graduate programs.

Providing resources to disadvantaged students for exam preparation may help lessen the disparities that exist between racial groups regarding their performance

142. In Fall 2002, the percentages of African-Americans enrolled in Master's and Doctoral programs were 8.8% and 12.7%, respectively. Hispanics accounted for only 6.4% of students enrolled in Doctoral programs and 7.9% of students enrolled in Master's programs. Whites, however, accounted for 69.2% and 70.4% of Doctoral and Master's students, respectively. See NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2005, MINORITY STUDENT ENROLLMENTS tbl. 31-3 (2005), available at <http://nces.ed.gov/programs/coe/2005/section5/indicator31.asp>. See also Johnson & Onwuachi-Willig, *supra* note 20, at 10 n.52 (citing Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 617 (1998)); Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 617-18 (1998) ("The real tragedy . . . is the low numbers of Chicano/Latino students in graduate schools, which in turn reflects the low number of Latino undergraduates in colleges and universities. Instead of eliminating affirmative action programs in admissions, we should be increasing our efforts to bring more Chicano/Latino students into graduate school . . .").

143. Preparatory courses such as Kaplan are often very expensive, and thus, not feasible for students who may be economically disadvantaged. Prices for Kaplan's GRE courses range from \$900 for online courses to \$4000 for private tutoring. See Kaplan Test Prep and Admissions, http://www.kaptest.com/course_options.jhtml?coi=GRE-Graduate&zip=77396&needeng=false&prodid=null&delivery_type=4&_requestid=35033 (last visited Sept. 23, 2005). Similarly, its LSAT courses range from \$1100 to \$4050. See Kaplan Test Prep and Admissions, http://www.kaptest.com/course_options.jhtml;jsessionid=MT4ZMACL32F11LA3AQJHBOFMDUCBG2HB?pi=3600046&zip=77396&needeng=false&_requestid=36907 (last visited Sept. 23, 2005).

144. Kaplan guarantees that an individual's score on standardized tests will increase after completion of its preparatory courses. See Kaplan Higher Score Guarantee, <http://www.kaptest.com/hsg/> (last visited Nov. 30, 2005).

145. See *infra* p. 143 (discussing the positive results of the Law School Preparation Institute implemented at the University of Texas Law School).

on standardized tests.¹⁴⁶ Such disparities could be due, in part, to disadvantaged minority students' lack of knowledge regarding certain aspects of graduate standardized tests and a deficiency of test-taking skills associated with such examinations. Simply granting minority students racial preferences in admissions decisions does nothing to address these problems. Contemporary concepts of race-based affirmative action fail to impart skills and knowledge that students can use to improve their performance on standardized tests. Without improvement, the educational opportunities available to minority students will continue to be limited. Thus, institutions of higher education should consider providing resources for exam preparation to disadvantaged minority students as they endeavor to broaden the scope of their affirmative action programs. Doing so will help to ensure that institutions are using the most effective programs to provide educational opportunities to minority students.

Evident in the education disparities that continue to exist between racial groups despite the use of racial preferences¹⁴⁷ is the necessity that affirmative action policies and programs look beyond the admissions decision to ensure that students of all races and ethnicities are receiving equal access to educational opportunities. To accomplish this goal, institutions of higher education must expand their use of contemporary affirmative action to include programs that effectively address the numerous challenges faced by minority students. Not only do minority students need to receive admission to undergraduate and graduate programs—which traditional race-based affirmative action provides—but they also need to receive information, encouragement, and skills necessary to successfully apply to such programs. Once admitted, institutions must continue their affirmative action efforts to ensure that minority students continue to receive access to educational opportunities following enrollment.

146. See William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055, 1074 (2001) ("African-Americans trail their equally accomplished White classmates by 9.2 points on the LSAT, with Chicanos and Latinos 6.8 points behind, Native Americans 4.0 points lower, and Asian Pacific Americans 2.5 points behind . . ."); Walter Williams, *Poor Education Prognosis*, CAPITALISM MAG., April 28, 2004, <http://capmag.com/article.asp?ID=3655> (noting a 200-point difference between "the 2002 average SAT scores of black students (857) compared to white students (1060)"). In 2002, there were 4461 law school applicants who had both LSAT scores of 165 or above and undergraduate GPA of 3.5 or above. Of that number, just 29 were African-Americans and 114 were Hispanic. In 2001, 24 African-American and 78 Hispanic applicants out of 3724 total applicants were in that range; in 2000, 26 African-Americans and 83 Hispanics out of 3542; in 1999, 22 African-American and 91 Hispanic applicants out of 3475; in 1998, 24 African-Americans and 82 Hispanics out of 3461; in 1997, 17 African-Americans and 59 Hispanics out of 3447 applicants nationwide were in that range. See Brief of the Law School Admission Council as Amicus Curiae in Support of Respondents at 8, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399229.

147. See *supra* notes 35, 122–25 and accompanying text, 138–39, 142, 146. See also *infra* note 149.

B. Minority Students' Access to Educational Opportunities Following Enrollment

By narrowly focusing on increasing the number of minority students admitted and enrolled into a particular institution, contemporary concepts of affirmative action succeed in opening the doors for minority students. Such concepts, however, fail to fully integrate minority students into an institution's community once they have walked through those doors.¹⁴⁸ Such failure contributes to the disproportionate number of minority students who decide not to complete their undergraduate or graduate education.¹⁴⁹ Contemporary concepts of affirmative action must be expanded to address this problem. As recognized by Annette B. Almazan, "It would not be enough for students to be accepted to the college or university and attend for a short time. A successful affirmative action program is one where students graduate from the educational institutions."¹⁵⁰

As previously discussed, traditional race-based affirmative action programs use racial preferences to admit and enroll a greater number of minority students, thereby providing educational opportunities to minority students. Without affirmative action, many minority students would not be admitted into certain universities and graduate programs.¹⁵¹ Educational opportunities, however,

148. See generally David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1826–27 (2005) (discussing the failure of affirmative action programs to fully integrate minorities and women into the "social fabric" of police departments).

149. See John C. Duncan, Jr., Two "Wrongs" Do/Can Make a Right: Remembering Mathematics, Physics, & Various Legal Analogies (Two Negatives Make a Positive; Are Remedies Wrong?) The Law Has Made Him Equal, but Man Has Not, 43 BRANDEIS L.J. 511, 536 n.154 (2005) ("[A]t each educational level there is a marked decline in the level of attainment by minorities, as reflected in comparison of drop-out rates between minorities and non-minorities and the percentages of the respective groups that graduate from high school and college College graduate rates for [1990] reflect 25.2% non-Hispanic whites, 12% black, and 7.3% Hispanic." (citing *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd* 78 F.3d 932 (5th Cir. 1996))). See also Linda Seebach & Scripps Howard, *Law-School Racial Disparities*, AM. RENAISSANCE, Nov. 12, 2004, available at http://www.amren.com/mtnews/archives/2004/11/lawschool_racia.php ("[F]or students starting law school in 1991 . . . 19.2 percent of black students failed to complete their studies within six years, compared with 8.2 percent of white students.").

150. Annette B. Almazan, Comment, *Looking at Diversity and Affirmative Action Through the Lens of Pilipino/a American Students' Experience at UCLA and Berkeley*, 9 ASIAN PAC. AM. L.J. 44, 80 & n.187 (2004). See also Kelli Levey, *A&M Regents Approve Race Factor*, THE BRYANT-COLL. STATION EAGLE, May 29, 2004, available at <http://www.theeagle.com/aandmnews/052904regents.php> (quoting Texas A&M Regents Vice Chairman Erle Nye as stating, "As I understand it, Texas A&M University beat all the other state institutions in the completion—that is, graduation—rate for minority students in six years I think that's part of the package: Not only do you bring students in, but you make sure they're successful once they get here").

151. See David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1867–68 (2005) (stating that the elimination of race-based affirmative action would result in a 32.5% decline in the number of current African-American law students due to their inability to be admitted into a school based on their low LSAT scores and undergraduate GPAs); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV.

encompass more than admission and enrollment into a particular college or university. There are myriad educational opportunities awaiting students once they enroll in an institution. Opportunities such as study abroad programs, internships, and research opportunities are all valuable experiences that contribute to a student's educational development. Students can also parlay such experiences into networking and future employment opportunities. Current affirmative action programs must be expanded to ensure minority students' access to such opportunities.

Because minority students often make up a small percentage of an institution's student body, many may feel isolated and, thus, excluded from the institution's community.¹⁵² Unfortunately, these feelings contribute to decisions by minority students to remove themselves from the community and not to take advantage of educational opportunities available to them. Other minority students do not participate in educationally enriching activities because of their lack of knowledge regarding such opportunities. Because of their lack of involvement in campus groups and activities and their failure to develop relationships with faculty members and administrators, many minority students are not aware of and not encouraged to participate in beneficial programs offered by an institution.

To effectively address these problems, institutions should expand their current affirmative action policies to include measures that make minority students feel welcome and included in the institutions' communities. Institutions should also implement measures that provide minority students access to information regarding educational opportunities. These measures should also encourage minority students to participate in educationally enriching programs. One such measure could be a separate orientation session for minority students to welcome them to an institution and to inform them about educational opportunities available to them. During such sessions, administrators, faculty, and students should encourage entering minority students to become involved in campus activities and groups and to seek and take advantage of educational opportunities such as internships and study abroad programs. Institutions could also provide mentors to minority students throughout their educational careers to assist them in their efforts to take advantage of these and other opportunities. Institutions could also establish multicultural enrichment centers that could serve as a meeting place for minority students as well as a place to receive information regarding job opportunities, internships, etc. The centers could be staffed by administrators or counselors who

367, 441 (2004) ("Lower-tier schools admit blacks who would not be admitted to any school in the absence of preferences."); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 14 (1997) (hypothesizing that abandoning race-based affirmative action would result in "a substantial reduction in the overall number of applicants of color who [would be] offered admission to ABA-approved law schools").

152. See Johnson & Onwuachi-Willig, *supra* note 20, at 15 ("As an African-American woman who recently graduated from Harvard Law School explained, 'The problem is not so much the entry; it's what happens while you're there [Y]ou're more likely to feel isolated and marginalized, and feel like 'nobody gets my experience.' That, in turn, can undermine a student's confidence." (quoting Katherine S. Mangan, *Does Affirmative Action Hurt Black Law Students?*, CHRON. HIGHER EDUC., Nov. 12, 2004, at 35)).

could assist students in their educational and employment endeavors.

The implementation of such support systems would positively impact minority students' educational experiences by lessening their feelings of isolation. These measures could also have a positive effect on graduation and completion rates since students who feel welcomed and involved in their institutions' communities are less likely to prematurely terminate their educational careers.¹⁵³ Expanding contemporary concepts of affirmative action to include programs that inform minority students of educational opportunities and encourage the students to take advantage of them helps to ensure equal access to information and opportunities for minority students. Minority students do not obtain such access by merely being awarded preferences based on their race or ethnicity during the admissions process. Rather, they obtain access through an institution's use of comprehensive programs that seek to fully integrate minority students into the social and academic fabric of that college or university.

In their efforts to provide minority students meaningful access to educational opportunities, institutions of higher education must move beyond traditional race-based affirmative action as sanctioned in *Grutter*. Colleges and universities should "move toward another kind of affirmative action, one in which the emphasis is on opportunity and the goal is educational equity in the broadest possible sense."¹⁵⁴ Instead of focusing on racial preferences that fail to effectively address challenges facing many minority students and fail to provide necessary resources and assistance to minority students beyond the admissions decision, institutions should develop and employ race-neutral alternatives to accomplish their educational goals.

IV. CURRENT IMPLEMENTATION OF RACE-NEUTRAL ALTERNATIVES

To most effectively provide educational opportunities and access to disadvantaged minority students, institutions of higher education should immediately begin to develop and use race-neutral approaches. By considering factors other than race and by providing resources and assistance both before and after the admissions decision has been made, race-neutral alternatives stretch beyond traditional race-based affirmative action in their efforts to provide students access to educational opportunities.

In response to court decisions and ballot initiatives prohibiting the use of race-based affirmative action in higher education, colleges and universities in states such as California and Texas began implementing race-neutral admissions programs in their efforts to achieve their diversity and educational goals. Such programs included percentage plans, under which applicants graduating in a certain top percentage of their graduating class are guaranteed admission into

153. See Paula Lipp, *Go to the Head of the Class*, <http://www.phdproject.com/phd23.html> (discussing the impact that Hispanic students' feelings of isolation have on their decision to discontinue their participation in doctoral programs).

154. Joel Seguire, *Redefining Affirmative Action*, THE UNIV. RECORD ONLINE, May 23, 2005, available at http://ipumich.temppublish.com/cgi-bin/pr.cgi?/~urecord/0405/May23_05/03.shtml (quoting Richard Atkinson, President Emeritus of the University of California system).

public colleges and universities, and class-based affirmative action, which affords preferences to applicants based on their socioeconomic status rather than their race or ethnicity. Educational institutions have also employed other race-neutral measures such as increased outreach and recruitment at secondary schools and establishment of new scholarships to help minority students achieve their educational goals. As instructed by the *Grutter* Court, institutions of higher education that currently use race-based admissions programs “can and *should* draw on the most promising aspects of these race-neutral alternatives as they develop.”¹⁵⁵

A. Percentage Plans

Following the termination of race-based affirmative action in their states, California, Texas, and Florida implemented percentage plans in an effort to achieve diverse student bodies, an objective previously accomplished by race-based programs.¹⁵⁶ Although all three plans guarantee admission to a certain top percentage of high school graduating classes, the plans differ in their requirements, criteria, and implementation.¹⁵⁷ For example, while the California plan (Four Percent Plan) guarantees admission to the top 4% of graduates from comprehensive public high schools and accredited private schools, the Florida plan (Talented Twenty Plan) guarantees admission to those students graduating in the top 20% of their public high school class.¹⁵⁸ Students graduating from private schools are not eligible for guaranteed admission under the Talented Twenty Plan.¹⁵⁹ Students graduating in the top 10% of their public or private high school class are eligible for automatic admission under the Texas plan (Ten Percent Plan).¹⁶⁰

The three percentage plans also differ regarding the institutions to which the applicants are guaranteed admission. Under the Ten Percent Plan, eligible applicants are automatically admitted to the public college or university of their choice.¹⁶¹ Under the Four Percent and Talented Twenty Plans, however, applicants are automatically admitted to a member institution of their state’s university system institution, “although not necessarily the one of [the applicant’s]

155. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (emphasis added).

156. In California, race-based affirmative action was terminated by the Board of Regents Resolution SP-1 and confirmed by Proposition 209. The Fifth Circuit’s decision in *Hopwood v. Texas* prohibited the use of race-conscious admissions programs in Texas, Louisiana, and Mississippi. By executive order, Governor Jeb Bush prohibited the consideration of race or ethnicity in admissions decisions in Florida.

157. For an in-depth analysis and comparison of the percentage plans implemented in California, Texas, and Florida, see CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf>.

158. *Id.* at 24, tbl. 1.

159. *Id.*

160. *Id.*

161. *Id.*

choice.”¹⁶² Therefore, under the Ten Percent Plan, students are automatically admitted into the state’s flagship and most competitive colleges and universities, regardless of their Grade Point Average (GPA) or performance on standardized tests such as the ACT and SAT. In California and Florida, eligible students that do not meet a particular campus’s admissions requirements are denied admission and, thus, must attend a less-competitive institution.

By not guaranteeing admission to the state’s most competitive schools, the California and Florida plans may address one of the common criticisms of percentage plans: that such plans may compromise institutions’ high academic standards by admitting students who do not meet the usual objective standards previously required for admission, such as GPA and standardized tests scores.¹⁶³ This criticism has particularly been launched against the Ten Percent Plan because it guarantees admission to the state’s most competitive colleges and universities.¹⁶⁴ Opponents of the Ten Percent Plan are concerned that students ranked in the top ten percent at lower quality high schools in lower socioeconomic neighborhoods will be admitted at greater rates than students who attend more academically challenging schools in middle to high socioeconomic neighborhoods but who are not ranked in the top 10% of their graduating class.¹⁶⁵ While this may be true, analysis of the academic performance of students admitted to UT suggests that students admitted under the Ten Percent Plan significantly outperform those not admitted under the plan.¹⁶⁶ According to the Fall 2003 demographic analysis of the implementation and results of the Ten Percent Plan at UT since 1996, “among all racial/ethnic groups, top 10% [students] outperformed non-top 10% students even when the non-top 10% groups had higher SAT scores.”¹⁶⁷ Therefore, it does not appear that a college or university’s academic standards will be compromised

162. *Id.*

163. *See id.* at 18 (quoting Ward Connerly, leader of the voter referendum to end affirmative action in California as stating, “If you admit the top 4 percent at every high school, while that sounds good politically, the effect is that . . . without a doubt it does amount to a relaxing of statewide standards”).

164. *See* Sylvia Moreno & George Kuempel, *House OKs Measure on Admissions; Diversity Bill Guarantees Entrance for Top Seniors*, THE DALLAS MORNING NEWS, Apr. 16, 1997, at 27A (noting that Rep. Frank Corte (R-San Antonio) believes that the Ten Percent Plan would weaken traditional academic standards used by Texas’s leading colleges and universities).

165. *See* *Premature Celebration*, DAILY TEXAN, Sept. 25, 2000 (“Students from traditionally well-off school districts with high test scores and GPAs are finding admission to the University [of Texas] is no longer a sure thing. And many are watching helplessly as students with lower SAT scores and GPAs are routinely admitted to the University.”). *See also* Starita Smith, *Much Effort Required to Make Percent Laws Work*, KNIGHT-RIDDER/TRIB. NEWS SERVICE, Aug. 25, 2000 (“Some critics are complaining that students at competitive and academically strong high schools who would have gotten spots at elite state universities previously won’t get those invitations any more. Instead, students from weaker high schools might get these spots.”); Moreno & Kuempel, *supra* note 164 (noting Rep. Corte’s concern that students from low-performing schools would gain unfair advantage over better qualified students).

166. *See* LAVERGNE & WALKER, *supra* note 20, at 3 (discussing findings that the average freshman year GPA for students admitted under the Ten Percent Plan was 3.24 compared to 2.90 for students not admitted under the plan).

167. *Id.* at 3, 10–13.

by granting automatic admission to applicants who graduate in the top percentage of their graduating class.

Another criticism that is often made against percentage plans is that they fail to achieve the same level of racial and ethnic diversity previously attained through the use of race-based affirmative action.¹⁶⁸ Recent statistics, however, show that at some colleges and universities, implementation of race-neutral programs such as percentage plans can help to achieve the same diversity levels as those previously attained through the use of racial preferences. In 2003, the percentage of Hispanic students enrolled at UT was 16%, which exceeded pre-*Hopwood* levels of 14%.¹⁶⁹ The percentage of African-American students enrolled at the university was 4%, which equaled pre-*Hopwood* levels.¹⁷⁰

While prior racial and ethnic diversity levels have not been restored at some flagship universities in California, such as Berkeley and UCLA, California colleges and universities have experienced a steady increase in their diversity levels since implementing race-neutral measures such as the Four Percent Plan. In 1995, prior to the elimination of race-based affirmative action, Berkeley and UCLA enrolled 24.3% and 30.1% of underrepresented minorities, respectively.¹⁷¹ In 1998, following the termination of race-based affirmative action, the percentages decreased to 11.2% and 14.3%, respectively.¹⁷² In 2002, however, following the implementation of the Four Percent Plan, Berkeley and UCLA experienced an increase in the number of underrepresented minorities enrolled in their schools: 15.6% and 19.3%, respectively.¹⁷³ Therefore, race-neutral alternatives such as percentage plans can be effective in helping institutions of higher education achieve their educational and diversity goals.

Despite the ability of percentage plans to positively impact diversity levels without categorizing or selecting students based on their race or ethnicity, many proponents of race-based affirmative action are critical of such race-neutral measures because they believe their effectiveness depends on “continued racial segregation at the secondary school level.”¹⁷⁴ This argument fails to recognize one

168. See Danielle Holley & Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 262 (1999) (stating that the Ten Percent Plan did not have a significant impact on the number of minorities enrolled as freshman at Texas’s two flagship institutions in its first year of implementation); William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL’Y REV. 185, 187–88 (1999) (stating that in 1999, the Ten Percent Plan in and of itself had only “modest” effects on the achievement of racial and ethnic diversity at UT and that the number of minorities attending the school prior to *Hopwood* was significantly higher than the number of minorities attending UT after the implementation of the plan in 1999).

169. LAVERGNE & WALKER, *supra* note 20, at 3–4.

170. *Id.* See also Torres, *supra* note 24, at 1600 (“Since 1997, the University of Texas has essentially restored pre-*Hopwood* ethnic and racial diversity to the undergraduate college.”).

171. See UNDERGRADUATE ACCESS, *supra* note 86, at 20, 22.

172. *Id.* at 22.

173. *Id.* at 20, 22.

174. *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting). See also Brief of Amici Curiae on Behalf of Concerned Black Graduates, *supra* note 30, at 23 (stating that percentage plans “rely on and tacitly condone secondary school segregation”); Brief of the Harvard Black Law Students Association et al. as Amici Curiae Supporting Respondents at 23–

of the most significant advantages of percentage plans: their ability to afford educational opportunities to minority students who would not otherwise have them. Because so many colleges and universities rely on traditional merit standards such as GPA and standardized test scores when making their admissions decisions, institutions that deny admission to students who do not meet traditional criteria miss students who possess the academic potential to succeed.¹⁷⁵ Percentage plans open college and university doors to these students whose academic potential is evidenced by their ability to graduate in the top 4, 10, or 20% of their graduating class. Minority students who previously would have been denied admission because of their lower GPAs or standardized test scores now have more educational opportunities available to them due to the use of percentage plans. Percentage plans have also succeeded in admitting minority students from high schools and school districts that did not traditionally feed into a particular college or university,¹⁷⁶ thereby providing educational opportunities to students who were previously excluded from particular institutions.

As evidenced by the findings in Texas and California,¹⁷⁷ percentage plans can positively affect institutions' racial and ethnic diversity levels; they may not, however, have a great impact in the first or second year of usage. Indeed, this may be true for all race-neutral programs. The development and implementation of effective race-neutral admissions policies is a very involved process that requires a considerable amount of time and effort. The complexity of this process makes it necessary for colleges and universities to begin experimenting with such programs. Such experimentation is crucial to institutions' abilities to continue providing educational opportunities to minority students following the inevitable termination of race-based affirmative action as foreshadowed in *Grutter*.

24, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399207 ("Percentage plans' ability to bring meaningful numbers of minority high school graduates to competitive universities has, perversely, depended on the existence of segregated secondary school systems."); Walsh, *supra* note 35, at 452 ("Percentage plans seek to solve one problem, low black enrollment, by relying on the existence of another problem, residential segregation.").

175. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957 (1996) (arguing that reliance on standardized tests denies minority students higher education opportunities and excludes those students "who can actually do the job"); Torres, *supra* note 24, at 1602 (noting that the University of Texas's "traditional admission schemes were causing it to miss students with the academic potential to prosper at the university level"). See also Kidder, *supra* note 146, at 1100 (arguing that "heavy reliance on standardized tests . . . penalize[s] underrepresented minority applicants"); Shelli D. Soto, *Responding to Attacks on Affirmative Action*, 51 DRAKE L. REV. 753, 755 (2003) (discussing UT Law School's decision to give less weight to the LSAT in its admissions decisions following *Hopwood*).

176. See Torres, *supra* note 24, at 1602.

177. For a detailed analysis of Florida's Talented Twenty Plan, see PATRICIA MARIN & EDGAR K. LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf>.

B. Class-based Affirmative Action

In an effort to achieve their educational and diversity goals following the termination of race-based affirmative action, many institutions of higher education now consider applicants' socioeconomic status in their admissions decisions. In 1997, UT expanded its admissions policies to include personal achievement index factors such as "socio-economic status of family" and "socio-economic status of school attended."¹⁷⁸ Similarly, campuses within the University of California system revised their admissions policies to "expand[] the weight given in their . . . review to such factors as socio-economic status (defined by various combinations of family income, parental occupation, and parental education level). In addition, many added as a factor attendance at a disadvantaged high school."¹⁷⁹

Proponents of class-based affirmative action argue that such programs avoid the infliction of harms that may result from the use of race-based admissions programs: harms such as promotion of racial inferiority, strengthening of racial stereotypes, heightening of racial hostility, and encouragement of racial resentment.¹⁸⁰ As argued by Kim Forde-Mazrui, "racial classification, by awarding benefits and burdens along racial lines, reinforce[s] beliefs in the inferiority of racial minorities, who are treated as disadvantaged because of their race, and in the superiority of whites, who are treated as too privileged to deserve a compensatory preference."¹⁸¹ He argues that by awarding preferences to individuals who suffer from "tangible disadvantage[s]" regardless of race, class-based affirmative action avoids this negative consequence.¹⁸²

Indeed, the notion of rewarding applicants by providing them a preference based on their ability to achieve academically while overcoming economic and social disadvantages is the central theme of class-based affirmative action.¹⁸³

178. LAVERGNE & WALKER, *supra* note 20, at 2.

179. UNDERGRADUATE ACCESS, *supra* note 86, at 9.

180. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612-14 (1970) (O'Connor, J., dissenting) (arguing that race-based classifications and unjustified stereotypes promote racial hostility); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 298 (1978) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."); Banks, *supra* note 35, at 1034 (arguing that a race-blind measure "furthers racial inclusion without formal consideration of race and does so in a manner that may mute the stereotypes and stigma that depress the academic performance of some racial minority students"); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) (concluding that racism will not disappear if different treatment based on race is tolerated in the practices of government); *supra* note 69.

181. Forde-Mazrui, *supra* note 39, at 2371.

182. *Id.*

183. Although Resolution SP-1 eliminated race-based affirmative action from the University of California higher education system, it also included the request that

the Academic Senate . . . develop new supplemental admissions criteria giving consideration to students who "despite having suffered disadvantage economically or in terms of their social environment . . . have nonetheless demonstrated sufficient character and determination in overcoming obstacles to warrant confidence that the applicant can pursue a course of study to successful completion."

Inherent in this theme is a holistic, individualized approach to analyzing and making admissions decisions.¹⁸⁴ Both the *Gratz* and *Grutter* decisions urge institutions of higher education to adopt such a comprehensive, individualized review of their applicants.¹⁸⁵ In fact, some scholars argue that adoption of such holistic admissions procedures is required to maintain a constitutional race-based affirmative action program.¹⁸⁶ In upholding the Law School's race-based admissions policies, the *Grutter* Court found that "the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."¹⁸⁷ In *Gratz*, however, the Court held that the undergraduate institution's twenty-point policy was unconstitutional because it failed to be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."¹⁸⁸

While considering an applicant's socioeconomic background and experiences does provide a more comprehensive, individualized review of each applicant, implementing such measures involves complex and occasionally administratively costly tasks such as determining which socioeconomic factors to consider and verifying those factors. Colleges and universities that wish to award preferences to applicants based on their ability to overcome disadvantaged circumstances may choose to consider one or several socioeconomic factors in their admissions decisions. These factors include "family characteristics such as parental income, education, occupation and wealth," as well as neighborhood and school socioeconomic factors.¹⁸⁹ Richard D. Kahlenberg proposes three different methods for measuring socioeconomic disadvantage: (1) the simple method, which measures disadvantage solely by an applicant's family income; (2) the moderately sophisticated method, which considers an applicant's parents' income, education, and occupation, and (3) the most sophisticated method, which measures

UNDERGRADUATE ACCESS, *supra* note 86, at 7 (citation omitted). *See also* Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 410–11 (1987) (arguing that preferences should be awarded based on "obstacles that have been unfairly placed in . . . individuals' paths, rather than on the basis of race or gender").

184. *See* Flagg, *supra* note 94, at 834 (discussing comprehensive admissions policies that consider various "dimensions of human experience" as expressed by factors such as applicants' geographic place of origin, gender, race, personal and professional goals and ambitions, and socioeconomic status).

185. *See* *Gratz v. Bollinger*, 539 U.S. 244, 269–75 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 336–37 (2003).

186. *See* *Bloom*, *supra* note 78, at 495 (concluding that "race may only be used as a factor in admissions pursuant to an individualized, competitive process in which all relevant diversifying factors are taken into account").

187. *Grutter*, 539 U.S. at 337.

188. *Gratz*, 539 U.S. at 271 (quoting *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 317) (1978). *See also* Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 48 (1992) ("Affirmative action that takes into account individual circumstances such as racial discrimination, economic hardship, or family disintegration, which the applicant has worked hard to overcome, asks the right question—a question about the individual. This brand of affirmative action is a far cry from the program that simply awards points on the basis of race.").

189. *Banks*, *supra* note 35, at 1061–64.

disadvantage by an applicant's parents' income, education, occupation, and net worth and by an applicant's quality of secondary education, neighborhood influences, and family structure.¹⁹⁰ Some proponents of class-based affirmative action advocate a broad formulation of socioeconomic status, such as the most sophisticated method, because it "account[s] for environmental disparities that might influence early academic achievement."¹⁹¹ Adopting broad measures of economic disadvantage help to address critics' concerns that class-based affirmative action fails to capture the extent of minority applicants' disadvantage.¹⁹²

Deborah C. Malamud argues that class-based programs designed to benefit minority students will fail to achieve adequate levels of racial diversity because such programs fail to account for differences in wealth, social status, and social advantage that exist between African-American and White individuals.¹⁹³ She argues that "middle-class African-Americans have markedly less wealth than whites of the same income level."¹⁹⁴ Therefore, in order for class-based policies to effectively impact racial and ethnic diversity levels, their socioeconomic and disadvantage measures must take into account the disparity in wealth and social status that exists between African-American and White individuals. Some scholars are beginning to experiment with this concept by proposing class-based admissions programs that consider "family wealth and the socioeconomic characteristics of one's neighborhood and school" as socioeconomic factors.¹⁹⁵

Although broad formulations of socioeconomic status may be preferred, they may also be the most costly to implement.¹⁹⁶ To ensure that applicants are truthful in their reporting of personal information, institutions using class-based affirmative action may need to implement administrative procedures such as interviewing applicants and their parents or conducting home and/or school visits to observe applicants' family, neighborhood, and school circumstances. Obviously, the

190. Richard D. Kahlenberg, *Class-based Affirmative Action*, 84 CAL. L. REV. 1037, 1074–85 (1996). See also Schimmel, *supra* note 105, at 413 (discussing the use of "a wide variety of socioeconomic and 'disadvantage' factors such as a family's net worth, whether the student came from an under-resourced school, or a high crime or poor neighborhood, parent's income, occupation, and whether they graduated from high school, linguistic background, overcoming adversity, work experience, and so on" to develop race-neutral admissions approaches).

191. Banks, *supra* note 35, at 1061–62.

192. See Roithmayr, *supra* note 37, at 11–12 (discussing class-based affirmative action's failure to account for economic differences and disadvantages resulting from racial discrimination).

193. See Deborah C. Malamud, *Assessing Class-based Affirmative Action*, 47 J. LEGAL EDUC. 452, 464 (1997) [hereinafter Malamud, *Assessing Class-based Affirmative Action*]; Deborah C. Malamud, *Class-based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1893 (1996).

194. Malamud, *Assessing Class-based Affirmative Action*, *supra* note 193, at 464.

195. Banks, *supra* note 35, at 1066–70 (concluding that a "broad measure of socioeconomic status" that includes family wealth and the socioeconomic characteristics of one's neighborhood and school "would significantly alter the relative rankings of students from different racial groups because it would more fully capture the resource disparities associated with race than would an income-based conception of socioeconomic status").

196. Kahlenberg, *supra* note 190, at 1083.

implementation of such procedures would require time, personnel, and resources. These costs, however, are outweighed by the benefits of providing educational opportunities to minority students who have achieved academically though faced with tremendous challenges and obstacles.

A common criticism launched against class-based affirmative action and other race-neutral policies is that such programs are unable to achieve significant levels of racial and ethnic diversity at institutions of higher education.¹⁹⁷ Opponents of class-based affirmative action argue that because the number of poor White people surpasses the number of poor African-American and Hispanic people in this country, admissions preferences based solely on family income will not significantly enhance racial and ethnic diversity levels.¹⁹⁸ Although class-based affirmative action has yet to produce the same levels of racial and ethnic diversity as race-based programs, college and university consideration of applicants' socioeconomic background has helped to increase their diversity levels. At the three University of California law schools, class-based affirmative action has helped to increase the level of Mexican-American enrollment from 7.2% in 1997 to 11.9% in 2003.¹⁹⁹ The institutions experienced similar increases in their African-American enrollment: from 1.9% in 1997 to 4.7% in 2003.²⁰⁰ In 1997, the University of California, Berkeley School of Law enrolled only one African-American and fourteen Hispanic students.²⁰¹ By 2003, those numbers had increased to sixteen and thirty-eight, respectively.²⁰² The number of Hispanic students surpassed the number enrolled prior to the termination of race-based affirmative action in 1997.²⁰³ Thus, the use of race-neutral admissions programs such as class-based affirmative action can be effective in helping colleges and universities provide educational opportunities for minority students.

The development and implementation of effective race-neutral policies such as class-based affirmative action require the consideration of several factors and issues. Only through experimentation with such policies can colleges and universities develop effective programs that are successful in helping them achieve their educational and diversity goals.²⁰⁴

197. See Maurice R. Dyson, *Towards an Establishment Clause Theory of Race-based Allocation: Administering Race-conscious Financial Aid After Grutter and Zelman*, 14 S. CAL. INTERDISC. L.J. 237, 244 (2005) (arguing that "most studies relying on socioeconomic indicators alone have proved ineffectual in maintaining previous levels of racial diversity, and largely tend to benefit low socioeconomic whites instead of racial minorities"); Wightman, *supra* note 151, at 40–45 (concluding that an institution's use of socioeconomic status as an admissions factor independent of race would not maintain racial diversity in higher education).

198. See Malamud, *Assessing Class-based Affirmative Action*, *supra* note 193, at 465.

199. APPLICATIONS, ADMISSIONS, AND FIRST-YEAR CLASS ENROLLMENTS, *supra* note 111.

200. *Id.*

201. *Id.*

202. *Id.*

203. See *Id.* See also Tanya Schevitz, *Affirmative Action Upheld, but High Court Sets Limits*, S.F. CHRON., June 24, 2003, at A1.

204. See Schimmel, *supra* note 105, at 412–13 (noting that institutions of higher education should consider the possibility of developing and testing various new and creative race-neutral models that "give[] different weights to a wide variety of socioeconomic and 'disadvantage'").

C. Outreach, Recruitment, and Financial Aid Measures

Although race-neutral programs such as percentage plans and class-based affirmative action can be effective in providing minority students access to educational opportunities, they suffer from the same flaw as traditional race-based affirmative action: both measures narrowly focus on the admissions decision itself rather than on the provision of resources and assistance to minority students both before and after the admissions decision has been made. While such narrow concepts of affirmative action may open the door for minority students, they do nothing to encourage them to walk through it or to support and assist them once they have. Therefore, perhaps the most effective race-neutral measures that have been implemented at institutions of higher education following the termination of race-based affirmative action are those that concern community outreach and recruitment. Such measures encourage minority students to seek and take advantage of educational opportunities available to them. Institutions have also developed new financial aid programs to help minority students take advantage of educational opportunities. As recognized by Gerald Torres, “[a]ctivities like outreach, recruitment, and financial aid are critical to a university in making a diverse student body possible.”²⁰⁵ Indeed, many of the improvements in diversity levels at colleges and universities in California and Texas are due to the implementation of innovative outreach, recruitment, and financial aid measures.²⁰⁶

One such measure is the Law School Preparation Institute (Institute) implemented at the University of Texas Law School. The Institute seeks to “better prepare students, especially students of color, for the rigors of law school, for the application process, and for the legal profession.”²⁰⁷ To accomplish this goal, the Institute provides intensive preparation for sophomores attending the University of Texas at El Paso (UTEP), which has a population of 80% Hispanic students, during the summers before their junior and senior years.²⁰⁸ Participants receive instruction on various topics such as analytical thinking, logical reasoning, writing skills, and LSAT preparation.²⁰⁹ They also receive guidance throughout their law school application process.²¹⁰ According to Shelli D. Soto, one of the Institute’s

factors It is worth considering whether such new, creative race-neutral approaches might succeed where such attempts have not succeeded in the past”).

205. Torres, *supra* note 24, at 1599.

206. See News Release, The University of Texas at Austin, Office of Public Affairs, The University of Texas at Austin’s Experience with the “Top 10 Percent” Law (Jan. 16, 2003), available at http://www.utexas.edu/opa/news/03newsreleases/nr_200301/nr_toptenpercent030116.html (“The University of Texas at Austin has effectively compensated for the loss of affirmative action, partly by increasing recruiting and financial aid for minority students.”). See also BRIAN BUCKS, AFFIRMATIVE ACCESS VERSUS AFFIRMATIVE ACTION: HOW HAVE TEXAS’ RACE-BLIND POLICIES AFFECTED COLLEGE OUTCOMES? 30 (2003), available at <http://www.ssc.wisc.edu/~bbucks/files/october31.pdf> (concluding that “revised recruiting and [financial] aid policies may in fact offer a means of partially offsetting losses in campus diversity and of ensuring minorities’ academic success”).

207. Soto, *supra* note 175, at 753, 756–58.

208. *Id.* at 757–58.

209. *Id.*

210. *Id.*

developers, the outreach program “has been incredibly successful.”²¹¹ Since the Institute began, there has been more than a 50% increase in the number of UTEP students who have been offered admission to top fifty law schools.²¹²

Other law schools have also implemented similar preparation programs that are designed to assist undergraduate students who are considering applying to law school.²¹³ The creation of outreach centers in select cities is another measure that colleges and universities are implementing in an effort to provide academic preparation for middle and high school students.²¹⁴ These programs succeed not only in making students aware of the importance of furthering their education but also in encouraging them to do so. Moreover, outreach programs can also increase the likelihood that minority students will be admitted into undergraduate and graduate programs by informing them of the processes by which to apply and by preparing them for admissions tests, including the SAT, GRE, and LSAT.

Simply increasing the number of minority students who apply and are admitted to undergraduate and graduate programs, however, does not ensure that they will actually enroll in a particular institution. As indicated by the findings of “a post-*Hopwood* study conducted by the Race and Ethnic Studies Institute at Texas A&M[,] . . . minority students were not enrolling at the university primarily because of lack of personal attention and inadequate financial aid packages.”²¹⁵ Thus, institutions of higher education must implement innovative recruitment and financial aid measures to achieve their educational and diversity goals.

Effective recruitment programs are critical to the achievement of racial and ethnic diversity in undergraduate and graduate programs. In their efforts to increase minority applications and enrollment, colleges and universities have begun implementing more assertive recruitment measures. For example, college and university presidents, recruiters, and counselors are making routine trips to underrepresented schools that have a high minority population to foster relationships and to encourage students to apply for admission;²¹⁶ institutions are opening admissions offices in cities heavily populated by minority citizens;²¹⁷ and colleges and universities are conducting application workshops to assist minority

211. *Id.* at 758 (reporting that since the Institute’s inaugural summer of 1998, “[m]ore than 90 law schools have offered admission to one or more of [the 144 students who have completed the program]”).

212. *Id.*

213. For discussion of the King Hall Outreach Program implemented at the UC-Davis School of Law, see the outreach website, <http://www.law.ucdavis.edu/admissions/outreach.html> (last visited Nov. 20, 2005).

214. HORN & FLORES, *supra* note 157, at 55 (discussing collaborative efforts by UT and Texas A&M to establish outreach centers in Austin, Corpus Christi, Dallas, Houston, San Antonio, and the Rio Grande Valley).

215. *Id.* at 53–54.

216. *Id.* at 52–53.

217. Mary Ann Roser, *Minority Applicants Rise at UT: Overall Numbers are Up at A&M and Texas—Officials See It as a Trend*, AUSTIN AM.N-STATESMAN, Feb. 23, 2000, at B1. See also HORN & FLORES, *supra* note 157, at 55 (discussing UT’s decision to open regional admissions offices in Houston and Dallas that focus on recruitment efforts and distribution of enrollment information to students).

students with the application process.²¹⁸ Aggressive recruiting has been invaluable to institutions in their efforts to establish and maintain student bodies that are racially and ethnically diverse.

Other admissions policies that have enhanced educational opportunities for minority students are newly created race-based and race-neutral scholarships. Following the Fifth Circuit's decision in *Hopwood*, colleges and universities in Texas—including UT and Texas A&M—terminated all race-based admissions programs, including scholarships. At UT alone, the decision ended the expenditure of \$5.6 million annually for minority grants and scholarships.²¹⁹ After suffering a steep decline in minority enrollment, those Texas institutions began to offer new scholarships such as the Longhorn Opportunity Scholarship (LOS) and the Century Scholars Program (CSP) that target students who are from high schools that traditionally have been underrepresented at Texas undergraduate programs and who graduate in the top 10% of their classes.²²⁰ The LOS is awarded to low-income students who graduate from high schools in low-income areas; thus, traditionally it has benefited African-American and Hispanic applicants.²²¹ Although the CSP is available to students from all income levels, it targets students who graduate from high schools with large minority populations.²²²

Some colleges and universities have also created new scholarships that reinforce class-based affirmative action by targeting students who have excelled academically while overcoming socioeconomic disadvantages. For example, UT has established the Presidential Achievement Scholars Program, which was intended to “identify students from economically disadvantaged backgrounds who may have attended an academically inferior high school, but found a way to excel academically at much higher levels than their peers within the same high school and socioeconomic circumstances.”²²³ Berkeley also awards scholarships to students “who, despite socioeconomic hardship, exhibit exceptional academic potential and leadership promise.”²²⁴

Private organizations and individuals, as well as public colleges and universities, recognize the positive impact adequate financial aid can have on enrollment of minority students. Following the termination of minority scholarships at UT, the Texas Exes Student Association (Texas Exes), the UT

218. Holley & Spencer, *supra* note 168, at 276–77.

219. See Christy Hoppe, *UT Outlines New Steps, Broader Criteria for Attracting Minorities*, THE DALLAS MORNING NEWS, Nov. 14, 1997, at 24A.

220. See HORN & FLORES, *supra* note 157, at 53–54. See also Jodi S. Cohen, *Answer to Affirmative Action Falts in Texas*, THE DETROIT NEWS, Jan. 24, 2003, at 1A, available at <http://www.detnews.com/2003/schools/0301/24/a01-68096.htm> (discussing the LOS award of \$4000 a year to cover recipients' tuition and fees).

221. See HORN & FLORES, *supra* note 157, at 53.

222. See *id.* at 54.

223. GARY R. HANSON & LAWRENCE BURT, RESPONDING TO *HOPWOOD*: USING POLICY ANALYSIS RESEARCH TO RE-DESIGN SCHOLARSHIP CRITERIA 4 (1999), <http://www.utexas.edu/student/research/reports/Hopwood/Hopwood.html>.

224. See HORN & FLORES, *supra* note 157, at 56 (quoting The University of California, Berkeley, The Incentive Awards Program, <http://students.berkeley.edu/incentive> (last visited Nov. 20, 2005)).

alumni group, succeeded in raising private funds to be used for freshman minority scholarships.²²⁵ In just one year, the Texas Exes raised over \$1 million in private donations.²²⁶ These private funds allowed UT to award full-tuition, four-year scholarships to minority students who graduated in the top 10% of their high school classes.²²⁷ Financial aid is critical to ensuring that minority students have access to educational opportunities. By developing and implementing race-neutral admissions programs that include outreach, recruitment, and financial aid measures, institutions of higher education will be better prepared to provide educational opportunities to minority students following the termination of race-based affirmative action.

V. SUGGESTIONS AND RECOMMENDATIONS FOR IMPLEMENTING RACE-NEUTRAL APPROACHES

Due to the tenuous legal and legislative environment that continues to exist regarding race-based affirmative action, institutions of higher education should immediately begin developing and implementing race-neutral programs.²²⁸ As a result, institutions will be able to actively participate in the expansion of affirmative action concepts beyond the admissions decision. Without efforts to provide assistance and resources to minority students both before and after the admissions decision has been made, colleges and universities will continue to employ substandard measures in their attempts to provide meaningful access and educational opportunities for minority students.

As experienced by colleges and universities in California, Texas, and Florida, implementation of one race-neutral program, such as a percentage plan, will not succeed in effectively providing educational opportunities for minority students unless the program is accompanied by other race-neutral measures such as outreach, recruitment, and financial aid. Institutions should also develop programs to help ensure that minority students continue to have access to educational opportunities following enrollment.

Colleges and universities that currently use race-based programs should examine race-neutral alternatives implemented at other institutions and attempt to include effective aspects of those measures in their own admissions policies. Percentage plans, for instance, have been effective in expanding and diversifying the applicant pool by expanding the number and character of high schools from which applicants are graduating.²²⁹ Undergraduate institutions that do not use

225. Amanda Smith, *Hopwood Means Loose Ends for A&M, UT*, THE BATTALION, April 28, 1998.

226. Linda K. Wertheimer, *Program to Give Helping Hand to College-bound: Top Seniors at Lower-income High Schools are Targeted*, THE DALLAS MORNING NEWS, Dec. 12, 1997, at 35A.

227. *Id.*

228. See BUCKS, *supra* note 206 (“[A]dministrators can control [race-neutral] policies better than they can their legal or legislative environment, so that understanding their effect is crucial to formulating effective post-affirmative action policies in higher education.”).

229. See Torres, *supra* note 24, at 1607–08 (discussing the effectiveness of percent plans implemented in California, Florida, and Texas in enhancing geographic diversity at public

percentage plans can simulate this effect by establishing recruitment and outreach programs at high schools from which their current applicants do not traditionally graduate. Graduate programs can implement similar programs at undergraduate institutions. Graduate institutions that are located in the same city or state as a historically Black college or university (HBCU) should actively recruit at the HBCU to encourage minority students to apply to their programs.²³⁰ Graduate institutions could also establish preparatory and advisory programs at HBCUs to help educate and encourage minority students regarding graduate programs. Preparatory programs could be as involved as the Institute implemented by the UT School of Law,²³¹ or they could simply involve the establishment of mentor relationships with undergraduate students who are interested in applying to particular graduate programs.

Partnerships and collaborations between educational institutions can also have positive effects on the academic achievement of minority students. Outreach programs linking high schools with undergraduate institutions, undergraduate institutions with community colleges, and undergraduate institutions with graduate institutions establish an educational system in which educational institutions work together to further the goal of preparing students, including minority and economically disadvantaged students, for the successful pursuit of educational opportunities.²³² To aid in this effort, undergraduate as well as graduate institutions could conduct workshops and seminars at which students are provided information, guidance, and advice regarding educational opportunities. Such programs may encourage students to pursue such opportunities, despite any socioeconomic disadvantages they may have to overcome to do so.

In their efforts to provide minority students meaningful access to educational opportunities, institutions of higher education should also consider amending their admissions criteria to deemphasize standardized test scores and to give more weight to factors such as socioeconomic disadvantage, leadership skills, and work experience.²³³ As instructed by the Supreme Court in *Grutter*, colleges and

colleges and universities by “broadening the feeder school number and geographic range”).

230. See Crump, *supra* note 32, at 531 (discussing the University of Houston Law Center’s efforts to increase its level of racial diversity by recruiting at Prairie View A&M, “a historically black college”). As Professor Crump notes in his article, “Emory could partner in this manner with Spellman, Georgetown with Howard.” *Id.* Other partnerships could be formed between Wake Forest University School of Law and HBCUs such as North Carolina A&T State University and Winston-Salem State University.

231. See *supra* notes 207–12 and accompanying text.

232. See Maurice Dyson, *In Search of the Talented Tenth: Diversity, Affirmative Access, and University-driven Reform*, 6 HARV. LATINO L. REV. 41, 44 (2003) (discussing the need for colleges and universities to partner with secondary and elementary schools to “ensure that the academic community is more diverse”). See also News Release, The University of Texas at Austin, Office of Public Affairs, Community College Leadership Program Receives \$1.8 Million to Help Underserved Students (July 8, 2004), available at http://www.utexas.edu/opa/news/04newsreleases/nr_200407/nr_education040708.html (discussing a \$1.8 million grant that was awarded to the Community College Leadership Program at UT-Austin to help raise success rates for low-income students and students of color attending community colleges).

233. See Schimmel, *supra* note 105, at 412–13 (proposing a race-neutral point system that

universities should begin to take a more holistic approach to reviewing applications.²³⁴ Such an approach allows for the use of admissions preferences based on socioeconomic disadvantages that some students must overcome to achieve academically. Institutions could award preferences to students based on socioeconomic and disadvantage factors such as a student's "family's net worth, whether the student came from an under-resourced school, or a high crime or poor neighborhood, parent's income, occupation, and whether they graduated from high school, linguistic background, overcoming adversity, work experience and so on."²³⁵ As previously discussed, class-based affirmative action has been effective in helping institutions achieve their educational and diversity goals;²³⁶ therefore, it can serve as an effective tool for providing educational opportunities to minority students.

Institutions could also implement a "direct measures" program such as that proposed by Daria Roithmayr. Under the Roithmayr program, institutions would grant preferences to students whose applications demonstrate that they meet "any of three criteria: (1) that [they] had suffered from the effects of racial discrimination; (2) that [they] likely would contribute an important and under-represented viewpoint to the classroom on issues of social and racial justice; and/or (3) that [they] likely would provide resources to underserved communities."²³⁷ Employing a direct measures program would enable institutions to provide educational opportunities to minority students without categorizing or selecting them based on their race or ethnicity.²³⁸

Another race-neutral alternative that institutions should implement is modification of their use of standardized test scores. Because minority students traditionally score lower on standardized tests than do their White counterparts,²³⁹ deemphasizing test scores and expanding admissions policies to include other factors that measure merit would provide minority students greater access to institutions of higher education. As previously discussed, heavy reliance on traditional standards of merit—including standardized test scores—may result in the denial of admission to qualified minority students.²⁴⁰ To prevent such

gives different weights to various socioeconomic and disadvantage factors); Soto, *supra* note 175, at 755 (discussing UT Law School's decisions to give less weight to the LSAT and to expand its admissions factors); Torres, *supra* note 24, at 1604, 1606 (recognizing need to expand admissions policies in light of faults associated with standardized test scores as predictors of undergraduate performance).

234. See *supra* notes 185–88 and accompanying text.

235. Schimmel, *supra* note 105, at 413.

236. See *supra* notes 199–203 and accompanying text.

237. Roithmayr, *supra* note 37, at 6.

238. See *id.* at 30 (noting that a "direct measures" approach could serve as a "constitutional race-neutral means to remedy the effects of discrimination").

239. See Levey, *supra* note 35; Walsh, *supra* note 35; *supra* note 146.

240. See *supra* note 175 and accompanying text. See also Roithmayr, *supra* note 37, at 4–5 ("[A]n increasing number of schools are abandoning or modifying the use of standardized tests, largely because such tests disproportionately exclude applicants of color. In a move widely noted by the educational community, the president of the University of California system recently called for the elimination of the Scholastic Aptitude Test in the admissions process. Likewise, the

outcomes, institutions should reconsider their means of determining “merit.” Colleges and universities should employ other factors, including work ethic and leadership skills as evidenced by their high school records,²⁴¹ work experience, extracurricular activities, and teacher recommendations to ascertain those students who deserve admission.

Institutions should also develop race-neutral financial aid programs to encourage admitted minority students to actually enroll in undergraduate and graduate programs. Scholarships and grants could be awarded to students based on their ability to achieve academically while overcoming socioeconomic disadvantages.²⁴² Institutions could also award scholarships to students graduating from disadvantaged high schools and school districts.²⁴³ Colleges and universities could also establish scholarship programs targeting graduates of community colleges to encourage them to continue their educational pursuits. On the graduate level, graduate programs could partner with HBCUs to award scholarships to students graduating at the top of their class.

Finally, institutions of higher education should implement programs to assist minority students once they have matriculated and begun their undergraduate or graduate studies. As previously discussed, educational opportunities for minority students should not end once the admissions decision has been made.²⁴⁴ Institutions should provide support systems such as mentoring programs, multicultural enrichment centers, and guidance counselors to ensure minority students continue to have access to educational opportunities following their enrollment. Implementation of these and other race-neutral alternatives is imperative to effectively providing meaningful educational opportunities for minority students.

CONCLUSION

As evidenced by racial disparities that continue to exist between Whites and minorities regarding educational achievement,²⁴⁵ reliance on traditional, race-based affirmative action will not win the war to most effectively provide minority students access to educational opportunities. While racial preferences succeed in providing minority students admission to educational institutions, their usefulness ends there. Traditional race-based affirmative action fails to address challenges that many minority students must face and overcome to achieve academically. It also fails to provide resources, assistance, and guidance to help minority students overcome these challenges. To remedy these failures, institutions of higher

outgoing chancellor of the Florida university system has urged schools to place less emphasis on standardized test scores. Indeed, several hundred colleges and universities already have abandoned the standardized test score as part of their admissions criteria.” (footnotes omitted).

241. See Torres, *supra* note 24, at 1604 (stating that “[h]igh school performance is a better indicator of college performance than are standardized test scores”).

242. See *supra* notes 223–24 and accompanying text.

243. See Torres, *supra* note 24, at 1604–05 (discussing scholarship program targeting underprivileged high schools and school districts rather than individual students).

244. See *supra* Part III.B.

245. See *supra* notes 35, 125 and accompanying text.

education should expand contemporary concepts of affirmative action to include the provision of resources both before and after the admissions decision has been made.

In light of the inevitable termination of race-based affirmative action,²⁴⁶ institutions should include the development and implementation of race-neutral alternatives in this expansion. Use of broad race-neutral programs that encompass outreach, expanded admissions criteria, financial aid, and support systems is essential to most effectively providing minority students with meaningful access to educational opportunities.

246. See *supra* Part II.B.

