

PERCENT PLANS: A “WORKABLE, RACE-NEUTRAL ALTERNATIVE” TO AFFIRMATIVE ACTION?

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INTRODUCTION

Since 1978, when *Regents of the Univ. of California v. Bakke* avowed its constitutionality,¹ affirmative action in higher education has continued to face legal and political challenges.² In 2003, *Grutter v. Bollinger* affirmed *Bakke*’s holding that the compelling state interest of diversity justifies affirmative action, but by a threadbare 5-4 margin.³ Justice O’Connor’s majority opinion also declared a societal time limit for affirmative action,⁴

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1. See 438 U.S. 265 (1978).

2. See, e.g., *Johnson v. Board of Regents of the Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001) (holding that automatically adding points to an admission score for non-white applicants violated the Equal Protection Clause).

3. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

4. See *id.* at 343 (“[w]e expect that 25 years from now, the use of racial

recognizing the societal burdens it creates. As various nationwide political movements demonstrate, this time limit seems on the horizon. Since 1996, six states have passed ballot measures banning affirmative action policies in public universities, including California and Michigan, where *Bakke* and *Grutter*, respectively, originated.⁵ In addition, lawmakers in other states have recently proposed initiatives to enact their own bans.⁶

With the Sword of Damocles hanging over affirmative action, many have proposed race-neutral mechanisms to replace it.⁷ In fact, in order for any given affirmative action program to be constitutional, *Grutter* first requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”⁸ These mechanisms have sparked much debate, centering mainly on the feasibility of class-based “affirmative action” to achieve diversity.⁹ However, another race-neutral alternative has received comparatively less attention, particularly in legal scholarship: percent plans.

Percent plans guarantee students who place in the top “x” percent of their high school class admission into a state’s university system. They are facially race-neutral, as they consider only a student’s class rank, and never a student’s race, for admissions purposes. Thus, these plans need only pass rational basis scrutiny under traditional equal protection analysis.¹⁰ However, they are implicitly designed to achieve racial diversity in at least two ways. First, they eschew standardized exam scores and numerical grade point average comparisons. Consequently, they circumvent any need to weigh academic measures differently for individuals of different racial groups.¹¹ In the process, they avoid the tension between maintaining

preferences will no longer be necessary to further the [diversity] interest”).

5. Affirmative Action: State Action, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=12857> (last visited Sept. 20, 2012).

6. See Robert Gehrke, *Affirmative Action: Push for a Color-Blind Utah*, THE SALT LAKE TRIB. (Dec. 2, 2010) archive.sltrib.com/printfriendly.php?id=50788330&itype=cmsid; Randy Krehbiel, *State House Sends Affirmative Action Ban to Voters*, TULSA WORLD (Apr. 27, 2011) www.tulsaworld.com/site/printfriendlystory.aspx?articleid=20110427_11_0_theokl298226.

7. See, e.g., KENNETH L. MARCUS, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION*, (2004), available at <http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.

8. *Grutter*, 539 U.S. at 339 (citation omitted).

9. See, e.g., RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1997).

10. See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (holding that a facially neutral law, absent adoption precisely because of the adverse effects it would have on a protected class, does not undergo strict scrutiny).

11. Blacks and Hispanic minority groups tend to score lower on these exams, such as the SATs. See, e.g., U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUCATION, *STATISTICS, DIGEST OF EDUCATION STATISTICS* tbl. 143 (2009).

diversity and maintaining academic selectivity.¹² Second, by granting admission solely based on class rank, they rely on the fact that every school will have a top “x” percent—including majority-minority schools. Under their logic, many minorities will achieve the class rank to qualify for admission through the plan, consequently engendering diversity.¹³

These plans were first introduced in 1997: The Texas state legislature passed the Texas Top Ten Percent Plan¹⁴ in response to a Fifth Circuit Court ruling in 1996 declaring that diversity was not a compelling state interest and striking down affirmative action in Texas.¹⁵ Though Texas reinstated affirmative action soon after *Grutter*, which abrogated this holding on diversity, Texas’s percent plan exists today. This plan grants applicants who place in the top ten percent of their high school class admission into the state university of their choice.¹⁶ Two other states, California and Florida, have also implemented percent plans, both in 1999 shortly after each banned affirmative action.¹⁷ In California and Florida, students in the top four and twenty percent, respectively, of their high school classes are guaranteed admission into one state university, though without guaranteed admission into any particular university.¹⁸

Despite the fact that three states have implemented percent plans in reaction to the abolition of—and, implicitly, as an alternative to—affirmative action, these percent plans continue to receive little attention in the legal world. By automatically admitting some students from majority-minority schools and resource-poor schools simultaneously, percent plans could render the race versus class-based affirmative action debate moot.¹⁹

12. This refusal to compromise was problematic for Justice Thomas in *Grutter*. See 539 U.S. at 355–56 (“the Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status”).

13. See, e.g., Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 312 (2006).

14. See H.B. 588, 75th Leg., Reg. Sess. (Tx. 1997).

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

16. See THE UNIV. OF TEX. AT AUSTIN, OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN: REPORT 13 (2010), available at http://www.utexas.edu/student/admissions/research/topten_reports.html.HB588-Report13.pdf.

17. California’s percent plan is called “Eligibility in the Local Context.” See *Eligibility in the Local Context*, UNIV. OF CAL., <http://www.ucop.edu/sas/elc/>. Florida’s percent plan is called “Talented Twenty.” See *What is the Talented Twenty Program?*, FLA. DEP’T OF EDUC., <http://www.fldoe.org/Talented20>. California and Florida banned affirmative action in 1996 and 1999, respectively. See *Affirmative Action: State Action*, *supra* note 5.

18. See *Eligibility in the Local Context*, *supra* note 17; *What is the Talented Twenty Program?*, *supra* note 17.

19. There is evidence, for example, that in Texas the percent plan passed the state legislature only because the plight of rural and poor whites were connected to those of minorities, underscoring the potential of the percent plan to help the socioeconomically

If not, the study of percent plans could still illuminate interactions between race, class, and other demographic factors to provide support for other race-neutral mechanisms (e.g., individually targeted class-based affirmative action). Such findings would rebuff the idea that it is necessary to consider race to achieve race-related interests. Nevertheless, none have comprehensively ascertained the merits of these plans, particularly not under the standards for “workable” alternatives that *Grutter* sets.²⁰ Until *Fisher v. University of Texas-Austin* in 2011,²¹ the only court to discuss these plans was the Supreme Court in *Grutter*—and then only hypothetically. The *Grutter* majority briefly commented that percent plans “may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”²²

Beyond the courts, academic research has also not yet explored the question of whether individualized assessments considering race are necessary to assemble a sufficiently diverse student body in practice. Largely analyzing one percent plan in isolation (mostly Texas’s plan) in its fledgling years (i.e., pre-*Grutter*), sociological studies have concluded that percent plans have achieved less diversity than affirmative action as measured by minority enrollment proportions.²³ However, such findings are insufficient to establish that percent plans are not a “workable” alternative under *Grutter*; it is still possible that percent plans achieve sufficient diversity from a constitutional perspective (e.g., they still enroll a “critical mass” of minorities).²⁴ It is also possible that these affirmative action programs achieved their gains by placing impermissible weight on race.

The issue of percent plans’ workability as an alternative to affirmative action gained attention in January 2011, with the decision in *Fisher v. University of Texas-Austin*.²⁵ In *Fisher*, the Fifth Circuit upheld UT-

disadvantaged. See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 71–73 (2002).

20. The one piece of legal scholarship that analyzes diversity under percent plans beyond Texas’s was written pre-*Grutter*. Therefore, these results were not analyzed under constitutional standards of sufficient race-neutral alternatives in higher education. See Jennifer L. Shea, Note, Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions, 78 *IND. L. REV.* 587 at 618 (2003) (finding that percent plans “do not generate the same results as admissions policies that individually evaluate a student’s contribution to campus diversity based on a range of factors including race”).

21. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011); see also *infra* notes 25–29 and accompanying text.

22. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

23. See, e.g., HORN & FLORES, *infra* note 87; MARIN & LEE, *infra* note 114; TIENDA ET AL., *infra* note 133. Such research also tends to focus mainly on the impact of percent plans on flagship universities.

24. See *Grutter*, 539 U.S. at 316.

25. See *Fisher*, 631 F.3d 213.

Austin's use of affirmative action to supplement the Texas percent plan.²⁶ In the process, the Court declared that this percent plan "does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it" to meet the university's interest in diversity."²⁷ However, the case far from settled the issue of percent plans' workability. One judge specially concurred, signing on to the Court's opinion *except*, curiously, for its entire analysis of whether the Texas percent plan is a workable alternative.²⁸ Another judge also specially concurred but implied that the percent plan *should* be considered a sufficient alternative because UT's use of affirmative action generated only a marginally more diverse student body.²⁹ The case gained further traction when the Supreme Court granted the petition for certiorari in February 2012.³⁰ With several Justices already critical of diversity as a compelling interest³¹ and leaning towards colorblindness,³² the Supreme Court could reverse the Fifth Circuit and hold that affirmative action is unconstitutional at UT. The Court could justify such a decision by declaring that race-neutral alternatives have been proven to realize the benefits of diversity sufficiently, regardless of whether they achieve the same levels of diversity as affirmative action. Even if the Court upholds UT's program, or strikes it down on much narrower grounds, it could use evidence from percent plan states to declare at its next opportunity that other affirmative action programs are unconstitutional because the states did not seriously consider this mechanism. Such results could not only compel *more* states to implement affirmative action bans, but also bring the Supreme Court significantly closer to holding that affirmative action in higher education is wholly unconstitutional.

These issues give rise to several questions that this article considers in proffering the first "serious, good faith consideration" of percent plans in legal scholarship. First, what framework should be used to evaluate the sufficiency of race-neutral alternatives like percent plans? Second, how well do percent plans, not merely in Texas but everywhere, achieve diversity? Are the levels of diversity they achieve sufficient by constitutional standards, supporting the proposition that affirmative action

26. *See id.*

27. *Id.* at 240.

28. *See id.* at 247 (King, J., specially concurring).

29. *See id.* at 259–60 (Garza, J., specially concurring).

30. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 2012 WL 538328 (U.S. Feb. 21, 2012) (No. 11–345).

31. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 354 (2003) (Thomas, J., concurring in part and dissenting in part) ("there are other ways to 'better' the education of law students aside from ensuring that the student body contains a 'critical mass' of underrepresented minority students").

32. These leanings are encapsulated by Chief Justice Roberts' statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

is generally unnecessary? Third, even if percent plans fall short, can states simply make adjustments to their percent plans, or are they fundamentally insufficient? And, even if percent plans are fundamentally insufficient, can individualized assessments actually achieve greater diversity without placing impermissible weight on race? Or are percent plans as equally effective as the most diversity-engendering, but constitutionally constrained affirmative action program possible?

Part I analyzes how well percent plans achieve the interest of diversity. First, it proposes a standard for evaluating what constitutes a “workable” race-neutral alternative, connecting *Grutter* and doctrine on disparate employment practices to argue that “critical mass” can and indeed must be evaluated quantitatively, especially in the context of race-neutral programs where a qualitative analysis is wholly inapplicable. Then, it empirically analyzes diversity outcomes in the three states that have implemented percent plans, ultimately finding that these plans have not sufficiently achieved critical mass. Part II analyzes why percent plans are limited in achieving diversity, particularly focusing on whether these plans erroneously assume that majority-minority schools will yield sufficient numbers of minority percent plan admits. It finds that, despite eschewing standardized exams, percent plans cannot circumvent racial disparities that are present in class rankings even in more homogenous schools. Thus, individualized assessments are likely necessary to achieve the diversity interest. In the process, this part examines whether individualized assessments can actually engender diversity gains above percent plans without placing impermissible weight on race. This article concludes that percent plans are an unworkable alternative, reaffirming the continuing constitutionality of affirmative action policies to achieve diversity—and, more broadly, the significant difficulties in achieving race-related goals without directly considering race.

I. EMPIRICS: ARE PERCENT PLANS SUFFICIENT TO ACHIEVE DIVERSITY?

As per *Grutter* precedent, a university must give “serious, good faith consideration” to “workable race-neutral alternatives” before implementing affirmative action to achieve diversity in higher education.³³ An innovative mechanism among such alternatives is the percent plan. Depending on how successful these plans have been in engendering diversity, they could raise serious doubts about the need for, and the constitutionality of, affirmative action at colleges and universities. On the other hand, given that several states have banned affirmative action, it is also important for other states and the Supreme Court alike to consider whether, in practice, there actually exist workable race-neutral alternatives. As such, how well percent plans

33. *Grutter*, 539 U.S. at 339. Good faith consideration does not require “exhaustion of every conceivable race-neutral alternative.” *Id.*

achieve diversity merits analysis.

A. At What Point Do Universities Achieve Sufficient Diversity?

How does one evaluate whether percent plans achieve sufficient diversity, particularly racial diversity? *Grutter* did not explicitly expound what constitutes a “workable” race-neutral alternative for achieving diversity, except to cite *Wygant v. Jackson Board of Education*, which states that race-neutral alternatives must serve to achieve diversity “about as well.”³⁴ However, serving the diversity interest “about as well” does not require achieving about the same levels of racial diversity as affirmative action. *Grutter* described the diversity interest as the pursuit of a “critical mass of underrepresented minority students.”³⁵ Because of its indefiniteness, this concept means that percent plans could still fulfill the diversity interest below, and perhaps even substantially below, the levels of racial diversity that affirmative action achieves. To evaluate whether percent plans serve diversity “about as well,” it is necessary to ask: what levels of diversity constitute critical mass?

This question is not without controversy. The majority in *Grutter* allowed critical mass to be “defined by reference to the educational benefits that diversity is designed to produce.”³⁶ However, the dissenters claimed that the majority in effect gave colleges and universities the deference to continue pursuing racial diversity indefinitely.³⁷ This debate about critical mass is one to which there is no bright-line answer. To disallow the diversity justification at all might deprive colleges and universities of benefits that allow them to fulfill their mission of higher education. These benefits, as *Grutter* articulates them, are what make diversity a compelling state interest in the first place: enriched classroom discussions and campus atmosphere, improved cross-racial understanding, and an increased sense that colleges and universities are open to individuals of all races.³⁸ However, to set a defined threshold of racial diversity would be akin to an impermissible quota itself.³⁹

The *Grutter* Court resolves this tension by appearing to place emphasis not on *overall* applicant and enrollment numbers, but on how schools evaluate each applicant *individually*. In order for an affirmative action program not to be a quota, it must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of

34. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, n.6 (1986) (citation omitted).

35. *Grutter*, 539 U.S. at 316. These underrepresented minorities include African-Americans, Hispanics, and Native Americans. *See id.*

36. *Id.* at 330.

37. *See id.* at 348–49 (Scalia, J., concurring in part and dissenting in part).

38. *See id.* at 330–33.

39. *See Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 315 (1978).

each applicant."⁴⁰ Race may serve only as a "plus" for any particular applicant; it cannot serve as the predominant factor. By limiting colleges and universities' ability to consider race at the individual level, this approach allows colleges and universities to pursue critical mass to some extent, while simultaneously avoiding the problem of numerically defining what constitutes critical mass and thus risk instituting a quota.

Nevertheless, this approach is insufficient in two important respects. First, it is susceptible to the criticism that colleges and universities can theoretically continue to pursue diversity even if they have, for example, a majority-minority student body, so long as the college or university never considers race as a predominant factor for any *individual* applicant.⁴¹ This criticism of *Grutter* leaves the diversity interest particularly vulnerable, as it applies even if one recognizes that diversity does have empirical benefits. Second, it is not a useful framework for evaluating whether race-neutral admissions programs achieve critical mass. Because achieving diversity "about as well" as an affirmative action program does not necessarily mean achieving very similar levels, it becomes necessary to define critical mass as a concept apart from co-existence with a race-conscious program. Therefore, avoiding a quantitative conception of critical mass, as the *Grutter* Court appeared to do, leaves no framework for evaluating race-neutral programs as alternatives to affirmative action—including percent plans.

However, *Grutter's* own language may give more guidance to the doctrinal concept of critical mass than initially appears. In particular, it may allow for a quantitative component that evaluates race-conscious *and* race-neutral programs more rigorously, while not effectively reinstating quotas. If, as the *Grutter* majority allows, critical mass is defined by the educational benefits that diversity produces, then implicitly colleges and universities are required to consider the following questions: given the level of racial diversity in any year of enrollment, what exactly would be the benefit of achieving incrementally greater levels? Would a greater minority presence benefit the school substantially, given that current minority enrollment is particularly low? Would it produce only small benefits? Or worse, would it be counterproductive, creating racial homogenization in another direction while sacrificing non-racial elements of diversity?⁴² Such questions, like any calculation of non-economic

40. *Grutter*, 539 U.S. at 334 (emphasis added) (citing *Regents*, 438 U.S. at 315, 317).

41. See, e.g., *id.* at 348–49 (Scalia, J., concurring in part and dissenting in part).

42. Other language in *Grutter* supports the idea that critical mass should be measured in this manner. See *Grutter*, 539 U.S. at 334 ("[a race-conscious admissions program] must be flexible enough to consider all pertinent elements of diversity"). Such a framework also dovetails with the benefits analysis proposed by Ian Ayres and Sydney Foster, as part of their larger cost-benefit analysis of affirmative action. See Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and*

benefits, are indefinite to some degree. However, rather than a wholly indefinite framework, such a scale begins to allow for more concrete arguments as to whether, at any given level of minority enrollment, a university may have amply garnered the benefits of racial diversity and reached the point of critical mass, or whether it might pursue greater diversity through other methods in subsequent years. Thus, this framework sets the stage for evaluating when colleges and universities achieve critical mass. It reconciles *Grutter*'s very proposition that critical mass entails "[s]ome attention to numbers,"⁴³ but cannot require achieving a specific number or percentage of minorities.⁴⁴

Strongly supporting this manner of evaluating critical mass is the Supreme Court's employment law doctrine. Since *Grutter*, several scholars have analyzed the implications of the critical mass concept for voluntary affirmative action in the workplace.⁴⁵ This race-conscious mechanism is another that the Supreme Court has also held to be constitutional.⁴⁶ However, no scholars have identified a significant feature of broader employment law doctrine inclusive of, but not limited to, workplace affirmative action precedent that guides how to evaluate critical mass itself: the Supreme Court also sees the magnitude of racial underrepresentation in employment along a scale.⁴⁷ At one extremity, under Title VII, employers may be held liable for practices that have disparately adverse outcomes for minority groups.⁴⁸ The bar to establishing such liability is high.⁴⁹ To

Gratz, 85 TEX. L. REV. 517, 565 (2007). Ayres and Foster state that, instead of looking at the weight of race on the individual level, affirmative action programs should justify overall and marginal benefits of increased diversity against overall and marginal costs to non-minorities.

43. *Grutter*, 539 U.S. at 336.

44. *See id.* at 318.

45. *See, e.g.*, Jessica Bulman-Pozen, Note, *Grutter at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1443 (2006) (arguing that *Grutter* affirms workplace affirmative action precedent, which stresses remediation, but through integration rather than compensation); Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005) (arguing that *Grutter* may justify non-remedial, diversity-centric affirmative action in the workplace).

46. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (holding that Title VII "does not condemn all private, voluntary, race-conscious affirmative action plans").

47. Bulman-Pozen comes the closest, briefly suggesting that the workplace affirmative action concept of "manifest imbalance" supports a "quantitative conception of critical mass." *See supra* note 45 at 1436, 1433. However, the "manifest imbalance" standard is restricted to workplace affirmative action. *See infra* note 52.

48. Such liability may exist regardless of whether there is intent to discriminate. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups").

49. *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (holding that, before an employer takes race-conscious action to remedy potential Title VII disparate impact

establish a *prima facie* case requires robust statistical evidence, or what the Court has termed a “gross disparity.”⁵⁰ Such a disparity entails a statistically significant difference of “greater than two or three standard deviations” between the expected number of minority hires, given their proportion in the particular occupational field and the actual number of minority hires.⁵¹ Moving further along the scale, however, even when employers are in full compliance with Title VII and there is no evidence that they have ever engaged in discriminatory employment practices, they are neither statutorily nor constitutionally barred from voluntarily addressing disparities that are less than two or three standard deviations, as long as there is still a “conspicuous” or “manifest imbalance.”⁵² That employment law doctrine inclusive of workplace affirmative action recognizes degrees of demographic underrepresentation—ones that affect how employers are permitted or even required to act to address disparities—further supports the contention that one must evaluate critical mass along an incremental scale, rather than a vaguely binary one.

Even establishing that *Grutter*’s “some attention to numbers” concept entails this incremental understanding of critical mass, evaluating diversity by simply “eyeballing” enrollment figures (or comparing whether a given means achieved more or less diversity than a prior one) may still give limited concrete guidance. Thus, although neither the Court nor scholars have specifically done so, applying a similar statistical framework as in employment law directly to higher education creates brighter-line standards that are fully consistent with *Grutter*’s some-numbers-but-no-quota principle. Such analysis would illuminate whether a percentage gap between minority and non-minority enrollment translates to a statistically significant result given broader demographics, specifically the actual pool

liability, it must have a strong basis in evidence to believe it will be subject to such liability).

50. *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 307 (1977).

51. *Id.* at 308, n.14 (citing *Castaneda v. Partida*, 430 U.S. 482, 496–97, n.17 (1977)). *Castaneda*, a juror selection case, provides a more detailed calculation of standard deviation, a calculation that *Hazelwood* then applies in the employment context. A result of greater than two or three standard deviations is statistically significant, corresponding with a 95% confidence level. Specifically, the result entails a 95% certainty that the “observed disparity in the applicant pool reflects a real disparity in the relevant labor market with respect to the challenged [employment] practice,” and a 5% possibility that the disparity is a result of mere chance due to sampling. Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 786 (2009).

52. See *Johnson v. Transportation Agency*, 480 U.S. 616, 632 (1987) (“a manifest imbalance need not be such that it would support a *prima facie* case against the employer”). The Supreme Court has not ruled on voluntary affirmative action in the workplace since *Johnson*, but lower courts have upheld affirmative action programs where the standard deviation was less than two. See, e.g., *Chance v. Bd. of Examiners*, 458 F.2d 1167, 1171 (2d Cir. 1972) (finding an adverse impact where the deviation between whites and minorities was 1.5).

of potential students. Considering especially that one of the doctrinally recognized benefits of diversity is to create an increased sense of open access,⁵³ statistically “gross” disparities in minority enrollment should safely indicate that a university has not achieved critical mass (e.g., four or more standard deviations from the composition of the applicant pool, that is, higher than the threshold for permitting voluntary affirmative action in the workplace). Lesser disparities may still indicate the same but are much more debatable. For example, less than three standard deviations (i.e., directly below the requirement for Title VII liability) would not necessarily bar a college or university from continued pursuit of critical mass. However, it would certainly require further justification for this pursuit, just as workplace affirmative action necessitates a showing of “manifest” disparities below this threshold.

Of course, the mechanism for evaluating racial disparities in employment law need not be the best framework for education for several potential reasons. First, the two areas of the law have some differing substantive goals. The goal of addressing racial disparities in employment is designed to redress discrimination that hurts minorities in the workplace. However, the goal of fostering educational diversity is patently not to address discrimination. Second, while a quantitative framework might be appropriate for evaluating whether an employer has redressed discrimination, importing this framework for evaluating educational diversity might transform critical mass into an impermissible quota.

Nevertheless, the two areas of law share important commonalities that, in concert with the language of *Grutter* itself, strongly support a quantitative framework for evaluating critical mass. First, while the goals of employment antidiscrimination and educational diversity may seem substantively different, a key concept unites the two: broader racial integration in society.⁵⁴ Underscoring this concept in employment is precisely that workplace affirmative action is permissible even when an employer has no legal obligation to correct any of its practices. In justifying this type of affirmative action, the Supreme Court explicitly highlighted the benefits of enabling work and integrating minorities into “the mainstream of American society,” benefits that arise from opening up access to employment opportunities even absent legally cognizable, discrete discrimination among similarly qualified applicants.⁵⁵ Further highlighting the integrative goal of employment law is that, while Title VII certainly prohibits employment practices that intentionally discriminate on the basis of race, it also prohibits practices that cause a racially disparate *impact* even absent invidious intent.⁵⁶ In this sense, Title VII’s concept of racial

53. *See supra* note 38 and accompanying text.

54. *See* Bulman-Pozen, *supra* note 455, at 1411.

55. *United Steelworkers of America v. Weber*, 443 U.S. 193, 202–03 (1979).

56. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

antidiscrimination is much more broadly and societally integrative than narrowly and individually remedial. For its part, *Grutter* does not see the benefits of diversity as limited by any means to producing classroom exchanges of diverse viewpoints. Instead, *Grutter* explicitly recognizes that the benefits of educational diversity encompass preparing people for work, citizenship, and “participation by members of all racial and ethnic groups in the civic life of our Nation,” which are benefits that arise by “[e]nsuring that public institutions are open and available to all segments of American society,” even absent legal discrimination.⁵⁷ The Court also stresses the importance of colleges and universities as a “training ground for a large number of our Nation’s leaders,” justifying attention paid to “the openness and integrity of the educational institutions that provide this training.”⁵⁸ In identifying these two interests, the *Grutter* Court emphasizes the broader integrative goal that links the goals of education and employment law.

Employment law’s integrative component has key implications for the portability of its quantitative framework for measuring racial disparities. If this framework were used solely for inferring employer discrimination between similarly qualified individuals, it may be difficult to justify importing into critical mass analysis. However, the same framework is also used to justify permitting employers to address workplace disparities affirmatively *even absent* any disparate treatment or even any disparate impact sufficiently large to violate Title VII. Consequently, even in employment law, quantitative analysis is used to justify integrative efforts in the absence of legal discrimination—precisely what characterizes the pursuit of educational diversity. Therefore, quantitative analysis should also be compatible in the latter context. One remaining distinction would be that the latter does not take into account the qualifications of the pool. Nonetheless, this distinction is warranted because it is the purpose of critical mass analysis neither to ascertain whether there is discrimination among similarly qualified applicants that must be corrected (like in Title VII disparate treatment)⁵⁹ nor to permit affirmative action without any further scrutiny. Instead, it is to determine whether there is *such* a large statistical discrepancy between the composition of enrolled and potential students that it creates a plausible inference: a college or university can continue to increase minority enrollment and would very likely garner substantial, diversity-specific benefits from doing so.⁶⁰ Whether and how it

57. *Grutter v. Bollinger*, 539 U.S. 306, 331–332 (2003).

58. *Id.* at 332.

59. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977). Again, such discrimination need not be intentional, but may be structural. *See also supra* note 45 and accompanying text.

60. Under a distributional curve in which the mean enrollment represents exactly proportional representation vis-à-vis the applicant pool, 95% of actual enrollment figures should fall within two standard deviations. More than two standard deviations consequently indicate a statistically large variance from proportional representation, as

intentionally chooses to *pursue* critical mass will depend, in part, on how a college or university chooses to weigh the relative importance of other applicant factors, such as traditional academic qualifications. In turn, how the university weighs these factors will remain constitutionally constrained.⁶¹ However, for the sole purpose of determining whether or not a university has achieved critical mass, such statistical analysis is probative *without* making differentiations in academic qualifications.

Second, just as Title VII's quantitative framework may be used to justify workplace affirmative action without effectively creating quotas, the same framework in education law also avoids this constitutionally problematic extreme, which the *Grutter* Court defines as a "certain fixed number or proportion of opportunities" that are "reserved exclusively" for individuals belonging to specific groups.⁶² In the workplace affirmative action context, an employer may implement a program when there is a certain manifest imbalance, tied to around two standard deviations or greater. However, even taking note of this quantitative imbalance—which the Court *requires* before implementing a program—an employer does not necessarily, and constitutionally cannot, pursue a specific number or proportion of minorities. An employer must still implement a process that does not "trammel the interests" of non-minorities, entailing that the employer must not manipulate the evaluation of applicants to reach a specific number or range (and that it is possible, depending on the applicant pool, for a large standard deviation to remain ultimately).⁶³ Similarly, in the college and university context, *Grutter* itself explicitly affirms that it is possible for colleges and universities to have minimum numerical *aspirations* in mind; it merely cannot engineer the process to *ensure* a specific number or range. For example, as the Court recognizes, "10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of

well as a 95% or greater probability that a result did not happen by chance (i.e., that the enrollment in a given year reflects a real gap between actual and proportional enrollment). Large negative variances from proportional representation should reasonably indicate that a university has not reaped the full benefits of diversity. *See Hazelwood Sch. Dist.*, 433 U.S. at 308, n. 14. Even in states where minority representation appears significant on its face, particularly sizeable variances are more likely to indicate that a university has not yet attracted certain distinctive perspectives from *within* minority groups.

61. This argument addresses another potential objection to such statistical analysis: that comparing applicant and enrollment figures does not account for admission rates. Since the applicant-admitted student ratio is often worse for minorities, it is also difficult to argue that a university admits (but does not enroll) a critical mass of minorities. *See infra* note 83 and accompanying text.

62. *Grutter*, 539 U.S. 306, 335 (2003).

63. *See Johnson v. Transp. Agency Santa Clara Cnty. Cal.*, 480 U.S. 616, 630 (1987). The *Johnson* Court stresses that workplace affirmative action programs must not turn into quotas, excluding some individuals from consideration for particular slots, but can authorize "that consideration be given to affirmative action concerns when evaluating qualified applicants." *Id.* at 638.

view.”⁶⁴ Therefore, considering any given level of statistical disparity, colleges and universities may decide that, at that particular point, they have not yet achieved their goals, while still not manipulating the process to ensure that it arrives at a specific point.

Parents Involved v. Seattle School District No. 1, a post-*Grutter* case, is additionally instructive. Here the Court struck down a facially race-conscious plan designed to achieve diversity in public high schools by assigning students to schools on the basis of their race when any given school deviated from a specific percentage target (as determined by a school district’s demographics), effectively allowing race to supersede all other factors automatically except for sibling attendance.⁶⁵ In striking down this plan, Chief Justice Roberts’ plurality opinion agreed that a “defined range set solely by reference to the demographics of the respective school districts” was impermissible.⁶⁶ However, Justice Kennedy, who was the decisive fifth vote in striking down the plan, did not sign on to this particular opinion.⁶⁷ While Justice Kennedy agreed that the plan was unconstitutional because, unlike the program in *Grutter*, it gave predominant and automatic weight to race individually, he explicitly stated that a more “general recognition of the demographics,” as well as “tracking enrollments, performance, and other statistics by race,” would still be permissible in pursuing diversity—an idea similar to this Article’s proposed framework.⁶⁸ *Parents Involved* further ties *Grutter* to employment law, affirming diversity not only for what it contributes to varied student exchange, but also for the societal importance of equal opportunity access for minorities, regardless of legally cognizable discrimination.⁶⁹ In these ways, *Parents Involved* affirms the possibility of conceiving *Grutter*’s critical mass quantitatively, still barring rigid number or percentage requirements but nevertheless entailing that some attention be paid to such figures to provide concrete guidance to critical mass.⁷⁰ Providing an even more concrete framework of evaluation, the case further rebuffs the criticism that critical mass affords excessive deference and allows colleges and universities to pursue diversity indefinitely.

64. *Grutter*, 539 U.S. at 335. The Court also quotes Justice Powell’s controlling opinion in *Bakke*: “there is of course ‘some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.’” *Id.* at 336.

65. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711–12 (2007).

66. *Id.* at 729.

67. See *id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment).

68. *Id.* at 789.

69. See *id.* at 787–88 (“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race”).

70. See *supra* text accompanying notes 47–48.

In summary, a quantitative analysis of critical mass is not only allowed by and fully consistent with *Grutter* itself, but also supported by direct comparison to employment law. After all, there is some merit to the criticism that a qualitative framework alone for evaluating race-conscious programs is insufficient to govern the pursuit of diversity. Not only does this framework theoretically allow colleges and universities to pursue diversity indefinitely, but it is also inapplicable to evaluating race-neutral programs' achievement of diversity, since evaluating the predominance of race for one applicant cannot equate to evaluating the overall benefits of diversity when race is not considered in admissions. A quantitative component of critical mass resolves both of these problems. It makes the analysis of diversity much more *rigorous*, but not *rigid* in the sense that it becomes a quota. A clearer conception of critical mass not only "saves" *Grutter* by placing more measurable constraints on the pursuit of diversity, but also opens the door to evaluating the achievement of this interest under regimes where race-conscious programs may not exist at all—most notably, percent plans.

B. Evaluating Diversity Under Percent Plans

With this framework in mind, one must now ask: do percent plans sufficiently engender critical mass? Or can one infer from the statistics that percent plans are limited in achieving the diversity interest? Ultimately, in the percent plan states of Texas, Florida, and California, the numbers show that there remain sizeable racial disparities in student body composition, both within and across colleges and universities. These gaps evidence the inability of percent plans to foster the benefits of diversity (and thus critical mass) sufficiently.

There are several levels at which to apply this framework to evaluate whether colleges and universities have sufficiently achieved diversity. One is to evaluate the degree of diversity within each institution. A particular method of doing so would be to analyze campus-wide enrollment; a college or university with few minorities would be hard pressed to claim that it is reaping the benefits of diversity.⁷¹ Another method would be to evaluate the student composition within segments of a university, for example, specific programs within a university. On the one hand, one might argue that a broadly diverse campus is sufficient to reap the benefits of diversity. *Grutter* itself and its companion case *Gratz v. Bollinger* did not look at

71. Empirical research shows that diversity benefits these goals. See, e.g., Steve Chatman, *Does Diversity Matter in the Education Process? An Exploration of Student Interactions By Wealth, Religion, Politics, Race, Ethnicity and Immigrant Status at the University of California*, CTR. FOR STUDIES IN HIGHER EDUC. 1, 12-13, 2008. This University of California-wide study found that, despite being a very small percentage of the student population, African Americans surveyed reported a 73% rate of interactions resulting in increased understanding of another's point of view. Hispanics reported a 68% rate of such interactions. See *id.*

diversity within specific segments of a school.⁷² On the other hand, *Grutter* also stresses the importance of diversity specifically in “classroom discussion,” as well as the “robust exchange of ideas.”⁷³ Thus, classroom-level diversity is important because it perpetuates not merely cross-racial understanding, but also the ideational exchange itself that is paramount to any university’s goal.⁷⁴ Without such diversity, the benefits of diversity will not flow in an important sense, particularly not to academic areas that have been traditionally dominated by certain groups and where such diversity would likely be able most to contribute to ideational exchange.⁷⁵ Finally, the broadest level at which to evaluate diversity is *across* colleges and universities. Such analysis is useful because it raises inferences about critical masses throughout an entire college or university system.

Percent plans are ultimately limited in achieving diversity within many colleges and universities. These limitations manifest themselves, first, in the persistent campus-wide disparities, particularly at flagship colleges and universities where most students seek admission. In Texas, the University of Texas-Austin exemplifies this phenomenon. In 2009, enrollment at UT-Austin was 4.6% black and 20% Hispanic.⁷⁶ Apart from any facial conclusions one could draw from this data, particularly from the former statistic, applying the statistical methods from employment law places these figures in the best context. With blacks and Hispanics comprising 7.8 and 21.5%, respectively, of the total applicant pool,⁷⁷ there are greater than six standard deviations between actual enrollment of these minorities and enrollment proportional to the applicant pool.⁷⁸ This statistic is large enough to create a robust inference that, despite the percent plan in Texas, this university in all likelihood has not yet reached the point of critical mass, particularly for blacks. It is also interesting to note, in comparing

72. *Grutter* concerned only the University of Michigan Law School. See *Grutter v. Bollinger*, 539 U.S. 306, 317–18 (2003). *Gratz* concerned the University’s undergraduate component as a whole. See *Gratz v. Bollinger* 539 U.S. 244 (2003).

73. *Grutter*, 539 U.S. at 329–30.

74. *Id.* at 324, 330. That the constitution recognizes “expansive freedoms of speech and thought” in the university setting was affirmed in *Parents Involved* in the plurality opinion, which distinguishes primary education from higher education. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723–25 (2007).

75. Deborah Malamud discusses the disproportionately large representation of certain groups in certain fields. See Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 965 (1997).

76. See OFFICE OF INFORMATION MANAGEMENT AND ANALYSIS, UNIVERSITY OF TEXAS AT AUSTIN, STATISTICAL HANDBOOK 2009–10, tbl. S 21 (2010).

77. See *id.*

78. Blacks and Hispanics comprised 29% of the applicant pool, and there were 7,148 total enrollees (minus those of unknown race). See *id.* Consequently, one standard deviation consists of 38 students. If the number of minority enrollees were proportional to the applicant pool, they would comprise 2,056 enrollees. In actuality, they comprised 1,814 enrollees. See *id.*

enrollment before UT-Austin reinstated affirmative action to enrollment in the years prior to Texas's affirmative action ban, racial diversity stagnated or declined in *absolute* numbers,⁷⁹ despite slight increases in the proportion of minority applicants.⁸⁰ Perhaps unsurprisingly, statistics also indicate that racial diversity is not the only type of diversity hampered in Texas flagships like UT-Austin.⁸¹ The full benefits of having many students from lower socioeconomic backgrounds, regardless of race, similarly do not appear to accrue.⁸²

California and Florida also fall short in achieving diversity, particularly within flagship institutions. Even among those eligible for admission under the California and Florida percent plans, blacks and Hispanics have lower rates of admission to these states' flagship colleges and universities, noting again that these plans do not guarantee admission into any particular college or university.⁸³ Perhaps unsurprisingly, these states' flagship institutions have maintained lower admissions and enrollment rates for these minority groups overall (and again for those of lower socioeconomic

79. At UT-Austin, total black enrollment decreased between 1989 and 2004, and Hispanic enrollment only increased by 100 despite large increases in the Hispanic population. *See* Fisher v. University of Texas at Austin, 631 F.3d 213, 244 (5th Cir. 2011).

80. From 1990 to 2001, the black and Hispanic combined proportion of applicants to UT-Austin increased from 19.9 to 20%. *See* OFFICE OF INSTITUTIONAL STUDIES, UNIVERSITY OF TEXAS AT AUSTIN, STATISTICAL HANDBOOK 2001–02, 34 (2002); OFFICE OF INSTITUTIONAL STUDIES, UNIVERSITY OF TEXAS AT AUSTIN, STATISTICAL HANDBOOK 1990–91, tbl. E 19 (1991).

81. In analyzing the period from 1993 to 2003, Koffman and Tienda find that Texas's percent plan did not change application rates from poorer high schools and that at Texas's two flagships, UT-Austin and Texas A&M, top ten percent applicants consisted mainly of students from wealthier high schools. *See* Dawn Koffman & Marta Tienda, Missing in Application: The Texas Top 10% Law and Campus Socioeconomic Diversity (March 2008) (unpublished thesis, Princeton University) (on file with Office of Population Research, Princeton University).

82. Recent empirical research underscores the value of increasing socioeconomic diversity. *See* CHATMAN, *supra* note 71, at 9 (“Across the UC system, 41% of all undergraduates reported that they often increased in understanding of other viewpoints through interactions with students who were from a different social class”).

83. In California, while the average admission rate into Berkeley for an ELCer was 56.7% in 2009, the admission rate for blacks and Hispanics, respectively, was 54.8 and 45.6. The average admission rate into UCLA for an ELCer in the same year was 59.9%, while it was 54.8 and 45.7 for blacks and Hispanics, respectively. *See* *University of California: StatFinder*, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, available at <http://statfinder.ucop.edu/statfinder/drawtable.aspx?track=1>. In Florida, the acceptance rate for Talented Twenty students to Florida State University in 2007 was 76%; for blacks and Hispanics, it was 46.7 and 69.9%, respectively. At the University of Florida, while the general Talented Twenty acceptance rate in the same year was 64.1, admissions for blacks and Hispanics, respectively, were 75.6 and 60.1. *See* *Talented 20 (Prior Year) Admission and Registration Headcounts and Percentages: By Race and University, Summer and Fall 2007*, FLORIDA BOARD OF GOVERNORS (available at <http://www.flbog.edu/resources/factbooks/factooks.php>).

status).⁸⁴ These rates translate to statistically significant disparities when one compares them to minority applicant numbers. For example, in 2009, the University of California-Berkeley's black enrollment was 2.9%, and Hispanic enrollment was 10.9%.⁸⁵ Beyond the facially small size of minority enrollment (e.g., less than 15% black and Hispanic enrollment), these figures seen in the context of the composition of applicants makes an even stronger case for the lack of diversity as there are greater than eleven standard deviations between actual enrollment of blacks and Hispanics and enrollment proportional to the applicant pool.⁸⁶ Such statistical disparities are gross enough to create the inference that, at whatever point these flagships achieve critical mass, they have very likely not reached that point even with percent plans. Therefore, this creates a strong inference that these institutions would gain substantial benefits from pursuing still greater diversity.⁸⁷ Lastly, considering increases in the proportion of black and

84. In California, Berkeley and UCLA are the most selective colleges in the UC system, with a general admissions rate of 21.6 and 21.9, respectively, in 2009. However, the admissions rates for blacks were 14.4 and 15.1 into the two institutions, respectively; for Hispanics, the rates were 16.7 and 15.6. For students with parental income of less than \$40,000, the rates were 17.1 and 17.4, respectively. See *University of California: StatFinder*, *supra* note 83. In addition, socioeconomic diversity, as measured by Pell Grant recipients in each campus, is lower at the flagship universities in California. See OFFICE OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA, UNDERGRADUATE ACCESS AND EXCELLENCE AT UC: OUTLOOK FOR 2010–11, 2 (2010). Research has also shown that affirmative action bans tend to have a stronger impact on the more selective universities, including in California. See Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, REV. OF ECON. & STATISTICS (forthcoming 2011), available at http://www9.georgetown.edu/faculty/plh24/hinrichs_aff_action.pdf. Florida's flagship universities, including Florida State University and the University of Florida, display similar demographics in total enrollment. At Florida State University, black enrollment decreased from 12.34% of the student body in 1999 to 10.16% in 2010, though Hispanic enrollment increased from 7.11% to 12.34% in the same time frame. See *Enrollment Headcount*, OFFICE OF INSTITUTIONAL RESEARCH, FLORIDA STATE UNIVERSITY, available at <http://ir.fsu.edu/student/headcount.htm>. On the other hand, at the University of Florida, both black and Hispanic enrollment increased from 1998 to 2009. See *Enrollment by Level, Gender, and Ethnicity: 1997–2009*, UF OFFICE OF INSTITUTIONAL PLANNING AND RESEARCH, UNIVERSITY OF FLORIDA (2010), available at <http://www.ir.ufl.edu/factbook/facti.xls>. However, interestingly, enrollment from those with lower socioeconomic status is comparatively lower than underrepresented minority enrollment, at 23 versus 30%. Furthermore, underrepresented minority enrollment still lags behind the top private institution, the University of Miami, which still permits affirmative action. See THE EDUCATION TRUST, OPPORTUNITY ADRIFT: OUR FLAGSHIP UNIVERSITIES ARE STRAYING FROM THEIR PUBLIC MISSION, 3 (2010).

85. See *University of California: StatFinder*, *supra* note 83.

86. Blacks and Hispanics comprised about 22% of the applicant pool, and there were 4,146 total enrollees. See *supra* note 83. Consequently, one standard deviation consists of 27 students. If the number of minority enrollees were proportional to the applicant pool, they would comprise 899 enrollees. In actuality, they comprised 606 enrollees. See *id.* These statistics exclude applicants and enrollees of unknown race.

87. Such results also confirm earlier research on percent plans, research that

Hispanic applicants over time,⁸⁸ statistics show the marked contrast between recent minority enrollment and that from before the affirmative action ban. For example, black and Hispanic enrollment at Berkeley each were numerous percentage points higher at 6.0% and 14.9%, respectively, in 1996 shortly before California enacted its ban.⁸⁹

Finally, though there is a relative paucity of data on this subject, there is some evidence that racial disparities within colleges and universities manifest themselves at the classroom level as well. UT-Austin again best exemplifies this phenomenon. A UT-Austin study reported more classes with zero to one black or Hispanic students in the fall of 2002 in the absence of affirmative action, than in the fall of 1996 shortly before the affirmative action ban came into effect; in fact, 79% of classrooms in 2002 had zero to one black students, and 30% had zero to one Hispanic students.⁹⁰ Furthermore, as *Fisher* itself points out, “nearly a quarter of the undergraduate students in UT’s College of Social Work are Hispanic, and more than 10% are African-American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African-American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African-American.”⁹¹

Based on such evidence, Texas’s percent plan has not been sufficient in at least some settings to foster the type of diversity—that is, classroom diversity—that would most directly lead to the desired exchange of viewpoints. While applicant data is not accessible at this level, given the starkness of these facial disparities, even incremental increases in classroom diversity at UT-Austin would arguably yield substantial benefit. In addition to augmenting the variety of viewpoints within in-class discussion, such increases would help to break down academic and occupational stereotypes of minorities, which the percent plan overlooks and potentially perpetuates by maintaining barriers of access into certain intra-university colleges.⁹²

reached similar conclusions regarding the limited impact of percent plans on flagships. See CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT: HARVARD UNIVERSITY, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES (2003) (finding that percent plans are not effective in increasing or maintain minority enrollment in flagship institutions).

88. For example, at Berkeley from 1994 to 2009, the black and Hispanic combined proportion of applicants increased from 16.73 to 20.78%. See *University of California: StatFinder*, *supra* note 83.

89. Similarly, UCLA’s minority enrollment decreased in the same time period, with Hispanic enrollment falling from 18.0 to 17.1%, and black enrollment falling from 6.8 to 4.3%. See *id.*

90. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 225 (5th Cir. 2011). Assuming a class size of 30, these figures leave, for example, 79% of classrooms to be comprised of 0 to 3.33% black students.

91. *Id.* at 240.

92. See, e.g., Charles R. Lawrence III, *The Id, the Ego and Equal Protection*:

Evaluation *across* colleges and universities within the same state system provides additional evidence that percent plans have not achieved diversity adequately. In California and Florida, the proportion of minorities in these public university systems is low, particularly blacks. This fact is most evident when again applying the statistical methods that courts use to analyze disparate employment practices. Blacks comprised 3.8% of total enrollment in California in 2009 (23.8% blacks and Hispanics combined),⁹³ equating to greater than ten standard deviations between actual enrollment of blacks and Hispanics and enrollment proportional to the applicant pool.⁹⁴ Florida's figures are facially higher, with blacks comprising 13.6% of total enrollment in 2007 (31% combined).⁹⁵ However, this figure equates to sixteen standard deviations with respect to enrollment proportional to the applicant pool—a result that seems ironic given the greater proportion of minority enrollees as compared to California, but which the much greater proportion of minority *applicants* in Florida explains.⁹⁶ Even Florida's minority enrollment proportions fall below each minority group's proportions in the statewide applicant pool⁹⁷ and the general state population.⁹⁸ Thus, these statistically large disparities strongly suggest that many campuses and classrooms within these college or

Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 372 (1987) (stating that the exclusion of blacks from certain “jobs has been rationalized by a belief in their unsuitability for these roles.”); see also Marta Tienda, *College Admission Policies and the Educational Pipeline: Implications for Medical and Health Professions* (March 11, 2001) (unpublished thesis, Princeton University) (on file with Office of Population Research, Princeton University) (discussing the negative impact of affirmative action bans on underrepresented minorities in the medical field).

93. In California, blacks and Hispanics comprised 5.2 and 21.3%, respectively, of applicants in 2009. See *University of California: StatFinder*, *supra* note 83.

94. Blacks and Hispanics comprised about 26.5% of the applicant pool, and there were 33,061 total enrollees (minus those of unknown race). Thus, one standard deviation consists of 80 students. If the number of minority enrollees were proportional to the applicant pool, they would comprise 8,768 enrollees. In actuality, they comprised 7,899 enrollees. See *id.*

95. In Florida, blacks and Hispanics comprised 18.5 and 16.2%, respectively, in 2005. See *Admission and Registration Headcounts and Percentages by Type of Student and University, Summer and Fall 2005*, FLORIDA BOARD OF GOVERNORS (available at <http://www.flbog.edu/resources/factbooks/factbooks.php>).

96. Blacks and Hispanics comprised about 34.7% of the applicant pool, and there were 27,233 total enrollees. See *First-Time-in-College (FTIC) Admission and Registration Headcounts and Percentages*, *supra* note 95. Consequently, one standard deviation consists of 79 students. If the number of minority enrollees were proportional to the applicant pool, they would comprise 9,450 enrollees. In actuality, they comprised 8,232 enrollees. See *id.*

97. See *id.*

98. Each of California and Florida's black and Hispanic enrollment figures falls below its counterpart number in the general state population. Blacks and Hispanics make up 6.6 and 38.1%, respectively, of the California population, and 16.5 and 22.9%, respectively, of the Florida population. See U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS (2010), available at <http://quickfacts.census.gov/qfd/states/48000.html>.

university systems have not yet attained critical mass under percent plan regimes.

Further underscoring these disparities are comparisons to diversity in these states prior to their respective affirmative action bans. When compared only to diversity immediately prior to affirmative action bans, it may appear that percent plans have achieved diversity adequately. For example, in the California and Florida state college and university systems, comparisons of recent enrollment to enrollment immediately before the states' respective bans show increases in racial (and socioeconomic) diversity.⁹⁹ However, when comparing more recent enrollment to enrollment in the years prior to these bans,¹⁰⁰ there are stagnancies or even decreases in black enrollment,¹⁰¹ despite increases in the proportion of black applicants over time.¹⁰² Even increases in the proportion of Hispanic enrollment¹⁰³ have been outpaced by the increasing proportion of minority students in California and Florida high schools.¹⁰⁴

99. See, e.g., *Fundable Student Headcount by Part-Time/Full-Time, Gender, Race, and Level: Fall 2007*, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, available at <http://statfinder.ucop.edu/statfinder/drawtable.aspx?track=1>; *Fundable Student Headcount by Part-Time/Full-Time, Gender, Race, and Level: Fall 1997*, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, available at <http://statfinder.ucop.edu/statfinder/drawtable.aspx?track=1>.

100. This accounts for the possibility that the affirmative action bans adversely impacted enrollment of minority applicants admitted before the ban, as happened in Texas in 1996. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011).

101. In the University of California system, black enrollment was 3.67% of the total enrollment in 2009, a decrease from 4.235 in 1994. See *University of California: StatFinder*, *supra* note 83. In Florida, black enrollment was 13.6% of total enrollment in 2007, while it was 12% in 1994. See *State University System of Florida Facts and Figures: Enrollment*, BOARD OF GOVERNORS, STATE UNIVERSITY SYSTEM OF FLORIDA, available at <http://www.flbog.org/resources/factbooks/factbooks.php>.

102. In California, for example, from 1994 to 2009, the black and Hispanic combined proportion of applicants increased from 19.17 to 25.57%. See *University of California: StatFinder*, *supra* note 83 (Florida provides applicant data by race for only a limited number of years).

103. In the University of California system, Hispanic enrollment was 19.4% of total enrollment in 2009 and 15.2 in 1994. See *University of California: StatFinder*, *supra* note 83. In Florida, Hispanic enrollment increased from 12.4% in 1994 to 17.5% 2007. See *State University System of Florida Facts and Figures: Enrollment*, *supra* note 101.

104. According to the *Tampa Bay Times*, increased Hispanic enrollment in pre-college education has been largely responsible for increasing diversity in Florida's public universities. See Shannon Colavecchio, *A Decade of Gov. Jeb Bush's One Florida Has Seen Minority College Enrollment Rise*, TAMPA BAY TIMES (Dec. 14, 2009), available at <http://www.tampabay.com/news/politics/legislature/a-decade-of-gov-jeb-bushs-one-florida-has-seen-minority-college-enrollment/1058573>. However, these figures may largely reflect, not increasingly opportunity for minorities, but the changing demographics of the state. In fact, while Hispanic enrollment has increased over time, the *Orlando Sentinel* states that the increase in Hispanic high school graduates has outpaced college enrollment. See Scott Powers and Luis Zaragoza, *10 Years In, "One Florida" Posts Mixed Results for Minorities at Universities*, ORLANDO SENTINEL (Apr. 10, 2010), available at <http://articles.orlandosentinel.com/2010-04->

Although diversity on the statewide level in Texas fares somewhat better, it still shows significant disparities under the state's percent plan. While total Hispanic enrollment was 46% statewide in 2009,¹⁰⁵ black enrollment was only 6.3% in the same year.¹⁰⁶ Apart from a facially low enrollment figure, the statistical disparity between black applicants (9% of the applicant pool)¹⁰⁷ and enrollment is large enough, representing fifteen standard deviations, to serve as significant evidence that Texas would likely gain substantial benefits from pursuing increased diversity.¹⁰⁸ In addition, although this 2009 enrollment figure is marginally better than the 4.5% black enrollment statistic from 1995 pre-affirmative action ban,¹⁰⁹ the black proportion of the applicant pool has also increased in the intervening years.¹¹⁰ Enrollment likewise still remains substantially below the state's black population, which has remained at 12% over two decades.¹¹¹

In summary, despite the existence of percent plans in Texas, California, and Florida, statistical evidence shows that these public college and university systems have likely not reached critical mass. Beyond "eyeballing" manifest disparities, statistical analysis—and specifically the frequent large, even double-digit standard deviations between applicants and enrolled students—creates a strong inference that percent plan states would continue to garner substantial, diversity-centric benefits from engendering greater minority enrollment.

10/news/os-one-florida-10-years-later-20100410_1_affirmative-action-florida-s-public-universities-graduates.

105. See THE UNIVERSITY OF TEXAS SYSTEM, OFFICE OF STRATEGIC INITIATIVES, ACCOUNTABILITY AND PERFORMANCE REPORT 2009–10 (2010).

106. See *id.*

107. See *First-time Undergraduate Applicant, Acceptance, and Enrollment Information for Summer/Fall 2009*, TEXAS HIGHER EDUCATION COORDINATING BOARD (2010).

108. There were 24,378 total enrollees in 2009. See *supra* note 96. Given the 9.0% black applicant pool, a standard deviation consists of 45 students. If the number of black enrollees were proportional to the applicant pool, they would comprise 2,204 enrollees. In actuality, they comprised 1,526 enrollees. See *id.*

109. See *Student Demographics: Undergraduate and Graduate Enrollment Fall 1992–1996*, THE UNIVERSITY OF TEXAS SYSTEM (last visited Sept. 10, 2012), available at <http://www.utsystem.edu/bus/ksr/FEB1997/Students97/UGEnrAll.html>.

110. Compare 2009's 9.0% figure with 1998's 5.25%. See *supra* note 107 and accompanying text; *First-time Undergraduate Applicant, Acceptance, and Enrollment Information for Summer/Fall 1998*, Texas Higher Education Coordinating Board (2010).

111. See U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING (2010); U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING (1990), available at http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&q_r_name=DEC_1990_STF1_DP1&ds_name=DEC_1.

II. MECHANICS: ARE INDIVIDUALIZED ASSESSMENTS NECESSARY TO ACHIEVE DIVERSITY?

Percent plan states have failed to achieve a sufficient level of diversity. Before declaring them as not workable, however, it is first important to determine *why* they have failed. The answer to this question will establish whether states, including those that might consider using percent plans in the future, need only properly calibrate these plans, or whether these plans are fundamentally inadequate to achieve the diversity interest. The former would demonstrate that percent plans can still be a workable, race-neutral alternative. The latter would support, on a more universal level, the *Grutter* Court's conjecture that individualized assessments may be necessary to assemble diverse student bodies.¹¹²

A. Percent Plan Thresholds and Restrictions

The most basic hypothesis for why percent plans have failed to achieve sufficient diversity is that their percentage thresholds and restrictions are too stringent. Unpacking this hypothesis, percent plans are not inherently inadequate, but need proper calibration to work.

Percent plan states themselves are aware of the limitations that the percentage threshold can place on diversity. Precisely to address this issue, California changed its plan in 2009, altering the threshold from the top 4% to the top 9%, effective in 2012.¹¹³ Since the governments of all three states have continued to evaluate the effectiveness of their respective plans,¹¹⁴ it may be that over time all will continue to increase the threshold of these plans as needed to produce greater diversity. Given that California's change has not come into effect (as of the time this article was authored), it is not yet possible to rule out that, at least in California, proper percent plan calibration could produce critical mass. It is worth noting that, despite even less stringent thresholds in Texas and Florida (10% and 20%, respectively),

112. See *supra* note 23 and accompanying text.

113. In February 2009, California changed the eligibility requirements from the top 4% in each school, to the top 9% in one school or statewide, the latter of which factors in standardized test scores in addition to school rank. See OFFICE OF STRATEGIC COMMUNICATIONS, UNIVERSITY OF CALIFORNIA, UC REGENTS ADOPT CHANGES TO FRESHMAN ELIGIBILITY (2009), available at http://www.universityofcalifornia.edu/news/eligibilitychanges/documents/eligibility_factsheet.pdf.

114. Texas commissions annual studies on its plan's effectiveness. See, e.g., Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 225–26 (5th Cir. 2011). California and Florida also have mechanisms to reevaluate their respective plans. In Florida, the One Florida Initiative under the Board of Governors is charged with, among other tasks, consistently overseeing its percent plan. See PATRICIA MARIN & EDGAR K. LEE, THE CIVIL RIGHTS PROJECT: HARVARD UNIVERSITY, APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA(2003). In California, the Board of Regents oversees its percent plan. See *Eligibility in the Local Context*, *supra* note 17.

these states have not yet sufficiently achieved diversity either. Nevertheless, it may be that all three states need only adjust their thresholds further.

On the other hand, a state's ability to alter their percent plan thresholds likely has limits. Perhaps the most significant limiting factor is the resource capacity of colleges and universities to enroll all students that percent plans automatically admit. The crowding at UT-Austin that automatic admission has caused exemplifies this risk; this crowding has actually led some to suggest that Texas's percentage threshold be *more* stringent, moving for example to a 4% threshold as in California¹¹⁵—though California itself will be moving to a 9% threshold precisely to address the limitations of its initial plan.¹¹⁶ High school student population increases may further limit this strategy to achieve greater diversity. If the number of high schools grow and states are forced to admit more students automatically, universities will need greater resource capacity to enroll all percent plan admits even at current percentage thresholds.¹¹⁷

This resource capacity problem limits another adjustment that states could make to their percent plans to increase diversity: loosening restrictions to flagship institutions and programs. As earlier stated, in Florida and California,¹¹⁸ percent plan admittees are not guaranteed admission into their first choice of college or university, ultimately stymieing percent plans' impact on certain flagship institutions. Meanwhile, Texas percent plan admittees *are* guaranteed admission into their first choice of college or university, but, as at UT-Austin, they are still not guaranteed admission into the various competitive intra-university colleges on campus.¹¹⁹ Thus, to gain entrance into certain intra-university colleges, students under any of these percent plans must still succeed under the traditional evaluation methods that percent plans were meant to circumvent, limiting these plans' ability to engender diversity within particular institutions.¹²⁰

Despite low minority enrollment within flagship institutions and certain competitive admissions programs, states face significant limitations in loosening their restrictions on access, largely because some colleges and universities are already dealing with crowding from percent plan admissions. To address this resource capacity issue, for example, the Texas legislature in 2009 limited the state's percent plan to fill only 75% of the

115. See, e.g., Steven Thomas Poston II, *The Texas Top Ten Percent Plan: The Problem It Causes for the University of Texas and a Potential Solution*, 50 S. TEX. L. REV. 257 (2008).

116. See *supra* note 113 and accompanying text.

117. See Poston, *supra* note 115.

118. See *supra* note 17 and accompanying text.

119. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 240 (5th Cir. 2011).

120. See *id.*

slots at UT-Austin.¹²¹ Though preserving current statewide diversity by not scaling back the 10% threshold, this solution does not help the representation of minorities at this particular flagship. Meanwhile, at the University of Florida, percent plan admittees already compose 98% of each class, even though with the design of Florida's percent plan, the university already does not admit every percent plan-eligible applicant.¹²² Therefore, school resource capacities also limit the loosening of access restrictions to produce critical mass within specific colleges and universities.

Nevertheless, one could argue that these limitations are too speculative, and that further adjustments of percentage thresholds and restrictions could still result in improved outcomes. Still, one may wonder: why have percent plans not *already* achieved a greater level of diversity? With the existence of majority-minority schools, should not more minorities be automatically admitted into at least one state college or university even at the current percentage thresholds and restrictions? The next section explores percent plans' assumption with respect to majority-minority schools, the one on which these plans most greatly depend.

B. High School Heterogeneity and Minorities in the Top "X" Percent

In circumventing *Grutter*'s requirement for race-conscious admissions—that it “be flexible enough to consider all pertinent elements of diversity”¹²³—a percent plan surrenders the flexibility to control racial diversity. Percent plans have direct control over only one type of diversity – that is, geographical diversity, as every school across the state will have percent plan admittees.

Given this feature of their design, another potential reason that percent plans have been inadequate is that, in the first place, they may incorrectly anticipate the number of minorities who will ultimately qualify for admission through the plan. This possibility would thwart the key expectation of percent plans that many minorities will be able to qualify for admission because they will inevitably place on top at majority-minority schools, even if they might be less competitive compared to the overall applicant pool.¹²⁴ If percent plans correctly estimate the number of minorities who will qualify at current thresholds, they may not be inherently ineffective. To reach critical mass, their thresholds and restrictions would simply need adjustment, albeit not so substantially that it

121. See Scott Jaschik, *Texas Limits 10% Admissions*, INSIDE HIGHER ED (Jun. 1, 2009, 3:00 AM), <http://www.insidehighered.com/news/2009/06/01/texas>.

122. See *Talented 20 (Prior Year) Admission and Registration Headcounts and Percentages*, *supra* note 83; *Admission and Registration Headcounts and Percentages by Type of Student and University, Fall 2007*, FLORIDA BOARD OF GOVERNORS (2008).

123. *Grutter*, 539 U.S. at 334 (citation omitted).

124. See *supra* note 13 and accompanying text.

triggers the possible resource capacity problem.¹²⁵ If, however, these estimates are already wrong, it becomes doubtful that even adjusting these thresholds and restrictions would increase diversity. Percent plans do accurately foresee the existence of many majority-minority schools. In fact, between 33% and 44% of public high schools in the three percent plan states are majority-minority.¹²⁶ However, these plans may be incorrect to assume that those who ultimately rank at the top of these schools are minorities, given that there are few schools that are perfectly homogeneous.¹²⁷

It thus bears noting a potentially important and ironic caveat to percent plans. Given their dependence on majority-minority schools, it follows logically that, if there is great diversity in student background within high schools, these plans could be less effective in achieving diversity in colleges and universities. This possibility arises in several ways. On the one hand, research suggests that because of discrimination, not merely structural, but even by educational actors themselves, minorities regularly may not have access to the same educational opportunities that help students not just to perform well on standardized exams, but also to compete with their own classmates for top class rankings.¹²⁸ These impediments also frequently elude capture by traditional socioeconomic

125. See *supra* Part II–A.

126. In Texas, 44.36% of the schools are composed of at least 60% non-white students. See Marta Tienda & Sunny Xinchun Niu, *The Impact of the Texas Top 10 Percent Law on College Enrollment: A Regression Discontinuity Approach*, 29 J. POL'Y ANALYSIS & MGMT. 84, 100 (2010). In California and Florida, 41.2% and 32.96% of the schools, respectively, are composed of at least 60% black or Hispanic students. See *Common Core of Data*, U.S. DEPARTMENT OF EDUCATION (last visited Nov. 1, 2011), available at <http://nces.ed.gov/ccd/>.

127. For example, in the percent plan states, only between 12.5% and 14.5% of schools are at least 90% black and Hispanic. See *Common Core of Data*, *supra* note 126.

128. For example, there is strong evidence that discrimination by school officials against minorities is prevalent and even systematic, even if unconscious. See, e.g., Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1317–21 (1995). In poor, predominantly minority urban school systems, administrators are more wary of approaching students who appear to be “unmanageable” in the large classrooms. See Lisa Delpit, *The Silenced Dialogue: Power and Pedagogy in Educating Other People's Children*, 58 HARV. EDUC. REV. 280, 283 (1988). In addition, the negative stereotypes of African-Americans as less capable and more disruptive provide teachers a heuristic for interpreting the everyday behavior of black children. See Lawrence, *supra* note 92 at 339. A number of studies have also shown teacher bias toward minority students. See SONIA NIETO, AFFIRMING DIVERSITY: THE SOCIOPOLITICAL CONTEXT OF MULTICULTURAL EDUCATION 20–33 (1991). These biases affect teacher perceptions concerning every interaction, and may lead teachers to overreact to small disruptions by African-American students. See DARLENE POWELL HOPSON & DEREK S. HOPSON, DIFFERENT AND WONDERFUL: RAISING BLACK CHILDREN IN A RACE CONSCIOUS SOCIETY 150–52 (1970). Cf. JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE (1995).

variables, such as parental income.¹²⁹ On the other hand, one might argue that racial minority status does not ubiquitously disadvantage an applicant, as, for example, socioeconomic status does. Even in this case, however, percent plans are *still* statistically less likely to ensure a diverse student body in any year if most high schools are racially heterogeneous. In contrast, if the vast majority of at least some schools are comprised of mostly minority students, it is more certain that a percent plan will admit minority students.

Were majority-minority high schools perfectly or near perfectly homogeneous, this caveat of percent plans would not matter, and colleges and universities would achieve diversity while circumventing the need to acknowledge any racial disparities within high schools or their possible causes. There is evidence, however, that because even the most racially homogeneous schools display some heterogeneity, percent plans cannot circumvent the need to consider race on an individual level.

To begin, evidence shows that percent plans have actually encouraged students to choose less competitive high schools, regardless of the racial composition of the school, precisely to take advantage of the percent plan.¹³⁰ On the one hand, percent plans may be an impetus for some integration rather than persistent *de facto* segregation. Some anticipated that percent plans would incentivize the latter, with the expectation that more minorities would choose to stay in majority-minority school districts to increase their chances at college and university acceptance.¹³¹ On the other hand, ironically, such integration increases the pure statistical likelihood that minority students will not be in the top percent cohort. Second, there is evidence that in practice high school heterogeneity disrupts the key assumption of percent plans. For example, survey data from Texas shows that white and Asian students in majority-minority high schools are likelier than their black and Hispanic classmates to graduate in the top 10%.¹³² Across the percent plan states, the uniformity of academic profiles within any given statewide cohort of percent plan admittees also calls into question whether these plans work as intended in accounting for local context.¹³³

129. See Malamud, *supra* note 75.

130. See Julie Berry Cullen et al., *Jockeying for Position: Strategic High School Choice Under Texas' Top Ten Percent Plan* (Nat'l Bureau of Econ. Research, Working Paper No. 16663, 2011).

131. See, e.g., Benjamin Forest, *A Policy That Depends on Segregation*, THE NEW YORK TIMES, Mar. 23, 2003, at A11.

132. See Tienda & Niu, *supra* note 13 (finding that it is not segregation, but concentrated disadvantage that inhibits minorities in gaining admission through the Texas percent plan). This data is unavailable for California and Florida.

133. Analyzing these academic profiles, for example, Tienda et al. find that most candidates admitted to selective universities in Texas such as UT-Austin would likely have been admitted without the plan. See MARTA TIENDA ET AL., CLOSING THE GAP? ADMISSIONS AND ENROLLMENTS AT THE TEXAS PUBLIC FLAGSHIPS BEFORE AND AFTER

Additional statistics cast further doubt on who qualifies for percent plan admission from majority-minority schools. Tellingly, in every percent plan state, the proportion of percent plan admittees who are black or Hispanic falls sizably below the proportion of majority-minority schools.¹³⁴ Perhaps best underscoring the flawed assumption of percent plans, however, is the application of the statistical method for comparing expected and actual demographic outcomes in employment—appropriate because percent plans hinge precisely on expected demographic outcomes, specifically in majority-minority schools.¹³⁵ In Texas, for example, approximately 48% of students graduate from high schools with over 60% black and Hispanic students, and on average black and Hispanic students comprise 86% of student population in these schools.¹³⁶ These figures are substantial, and based on their product, one should expect around roughly 40% of top ten graduates to be minorities from these schools alone. In actuality, minorities from any Texas school *regardless* of racial composition comprise only 35% of top ten graduates.¹³⁷ This figure represents a double-digit standard deviation,¹³⁸ evidencing the limited capacity of the percent plan's key assumption towards engendering critical mass. The same statistical analysis of California produces similar results, finding another double-digit standard deviation between expected minority outcomes from majority-minority schools and actual minority outcomes from all schools.¹³⁹ Such

AFFIRMATIVE ACTION 30–31 (2003). Marin and Lee also find that, in Florida, most students do not need the assistance of the percent plan to gain admission into at least one state college or university. *See* MARIN & LEE, *supra* note 114.

134. In Texas, 39.79% of percent plan admits are black or Hispanic (2008), compared to 44.36% of public high schools being majority-minority. In Florida, the ratio is 30% black or Hispanic percent plan admits (2007) to 38% majority-minority schools; in California, the same ratio is 27.49% (2009) to 41%. For statistics on the proportion of percent plan admits who are black or Hispanic, *see* THE UNIVERSITY OF TEXAS SYSTEM, *supra* note 105; *Talented 20 (Prior Year) Admission and Registration Headcounts and Percentages*, *supra* note 83; *University of California: StatFinder*, *supra* note 83. For majority-minority school statistics, *see Common Core of Data*, *supra* note 126.

135. *See supra* note 13 and accompanying text.

136. *See Common Core of Data*, *supra* note 126.

137. *See First-time Undergraduate Applicant, Acceptance, and Enrollment Information*, *supra* note 107.

138. There were 23,232 top ten graduates in 2009, entailing a 41% estimate of 9,484 minorities from majority-minority schools, and a per-standard deviation value of 36 students. In actuality, there were 8,268 minorities from any Texas school. *See supra* note 107.

139. In California, 42% of students are from schools with over 60% minorities, and these schools, on average, are comprised of 82% minorities. *See Common Core of Data*, *supra* note 126. Given the total number of top four graduates, 13,197, one might expect about 4,570 minorities from these schools. In actuality, there are 4,103 top four minorities from any California school, representing 16 standard deviations. *See University of California: StatFinder*, *supra* note 83. In Florida, the total number of top twenty minority students exceeds the expected number of top twenty minorities from majority-minority schools. *See Talented 20 (Prior Year) Admission and Registration*

evidence further supports the proposition that, even in majority-minority schools, minorities are frequently not those whom percent plans admit (statistics also indicate that among non-minorities, those who are socioeconomically disadvantaged are also not those whom percent plans generally help).¹⁴⁰

One perhaps unintended consequence of percent plans is also worth noting, as they only exacerbate the displacement of minorities (and socioeconomically disadvantaged non-minorities) from the top ranks. Because percent plan admissions substantially limit the number of remaining slots, admission at the most popular flagship institutions has become increasingly difficult for even students who are right below the percentage threshold.¹⁴¹ Consequently, while percent plans implicitly recognize that minorities are less competitive on standardized metrics, for many of these minorities—that is, those not at the very top of class rankings—not only does the traditional system of evaluation still apply, but the competition also becomes much more intense.¹⁴²

Thus, the issue with percent plans is not that majority-minority schools do not exist. In the last decade, the proportion of majority-minority schools actually has increased in all three percent plan states, but the proportion of percent plan admittees who are underrepresented minorities has not risen accordingly.¹⁴³ The issue, instead, is that percent plans cannot account for

Headcounts and Percentages, *supra* note 83. Data on the actual number of top twenty minorities from these majority-minority schools is unavailable.

140. In Florida, for example, there is evidence that few white percent plan eligible students are those who actually needed the plan's guarantee to gain admission. In 2000, of the percent plan eligible applicants with GPAs falling below 3.0—applicants that, it can be inferred, faced resource deficiencies—only 18% were white. *See* MARIN & LEE, *supra* note 114. In California, where socioeconomic data for percent plan admits is available for certain schools, statistics point to the same phenomenon: in 2009, only 20.85% of percent plan admits to Berkeley with annual family incomes of less than \$40,000 were not black or Hispanic. This figure was 26.2% for UCLA. *See University of California: StatFinder*, *supra* note 83.

141. Regarding the University of Texas, *Fisher* states that “[n]either the record nor any public information released by the University disclose what portion of that total applicant pool were Texas residents, but if we assume that proportion of applicants from Texas matches the 90% of admissions slots reserved for Texas applicants, one can estimate that there were 24,940 Texas applicants. Subtracting the 8,984 students admitted under the Top Ten Percent Law yields an estimate of 15,956 applicants for 1,216 seats, or an acceptance rate of approximately 7.6%.” *Fisher v. University of Texas at Austin*, 631 F.3d 213, 241, n.5 (2011). As mentioned earlier, the University of Florida's percent plan admits compose a vast majority, 98%, of the class. *See supra* note 122 and accompanying text.

142. *See* RITA BARR, HOUSE RESEARCH ORG., TEX. HOUSE OF REPRESENTATIVES, FOCUS REPORT: SHOULD TEXAS CHANGE THE TOP 10 PERCENT LAW? 4 (2005).

143. *Compare supra* note 139 *with* statistics from earlier years: in California, 19.42% of percent plan admits were black or Hispanic (2001), while the proportion of majority-minority schools was 23.27. In Florida, the ratio was 29.32% (2003) to 17.65; in Texas, 30.1% (2002) to 25.44. For percent plan admit statistics, *see* THE UNIVERSITY OF TEXAS SYSTEM, *supra* note 105; *Talented 20 (Prior Year) Admission and*

heterogeneity in individual backgrounds that typifies even racially homogeneous schools. Percent plans would work only if there is even greater *de facto* segregation than there already is. Consequently, even as they contextualize applicants as narrowly as possible without considering them individually, percent plans cannot circumvent the issue of racial disparities in achievement, whatever their cause.

Finally, it is necessary to note that, regardless of their restrictions or percentage thresholds, percent plans will face the issue discussed above. In other words, increasing these thresholds would likely not yield as great an increase in minority admittees as would be expected, at least not until the threshold rises to admit more than relatively small fractions of students in each school. In that case, however, colleges and universities would then face the over-enrollment and resource capacity problem. A probative example underlying the impracticality of adjusting percent plans to achieve critical mass: in 2009, to bring UT-Austin's minority enrollment from six standard deviations of fully proportional enrollment to within two¹⁴⁴ would have required Texas to increase its percent plan threshold to roughly 11%, given several factors (i.e., the minority proportion of percent plan-qualifying students, the proportion of all percent plan-qualifying students who ultimately enroll in a college or university, and the proportion of percent plan enrollees who choose UT-Austin).¹⁴⁵ While this one percentage point difference seems small, given the popularity of UT-Austin among percent plan admittees,¹⁴⁶ this figure would have yielded an

Registration Headcounts and Percentages, *supra* note 83; *University of California: StatFinder*, *supra* note 83. For majority-minority school statistics, see *Common Core of Data*, *supra* note 126.

144. Each standard deviation is 38 students, entailing 152 minority students to move from six to two standard deviations. See *supra* note 78. Two standard deviations raise a strong inference that a college or university is at or near critical mass. See Tienda and Niu, *supra* note 13.

145. This calculation for this percent plan threshold is as follows: (total number of high school graduates * percent plan threshold * minority proportion of percent plan admits) = (current number of minority percent plan-eligible students + (four standard deviations / [proportion of percent plan eligible students that ultimately enroll * proportion of percent plan enrollees that enroll at UT-Austin])). The total number of high school students is approximately 232,230. See *supra* note 138. The minority proportion of percent plan admits is 35%. See *supra* note 137 and accompanying text. The current number of minority percent plan-eligible students is 8,268. See *supra* note 138. Four standard deviations are 152 students. See *supra* note 140. The proportion of percent plan eligible students that ultimately enroll in any university is 33%. See THE UNIVERSITY OF TEXAS SYSTEM, *supra* note 105. The proportion of percent plan enrollees that enroll at UT-Austin is 80.4%. See *infra* note 153. For the sake of argument, this calculation assumes that, if a percent plan threshold increased, particularly by one percentage point, both the minority proportion of percent plan admits and the proportion of percent plan eligible students that enroll would stay roughly the same.

146. See *infra* note 153.

additional 1,577 students at UT-Austin,¹⁴⁷ representing a significant 21% increase in *total* enrollment.¹⁴⁸ Given such findings, percent plans in practice support the proposition that individualized assessments are necessary to achieve sufficient diversity.

C. The Feasibility of Individualized Assessments

However much percent plans have contributed to diversity, they are fundamentally insufficient to achieve critical mass. Nevertheless, before concluding that percent plans are an unworkable alternative to the individualized assessments that affirmative action undertakes—and, consequently, that affirmative action should remain generally permissible—it is necessary to address a final counterargument. That is, individualized assessments may be able to achieve greater diversity only by placing impermissible weight on race, since percent plans would arguably capture most, if not all, academically qualified minorities. Put differently, percent plans may work well enough to admit a similar number of minorities that would have been admitted under the optimum race-conscious program that does *not* subjugate non-racial factors such as academics. Thus, even though percent plans are fundamentally insufficient to achieve critical mass—and even though percent plan/affirmative action comparisons in Part I show that affirmative action can achieve substantially greater diversity¹⁴⁹—it is unwise to conclude that percent plans are a constitutionally insufficient alternative to individualized assessments, and/or that such assessments are feasible notwithstanding the prospect of these plans.

Workability analysis must address the following question: is it actually possible to create individualized assessment regimes that engender greater diversity but do not weigh race to an impermissible degree? UT-Austin provides a timely opportunity to answer this question. Acknowledging that percent plans are not a diversity panacea, UT-Austin, has chosen a unique approach of combining the percent plan with affirmative action. In contrast, California and Florida have continued their bans on affirmative action despite the resulting lower minority numbers,¹⁵⁰ instead relying solely on

147. This calculation is as follows: (total number of high school graduates * percent plan threshold * proportion of percent plan-eligible students that ultimately enroll * proportion of percent plan enrollees that enroll at UT-Austin) – (current number of percent plan enrollees at UT-Austin). For the first three numbers, *see supra* note 145. Multiplied together and with the percent plan threshold, they equate to 6,780 percent plan enrollees. The current number of percent plan enrollees at UT-Austin is 5,203, representing a difference of 1,577 additional students. *See THE UNIVERSITY OF TEXAS SYSTEM, supra* note 105.

148. Current enrollment at UT-Austin is at 7,242. *See THE UNIVERSITY OF TEXAS SYSTEM, supra* note 105.

149. *See* Part I–B.

150. *See supra* notes 99–104 and accompanying text.

percent plans and race-neutral measures to improve pre-collegiate education.¹⁵¹ Yet, since even before it became the subject of the *Fisher* case, UT-Austin has been accused precisely of excessively weighing race in individual assessments to make diversity gains beyond the Texas percent plan.¹⁵² Particularly considering the new limits on the proportion of UT-Austin students admitted through percent plans,¹⁵³ UT-Austin's affirmative action program compels analysis of percent plan workability, in light of the actual feasibility of adopting individualized assessments to engender greater diversity.

Before analyzing this program, it is first necessary to clarify what it means for an affirmative action program to place impermissible weight on race. Because such individualized assessments are facially race-conscious, they trigger strict scrutiny,¹⁵⁴ under which they must meet a compelling state interest, be narrowly tailored, and be the least restrictive means to achieve the state interest.¹⁵⁵ As per *Grutter*, for any affirmative action program to be the least restrictive means, a university must have first considered race-neutral alternatives—a criterion that UT-Austin meets by virtue of the implementation, and empirical inadequacy, of the Texas percent plan operating before UT-Austin reinstated affirmative action.¹⁵⁶ Additionally, to meet both the narrow tailoring and least restrictive means requirements,¹⁵⁷ an affirmative action program cannot effectively be a

151. Florida's strategies target increased enrollment, including minority enrollment, in college preparatory, professional development, and other activities. See FLORIDA BOARD OF GOVERNORS, THE ONE FLORIDA ACCOUNTABILITY COMMISSION: AN INDEPENDENT REVIEW OF EQUITY IN EDUCATION AND EQUITY IN CONTRACTS COMPONENTS OF ONE FLORIDA, JUNE 2002 (2002). California is changing its Eligibility in the Local Context percent plan, and besides the change in the percentage threshold, another is dropping SAT II Subject Tests as part of the requirements for eligibility. The drop was designed to eliminate barriers to high-performing students. However, besides this change, the plan in California will remain the same, and education reform remains focused on pre-higher education initiatives. See OFFICE OF STRATEGIC COMMUNICATIONS, *supra* note 113.

152. See *infra* note 163 and accompanying text.

153. See *supra* note 121 and accompanying text. With the Texas percent plan allowing a student to attend one's school of choice, UT-Austin is the most popular of nine undergraduate institutions. For example, in 2009, it enrolled 80.4% of all percent plan enrollees, and 71.8% of entering UT-Austin freshmen were percent plan admits. See THE UNIVERSITY OF TEXAS SYSTEM, *supra* note 105.

154. In affirmative action cases specifically (including those outside of the education context), the Supreme Court's purpose for strict scrutiny has extended beyond smoking out irrational, invidiously intended discrimination to conducting a cost-benefit justification for the facial use of race. See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 437–38 (1997).

155. See, e.g., *Sable Commun's of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

156. See *supra* notes 71–75, 85–87 and accompanying text.

157. See, e.g., *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n.6 (narrow tailoring requires consideration of "lawful alternative and less restrictive means"); see

quota: it must “be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.”¹⁵⁸ If the admissions process places too much weight on an individual’s race at the expense of other types of diversity, as well as academic qualifications, it is not narrowly tailored.¹⁵⁹

Applying these criteria, does UT-Austin’s plan achieve greater diversity, but only by placing impermissible weight on race? It is first important to reiterate that, indicating the underperformance of the Texas percent plan as a whole, UT-Austin has continued to show significant racial disparities, both campus-wide as well as in specific intra-university colleges.¹⁶⁰ Consequently, affirmative action could be indispensable as a means to reduce these disparities, both now and in the future—and, indeed, UT-Austin has shown diversity gains since adopting its affirmative action program.¹⁶¹ On the other hand, some have raised concerns that the university attained these diversity gains unconstitutionally, pointing especially to the magnitude of these gains, which appear small. Some scholars have noted, for example, that Texas’s reinstatement of race-based affirmative action in the year following *Grutter* led to only a one percent increase in minority enrollment at UT-Austin.¹⁶² Using this statistic, these scholars have argued that, since percent plans should capture a vast majority of the best academically qualified minorities, UT-Austin’s affirmative action may be placing impermissible weight on race at the expense of other factors, in order to gain any additional diversity.¹⁶³

However, there are two counterarguments to this claim, both of which underscore crucial points in evaluating whether individualized assessment regimes can garner a diversity advantage permissibly, or whether percent plans are effectively equal to the best constitutionally feasible means. First, as Part I argued, given the composition of the overall applicant pool and the degree of the school’s lack of diversity, it is imprudent to assume in the first place that facially small percentage point gains of minority students are marginal, because such gains could actually contribute significantly to the university’s goals.¹⁶⁴ Applying critical mass analysis again underscores

also Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1788 (1996) (“When applied to racial classifications, [the least restrictive means principle] seems to require the government to achieve its compelling remedial interest in the way that least restricts or burdens the fundamental rights of the program’s non-beneficiaries”).

158. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (citing *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 315, 317 (1978)).

159. *See id.*

160. *See supra* notes 76–80, 90–92 and accompanying text.

161. *See supra* notes 79–80 and accompanying text.

162. *See* George La Noue & Kenneth L. Marcus, “*Serious Consideration*” of *Race-Neutral Alternatives in Higher Education*, 57 CATH. U.L. REV. 991, 1034 (2008).

163. *See id.* The petitioners in *Fisher* also make this argument. *See Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 242–44 (5th Cir. 2011).

164. *See* Tienda and Niu, *supra* note 13.

this notion: a one percent increase in minority enrollment in 2009 would have represented nearly two full standard deviations with respect to enrollment proportional to the applicant pool.¹⁶⁵ This result would have brought the university within four standard deviations of fully proportional enrollment, a range where legitimate doubt arises regarding any argument that the university has not achieved critical mass.¹⁶⁶ Therefore, at contemporary levels of diversity, numerical gains such as those that UT-Austin has achieved likely produces large benefits, validating the advantage of affirmative action compared to what percent plans have accomplished, and justifying the university's continued pursuit of diversity within *Grutter's* critical mass framework.¹⁶⁷ This counters the inference that UT-Austin's affirmative action may be placing impermissible emphasis on race because seemingly small percentage gains could in actuality be significant.

Second, that minority enrollment has not dramatically increased under affirmative action can instead be circumstantial evidence that a process does *not* place impermissible weight on race. Probative in this instance is that, since UT-Austin reinstated affirmative action, the proportion of black and Hispanic *non*-percent plan enrollees (i.e., possible affirmative action beneficiaries) compared to total enrollment at UT-Austin has not increased significantly.¹⁶⁸ Most importantly, focusing directly on the applicant evaluation process itself, race is only one of many factors of one component of one applicant indicator in the UT-Austin system.¹⁶⁹ The

165. A one percent increase in minority enrollment represents 72 students, while one standard deviation is 38 students. *See supra* note 78.

166. *See* Tienda and Niu, *supra* note 13.

167. The post-*Grutter* case of *Parents Involved* also implies that pursuing race-related goals in education is permissible even if the gains are small in absolute number: “[t]he small number of assignments affected suggests that the schools could have achieved their stated ends through different means.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 791 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (holding that it was unconstitutional for a particular school district to assign students to schools based on race, and to do so in a manner that viewed race in binary “white” and “other” categories).

168. For example, from 2001 (pre-reinstitution of affirmative action) to 2005 (post-reinstitution), the proportion increased from 1.42% to 1.43% for blacks, and even decreased from 6.14% to 4.36% for Hispanics. *See* THE UNIVERSITY OF TEXAS SYSTEM, OFFICE OF STRATEGIC INITIATIVES, ACCOUNTABILITY AND PERFORMANCE REPORT 2006–2007 (2007).

169. UT-Austin performs a holistic review of applicants who fall outside of the top ten percent of their respective schools. Admissions decisions for these applicants are made on the basis of an Academic Index, which factors in grades and test scores, and a Personal Academic Index, which evaluates essays and “personal achievement.” The Academic Index is considered first; without a sufficiently high score, the Personal Academic Index will not be considered, although there is some room for discretion in this area. The Personal Academic Index is then calculated as: $PAI = [(personal\ achievement\ score * 4) + (average\ essay\ score\ of\ 2\ essays * 3)]/7$. “Personal achievement” is measured by factors that fall under two general categories: personal

university does not give race its own individual weight;¹⁷⁰ instead, for minority and non-minority applicants alike, a litany of non-racial diversity and personal achievement factors receives concurrent consideration.¹⁷¹ Additionally, race receives consideration only after an applicant has already met a minimum threshold on an academic index, where race is not considered at all.¹⁷² Within such a system it is unlikely that race subjugates other considerations in evaluating an applicant. In fact, given the discretion to consider race individually, affirmative action may allow for greater flexibility in diversity than even percent plans. The latter may admit similar numbers of minorities annually, because they draw from the same schools with likely the same composition.¹⁷³ Overall, the mechanics of the system work to ensure that it is narrowly tailored and the least restrictive means to achieve diversity.

UT-Austin's affirmative action establishes that improvement over percent plans need not necessitate a constitutional violation in impermissibly weighing race in individualized assessments. This strongly supports the notion that percent plans are broadly not a workable alternative, and consequently, that individualized assessments considering race should remain generally permissible. As a caveat, this analysis cannot exclude the possibility that in other states' universities, percent plans perform as well as the most diversity-engendering, constitutional affirmative action program possible in those settings. Nevertheless, analysis of the UT-Austin example underscores the general potential for individualized assessments, even despite facial appearances, to make substantial critical mass gains over percent plans *and* to meet constitutional requirements.

circumstances and accomplishments. The former category is comprised of race, socioeconomic status of the applicant and of the applicant's high school, and the familial status and responsibilities of the applicant. The latter is comprised of leadership qualities, awards and honors, work experience, involvement in extracurricular activities and community service, and the applicant's standardized test score compared to the average of his or her high school. *See* Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 226–31 (2011).

170. In *Gratz*, the Supreme Court found unconstitutional that an applicant was awarded 20 points of the 100 necessary for admission based on membership in an underrepresented racial or ethnic minority group. *See* Gratz v. Bollinger, 539 U.S. 244, 255 (2003); *see also* *Parents Involved*, *supra* note 167.

171. *See supra* note 169.

172. *See id.*

173. Such variation would address the concern raised by Kennedy in *Grutter v. Bollinger*, 539 U.S. 306, 389–91 (2003) (Kennedy, J., dissenting) (stating that Michigan Law School's lack of yearly variation was essentially a quota). This flexibility also helps to address the concern that dissimilarities in critical mass numbers between various underrepresented minority groups evidence a quota and/or discrimination between these minorities. *See* Gratz, 539 U.S. at 281 (Thomas, J., concurring); *Grutter*, 539 U.S. at 380–81 (Rehnquist, J., dissenting).

CONCLUSION

Justice O'Connor's time limit on affirmative action underscores the trend seen in the six states that have banned affirmative action: limiting race-consciousness in state action. However, despite Justice O'Connor's opinion that affirmative action will soon no longer be necessary—and as this analysis of California, Florida, and Texas has shown—past disparities are present ones in America's public colleges and universities. Lack of diversity continues to persist on several levels, limiting potentially substantial benefits for higher education.

Percent plans have attempted to address this issue while being sensitive to constitutional and political trends. However, the experiences of all three percent plan states since 1996 provide evidence that states cannot achieve sufficient diversity solely with percent plans, and that these plans are neither “workable” in current percent plan states, nor likely workable in prospective percent plan states. Ultimately, these plans provide strong evidence that individualized assessments are necessary to approach sufficient realization of diversity.

These realities of percent plans also lend support to the argument that other race neutral means, of which class-based affirmative action is perhaps the most discussed,¹⁷⁴ may fare no better. Just as percent plans, no matter how well-calibrated, cannot circumvent the imperfect correlations between locale and race, class-based affirmative action may be unable to address the imperfect correlations between race and class status.¹⁷⁵ Even if liberally-applied, a class-based affirmative action program may still fail to achieve a critical mass of minorities, unless a vast majority of minority applicants are socioeconomically disadvantaged enough to qualify. Looking at various mechanisms in concert, it may become even clearer that heterogeneity in race, class, and other factors can instead impede diversity, if a university itself chooses a homogeneous approach. Thus, without directly addressing race, racial disparities in public higher education will likely continue.

Do individualized assessments have the potential to address these disparities without subjugating academic and other non-racial factors? Or are percent plans sufficient, despite their inadequacy, to substitute for the best possible constitutional affirmative action program? An analysis of UT-Austin shows that the former is possible in at least some universities. Should individualized assessments fully *replace* for all percent plans? It is

174. See *supra* note 9 and accompanying text.

175. See *supra* note 130 and accompanying text. The California and Florida university systems also demonstrate this imperfect congruence. To the extent that percent plans account for local concentrations of minorities, so it would account for concentrations of the socioeconomically disadvantaged. Interestingly, however, California tends to do significantly better with enrolling students from socioeconomically disadvantaged backgrounds than minorities; Florida tends to manifest the opposite. See *supra* note 84.

more difficult to answer this question. States should not lightly discard the promise of university admission for anyone who places at the top of his or her class. In any case, a system like UT-Austin's could serve as a model for affirmative action, either as a substitute or replacement, as it achieves substantial gains without placing impermissible weight on race.

For the constitutional doctrine itself, a plausible implication of these results is that race-conscious means should receive greater deference even when race-neutral means have not received the utmost consideration. In other words, race-conscious means might receive strict scrutiny without exacting analysis as to whether various race-neutral means are "workable" alternatives. The reason is that, at least in the context of higher education, race-neutral means as implemented provide support for the notion that to achieve certain compelling race-related interests, it is necessary to consider race directly. The argument in Justice Ginsburg's *Gratz* dissent, used in that context to support automatic admissions points for minorities, thus finds greater traction in the race-neutral versus race-conscious debate: "[the] fully disclosed College affirmative action program is preferable to achieving similar numbers through . . . disguises."¹⁷⁶

Ultimately, any admissions system must work in concert with various measures that help minorities succeed, instead of merely serving as a mechanism for facial diversity.¹⁷⁷ Just as the lack of diversity has a root cause, so is diversity itself only a root, the branch being the exchange it is supposed to engender in the classroom and on campus. Even the "best" admissions system does not eliminate the factors that hindered a student's ability to enter university in the first place. First garnering access to higher education is paramount, but without addressing these disadvantages in the long-term, both individuals and society would not attain the benefits of such education. Nevertheless, the empirical results of race-neutral percent plans support the notion that race-conscious means should still be permissible to help achieve the greater purposes of higher education in America.

176. *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting).

177. See, e.g., *Grutter*, 539 U.S. at 371–72, n.11 (2003) (Thomas, J., concurring in part, dissenting in part) (noting the problem of facial diversity substituting for mechanisms that actually help underrepresented minorities).