

**Appendix 4:**  
**“Race-Neutral” Policies**

## Appendix 4: “Race-Neutral” Policies

As discussed in Chapter II, institutions must conduct a “serious, good faith consideration of workable race-neutral alternatives” before implementing race-conscious admissions policies. Race-neutral admissions policies purportedly do not consider race in making admissions decisions, but are still designed to assemble a student body reflecting the diverse composition of the college-age population. This Appendix examines “race-neutral” policies employed by universities in several states in which consideration of race has been prohibited, and the relative effectiveness of those policies in achieving the goal of a diverse student body.

Several studies suggest that, standing alone, certain race-neutral alternatives such as percent plans or those focusing on test scores, class or economic disadvantage are not viable alternatives to race-conscious policies in increasing racial and ethnic diversity. Studies also indicate that some race-neutral policies have a discriminatory impact on minority applicants. In addition, there is a debate as to whether programs like percent plans are, in fact, race-neutral.

Where consideration of race has been prohibited, institutions also have relied on other non-admissions programs to maintain and increase student body diversity on their campuses, including financial aid, recruitment and support programs. Many of these programs potentially can be employed by state colleges and universities to increase racial diversity, whether or not they are prohibited by state law from considering race in making admissions decisions. This Appendix will also discuss some of these financial aid, recruitment and support programs. For a fuller discussion of the constitutionality of these types of programs, see *supra* Chapter VI.

### A. Percent Plans

Percent plans have been utilized in California, Florida, and Texas, states in which consideration of race in admissions has been banned. (For a discussion of state laws banning race conscious admissions, see *supra* Chapter I, Section D). The plans are an effort to maintain and improve the diversity on their campuses. Critics argue, however, that percent plans *standing alone* have done little to achieve these goals.

Unlike the holistic evaluation of student applicants advocated in the *Grutter* decision, percent plans focus primarily on evaluation of grades and class rank. As one study observed: “Although presented as new initiatives, these plans actually represent a return to an old method of admitting students to leading colleges—the evaluation of high school grades and class standing.”<sup>1</sup> Percent plans are currently applied only to

public university undergraduate admissions policies. The following is a description of the plans employed in Texas, California, and Florida.<sup>2</sup>

## 1. Texas

In Texas, students in the top 10 percent of their graduating class in each accredited public or private high school are eligible for automatic admission, regardless of standardized test score, to any of the 35 public universities in the state.

The catalyst for Texas's percent plan<sup>3</sup> was the 1996 decision of *Hopwood v. Texas*, in which the Fifth Circuit Court of Appeals held that the University of Texas law school's admission policies did not withstand strict scrutiny review.<sup>4</sup> In so holding, the *Hopwood* court prohibited race-conscious admissions policies designed to promote student body diversity.<sup>5</sup> Although this element of *Hopwood* is no longer good law after the *Grutter* and *Gratz* decisions, and colleges and universities in Texas can employ race-conscious measures to promote student body diversity, the ten percent plan remains in place.

The Texas plan includes three elements:

- The top 10 percent of graduating high school seniors in any accredited public or private high school is guaranteed admission to his or her school of choice, including the state's flagship schools, the University of Texas at Austin and Texas A&M. Class rank is calculated by the school district or school.
- Universities have the option to extend the automatic admission threshold to the top 25 percent.
- Universities may consider 18 other factors in making admissions decisions, including academic record, socioeconomic background, first-generation college student status, bilingualism, financial status, extracurricular activity and personal interview.

Race, however, is not explicitly considered under the Texas ten percent plan.

The Texas Higher Education Coordinating Board established the policy by which students are classified under the ten percent plan.<sup>6</sup> A student must complete a certain level of coursework; he or she must submit their SAT or ACT scores, though these are not considered; and he or she must take the Texas Academic Skills Program (TASP). While students are guaranteed admission to any of Texas's 35 universities of their

choice, if they choose to attend UT Austin or Texas A&M—Texas’s flagship schools—they are not necessarily guaranteed the major of their choice.

## 2. California

In California, the automatic admissions plan currently in place guarantees students in the top 4 percent of each comprehensive public or private high school’s graduating class admission to one of the UC system’s nine campuses, but not necessarily to the one of the student’s choice.<sup>7</sup> In other words, the University of California’s flagship schools, the University of California, Berkeley and UCLA, can reject a student who qualifies for the 4 percent plan.

California’s plan was a response to successful efforts to ban the use of race in admissions at public colleges and universities.<sup>8</sup> First, in 1995, the University of California Board of Regents passed SP-1, which banned the use of race and ethnicity in UC admissions.<sup>9</sup> In 1996, voters passed the California Civil Rights Initiative (Proposition 209), which amended the California Constitution to ban affirmative action in higher education, public employment, and contracting.<sup>10</sup> Proposition 209, spearheaded by UC Regent Ward Connerly, was fully implemented in 1998.

Three years after passage of Proposition 209, newly elected Governor Gray Davis in his inaugural address proposed that each public and private high school graduate in California finishing in the top 4 percent of his or her class receive guaranteed admission to the University of California system. The goal was to “seek to ensure diversity and fair play by guaranteeing to those students who truly excel.”<sup>11</sup> Called the Eligibility in Local Context (“ELC”), California’s 4 percent plan was first implemented in considering the fall 2001 freshman applicants.

To be eligible for ELC Program, students must complete 11 specific units of the UC system’s high school course requirements (called the “a-g requirements”) by the end of junior year. Grades in these required courses, as well as those in additional courses completed by the student, are used to calculate GPA. At the end of junior year, participating high schools identify to the UC the top 10 percent of students expected to graduate the following year. Using the information provided by the high schools, the UC system then determines the top 4 percent of students based on GPA for UC-approved coursework completed in the 10th and 11th grades.

A student must have a minimum GPA of 2.8 in the required a-g courses to be considered for ELC. Qualified students must submit an application and complete the remaining system eligibility requirements to remain ELC eligible. These requirements are completion of four additional units of a-g coursework, the SAT I or the ACT and

three SAT subject tests. While these additional requirements are not taken into account for admission to the UC system under the ELC, they presumably are taken into account by individual institutions as they make their decisions.

California also has a dual admission program, approved by the UC Board of Regents which grants provisional admission to the UC system to those students who fall between the top 4<sup>th</sup> and 12.5<sup>th</sup> percent of their high school graduating class but lack the GPA and standardized test scores to be eligible for traditional admissions. To be eligible, a student must complete the first two years of coursework at a community college and maintain a GPA of at least 2.4. This program took effect for the 2003 entering class.

### **3. Florida**

In Florida, the Talented 20 policy guarantees system admission to public high school graduates who finish in the top 20 percent of their class as long as they complete certain required course work.<sup>12</sup>

Florida's plan also arose out of a statewide anti-affirmative action campaign launched by Ward Connerly in 1999 to end gender- and race-conscious policies in public education, employment, and contracting. While the Connerly campaign ended unsuccessfully, Governor Jeb Bush implemented Executive Order 99-281, or "One Florida," in November of 1999, eliminating the use of race- or gender-conscious decisions in government employment, state contracting and higher education. Race consciousness, however, was still permissible in awarding scholarships, conducting outreach, or developing pre-college summer programs.

At the same time that he implemented One Florida, Governor Bush initiated the Talented 20 policy guaranteeing admission to the Florida State University System. This program guarantees only system admission to public high school graduates finishing in the top 20 percent of their class. The Talented 20 policy officially went into effect in July of 2000.<sup>13</sup>

The Talented 20 program was added to the existing Board of Regents' admissions policy.<sup>14</sup> Students are eligible for admission into the Florida State University System with: (1) a B average in 19 required academic units; or (2) a combination of GPA and admission test scores on a sliding scale if their GPA is less than a B average. Only public high school students who complete the required 19 credits and are classified in the top 20 percent of their graduating class, as determined by their respective districts, are guaranteed admission into the Florida State University

System. Students are not guaranteed admission into the school of their choice, only to the system.

Commentators have noted that percent plans have helped at least some under-represented groups increase their representation at some schools.<sup>15</sup> Indeed, statistics show that at the University of Texas at Austin, the number of black students in undergraduate programs has returned to pre-*Hopwood* levels,<sup>16</sup> and the percentage of Latinos enrolled at the University of Florida and Florida State University has increased from 1998 to 2001.<sup>17</sup> However, a recent MALDEF study found that at Texas A&M University African Americans and Latinos were 18.8% of freshmen enrollments in 1995, compared to an average of 12.1% under the Texas Ten Percent Plan (1998-2002), a decline of more than one-third.<sup>18</sup> As discussed below, much of the success of percent plans is attributable to the implementation of non-admissions programs such as recruitment and outreach. In addition, opponents suggest that the many gains made through percent plans are offset by the many problems inherent in the plans.

## **B. Evaluating the Effectiveness of Percent Plans**

Several studies have examined the effectiveness of percent plans in increasing racial diversity on college campuses in Texas, California, and Florida.<sup>19</sup> Many of these studies conclude that percent plans alone have done little to impact racial diversity on most campuses, and in some instances diminished diversity at flagship schools.<sup>20</sup>

*Grutter* and *Gratz* also pointed out that percent plans do not allow for the holistic, individualized review of applicants and are inapplicable at the graduate level.<sup>21</sup> Justices Ginsburg and Souter in their dissents in *Gratz* questioned whether percent plans are in fact “race neutral” since their aim is to increase the number of underrepresented minorities on college campuses.<sup>22</sup>

While the percent plans in each state vary significantly, and although data is incomplete, these studies conclude that percent plans standing alone are less effective than race-conscious policies for several reasons:

- **Percent Plans Cannot Be Used For All Programs**

Percent plan application is limited to the undergraduate level of large state universities and cannot be applied to graduate or professional school programs because of their focus on high school grades and class rank. In *Grutter*, the Supreme Court criticized the Bush Administration for not explaining “how such plans could work for graduate and professional schools.”<sup>23</sup> Moreover, it is well documented that despite vigorous race-neutral efforts, there has been a dramatic drop in racial and ethnic

diversity at selective professional schools under affirmative action bans. For example, one study of law schools found that at Boalt Hall (UC Berkeley), UCLA, and the University of Texas combined, African Americans averaged 7.4% of enrollments with affirmative action in 1993-96, compared to only 2.4% in 1997-2001, a decline of more than two-thirds.<sup>24</sup> Thus, studies by the president of the Association of American Medical Colleges as well as the former vice president of the Law School Admission Council both document that race-neutral admission policies, particularly if dominated by standardized test scores and undergraduate grades, would have a devastating impact on racial diversity at medical and law schools nationally.<sup>25</sup> Students applying from out of state also are ineligible for these plans.

- **Percent Plans Rely On Racial Segregation**

According to a comparative study of the three states' experiences, Catherine L. Horn and Stella M. Flores concluded that percent plans rely heavily on significant levels of racial segregation in a state's high school educational system in order to draw racial minority students.<sup>26</sup> In Texas, almost half of all Latino and more than one-third of all Black public school students attend a school of 90 percent minority students; the same is true for 44 percent of Latino and 37 percent of Black public school students in California.<sup>27</sup> In addition, 31 percent of Black students in Florida are in 90 to 100 percent minority schools, and 30 percent of Latinos in the state are similarly situated.<sup>28</sup> In all three states, Black and Latino students are increasingly, on average, attending racially isolated schools. Thus, percent plans in these states discourage integration.<sup>29</sup>

- **The Proportion of Minority Students Enrolling in Flagship Schools Has Not Kept Pace with Proportions In The College-Age Population**

Studies indicate that statistics showing an increase in the numbers of minority students at institutions in Texas, California, and Florida can be misleading. They show that as the proportion of minority college-age students increases in these states, the proportion of minority students admitted and enrolled in flagship institutions in those states generally has not kept pace. Horn and Flores report that in California, for example, "proportional representation of applied, admitted and enrolled blacks and Hispanics on the flagship campuses has decreased since the end of race-conscious policies."<sup>30</sup> They also report that at Berkeley from 1995 to 2001, the proportional representation of Hispanics and African Americans dropped dramatically, from 16.9 and 6.7 percent, respectively, to 10.8 and 3.9 percent respectively.<sup>31</sup> At UCLA, African American enrollments dropped from 7.4 percent to 3.4 percent between 1995 and 2001, and Latinos dropped from 22.4 percent to 14.4 percent over the same period.<sup>32</sup> The study found that "even among those with rising minority rates, none of the premier

institutions in Texas, California, or Florida has reached enrollment levels reflecting the potential college-going population.”<sup>33</sup>

- **Percent Plans May Be Irrelevant**

Studies suggest that the majority of students admitted through percent plans would have been admitted regardless of the plans.<sup>34</sup> For example, researchers analyzing the effect of the Talented 20 plan at the University of Florida concluded that the plan was irrelevant since the school is not required to accept Talented 20 students and the ones who were admitted under the plan would have been admitted anyway.<sup>35</sup>

It is difficult to discern the true impact of percent plans on racial diversity because the University of Florida and other schools in Florida, California and Texas have focused heavily on non-admissions programs to mitigate the inability to consider race in admissions.<sup>36</sup> Many minority students thus may have been admitted as a result of these efforts and not solely because of the percent plans. Following is a discussion of some of these programs.

### **C. Financial Aid, Recruitment and Support Programs In Percent Plan States**

Although percent plans achieve some racial diversity, reliance on a percent plan by itself usually fails to realize the adequate minority representation necessary to meet an institution’s diversity goals.<sup>37</sup> For example, researchers evaluating the Talented 20 Program in Florida found that Talented 20 students applying to Florida’s flagship school, the University of Florida, were overwhelmingly white.<sup>38</sup> In 2000, 70.4 percent of applicants in the Talented 20 were white, rising to 72.9 percent in 2001.<sup>39</sup> In the rare instance where institutions using percent plans have maintained existing levels of minority representation, that success has been attributable to vigorous recruitment and support programs and targeted financial aid.

Global outreach efforts employed by these states include Texas’s Closing the Gaps by 2015 plan to improve participation, success, excellence, and research in public higher education; California’s Expanding Education Horizons program, which offers tutoring, school partnerships and professional development; and Florida’s A+ reform and the Bright Futures Scholarship Program, which awards merit scholarships to students based on high school GPA and test scores.<sup>40</sup> Texas has used such programs both globally and in conjunction with percent plans in an effort to increase diversity on flagship campuses.

These programs may also be useful to schools in states where race can still be used as a factor in admissions. All universities can potentially further their diversity goals by implementing financial aid, recruitment and support programs like those employed by Texas, California, Florida and other states. These programs include:

- **Visits to Underrepresented High Schools**

The University of Texas at Austin has worked to recruit underrepresented students by sending the president of the University, Larry Faulkner, to visit high schools that have historically sent few students to the school.<sup>41</sup>

- **Scholarships Targeted at Underrepresented Groups**

UT Austin has created scholarships targeted at underrepresented groups. Following *Hopwood*, UT implemented the Presidential Achievement Scholars program (PAS) which uses an adversity index score comprising family socioeconomic status, a school quality index, an indicator of peer performance on the SAT or ACT, and high school class rank. Depending on the level of need and class rank, students graduating in the top 25 percent of their high school classes can receive scholarship awards ranging from \$1000 to \$5000.<sup>42</sup>

UT Austin also implemented the Longhorn Opportunity Scholarship (“LOS”), a program specifically earmarked for low-income students graduating in the top 10 percent of their classes who come from high schools in designated low-income areas. The LOS also has a retention component, requiring recipients to participate in the Connexus Program, an infrastructural support system that provides access to housing, free tutoring, a mentor, and other benefits. In addition, LOS students who have SAT scores of less than 1100 can also participate in a separate retention program focused on less academically prepared students.<sup>43</sup>

In the Fall of 2000, Texas A&M established the Century Scholars Program (“CSP”), a scholarship program which targets students in the top 10 percent. The CSP serves students from approximately 40 high schools in the Dallas and Houston school districts, which have large numbers of Black and Latino students. This scholarship is available to students across income levels. The CSP also has a retention component including the opportunity to attend a summer camp that provides summer school classes and mentoring prior to freshman year.<sup>44</sup>

- **Multicultural Centers**

After the passage of Proposition 209, UC Berkeley established the Bridges Multicultural Center, through which student organizations are trained and funded to

carry out such activities as visiting high schools, conducting essay-writing workshops, and assisting students with the completion of their college applications. Student groups in the umbrella organization include the Black Recruitment and Retention Center, the Native American Recruitment and Retention Center, Raza Recruitment and Retention Center, and the Asian American Recruitment and Retention Center. The admissions office also has held recruiting events targeted at African American and Chicano applicants.<sup>45</sup>

- **Outreach to Families and Students**

Florida State University engages in outreach by sending minority recruitment officers to high schools with high minority student populations in Miami, Tampa, Jacksonville, and other cities. The University of Florida's Admissions Office and Office for Student Financial Affairs cooperated to create a team that travels throughout Florida to recruit minority students with a special emphasis on involving entire families.<sup>46</sup> The university's counseling center also created the African American Student Program for Improvement and Retention in Education (A.S.P.I.R.E.), a grant-based initiative launched in 2000, which provides consultation and support programs that promote the recruitment and retention of African American Students.<sup>47</sup>

- **Outreach Offices**

Though it is not in a percent plan state, the University of Virginia has established a Minority Outreach Office to recruit and retain minority students. In addition to providing admissions assistance, the office serves as a support system for underrepresented students. Minority Outreach connects individuals with racial and ethnic student groups and alumni associations to help minority students feel more comfortable in their new educational environment.

#### **D. Considering Socioeconomic Status**

For many years, a number of universities have considered socioeconomic status ("SES") in addition to race as part of their admissions criteria. Universities in California, Washington and Florida have tended to place even heavier emphasis on socioeconomic status because they are prohibited from considering race. For example, the University of California, the University of Washington, and the University of Florida, all examine academic achievement in light of such factors as low family income, parents' educational level, and access to high school free lunch programs.<sup>48</sup> Most universities employing race-conscious admissions programs also state that they give significant favorable consideration to socioeconomically disadvantaged applicants.<sup>49</sup>

Advocates of using SES instead of race as an admissions criteria argue that policies would provide a similar degree of overall racial diversity, while also benefiting a quite different group of African Americans and Latinos who have overcome economic deprivation, as well as a whole new group of working-class whites and Asian Americans.<sup>50</sup> Advocates contend that, as a matter of fairness, it is very difficult “to insist on continuing to use race to benefit advantaged students of color, living in advantaged communities and enjoying the benefits of a substantial net worth.”<sup>51</sup>

However, many studies show that policies focusing on socioeconomic status, also known as “economic affirmative action,” are not as effective as race-conscious policies in maintaining racial diversity. These studies conclude that the likely outcome of substituting socioeconomic disadvantage for race will be the admission of fewer and less-prepared African American, Latino, and Native American students.

According to a study by Anthony Carnevale of the Educational Testing Service and Stephen J. Rose of ORC Macro, economic affirmative action at the nation’s 146 most selective colleges would result in a 2-percentage-point decline in racial diversity and a 28-point increase in economic diversity.<sup>52</sup> The study proposes combining race and class considerations in order to avoid the 2-point drop. If diversity is defined broadly, to value differences in both economic and racial backgrounds, Carnevale and Rose believe that economic affirmative action would provide a large net gain in the total diversity enjoyed by students at elite colleges. Similarly, in Texas, MALDEF supports a “blend it, don’t end it” approach to the Ten Percent Plan and affirmative action because the Ten Percent Plan has contributed to socioeconomic and geographic diversity at flagship institutions like the University of Texas at Austin, but the Ten Percent Plan has not been a satisfactory substitute for race-conscious admissions.<sup>53</sup>

Because African Americans, Latinos, and Native Americans are more likely than whites to be poor and to attend schools of concentrated poverty, socioeconomic disadvantage may appear a useful substitute for race in preserving diversity on university campuses.<sup>54</sup> But universities should keep in mind that most poor people in the United States are not African American, Latino, or Native American. In 2001, although the poverty rate among non-Hispanic whites was significantly lower than that of people of color, non-Hispanic whites still constituted 46.4 percent of the poor.<sup>55</sup> As a result, those students who are more likely to benefit from economic affirmative action are not underrepresented minorities.

### **Why Socioeconomic Measurements Should Include Wealth, and Not Only Income**

Socioeconomic measurements that ignore wealth as an element of economic status may be incomplete.<sup>56</sup> Wealth—the ownership of property and other productive assets—is distributed far less equally than income in American society.<sup>57</sup> In particular, “[w]ealth barriers are strongly resistant to intergenerational mobility, and inequalities in wealth have greatly increased in the United States since the mid-1970s.”<sup>58</sup> In the mid-1990s, the average income of blacks, for example, was 60% of that of whites, while the median wealth of blacks was only 8% of that of whites.<sup>59</sup> This skewed distribution of wealth by race may suggest the extent to which wealth inequality may underlie other forms of racial inequality.<sup>60</sup>

Blacks generally have less wealth than whites in the same income group in part because of residential discrimination and less inherited family money.<sup>61</sup> This disparity in wealth matters significantly because “[w]ealth has a major impact on life chances, in that it diminishes the dependency of an individual’s economic well-being upon occupation, income, educational attainment, or any of the other conventionally measured elements of relative economic position.”<sup>62</sup>

By leaving wealth out of the socioeconomic calculus, the socioeconomic differences associated with racial and ethnic group membership may be considerably underreported. Thus, it is likely that an admissions program that emphasizes wealth will have a higher yield of disadvantaged minorities than one that emphasizes only income.

Another study found that class is a very poor substitute for race, particularly for selective colleges seeking racial diversity. Thomas J. Kane found in a 1997-1998 study that, among the high-scoring youth who were also low-income, only 17.3 percent (roughly one out of six) were African American or Latino.<sup>63</sup> Accordingly, if a selective college with an application pool of students with test scores in the top ten percent granted a “preference” to students with family incomes below \$20,000, only one out of six would be African American or Latino.<sup>64</sup> Because African Americans and Latinos are a minority of the population and have a very small number of students with test scores in the top ten percent, using socioeconomic status as a criterion instead of race would

not result in the admission of a significant number of African American or Latino youth.<sup>65</sup>

To maintain the current level of African American and Latino representation using socioeconomic disadvantage as a criteria instead of race, another Kane study showed that selective colleges would have to reserve six times as many places for poor students as they currently reserve for underrepresented minorities.<sup>66</sup> The Kane study further found that in order to obtain a comparable level of diversity, a class-based policy would have to assign negative values to applicants on the basis of higher income levels and parents' educational level, and would even have to assign a negative value to SAT scores for some applicants.<sup>67</sup> In other words, in addition to assigning a plus factor to socioeconomic status, institutions would have to assign minus factors to these other criteria in order to achieve a racially diverse class of admitted students.

Another study employed a model of the University of California admissions process and actual standardized test scores to examine the effectiveness of admissions policies focusing on disadvantaged background, as measured by factors such as income, parents' education, high school graduation rate, percent of students on free school lunch programs, and school location.<sup>68</sup> The study found that even giving preference to urban and rural students with low family incomes whose mothers had not completed college and who attended high schools with low rates of graduation and high rates of free and reduced school lunch programs, still resulted in a "dramatic underrepresentation of black and Hispanic students and an overrepresentation of white students."<sup>69</sup>

One potential "race-neutral" way to ensure some minority representation would be to target high-poverty schools in which more than ninety percent of the students are African American or Latino, as states like Texas have done through percent plans.<sup>70</sup> However, this method depends on continued school segregation.<sup>71</sup> Another serious problem arises when one considers the unequal college preparation of top students in many high-poverty schools.<sup>72</sup>

In addition, studies indicate that a focus on SES to the exclusion of race has the effect of excluding many of the best-prepared minority students. For example, when students were separated by socioeconomic status in Wightman's study, the data showed that the lowest SES students within each ethnic group reported the lowest LSAT scores and the lowest grade point averages.<sup>73</sup> Students who would be admitted under a socioeconomic status weighted model would therefore have LSAT scores and GPAs that are statistically and significantly lower than the scores and grades of other students in the same racial and ethnic group who would not be admitted because they do not meet the economic criteria.<sup>74</sup> This SES-weighted model also overlooks the fact that

many of the best-prepared African American and Latino students face forms of racial discrimination, but are neither very poor nor isolated in the weakest schools to benefit from this policy.<sup>75</sup>

At the same time, however, institutions should not assume that poor African American or Latino students from weak schools cannot perform well academically. Socioeconomic disadvantage is still one of *many* factors that college and university admissions programs can consider. Because substituting socioeconomic disadvantage for race will, in many contexts, result in the admission of fewer and less prepared students of color, institutions should exercise great caution when relying heavily on socioeconomic disadvantage to maintain or increase diversity. Rather, as discussed above, it is advisable for institutions to implement an admissions policy that is flexible, individualized, and that “adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.”<sup>76</sup>

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<sup>1</sup> See Gary Orfield, *Foreword* to Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, at viii (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf> [hereinafter Horn & Flores].

<sup>2</sup> For a comprehensive discussion of percent plans in Texas, Florida, and California, see Horn & Flores, *supra* note 1.

<sup>3</sup> See *id.* at 14-17 (discussing background of the Texas plan).

<sup>4</sup> Hopwood v. Texas, 78 F.3d 932, 944-45 (5th Cir. 1996).

<sup>5</sup> *Id.* at 946.

<sup>6</sup> See Horn & Flores, *supra* note 1, at 20-24 (describing Texas plan).

<sup>7</sup> See *id.* at 20-24 (describing California plan).

<sup>8</sup> See *id.* at 17-19 (discussing the background of the California plan).

<sup>9</sup> On May 16, 2001, the UC Board of Regents unanimously rescinded SP-1. See Future Admissions, Employment, and Contracting Policies - Resolution Rescinding SP-1 and SP-2, May 16, 2001, available at <http://www.ucop.edu/ucophome/commserv/access/propres.htm>.

<sup>10</sup> See CAL. CONST. ART. 1, § 31(a) (West 2003) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color ethnicity, or national origin in the operation of public employment, public education, or public contracting.")

<sup>11</sup> See Horn & Flores, *supra* note 1, at 17.

<sup>12</sup> For a detailed discussion of the history of the Talented 20 Program, see Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, at 10-13 (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf> [hereinafter Marin & Lee]

<sup>13</sup> The Talented 20 Program states:

A student applying for admission who is a graduate of a public Florida high school, has completed nineteen (19) required high school units . . . , ranks in the top 20% of his/her high school graduating class, and who has

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submitted test scores from the Scholastic Assessment Test of the College Entrance Examination Board or from the American College Testing program shall be admitted to a university in the State University System. The State University System will use class rank as determined by the Florida Department of Education.

Marin & Lee, *supra* note 12, at 11 (citing Department of Education, Florida Division of Colleges & Universities (2001)).

<sup>14</sup> See Horn & Flores, *supra* note 1, at 22-24 (describing Florida plan); Marin & Lee, *supra* note 12, at 11-12 (same).

<sup>15</sup> See, e.g., Jeffrey Selingo, *California Policy Most Helps Hispanic and Rural Applicants*, CHRON. HIGH. EDUC., May 31, 2002 (“All groups except black and American Indian students received some boost from the 4-percent plan this year, with Hispanic students benefiting the most”).

<sup>16</sup> See Horn & Flores, *supra* note 1, at 49 Table 28. *But see The Impact of the ‘10 Percent Plan’ on Black Enrollments at the University of Texas at Austin*, JOURNAL OF BLACKS IN HIGHER EDUC., 2002, available at [http://www.jbhe.com/latest/37\\_10\\_percent\\_plan.html](http://www.jbhe.com/latest/37_10_percent_plan.html) (opining that Texas’s 10 percent plan “has served to open the door, albeit slightly, to African Americans pursuing higher education at Texas’s most selective colleges.”)

<sup>17</sup> See Horn & Flores, *supra* note 1, at 51 Table 30.

<sup>18</sup> MALDEF et al., *Unfinished Business: Affirmative Action in Texas After Grutter and Gratz*, Chart 1 (forthcoming 2004).

<sup>19</sup> See Horn & Flores, *supra* note 1; Marta Tienda, et al., *Closing the Gap?: Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action*, January 21, 2003, available at <http://www.texastop10.princeton.edu/publications/tienda012103.pdf>; Matt A. Barreto and Harry P. Pachon, Ph.D., *The Reality of Race Neutral Admissions for Minority Students at the University of California: Turning the Tide or Turning Them Away?* (2003), available at [http://www.umich.edu/~urel/admissions/research/UC\\_Minority\\_Admissions.pdf](http://www.umich.edu/~urel/admissions/research/UC_Minority_Admissions.pdf); Marin & Lee, *supra* note 12; U.S. Comm’n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, November 2002, available at <http://www.usccr.gov/pubs/percent2/main.htm>.

<sup>20</sup> See, e.g., Horn & Flores, *supra* note 1, at 51.

<sup>21</sup> The Court in *Grutter* found percent plans to be objectionable in large part because they did not allow for the individualized consideration and “nuanced judgment” permitted by the Law School’s existing policy. 123 S. Ct. at 2345. Justice O’Connor stated that percent plans

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“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.” *Id.* Both Justice O’Connor in *Grutter* and Justice Ginsburg in her dissent in *Gratz* also pointed out that percent plans do not affect enrollment in graduate schools. *Grutter*, 123 S. Ct. at 2345; *Gratz*, 123 S. Ct. at 2445 n.10 (Ginsburg, J., dissenting).

<sup>22</sup> See 123 S. Ct. at 2442 (Souter, J., dissenting); *id.* at 2445 n.10 (Ginsburg, J., dissenting). Justice Ginsburg wrote: “Calling such 10 or 20% plans race neutral seems to me disingenuous, for they unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system.” 123 S. Ct. at 2445 n.10 (Ginsburg, J. dissenting). She further criticized the plans for being dependent on “continued racial segregation at the secondary school level: They can ensure significant minority enrollment in universities only if the majority-minority high school population is large enough to guarantee that, in many schools, most of the students in the top 10 or 20% are minorities.” *Id.* She noted further the danger that the plans create incentives for students to remain in low-performing, segregated schools and discourage students from taking more challenging classes for fear of lowering their grade point average. *Id.*

<sup>23</sup> 123 S.Ct. at 2345.

<sup>24</sup> William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 32 tbls.4-5 (2003).

<sup>25</sup> Jordan J. Cohen, *The Consequences of Premature Abandonment of Affirmative Action in Medical School Admissions*, 289 J. AM. MEDICAL ASS’N 1143 (2003); Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data*, 53 J. LEGAL EDUC. 229 (2003); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997) [hereinafter Wightman, *The Threat to Diversity*].

<sup>26</sup> Horn & Flores, *supra* note 1, at 14-20.

<sup>27</sup> *Id.* at 28.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 27-28.

<sup>30</sup> *Id.* at 51.

<sup>31</sup> *Id.* at 50 Table 29.

<sup>32</sup> *Id.*

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33 *Id.* at 51.

34 *See, e.g.,* Marin & Lee, *supra* note 12, at 37 (“This report concludes that [Florida’s] Talented 20 plan is largely inconsequential.”).

35 *See, e.g., id.* at 34.

36 *See id.* at 32-34; Horn & Flores, *supra* note 1, at 52-59.

37 *See* Marin & Lee, *supra* note 12, at 30 (“Being able to apply and deciding to apply are two very different things, the second much more dependent on outreach and recruitment than the first.”).

38 *Id.*

39 *Id.*

40 *See* Horn & Flores, *supra* note 1, at 52.

41 *See id.* at 52-53.

42 *See id.* at 53.

43 *See id.*

44 *See id.* at 54.

45 *See id.* at 55.

46 *See* Marin & Lee, *supra* note 12, at 33.

47 *See* Horn & Flores, *supra* note 1, at 57-58.

48 Richard Kahlenberg, *Economic Affirmative Action in College Admissions*, THE CENTURY FOUNDATION ISSUE BRIEF SERIES (March 2003), available at [http://www.tcf.org/Publications/Issue\\_Briefs/kahlenberg-affaction.pdf](http://www.tcf.org/Publications/Issue_Briefs/kahlenberg-affaction.pdf). Written into Texas law is the consideration of barriers such as “the socioeconomic background of the applicant,” “whether the applicant would be the first generation of his or her family to attend or graduate from an institution of higher education,” and “the financial status of the applicant's school district.” *Id.* (citing Shelby Samuelson and Demaree Michelau, *Whatever Happened to Affirmative Action?*, STATE LEGISLATURES, March 1, 2001, at 28).

49 *Id.*

50 *Id.*

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51 *Id.*

52 Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity and Selective College Admissions*, THE CENTURY FOUNDATION ISSUE BRIEF SERIES (March 2003), available at [http://www.tcf.org/Publications/Issue\\_Briefs/kahlenberg-affaction.pdf](http://www.tcf.org/Publications/Issue_Briefs/kahlenberg-affaction.pdf).

53 MALDEF et al., *Unfinished Business*, *supra* note 18, at passim.

54 Gary Orfield, *Campus Resegregation and Its Alternatives*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 3 (Gary Orfield & Edward Miller eds. 1998), available at [http://www.civilrightsproject.harvard.edu/research/books/call\\_chillingintro.php?](http://www.civilrightsproject.harvard.edu/research/books/call_chillingintro.php?) [hereinafter Orfield, *Campus Resegregation*]; see also Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in THE BLACK-WHITE TEST SCORE GAP 448 (Christopher Jencks & Meredith Phillips eds., 1998) (explaining the source of the perception that income-based "preference" in college admissions would disproportionately benefit black and Latino youth since they are more likely to be from low-income backgrounds than whites and non-Latinos) [hereinafter Kane, *Racial and Ethnic Preferences*].

55 Bernadette D. Proctor & Joseph Dalaker, U.S. Census Bureau, *Current Population Reports, Poverty in the United States: 2001*, at 3 (2002), available at <http://www.census.gov/prod/2002pubs/p60-219.pdf>.

56 Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1870-71 (1996) (explaining how "socioeconomic status" is usually thought of as the product of earned income, occupation, and education, with no regard to "wealth" in the sense of ownership of productive assets).

57 See Katheryn K. Russell, *Affirmative (Re)Action: Anything But Race*, 45 AM. U. L. REV. 803, 808 (1996) (arguing that data on wealth shows a tremendous gap between black and white net worth, which includes property ownership and financial assets).

58 Malamud, *supra* note 57, at 1871 (citations omitted).

59 See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 45 (1998).

60 Richard Banks, Book Review, *"Nondiscriminatory" Perpetuation of Racial Subordination*, 76 B.U. L. REV. 669, 677 (1996).

61 Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1078 (1996).

62 Malamud, *supra* note 57, at 1871.

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<sup>63</sup> Kane, *Racial and Ethnic Preferences*, *supra* note 55, at 431.

<sup>64</sup> *Id.* at 450.

<sup>65</sup> According to Harvard Professor Gary Orfield, "[a] ranking of students below the poverty line by their test scores would result in a pool of favored applicants that was mostly Asian and White—many of them from temporarily poor families who managed to send their children to competitive schools that prepared them for college entrance exams." Orfield, *Campus Resegregation*, *supra* note 55, at 3. Orfield explains, more specifically, that some recent immigrants from Asia often are highly educated people who cannot practice their professions in the United States. Their children, however, have the advantage of the parents' education and often are able to attend suburban schools because they face less housing discrimination than African Americans and Latinos. It should be noted, however, that many Asian parents do not fall into this category: "Some Asian refugee groups do not, of course, enjoy these advantages and in fact face problems much more like those confronting Latinos." *Id.*

<sup>66</sup> Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 17, 24-25 (Gary Orfield & Edward Miller eds.).

<sup>67</sup> *Id.* at 26-27.

<sup>68</sup> See Daniel Koretz, et al., *Testing and Diversity in Postsecondary Education: The Case of California*, 10 EDUC. POL'Y ANALYSIS ARCHIVES (2002), available at <http://epaa.asu.edu/epaa/v10n1>.

<sup>69</sup> *Id.*

<sup>70</sup> Orfield, *Campus Resegregation*, *supra* note 55, at 4.

<sup>71</sup> *Gratz v. Bollinger*, 123 S. Ct. 2411, 2445 n.10 (Ginsburg, J., dissenting).

<sup>72</sup> Orfield, *Campus Resegregation*, *supra* note 55, at 4.

<sup>73</sup> Wightman, *The Threat to Diversity*, *supra* note 26, at 53.

<sup>74</sup> *Id.*

<sup>75</sup> Orfield, *Campus Resegregation*, *supra* note 55, at 5.

<sup>76</sup> *Grutter v. Bollinger*, 123 S. Ct. 2325, 2344 (2003).