

Blend It, Don't End It:

**Affirmative Action and the Texas Ten
Percent Plan After *Grutter* and *Gratz***

**Mexican American Legal Defense
and Educational Fund (MALDEF)**

**Americans for a Fair Chance,
a project of the Leadership Conference
on Civil Rights Education Fund**

Equal Justice Society

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This report is dedicated to the memory of Texas State Representative Irma Rangel (1931-2003), who was the first Latina elected to the Texas Legislature and was a tireless champion for expanding opportunities in higher education, including through the Texas Ten Percent Plan.

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EXECUTIVE SUMMARY

The Fifth Circuit's *Hopwood v. Texas* ruling, repudiating the diversity rationale as a compelling interest for race-conscious admissions, dramatically restricted higher education opportunities for students of color in Texas. The recent Supreme Court decision in *Grutter v. Bollinger* overrules *Hopwood* and reaffirms that student body diversity is a compelling governmental interest that warrants the use of affirmative action at colleges and universities. Also, the Supreme Court ruling provides guidance about what is required to narrowly tailor affirmative action, so that race is one factor among many and so that all applicants are given the benefit of individualized review. In “Blend It, Don’t End It,” Mexican American Legal Defense and Educational Fund (MALDEF), Americans for a Fair Chance (a project of the Leadership Conference on Civil Rights Education Fund), the Equal Justice Society, and the Society of American Law Teachers, assess racial and ethnic diversity in Texas higher education at the flagship undergraduate campuses, law schools, and medical schools.

This report primarily focuses on opportunities for African Americans, Latinos, and American Indians. Asian Pacific Americans are also discussed in some sections, but the data are not as complete, which reflects the fact that admission figures are generally unavailable for the diverse ethnic/national subgroups within this umbrella category. Likewise, this report does not focus on the barriers women continue to face in higher education, especially as they relate to access to opportunities in underrepresented fields including the sciences, mathematics, engineering, and business.

“Blend It, Don’t End It” recommends that the benefits and lessons of the Texas Ten Percent Plan currently in place be woven together with the constitutionally permissible consideration of race in admissions. While the Ten Percent Plan has important benefits, our comprehensive review of the evidence confirms that the Ten Percent Plan and other race-neutral measures cannot wholly replace the affirmative action policies and programs needed to achieve racial diversity at the University of Texas at Austin, and particularly at Texas A&M University.

“Blend It, Don’t End It” also documents that the Ten Percent Plan contributed significantly to socioeconomic, geographic, and racial/ethnic diversity, particularly at UT-Austin. We therefore strongly oppose legislative proposals to repeal or cap the Ten Percent Plan, which would likely undermine

the college aspirations of rural as well as low-income students from all racial and ethnic backgrounds. Others urge modifying the Ten Percent Plan so that it no longer guarantees admission to flagship campuses, but we conclude that such a proposal is ill-conceived because it would eliminate the key feature of the Ten Percent Plan and would diminish the flagship institutions' accountability to all Texans.

"Blend It, Don't End It" showcases seven ways that universities can affirm their support for student body diversity by implementing and/or maintaining legally permissible affirmative action, including: 1) looking beyond the numbers to holistically evaluate each applicant; 2) developing a diversity policy statement; 3) documenting the educational benefits of diversity and, if applicable, the institution's prior record of discrimination; 4) developing broad diversity goals and maintaining sound criteria; 5) reviewing legacy policies and evaluating the potential disparate impact on students of color; 6) periodically reviewing whether there are workable race-neutral alternatives to affirmative action; and 7) eliminating other artificial barriers to inclusion.

Among the significant educational findings at the Texas flagship undergraduate universities, law schools, and medical schools are the following:

Undergraduate Education:

- At Texas A&M University at College Station, African Americans and Latinos were 18.8% of freshmen enrollments at A&M in 1995, shortly before *Hopwood*. This dropped to an average of 12.1% in the first six years of the Texas Ten Percent Plan (1998-2003). Moreover, the situation at Texas A&M has not improved since 2000. In 2003, the proportion of African Americans and Latinos (12.6%) was still one-third lower than in 1995 despite the fact the percentage of Texas high school graduates who are Black and Latino increased significantly over the same period. We conclude that Texas A&M was seriously mistaken when it recently concluded that it can significantly improve diversity without affirmative action, and we urge the institution to revisit this decision.
- The situation at the University of Texas at Austin under the Ten Percent Plan is best characterized as "good but not good enough." The proportion of African Americans and Latinos in 1995 (17.5%) increased slightly to an average of 17.8% under the Ten Percent Plan in 1998-2003. The trend, though somewhat uneven, is also in a positive direction. However, during the first

five years of the Ten Percent Plan, there was a widening “opportunity gap” between the percentage of Black and Latino Texas high school graduates, and the percentage of Black and Latino freshmen at UT-Austin. Even in 2003, when Black/Latino enrollments rose to 20.6%, up significantly from the prior year, the opportunity gap nonetheless remained wider than it had been in 1995 with affirmative action.

Legal Education:

- Prior to *Hopwood*, the University of Texas Law School (UTLS) graduated more Mexican American and African American attorneys than just about any other non-minority law school in the country. African American enrollments at UTLS dropped from an average of 7.0% in 1990-95 to an average of 2.97% since *Hopwood* (1997-2003), nearly a three-fifths decline. For Mexican Americans, the corresponding figures declined from 10.9% to 7.8%. *Hopwood* initially precipitated stunning resegregation in 1997 (0.9% African Americans, 5.6% Mexican Americans), but enrollments gradually improved annually so that the 2002 entering class included 4% African Americans and 8% Mexican Americans. In 2003, enrollments for African American (6%) and Mexican Americans (13.9%) increased substantially from the previous year, but for reasons explained in this report, the 2003 yield rates for Mexican Americans and Blacks were historically high, so the 2003 figures do not suggest that UTLS can sustain a workable race-neutral program.
- Overall, the law schools in Texas have low levels of diversity after *Hopwood*, though legislation such as Education Code § 51.842, to reduce the misuse of standardized testing in graduate and professional school admissions, has had a positive impact at public institutions. African Americans are well represented at Texas Southern University’s Thurgood Marshall School of Law, a historically Black institution, but at the other eight Texas law schools, African Americans were a combined 3.7% of enrollments in 2002, well below the national average. This includes only 1.5% of enrollments at the University of Houston, 1.6% at Texas Tech, 2.5% at St. Mary’s, and 0.6% at Baylor. Across the nine Texas law schools, Latinos were about 11.8% of total enrollments in 2002, and only 8.9% when excluding St. Mary’s and Thurgood Marshall. Asian Pacific Americans were 5.0% of enrolled students in 2002 at the nine law schools in Texas, and American Indians were only 0.6%.

Medical Education:

- Only 3.3% of Texas medical degrees went to African Americans in 2001, less than half of the national average. Latinos received 11.5% of Texas medical degrees. African Americans, Latinos, and American Indians were 21.4% of first-year Texas medical school enrollments in 1995, which declined after *Hopwood* to an average of 17.2% in 1997-2002. Yet, research shows that African American and Latino physicians care for a grossly disproportionate share of the Black and Latino communities, which have urgent needs for improved health care.

I. LEGAL ANALYSIS: AFFIRMATIVE ACTION REAFFIRMED

The Fifth Circuit's *Hopwood v. Texas* ruling had a dramatic impact on higher education opportunities for students of color in Texas.¹ Now that the *Hopwood* panel's repudiation of *Bakke* has been overruled by *Grutter v. Bollinger*,² MALDEF, Americans for a Fair Chance (a project of the Leadership Conference on Civil Rights Education Fund), the Equal Justice Society, and the Society of American Law Teachers, provide this policy report to public and private universities in Texas to demonstrate why the reintroduction of race-conscious plus factor admissions is needed, and to guide institutions in developing fair and sound admissions policies. Our comprehensive review of the evidence confirms that the Ten Percent Plan and other race-neutral measures are simply not sufficient to achieve racial diversity at the University of Texas at Austin, and particularly at Texas A&M University. Affirmative action is especially needed in law and medical schools, which were not aided by the Ten Percent Plan.

A. DIVERSITY IS A COMPELLING INTEREST

In *Grutter v. Bollinger*, the Supreme Court applied strict scrutiny review to the affirmative action program at the University of Michigan Law School and held that student body diversity is a compelling governmental interest that allows for the consideration of race and ethnicity as a plus factor in the admissions process.³ The Court found that the Law School program was narrowly tailored because it was flexible, holistic, and considered race as part of an individualized assessment of each applicant.⁴ In *Gratz v. Bollinger*, the Court struck down the undergraduate affirmative action program at the University of Michigan on narrow tailoring grounds because applicants were automatically and inflexibly assigned a fixed number of points based on racial/ethnic background.⁵

In *Grutter*, the Court quoted from *Brown v. Board of Education*, and powerfully affirmed that the promotion of diversity and integration in higher education is compelling:

¹ 78 F.3d 932 (5th Cir. 1996), *rev'd in part by* *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003).

² 123 S.Ct. 2325 (2003).

³ *Id.* at 2337-41.

⁴ *Id.* at 2341-47.

⁵ 123 S.Ct. 2411 (2003).

This Court has long recognized that “education . . . is the very foundation of good citizenship.” For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.⁶

Since the modern civil rights era began a half-century ago with *Brown v. Board of Education*, and for Latinos with *Hernández v. Texas*,⁷ America has

⁶ 123 S.Ct. at 2340 (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

⁷ 347 U.S. 475 (1954). In *Hernández*, decided in the same term as *Brown*, the Court held that Mexican Americans constituted a cognizable minority class for purposes of equal protection under the Fourteenth Amendment *in areas where they were subject to local discrimination*. See JAMES A. FERG-CADIMA, BLACK, WHITE AND BROWN: LATINO SCHOOL DESEGREGATION EFFORTS IN THE PRE- AND POST-BROWN V. BOARD OF EDUCATION ERA 23 (May 2004), available at <http://www.maldef.org/pdf/LatinoDesegregation.pdf>.

It must be acknowledged that both before and after the Supreme Court’s ruling in *Hernández*, many school districts in Texas and throughout the Southwest deployed specious arguments about migrant status, limited English proficiency and other legally sanctioned loopholes to entrench segregation practices against Mexican Americans. FERG-CADIMA, *id.* at 14, 36-38. See e.g., *Independent School District v. Salvatierra*, 33 S.W. 2d 790 (Tex. Civ. App. 1930), *appeal dismissed for w.o.j., & cert. denied*, 284 U.S. 580 (1931) (allowing district to resort to the pretext that migrant children should be segregated because they started school late, though the school district only applied such a policy to Mexican Americans and not White migrant children); *Delgado v. Bastrop Indep. School Dist.*, Civ. No. 388 (W.D. Tex. June 15, 1948) (while the court declared it illegal to segregate Mexican Americans in different buildings, it allowed exceptions in the early grades where students did not know English); *United States v. Texas Educ. Agency*, 600 F.2d 518, 521 (5th Cir. 1979) (describing 1950s policy at the Lubbock Independent School District, which segregated Mexican Americans at the Guadalupe School, formerly known as the “Mexican School”); *Hernandez v. Driscoll Consolidated Indep. School Dist.*, 2 Race Rel. L. Rev. 329 (S.D. Tex. January 11, 1957) (pursuant to the *Delgado* case, the superintendent in Driscoll ordered that Mexican Americans could only be segregated in the first grade, supposedly as a means of combating language deficiency, whereupon the district simply kept Mexican Americans in first grade for the first *four years* of their education). See also *U.S. v. Flager Co. School Dist.* 457 F.2d 1402, 1402 n.3 (5th Cir. 1972) (describing the *Driscoll* case).

As MALDEF attorney Ferg-Cadima explains, “[T]oday we recognize that ethnic discrimination is largely indistinguishable from racial discrimination’ but in the 1950s localities believed ‘they could hide what was, in intent and effect, racial discrimination, behind a façade of ...ethnic discrimination’ and assume that the courts would find it acceptable.” FERG-CADIMA, *id.* at 14 (quoting Thomas A. Saenz, Vice President of MALDEF’s litigation team). Thus, it was not until the *Cisneros* and *Keyes* cases in the early 1970s -- in which MALDEF filed pivotal friend-of-the-court briefs – that *Brown v. Board of Education* began to apply to Mexican Americans in a meaningful way. See *Cisneros v. Corpus Christi Indep. School Dist.*, 324 F. Supp. 599 (S.D. Tex. 1970), *aff’d* 467 F.2d 142 (5th Cir. 1972); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189,

struggled to live up to its ideals of equality. Education, because it is “perhaps the most important function of state and local governments”⁸ and because it has a “fundamental role in maintaining the fabric of our society,”⁹ will continue to play a unique role in the elimination of discrimination and the creation of genuine equality in America.

In *Regents of the University of California v. Bakke*, Justice Powell declared, “The atmosphere of ‘speculation, experiment and creation’ – so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.”¹⁰ In *Grutter*, moreover, the Court was presented with a large body of social science research confirming the benefits of a diverse student body from the University of Michigan¹¹ and amici.¹² *Grutter* substantially strengthened Powell’s opinion, finding that the educational benefits of diversity are “substantial” and “are not theoretical but real.”¹³

In *Hopwood*, two Fifth Circuit judges held that diversity is not a compelling interest under strict scrutiny review.¹⁴ The Fifth Circuit rejected Justice Powell’s opinion in *Bakke*, instead relying on the Supreme Court’s subsequent rulings in the area of contracting.¹⁵ *Hopwood*’s ill-advised prediction

197-98 (1973). See also FERG-CADIMA, *id.* at 31-33; Margaret E. Montoya, *A Brief History of Chicano School Segregation: One Rationale for Affirmative Action*, 12 BERKELEY LA RAZA L.J. 159, 163, 169-70 (2001). The aforementioned Mexican American segregation cases demonstrate that the Fifth Circuit was incorrect in *Hopwood* when it declared, “There is no history...of *de jure* discrimination against Mexican Americans in education at any level in Texas...” 78 F.3d at 955 n.50.

⁸ *Brown*, 347 U.S. at 493.

⁹ *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

¹⁰ 438 U.S. 265, 312 (1978) (citing William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY, Sept. 26, 1977, at 7, 9).

¹¹ Regarding the University of Michigan experts’ evidence on diversity, see e.g., Expert Report of Patricia Gurin, reprinted at 5 MICH. J. RACE & L. 363 (1999); Expert Report of William G. Bowen, reprinted at 5 MICH. J. RACE & L. 427 (1999); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998).

¹² The *Grutter* majority, 123 S.Ct. at 2340, was also persuaded by the Brief for the American Educational Research Ass’n et al. as Amici Curiae (Feb. 15, 2003), available at <http://www.umich.edu/~urel/admissions/legal/grutter/>; DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & M. Kurlaender eds., 2001); COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGE AND UNIVERSITIES (Mitchell Chang et al., eds., 2003).

¹³ 123 S.Ct. at 2339-40.

¹⁴ 78 F.3d 932, 944 (5th Cir. 1996).

¹⁵ *Id.* at 944-45 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)). See also Gerald Torres, *Grutter v. Bollinger/Gratz v.*

that diversity was not compelling in higher education¹⁶ was rebuked in *Grutter*: “We first wish to dispel the notion that the Law School’s argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*.”¹⁷ The Court’s majority opinion authored by Justice O’Connor also declared, “Context matters when reviewing race-based governmental action under the Equal Protection Clause.”¹⁸

Grutter also acknowledged that strict scrutiny review in the context of higher education means “taking into account complex educational judgments in an area that lies primarily within the expertise of the university.”¹⁹ The Court recognized that “universities occupy a special niche in our constitutional tradition.”²⁰ Thus, *Grutter* announced a presumption of “good faith” on the part of universities selecting their student bodies unless there is a showing to the contrary.²¹

The *Hopwood* court found that “the use of race to achieve diversity undercuts the ultimate goal of the Fourteenth Amendment”²² This formulation, which turns a blind eye to the legislative intent of the Fourteenth Amendment,²³ contrasts with the *Grutter* decision. The Court forcefully declared, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”²⁴

Bollinger: *View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1596 (2003) (“The *Hopwood v. Texas* decision was breathtaking in its disdain for the Supreme Court’s educational equal protection jurisprudence.”).

¹⁶ See *Rodríguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (only the Supreme Court retains “the prerogative of overruling its own decisions.”). See also *Hopwood*, 78 F.3d at 963 (Weiner, J. specially concurring) (“[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.”).

¹⁷ 123 S.Ct. at 2338.

¹⁸ *Id.* at 2338 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960)).

¹⁹ *Id.* at 2339.

²⁰ *Id.* at 2339 (citations omitted).

²¹ *Id.* at 2339.

²² 78 F.3d at 947-48.

²³ See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

²⁴ 123 S.Ct. at 2340-41.

B. NARROWLY TAILORING AFFIRMATIVE ACTION PROGRAMS

In *Grutter*, the Supreme Court held that the University of Michigan Law School's affirmative action program "bears the hallmarks of a narrowly tailored plan."²⁵ *Grutter* and *Gratz* are the first Supreme Court cases to clearly define the narrow tailoring prong of strict scrutiny review in the context of higher education admissions. The Court stated that the narrow tailoring test "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."²⁶

The narrow tailoring test applied in *Grutter* and *Gratz* raises five key points. First, the Court distinguished quotas, which were clearly impermissible under *Bakke*,²⁷ from Michigan's use of a goal in the form of a target range. Michigan sought to enroll a "critical mass" of underrepresented minority students who otherwise would not have a "meaningful representation" at the Law School, and sought to have enough diversity so that such students "do not feel isolated or like spokespersons for their race."²⁸ *Grutter* clearly delineated quotas from goals:

Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." Quotas "impose a fixed number or percentage which must be attained, or which cannot be exceeded," and "insulate the individual from comparison with all other candidates for the available seats." In contrast, "a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself," and permits consideration of a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants."²⁹

As a practical matter, the University of Michigan Law School enrolled a range of 13.5% to 20% of African Americans, Latinos and American Indians

²⁵ 123 S.Ct. at 2342.

²⁶ *Id.* at 2341.

²⁷ *Id.* at 2342 (citing *Bakke*, 438 U.S. at 315-16 (opinion of Powell, J)).

²⁸ *Id.* at 2333-34 (quoting trial testimony of admissions director Erica Munzel and dean Jeffrey Lehman).

²⁹ *Id.* at 2342 (citations omitted).

combined between 1993 and 2000.³⁰ In *Grutter*, the Court, citing Justice Powell's *Bakke* opinion, recognized that "'some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota."³¹ The Court also acknowledged, "[T]here 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.'"³² Thus, it can be constitutionally permissible to establish affirmative action enrollment goals as long as the policy and/or practice does not establish a fixed number or percentage of admittees.

Second, narrowly tailored affirmative action plans must be sufficiently flexible so as to provide for individualized consideration of applicants from all racial and ethnic groups. As the Court explained in *Grutter*:

When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.³³

In contrast to *Grutter*, in *Gratz* the Court found that Michigan's undergraduate admissions program was not narrowly tailored because it automatically assigned a fixed number of points to all applicants from underrepresented groups.³⁴ The Court rejected Michigan's argument in *Gratz* that the volume of applications it receives render individualized review impractical: "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."³⁵

Third, under *Grutter* narrowly tailored affirmative action does "require serious, good faith consideration of workable race-neutral alternatives that will

³⁰ Brief for Respondents in *Grutter v. Bollinger* 41 n.67 (Feb. 18, 2003), available at <http://www.umich.edu/~urel/admissions/legal/grutter/>.

³¹ 123 S.Ct. at 2343 (citing *Bakke*, 438 U.S. at 323 (opinion of Powell, J.)).

³² *Id.* at 2343 (citing *Bakke*, 438 U.S. at 323 (opinion of Powell, J.)).

³³ *Id.* at 2343.

³⁴ 123 S.Ct. at 2428-29.

³⁵ *Id.* at 2430 (citations omitted).

achieve the diversity the university seeks.”³⁶ However, “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”³⁷ In fact, the Supreme Court rejected Justice Scalia’s contention, shared by the district court, that the Law School should be forced to forego selective admission standards for everyone.³⁸

Of course, in Texas *Hopwood* has already forced institutions of higher learning to experiment with several race-neutral alternatives. In the latter portions of this report, we analyze the successes and shortcomings of many of these efforts. In Parts II through IV we will explain why affirmative action should be pursued at public and private institutions in Texas, but that it would be unwise to simply return to the pre-*Hopwood* status quo. For example, we agree with Professor Gerald Torres of the University of Texas Law School, who argued in an essay after the *Grutter* ruling:

Hopwood forced us to reexamine our goals with clarity and honesty. What does our responsibility as a flagship institution demand? The answer is in many ways consonant with the one expressed by Justice O’Connor—that education is unique in our society because it is “the path to leadership.” That is even truer where particular institutions served as historical gateways to state leadership. The flagship campuses in Texas have traditionally served that role. We had to be concerned about our capacity to serve every geographic region of the state of Texas, along with every community, every school district, and every socioeconomic level. By weaving considerations of race into our admissions policies without forgetting the lessons we have learned since 1996, we will be better able to serve the entire state as well as the students on campus.³⁹

Regarding workable race-neutral alternatives, in *Grutter* and *Gratz*, the Bush Administration argued that the University of Michigan’s affirmative action programs were not narrowly tailored and were unconstitutional because there are ample race-neutral alternatives, with the Texas Ten Percent Plan being the

³⁶ 123 S.Ct at 2345.

³⁷ *Id.* at 2344.

³⁸ *Id.* at 2344-45.

³⁹ Torres, *View from a Limestone Ledge*, *supra* note 15, at 1608 (quoting *Grutter*, 123 S.Ct. at 2341).

most prominent example.⁴⁰ While the Court did find that Michigan's undergraduate admissions program at issue in *Gratz* was not narrowly tailored to meet the goal of educational diversity, this holding was principally based on the Court's finding that the automatic awarding of 20 points to every underrepresented minority applicant effectively made race the decisive factor in admission for virtually all minimally qualified beneficiaries of the plan.⁴¹ In other words, Michigan's policy in *Gratz* was struck down for reasons completely unrelated to the Texas Ten Percent Plan, and neither the majority nor concurring opinions in *Gratz* even mention the Ten Percent Plan.⁴²

Moreover, in *Grutter* the Court criticized the Bush Administration for not "explain[ing] how such plans could work for graduate and professional schools."⁴³ The *Grutter* majority opinion also includes dicta highlighting the tension between percentage plans and the individualized review necessary for constitutionally permissible affirmative action. The Court noted, "[E]ven assuming such plans are race-neutral, they 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."⁴⁴ We will address this issue in Parts II through IV of this report.

Fourth, the Court proclaimed that narrowly tailored affirmative action programs "must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'"⁴⁵ The Court found that since the University of Michigan Law School employed a holistic, individualized review process, members of other groups were not unduly burdened: "Because the Law School considers 'all pertinent elements of diversity,' it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants."⁴⁶ The Court's finding in *Grutter* is instructive because both conservatives and liberals have made exaggerated claims about the extent to which affirmative action harms Whites,

⁴⁰ Brief of the United States as Amicus Curiae Supporting Petitioner in *Grutter v. Bollinger* and *Gratz v. Bollinger* (Jan. 15, 2003), available at <http://www.umich.edu/~urel/admissions/legal/amicus.html>.

⁴¹ 123 S.Ct. at 2426-31.

⁴² *Id.* at 2426-31 (Rehnquist, C.J., writing for the majority); *id.* at 2431-33 (O'Connor, J., concurring); *id.* at 2433 (Thomas, J., concurring); *id.* at 2433-34 (Breyer, J., concurring in the judgment).

⁴³ 123 S.Ct. at 2345.

⁴⁴ *Id.* at 2345.

⁴⁵ *Id.* (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

⁴⁶ *Id.* (citing *Bakke*, 438 U.S. at 317).

including with respect to the University of Texas Law School.⁴⁷ Thus, it must be pointed out that at highly selective institutions the presence of affirmative action typically has a quite minimal effect on the admission rates for White applicants.⁴⁸

Fifth, the Court in *Grutter* declared, “In the context of higher education, the durational requirement [of narrow tailoring] can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”⁴⁹ The Court also noted, “We expect that 25 years from now, the use of the racial preferences will no longer be necessary to further the interest approved today.”⁵⁰

It is important to emphasize that this last sentence should not be interpreted as imposing a 25-year sunset clause on affirmative action, for, as *Grutter* makes clear, institutions may ensure that their affirmative action programs are narrowly tailored by periodically reviewing whether race-conscious admissions continue to be necessary to achieve diversity.⁵¹ As many of our country’s preeminent constitutional scholars recently concluded in their analysis of *Grutter*, “This sentence [regarding 25 years] should be construed as the Court’s dictum expressing, by reference to the passage of time since the *Bakke* decision, its aspiration—and not its mandate—that there will be enough progress in equal educational opportunity that race-conscious policies will, at some point in the future, be unnecessary to ensure diversity.”⁵²

⁴⁷ See e.g., Lino A. Graglia, *Hopwood v. Texas: Racial Preferences in Higher Education Upheld and Endorsed*, 45 J. LEGAL EDUC. 79, 87 (1995) (criticizing Justice Powell’s *Bakke* opinion: “*Bakke* won, but no other of the *thousands or millions* of victims of racial discrimination by institutions of higher education would ever win.”) (emphasis added); MICHAEL LIND, *THE NEXT AMERICAN NATION* 166 (1995) (In reference to the University of Texas Law School, arguing: “[I]n order to accommodate a few less-qualified black students” universities and law schools “must turn down hundreds or thousands of academically superior white students every year.”).

⁴⁸ Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002).

⁴⁹ 123 S.Ct. at 2346.

⁵⁰ 123 S.Ct. at 2347. In dissent, Justice Thomas joined by Justice Scalia, characterized this language as part of the holding of the case. 123 S.Ct. at 2350 (“I agree with the Court’s holding that racial discrimination in higher education admissions will be illegal in 25 years.”). *But see* 123 S.Ct. at 2369-70 (Rehnquist, C.J., dissenting) (criticizing the majority’s “possible 25-year limitation” as “the vaguest of assurances”).

⁵¹ *Id.* at 2346.

⁵² Joint Statement of Constitutional Law Scholars, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 11 (July 2003), available at http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf

II. BLEND IT, DON'T END IT: THE TEXAS TEN PERCENT PLAN AND AFFIRMATIVE ACTION IN UNDERGRADUATE EDUCATION

A. WHY RACE-CONSCIOUS ADMISSIONS ARE STILL NECESSARY AT THE UNIVERSITY OF TEXAS AT AUSTIN & TEXAS A&M UNIVERSITY

As discussed in Part I, *Grutter* directs that in order for race-conscious admissions to be narrowly tailored a university must engage in “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”⁵³ Narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative,”⁵⁴ but if a university’s previous experience already confirms that race-neutral methods produce sufficient student body diversity, then affirmative action would likely be constitutionally suspect. Thus, before affirmative action can be adopted, a threshold question is whether the Ten Percent Plan in combination with other programs in Texas produces enough diversity that race-conscious admissions is rendered unnecessary.

Texas House Bill No. 588, known as the Texas Ten Percent Plan, was enacted in 1997 and took effect in 1998.⁵⁵ Under the Ten Percent Plan, Texas students ranked in the top tenth of their high school class are guaranteed admission to any public university in Texas, including at UT-Austin and Texas A&M.

In Part II, our analysis of racial/ethnic diversity and the Texas Ten Percent Plan is limited to the two flagship public universities in Texas: the University of Texas at Austin (hereinafter “UT-Austin”) and Texas A&M University at College Station (hereinafter “Texas A&M”). It is at these two large, competitive public universities where the Ten Percent Plan altered admissions, and the flagships are also important because the tradition of low in-state tuition make them important

⁵³ 123 S.Ct. at 2345.

⁵⁴ *Id.* at 2344.

⁵⁵ Tex. Educ. Code § 51.803. For a legislative and political history of the Texas Ten Percent Plan, see Torres, *View from a Limestone Ledge*, *supra* note 15, at *passim*; Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK LITTLE ROCK L.J. 993, 1004, 1114-18 (1999); Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 252-59 (1999); David Montejano, *Maintaining Diversity at the University of Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 359 (Robert Post & Michael Rogin, eds., 1998).

gateways of opportunity.⁵⁶ Our analysis indicates that the Ten Percent Plan has a mixed record of promoting racial diversity, particularly at Texas A&M, and we conclude that affirmative action is still needed at UT-Austin and Texas A&M. Accordingly, we strongly support UT-Austin's proposal to reintroduce affirmative action for the fall 2005 class.⁵⁷ On the other hand, we believe that Texas A&M's decision not to take account of race in admissions will further roll back access for underrepresented students of color in Texas higher education.⁵⁸

In this section, as well as the law school and medical school sections that follow, we primarily focus on opportunities for African Americans, Latinos, and American Indians, although Asian Pacific Americans are also discussed in some sections. The data is not as complete for Asian Pacific Americans, in part because of the unavailability of admission figures for the diverse ethnic/national subgroups included within such a broad category, but we acknowledge that it is important for future research to address the positions of Asian Pacific Americans in Texas higher education. Likewise, this report does not focus on the barriers women continue to face in higher education, especially as they relate to access to opportunities in underrepresented fields including the sciences, mathematics, engineering, and business.

1) *UT-Austin & Texas A&M Had Low Diversity Prior to Hopwood*

In order to properly analyze the Texas Ten Percent Plan's impact on racial and ethnic diversity, we begin by showing that Texas A&M and UT-Austin were hardly national models of racial diversity prior to *Hopwood*. This point is crucial because many argue that with the Texas Ten Percent Plan, African American and

⁵⁶ See Jorge Chapa, *Affirmative Action, X Percent Plans, and Latino Access to Higher Education in the Twenty-first Century*, in *LATINOS: REMAKING AMERICA* 375, 381 (Marcelo M. Suárez-Orozco & Mariela M. Páez eds., 2002); MARTA TIENDA ET AL., *CLOSING THE GAP?: ADMISSIONS & ENROLLMENTS AT THE TEXAS PUBLIC FLAGSHIPS BEFORE AND AFTER AFFIRMATIVE ACTION* 4, 6 (2003), available at <http://opr.princeton.edu/papers/opr0301.pdf> (study of 240,000 in-state resident applicants comparing admissions at the two flagships with affirmative action (1992-96) and without affirmative action (1997-2000)).

Note that the Tienda post-*Hopwood* data combines one cycle without the Texas Ten Percent Plan (1997) with three cycles during which the Plan was in effect (1998-2000). For this reason, in Section II.A we rely upon independent data sources to draw conclusions specifically about the impact of the Texas Ten Percent Plan.

⁵⁷ Todd Ackerman, *Texas at Center of Debate over Race*, *HOUSTON CHRON.*, Dec. 14, 2003; Matt Flores, *UT Plans for Affirmative Action*, *SAN ANTONIO EXPRESS-NEWS.*, Dec. 2, 2003.

⁵⁸ Ron Nissimov, *A&M Regents Approve Admissions Policy*, *HOUSTON CHRON.*, Dec. 6, 2003; David Sedeno, *A&M Won't Use Race in Admissions*, *DALLAS MORNING NEWS*, Dec. 5, 2003.

Latino enrollments are now above pre-*Hopwood* levels. While that observation is accurate at UT-Austin in 1999 and 2002-2003, when viewed in context, it does not follow from this fact that there is no need for narrowly tailored race-conscious affirmative action. As Professor Torres of UT explains, “There is no reason for the pre-*Hopwood* number . . . to be the baseline.”⁵⁹ In fact, for the reasons discussed later in this Section, the Texas Ten Percent Plan and affirmative action can and should go hand-in-hand.

Chart 1 (and Chart 4 in the section II.A.3), which uses 1995 as a benchmark for pre-*Hopwood* enrollment levels,⁶⁰ indicates that prior to the Fifth Circuit’s ban on affirmative action Texas A&M was modestly more diverse than UT-Austin. In 1995, African Americans were 4.5% of the freshman class at Texas A&M and 3.4% at UT-Austin. Latinos were 14.3% of freshman enrollments at A&M and 14.1% at UT-Austin.⁶¹ In addition, both A&M and UT-Austin were substantially less diverse than the average for the dozens of institutions in the Texas public university system as a whole, where African Americans were 11.3% of freshman in 1995 and Latinos were 20.8%.⁶²

Moreover, the low pre-*Hopwood* diversity levels at UT-Austin and Texas A&M were not simply an artifact of these two institutions being more selective than other public universities. For example, UC Berkeley and UCLA were both more selective than UT-Austin and Texas A&M, and California has a comparable Latino population and a smaller African American population (in addition to a

⁵⁹ PENDA D. HAIR, *LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE* 18 (2001) (quoting Torres), available at <http://www.rockfound.org/Documents/431/louderthanwords.pdf>

⁶⁰ Throughout this report, 1995 data is preferred as the benchmark for assessing the consequences of *Hopwood* because the Fifth Circuit’s March 1996 ruling did impact some admission decisions in 1996 and public awareness of the ruling had a chilling effect on yield rates as some admitted students of color were concerned they would be attending institutions where they could become increasingly marginalized. See Susanna Finnell, *The Hopwood Chill: How the Court Derailed Diversity Efforts at Texas A&M*, in *CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES* 71, 72-73 (Gary Orfield & Edward M. Miller eds., 1998) (documenting the chilling effect of *Hopwood* at Texas A&M in 1996 even before the ruling impacted the upcoming admissions cycle); University of Texas Law School, *Minority Enrollment for Entering First Year Classes at the University of Texas School of Law, 1983-2002* (stating that 1996 included affirmative action for only part of the admissions cycle), available at <http://tarlton.law.utexas.edu/hopwood/minority.html>.

⁶¹ CATHERINE L. HORN & STELLA M. FLORES, *PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES* 49 tbl.28 (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf>.

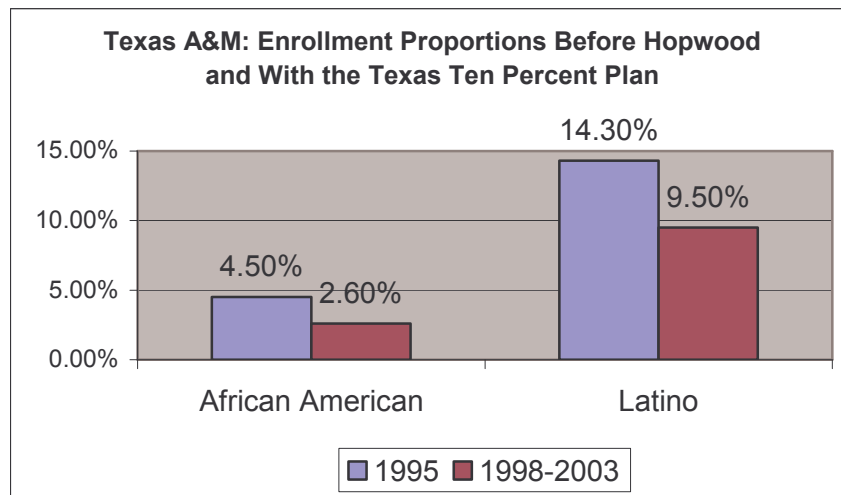
⁶² *Id.* at 25 tbl.25.

substantially larger Asian Pacific American population). Yet the flagship UC campuses were noticeably more diverse than the Texas flagships. In 1995 with affirmative action, African Americans were 6.7% of freshmen at Berkeley and 7.4% at UCLA, while Latinos were 16.9% and 22.4%, respectively.⁶³

2) *Texas A&M's Diversity Sinks Lower Under the Ten Percent Plan*

Even though racial diversity was already relatively low prior to *Hopwood*, Chart 1 confirms that under the Texas Ten Percent Plan racial diversity remains substantially below pre-*Hopwood* levels at Texas A&M. African American freshman enrollments sunk from 4.5% in 1995 to an average of 2.6% in 1998-2003, a decline of more than two-fifths. Latino freshman enrollments also declined from 14.3% to 9.5% at Texas A&M under the Ten Percent Plan, a drop of one-third. Combined, African Americans and Latinos were 18.8% of freshmen enrollments at A&M in 1995, compared to an average of 12.1% under the first six years of the Texas Ten Percent Plan (1998-2003).

Chart 1⁶⁴



As for trends since the Ten Percent Plan went into effect, Chart 2 illustrates that there was a very small increase in the proportion Texas A&M freshmen who were African American and Latino between the first year (1998) and the sixth year of the Plan (2003). This figure increased from 11.6% in 1998 to

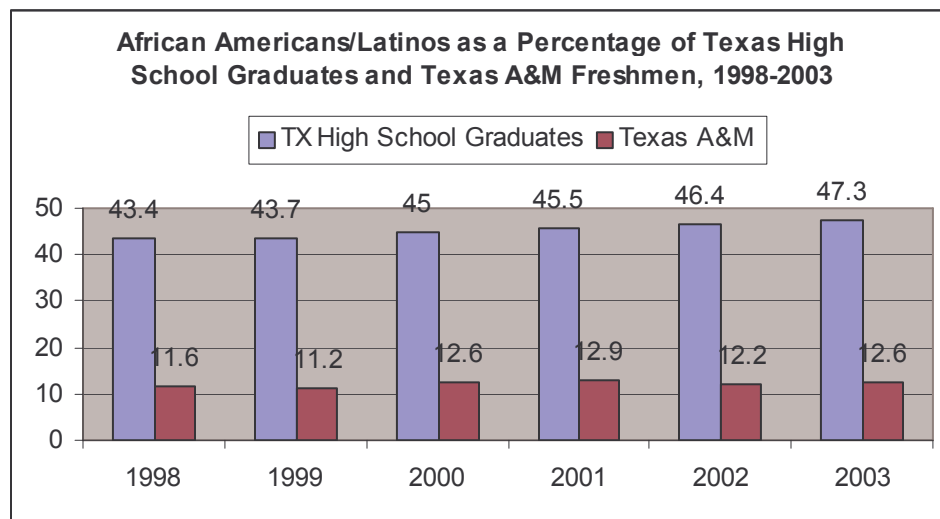
⁶³ *Id.* at 50 tbl.29.

⁶⁴ 1998 to 2002 data are from the Texas Higher Education Coordinating Board, First-Time Undergraduate Applicant, Acceptance, and Enrollment Information (1998-2002), available at http://www.thecb.state.tx.us/ane/reports/top_10/default.htm, and are based on a weighted average of 1998-2002 enrollments. 1995 data is from HORN & FLORES *supra note* 61, at 49 tbl.28.

12.6% in 2000. However, in the last four years (2000-2003), the percentage of Black and Latino A&M freshmen stayed flat at about 12.6%.

Moreover, even these meager gains under the first six years of the Ten Percent Plan should be evaluated in the larger context of the changing demographics of Texas. Chart 2 confirms that between 1998 and 2003 the “opportunity gap” actually widened: There was a growing divide between the percentage of Texas high school graduates who are Black and Latino, and the percentage of Texas A&M freshmen who are Black and Latino. This opportunity gap grew from 31.8 percentage points in 1998, to 32.4 points in 2000, and 34.7 points in 2003.

Chart 2⁶⁵



In light of these figures, we find it difficult to reconcile the recent decision by the Texas A&M Regents and President Robert Gates not to resume race-conscious admissions with Gates’ claim that his “top priority is increasing minority enrollment.”⁶⁶ Gates promises that increased financial aid and outreach will accomplish this goal.⁶⁷ Yet there is little in Texas A&M’s track record to suggest diversity will significantly improve in the near future. Thus, as

⁶⁵ Texas Education Agency, Student Graduate Reports (1998-2003), available at <http://www.tea.state.tx.us/adhocrpt/>; Texas Higher Education Coordinating Board, First-Time Undergraduate Applicant, Acceptance, and Enrollment Information (1998-2003), available at http://www.theccb.state.tx.us/ane/reports/top_10/default.htm.

⁶⁶ Todd Ackerman, *Texas at Center of Debate over Race*, HOUSTON CHRON., Dec. 14, 2003.

⁶⁷ *Id.*

our “Blend It, Don’t End It” title suggests, a more effective approach for Texas A&M is to blend *Grutter*-style affirmative action with the Ten Percent Plan.

The fact remains that since *Hopwood* banned affirmative action, Texas A&M has had seven years to experiment with “race neutral” scholarship assistance and outreach to low-income students, such as the Century Scholars Program initiated in 2002, and A&M’s efforts have been considerably less successful at maintaining diversity in comparison to UT-Austin.⁶⁸ Texas A&M also administers scholarships targeting minorities that are privately funded by alumni groups and corporations,⁶⁹ but this, too, has been insufficient to preserve diversity since *Hopwood*.

President Gates’ public statement reflects the position that encouraging students of color to apply and accept admission offers are the only keys to increasing diversity at A&M.⁷⁰ Yet, Gates ignores the recommendation that Dr. Arekere and Professor Rice made in a major study commissioned by Texas A&M officials on how best to improve enrollments for students of color. In that study, Arekere and Rice acknowledged that increasing minority application volume, scholarship assistance, and outreach were important, but they also recommended, even prior to *Grutter*, that A&M should “[i]ncrease the offer rate to improve proportional minority student enrollment even if yield rate stays constant.”⁷¹

Moreover, Chart 3 demonstrates that despite the Ten Percent Plan, Texas A&M’s admission decisions, and not merely students’ decisions not to enroll, continue to be an obstacle to diversity. Chart 3 displays Texas A&M “admission ratios,” a measure of how likely students of color were to be offered admission relative to White applicants.⁷² For example, in 2003, 59.0% of African Americans who applied to A&M were offered admission, compared to 68.9% of Whites. This means that African Americans were 85.6% as likely as Whites to be admitted

⁶⁸ Torres, *View from a Limestone Ledge*, *supra* note 15, at 1604-07.

⁶⁹ Ron Nissimov, *Detouring Toward Diversity, Schools Push Limits of Hopwood Ruling*, HOUSTON CHRON., May 5, 2002.

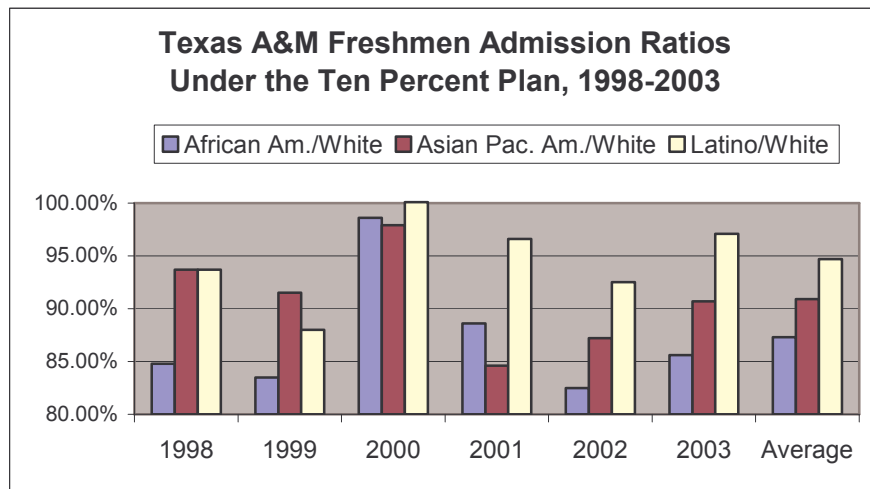
⁷⁰ Cf. Ackerman, *Texas at Center of Debate over Race*, *supra* note 66.

⁷¹ Dhananjaya Arekere & Mitchell F. Rice, *Factors Influencing Minority Students’ Decision Not to Enroll at Texas A&M University (Minority Study III) v* (Sept. 2002), *available at* <http://resi.tamu.edu> (go to Minority Student Study Reports).

⁷² William C. Kidder, *Silence, Segregation, and Student Activism at Boalt Hall*, 91 CAL. L. REV. 1167, 1180 (2003) (explaining that the admission ratio of minority to White admits makes year-to-year figures comparable despite fluctuations in selectivity).

to Texas A&M (100% means equal chances of admission). Chart 3, which includes all Texas A&M applicants as opposed to only those eligible under the Ten Percent Plan, indicates – with the sole exception of 2000 – African Americans, Asian Pacific Americans, and Latinos have not yet reached parity with Whites at A&M. Moreover, there is little indication that the situation is improving even though there is now a better infrastructure of institutional relationships to reach out to Texas college-bound high school students, compared to when the Ten Percent Plan began.

Chart 3⁷³



Accordingly, we conclude that while increased scholarship aid and outreach are very important, it is unrealistic to think that these tools alone will substantially boost racial and ethnic diversity at Texas A&M in the absence of race-conscious admissions. As Ray Bowen, the past President of Texas A&M recently concluded, “It was a real struggle to argue that the top 10-percent rule made any difference.”⁷⁴ Since Texas A&M has, for several years now, already engaged in what the *Grutter* Court calls “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks,”⁷⁵ we are mystified by A&M’s insistence that a diverse student body is just around the corner using race-neutral methods.

⁷³ Analyzed from data collected in Texas Higher Education Coordinating Board, First-Time Undergraduate Applicant, Acceptance, and Enrollment Information (1998-2003) available at http://www.thecb.state.tx.us/ane/reports/top_10/default.htm American Indians are excluded because of the statistically small sample (only about 40-60 are admitted each year).

⁷⁴ Sara Hebel, ‘Percent Plans’ Don’t Add Up, CHRON. HIGHER EDUC., March 21, 2003, at A26.

⁷⁵ 123 S.Ct. at 2345.

3) *UT-Austin's Diversity is Good but not Good Enough Under the Ten Percent Plan*

At UT-Austin the main effect of the Texas Ten Percent Plan was to stem the tide of resegregation evident in the first post-*Hopwood* class of 1997, when African Americans were only 2.7% of the freshman class and Latinos were 12.6%.⁷⁶ Chart 4 indicates that under the first six years of the Ten Percent Plan, on average, UT-Austin has been able to slightly exceed pre-*Hopwood* levels of racial and ethnic diversity. For the reasons explained in this section, we find that the Ten Percent Plan has had a positive effect on UT-Austin, but that enrollments are not yet sufficiently diverse so that race and ethnicity should be ignored in the admissions and financial aid process. For African Americans, enrollments at UT-Austin increased marginally, from 3.4% in 1995 to an average of 3.6% in 1998-2003. For Latinos, enrollments at UT-Austin went from 14.1% in 1995 to an average of 14.2% in 1998-2003.

Chart 4⁷⁷

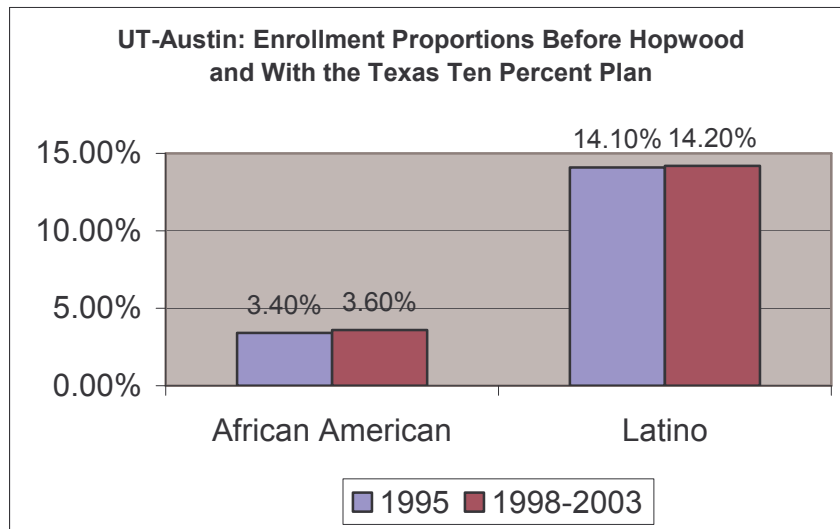


Chart 5 takes a closer look at year-to-year trends since the Ten Percent Plan went into effect, showing that there was a small increase in the percentage African American and Latino freshmen at UT-Austin between 1998 (16.2%) and 1999 (17.9%), then no additional progress between 1999 and 2002 (17.9%). However, 2003 marked a significant increase in diversity, when Blacks and

⁷⁶ Holley & Spencer, *supra note 55*, at 252 tbl.1.

⁷⁷ 1998 to 2002 data are from the Texas Higher Education Coordinating Board, available at http://www.thecb.state.tx.us/ane/reports/top_10/default.htm, and are based on a weighted average of 1998-2002 enrollments. 1995 data is from HORN & FLORES, *supra note 55*, at 49 tbl.28.

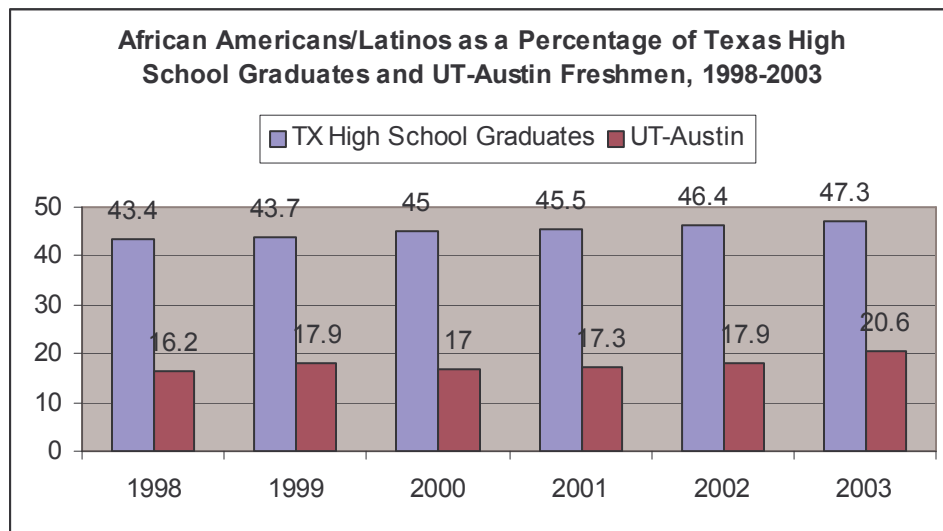
Latinos were 20.6% of UT-Austin freshmen. The reasons for this noticeable rise during year six of the Ten Percent Plan are unclear, so it is too soon to say whether this is a statistical anomaly or the beginning of a trend. Because UT-Austin curtailed the size of the freshmen class, there was a large increase in the proportion of the Texas resident freshmen admitted under the Texas Ten Percent Plan, from 54% in 2002 to 70% in 2003.⁷⁸

The year-to-year diversity figures at UT-Austin during the first six years of the Ten Percent Plan should be evaluated in the larger context of changing Texas demographics. Chart 5 confirms that during the first five years of the Ten Percent Plan (1998 to 2002), there was a growing divide between African Americans' and Latinos' percentage of Texas high school graduates versus UT-Austin freshmen enrollment levels. This opportunity gap grew from 27.2 percentage points in 1998, to 28.0 points in 2000, and 28.5 points in 2002. It was only in 2003 that the opportunity gap at UT-Austin dropped to 26.7 points. However, even in 2003 the opportunity gap was wider than in 1995 with affirmative action, when it was 23.5 points.⁷⁹

⁷⁸ GARY M. LAVERGNE & BRUCE WALKER, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN: DEMOGRAPHIC ANALYSIS FALL 2003, 3 (Jan. 2004), available at <http://www.utexas.edu/student/admissions/research/HB588-Report6-part1.pdf>.

⁷⁹ The link to the report of 1995 high school graduates at Texas Education Agency, Student Graduate Reports, available at <http://www.tea.state.tx.us/adhocrpt/>, is no longer active. Thus, here we compare the 1995 UT-Austin data in Chart 4 to the 1996 Texas high school graduation data reported in HORN & FLORES *supra* note 55, at 29 tbl.5. This estimate is conservative vis-à-vis our claim about 2003 versus 1995 (i.e., it slightly overstates the size of the 1995 “opportunity gap”); the 1996 Black/Latino high school graduate percentage is likely a bit higher than that for 1995.

Chart 5⁸⁰



In summary, we strongly support UT-Austin’s proposal to resume narrowly tailored race-conscious admissions beginning with the 2005 class. As applied to UT-Austin, affirmative action remains necessary to reap the educational benefits of diversity that the Supreme Court, in *Grutter*, found are “substantial.”⁸¹ UT-Austin’s recent analysis of its Fall 2002 undergraduate course enrollments confirms that there is not yet a “critical mass” necessary to foster a diverse learning environment.

UT-Austin found that a high proportion of 2002 classes had one or zero African Americans or Latinos.⁸² In all classes of five or more students, 52% had no African Americans and 79% had one or zero African Americans.⁸³ In smaller UT-Austin classes (5-24 students), 65% had no African Americans and 90% had one or zero African Americans.⁸⁴ In addition, 30% of classes had one or zero

⁸⁰ Texas Education Agency, Student Graduate Reports (1998-2002), available at <http://www.tea.state.tx.us/adhocrpt/>; Texas Higher Education Coordinating Board, First-Time Undergraduate Applicant, Acceptance, and Enrollment Information (1998-2002), available at http://www.theccb.state.tx.us/ane/reports/top_10/default.htm,

⁸¹ 123 S.Ct. at 2339.

⁸² University of Texas at Austin, Press Release: The University of Texas at Austin proposes inclusion of race as a factor in admissions process, Nov. 24, 2003, available at http://www.utexas.edu/opa/news/03newsreleases/nr_200311/nr_admission031124.html. See also UNIVERSITY OF TEXAS AT AUSTIN OFFICE OF ADMISSIONS, DIVERSITY LEVELS OF UNDERGRADUATE CLASSES AT THE UNIVERSITY OF TEXAS AT AUSTIN 1996-2002 (Nov. 2003), available at <http://www.utexas.edu/student/admissions/research/ClassroomDiversity96-03.pdf>

⁸³ UT-Austin Press Release, *id.*

⁸⁴ *Id.*

Latinos (43% for small classes), and 33% had one or zero Asian Pacific Americans (46% for small classes).⁸⁵

We also conclude that the Ten Percent Plan is “good but not good enough” regarding racial/ethnic diversity because the percentage of Black and Latino graduates from the most competitive high schools in Texas are less likely to enroll in selective public universities in Texas than they were prior to *Hopwood*. For example, Professors Kain and O’Brien compared the fraction of students of color from these competitive high schools who enrolled at UT-Austin, Texas A&M, and UT-Dallas prior to *Hopwood* (1996) and under the Ten Percent Plan (1999-2001).⁸⁶ Kain and O’Brien found that under the Ten Percent Plan, African American enrollments at these three campuses sunk by nearly half (from 12.6% to 6.5%) and Latino enrollments dropped by nearly a third (from 18.7% to 12.9%) within the pool of graduates from traditional feeder high schools.⁸⁷ With race-conscious affirmative action, UT-Austin and other public institutions will more effectively be able to attract and admit qualified Black and Latino students who attend integrated, middle-class high schools but who may not rank in the top ten percent of their class.

In conclusion, the admission and enrollment data reviewed in this report demonstrates the wisdom of a “Blend It, Don’t End It” approach to the Ten Percent Plan and affirmative action. The Texas Ten Percent Plan needs to be complemented by race-conscious plus factor admissions at both UT-Austin and Texas A&M. Combined, these two policies will allow the Texas flagships to realize the principle at the heart of *Grutter* that “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”⁸⁸

B. DEFENDING THE BENEFITS OF THE TEN PERCENT PLAN

MALDEF has been a strong supporter of the Texas Ten Percent Plan, and believes that the Plan has had a number of important educational benefits that are broader than the debate about race-conscious affirmative action. The authors

⁸⁵ *Id.*

⁸⁶ John F. Kain & Daniel M. O’Brien, *Hopwood and the Top 10 Percent Law: How They Affected the College Enrollment Decisions of Texas High School Graduates* (Feb. 2003), *available at* <http://www.utdallas.edu/research/tsp/pdfpapers/paper26.pdf> .

⁸⁷ *Id.* at 8, tbl.3.

⁸⁸ 123 S.Ct. at 2340-41.

of this report believe that higher education in Texas will be stronger if the Ten Percent Plan is combined with affirmative action. Each has particular strengths, which is why we recommend adopting a “Blend It, Don’t End It” approach. In other words, available data supports the conclusion that the Texas Ten Percent Plan has been an educational success on several fronts, but that the Plan is not a complete replacement for narrowly tailored affirmative action policies, or vice versa. We believe the authors of the Texas Ten Percent Plan best articulated this position when they argued in *Gratz*:

As scholars, legislators, and attorneys who have actively fought for more inclusive admissions processes, we are dismayed by the *Hopwood* decision and other anti-affirmative action measures – including efforts to use percentage plans as a rationale for discarding affirmative action. As Texas has shown, properly designed and implemented percentage plans, coupled with a narrowly tailored plan of affirmative action, have inherent value beyond increased racial and geographic diversity. Percent plans can be used *together with* affirmative action, giving colleges and universities the considerable benefits of both strategies.⁸⁹

First, the Texas Ten Percent Plan has had the effect of broadening the socioeconomic diversity of flagship campuses like UT-Austin. We are heartened by Professor David Montejano’s research indicating that the Texas Ten Percent Plan, in combination with scholarship assistance and other efforts, led to a more than one-quarter increase in the high schools sending students to UT-Austin between 1996 and 2000.⁹⁰ The Plan contributed to a substantial increase in students from both inner-city, largely minority schools in Dallas-Fort Worth, Houston, and San Antonio, as well as rural schools with large White, Black, and/or Latino populations in western, eastern, and southern Texas.⁹¹ These concerns explain why the Ten Percent Plan had support from across the political spectrum.⁹²

⁸⁹ Brief of the Authors of the Texas Ten Percent Plan as Amicus Curiae Supporting Respondent in *Gratz v. Bollinger* 8 (Feb. 15, 2003), available at http://www.umich.edu/~urel/admissions/legal/gra_amicus-ussc/um/10percent-gra.pdf.

⁹⁰ David Montejano, Access to the University of Texas at Austin and the Ten Percent Plan: A Three-year Assessment (updated version Jan. 2003), available at <http://www.utexas.edu/student/research/reports/admissions/Montejanopaper.htm>.

⁹¹ *Id.* Regarding the obstacles faced by students from rural backgrounds, see Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2003).

⁹² Torres, *View from a Limestone Ledge*, *supra* note 15, at 1602; HAIR, *supra* note 59, at 28-29.

Prior to *Hopwood* and the Ten Percent Plan, a relatively small group of feeder high schools from affluent communities had the inside track on admission to campuses like UT-Austin. For example, the UT-Austin admissions office reports that historically one tenth of the state's high schools accounted for half to three-quarters of each freshman class.⁹³ All too often, selective colleges and universities, like UT-Austin, took the easy route of admitting students who benefit from parental resources rather than working to find students who demonstrate the ability to succeed in the face of obstacles. A recent study by the Century Foundation found that at 146 highly selective colleges and universities 74% of students came from the top quarter of the socioeconomic status (SES) scale, whereas only 3% came from the bottom quarter.⁹⁴

Because the Ten Percent Plan has contributed to socioeconomic, geographic, and racial/ethnic diversity, it would be unwise to return to the pre-*Hopwood* status quo. Accordingly, we strongly oppose efforts by Governor Rick Perry, State Senator Jeff Wentworth (R-San Antonio), and others to repeal the Ten Percent Plan.⁹⁵ Governor Perry ignores the fact that the Ten Percent Plan has made flagship public university campuses more accountable to the taxpayers of Texas⁹⁶ by significantly expanding the pool of high schools that send students to UT-Austin, for example.⁹⁷ Too many qualified students from disadvantaged

⁹³ Torres, *View from a Limestone Ledge*, *supra* note 15, at 1600 (reporting data provided by Augustine Garza, UT-Austin's deputy director of admissions).

⁹⁴ ANTHONY P. CARNEVALE & STEPHEN J. ROSE, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 11 (March 2003), *available at* http://www.tcf.org/Publications/White_Papers/Carnevale_rose.pdf.

⁹⁵ See e.g., Jonathan D. Glater, *Diversity Plan Shaped in Texas Is Under Attack*, N.Y. TIMES, June 13, 2004, at 1 (quoting Perry, "I really don't see how it [the Ten Percent Plan] has worked the way people projected it would work. . . And I think, across the board, Texans see it as a problem."); Darren Meritz, *Top 10% Plan has Improved Diversity at Top Texas Colleges*, EL PASO TIMES, Jan. 23, 2004, at 1 (quoting Wentworth, "There are a lot of problems with the Top 10 Percent rule, and it needs to be repealed."); Kent Fischer, *Study – Top Students not Hurt by Admissions Law*, DALLAS MORNING NEWS, Jan. 20, 2004, at 3 (quoting Wentworth, "This 'entitlement' is not fair, and it should be repealed.").

⁹⁶ Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 168 (2003) ("[T]he [Texas Ten Percent Plan] was animated by the belief that distributing access to educational opportunity broadly is consistent with the educational mission of higher education, necessary to economic viability in the global economy, important for training a representative group of citizens who will contribute to the public good, central to reconnecting the university to the K-12 educational system, and indicative of greater legitimacy within higher education.").

⁹⁷ Montejano, *Access to the University of Texas at Austin and the Ten Percent Plan*, *supra* note 90.

backgrounds were excluded from the Texas flagships prior to the Ten Percent Plan, and it would be a grave mistake to return to the prior admissions system in which a relatively small number of affluent, largely-White suburban high schools were grossly over-represented at UT-Austin.⁹⁸

While some Ten Percent Plan critics express concern about the need for a “fair set of rules” that will encourage students to take a rigorous curriculum,⁹⁹ eliminating the Ten Percent Plan would in fact send the opposite message to thousands of disadvantaged high school students across Texas. Discontinuing the Texas Ten Percent Plan would diminish incentives for these students to do their best in school,¹⁰⁰ and it would effectively penalize students from modest economic backgrounds because they cannot afford SAT preparation classes and college application coaches, or attend high schools with fewer resources and opportunities, including Advanced Placement (AP) courses.¹⁰¹

In short, ending the Ten Percent Plan would create more unfairness than it would rectify. Black and Latino high school students in Texas already have lower college aspirations than White students, on average, due to socioeconomic barriers.¹⁰² However, high school students’ knowledge of the Ten Percent Plan law has a positive effect on the extent to which students’ seek admission to four-year universities.¹⁰³ Thus, for students from modest socioeconomic backgrounds -- who are often the first in their families to attend college, and who frequently lack access to networks of college-going peers found in affluent White communities -- eliminating the Ten Percent Plan would likely undermine the college aspirations of those who are already the most vulnerable.

⁹⁸ *Id.*, see also Matt Flores, *Senator Wants College Rule Axed*, SAN ANTONIO EXPRESS NEWS, Sept. 26, 2003, at 1B (quoting Professor Michael A. Olivas as criticizing proposals to terminate the Ten Percent Plan).

⁹⁹ Melissa Drosjack, *House OKs Tougher 10% Admission Rule*, HOUSTON CHRON., May 27, 2003.

¹⁰⁰ William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL’Y REV. 185, 186-87 (1999) (arguing Texans are better off with the Ten Percent Plan’s incentive structure geared toward real learning as opposed to incentivizing standardized test preparation).

¹⁰¹ See Chapa, *supra* note 56, at 378-79 (documenting substantial disparities in Texas between Whites and Latinos regarding AP enrollments and SAT preparation courses).

¹⁰² Marta Tienda et al., *College Attendance and the Texas 10 Percent Law: Permanent Contagion or Transitory Promise?* 9-11 (Nov. 2003), available at <http://www.texas10.princeton.edu/publications/tienda101803.pdf>.

¹⁰³ *Id.* at 12, 24-25 (based on a statistically representative 2002 survey of 19,976 sophomores and 13,803 seniors in Texas high schools).

By contrast, the Ten Percent Plan sends an inclusive and hopeful “play by the rules” message to students from all backgrounds, as Professor Torres recently argued:

It is clear that the path the University of Texas has taken with the incentive of the Top 10% Plan has begun to transform the kind of promise that can be made to each child as they enter kindergarten: Keep your shoulder to the wheel and play by the rules and the public system will be open to you and your ambitions. It does not matter that politicians still squabble over how to achieve the state’s constitutionally mandated goal of equal investment in education across the state. We will not let their failures be visited on you. We will try not to let the circumstances of your birth or where your parents could buy a house determine your access to what the state can provide.¹⁰⁴

In addition to broadening access for African Americans and Latinos from modest economic backgrounds, evidence indicates that the Texas Ten Percent Plan in combination with a host of other changes appears to have helped alleviate the slight preference for White applicants over Asian Pacific Americans with similar class rank and test scores at UT-Austin.¹⁰⁵ Asian Pacific Americans sometimes encounter “negative action” relative to Whites in university admissions,¹⁰⁶ and the data suggest that the Ten Percent Plan is a useful tool to ensure that Asian Pacific Americans are treated fairly.

¹⁰⁴ Torres, *View from a Limestone Ledge*, *supra* note 15, at 1608-09.

¹⁰⁵ TIENDA ET AL., *CLOSING THE GAP?*, *supra* note 56, at 17 tbls.4-6.

¹⁰⁶ See Nat’l Asian Pacific Am. Legal Consortium et. al., Brief of Amici Curiae in Support of Respondents in *Grutter v. Bollinger* and *Gratz v. Bollinger* (Feb. 15, 2003), reprinted at 10 *ASIAN L.J.* 295 (2003) (brief jointly filed by 27 APA civil rights and public interest organizations supporting affirmative action and debunking the “model minority” myth that APAs no longer face discrimination in American society); Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 *UCLA ASIAN PAC. AM. L.J.* 129, 159-60 (1996) (“What APAs must understand is that negative action against us does not result from affirmative action for other minorities. In fact, in cases of proven racial disparities between APA and White admission rates, the causes have been either stereotypical treatment of APA applicants or other preference such as that for alumni children, who tend to be predominantly White.”).

While some opponents argue that the Ten Percent Plan leads to the admission of unqualified students,¹⁰⁷ the evidence suggests these claims are exaggerated. For example, in 2003, more than 99% of UT-Austin's freshmen class, including 99% of those admitted under the Ten Percent Plan, satisfy the state-mandated Texas Academic Skills Program (TASP) criteria, which measure readiness for college-level coursework based on reading, mathematics and writing scores.¹⁰⁸ Over the last five years, a mere one percent of UT-Austin freshmen admitted through the Ten Percent Plan have needed remedial courses in accordance with TASP.¹⁰⁹

Research also confirms the academic success of the students admitted under the Texas Ten Percent Plan. UT-Austin officials Gary Lavergne and Bruce Walker report that in each and every year the Plan has been in effect, UT-Austin students who were in the top 10% of their class consistently had higher freshman grades than non-top 10% students with significantly higher SAT scores.¹¹⁰ In fact, UT-Austin President Larry Faulkner acknowledges that "top ten-percenters" outperform non-top ten percent students with "SAT scores that are 200 to 300 points higher."¹¹¹ These findings reflect the fact that high school grades are a better predictor of freshman grades at UT-Austin,¹¹² a finding consistent with similar institutions like the University of California.¹¹³ These findings suggest

¹⁰⁷ See e.g., Shelby Steele, *X-Percent Plans – After Preferences, More Race Games*, NAT'L REV., Feb. 2000, at 22, available at http://articles.findarticles.com/p/articles/mi_m1282/is_2_52/ai_58836288.

¹⁰⁸ LAVERGNE & WALKER, UNIVERSITY OF TEXAS AT AUSTIN: DEMOGRAPHIC ANALYSIS FALL 2003, *supra* note 78, at 3, 8.

¹⁰⁹ *Id.* at 8 tbl.5.

¹¹⁰ *Id.* at 9 tbl. 6; GARY M. LAVERGNE & BRUCE WALKER, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN: DEMOGRAPHIC ANALYSIS FALL 2002, 10 (2003) ("Indeed, at the mid-ranges where most students are located, top 10% students performed as well as non-top 10% students scoring 200-300 points higher on the SAT scale."), available at <http://www.utexas.edu/student/research/reports/admissions/HB588-Report5.pdf>.

¹¹¹ Montejano, Access to the University of Texas at Austin and the Ten Percent Plan, *supra* note 90 (quoting President Faulkner).

¹¹² BRUCE WALKER ET AL., A REVIEW OF THE USE OF STANDARDIZED TEST SCORES IN THE UNDERGRADUATE ADMISSIONS PROCESS AT THE UNIVERSITY OF TEXAS AT AUSTIN 5 (Jan. 2002), available at <http://www.utexas.edu/student/research/reports/admissions/TxTestingTaskForce2001.pdf>. Note that operation of the Texas Ten Percent Plan means that there is likely to be greater "restriction of range" among the high school grades of UT-Austin admits than among those same students' SAT scores, so it is all the more notable that high school grades continue to be a better predictor.

¹¹³ SAUL GEISER & ROGER STUDLEY, UC AND THE SAT: PREDICTIVE VALIDITY AND DIFFERENTIAL IMPACT OF THE SAT I AND SAT II AT THE UNIVERSITY OF CALIFORNIA 3 tbl.1 (2001).

not placing too great an emphasis in admissions on modest differences in standardized test scores, a topic we address at length in Section V of this report.

We are also concerned that other efforts to modify the Ten Percent Plan may end up doing more harm than good for underrepresented minority and working-class students. For example, the presidents of UT-Austin and Texas A&M recently testified before the Texas Senate on the need to cap admissions under the Ten Percent Plan in order to preserve the ability to admit students under different criteria.¹¹⁴ It is true that in 1998 UT-Austin enrolled 37% of freshmen under the Ten Percent Plan, compared to 50% in 2002 and 65% in 2003.¹¹⁵ However, it was UT-Austin's choice, after several years of enrollment growth, to slash 1,400 spots from the freshmen class in 2003,¹¹⁶ which had the effect of significantly increasing the proportion of freshmen admitted through the Ten Percent Plan.

Those concerned that the Ten Percent Plan will take over the entire admissions process also ignore that there are other ways to preserve space for discretionary admissions. For example, the Enrollment Strategy Taskforce at UT-Austin is trying to enhance incentives for students to graduate in a timely manner, thus freeing up seats for more entering students.¹¹⁷ The Taskforce is also attempting to funnel graduates who continue taking non-degree classes into its continuing education program. We support these steps as long as safeguards are in place to ensure that UT-Austin does not effectively penalize low-income students for taking longer to graduate due to interruptions caused by financial hardship.

Some scholars also advocate modifying the Ten Percent Plan so that it no longer guarantees admission to flagship campuses like UT-Austin and Texas A&M, but rather, like the percentage plans in California and Florida, only assures admission to the public university system.¹¹⁸ We believe this amounts to

¹¹⁴ Texas Senate News, *Presidents of Texas A&M and UT Testify Before Senate Higher Education Subcommittee*, April 29, 2004, available at <http://www.senate.state.tx.us/75r/Senate/Archives/Arch04/p042904a.htm>.

¹¹⁵ Correspondence with Bruce Walker, Vice Provost and Director of Admissions at UT-Austin, Oct. 3, 2003.

¹¹⁶ *Id.*

¹¹⁷ Sharon Jayson, *Finding Ways to Scale Down UT*, AUSTIN AMERICAN-STATESMAN, Nov. 11, 2003.

¹¹⁸ Marta Tienda et al., Policy Brief, Nov. 2003, at 2 (quoting Professor Tienda, "[I]t may be prudent to remove the provision allowing students to select their institution of choice and allow the UT and A&M systems to determine where students are placed, as done in California and Florida."), available at <http://www.texastop10.princeton.edu/publications/tienda101803-short.pdf>.

“throwing the baby out with the bathwater” because it would eliminate one of the most important features of the Ten Percent Plan. Consistent with the Supreme Court’s language in *Grutter* about the link between affirmative action and “the path to leadership”, it is similarly crucial that flagship institutions like UT-Austin and Texas A&M remain accessible to students of all racial and socioeconomic backgrounds.¹¹⁹

III. HOPWOOD’S IMPACT ON TEXAS LEGAL EDUCATION

A. RESEGREGATION AT THE UT LAW SCHOOL

This Section on the post-*Hopwood* resegregation of legal education begins with the University of Texas Law School (UTLS), where more than a half-century ago, the Supreme Court’s ruling in *Sweatt v. Painter* marked the beginning of the end of *de jure* segregation.¹²⁰ Prior to the adoption of affirmative action in the late 1960s, there were only about 37 African Americans enrolled at UTLS in its entire history.¹²¹ Yet, despite its segregated and exclusionary past, with affirmative action approximately 650 African American attorneys and 1,300 Mexican American attorneys earned their law degrees at UTLS prior to *Hopwood*, making UTLS one of the top feeder law schools for Mexican Americans in the United States.¹²² UTLS also graduated more African American attorneys than any non-minority law school in America.¹²³

The prior affirmative action program at UTLS included Mexican Americans but not other Latinos.¹²⁴ Because Part III.A relies on data collected by the UTLS admissions office, it was not possible to provide comprehensive data

¹¹⁹ Torres, *View from a Limestone Ledge*, *supra* note 15, at 1608-09.

¹²⁰ 339 U.S. 629 (1950). See also Jonathan L. Entin, *Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law*, 5 REV. OF LITIGATION 3, 70 (1986) (“*Sweatt* converted the demise of *Plessy* from a long-range dream to a substantial likelihood.”).

¹²¹ Douglas L. Jones, *The Sweatt Case and the Development of Legal Education for Negroes in Texas*, 47 TEX. L. REV. 677, 690 (1969).

¹²² Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 930 n.9 (2001); 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, 31, 33 (2003).

¹²³ Torres, *View from a Limestone Ledge*, *supra* note 15, at 1597 (citing data compiled by former UTLS Dean M. Michael Sharlot).

¹²⁴ *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996).

on all Latinos combined at UTLS for the entire period in question.¹²⁵ Thus, the discussion of UTLS refers to Mexican Americans specifically whereas the rest of the report analyzes Latinos where such data is available.

Chart 6 confirms that compared to 1990-95, the proportion of African Americans enrolled at UTLS in the first seven years after *Hopwood* (1997-2003) was nearly three-fifths lower, and the enrollment of Mexican Americans was more than one-quarter lower. In fact, shortly after Thurgood Marshall and the NAACP Legal Defense Fund successfully defeated UTLS' *Plessy*-style "separate but equal" argument, Heman Marion Sweatt and the other African Americans in the first desegregated class in the fall of 1950 comprised 2.1% of the student body at UTLS.¹²⁶ African Americans comprised an average of 2.97% of the entering students at UTLS in the six years since *Hopwood*, a figure not that dissimilar from the *Sweatt* era.¹²⁷ Moreover, the data in Chart 6 refutes the Bush Administration's Department of Education, which claimed, even before the encouraging but atypical 2003 figures (discussed below) became available, that UTLS "continues to reflect significant levels of racial diversity."¹²⁸

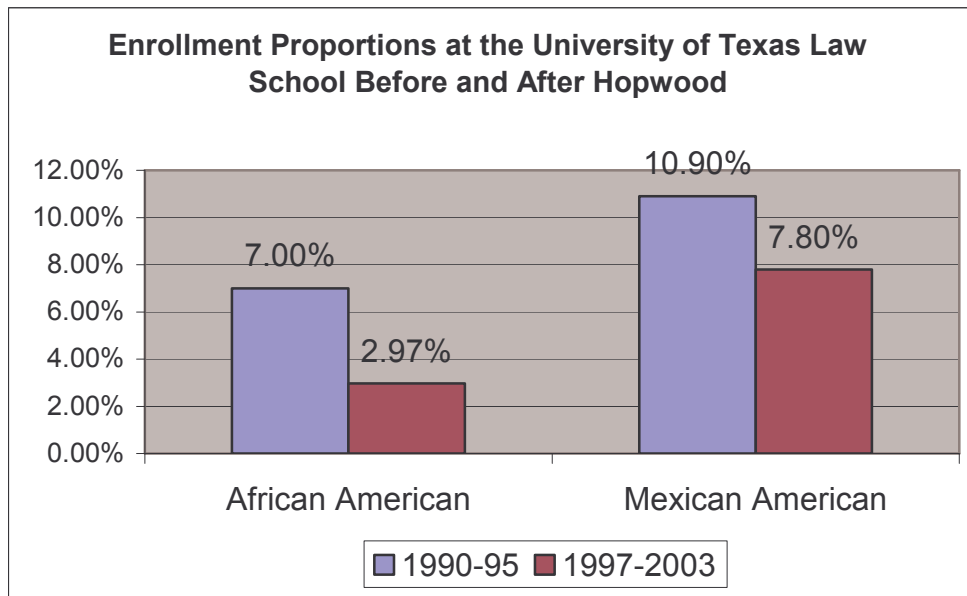
¹²⁵ The UTLS Admissions Office data includes a classification for Mexican Americans but other Latinos are lumped into an "other minority" category that includes American Indians as well, making it impossible to construct an accurate category for Latinos. Alternatively, the data that UTLS reports to the American Bar Association does make it possible to combine data into a Latino category, but this is only true beginning in the late-1990s, which made it impossible to report pre-*Hopwood* 1990-95 data for Latinos. Thus, the discussion of *Hopwood* and UTLS is restricted to Mexican Americans.

¹²⁶ Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 LAW & SOC. INQUIRY 507, 507 (2000) (Heman Sweatt's class included six African Americans out of 280 first year students, or 2.1%).

¹²⁷ See also Torres, *View from a Limestone Ledge*, *supra* note 15, at 1597 (noting the effect of *Hopwood* at UTLS: "To the dismay of many in our community, we were seeing the destruction of a legacy the Law School had established since it was desegregated by Heman Sweatt . . .").

¹²⁸ U.S. DEPT. OF EDUCATION OFFICE FOR CIVIL RIGHTS, RACE-NEUTRAL ALTERNATIVES IN POSTSECONDARY EDUCATION: INNOVATIVE APPROACHES TO DIVERSITY (March 2003), *available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html#_ftnref82

Chart 6¹²⁹



The UTLS data in Chart 6 actually understates the magnitude of the adverse impact of *Hopwood*, given that nationwide in 1990 there were 8.8 White applicants for every Black or Mexican American applicant, but only 5.2 White applicants for every Black or Mexican American applicant in 2003.¹³⁰ Thus, had UTLS been able to practice affirmative action prior to *Grutter*, its applicant pool would almost certainly have been more diverse in the past few years than it was in the early 1990s.

Chart 7 displays annual African American and Mexican American enrollment proportions at UTLS in the pre-*Hopwood* (1990-1995) and post-*Hopwood* (1997-2003) periods. At UTLS the general post-*Hopwood* trend has been one of increasing diversity. In 1997-1999, for example, African Americans were only 0.9% to 1.4% of first-year students at UTLS, compared to a range of 3.0% to 4.0% in 2000-2002. Likewise, Mexican American enrollment proportions gradually increased from 5.6% in 1997 to 7.1% in 2000 and 8.0% in 2002.

¹²⁹ University of Texas Law School, Minority Enrollment for Entering First Year Classes at the University of Texas School of Law, 1983-2002, *supra note* 60; University of Texas Law School, Statistics on JD Entering Classes (unpublished memorandum available from Terry Barry, Associate Director of Admissions at UTLS). The figures in the chart are based on unweighted averages of 1990-95 and 1997-2002 data since enrollment counts were not listed.

¹³⁰ Law School Admission Council, National Decision Profiles 1990-91 (1991); Law School Admission Council, National Decision Profiles for Fall 2003 (2003).

What is most notable in Chart 7 is the unusually high proportion of African American (6.0%) and Mexican American (13.9%) enrollment proportions at UTLS in 2003. Unlike 2003, the figures from the six prior post-*Hopwood* years (1997-2002) are all substantially below pre-*Hopwood* levels. Thus the key question for purposes of narrow tailoring under *Grutter* is the following: Does the 2003 admissions cycle demonstrate a workable race-neutral alternative to affirmative action, or is it a statistical anomaly that is not likely to be sustained in the future?

Available evidence suggests that 2003 at UTLS was in fact an anomaly related, in part, to the bad job market driving college graduates to apply to law school as an economic refuge.¹³¹ As UTLS Professor Douglas Laycock notes, the yield rates for accepted African Americans and Mexican Americans in 2003 reached historic highs:

The 2003 yield for both blacks and Mexican-Americans exceed any level ever seen in the sixteen years for which the Law School has yield records; in the case of blacks, the 2003 yield exceeded the previous high by a large margin. These very high yields presumably reflect the economy; there is no reason to believe that either the application rate or the yield rate will continue at these high levels once the economy improves.¹³²

Specifically, in 2003, 67% of admitted African Americans decided to enroll at UTLS, which is substantially higher than the average of 41% in 1997-2002.¹³³ Likewise, in 2003, 72% of admitted Mexican Americans decided to enroll at UTLS, far higher than the average of 56% in 1997-2002.¹³⁴ This occurred despite

¹³¹ Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 79 TULANE L. REV. __ (forthcoming 2004). Note that after a couple years of the so-called “jobless recovery” over 99,000 applicants applied to ABA-accredited law schools in 2003, a ten-year high. Law School Admission Council, National Decision Profiles for Fall 2003 (2003). Likewise, the 1991 recession produced a record high number of applications to law school. Law School Admission Council, National Decision Profiles 1990-91 (1991).

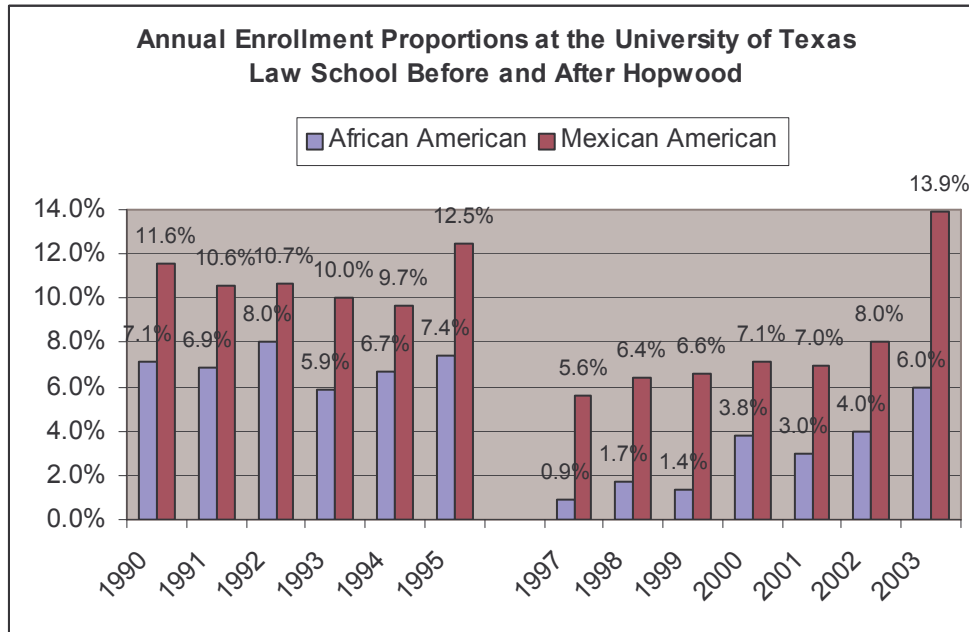
¹³² *Id.* Professor Laycock has closely followed UTLS admissions since *Hopwood*, when he was part of the legal team representing the University of Texas.

¹³³ University of Texas Law School, Statistics on JD Entering Classes, *supra* note 129.

¹³⁴ *Id.* The yield rate for Mexican Americans is generally higher at UTLS than that for African Americans because a higher proportion of the former are Texas residents who therefore have stronger tuition and community-related incentives for choosing UTLS.

the fact that there was little movement in the Black and Mexican American admission rates at UTLS in 2003 compared to prior years.¹³⁵

Chart 7¹³⁶



The impact of *Hopwood* was widely reported in the media, and as word spread, UTLS experienced a precipitous drop in applications from African Americans and Mexican Americans, who comprised 18.3% of UTLS applicants in 1996, compared to 15.2% in 1997 and 11.9% in 1998.¹³⁷ Although the number of African American and Mexican American applications at UTLS has risen since then, overall applications have risen even faster. Consequently, despite many race-neutral efforts to boost applications from African Americans and Mexican Americans, they were still only 11.6% of UTLS applicants in 2002 and 11.8% in 2003.¹³⁸ Thus, the proportion of applications from African Americans and Mexican Americans in 2002-03 is still more than one-third below pre-*Hopwood* levels. This suggests that one important effect of reviving affirmative action may be, with wide publicity, to encourage qualified underrepresented minority

¹³⁵ *Id.*

¹³⁶ University of Texas Law School, *Minority Enrollment for Entering First Year Classes at the University of Texas School of Law, 1983-2002*, *supra* note 60; University of Texas Law School, *Statistics on JD Entering Classes*, *supra* note 129. The figures in the chart are based on unweighted averages of 1990-95 and 1997-2002 data since enrollment counts were not listed.

¹³⁷ University of Texas Law School, *Statistics on JD Entering Classes*, *supra* note 129.

¹³⁸ *Id.*

applicants to apply to UTLS by shedding its post-*Hopwood* reputation as a place that lacks a critical mass of students of color.

Consistent with the “Blend It, Don’t End It” analysis of undergraduate education, we recommend that UTLS not abandon geographic diversity-based recruitment strategies in South Texas simply because affirmative action is once again constitutionally permissible. Despite its obligation as the flagship public law school in Texas, prior to the last couple years UTLS had *never* recruited students from campuses like the University of Texas at Brownsville.¹³⁹ UTLS also funded pre-law programs in El Paso, Cameron, Hidalgo, and Starr counties, which are predominantly Latino.¹⁴⁰

Overall, it is clear from the data that despite vigorous efforts by UTLS, including increased recruitment, funding LSAT test preparation classes, partnering with organizations for privately funded scholarships, and offering free trips to Austin for admitted minority applicants,¹⁴¹ UTLS has not been able to attain a critical mass of underrepresented minority students on a sustained basis, particularly African Americans. Without affirmative action, UTLS has been unable to follow the core principle of *Sweatt*, affirmed in *Bakke* and *Grutter*, that “The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts.”¹⁴²

B. DECLINING DIVERSITY AT OTHER TEXAS LAW SCHOOLS

In addition to UTLS, other law schools in Texas have low levels of diversity after *Hopwood*.¹⁴³ At Houston and Texas Tech, admission rates for

¹³⁹ Interview with UTLS Professor Douglas Laycock, May 24, 2004 (on file with authors).

¹⁴⁰ Laycock, *supra* note 131.

¹⁴¹ See e.g., University of Texas Law School Press Release, *UT Law Leads Nation in Private Initiatives for Recruiting*, (June 21, 2001), available at <http://www.law.utexas.edu/hopwood/private.html> ; University of Texas Law School Press Release, *Time Magazine: UT Law #1 in Reaching Out to Students of All Backgrounds*, (Oct. 16, 2001), available at <http://www.utexas.edu/law/news/time.html> .

¹⁴² 339 U.S. at 634. See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313-314 (1978) (Powell, J.) (quoting *Sweatt*); *Grutter*, 123 S.Ct. at 2341 (quoting *Sweatt*).

¹⁴³ In 1995, while the ABA recorded national enrollments by racial and ethnic group, regarding specific law schools in Texas and elsewhere it only reported the number of all minority groups combined. See AM. BAR ASS'N, *A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL 1995*, 55-58 (1996). For this reason, we were unable to compare 1995 and post-*Hopwood* data across all Texas law schools, as we did with UTLS earlier.

African Americans and Latinos are down since *Hopwood*.¹⁴⁴ Moreover, within the 2002 first-year class, African Americans were 1.5% of enrollments at Houston, 1.6% at Texas Tech, 2.5% at St. Mary's University School of Law, and 0.6% at Baylor.¹⁴⁵ Among all law students enrolled at eight law schools in Texas in 2002 (excluding Texas Southern University's Thurgood Marshall School of Law), African Americans were a combined 3.7% of the more than 7,000 students.¹⁴⁶ By comparison, the average law school nationwide had 7.1% African Americans.¹⁴⁷

The representation of Latinos is somewhat higher, but this must be evaluated in light of the fact that Latinos comprise 40% of the college-age population in Texas, compared to 12% for African Americans.¹⁴⁸ Across the nine Texas law schools, Latinos are about 11.8% of total enrollments.¹⁴⁹ However, Latinos are disproportionately clustered at St. Mary's (31.5%) and Thurgood Marshall School of Law (20.2%).¹⁵⁰ Thus, at the other seven Texas law schools Latinos were only 8.9% of total enrollments in 2002.¹⁵¹ Moreover, Latinos were only 6.7% of first year law school enrollments in the latest class at Houston and 5.6% at Southern Methodist University.¹⁵²

¹⁴⁴ U.S. CIVIL RIGHTS COMM'N, BEYOND PERCENTAGE PLANS: THE CHALLENGE OF EQUAL OPPORTUNITY IN HIGHER EDUCATION 42-45 (Draft Report Nov. 2002), available at <http://www.usccr.gov>.

¹⁴⁵ AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2004 EDITION 126, 334, 602, 698 (2003). System-wide 2003 data for the Texas law schools was not yet available when this report was being prepared.

¹⁴⁶ *Id.* at 33. This figure includes Baylor, Houston, St. Mary's, SMU, South Texas, University of Texas, Texas Tech, and Texas Wesleyan. We excluded Thurgood Marshall School of Law at Texas Southern University because its historical mission has focused on the education of African Americans and its current enrollment of 57.4% African Americans (*id.* at 33) in the overall average would give a false picture of diversity at the other eight law schools.

¹⁴⁷ *Ranking the Nation's Law Schools According to Percentage of Black Students*, J. BLACKS IN HIGHER EDUC., Autumn 2001, at 86, 87 (citing data from the 2002 edition of the Official Guide to ABA-Approved Law Schools).

¹⁴⁸ Brief of Am. Law Deans Ass'n as Amicus Curiae in Support of Respondents in *Grutter v. Bollinger*, at 13 (Feb. 15, 2003), available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/ALDA-gru.pdf.

¹⁴⁹ AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, *supra* note 145, at 33.

¹⁵⁰ AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, *supra* note 145, at 33; University of Texas Law School, Statistics on JD Entering Classes, *supra* note 129.

¹⁵¹ AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, *supra* note 145, at 33; University of Texas Law School, Statistics on JD Entering Classes, *supra* note 129.

¹⁵² AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, *supra* note 145, at 334, 634. Census data is available at <http://factfinder.census.gov>.

Asian Pacific Americans were 5.0% of enrolled students in 2002 at the nine law schools in Texas, higher than the proportion of college-age (18-24) Texans who are Asian Pacific American (3.2%).¹⁵³ The least diverse schools as far as Asian Pacific Americans are Baylor (2.5%), St. Mary's (2.6%) and Texas Tech (1.3%).¹⁵⁴ While the University of Michigan Law School plan at issue in *Grutter* did not include Asian Pacific Americans, at Michigan, they comprised 9.7% of entering law students in 2002.¹⁵⁵ Clearly many law schools in Texas are not as successful and more needs to be done, particularly for Asian Pacific American subgroups that are traditionally underrepresented in higher education.¹⁵⁶

The absolute number of American Indians at each school is quite low and varies from year to year. American Indians comprised 0.6% of total enrollments at the nine Texas law schools in 2002, which is the same as their proportion of the college-age population in Texas.¹⁵⁷ Prior to *Hopwood*, American Indians were not included in the affirmative action program at UTLS.¹⁵⁸ However, the University of Michigan Law School recognized that it was important to include American Indian students in its affirmative action program that was upheld in *Grutter*.¹⁵⁹ The policy at Michigan was consistent with the amici and expert report filed in *Grutter* that specifically addressed the importance of affirmative action for American Indians in legal education.¹⁶⁰

¹⁵³ *Id.* at 33.

¹⁵⁴ *Id.* at 33.

¹⁵⁵ *Id.* at 29.

¹⁵⁶ Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 245-46 (1995) ("Statistically, the socioeconomic positions of Vietnamese and other Southeast Asian refugee groups resemble the position of African Americans, rather than that of whites.").

¹⁵⁷ *Id.* at 33; Brief of Am. Law Deans Ass'n, *supra* note 148, at 13.

¹⁵⁸ *Hopwood v. Texas*, 78 F.3d 932, 936 n.4 (5th Cir. 1996).

¹⁵⁹ 123 S.Ct. 2325 (2003).

¹⁶⁰ Brief of the New Mexico Hispanic Bar Ass'n et al. in Support of Respondents in *Grutter v. Bollinger* (Feb. 15, 2003), reprinted at 14 BERKELEY LA RAZA L.J. 51 (2003); Brief of the Bay Mills Indian Community in Support of Respondents in *Grutter v. Bollinger* (Feb. 15, 2003), available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html; Brief of Arizona State Univ. School of Law in Support of Respondents in *Grutter v. Bollinger* (Feb. 15, 2003), available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html; Expert Report of Faith Smith in *Grutter v. Bollinger*, reprinted at 12 BERKELEY LA RAZA L.J. 397 (2001). See also Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999); Gloria Valencia-Weber, *Law School Training of American Indians as Legal-Warriors*, 20 AM. INDIAN. L. REV. 5 (1995-96).

Thus, between 1995 and 2000, approximately 0.7%-1.1% of University of Michigan Law School applicants were American Indians, but 1.0-1.6% of admission offers at Michigan went to American Indians,¹⁶¹ and the Court found that this was part of a program that was narrowly tailored to meet the compelling governmental interest of diversity. *Grutter* is an opportunity to rethink and improve affirmative action by including American Indians at law schools (and undergraduate and graduate programs) in Texas where they are otherwise likely to have a token presence.¹⁶²

Graduate and professional school opportunities were positively affected when a bill sponsored by the late Irma Rangel, Texas State Representative, which was supported by MALDEF, was signed into law in June of 2001.¹⁶³ Codified at Section 51.842 of the Education Code, the law specifies several criteria that graduate and professional schools may consider in admissions, including applicants' socioeconomic background and geographic diversity.¹⁶⁴ This law also states:

An applicant's performance on a standardized test may not be used in the admissions or competitive scholarship process for a graduate or professional program as the sole criteria for consideration of the applicant or as the primary criterion to end consideration of the applicant.¹⁶⁵

The entering law school class of 2002 was the first under § 51.842. For the three majority-White public law schools in Texas – UTLS, Houston, and Texas Tech – the entering class in 2002 included 18.6% students of color,¹⁶⁶ an improvement over 17.5% students of color in 2001.¹⁶⁷

¹⁶¹ 123 S.Ct. at 2368 tbl.3 (Rehnquist, C.J., dissenting) (reproducing a table with 1995-2000 admission data).

¹⁶² Garrick B. Pursley, Note, *Thinking Diversity, Rethinking Race: Toward a Transformative Concept of Diversity in Higher Education*, 82 TEX. L. REV. 153, 191 (2003).

¹⁶³ Tex. Educ. Code § 51.842. See also Dan Curry, *Texas Law Limits Use of Standardized Tests in Graduate Admissions*, CHRON. HIGHER EDUC. July 13, 2001, at A23.

¹⁶⁴ Tex. Educ. Code § 51.842(a).

¹⁶⁵ Tex. Educ. Code § 51.842(b). This subsection also directs that test scores be evaluated in the context of the applicant's performance relative to other students from similar socioeconomic background, where that information can be determined. *Id.*

¹⁶⁶ AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, *supra* note 145, at 334, 690, 698.

¹⁶⁷ AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2003 EDITION 34 (2002).

While race-neutral efforts like § 51.842 to reduce the misuse of standardized testing are laudable in their own right, it remains the case that there are no suitable substitutes for race-conscious admissions in legal education in Texas or elsewhere.¹⁶⁸ For example, the authors of the Texas Ten Percent Plan fully acknowledge that the Plan is not appropriate for the greater educational specialization at the graduate and professional school level.¹⁶⁹ As a matter of social policy, this is a good thing because it means that undergraduate campuses are not nearly as segregated as Texas high schools.¹⁷⁰

Other ambitious efforts outside Texas have also been ineffective in producing a critical mass of racial diversity. At UCLA, the Law School's class-based affirmative action program involves a sophisticated index that weighs several socioeconomic criteria.¹⁷¹ Nonetheless, under this program UCLA's 1999 entering class had 7.3% African Americans and Latinos combined, compared to an average of 22.8% with affirmative action in 1993-96.¹⁷² This example from UCLA is well below the University of Michigan Law School's critical mass of underrepresented students of color, which the Court affirmed in *Grutter*. Moreover, *Hopwood* and its aftermath made all too clear that the concept of critical mass is not an amorphous "feel good" admissions policy, but rather reflects the demographic and pedagogical realities of legal education.¹⁷³

¹⁶⁸ Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452 (1997); 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, 40-45 (1997).

¹⁶⁹ Brief of the Authors of the Texas Ten Percent Plan as Amicus Curiae Supporting Respondent in *Gratz v. Bollinger*, *supra* note 89, at 8-9.

¹⁷⁰ Brief of Am. Law Deans Ass'n as Amicus Curiae in Support of Respondents in *Grutter v. Bollinger*, *supra* note 148, at 20 ("The dependence on segregated high schools also means that percentage plans are useless for admission to law schools or other graduate and professional programs. Because college attendance is not based on residence, colleges are not nearly so segregated as high schools.").

¹⁷¹ See e.g., Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 504 (1997).

¹⁷² Kidder, *Struggle for Access from Sweatt to Grutter*, *supra* note 122, at 32, 34.

¹⁷³ Torres, *View from a Limestone Ledge*, *supra* note 15, at 1597 (speaking as a member of the UTLS faculty: "We knew, in other words, that the idea of critical mass that the University of Michigan had been advancing was not a makeweight or a dodge, but an important sociological fact that affected the learning environment. It also determined whether the Law School would be a place members of underrepresented communities might want to attend. We also knew that the kinds of drops in enrollment that we were experiencing would seriously compromise our ability to perform our mission as the flagship state law school."). See also Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1591-92 (2003) ("The key point is that the

While diversity declined at UTLS and most other law schools in Texas after *Hopwood*, at the Thurgood Marshall School of Law, the pattern is the opposite, with African American admission rates climbing after *Hopwood* and White admission rates declining.¹⁷⁴ However, the desegregation mandate that undergirds *Grutter* forcefully applies to each and every law school in Texas:

Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.¹⁷⁵

The post-*Hopwood* data reviewed in this section demonstrates that without affirmative action, prospects for students of color to receive educational and leadership opportunities in Texas legal education will remain obstructed.

C. BUILDING A BETTER FUTURE AND A BETTER BAR IN TEXAS

In *Grutter*, the Court also recognized that affirmative action is a way to “cultivate a set of leaders with legitimacy in the eyes of the citizenry.”¹⁷⁶ However, on this front there is much work that remains to be done in the Texas legal profession, particularly when comparing the current composition of the Texas bar with the population of potential lawyers and civic leaders that will guide Texas into the future. In 2002, only 5.1% of law firm partners in Texas were people of color, including 4.6% in Austin, 4.1% in Houston, and 2.8% in

diversity-seeking admissions policy is not a simple form of social engineering detached from basic educational purposes but rather rooted in the traditional educational mission.”).

¹⁷⁴ U.S. CIVIL RIGHTS COMM’N, BEYOND PERCENTAGE PLANS, *supra* note 144, at 43. Note the irony vis-à-vis *Sweatt v. Painter*, as the Thurgood Marshall School of Law was originally established in 1947 as the Texas State University for Negroes as part of Texas officials’ efforts to block the integration of the University of Texas. Jones, *supra* note 121, at 683 (quoting the Chairman of the UT Board of Regents that the bill creating Texas State was needed to prevent opening “every school in Texas to children with Negro blood.”). For discussion of the accomplishments of Thurgood Marshall School of Law and other Historically Black Law Schools see John C. Brittain, *Black History Month Tribute to HBCU Law Schools*, NAT’L BAR ASS’N MAGAZINE, Jan./Feb. 2001, at 10, 12-13.

¹⁷⁵ 123 S.Ct. at 2341.

¹⁷⁶ 123 S.Ct. at 2341.

Dallas.¹⁷⁷ As of 2003, 87.1% of Texas lawyers are White, with Latinos 6.4%, African Americans 3.8%, Asian Pacific Americans 1.4%, and American Indians 0.3%.¹⁷⁸ In terms of the future of Texas, the 2000 Census indicates that 52.8% of the college age (18-24) population in Texas is African American (12.1%), Latino (40.0%) or American Indian (0.6%).¹⁷⁹

In summary, whereas *Hopwood* represented a step backward toward Jim Crow levels of educational inequality, *Grutter* now allows law schools to step affirmatively into the twenty-first century by creating a “path to leadership [that is] visibly open to talented and qualified individuals of every race and ethnicity.”¹⁸⁰ Without the tool of properly devised affirmative action plans, this pathway to democratic excellence will continue to be obstructed.

IV. MEDICAL EDUCATION IN TEXAS

Narrowly-tailored race-conscious affirmative action is urgently needed in the eight Texas medical schools.¹⁸¹ The Texas Higher Education Coordinating Board (THECB) reports that of the 1,225 medical degrees conferred by the seven public and one independent medical schools in Texas in 2001, only 3.3% went to African Americans and 11.5% went to Latinos.¹⁸² By comparison, 6.9% of U.S. medical degrees were awarded to African Americans in 2001.¹⁸³ Chart 8 displays African American and Latino medical degrees between 1990-91 and 2000-01. Given that medical school graduation usually takes four years, and sometimes longer, the data reflects pre-*Hopwood* entry with the exception of 2001. For each

¹⁷⁷ Nat'l Ass'n for Law Placement, Women and Attorneys of Color at Law Firms – 2002, available at <http://www.nalp.org/nalpresearch/mw02sum.htm>.

¹⁷⁸ State Bar of Texas Dep't of Research & Analysis, Annual Report on the Status of Racial/Ethnic Minorities in the State Bar of Texas 2002-2003 1 (May 2003), available at <http://www.texasbar.com/members/buildpractice/research/minority.pdf>.

¹⁷⁹ Brief of Am. Law Deans Ass'n as Amicus Curiae in Support of Respondents in *Grutter v. Bollinger*, *supra* note 148, at 13.

¹⁸⁰ 123 S.Ct. at 2341.

¹⁸¹ These medical schools include UT-Galveston, UT-Houston, UT-San Antonio, Baylor, Texas A&M, Texas Tech, Southwestern, and Texas College of Osteopathic Medicine.

¹⁸² TEXAS HIGHER EDUCATION COORDINATING BOARD, PROJECTING THE NEED FOR MEDICAL EDUCATION IN TEXAS 6, 8 (July 2002), available at <http://www.thecb.state.tx.us/reports/pdf/0494.pdf>. More recent data was not available at the same website when this report was being prepared.

¹⁸³ *Id.* at 5.

and every year listed, the proportion of African Americans graduating from Texas medical schools was well below the national average for that year.¹⁸⁴

Chart 8¹⁸⁵

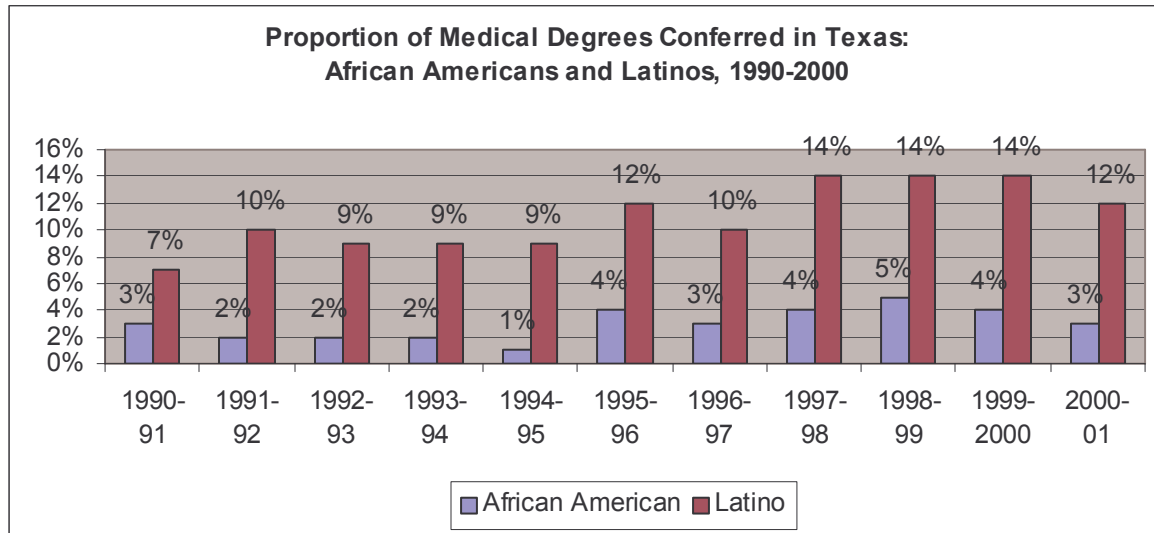


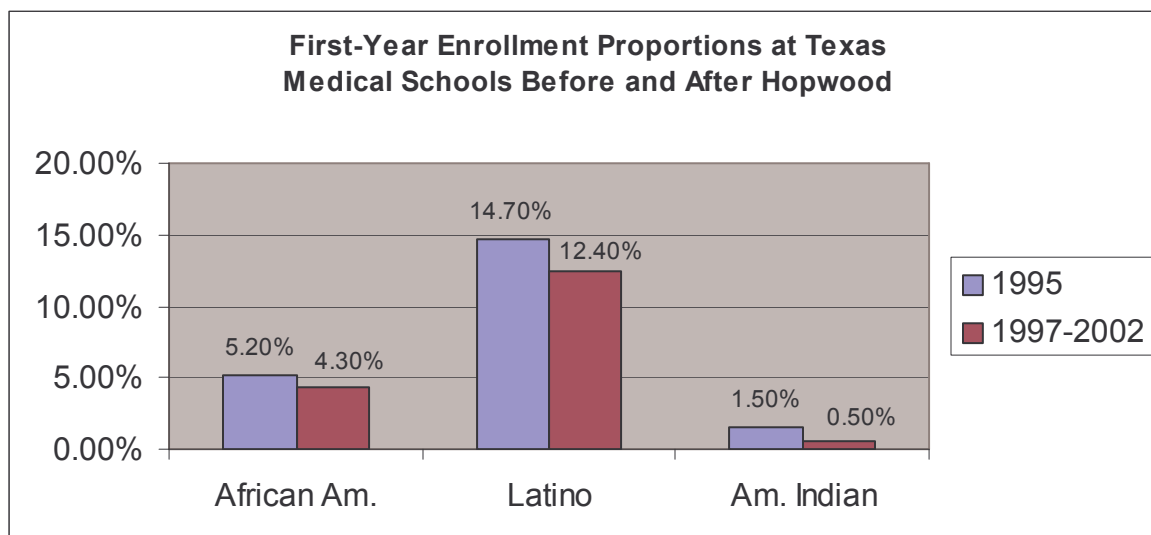
Chart 8 indicates that Texas medical schools, like the flagship undergraduate institutions, did not have a particularly impressive record of racial/ethnic diversity prior to *Hopwood*.

Nonetheless, Chart 9 shows that there still was a modest decline in diversity in first-year medical school enrollments after *Hopwood*. African Americans, Latinos, and American Indians were 21.4% of first-year enrollments in 1995, compared to an average of 17.2% in 1997-2002, a decline of one-fifth.

¹⁸⁴ *Id.* at 6.

¹⁸⁵ *Id.* at 6.

Chart 9¹⁸⁶



The importance of diversity and affirmative action in medical education is as great, if not greater, than in other educational settings. For example, Dr. Jordan Cohen, president of the Association of American Medical Colleges (AAMC) studied the consequences of ending affirmative action in a recent *Journal of the American Medical Association* article.¹⁸⁷ Dr. Cohen found that percentage plans and other efforts could not replace affirmative action,¹⁸⁸ and he concluded:

For the foreseeable future, the use of race-conscious decision making in medical school admissions is the only way medicine can meet its obligations to everyone in our society. At this point in our history, only by reaching out affirmatively to [underrepresented minority] students who have not acquired competitive academic credentials, but who possess all of the qualities of mind and spirit required to succeed as medical students, can our profession achieve the diversity needed to (1) provide a quality education for all students; (2) supply a balanced cohort of practitioners, investigators, and health care managers for an increasingly diverse population; and (3) help fulfill our country's ideals of fairness, justice, and equity.¹⁸⁹

¹⁸⁶ *Id.* at 5.

¹⁸⁷ Jordan J. Cohen, *The Consequences of Premature Abandonment of Affirmative Action in Medical School Admissions*, 289 J. AM. MEDICAL ASS'N 1143 (2003).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1149.

In fact, an impressive 90% of those underrepresented minority students graduated from medical school nationwide, which is only marginally different than the 96% rate for Whites, who on average had substantially higher MCAT scores.¹⁹⁰

While the Court's focus in *Grutter* was on legal education, the benefits of diversity in medical education are also well documented.¹⁹¹ For example, Dean Whitla and his colleagues at Harvard surveyed students from all four years at Harvard Medical School and the University of California, San Francisco School of Medicine (UCSF).¹⁹² The Harvard and UCSF students reported that they had less interracial contact in their formative years, but significantly more contact during college and especially medical school.¹⁹³ Moreover, medical students from all backgrounds overwhelmingly reported that racial and ethnic diversity enhanced their education: 86% of the medical students thought that racial diversity in the classroom was more likely to foster serious discussions of alternative viewpoints, and 77% reported that a greater understanding of medical conditions and treatments was more likely with a racially diverse student body.¹⁹⁴ Overall, 94% indicated that student body diversity was a positive element of their educational experience in medical school (78% clearly positive and 16% moderately positive).¹⁹⁵

In addition to the substantial impact that diversity has on learning in higher education, there are other critical health-related considerations that weigh in favor of affirmative action in medical education specifically. First, people of

¹⁹⁰ *Id.* at 1147.

¹⁹¹ See e.g., ASS'N OF AM. MEDICAL COLLEGES, ASSESSING MEDICAL SCHOOL ADMISSIONS POLICIES: IMPLICATIONS OF THE U.S. SUPREME COURT'S AFFIRMATIVE-ACTION DECISIONS App. B (Sept. 2003), available at <http://www.aamc.org/publications/assessmedschooladmissions.pdf>; Brief of the Ass'n of American Medical Colleges et al., as Amici Curiae in Support of Respondents in *Grutter v. Bollinger* 14-15 (Feb. 15, 2003) available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html.

¹⁹² Dean K. Whitla et al., *Educational Benefits of Diversity in Medical School: A Survey of Students*, 78 ACADEMIC MEDICINE 460 (2003). This was a telephone survey conducted in 2000. 55% of students could be located, but of those an impressive 97% responded to the survey (n = 639). Also note that California's Proposition 209, banning affirmative action in California public universities, took effect for the entering Fall 1997 class, but that many of those surveyed at UCSF entered with affirmative action.

¹⁹³ *Id.* at 462 tbl.1.

¹⁹⁴ *Id.* at 462.

¹⁹⁵ *Id.* at 463.

color receive lower quality health care in the U.S. compared to Whites, even after controlling for access-related factors such as patients' income and insurance status.¹⁹⁶ This is the troubling finding of the Institute of Medicine (IOM), a branch of the National Academy of Sciences that was charged by Congress with investigating this issue.¹⁹⁷ The IOM's book-length report, *Unequal Treatment*, was based on their expert panel's review of more than 600 health disparity studies, as well as public workshops, commissioned papers, and testimony.¹⁹⁸

One of the IOM's recommendations to eliminate racial/ethnic healthcare disparities is to increase the proportion of underrepresented minorities among health care professionals.¹⁹⁹ This recommendation is consistent with the finding that physicians of color are significantly more likely to serve communities of color, even after controlling for other factors such as patient income level and physician practice location.²⁰⁰ A recent national survey found that while African Americans and Latinos were only 4 and 5 percent of U.S. physicians respectively, those doctors care for 25% of African American and 23% of Latino patients, respectively.²⁰¹ Other studies document that for a combination of linguistic and cultural reasons, people of color tend to choose, and be more satisfied with physicians who share their racial and ethnic background.²⁰²

In *Grutter*, the Court declared, "All members of our heterogenous society must have confidence in the openness and integrity of the educational institutions that provide [leadership] training."²⁰³ This argument about public

¹⁹⁶ See e.g., Janice Blanchard et al., *Racial and Ethnic Disparities in Health: An Emergency Medicine Perspective*, 10 ACADEMIC EMERGENCY MEDICINE 1289 (2003).

¹⁹⁷ UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley et al. eds., 2003)

¹⁹⁸ *Id.* at 30-31; David C. Cone et al., *Health Care Disparities in Emergency Medicine*, 10 ACADEMIC EMERGENCY MEDICINE 1176, 1177 (2003) (discussing the Institute of Medicine's Report).

¹⁹⁹ Smedley et al., *supra* note 197, at 14, 186 (discussing recommendation 5.3).

²⁰⁰ See e.g., Jordan J. Cohen et al., *The Case for Diversity in the Health Care Workforce*, 21 HEALTH AFFAIRS 90, 93 (2002); Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 NEW ENGLAND J. OF MEDICINE 1305 (1996).

Congress also recognizes that underrepresented minority doctors are more likely to practice in underserved areas. See Brief of the Ass'n of American Medical Colleges et al., as Amici Curiae in Support of Respondents in *Grutter v. Bollinger*, *supra* note 191, at 9-10 (citing S. Rep. No. 105-220 at 20; 42 U.S.C. §300-u6 note).

²⁰¹ Somnath Saha et al., *Do Patients Choose Physicians of Their Own Race?* 19 HEALTH AFFAIRS 76, 80 (2000).

²⁰² Somnath Saha et al., *Patient-Physician Racial Concordance and the Perceived Quality and Use of Health Care*, 159 ARCHIVES INTERN. MED. 997 (1999).

²⁰³ 123 S.Ct. at 2341.

confidence takes on added urgency in a doctor-patient context. Because minority patients' confidence in their physicians influences the extent to which they seek preventive care, follow a physician's recommendation, and continue with treatment, enrolling racially diverse classes of medical students can actually have important health consequences for minority populations.²⁰⁴ Given, for example, that the African American mortality rate is 60% higher than that of Whites (the same as it was in 1950),²⁰⁵ the diversity rationale may be blended with a "public health necessity" argument in the field of medical education.²⁰⁶

For the above reasons, we support the Texas A&M officials who are seeking regent approval for affirmative action in medical school programs.²⁰⁷

V. RECOMMENDATIONS: SEVEN SECRETS TO SUCCESSFUL COMPLIANCE WITH *GRUTTER*

A. INDIVIDUALIZED REVIEW: LOOKING BEYOND THE NUMBERS

For undergraduate, graduate, and professional school admissions programs not governed by the Texas Ten Percent Plan, it is essential that all applications undergo individualized review. The same recommendation applies to applicants to UT-Austin and Texas A&M who are not automatically eligible under the Ten Percent Plan. Individualized review refers to a holistic assessment of the applicant's entire file, as well as a holistic evaluation of the candidate. An institution should consider all of the applicant's qualities, including any "plus" factors that indicate the student would contribute to diversity, and judge those factors in totality. A decision of whether to admit the applicant should be based on this complete evaluation.

²⁰⁴ Saha et al., *Patient-Physician Racial Concordance*, *supra* 202, at 1000-03.

²⁰⁵ H. Jack Geiger, *Racial and Ethnic Disparities in Diagnosis and Treatment: A Review of the Evidence and a Consideration of Causes*, in Smedley et al., *supra* note 197, at 417, 417 (commissioned paper available on the CD-ROM included with the print version of UNEQUAL TREATMENT).

²⁰⁶ *Cf.* Reynolds v. City of Chicago, 296 F.3d 524, 529-31 (7th Cir. 2002) (compelling interest in hiring more Latino police lieutenants when Latinos are a fifth of the Chicago population and where evidence suggested Chicago Latinos responded more positively to Latino police officers); Wittmer v. Peters, 87 F.3d 916, 920-21 (7th Cir. 1996) (prison had a compelling justification for hiring African American lieutenant where evidence showed that Black correctional officers were essential for the prison boot camp program to be successful). Note that the Supreme Court did not address such a public health necessity rationale in *Bakke*.

²⁰⁷ Brett Nauman, *Plan would allow use of race in admissions*, BRYAN-COLLEGE STATION EAGLE, May 27, 2004, available at <http://www.theeagle.com/aandmnews/052704regents.php>.

In *Grutter*, the Court explained, “As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way.”²⁰⁸ Accordingly, no single factor should dominate the admissions process, including race. For example, an institution should not give an applicant’s race such undue weight that all other qualities of the applicant are subsumed under that single consideration. In practical terms, this means that an applicant’s race should not automatically allow the applicant to gain admission, without considering other factors of that applicant or other applicants. In addition, the size of the “plus factor” accorded for race should not be uniform, but should vary from applicant to applicant as schools also seriously consider a host of other plus factors like geographic diversity, socioeconomic background, athletic ability, special talents, and so forth. Thus, while race may effectively be an influential factor in some individual admission decisions, constitutionally sound affirmative action policies do not operate as a two-track program where underrepresented minorities are automatically admitted based on race.²⁰⁹

It is instructive to contrast *Grutter* (and *Bakke*) with the UTLS admissions policy of the early 1990s struck down in *Hopwood*.²¹⁰ The old admissions program at UTLS separated applicants into three categories based upon LSAT/UGPA index scores: presumptive admits, discretionary zone, and presumptive denials, and it had different cut-offs based on race and ethnicity.²¹¹ In contrast, while race was a substantial plus factor for a large number of applicants in the program upheld at the University of Michigan Law School, it was also true that the applicants admitted with the lowest UGPAs were frequently White.²¹²

Not only would UTLS’ prior policy fail on narrow tailoring grounds, it also would go against the guidance of the LSAC, which recommends, “Schools

²⁰⁸ 123 S.Ct. at 2342.

²⁰⁹ See *Grutter*, 123 S.Ct. at 2342-44.

²¹⁰ Michael A. Olivas, *Race, Raza, and Ruins*, 24 J.C. & U.L. 123, 126 (1997) (book review) (criticizing the “ham-handed” admissions process at UTLS with separate admission tracks by race and ethnicity).

²¹¹ *Hopwood v. Texas*, 236 F.3d 256, 265 (5th Cir. 2000).

²¹² Expert Report of David M. White in *Grutter v. Bollinger*, reprinted at 12 BERKELEY LA RAZA L.J. 399, 403 (2001).

currently using the [presumptive admissions method] are encouraged to modify it because such methods may be using the LSAT score incorrectly.”²¹³

Institutions must take measures to ensure their admissions programs are faithful to the narrow tailoring framework in *Grutter*, including “truly individualized consideration” and using race in a “flexible, nonmechanical way.”²¹⁴ We recommend that one important step in this process is not giving standardized tests unwarranted weight in admissions and financial aid. As Professor Michael A. Olivas, an expert in higher education law, cautions:

The heavy reliance on test scores and the near-magical properties accorded them inflate the narrow and modest use to which any standardized scores should be put. Accepted psychometric principles, testing-industry norms of good practice, and research on the efficacy of testing all suggest modest claims for test scores, whether standing alone or combined with other proxy measures.²¹⁵

The Law School Admission Council (LSAC), and other standardized test producers make similar cautionary statements.²¹⁶

This suggestion is important on a practical level. In terms of the mechanics of the admissions process, institutions practicing affirmative action are much more vulnerable to legal challenge if they make admission decisions almost entirely on the basis of test scores or index formulas that combine tests

²¹³ LAW SCH. ADMISSION COUNCIL, NEW MODELS TO ASSURE DIVERSITY, FAIRNESS, AND APPROPRIATE TEST USE IN LAW SCHOOL ADMISSIONS 21 (1999). See *id.* at 22 (“[I]t is important for all applicants—including those at the top and the bottom—to be evaluated on the basis of the criteria established by the school.”).

²¹⁴ 123 S.Ct. at 2342.

²¹⁵ Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 J. LEGAL EDUC. 103, 114 (1992). For example, standard error of measurement (the estimate of reliability for an individual score) on the LSAT is +/- 5.2 points at a 95% confidence level, meaning that the “true score” of an applicant who scores 160 is between 155 and 165. William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education*, 12 YALE J. L. & FEMINISM 1, 19 (2000); Olivas, *Higher Education Admissions and the Search for One Important Thing*, *supra* note 55, at 995 (reviewing the LSAT SEM at a 68% confidence level).

²¹⁶ Law Sch. Admission Council, LSAC Statement of Good Admission and Financial Aid Practices 2 (1999) (“the LSAT score should be used as only one of several criteria for evaluation and should not be given undue weight.”). The LSAC also acknowledges, “The LSAT is often overrelied on or used improperly relative to its appropriate role in admissions.” LAW SCH. ADMISSION COUNCIL, NEW MODELS TO ASSURE DIVERSITY, *supra* note 213, at 33.

and grades. In such a scenario, a court is more likely to find that the institution is not making a good faith effort at individualized review. If test scores and/or index scores truly dominate the admissions process, a court would be more likely to find that institution's use of affirmative action is not narrowly tailored, since race would then function as a substantial departure from "regular" admissions (i.e., race as the decisive factor). Framed more positively, the lesson of *Grutter* is that there is a deep connection between the goal of treating all applicants fairly by individualized review, and the goal of admitting a class with racial and ethnic diversity.

In addition to pragmatic concerns over making sure that affirmative action is narrowly tailored, ensuring that standardized tests are not given undue weight also helps to minimize the adverse impact such tests tend to have on students of color. This is a point about which there is a solid consensus among the Texas Ten Percent Plan authors,²¹⁷ MALDEF,²¹⁸ and psychologists.²¹⁹ Disparate impact is a concern in part because racial and ethnic disparities on the SAT are larger than the gap in high school grades. Nationally, it is equally difficult for White college-bound seniors to rank in the top ten percent of their class as it was for them to obtain 600+ scores on the SAT Math or Verbal

²¹⁷ See e.g. Brief of the Authors of the Texas Ten Percent Plan as Amicus Curiae Supporting Respondent in *Gratz v. Bollinger*, *supra* note 89, at 8 (the Ten Percent Plan "tends to neutralize the adverse impact these standardized test scores have upon African American and Latino students, even when the effects of family income are controlled for."); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1072 (1997) ("For minority students, moreover, studies by several admissions scholars reveal small or no meaningful statistical relationships between test scores and academic performance."); Chapa, *supra* note 56, at 380 ("I am among the many who believe that these test scores are very often used inappropriately and perniciously. . . I also believe that such use wrongly discriminates against minorities.").

²¹⁸ Press Release, MALDEF Sues Cal Poly San Luis Obispo For Admissions Policies, Jan. 9, 2004 (arguing that Cal Poly's misuse of the SAT harms Latinos) available at <http://www.maldef.org/news/press.cfm?ID=201>; Plácido Gómez et al., *The Texas Assessment of Academic Skills Exit Test – "Driver of Equity" or "Ticket to Nowhere?"*, 2 SCHOLAR 187, 242 (2000) (quoting former MALDEF regional counsel for Texas Albert Kauffman, "After twenty-five years of work involving Latino civil rights, I am convinced that the misuse of standardized tests is an overarching barrier to Latino progress in both education and employment.").

²¹⁹ See e.g., Expert Report of Claude M. Steele in *Grutter v. Bollinger* and *Gratz v. Bollinger*, reprinted at 5 MICH. J. RACE & L. 439, 443 (1999) (Steele, a Stanford psychologist explains, "[E]ven large score differences on the SAT do not translate into very large differences in the skills that underlie grade performance. This is what is implied by the small relationship between scores on the test and subsequent grades: that relatively few of the skills critical to grades are measured by the tests.").

sections.²²⁰ In contrast, for African Americans and Mexican Americans, obtaining a 600+ score on either section of the SAT is twice as difficult as ranking in the top tenth of the class.²²¹ Likewise, the students intervening in *Grutter* established that students of color are substantially disadvantaged on the LSAT even among law school applicants who earned equivalent grades in the same selective universities and in the same majors as Whites.²²²

Standardized tests like the SAT and ACT also limit opportunities for low-income students to a greater extent than other admission criteria.²²³ For example, Crouse and Trusheim, in the most extensive scholarly critique of the SAT, conclude, “[E]very measure of socioeconomic background is more strongly correlated with SAT scores than with high school class rank.”²²⁴ More recently, the College Board studied a national sample of SAT test-takers and found that socioeconomic status correlated more strongly with SAT scores than did high school GPA or high school rank.²²⁵ Moreover, while Texas high schools are

²²⁰ William C. Kidder & Jay Rosner, *How the SAT Creates ‘Built-In Headwinds’: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 144 (2002).

²²¹ *Id.* at 144-45. See also Roy O. Freedle, *Correcting the SAT’s Ethnic and Social-Class Bias: A Method of Reestimating SAT Scores*, 73 HARV. EDUC. REV. 1 (2003); Stephen R. Shalom, *Dubious Data: The Thernstroms on Race in America*, 1 RACE & SOC’Y 125, 132 (1998); JAMES CROUSE & DALE TRUSHEIM, *THE CASE AGAINST THE SAT* 92, 94 (1988).

²²² *Grutter v. Bollinger*, 137 F.Supp.2d 821, 861 (E.D. Mich. 2001), *rev’d* 123 S.Ct. 2325 (2003); Expert Report of David M. White in *Grutter v. Bollinger*, reprinted at 12 BERKELEY LA RAZA L.J. 399, 405-6 (2001). See also William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving ‘Elite’ College Students*, 89 CAL. L. REV. 1055 (2001).

²²³ Guinier, *Admissions Rituals as Political Acts*, *supra* note 96, at 146-47 (“The correlation between test scores and SES indicators is even stronger than the correlation between test scores and future academic performance.”); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957 (1996) (“[W]e seek to highlight the way that certain paper-and-pencil tests have been used as ‘wealth preferences’ or poll taxes to determines who gets to participate as full citizens in our democracy.”).

Less reliance on standardized testing also neutralizes the well documented and persistent disparate impact these tests have against women, and women of color in particular. See e.g., David K. Leonard & Jiming Jiang, *Gender Bias and the College Predictions of the SAT: A Cry of Despair*, 40 RESEARCH IN HIGHER EDUC. 375 (1999); Sturm & Guinier, *id.* at 992-97; Stephanie M. Wildman, *Affirmative Action: Necessary for Equality for All Women*, Expert Report in *Grutter v. Bollinger*, reprinted at 12 BERKELEY LA RAZA L.J. 429 (2001); Kidder, *Portia Denied*, *supra* note 215, at *passim*.

²²⁴ CROUSE & TRUSHEIM, *supra* note 221, at 126.

²²⁵ LAWRENCE J. STRICKER ET AL., *MEASURING EDUCATIONAL DISADVANTAGE OF SAT CANDIDATES* 10 tbl.9 (2002), College Board Research Report No. 2002-1. This report used a combination of family income and parental education as its measure of socioeconomic status. *Id.* at 3.

certainly segregated, the suggestion that different grading standards between high schools explain the greater association between SAT scores and socioeconomic status (compared to high school grades) does not hold up to close scrutiny.²²⁶

Another policy reason for moving beyond sole reliance on test scores and grade-point averages is the need to evaluate students' promise within the context of their opportunities, rather than cementing structural inequalities in K-12 education. For example, across all Texas high schools, 21.6% of Whites are enrolled in AP courses, compared to only 11.4% of African Americans and 12.4% of Latinos.²²⁷ While the *Edgewood* litigation and the subsequent school finance legislation played a major role in making public school funding in Texas more equitable,²²⁸ as it stands there is still a legally permissible gap between the funding per student in low-wealth and high-wealth school districts.²²⁹

The Texas Ten Percent Plan, which both supporters and critics agree is reliant on the fact that Texas high schools are staggeringly segregated by race and ethnicity,²³⁰ addresses such inequality by focusing on rank within high schools rather than GPAs (with AP bonus points) across high schools.²³¹

²²⁶ *Id.* at 12.

²²⁷ Chapa, *supra* note 56, at 378 tbl.19.1.

²²⁸ *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); 804 S.W.2d 491 (Tex. 1991); 826 S.W.2d 489 (Tex. 1992); 917 S.W.2d 717 (Tex. 1995). See also J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607 (1999).

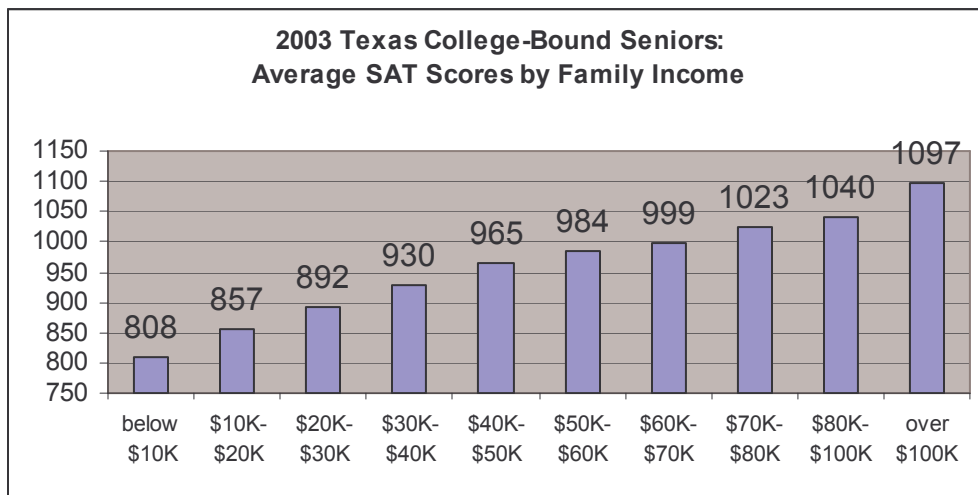
²²⁹ Farr & Trachtenberg, *supra* note 228, at 703.

²³⁰ See e.g., Forbath & Torres, *supra* note 100, at 185 (quoting H.B. 288 co-author David Montejano, "Texas is deeply segregated, regionally and neighborhood-by-neighborhood in its major cities, so the majority of our high schools are almost entirely white or black or brown. This law is color-blind, but it used our bitter history of segregation to promote diversity."); Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of 'Percentage Plans'*, 62 OHIO ST. L.J. 1729, 1733-34 (2001) (criticizing percentage plans and observing, "[I]t is more accurate to describe percentage plans as a reflection of current day educational apartheid."); Holley & Spencer, *supra* note 55, at 257 (citing H.B. 288 supporter Professor Michael A. Olivas' testimony that the bill would be effective in light of segregation patterns).

²³¹ This should remind us of another lesson that applies to both the Texas Ten Percent Plan and to race-conscious affirmative action: we must not take our attention away from other "remedies for the core problem—the appalling inequities in the state's system, particularly gross underfunding of K-12 education at many minority schools." HAIR, *supra* note 59, at 25. See also Guinier, *Admissions Rituals as Political Acts*, *supra* note 96, at 169 n.223 (noting that the argument that the Ten Percent Plan carries a danger of not remedying segregation is one that applies equally to affirmative action as well); Wade Henderson, *Comments at Columbia Law School Symposium on Affirmative Action*, 30 COLUM. HUM. RTS. L. REV. 451, 458 (1999) (Mr. Henderson, executive

These inequalities in K-12 educational opportunities are also reflected in SAT scores. Chart 10 displays College Board data on SAT performance by family income bracket. Among the nearly 72,000 college-bound seniors in Texas who reported their family income in 2003, with every \$10,000 increase in family income, there is a corresponding increase in SAT scores. Texas college-bound seniors who come from families with under \$10,000 in annual income average 808 points on the SAT. Students from families with \$50,000 to \$60,000 average 984 points on the SAT. Texas college-bound seniors from families with \$100,000+ income average 1097 points on the SAT.

Chart 10 ²³²



The College Board reports a similar relationship between SAT performance and parental education level. Among the nearly 90,000 college-bound seniors in Texas who reported parental education level in 2003, students whose parents did not obtain high school diplomas averaged 828 points on the SAT.²³³ College-bound seniors for whom the highest level of parental education is graduating from high school average 917 points on the SAT.²³⁴ Students whose parents graduated from college averaged 1043 points on the test, and those

director of the Leadership Conference on Civil Rights, argues, “The issues of affirmative action and improving the quality of public education K-12, are inextricably linked.”).

²³² COLLEGE BOARD, 2003 COLLEGE-BOUND SENIORS TEXAS REPORT 7 tbl.4-2 (2003), available at http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2003/pdf/2003_TEX_AS.pdf.

²³³ *Id.* at 7 tbl.4-2.

²³⁴ *Id.*

whose parents obtained graduate degrees averaged 1097 points on the SAT.²³⁵ In addition, Texas seniors whose first language was English scored an average of 95 points higher than students who first learned another language.²³⁶

Texas Education Code § 51.842, passed in 2001, was a positive step toward individualized review by limiting reliance on standardized tests at public graduate and professional level programs.²³⁷ Likewise, the Texas A&M Medical School dropped reliance on the MCAT for students who successfully complete required premed courses.²³⁸ However, admission data from the period just prior to *Grutter* suggests that law schools in Texas have further improvements to make to ensure that all applicants are given a good faith individualized assessment. We analyzed LSAT/UGPA grid data for the 2002 admissions cycle, paying careful attention to the cells with the highest applicant volume (i.e., most representative). The following examples, involving differences of five points on the LSAT, may suggest that a significant number of applications are only given cursory review rather than the good faith comprehensive review now required by *Grutter*:

- At the SMU Dedman School of Law, among applicants with 3.25-3.49 UGPAs, those with 160-164 LSATs are offered admission 94.7% of the time, whereas applicants with 155-159 LSATs are offered admission 14.8% of the time.²³⁹
- At Texas Tech, among those with 3.25-3.49 UGPAs, applicants with 150-154 LSAT scores are admitted 72.9% of the time, but applicants with the same UGPAs and 145-149 LSATs are admitted 11.9% of the time.²⁴⁰
- At UTLS, among applicants with a 3.75+ UGPA, those with 160-164 on the LSAT have a 56.9% chance of admission but those with 155-159 LSAT scores have a 14.0% chance of admission.²⁴¹ Among UTLS applicants with 3.50-3.74 UGPAs, those with LSAT scores of 165-169 have a 74.0% chance of admission, but those with 160-164 LSATs have a 32.7% chance of admission.²⁴²

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Infra* Part II.

²³⁸ HAIR, *supra* note 59, at 34 n.69.

²³⁹ AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, *supra* note 145, at 637.

²⁴⁰ *Id.* at 701.

²⁴¹ *Id.* at 693.

²⁴² *Id.*

- At the University of Houston Law Center, applicants with 3.25-3.49 UGPAs and 155-159 LSATs are offered admission 67.2% of the time, but applicants with the same grades and 150-154 LSATs are admitted 13.7% of the time.²⁴³
- At Baylor, among applicants with 3.75+ UGPAs, those with 155-159 LSATs are admitted 89.9% of the time, but those with equivalent grades and 150-154 LSATs are admitted 34.1% of the time.²⁴⁴

B. ARTICULATE A DIVERSITY ADMISSIONS POLICY STATEMENT

In *Grutter*, the University of Michigan Law School was able to thoroughly document the origins and development of its Admissions Policy Statement, which laid out the rationale for enrolling a “critical mass” of underrepresented minority students.²⁴⁵ For example, in *Grutter*, the Court describes Michigan’s policy as follows:

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School."²⁴⁶

²⁴³ *Id.* at 337.

²⁴⁴ *Id.* at 129.

²⁴⁵ *Grutter*, 123 S.Ct. at 2331-34. See also Dennis J. Shields, *A View From the Files: Law School Admissions and Affirmative Action*, 51 DRAKE L. REV. 731 (2003) (describing the Policy Statement from the perspective of the University of Michigan Law School admissions director).

²⁴⁶ 123 S.Ct. at 2332 (internal citations omitted).

We recommend that each institution's formal admissions policy statement describe the goals and objectives of the admissions policy and should be closely aligned with the overarching mission of the institution.²⁴⁷ The policy statement should thoughtfully articulate how diversity plays a part in the admissions process. Specifically, the statement should explain how diversity furthers the educational goals of the institution and advances the mission of the school. Some examples of the benefits of diversity include:

- Helping students break down stereotypes by providing a range of experiences and viewpoints within a particular racial or ethnic group;
- Promoting cross-cultural understanding and helping students develop interpersonal skills for a multiracial world;
- Challenging students to consider multiple perspectives and to engage in higher-level thinking;
- Preparing students with the human relations and analytic skills needed for a racially diverse workplace;
- Training and educating a diverse group of leaders;
- Contributing to more effective decision-making on issues affecting our multicultural society;
- Creating a diverse group of civic and business leaders with legitimacy in the eyes of the public;
- Overcoming the chilling effect of students of color encountering isolation, tokenism, and a hostile campus climate.

In *Grutter*, the Court announced that institutions of higher learning should be afforded a presumption of "good faith" regarding the selection of their student bodies unless there is a showing to the contrary.²⁴⁸ If the program at your institution is challenged, a well articulated diversity policy helps overcome allegations of bad faith by assisting a judge and other individuals in understanding the goals of the program. In addition, a clearly articulated policy helps to harmonize and coordinate the admissions procedure for all admissions officers and the people reviewing applicant files.

²⁴⁷ See Guinier, *Admissions Rituals as Political Acts*, *supra* note 96, at 125-36, for a discussion of higher education mission statements and democratic values.

²⁴⁸ *Id.* at 2339.

C. DOCUMENT THE NEED FOR AND BENEFITS OF DIVERSITY AND DOCUMENT THE INSTITUTION’S OWN PRIOR DISCRIMINATION

As discussed throughout this report, in *Grutter* and *Gratz*, the University of Michigan, as well as many civil rights and educational groups, provided the Court with ample empirical evidence of the educational benefits of diversity. For example, a study of 1970-1996 alumni of the University of Michigan Law School found that minority graduates were equally successful in legal practice despite lower average LSAT/UGPA index scores, and that Michigan’s minority attorneys made greater civic service contributions, including time dedicated to pro bono cases and serving on the board of non-profit organizations.²⁴⁹ University of Michigan psychologist Patricia Gurin, a pivotal expert witness in *Grutter* and *Gratz*, also found, based on extensive research at Michigan and nationally:

Colleges that diversify their student bodies and institute policies that foster genuine interaction across race and ethnicity provide the first opportunity for many students to learn from peers with different cultures, values, and experiences. Genuine interaction goes far beyond mere contact and includes learning about difference in background, experience, and perspectives, as well as getting to know one another individually in an intimate enough way to discern common goals and personal qualities.²⁵⁰

In addition, researchers with the Civil Rights Project at Harvard University surveyed law students at the University of Michigan and Harvard, and found that racial diversity had an impact on how students thought about legal issues in class, and that about 90% of students found racial diversity was a positive aspect of their law school experience.²⁵¹ These examples were merely the tip of the iceberg.

An institution seeking diversity should document that it has made the judgment similar to that of the University of Michigan, and that it has a clear concept of the meaning of diversity and how diversity is essential to its

²⁴⁹ Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 463-71 (2000). See also Lani Guinier, *Confirmative Action*, 25 LAW & SOC. INQUIRY 565 (2000) (discussing implications of the Michigan study).

²⁵⁰ Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 336 (2002).

²⁵¹ Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED, *supra* note 12, at 156-63.

educational mission. It should expend the effort to understand what diversity is and how it improves the institution, and record what it has learned.

The studies referenced throughout this report are a good starting point but are far from exhaustive. Several leading American law firms just released a detailed manual entitled *Preserving Diversity in Higher Education*, which has a much more extensive collection of relevant educational research.²⁵²

While the diversity rationale is the focus of this policy report, the Supreme Court also recognizes that remedying the present effects of past discrimination can be a compelling interest for public entities to justify race-conscious affirmative action.²⁵³ In order for a university to institute affirmative action based on a remedial justification, it must establish that it has a “strong basis in evidence for its conclusion that remedial action was necessary.”²⁵⁴

The Court has not delineated the precise contours of what qualifies as a “strong basis in evidence”, though in *Croson*, the Court suggested that it would be evidence “approaching a prima facie case of a constitutional or statutory violation.”²⁵⁵ Establishing a strong basis in evidence is highly fact specific, so institutions committed to the remedial rationale for affirmative action are encouraged to make a vigorous effort to document past discrimination and its present day effects by means of direct evidence such as judicial findings.²⁵⁶ In addition, indirect evidence should be documented, such as statistical disparities demonstrating that among enrolled students, minorities are underrepresented.²⁵⁷

²⁵² BINGHAM MCCUTCHEN LLP ET AL., PRESERVING DIVERSITY IN HIGHER EDUCATION: A MANUAL ON ADMISSIONS POLICIES AND PROCEDURES AFTER THE UNIVERSITY OF MICHIGAN DECISIONS (April 2004), available at <http://www.equaljusticesociety.org/compliancemanual/>

²⁵³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492, 503-04 (1989).

²⁵⁴ *Id.* at 500 (quoting *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1985) (plurality opinion)).

²⁵⁵ *Id.* at 500.

²⁵⁶ Note that in *Hopwood*, the Fifth Circuit rejected the argument that UTLS was obligated to keep affirmative action in order to comply with “Texas Plan” negotiated between the state of Texas and the Office for Civil Rights in the 1980s, finding that the Texas Plan did not specifically obligate UTLS. 78 F.3d at 954. The *Hopwood* panel also found that the “state actor that had previously discriminated” was limited to UTLS rather than the Texas public higher education system as a whole. *Id.* at 953-54.

²⁵⁷ *Croson*, 488 U.S. at 501-02 (“[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.”).

Although gross statistical disparities may be sufficient in some circumstances,²⁵⁸ it is prudent to buttress statistical evidence with anecdotal evidence that will aid a court in making the inference that the statistical disparities were in fact caused by the past discrimination and its present effects.²⁵⁹

D. DEVELOP BROAD DIVERSITY GOALS AND SOUND ADMISSION CRITERIA

In *Grutter*, the Supreme Court held that setting goals for minority enrollment and making a “good faith effort” to reach those goals is distinguishable from a quota system. The Court explained:

Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." . . . Quotas "impose a fixed number or percentage which must be attained, or which cannot be exceeded," "and "insulate the individual from comparison with all other candidates for the available seats." In contrast, "a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself," and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants."²⁶⁰

The goal of admitting a “critical mass” of minority students is aspirational rather than guaranteed. In a quota system, the outcome is predetermined and admissions decisions are based on the desire to satisfy that outcome. In a “critical mass” system, however, there is a desired outcome, but that outcome is not predetermined. As a result, a school will not necessarily reach the desired outcome from year to year, and in some years a school may even exceed its targets.

In *Grutter* the Court did not define “critical mass,” though it did state that it would grant universities some deference in this area. Many institutions may wish to set their target goals for minority admissions based, in part, on the composition of the community from which they recruit (or hope to recruit)

²⁵⁸ *Id.* at 501 (“[W]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”).

²⁵⁹ BINGHAM MCCUTCHEN LLP ET AL., PRESERVING DIVERSITY IN HIGHER EDUCATION, *supra* note 252, at 74.

²⁶⁰ 123 S.Ct. at 2342 (internal citations omitted).

students. For example, large state institutions like UT-Austin and Texas A&M overwhelmingly admit Texas residents. Rice University, on the other hand enrolls about half of its freshmen class of 660 from outside Texas.²⁶¹ At the same time, it is important that the racial composition of a state or region not be presented in such an inflexible manner as to be vulnerable to accusations that such figures serve as *de facto* quotas.

Developing admissions criteria is an integral part of the admissions process, since the criteria assist in shaping the class of admitted students. Along with grades and test scores, other factors that may play a part in admissions are personal statements, essays, activities, recommendations, and interviews. In addition, certain characteristics may give an applicant a “plus,” including race, gender, socioeconomic background, geography, leadership qualities, athletic ability, unique talents, and how well the applicant has utilized the opportunities available at her high school or undergraduate institution.

The Society of American Law Teachers (SALT), the nation’s largest membership organization of law professors, recently analyzed law school admissions and found, “Notwithstanding the claims in glossy law school catalogues that admissions is a ‘personalized,’ ‘holistic’ process, studies demonstrate that 70-80% of all admissions are determined strictly on the numbers.”²⁶² SALT concludes that this overreliance on numerical indicators harms the legal profession by neglecting other vital criteria:

[L]aw schools . . . fail to give appropriate consideration to other attributes and skills that are important to success in law school and, ultimately, in the delivery of legal services. The LSAT does not measure motivation, perseverance, character, interpersonal skills, problem-solving skills, oral communication, empathy for clients, commitment to public service or the likelihood that the applicant will work with underserved communities. Law schools, by neglecting these important qualities, do a disservice to the legal profession and its clients, and they limit the legal profession’s

²⁶¹ Columbia University et al., Brief of Amici Curiae in Support of Respondents in *Gratz v. Bollinger* 18 (Feb. 15, 2003), available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/Columbia-both.pdf

²⁶² Society of American Law Teachers, SALT on the LSAT 2 (Dec. 2003), available at <http://www.saltlaw.org/StatementLSATBrochure.pdf>

ability to provide meaningful access to legal services to all segments of society.²⁶³

In order for individualized review to be a realistic outcome, more than an inspirational policy statement is needed. Formulating questions that will solicit important information will help an institution achieve its diversity goals. Since schools are evaluating the individual, it is important to know who the applicant is. Many schools discover more about the applicant by asking short essay questions. The information provided in essays may reveal qualities and attributes that the school feels will contribute highly to the diversity of its student body.

E. CAREFULLY EXAMINE THE EFFECTS OF LEGACY POLICIES

We recommend that colleges and universities that favor the relatives of alumni carefully review whether such policies have a disparate impact on applicants from communities historically excluded from higher learning in Texas. For example, legacy policies are one factor contributing to low diversity at Texas A&M both before and after *Hopwood*. Recently the *Houston Chronicle* estimated that that in 2002 and 2003 about 350 freshmen were ultimately admitted to A&M because their family members had attended that institution.²⁶⁴ By comparison, A&M enrolled an average of 180 African Americans in 1998-2002 out of an average freshman class of about 6,400.²⁶⁵ Latinos and African Americans combined were only 8.6% of the pool of 2002-2003 A&M legacy beneficiaries.²⁶⁶

MALDEF, Americans for a Fair Chance (a project of the Leadership Conference on Civil Rights Education Fund), the Equal Justice Society, and the Society of American Law Teachers share University of Houston Professor Michael A. Olivas' concern that legacy policies too often correlate with family wealth and racial/ethnic background.²⁶⁷ For instance, since Texas A&M began

²⁶³ *Id.* at 3.

²⁶⁴ Todd Ackerman, *Legislators Slam A&M over Legacy Admissions*, HOUSTON CHRON., Jan. 4, 2004. Likewise, Texas A&M acknowledged a few years ago that 2000-3000 admits a year benefit from legacy points, and that it is the decisive factor for about 200 students. Kenneth Ma, *Texas Bill Would Bar Admissions Preferences*, CHRON. HIGHER EDUC. Feb. 5, 1999, at A38.

²⁶⁵ HORN & FLORES, *supra* note 61, at 49 tbl.28.

²⁶⁶ Ackerman, *Legislators Slam A&M*, *supra* note 264.

²⁶⁷ Testimony of Michael A. Olivas before the Texas House of Rep. Committee on Higher Educ. in Support of H.B. 954 (March 20, 2001) (on file with the authors). See also Michael A. Olivas, *Why*

decades ago essentially as a White, all-male military institution,²⁶⁸ it is not surprising that its policy toward the children and siblings of A&M alumni largely benefited Whites. We suspect legacies partly explains why Asian Pacific Americans are at a disadvantage relative to Whites applying to Texas A&M even with equivalent credentials, in contrast to UT-Austin, which does not employ legacy policies.²⁶⁹

It was only in response to recent public criticism from politicians and civil rights groups, including MALDEF, the League of United Latin-American Citizens (LULAC), the Urban League, and the Texas Civil Rights Project, that Texas A&M president Robert Gates announced that legacy policies would be discontinued at the university.²⁷⁰

F. PERIODICALLY REVIEW AFFIRMATIVE ACTION PROGRAMS AND THE EFFICACY OF RACE-NEUTRAL ALTERNATIVES

In accordance with *Grutter*, when race-conscious policies are no longer needed to further the interest of student diversity, the institution should stop considering race in the admissions process.²⁷¹ *Grutter* requires that universities engage in “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”²⁷² However, “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”²⁷³

In this report we presented our assessment of the efficacy of many race-neutral efforts. For example, in Section II we found that the Texas Ten Percent Plan in combination with other race-neutral efforts, while contributing a great

Legacy Admissions are Bad Policy, CASE CURRENTS, Nov./Dec. 2003, available at <http://www.case.org/Currents/ViewIssue.cfm?contentItemID=3589>

²⁶⁸ Finnell, *supra* note 60, at 71.

²⁶⁹ See Texas Higher Education Coordinating Board, First-Time Undergraduate Applicant, Acceptance, and Enrollment Information (1998-2002) available at http://www.thecb.state.tx.us/ane/reports/top_10/default.htm; see also TIENDA ET AL., CLOSING THE GAP?, *supra* note 56, at 17-18 (finding this to be true in 1997-2000 for Texas resident applicants).

²⁷⁰ Peter Schmidt, *New Pressure Put on Colleges to End Legacies in Admissions*, CHRON. HIGHER EDUC., Jan. 30, 2004, at A1; Greg Winter, *Texas A&M Ban on 'Legacies' Fuels Debate on Admissions*, N.Y. TIMES, Jan. 13, 2004, at A16; Todd Ackerman, *End 'Legacy' Program, A&M Urged*, HOUSTON CHRON., Jan. 8, 2004.

²⁷¹ 123 S.Ct. 2344.

²⁷² 123 S.Ct at 2345.

²⁷³ *Id.* at 2344.

deal, nonetheless were not effective at promoting racial diversity at UT-Austin, and particularly at Texas A&M. In Sections III and IV, we documented the troubling decline in diversity in legal and medical education in Texas, especially at flagship institutions like the UT Law School.

This “Blend It, Don’t End It” policy report, however, is far from an exhaustive analysis of the myriad race-neutral programs in Texas. We applaud research efforts like that at UT-Austin to measure the racial and ethnic composition of each classroom in order to gauge whether race-conscious measures are necessary.²⁷⁴

There are also a vast number of undergraduate, graduate, and professional programs that, for reasons of time and space, were not assessed in this report, but nonetheless indicate that race-neutral efforts are inadequate. For example, in the arts, sciences, humanities, and social sciences graduate school programs at UT-Austin, the applicant pool for the fall 2003 class included a paltry 6.2% Latinos, African Americans, and American Indians combined.²⁷⁵

Grutter mandates that universities adopting race-conscious admissions programs periodically review their programs. On the other hand, the Court’s language about periodic review indicates that *Grutter* did not impose a 25-year sunset clause on affirmative action in higher education. As long as *Grutter* remains the law of the land, institutions of higher learning will continue to have a compelling interest in a racially and ethnically diverse student body. Although the Court in *Grutter* was not specific about the frequency needed for periodic review, we recommend that it be conducted at least every few years.

In addition to evaluating race-neutral alternatives, there are other reasons an institution should undertake periodic review. Because so many different factors play a part in an individualized review of an applicant, reevaluating an admissions program will allow an institution to reassess its diversity goals and to tailor its admissions program to meet those goals. A school should seek to periodically reassess the different factors that will create a diverse student body, the criteria for admissions, and the different relative weights given to “plus” factors. An institution should also review its target goals for admitting minority students at the school. This type of periodic reevaluation will help an institution

²⁷⁴ University of Texas at Austin, Press Release: The University of Texas at Austin proposes inclusion of race as a factor in admissions process, *supra* note 82.

²⁷⁵ Rick Cherwitz, *To Diversity . . . and Beyond*, FORT-WORTH STAR-TELEGRAM, Jan. 12, 2004, at 11.

ensure that its diversity goals are advancing the educational mission of the school.

G. ELIMINATE OTHER ARTIFICIAL BARRIERS TO INCLUSION

In recent months the Center for Equal Opportunity, a conservative think tank, filed complaints with the U.S. Department of Education's Office for Civil Rights (OCR) against Rice University, Texas Tech University, and threatened to do so against UT-Austin, all in an attempt to block the reintroduction of affirmative action.²⁷⁶ Given these scare tactics, we are obliged to remind private and public colleges and universities of their obligations under the U.S. Department of Education's disparate impact regulations promulgated pursuant to Title VI of the 1964 Civil Rights Act.²⁷⁷

OCR can enforce these regulations when a complaint prompts an OCR investigation.²⁷⁸ In resolving claims under the disparate impact regulations, the educational institution has the burden of demonstrating the "educational necessity"²⁷⁹ of the admissions practice at issue once disparate impact is established.²⁸⁰

²⁷⁶ See Center for Equal Opportunity, Recent Projects, available at <http://www.ceousa.org/>. See also Peter Schmidt, *Advocacy Groups Pressure Colleges to Disclose Affirmative-Action Policies*, CHRON. HIGHER EDUC., April 2, 2004, at A26.

²⁷⁷ 34 C.F.R. § 100.3(vii)(2) (providing that recipients of federal funding "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . ."). For a synthesis of many higher education cases addressing disparate impact, see Olivas, *Constitutional Criteria*, supra note 217, at 1090-1114.

²⁷⁸ Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1174 (2003).

²⁷⁹ Board of Educ. v. Harris, 444 U.S. 130, 151 (1979); Debra P. v. Turlington, 644 F.2d 397, 407 (5th Cir. 1981). In *GI Forum v. Texas Education Agency*, 87 F. Supp. 2d 667, 675-78 (W.D. Tex. 2000), the Western District of Texas applied the lower "reasonableness" standard, citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-61 (1989). However, the Civil Rights Act of 1991 expressly revived the "business necessity" standard and rejected this aspect of *Wards Cove*. Pub. L. 102-166, § 105, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e-2(1991)). Thus, *GI Forum* is questionable for relying on *Wards Cove* and the other pre-1991 Civil Rights Act authority on this point. See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1412 (11th Cir. 1993).

²⁸⁰ This can be established using the EEOC's Four-Fifths Rule, or preferably, statistical techniques such as the z-score statistic. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995 n.3 (1988) (O'Connor, J., plurality opinion) (noting that the Four-Fifths rule has "been criticized on technical grounds"); *GI Forum v. Texas Education Agency*, 87 F. Supp. 2d 667, 675-78 (W.D. Tex. 2000); *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1527 (M.D. Ala. 1991); David H. Kaye &

The admissions program at UTLS that was struck down in *Hopwood* is a telling example of how certain admission practices can have an unwarranted disparate impact on low-income and minority students. Cheryl Hopwood's 3.8 UGPA was downgraded, causing her to drop to the discretionary zone where she was eventually placed on the waitlist, because she graduated from California State University Sacramento and attended community college.²⁸¹ This is an area of concern because, as MALDEF pointed out in *Grutter*, a high proportion of Latinos attend less prestigious institutions or begin their higher education journey in community college.²⁸² A study by the Pew Hispanic Center reports among the college age population (18-24), 44% of Latinos attend community college, compared to less than 30% of Whites and African Americans.²⁸³

In *Hopwood*, UTLS Professor Wellborn provided an expert report and testimony indicating that at UTLS "even though the LSDAS [Law School Data Assembly Service] treats all GPAs alike for purposes of calculating the [Texas index] score, file reviewers customarily take cognizance of . . . the mean LSAT score for the applicant's college . . ." ²⁸⁴ Wellborn also assured the court that "comparing the colleges' mean LSAT scores is the best way of evaluating the various colleges and universities in terms of the caliber of their respective student bodies."²⁸⁵

Unfortunately, when the LSAT is used as a yardstick for evaluating the "caliber" of an undergraduate student body, schools that have a high proportion of Black, Latino, and low-income students tend to be downgraded and wealthy elite schools are boosted.²⁸⁶ Thus, Sturm and Guinier persuasively argue,

David A. Freedman, *Reference Guide on Statistics*, in FEDERAL JUDICIAL COUNCIL, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 109 (2000).

²⁸¹ *Hopwood v. Texas*, 236 F.3d 256, 266 (5th Cir. 2000).

²⁸² Brief of the Mexican American Legal Defense and Educational Fund et al. as Amici Curiae in Support of Respondents in *Grutter v. Bollinger*, reprinted at 14 BERKELEY LA RAZA L.J. 1, 15 (2003).

²⁸³ RICHARD FRY, LATINOS IN HIGHER EDUCATION: MANY ENROLL, TOO FEW GRADUATE 6 (Sept. 2002), available at <http://www.pewhispanic.org>.

²⁸⁴ 236 F.3d at 268.

²⁸⁵ *Id.*

²⁸⁶ Brief of the Mexican American Legal Defense and Educational Fund et al. as Amici Curiae in Support of Respondents in *Grutter v. Bollinger*, *supra* note 282, at 15 ("[R]egardless of academic performance, Latinos may be further handicapped by the Law School's emphasis on automatically rewarding students who attended prestigious undergraduate universities."). See also Cheryl L. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1224 n.19 (2002);

“Cheryl Hopwood may well be the victim of a class bias in the admissions process that mirrors the bias confronting applicants of color.”²⁸⁷

A law school would have a difficult time meeting its burden of establishing the educational necessity of UGPA adjustments. UTLS officials acknowledged that the LSAC did not adjust UGPAs in calculating LSAT/UGPA index scores on behalf of UTLS.²⁸⁸ More importantly, LSAC has repeatedly studied the issue and found that UGPA adjustments do not improve prediction of law school grades.²⁸⁹

As this example illustrates, at times colleges and universities use criteria and procedures, often with little forethought, that negatively impact admission opportunities for students of color. The more that the admissions office is cognizant of the effect such factors have on admissions, the more effectively it can take steps to counterbalance this adverse impact. Therefore, an admissions office should rigorously evaluate all factors used in its admissions program and determine what effect they may have on minority applicants. We recommend that institutions take care to avoid criteria that place an undue burden on students of color and applicants from disadvantaged backgrounds.

William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 176 (2000).

²⁸⁷ Sturm & Guinier, *supra* note 223, at 991.

²⁸⁸ 236 F.3d at 268. In fact, it appears that LSAC has not adjusted UGPAs on behalf of law schools since the late-1970s. ALLAN NAIRN & ASSOCIATES, *THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS* 247 (1980).

²⁸⁹ Donald A. Rock & Franklin R. Evans, *The Effectiveness of Several Grade Adjustment Methods for Predicting Law School Performance*, in LAW SCH. ADMISSION COUNCIL, *REPORTS OF LSAC SPONSORED RESEARCH: VOLUME IV, 1978-1983* 363, 444 (1984) (“The relatively modest and unstable validity gains observed here, as well as the desirability to treat all law school applicants fairly and equitably, argue against the use of these types of grade adjustment techniques in the calculation of prediction indices.”); Robert F. Boldt, *Efficacy of Undergraduate Grade Adjustment for Improving the Prediction of Law School Grades*, in LAW SCH. ADMISSION COUNCIL, *REPORTS OF LSAC SPONSORED RESEARCH: VOLUME III, 1975-1977* (1978) (at best adjustments were only as good as not using them, and were often worse than no adjustments); W.B. Schrader & Barbara Pitcher, *Effect of Differences in College Grading Standards on the Prediction of Law School Grades*, in LAW SCH. ADMISSION COUNCIL, *REPORTS OF LSAC SPONSORED RESEARCH: VOLUME II, 1970-1974* 433 (1976); Robert L. Linn, *Grade Adjustments for Prediction of Academic Performance*, 3 J. EDUC. MEASUREMENT 313 (1966); W.B. Schrader & Barbara Pitcher, *Adjusted Undergraduate Average Grades as Predictors of Law School Performance*, in LAW SCH. ADMISSION COUNCIL, *REPORTS OF LSAC SPONSORED RESEARCH: VOLUME I, 1949-1969* 291 (1976). Significantly, more recent studies were not conducted because LSAC basically gave up on this line of research after it was consistently unfruitful.