

In Search of the Talented Tenth: Diversity, Affirmative Access, and University-Driven Reform

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INTRODUCTION

One hundred years ago, W. E. B. DuBois introduced the concept of the Talented Tenth, which emphasized the need for higher education to develop the leadership capacity among the most able ten percent of black Americans. DuBois was one of a number of black intellectuals who feared what they saw as an overemphasis on industrial training in Booker T. Washington's 1895 Atlanta Compromise. Washington's plan, critics thought, would confine blacks permanently to the ranks of second-class citizenship by de-emphasizing higher education pursuits.¹

Today bears witness to the wisdom of this concern because DuBois's view has carried the day in a world where the default rule in an increasingly complex, knowledge-driven society is that anything less than a college degree virtually guarantees second-class citizenship.² Accordingly, Texas as well as California and Florida have created their own versions of the

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¹ W. E. B. DuBois, *The Talented Tenth*, in *THE NEGRO PROBLEM: A SERIES OF ARTICLES BY REPRESENTATIVE AMERICAN NEGROES OF TO-DAY* 33 (1903). In a famous speech at the Atlanta Exposition on September 18, 1895, Washington asserted that vocational education, which gave blacks an opportunity for economic security, was more valuable to them than social advantages or political office. In one sentence Washington summarized his concept of race relations appropriate for the times: "In all things that are purely social we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress." BOOKER T. WASHINGTON, *Atlanta Exposition Address*, in 3 *THE BOOKER T. WASHINGTON PAPERS: 1889-1895* 585 (Louis R. Harlan ed., 1974).

² See Bureau of Labor Statistics, U.S. Dep't of Labor, *Futurework: Trends and Challenges for Work in the 21st Century*, OCCUPATIONAL OUTLOOK Q., Summer 2000, at 31, 36.

Talented Tenth model in the hope that more black and Latino leaders will emerge as they become eligible for admission to higher education institutions. Specifically, Texas offers admission to its flagship institutions and other schools in its university system for the most able ten percent of students graduating from its high schools.³ Likewise, under similar plans in Florida and California, a fixed percentage of the graduating class of each high school in the state is guaranteed admission to one or more universities in the state system.⁴

These new percent plans—applications of the policy President George W. Bush has dubbed “affirmative access”—are intended to replace race-conscious admission systems while still achieving the goal of racial diversity within the university student body.⁵ Indeed, the Bush administration has

³ Texas House Bill No. 588, known as the Ten Percent Plan and enacted in 1997, entitles the top ten percent of graduating classes of all accredited high schools in Texas to attend the University of Texas at Austin, the university system’s flagship campus, Texas A&M University, or any other state university. TEX. EDUC. CODE ANN. § 51.801–.809 (Vernon 2001). Colleges and universities are permitted to require an essay, letters of recommendation, admission and placement tests, fees, and an official high school transcript. Under the Ten Percent Plan, the students must take the ACT or SAT, but only to determine the need for academic support and to track whether the scores can predict the success or failure of the students. The Plan also stipulates that the governing board of each university should decide on an institutional basis whether to extend automatic admission to any student in the top twenty-five percent of his or her graduating class. TEX. EDUC. CODE ANN. § 51.084 (Vernon 2001). The legislature also outlined factors other than academic achievement that institutions may take into consideration when admitting the rest of their freshman classes—factors related primarily to socioeconomic status, geographic region, and uncommon hardship. TEX. EDUC. CODE ANN. § 51.805(b) (Vernon 2001). The admission criteria for students not in the top ten percent or twenty-five percent of their classes are to be published in the institutions’ academic catalogs and made available to the public not later than one year before the date when they are to take effect. TEX. EDUC. CODE ANN. § 51.805(d) (Vernon 2001). Similarly, the factors used in awarding competitive fellowships and scholarships are to be made public. TEX. EDUC. CODE ANN. § 51.809(a)–(b) (Vernon 2001). The Ten Percent Plan has applied to all admissions and scholarship awards since the fall semester of 1998. H.R. 588, 75th Leg. § 2 (Tex. 1997).

⁴ Under the Florida and California programs, candidates are not automatically admitted to the institution of their choice as under the Texas model. For example, the top four percent of graduates from each public high school in California are guaranteed admission to one of the eight campuses in the University of California system. Office of the President, Univ. of Cal., *Paths to UC Eligibility for Freshmen* (Sept. 1999), at http://www.ucop.edu/pathways/ucnotes/cn_archives/sep99_paths.html. Likewise, in 2001, the University of California Board of Regents approved the “Dual Admissions” plan whereby the top 12.5% of students statewide are granted admission to one of the campuses, subject to their completion of a transfer program at a California community college. Office of the President, Univ. of Cal., *Regents Approve “Dual Admissions” Plan, Expanding UC Access for High Achieving Students* (July 19, 2001), at <http://www.ucop.edu/news/archives/2001/july19art2.htm>. In Florida, an executive order to maintain diversity was issued by Governor Jeb Bush in an effort to preempt a ballot initiative led by California Civil Rights Initiative Chairman Ward Connerly. Governor Bush’s plan, known as the Talented Twenty program, guarantees admission to the top twenty percent of graduates, but does not ensure that students will get into the campus of their choice. See OFFICE OF THE GOVERNOR, STATE OF FLA., GOVERNOR BUSH’S EQUITY IN EDUCATION PLAN (1999), available at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/documents/educationplan.doc.

⁵ See Ctr. for Individual Rights, *Alternatives to Affirmative Action*, at http://www.cir-usa.org/articles/michigan_alternativeAA.html (last visited Mar. 25, 2003). The Texas legis-

touted percent plans as legally acceptable forms of “race-neutral” affirmative action.⁶ Nonetheless, when officials at Texas A&M University proposed a top twenty percent plan directed at underperforming schools, critics such as California Civil Rights Initiative Chairman Ward Connerly immediately cried foul, and the plan was quickly scrapped.⁷ Although it quickly disappeared into obscurity, the Texas A&M plan raises some issues that merit consideration.

lature, for example, approved the Ten Percent Plan soon after the devastating effects of *Hopwood v. Texas* (*Hopwood II*), which prohibited the use of race in admissions at the University of Texas Law School. 78 F.3d 932 (5th Cir. 1996). Professor Thomas Russell points out that the first three post-*Hopwood II* matriculating classes at the University of Texas Law School—the classes of 2000, 2001, and 2002—included only 19 African Americans out of 1,387 J.D. students, or 1.4% of the student body. See 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, 507–08 (2000). This is a smaller percentage than in the fall of 1950, when Heman Sweatt and five other African Americans were first permitted to enroll at the University of Texas Law School following an order by the Texas Supreme Court. *Id.* at 507 (citing *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the law school’s policy of *de jure* segregation was inconsistent with the Equal Protection Clause of the Fourteenth Amendment)). In a class of 280 students, those six African American students in 1950 constituted 2.1% of the entering class. *Id.* at 507–08.

Similarly, the Regents of the University of California adopted a percent plan only after their affirmative action plan was successfully attacked. Pamela Burdman, *UC Regents Re-thinking Use of SAT—Newly Approved 4% Admissions Policy May Still Need Tweaking*, S.F. CHRON., Mar. 20, 1999, at A22; V. Dion Haynes, *U. of California Alters its Policy on Admissions: Change Aims to Increase Number of Minority Students*, CHI. TRIB., Mar. 20, 1999, at 1; Kenneth R. Weiss, *Plans Seek More UC Pupils From Poorer Schools*, L.A. TIMES, May 12, 1997, at A1. In July of 2001, the University of California Regents approved a provisional admission plan. Under this scheme, students in the top 12.5% of their high school who were not initially admitted to a University of California campus would still be admitted as junior transfers (without having to reapply) if they completed two years of community college and met the GPA requirement specified by the campus. Tanya Schevitz, *UC Widens Chance of Gaining Admission*, S.F. CHRON., July 20, 2001, at A1. There is no assurance that applicants under this plan can secure a spot at Berkeley or UCLA, the most selective UC campuses. See e.g., Harriet Chiang, *Affirmative Action Setback: State Supreme Court Rules Prop. 209 Prohibits Minority-Based Outreach*, S.F. CHRON., Dec. 1, 2000, at A1; Maura Dolan, *State Justices Deal New Setback to Affirmative Action*, L.A. TIMES, Dec. 1, 2000, at A1; Pamela Burdman, *UC System Has No Leeway to Consider Race in Admissions, Despite Recent Court Ruling*, BLACK ISSUES IN HIGHER EDUC., Jan. 4, 2001, at 22; Tanya Schevitz, *UC San Diego Told Scholarships May Be Illegal Under Prop. 209*, S.F. CHRON., July 23, 2001, at A6. Likewise, Florida settled on a twenty percent standard after computer models revealed that fifteen percent and ten percent admission policies would fail to produce enough black and Hispanic students. Univ. of Mich., *Reasons Why “Percent Plans” Won’t Work for College Admissions Nationwide* (Jan. 28, 2003), at <http://www.umich.edu/~newsinfo/Releases/2003/Jan03/r012903.html>.

⁶ Both U.S. Solicitor General Ted Olson and the U.S. Department of Education’s Office for Civil Rights have recently endorsed the notion that percent plans represent a permissible race-neutral alternative. See Grutter Transcript, U.S. Supreme Court, Apr. 1, 2003 (on file with author). See also U.S. DEP’T OF EDUCATION, OFFICE FOR CIVIL RIGHTS, RACE-NEUTRAL ALTERNATIVES IN POSTSECONDARY EDUCATION: INNOVATIVE APPROACHES TO DIVERSITY (2003), available at <http://www.ed.gov/ocr/raceneutralreport.html>.

⁷ CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES 55 (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf> (noting that a plan to admit students in the top twenty percent of their class from 250 underperforming schools was automatically politically and legally vulnerable).

In this Article, I address the fundamental question underlying the Texas A&M percent plan: to what extent is diversity in college admissions dependent on a renewed focus on underperforming schools? In particular, I will explore the implications of the Texas A&M plan for what I refer to as socioacademic-based affirmative action. The need for new proposals in light of the current constitutional hostility to race, I suggest, requires that universities embrace their institutional missions of providing meaningful affirmative educational access to underrepresented people of color.⁸ This proposition raises several questions. For example, what does affirmative access mean? When does affirmative access begin and how should its merits be assessed? Do percent plans inherently run counter to the mandate of leaving no child behind? Is improving underperforming schools the policy goal of the diversity rationale? Finally, how does one reconcile the race-conscious mandates of the No Child Left Behind Act of 2001 with the Bush administration's attack on race consciousness.⁹

In examining these issues, I contend that universities must leverage their institutional influence to shape state assessment policies and school district practices. In so doing, they become partners with schools and ensure that the academic community is more diverse. Realizing the benefits of this proposal requires that society reject the prevailing approach to learning where school is defined as a series of isolated and discrete grade units, rather than by the students who transition through the system.¹⁰

I also suggest that the permissible race-conscious measures set forth by the No Child Left Behind Act may bolster diversity and provide a legal cover for targeted college outreach and remedial programs.¹¹ Given recent data indicating the limits of percent plans, this inquiry becomes vitally important in seeking more effective ways to achieve racial diversity within a permissible legal framework. This issue is also important because income-based affirmative action may not succeed in maintaining existing racial diversity,¹² although some have contended otherwise in recent months.¹³ The solution is to adopt a university-driven model of reform

⁸ See Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP* 431–56 (Christopher Jencks & Meredith Phillips eds., 1998).

⁹ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

¹⁰ See HAROLD L. HODGKINSON, *ALL ONE SYSTEM: DEMOGRAPHICS OF EDUCATION, KINDERGARTEN THROUGH GRADUATE SCHOOL* (1985).

¹¹ No Child Left Behind Act § 502.

¹² A study by Thomas Kane, for example, found that colleges would have to admit six times as many students under a class-based policy in order to admit the same number of minority students under a race-based policy. See Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in *CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES* 17, 28 (Gary Orfield & Edward Miller eds., 1998).

¹³ Most programs that rely on socioeconomic indicators alone have proven ineffective in maintaining previous levels of racial diversity and largely tend to benefit lower class whites instead. This point, however, is not without controversy. Earlier this year, the Century Foundation released a study espousing the effectiveness of such schemes. This report is somewhat at odds with the federal government's current position. The Century Founda-

that redefines merit and holds schools and policymakers accountable for leaving students of color behind.

Despite the Bush administration's support of percent plans, they are the target of growing criticism. Percent plans have been attacked as race-based schemes resembling affirmative action.¹⁴ At the same time, most critics embrace the widespread existence of scholarships for non-Hispanic whites,¹⁵ the religious,¹⁶ women,¹⁷ and the dis-

tion report acknowledges that there is no adequate substitute for race-based affirmative action and, therefore, recommends that both race-based and socioeconomic factors be considered. See ANTHONY P. CARNEVALE & STEPHEN J. ROSE, *SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS* (2003), available at http://www.tcf.org/Publications/White_Papers/carnevale_rose.pdf.

¹⁴ Race-based solutions have a greater potential to remedy past discrimination. Nonetheless, where the identified discrimination has not occurred in the immediate past, "the inquiry into the legitimacy of a race-based classification turns to the state's basis for finding continuing effects of such past discrimination." *Podberesky v. Kirwan*, 956 F.2d 52, 56 (4th Cir. 1992), *modified*, 38 F.3d 147 (4th Cir. 1994). See also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that racial classifications are subject to strict judicial scrutiny requiring a compelling state interest narrowly tailored to achieve that interest and remanding a lower court decision upholding a federal affirmative action program for minority businesses); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (invalidating a subcontracting set-aside program intended to remedy the effects of racial discrimination); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (striking down a race-sensitive layoff provision); *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (recognizing "the need for careful judicial evaluation to assure that any . . . program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal"). *But see Adarand*, 515 U.S. at 243–49 (Stevens, J., joined by Ginsburg, J., dissenting) (finding significant differences between affirmative action programs and invidious discrimination).

¹⁵ See, e.g., Association of Italian American Charities (Dr. Frank C. Marino Memorial Scholarship); Education and Scholarship Trust of the Trans-Canada Alliance of German-Canadians; Walter N. and Frances Hnatiuk Scholarship—Ukrainian; The Kosciuszko Foundation Tuition Scholarship Program—Polish; Marinelli Scholarship—Italian; Deutscher Brüderliche Bund Scholarship—German; Petryshyn Memorial Scholarship—Ukrainian; National Italian American Foundation (Merrill Lynch Scholarship); National Italian American Foundation (Alexander Defilippis Scholarship); Vincent Viceglia Fellowship—Italian; George L. Graziado Fellowship for Business—Italian; Norman R. Peterson Scholarship—Italian; Augustus Society Scholarship—Italian; National Italian American Foundation (Assunta Luchetti Martino Scholarship for International Studies); National Italian American Foundation (Bolla Wines Scholarship); National Italian American Foundation (F. D. Stella Scholarship).

¹⁶ See, e.g., Abraham Fellowship—Jewish; Jewish War Veterans National Scholarship Program; Starkoff Fellowship—Jewish; Ethel Marcus Memorial Fellowship—Jewish; Anna and Charles Stockwitz Fund for Education of Jewish Children; Charles and Louise Rosenbaum Scholarship Loan Fund—Jewish; B'nai Brith Women of Greater Hartford Scholarship; Jewish Social Service Agency of Metropolitan Washington; Levie Educational Fund Scholarship—Jewish; Marcus and Theresa Levie Educational Fund—Jewish; The Rothbert Fund—Religious; Jewish Foundation for Education of Women Scholarship; Jewish War Veterans of the USA Scholarship; Jewish Welfare Board Scholarship; Amelia Greenbaum Scholarship Fund—Jewish; Encouragement Scholarship—Jewish; Free Sons of Israel Scholarship; Frank L. Weil Memorial Scholarship—Jewish; Adele Kagen Scholarship Fund—Jewish.

¹⁷ See, e.g., University of Arizona Women in Science and Engineering (WISE); University of Arizona WISE'M UP Mentoring Undergraduate Program; University of California, Davis Women in Engineering (WIE) Programs; Clemson University Women in Science & Engineering (WISE); Cornell University Women's Programs in Engineering; Dartmouth College Women in Science Project; Michigan Technological University Women in Engi-

abled,¹⁸ as well as preferences for alumni legacies and development admits.¹⁹ In fact, most universities acknowledge that in addition to favoring children of alumni who make financial contributions to their alma mater, colleges are bending admission standards to make room for wait-listed or tentatively rejected children from wealthy families. After these students enroll, universities promptly begin soliciting gifts from their parents. Emory, Duke, and several other selective schools have adopted this practice.²⁰

These preferences for students from high-income families help little in achieving diversity in increasingly economically segregated colleges. Approximately seventy-four percent of students attending the 146 most selective colleges come from families in the highest income quartile,

neering (WIE); Northeastern University Women in Engineering (WIE) Programs; Ohio State University Women in Engineering (WIE) Program; Pennsylvania State University Women in Engineering (WIE) Program; Purdue University Women in Engineering Program (WIEP); Purdue University Women in Science Programs (WISP); Rochester Institute of Technology Women Intent on Success in Engineering (WISE); Stevens Institute of Technology Lore-El Center for Women in Engineering and Science; Texas A&M Women in Engineering, Science, and Technology (WEST) Program; University of Illinois, Urbana-Champaign Women in Engineering (WIE) Program; University of Texas at Austin Women in Engineering Program (WEP); Agnes Kujawa Scholarship; Mary L. Frymire Scholarship; Mildred Cater Bradham Social Work Fellowship; Amelia Earhart Fellowship; Association for Women Veterinarians Scholarship; BPW Loan Fund for Women in Engineering Studies; Massachusetts State Federation of Women's Clubs Scholarship; College Women's Club of Montclair Scholarship; Juniata College (Anna Groninger Smith Memorial Scholarship); Association for Women in Science Educational Foundation (Ruth Satter Memorial Award); Business and Professional Women's Foundation (AVON Products Foundation Career Empowerment Scholarship Program); Women's International Science Collaboration (WISC) Program; Eleanor Roosevelt Teacher Fellowships; Association for Women in Computing Scholarship.

¹⁸ See, e.g., Frank Walton Horn Memorial Scholarship for the Blind; Ann PeKar Memorial Scholarship for the Blind; Howard Brown Richard Scholarship for the Blind; Ezra Davis Memorial Scholarship for the Blind; Howard B. Rickard Scholarship for the Blind; American Foundation for the Blind Scholarship; Kuchler-Killian Memorial Scholarship for the Blind; Delta Gamma Foundation Memorial Scholarship for the Blind; Rudolph Dillman Memorial Scholarships for the Blind; H. B. Fiebelman, Jr. Award for the Hearing Impaired; Maude Winkler Scholarship for the Hearing Impaired; A. G. Bell Scholarship for Deaf Adults; Volta Award for the Hearing Impaired.

¹⁹ Development admits are students of wealthy parents who are admitted to selective universities. Officials at Duke University recently told the *Wall Street Journal* that between three and five percent of Duke's students are development admits. The end result may be higher contribution yields for universities, whose presidents are subject to increasing pressures to meet capital campaign goals. As the *Wall Street Journal* reported:

[I]n recent years, Duke says it has relaxed these standards to admit 100 to 125 students annually as a result of family wealth or connections, up from about 20 a decade ago. These students aren't alumni children and were tentatively rejected, or wait-listed, in the regular admissions review. More than half of them enroll, constituting an estimated 3% to 5% of Duke's student body of 6,200.

Daniel Golden, *Extra Credit: At Many Colleges, the Rich Kids Get Affirmative Action*, WALL ST. J., Feb. 20, 2003, at A1. Other top schools from Stanford to Emory report that they also occasionally consider parental wealth in admission decisions. *Id.*

²⁰ *Id.*

whereas only three percent have parents in the lowest income quartile.²¹ Most applicants are from the wealthiest ten percent of school districts, which spend ten times more per student than the poorest ten percent.²² Legacies and development admits only compound universities' economically segregated nature.

Notwithstanding the existence of these preferences that primarily benefit affluent non-Hispanic whites, collective efforts to enhance college diversity through minority academic scholarships, enrichment programs, and percent plans have come under attack as race-based measures.²³ Curiously, these attacks began just as affirmative action programs—previously designed to include many non-Hispanic white females and Asian Americans—shifted their focus to underrepresented people of color.²⁴ Thus, as soon as minorities began to occupy a position similar to that of the preferred elite, it became politically inexpedient to maintain affirmative action programs.²⁵ Some perceive percent plans, such as the one considered by Texas A&M University, to be equally threatening as traditional affirmative action programs.

I. A PILOT WITHOUT WINGS?: THE STRANGE DISAPPEARANCE OF THE TEXAS A&M UNIVERSITY PLAN

When Texas A&M University set forth a pilot proposal to make its class-rank requirement more advantageous to students from underperform-

²¹ DEP'T OF EDUCATION, *supra* note 6, at 26 (“[E]conomically disadvantaged students are 25 times less likely to be found on selective college campuses as economically advantaged students.”). *See also* Century Foundation, *Should Race Count?: A Policy Discussion on the Future of Affirmative Action* (Mar. 31, 2003), available at http://www.tcf.org/Events/033103_AA/transcript.pdf.

²² Linda Darling-Hammond & Laura Post, *Inequality in Teaching and Schooling: Supporting High-Quality Teaching and Leadership in Low-Income Schools*, in *A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY* 127 (Richard D. Kahlenberg ed., 2000), available at <http://www.equaleducation.org/Notion/chpt5.pdf>.

²³ In fact, MIT recently dissolved its summer enrichment program for minorities and educationally disadvantaged students because of complaints from anti-affirmative action activists. *See* Michael A. Fletcher, *MIT to End Programs' Racial Exclusions: Nonminority Students to Be Accepted*, WASH. POST, Feb. 12, 2003, at A3.

²⁴ *See* Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1127 (1996). As the author explains:

Asian Americans are pitted against Blacks and Hispanics as if there are only a certain number of seats available for minority students. This is true only if a certain number of seats are reserved for white students. Through negative action against Asian Americans, whiteness becomes a diversity category . . . demonstrating how the merit and fairness rationales are a smoke screen for what is really being protected—white entitlement.

Id.

²⁵ *See* Daniel Golden, *College Ties: For Groton Grads, Academics Aren't Only Keys to Ivies*, WALL ST. J., Apr. 25, 2003, at A1.

ing schools, conservatives who until then had remained in relatively tacit agreement with percent plans unleashed a wave of criticism, with Ward Connerly and Linda Chavez leading the way.²⁶ The plan called for extending an offer of guaranteed admission to the top twenty percent of graduates from each of 250 high schools that had been designated as underperforming. This approach was regarded as novel, in that other universities in the state opted to accept only the top ten percent of graduates without regard to the status of underperforming schools.²⁷ In December of 2001, critics of the plan leveled a two prong attack. First, they urged John Cornyn, then the state's attorney general, to declare it illegal. Second, they called on federal officials to investigate whether the proposal would violate the *Hopwood II* ban on affirmative action in state colleges.²⁸

More generally, the backlash against Texas A&M's pilot plan threatened the uncertain future of the state's four-year-old Ten Percent Plan. Outspoken critics of the plan such as Roger Clegg at the Center for Equal Opportunity commented:

Not only [was Texas A&M under the Ten Percent Program] choosing a particular criteria, the top 10 percent, with the idea of achieving a certain racial and ethnic mix[, but, on] top of that, they are now [under the new pilot program] looking at particular high schools where the presence of the favored groups is likely to be the heaviest.²⁹

Although the Texas A&M Board of Regents considered the twenty percent proposal, final endorsement was less forthcoming from the state's attorney general as to its legality. Even though the Regents had asked in 2001 for the attorney general to rule on the plan, as of March of 2002, when the university withdrew the plan, no ruling of any kind had been issued. It was clear that the university withdrew the plan on account of the uncertain legal terrain and concerns about exposing the institution to litigation.³⁰

²⁶ See Daniel Koretz et al., *Testing and Diversity in Postsecondary Education: The Case of California*, 10 EDUC. POLICY ANALYSIS ARCHIVES 1 (2002). Ward Connerly successfully led ballot initiatives in California and Washington to ban affirmative action. Linda Chavez, who withdrew her nomination from President Bush to become Secretary of Labor, is currently president of the Center for Equal Opportunity. *Id.*

²⁷ HORN & FLORES, *supra* note 7, at 55.

²⁸ See *Hopwood II*, 78 F.3d 932 (5th cir. 1996).

²⁹ Jeffrey Selingo, *Critics Blast Plan to Expand Class-Rank Policy in Texas as Affirmative-Action Ploy*, CHRON. HIGHER EDUC., Jan. 11, 2002, at 29.

³⁰ See Ron Nissimov, *A&M Shelves Pilot Enrollment Plan: Legal Issues Force Delay for Seniors at 250 State High Schools*, HOUSTON CHRON., Mar. 2, 2002, at A38. See also *A&M Admissions Plan Raises Legal Concerns: A&M Regents Are Right to Seek Diversity, but They Must Not Open the University to Litigation*, SAN ANTONIO EXPRESS-NEWS, Mar. 5, 2002, at 6B (noting that Scott Kelly, Texas A&M's deputy general counsel, had been advised that university officials would not proceed until they were confident that the plan was

Many charges in the media claimed that Texas A&M's pilot plan was race-based and a thinly veiled attempt to circumvent *Hopwood II*.³¹ Nonetheless, although minorities were sure to be included in the plan, they were by no means the only populations targeted. In fact, Joseph A. Estrada, the assistant provost for enrollment at Texas A&M's College Station campus, noted that predominantly white, non-Hispanic high schools would also be beneficiaries under the plan.³² Attacks on the twenty percent plan also included many of the same arguments used against Texas' Ten Percent Plan. These included concerns that the proposed policy would displace qualified candidates, including those from traditional feeder schools.³³ However, these claims lack merit since, in order to qualify for automatic admission under the proposed pilot plan, students from those schools would still have to meet the university's requirements for test scores, grades, and any necessary college preparatory classes. In reality, this would only yield a marginal increase of approximately 500 additional students.³⁴ In contrast, those students admitted under the state's general Ten Percent Plan did not have to meet these same standards.³⁵

Another objection raised by critics was that Texas A&M's twenty percent plan granted admission to students from third-rate high schools who would be unable to compete at the university level. However, research conducted by Texas A&M officials into the college careers of students from underperforming schools flatly refutes this claim. For instance, students from targeted high schools who had been admitted under the less rigorous Ten Percent Plan standard had a ninety percent retention rate—a rate slightly higher than that of students from other schools during their freshman and sophomore years.³⁶ Still, university officials had

not race-based and could be defended on that basis).

³¹ See Jennifer K. Ruark, *Texas A&M Scraps Admissions Plan*, CHRON. HIGHER EDUC., Mar. 15, 2002, at 26.

³² Selingo, *supra* note 29.

³³ Marta Tienda and her colleagues studied the top twenty feeder high schools based on the total number of students admitted to the University of Texas at Austin and Texas A&M in 2000. Although the share of Texas A&M enrollees from the major feeder schools did not change between admission regimes, the share of matriculants from major feeder schools increased at the University of Texas after 1996. Thus, they conclude that there is no prima facie evidence that students from the traditional feeder schools have been hurt by the Ten Percent Plan. MARTA TIENDA ET AL., CLOSING THE GAP?: ADMISSIONS & ENROLLMENTS AT THE TEXAS PUBLIC FLAGSHIPS BEFORE AND AFTER AFFIRMATIVE ACTION 16 (2003), available at <http://www.texastop10.princeton.edu/publications/tienda012103.pdf>.

³⁴ *Id.* Although 20,000 additional students at the selected schools would be considered for automatic admission under the new plan, only about 4,000 were expected to have met the minimum admission requirements. University officials expected that only 500 students would enroll. When officials considered a twenty-five percent plan for all high schools in the state, they soon realized that the university would not be able to accommodate the number of students admitted under the scheme.

³⁵ Selingo, *supra* note 29.

³⁶ Lydia Lum, *Texas A&M Admissions Proposal Draws Controversy: Critics See Plan as Attempt to Reinstate Race-Conscious Admissions*, BLACK ISSUES IN HIGHER EDUC., Jan. 17, 2002, at 10.

to expend a great deal of energy dispelling the notion that all students from underperforming schools were themselves underperforming or likely to underperform.³⁷ The objections of critics, then, appear to have been misplaced. Perhaps predictably, the public debate over Texas A&M's twenty percent plan also became exploitative of the racially charged dialogue that has so often beset the usual discussion of affirmative action.

In light of matriculation data that suggested that students of color could succeed, public debate switched to why black and Latino applicants perceived Texas A&M as inhospitable. Notably, Texas A&M has an eighty-one percent white enrollment rate. Due to its background as an all-male, overwhelmingly white military training school where minority students have historically participated little, it is widely regarded as a less attractive option for students of color concerned about fitting in.³⁸

Nevertheless, while many objections to the plan were raised, there has yet to be an earnest dialogue surrounding the university's articulated non-race-based justification for its proposal. Is there, for example, a legitimate nexus between achieving college diversity and underperforming schools? In this regard, it is significant to note that Texas A&M officials have articulated a goal of encouraging first-generation, college-bound students from families traditionally discouraged from pursuing a college education to apply.³⁹ The admission scheme was also designed to curb practices by high school guidance counselors that advise students not to bother applying to top-notch colleges.⁴⁰ Interestingly, many would-be candidates that would be the first among their families to pursue a college degree include not only people of color but also significant portions of poor, non-Hispanic, Southern whites.

Texas A&M's right to shape its student body as it sees fit, so long as it does not transgress constitutional norms, remains a vital legal claim and is a "paradigmatic academic judgment" at the heart of educational excellence.⁴¹ Diversity initiatives such as those of Texas A&M also find support in the Ten Percent Plan itself. According to the plan, universities are permitted to have a policy more elaborate than simply admitting the top ten percent of a graduating class of high school students. Universities may also consider students in the top twenty-five percent of high school classes.⁴² Indeed, colleges may consider a number of factors including

³⁷ *Id.*

³⁸ See Nissimov, *supra* note 30.

³⁹ Selingo, *supra* note 29.

⁴⁰ Lum, *supra* note 36.

⁴¹ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., joined by Harlan, J., concurring)).

⁴² The Ten Percent Plan provides:

For each academic year, the governing board of each general academic teaching institution shall determine whether to adopt an admissions policy under which an

family income, whether a student is from an urban or rural school, and how that school fared in the state accountability ratings in making their admission decisions.⁴³ Other factors that may be taken into account include whether the applicant would be the first generation of his or her family to attend or graduate from an institution of higher education,⁴⁴ whether the applicant has bilingual proficiency,⁴⁵ the financial status of the applicant's school district,⁴⁶ the applicant's performance on standardized tests in comparison with those of other students from similar socioeconomic backgrounds,⁴⁷ whether the applicant attended any school that was under a court-ordered desegregation plan,⁴⁸ and any other considerations the institution deems necessary to accomplish its stated mission.⁴⁹ The aforementioned provisions have been subjected to little public scrutiny, but nonetheless fully support Texas A&M's proposal under the law. Further, the university's proposal was adopted with respect to measures that were not race-based but related to educational indicators and socioeconomic factors that relate to education. In fact, the university could undertake more expansive measures, such as using more recruiting tools through its admissions office.

If Texas' Ten Percent Plan clearly permitted Texas A&M to adopt its proposed policy, why would the university withdraw its proposal due to concerns over its legal standing? To be sure, concerns over the legal challenges raised by *Hopwood II*,⁵⁰ *Grutter v. Bollinger*,⁵¹ and *Gratz v. Bollinger*⁵² played some role. However, since Texas A&M's measures could be adopted without regard to race, the most likely explanation was the political opposition that ensued. Unfortunately, when political opposition invites excessive government intrusion, the fundamental mission of educational excellence in higher learning institutions is threatened.⁵³ Indeed,

applicant to the institution as a first-time freshman student . . . shall be admitted to the institution if the applicant graduated from a public or private high school in this state accredited by a generally recognized accrediting organization with a grade point average in the top 25 percent of the applicant's high school graduating class.

TEX. EDUC. CODE ANN. § 51.804 (Vernon 2001).

⁴³ TEX. EDUC. CODE ANN. § 51.805(b)(2), (6), (9).

⁴⁴ *Id.* at (b)(3).

⁴⁵ *Id.* at (b)(4).

⁴⁶ *Id.* at (b)(5).

⁴⁷ *Id.* at (b)(11).

⁴⁸ *Id.* at (b)(12).

⁴⁹ *Id.* at (b)(18).

⁵⁰ 78 F.3d 932 (1996) (holding that the race-conscious admission program violated the Equal Protection Clause).

⁵¹ 137 F. Supp. 2d 821 (E.D. Mich. 2001) (observing that the desire for student body diversity was an insufficient basis for a race-conscious admission policy), *vacated*, 288 F.3d 732 (6th Cir. 2002).

⁵² 135 F. Supp. 2d 790 (E.D. Mich. 2001) (finding that the race-conscious admission policy was not sufficiently narrowly tailored to achieve a compelling government interest of remedying past discrimination).

⁵³ See Robert H. Bork, *The Limits of Governmental Regulation*, in THE UNIVERSITY

American higher education, which boasts two-thirds to three-quarters of the best universities in the world, is a product of governmental forbearance.⁵⁴ However, government forbearance has never been accompanied by a hands off approach on the part of universities in fulfilling their institutional missions, particularly with targeted intervention at the elementary and secondary school levels.⁵⁵ Accordingly, Texas' Ten Percent Plan is being underutilized when Texas A&M feels constrained not to use its lawfully conferred discretion to establish admission criteria that will advance its mission of enhancing academic excellence and forming a diversified student body.

Although more must be done to attract students of color to Texas A&M,⁵⁶ perhaps all hope is not lost for the future of its twenty percent plan.⁵⁷ Undoubtedly, universities like Texas A&M have a vital role to play in the educational health of our nation's public schools. While seventy percent of today's high school graduates enroll in post-secondary

AND THE STATE: WHAT ROLE FOR GOVERNMENT IN HIGHER EDUCATION? 169 (S. Hook et al. eds., 1978).

⁵⁴ See HENRY ROZOVSKY, *THE UNIVERSITY: AN OWNER'S MANUAL* 29–33 (1990). Courts have granted institutions the final authority to make educational judgments. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819) (stating that colleges are more qualified than the legislature to decide educational matters). See also 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 416–17 (O. W. Holmes, Jr. ed., 12th ed. 1873). Governmental forbearance in educational judgment is generally widely accorded to universities. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In fact, Congress rejected the establishment of a national university that would set federal standards for all of the nation's new colleges. See, e.g., 1 *AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY* 148 (Richard Hofstadter & Wilson Smith eds., 1961). Federal authority over the educational judgments of colleges and universities was repeatedly rejected by Congress. See, e.g., Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581; Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448; Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268; Education Amendments of 1984, Pub. L. No. 98-511, 98 Stat. 2366; Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143; Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235. Likewise, the Executive Branch has reaffirmed its respect for the discretion of educational officials to foster diversity. See, e.g., 34 C.F.R. § 100.3(b)(6)(ii) (2003); 59 Fed. Reg. 8756, 8760–62 (Feb. 23, 1994); 56 Fed. Reg. 64,548 (Dec. 10, 1991); 44 Fed. Reg. 58,509, 58,509–10 (Oct. 10, 1979).

⁵⁵ See Will Potter, *Best Programs for "Early Intervention" Give Students More Than Money, Study Finds*, *CHRON. HIGHER EDUC.*, Mar. 3, 2003, available at <http://chronicle.com/daily/2003/03/2003030301n.htm>. See also ALISA CUNNINGHAM ET AL., *INVESTING EARLY: INTERVENTION PROGRAMS IN SELECTED U.S. STATES* (2003), available at http://www.millenniumscholarships.ca/en/research/investingeng_web.pdf.

⁵⁶ Texas A&M still struggles with diversity issues for a number of reasons. For instance, potential students receive better financial aid offers from other institutions, the college's admission process often fails to give students personal attention, qualified students may want to attend more prestigious universities or traditional black colleges, and family incomes of admitted students are often too high to qualify for aid. See, e.g., Sara Hebel, *"Percent Plans" Don't Add Up*, *CHRON. HIGHER EDUC.*, Mar. 21, 2003, at A22.

⁵⁷ Modifications to the proposal have been considered. One possibility raised by Texas A&M's chief deputy counsel in March of 2002 was to have 100 designated schools instead of 250. The smaller group would eliminate public schools that have graduating classes of fewer than twenty-five students and send a relatively high number of students to universities out of state. See Nissimov, *supra* note 30.

education, only half of students who enroll in four year institutions receive a degree, due to a lack of adequate high school preparation.⁵⁸ Further, although ninety percent of freshmen expect to complete college, only about forty-four percent have taken a college preparatory course.⁵⁹ The remaining thirty million are poorly prepared for a future that has already been largely foreclosed.⁶⁰ Within this context, universities can play a greater role in shaping reform by leveraging their institutional power. Indeed,

There seems little doubt that American colleges have realized their ideals of service. They have never been isolated “ivory towers” but, rather, high “watchtowers.” They have played a decisive role in the advancement of American democracy. They have furnished the professional training needed by a growing nation. They have contributed to the efficiency of its economy by making possible the specialization required by a technological age. They have helped advance man’s knowledge of himself and of his universe. And, all the while, they have thus been increasing the health, wealth, and power of the United States.⁶¹

Colleges have an instrumental role to play in the reform of public schools. One primary justification for tax exemption of public education under the market failure theory is relevant to diversity concerns because education is viewed as a public good that is not properly distributed to all persons on an equal basis.⁶² Therefore, universities arguably fulfill their core exempt function by broadening the opportunities available to a racially and economically diverse community of learners not otherwise served. The recently enacted No Child Left Behind Act further supports potential efforts to target students of color under the innocuous umbrella of assisting those schools that fail to make “adequate yearly progress” under the Act.⁶³ This argument can be made because the requirement that schools make “adequate yearly progress” is measured in part by academic achievement on the basis of race.⁶⁴ Consequently, however suspect the use of race in student admissions might be, this proposition does not control the use of race-conscious efforts to aid schools that have failed to meet the academic mandates of the No Child Left Behind Act.

⁵⁸ Alex P. Kellog, *Report Finds the Majority of U.S. Students Not Prepared for College*, CHRON. HIGHER EDUC., Oct. 5, 2001.

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ JOHN S. BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES* 428–29 (4th ed. 1997).

⁶² *See* LESTER M. SALAMON, *AMERICA’S NONPROFIT SECTOR: A PRIMER* 7–9 (1999).

⁶³ No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111(h)(1)(C)(i)–(iv), 115 Stat. 1425 (2002).

⁶⁴ *Id.*

Thus, I suggest that this disaggregated, race-conscious reporting framework can facilitate collaborative university participation in school district initiatives that aim to foster diversity. Although not without potential difficulties, the measurement of “adequate yearly progress” is assessed through state education agencies that must provide individual student interpretive and descriptive reports. These documents must allow for the disaggregation of test results within each state, district, and school by gender, race, ethnicity, English proficiency, migrant status, disability, and income.⁶⁵ Accordingly, race is one factor among many in determining “adequate yearly progress.” Further, test results must include individual student scores and be reported by race, income, and other categories in order to measure not just overall trends but gaps between, and progress of, various subgroups.⁶⁶ By looking at minorities alone as well as minorities in relation to whites and other income class groups, the measure for any intervention becomes based on a more comprehensive contextualized framework. This framework provides less opportunity for contrived assertions as to what truly constitutes a disadvantaged background. Moreover, when one combines these race-conscious measures with other socioeconomic factors, some meaningful level of racial and economic diversity may be possible.⁶⁷ Under the Act’s accountability model, I propose that universities can create an informal, market-driven model of monitoring by ensuring equitable compliance with the statute. Universities can also promote these efforts by encouraging the removal of school district measures that exacerbate inequity through racialized double standards in tracking, placement, testing, referrals to special education, and disciplinary actions.

By collectively grounding race-conscious approaches within (1) underperforming schools and their practices, similar to the approach taken by Texas A&M University, (2) the public service nature of the university mission and tax-exempt status, as well as (3) the mandates of the No Child Left Behind Act, the educational justifications for academic improvement become more solidly independent beyond their ability to serve as a proxy for race. This scheme is thereby made less vulnerable to legal attack while promoting academic excellence and diversity.

By now the benefits of diversity in the classroom and in student development are manifest.⁶⁸ What should also be clear is that the success of

⁶⁵ *Id.* § 502.

⁶⁶ *Id.*

⁶⁷ See generally CARNEVALE & ROSE, *supra* note 13.

⁶⁸ See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 187 (Gary Orfield & Michal Kurlaender eds., 2001); ROBERT M. HUTCHINS, *THE HIGHER LEARNING IN AMERICA* 15, 19 (1936); ALEXANDER MEIKLEJOHN, *EDUCATION BETWEEN TWO WORLDS* (1942); Jeffrey F. Milem, *The*

any future diversity initiative capable of withstanding legal challenges will require more able college applicants and local schools capable of producing them. The need to preserve the academic integrity and diversity of prospective applicants requires that universities be prepared to intervene in unprecedented ways at elementary and secondary schools. The Texas A&M plan comes closest to realizing that a focus on underperforming schools is necessary to stimulate true diversity. However, such a renewed focus will require further integration of efforts in an educational system that has long been characterized by bureaucratic isolation.

II. BUREAUCRATIC ISOLATION AND THE LIMITS OF PERCENT PLANS

It is an unfortunate reality that percent plans, particularly those in Florida and California, have enjoyed only limited success. The enrollment of blacks and Latinos that would not otherwise qualify for admission is small even though, as ethnic groups, the two collectively comprise the majority of residents in both states.⁶⁹ It is also problematic that percent plans appear to reinforce residential segregation patterns that in turn create segregated schools.⁷⁰ However, the most troubling aspect of affirmative access—yet to be explored fully in the literature—has the unique ability to shed light on how the U.S. educational system should function. It is the realization that affirmative access has failed because our system is comprised of a set of discrete institutions that function ineffectively in isolation from one another. These discrete units may take the form of nursery schools, day care centers, kindergartens, elementary schools, junior high schools, senior high schools, two year colleges, four year undergraduate colleges, universities with graduate programs, or post-graduate institutions. While the benefits of such a system are manifest given the need for age-appropriate education, this alone should not mean that functional isolation should be the default rule for public educational preparation. Under prevailing approaches to learning, school is defined according to such fixed units and not as an organic product of the people who transition through them.⁷¹ The only people who are likely to experience these institutions personally as an integrated whole are those

Educational Benefits of Diversity, in *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell Chang et al. eds., 2000); DARYL G. SMITH ET AL., *DIVERSITY WORKS: THE EMERGING PICTURE OF HOW STUDENTS BENEFIT* (Ass'n of Am. Colls. and Univs. 1997); Neil L. Rudenstine, *Why a Diverse Student Body Is So Important*, *CHRON. HIGHER EDUC.*, Apr. 19, 1996, at B1; Harold T. Shapiro, *Affirmative Action: A Continuing Discussion—A Continuing Commitment*, *PRINCETON WKLY. BULL.*, Oct. 16, 1995.

⁶⁹ HORN & FLORES, *supra* note 7, at 46.

⁷⁰ See Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percent-age Plans"*, 62 *OHIO ST. L.J.* 1729, 1734–35 (2001).

⁷¹ See HODGKINSON, *supra* note 10.

students who are fortunate enough to make it through to graduation.⁷² The holistic approach to educational equity has yet to be fully recognized by college and university officials.

Accordingly, percent plans constitute nothing more than artificial manipulations of admission schemes that do not directly address the prevailing issues of educational equity and demographic shifts that lie at the heart of the elementary and secondary education experience. Instead, these schemes often operate to exploit and exacerbate existing inequity. In this sense, percent plans are emblematic of peripheral approaches to the issue of equality that have long characterized educational reform efforts.

Is there a relationship between compartmental approaches to educational reform and the ineffectiveness of percent plans in attracting new underrepresented minorities? An emerging consensus agrees that percent plans may not necessarily promote diversity among underrepresented people of color as initial claims once purported, particularly at flagship institutions.⁷³ For example, the largest beneficiaries of Texas' Ten Percent Plan to date have been Asian American students, who now constitute nearly twenty percent of the incoming class at the University of Texas at Austin, even though they represent only about three percent of the state population.⁷⁴ By contrast, African Americans now comprise three percent of the class, down from the pre-*Hopwood II* years, while constituting twelve percent of the state population.⁷⁵ Notably, the Talented Twenty plan adopted by the Florida legislature has also sharply reduced the number of minority students attending the University of Florida.⁷⁶ In its twenty percent program, fewer than one percent of Floridians actually needed the plan's guarantee in order to be eligible for admission.⁷⁷

⁷² See *id.*

⁷³ See TIENDA ET AL., *supra* note 33, at 7; John F. Kain & Daniel M. O'Brien, *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates* (Feb. 5, 2003), available at <http://www.utdallas.edu/research/greenctr/Papers/pdfpapers/paper26.pdf>.

⁷⁴ See Jim Yardley, *Desperately Seeking Diversity: The 10 Percent Solution*, N.Y. TIMES, Apr. 14, 2002, at A4. This has not been the case in California, where Asian Americans have not benefited substantially from the legislative prohibition on the use of race in admission decisions. See William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29, 43 (2000).

⁷⁵ Yardley, *supra* note 74. The Ten Percent Plan has proven less effective at Texas A&M, which has been and remains a predominantly white institution. In 1996, 80.4% of the incoming freshmen were white, whereas the incoming class in 2001 was 82% white. See Linda K. Wertheimer, *A&M Tries New Diversity Tactic: University Wants to Target Top 20% at 250 Low-Ranking Schools*, DALLAS MORNING NEWS, Feb. 10, 2002, at A1.

⁷⁶ African Americans comprised 7.2% of the students in the 2001 incoming class at the University of Florida, down from 11.8% the previous year. Amie Parnes, *Enrollment Data Feed Rift on Florida Policy*, BOSTON GLOBE, Sept. 9, 2001, at A19. Latino students suffered a smaller decline, from 12% to 11%. *Id.*

⁷⁷ HORN & FLORES, *supra* note 7, at 45.

In addition to mounting evidence that percent plans perpetuate segregated patterns,⁷⁸ it is becoming increasingly clear that these plans fall far short of their promises to increase diversity in graduate and professional schools, as well as in some of the nation's most selective colleges.⁷⁹ The prestigious campuses of Berkeley and UCLA, for example, have yet to reverse the declines in enrollment of black and Latino students that followed the University of California Regents' decision to end affirmative action as a remedy in 1998 at the undergraduate level and in 1997 at the graduate level.⁸⁰ Florida, unlike Texas, failed to provide for adequate re-

⁷⁸ See Jeffrey Selingo, *What States Aren't Saying About the "X-Percent Solution,"* CHRON. HIGHER EDUC., June 2, 2000, at A31 (citing critics of percent plans who argue that their reliance on high schools with large minority populations "exploits educational segregation while doing nothing to make schools better" and "discourage[s] states from integrating high schools").

⁷⁹ U.S. COMM'N ON CIVIL RIGHTS, TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS IN HIGHER EDUCATION: ARE THEY EFFECTIVE SUBSTITUTES FOR AFFIRMATIVE ACTION? 5 (2000) ("The major problem with the percentage plans is their inattention to law schools, medical schools, and other graduate and professional schools, where ending affirmative action is devastating."). Many of the opinions expressed in this report are summarized in Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College*, CHRON. HIGHER EDUC., Aug. 4, 2000, at A48.

⁸⁰ Since the University of California Board of Regents' policy first took effect in 1998, the amount of enrolled Native American, African American, Latino, and Filipino students has decreased significantly. The number of first-time, California resident, Native American freshmen in the University of California system has decreased from 183 in 1997 to 168 in 1998 to 140 in 1999. Office of the President, Univ. of Cal., *Applications, Admissions, and Enrollments for California First-time Freshmen by Ethnicity: Fall Terms 1995 Through 1999* (2001), available at <http://www.ucop.edu/sas/infodigest01/pdf/id01aaep8.pdf>. Total enrollment for Native American undergraduates at UCLA has also steadily declined since 1997. In that year, UCLA had 203 Native American undergraduates enrolled, 177 in 1998, and 147 in 1999. Office of the President, Univ. of Cal., *Domestic Student Enrollment by Campus and Ethnicity: Fall 1999 Term* (2001), available at <http://www.ucop.edu/sas/infodigest01/pdf/id01aaep5.pdf>; Office of the President, Univ. of Cal., *Domestic Student Enrollment by Campus and Ethnicity: Fall 1998 Term* (2000), available at <http://www.ucop.edu/sas/infodigest00/pdf/id00aaep5.pdf>; Office of the President, Univ. of Cal., *Domestic Student Enrollment by Campus and Ethnicity: Fall 1997 Term* (1999), available at http://www.ucop.edu/sas/infodigest/pdf/id99_10.pdf. Even after controlling for fluctuations in total student population, the Native American population has decreased at UCLA by at least ten percent each year since the policy took effect. Similarly, African American undergraduate enrollment at UCLA dropped from 5.6% in 1997 to 3.8% in 1999. Office of the President, Univ. of Cal., *New Domestic Student Enrollment by Campus and Ethnicity: Fall 1999 Term* (2001), available at <http://www.ucop.edu/sas/infodigest01/pdf/id01aaep3.pdf>; Office of the President, Univ. of Cal., *New Domestic Student Enrollment by Campus and Ethnicity: Fall 1997 Term* (1999), available at http://www.ucop.edu/sas/infodigest/pdf/id99_04.pdf. During the same period, Chicano enrollment dropped from 12.5% to 10.2%. *Id.* At Berkeley, African American first-year enrollment dropped from 7.3% in 1997 to 4.0% in 1999. *Id.* Chicano undergraduate enrollment went from 10.7% in 1997 to 7.1% in 1999. *Id.* See also Barbara Whitaker, *Minority Rolls Rebound at University of California*, N.Y. TIMES, Apr. 5, 2000, at A16.

The Regents' decision and Proposition 209 have had even more drastic effects on graduate enrollment. In 1996, African American enrollment for law students at UCLA was 6.2%. Office of the President, Univ. of Cal., *Law School Applications, Admissions, and First-Year Class Enrollment: 1993-2002, by Ethnicity* (2002), available at <http://www.ucop.edu/acadadv/datamgmt/lawmed/law-enrolls-eth2.html>. By 1999, that figure declined to just 1%. *Id.* At Boalt Hall, African American enrollment went from 7.6% in 1996 to 2.6% in 1999.

mediation given Governor Jeb Bush's acknowledgement of the poor quality of K–12 schools attended by many African American and Latino students. The announcement of the extension of existing mentoring programs and the establishment of a task force to deal with K–12 inequities may help in the long run.⁸¹ For now, as Florida A&M President Frederick Humphries and others point out, students who graduate from underperforming minority schools may not have the nineteen pre-college credits required by the state university system because of inadequate curricular offerings at their high schools. Humphries has suggested that Florida fix the schools so that any failure to take the courses would be “[the students’] choice, not the system’s choice.”⁸²

In addition to K–12 deficiencies, some percent plans, such as those in Florida and California, could benefit by promoting individual choice to eligible candidates in selecting their desired institutions. For example, Florida’s Talented Twenty program, unlike the Ten Percent Plan in Texas, does not require the state’s most prestigious flagship institutions to admit students eligible under the program.⁸³ The program also makes no provision for students who are qualified for admission but who are not in the top twenty percent of their class. Moreover, future percent plans may be limited in their ability to enhance diversity without the provisional assistance of supplemental minority enrichment and scholarship programs, or what I refer to as the Percent Plus approach.⁸⁴

Id. Similarly, the number of Hispanics and Native Americans at the law school declined in the years following the UC policy and Proposition 209. In 1996, Hispanic enrollment at the UCLA School of Law was 14.7%. *Id.* By 1999, that figure was 6.2%. *Id.* Hispanic enrollment at Boalt Hall was at 10.6% in 1996, although it dropped to 5.9% by 1999. *Id.* The Native American population at the UCLA School of Law and Boalt Hall dropped from approximately 1.5% in 1996 to less than 1% in 1999. *Id.*

⁸¹ See James Traub, *The Class of Prop. 209*, N.Y. TIMES, May 2, 1999, §6 (Magazine), at 1. Some argue that this “top X% solution” may not only increase minority admissions but, by altering parents’ incentives, also improve the quality of the weaker high schools. See David Orentlicher, *Affirmative Action and Texas’ Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181 (1998).

⁸² Karla Schuster, *Regents Approve One Florida Plan: Controversial Proposal Ends Race-Based Preferences in Student Admissions to Colleges*, SUN-SENTINEL (Ft. Lauderdale), Feb. 18, 2000, at A1.

⁸³ Although the Governor’s office states that minority enrollment at Florida flagship universities—the University of Florida and Florida State University—will not decline under its One Florida plan, it offers no evidence to support this claim. See OFFICE OF THE GOVERNOR, STATE OF FLA., GOVERNOR BUSH’S EQUITY IN EDUCATION PLAN (1999), available at http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/documents/educationplan.doc. Even Bill Kolb, the admissions director for the University of Florida, admits that the effect of the twenty percent plan on minority admissions is “difficult to predict.” Mary MacDonald, *Panel Suggests Other Admissions Factors*, FLA. TIMES-UNION (Jacksonville), Dec. 4, 1999, at B1.

⁸⁴ In 1995, blacks made up 6.7% of Berkeley’s freshman class, while Hispanics accounted for 16.9%. Last school year, only 3.9% of the freshmen were black, and Hispanics accounted for 10.8% of Berkeley’s freshman class. The declines have been less precipitous at the premier schools in Texas and Florida, which are considered far less selective than Berkeley and UCLA.

III. COLLABORATIVE ROOT STRATEGIES

Although the No Child Left Behind Act promises to usher in a new era of accountability, it is in the end just one more peripheral manipulation by policymakers to jump start a monolithic educational system that has yet to be fully transformed.⁸⁵ Percent plans take a similar approach insofar as they place a value on class ranking and educational factors that reward educational inequity, rather than remedy inequity.

In fixing the educational system, colleges and universities should use strategic planning to design advising programs based on relationships of shared responsibility and focused on students' success. Ideally, advising is first a means of exploring careers and majors and then a method for selecting courses and arranging schedules. As partners in the process, local schools and students can learn to discover options, frame questions, gather information, and make decisions that may increase students' academic participation and encourage them to graduate. Institutions as well as individuals benefit from the efforts of administrators, coordinators, advisors, and support personnel who work together with local schools to construct an advising system for percent plan admission criteria and enrichment program opportunities. When representatives from these groups plan, train for, implement, and evaluate advising, they create a network of cooperation that can be transferred to other aspects of the college. They also model collaborative behavior for students. Program planning centered around an institution's mission and the needs of all students can result in a dynamic advising system with the capacity to adapt to internal and external change. In this collaborative process, educators and administrators who shape curriculum policy should also be held accountable since their actions affect the potential of incoming freshmen.⁸⁶

The fact that college admission officers have not sufficiently conceptualized K-12 education when formulating long-term strategies to improve diversity is not a problem solely limited to their domain of decisionmaking. Despite good intentions, many efforts to reform our education system have suffered from a similar myopic focus. While grade partitioning is an administrative convenience that bears some relationship to cognitive and physical development, it has suffered from a compartmentalized approach to thinking through educational reform efforts. For ex-

⁸⁵ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

⁸⁶ I suggest this as a hopeful outcome since accountability may not produce reform. As a report by the Harvard University Civil Rights Project indicates, oversight of the Florida Talented Twenty program is left to a number of decentralized entities. This may lead to reduced accountability in implementation. See PATRICIA MARIN & EDGAR K. LEE, APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA 18-19 (2003), available at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf>. Accountability at the secondary level will be a function of the commitment of university administrators and the State Department of Education and the receptivity of local school leaders.

ample, with all its emphasis on testing and accountability, the No Child Left Behind Act provides very little insight into the longitudinal progress of individual students as they transition from one grade to the next in a system experiencing dramatic demographic shifts.⁸⁷ Instead, the aim of testing provided for in the Act is to measure and leverage pressure at certain intervals within the K–12 educational system.⁸⁸ What accounts for this evasive approach to address the root of educational inequity? As one commentator set forth:

Adopting a root cause approach to reforming affirmative action yields the same difficulties that this approach faces in other social policy areas. Root causes usually remain root causes for one of three reasons: we do not know how to eliminate them, or we (think we) know how but consider it too costly to do so in terms of resources or competing values, or we believe it is worth doing but simply cannot muster the necessary political will. When these impediments to attacking root causes exist—with violent crime, for example—our best course may be to focus on managing symptoms until we can figure out how to remove the more fundamental causes. In such cases, insisting on a root cause strategy may in effect be a prescription for inaction, futility, rhetorical excess, and (because root causes are hard to understand) sloppy analysis.

To the extent that the academic performance of low-income children can be improved by remediation and educational reform, this is clearly the road that we should travel—and hopefully are traveling—even as we search for other ways to improve their life prospects. But to the extent that we do not understand the causes of their inferior performance, or those causes seem to lie in more recalcitrant social structures of low-income neighborhoods, or the politics of educational and social reform impede desired solutions, such measures may be ineffective—or worse.⁸⁹

What the foregoing critique understates is that root strategy, when sought at the federal level, is rarely ever pursued with the good faith effort it requires in local implementation. This observation has held true in a variety of educational policy contexts, including efforts to equalize urban teachers' salaries with their suburban counterparts,⁹⁰

⁸⁷ No Child Left Behind Act § 502.

⁸⁸ *See id.*

⁸⁹ Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 83 (2002).

⁹⁰ *See, e.g., Campaign For Fiscal Equity, Inc. v. New York*, 744 N.Y.S.2d 130 (N.Y.

integration,⁹¹ resource distribution,⁹² tracking and high stakes testing,⁹³ discipline, and special education.⁹⁴

Discrete “jolts” applied at key points within the educational pipeline can be effective in addressing root causes. Strategic infusions of pre-natal and neo-natal intervention, universal pre-kindergarten, mentorship, and accelerated learning programs, combined with attacks on discriminatory policies, can effectively address root problems. Universities can leverage their influence to drive and reinforce change, while sharing their expertise as institutions of higher learning. Moreover, we know enough about the so-called “intractable” problems to begin making a difference now.

App. Div. 2002). See also *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002).

⁹¹ See generally JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994) (discussing several legal tactics to subvert equality).

⁹² See Lynn Olson, *Kozol Book Puts Human Face on Fiscal Inequities*, EDUC. WK., Sept. 25, 1991, at 11; Robert A. Gross & John Esty, *The Spirit of Concord*, EDUC. WK., Oct. 5, 1994, at 6; Robert C. Johnston, *Study Reveals Funding Gaps Across States*, EDUC. WK., Mar. 19, 1997, at 30; Kerry A. White & Robert C. Johnston, *Schools' Taxes Bartered Away to Garner Jobs*, EDUC. WK., Mar. 12, 1997, at 26–29; Robert C. Johnston & Kerry A. White, *Despite Rhetoric, Businesses Eye Bottom Line*, EDUC. WK., Mar. 19, 1997, at 32–35; Kerry A. White, *Finance Battles Show Solutions Remain Elusive*, EDUC. WK., June 11, 1997, at 32–33; Lonnie Harp, *Redoing the Math: States Push to Tie Formulas to Real Costs*, EDUC. WK., May 15, 1996, at 1; Lonnie Harp, *School-Finance Suits Look Beyond Money to Issues of Quality*, EDUC. WK., June 17, 1992, at 28–29; MICHAEL A. REBELL, *STUDIES IN JUDICIAL REMEDIES AND PUBLIC ENGAGEMENT: EDUCATION ADEQUACY LITIGATION AND THE QUEST FOR EQUAL EDUCATIONAL OPPORTUNITY 2* (1999).

⁹³ See *GI Forum Image de Tejas v. Tex. Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000); *HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION* 89–113 (Jay P. Heubert & Robert M. Hauser eds., 1999); *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); Harry W. Forgan, *Teachers Don't Want to Be Labeled*, PHI DELTA KAPPAN, Sept. 1973, at 55; LEON J. KAMIN, *THE SCIENCE AND POLITICS OF IQ 5–30* (1974); MILBREY W. McLAUGHLIN & LORRIE E. SHEPARD, *IMPROVING EDUCATION THROUGH STANDARDS-BASED REFORM 7–17* (1995); Linda Darling-Hammond & Beverly Falk, *Using Standards and Assessments to Support Student Learning*, PHI DELTA KAPPAN, Nov. 1997, at 190–99; Ronald A. Wolk, *Education's High-Stakes Gamble*, EDUC. WK., Nov. 25, 1998, at 48; William L. Taylor, *Standards, Tests, and Civil Rights*, EDUC. WK., Nov. 15, 2000, at 56.

⁹⁴ See U.S. DEP'T OF EDUC., *IDEA FINAL REGULATIONS: MAJOR ISSUES* (1999); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); U.S. DEP'T OF EDUC., *IDEA TOPIC BRIEF 10: PARENTALLY PLACED CHILDREN IN PRIVATE SCHOOLS* (1999); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Honig v. Doe*, 484 U.S. 305 (1988); U.S. DEP'T OF EDUC., *IDEA FINAL REGULATIONS: DISCIPLINE FOR CHILDREN WITH DISABILITIES* (1999); Joetta L. Sack, *IDEA Opens Doors, Fans Controversy*, EDUC. WK., Nov. 29, 2000, at 1; Jacques Steinberg, *Special Education Practices in New York Faulted by U.S.*, N.Y. TIMES, May 31, 1997, at A1; *Focusing on Minorities in Special Education*, N.Y. TIMES, Oct. 16, 1996, at B10; John Merrow, *What's So Special About Special Education?*, EDUC. WK., May 8, 1996, at 48; N. Webb, *With New Court Decisions Backing Them, Advocates See Inclusion as a Question of Values*, HARV. EDUC. LETTER, July/Aug. 1994, at 1; Oscar Cohen, *“Inclusion” Should Not Include Deaf Students*, EDUC. WK., Apr. 20, 1994, at 35; *Diplomas and Disabilities*, EDUC. WK., Dec. 6, 2000, at 26; U.S. DEP'T OF EDUC., *QUESTIONS AND ANSWERS ABOUT PROVISIONS IN THE IDEA RELATED TO STUDENTS WITH DISABILITIES AND STATE AND DISTRICT-WIDE ASSESSMENTS* (2000); John O'Neil, *A Better IDEA*, N.Y. TIMES (Late Ed.), Apr. 14, 2002, at A17.

No human endeavor, including the most impressive conquest in science and math, would ever be achieved under such a limiting rationale. However, we should acknowledge that what is deemed intractable is often regarded as such precisely because there is a lack of political will.

One way to address this difficulty is to exploit opportunities to place additional pressure on and provide additional support to local school districts seeking to improve the academic performance of students of color when the political will is present. After all, it was political will that made possible the passage of the No Child Left Behind Act (although the Act's fidelity in local implementation has yet to be tested).⁹⁵ Now is an opportune time for colleges to piggyback off of the current political discourse surrounding education that places value on narrowing the achievement gap among whites and blacks, Latinos, and Native Americans.

Fully realizing this awesome potential, however, requires both targeted recruiting and thinking outside of the metaphorical box of traditional K–12 education. This, in turn, will require overcoming long established, traditional thinking about effective approaches to college admissions. To begin with, admission officers, supported by well-integrated initiatives leveraged by their institutions, must begin viewing the diversity issue not as a college problem, but as a high school and middle school problem. In other words, schools must take into account the manner in which a student is ideologically and emotionally encouraged, connected to her school, and navigated through curriculum decisions, scheduling, guidance counselor planning, testing, and tracking. These are critical juncture points that should not be ignored.

In fact, new approaches to breaking out of conventional categorical thinking engendered by analogous categorical, bureaucratic frameworks have already begun to influence other areas of educational reform. For example, recent concerns regarding the over-referral of minority students to special education programs have raised significant issues about inappropriate referrals by general education teachers.⁹⁶ Thus, the problem is reconceptualized not as a special education problem, but as a general education problem.⁹⁷ Since general education teachers are the primary

⁹⁵ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

⁹⁶ See PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES (2002), available at <http://www.ed.gov/inits/commissionsboards/whspecaleducation/reports/index.html>.

⁹⁷ See *id.* President George W. Bush ordered the creation of the President's Commission on Excellence in Special Education on October 2, 2001. The commission held thirteen public hearings throughout the country in order to better understand society's educational concerns. In its final report, the organization observed:

[E]ducators and policy-makers think about the two systems [special education and general education] as separate and tally the cost of special education as a separate program, not as additional services with resultant add-on expense. In such a system, children with disabilities are often treated not as children who are general education students and whose special instructional needs can be met with sci-

educators who identify and refer minority students to special education programs, this is where many of the concerns about educational equity surface in the classroom. Under this new paradigm, referrals are not due to concerns about qualifiable disabilities students of color are perceived to have, but to a genuine interest in providing these students additional resources for academic achievement even when in contravention of established federal law.⁹⁸

Likewise, it ought to be a legitimate concern of local college admission officers to take into account the various tracking policies that local high schools, middle schools, and elementary schools institute that lock students of color into dead-end classes and give them little hope of reintegrating into mainstream education.⁹⁹ This, however, is far from the quick fix solution that percent plans aim to provide. Reconceptualized in this fashion, universities have a critical stake in local diploma award practices¹⁰⁰ and the lack of quality education in pre-kindergarten and elementary schools, where critical formative learning is shaped.¹⁰¹

IV. STRATIFIED DIPLOMAS AND DROPOUT PREVENTION

Affirmative access rewards the top students in a class with either automatic admission to a state institution or eligibility for admission to certain universities. However, as I indicated, holding a high class rank is largely a function of policies, practices, attitudes, and the encouragement received by a student. Accordingly, diversity is inextricably intertwined with ensuring affirmative equal access, which requires examining the impact of new methods developed by high schools and middle schools that make racial and class distinctions among their attendees.

As a historical matter, diplomas in the nineteenth century were used to recognize a small, selective group of people that attended high school and completed a program of studies.¹⁰² The early twentieth century saw

entifically based approaches; they are considered separately with unique costs—creating incentives for misidentification and academic isolation—preventing the pooling of all available resources to aid learning. General education and special education share responsibilities for children with disabilities. They are not separable at any level—cost, instruction or even identification.

See id. at 7.

⁹⁸ See American Youth Policy Forum, *New Research on Minorities and Special Education: Implications for Federal Law and Policy* (Mar. 2, 2001), at <http://www.aypf.org/forumbriefs/2001/fb030201.htm>.

⁹⁹ See Ruben Navarrette, Jr., Editorial, *I'm Not My Brother's Keeper of Racial Benefits*, L.A. TIMES, July 16, 1995, at M1.

¹⁰⁰ The Florida percent plan indicates that eligible students are those who have standardized diplomas. See MARIN & LEE, *supra* note 86.

¹⁰¹ Universities can play a proactive role given recent data that shows the importance of pre-natal, neo-natal, and universal pre-kindergarten intervention in overcoming the societal effects of poverty and discrimination on learning.

¹⁰² See Sherman Dorn, *High-Stakes Testing and the History of Graduation*, 11 EDUC.

the adoption of additional levels of differentiation through tracking and separate, specialized high schools.¹⁰³ More recently, states have created different types of diplomas.¹⁰⁴ These changes form part of a regular, institutional repertoire in which students are compartmentalized when schools are pressed to solve problems in the education system. Differentiation through the establishment of high schools with unique programs and entrance criteria went one step beyond differentiating students within high schools through tracking, which had developed earlier in the century.¹⁰⁵ The creation of separate schools demonstrates the way in which public schools have been willing to create new, flexible programs in order to respond to various pressures.¹⁰⁶ One ostensible result of this flexibility is that school systems have been willing to create programs for different levels of diplomas. In the last fifteen years, states across the country have created various tiers of official diplomas and pursued unofficial policies in some districts of steering students into GED programs. In fact, one recent report documented fifteen separate types of diplomas in the fifty states and the District of Columbia.¹⁰⁷ Three years ago, eight states had one type of exit document for high school students; twelve states had some type of honors diploma; thirty-five had either "IEP" diplomas or certificates of attendance (typically available only for students with disabilities); and thirteen states had additional, idiosyncratic types of exit documents.¹⁰⁸

There are two logical consequences that emerge from this historical context. First, measuring educational attainment requires a life-course approach that accommodates the various stops and starts in formal schooling that were common in the nineteenth century and are becoming more common today. Second, dropping out of school is a social problem, yet public policy discussions on this issue are often disconnected from the larger patterns of school system behavior. One should thus be wary of narrow interpretations of the graduation-test question that may omit crucial features of schools. In particular, the proliferation of diploma types and elevated dropout rates are new issues facing secondary schools that deserve greater attention by universities.

While dropout prevention programs may have helped a few individual teenage participants, they have not as a whole changed nationwide patterns of graduation. Why have programs had such little effect overall?

POLICY ANALYSIS ARCHIVES 1 (2003), available at <http://epaa.asu.edu/epaa/v11n1/>.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ DAVID L. ANGUS & JEFFERY. E. MIREL, *THE FAILED PROMISE OF THE AMERICAN HIGH SCHOOL, 1890–1995* (1999); Dorn, *supra* note 102.

¹⁰⁶ See DAVID B. TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* (1995).

¹⁰⁷ Barbara Guy et al., *State Graduation Requirements for Students With and Without Disabilities, Technical Report 24* (Apr. 1999), at <http://education.umn.edu/NCEO/OnlinePubs/Technical24.html>.

¹⁰⁸ Dorn, *supra* note 102.

The answer is that dropout prevention programs have generally been small, focusing on only a few students at a time. They are programs rather than changes in schools.¹⁰⁹ Throughout American history, schools have been far more willing to adopt small, incremental changes than large ones.¹¹⁰ Despite the mandate of the war on poverty, most programs explicitly labeled “dropout prevention” in the 1960s never planned to serve more than a fraction of adolescent dropouts.¹¹¹ Although there are a variety of dropout prevention initiatives that vary widely in character from the earlier models, they still do not have a significantly broader scope.¹¹² They still involve counseling, have difficulties obtaining funding, and remain on the fringes of school systems.¹¹³ Moreover, when outside funding was exhausted in the late 1960s, school systems like New York City often eliminated dropout prevention efforts.¹¹⁴ Systematic dropout prevention is simply not a high priority for most local school systems. As one commentator reflected:

One reason why dropout prevention is not a priority is that it contradicts an abiding incentive for public school systems to restrict credentials. Indeed, there is a long history of high schools being rewarded for either restricting all high school credentials or stratifying them and restricting the most valued ones.¹¹⁵

The percent plan approach may only exacerbate this trend. Public school systems have created selective-admission programs, such as those for gifted and talented students, which often generate positive reviews. Thus, schools have contradictory missions—attempting to educate all adolescents while providing the greatest academic rewards to a limited few. It seems that the rhetoric of meritocracy in American society has permeated the beliefs of many educators and administrators. In addition, some underperforming or “trouble” students are perceived as hijacking a school’s progress, so many educators have an unwillingness to educate everyone equally.¹¹⁶ Even the most well-intentioned teachers often resort to a form of educational triage—trying to save a few children while tolerating the failure of others.¹¹⁷

¹⁰⁹ See SHERMAN DORN, *CREATING THE DROPOUT: AN INSTITUTIONAL AND SOCIAL HISTORY OF SCHOOL FAILURE* 88 (1996).

¹¹⁰ TYACK & CUBAN, *supra* note 106.

¹¹¹ DORN, *supra* note 109.

¹¹² *Id.*

¹¹³ M. Dynarski & P. Gleason, *How Can We Help?: What We Have Learned From Evaluations of Federal Dropout-prevention Programs* (1998), at <http://www.dropoutprevention.org/2levelpages/downloads/dod-syn.pdf>.

¹¹⁴ *Id.*

¹¹⁵ DAVID F. LABAREE, *THE MAKING OF AN AMERICAN HIGH SCHOOL: THE CREDENTIAL MARKET AND CENTRAL HIGH SCHOOL OF PHILADELPHIA 1838–1839* (1988).

¹¹⁶ See Dynarski & Gleason, *supra* note 113.

¹¹⁷ See *id.*

V. RETENTION AND DROPOUT

College admission officials not only need to continue high school outreach programs, but also be cognizant of what happens in earlier grades since formative educational experiences predate high school.¹¹⁸ Recent data indicates that the increasing non-white, population of individuals ages fifteen to nineteen in Texas, California, and Florida—where percent plans were instituted—often witnessed an overrepresentation of whites and Asian Americans, an underrepresentation of Latinos, and stagnation in the representation of African Americans in high school graduating classes.¹¹⁹ Each of these percent plan states had a low overall rate of high school completion in comparison with the rest of the nation. Also, their high school graduation rates did not correspond to statewide ethnic population levels. In 2001, Texas had a graduating class that was thirteen percent African American, thirty-two percent Latino, fifty-one percent white, and three percent Asian American.¹²⁰ In contrast, the state's population was forty-four percent white, thirteen percent African American, thirty-nine percent Hispanic, and three percent Asian American among those ages fifteen to nineteen.¹²¹ Likewise, in California, whites and Asian Americans were overrepresented in the 2001 graduating class relative to the teenage population. Latinos constituted thirty-three percent of the graduating class even though they composed thirty-nine percent of the population ages fifteen to nineteen.¹²² Florida's spring 2001 graduates were fifty-nine percent white, twenty percent African American, and seventeen percent Latino.¹²³ Hispanics were underrepresented while whites were overrepresented relative to their overall population. Accordingly, in all three states the graduating class did not resemble the general population. Moreover, the completion rates in Texas as of 2000 show that nearly three-fourths of whites enrolled in high school received a diploma, compared to approximately half of African American and Latino students.¹²⁴ The rates were much higher in California, where seventy-eight percent of whites, fifty-eight percent of blacks, and fifty-seven percent of Latinos received diplomas.¹²⁵ In comparison, Florida had the lowest rate of completion among the three states, with only forty-five percent of African

¹¹⁸ See Karl L. Alexander et al., *The Dropout Process in Life Course Perspective: Early Risk Factors at Home and School*, TCHRS. C. REC., Oct. 2001, at 760. See also VALERIE E. LEE & DAVID T. BURKHAM, *INEQUALITY AT THE STARTING GATE: SOCIAL BACKGROUND DIFFERENCES IN ACHIEVEMENT AS CHILDREN BEGIN SCHOOL* (2002).

¹¹⁹ HORN & FLORES, *supra* note 7, at 28.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 29.

¹²⁵ *Id.*

Americans graduating.¹²⁶ Most dropouts exit school between the tenth and twelfth grades, as the permissible legal age for students to leave school is sixteen in most states.¹²⁷ Although most universities target their efforts at high school students, this does not necessarily mean that this is where their energies will have the greatest impact. Understanding dropout proneness among students of color requires considering what their educational experience is like well before high school.

Recent research by Karl Alexander, Doris Entwisle, and Nader Kabbani depicts dropping out of school as an expression of academic disengagement.¹²⁸ Their analysis examines in parallel the risk/resource measures factoring social background characteristics, parental supports, school performance and experiences, children's engagement attitudes, and children's engagement behavior over a nine year period.¹²⁹ They found that risk escalates as the number of factors in the family context increases. Although low SES, high levels of family stress, and residence in a single parent household likely impede learning, favorable conditions such as high levels of parental support offset the adverse effects of social structural disadvantage.¹³⁰ In general, risk factors for dropout become more discriminating as children progress through school. There is, however, a conspicuous exception to this pattern involving grade retention. Comprehensive analyses—which incorporate school performance, patterns of behavioral and attitudinal engagement, and parental support—reveal that repeating grades in elementary and middle school elevates dropout risk.¹³¹ The fact that children who fall behind in classes have a difficult time making the transition to high school suggests that the problem is organizational, involving age-grading and children's off-time status.¹³² Accordingly, the dropout dynamic, along with the other reforms that I have advocated, should be viewed in the context of a child's cumulative history of schooling. Dropout prevention should take into account how school and the home intersect to shape a person's education.

When does this self-direction first become apparent? One study shows that behaviors are consequential as early as the fall of first grade, whereas attitudes do not take on significance until much later.¹³³ In fact, engagement behaviors rival test scores and report card marks in predicting eventual dropout.¹³⁴ This life course examination suggests strategic times for in-

¹²⁶ *Id.*

¹²⁷ Roberta Nerison-Low, *The Educational Structure of the United States School System*, at <http://www.ed.gov/pubs/Research5/UnitedStates/structure.html> (last visited Mar. 5, 2003).

¹²⁸ Alexander et al., *supra* note 118.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *See id.*

¹³³ *Id.*

¹³⁴ *Id.*

tervention—as a general rule, dropout prevention should occur sooner rather than later.

VI. GIFTED AND TALENTED PROGRAMS

Given the foregoing, it is no surprise that race-conscious summer enrichment programs and other supplemental programs are critical in determining whether percent plans will effectively achieve diversity. Percent plans bolster testing and placement policies that exacerbate not only residential school segregation, but intra-school stratification among students of color into tiered academic tracks. Since many schools do not have a predominately minority population, percentage plans serve to admit a large number of Caucasians automatically.¹³⁵ Consequently, university admission efforts will need to play a more proactive role in shaping the implementation of testing, placement, and tracking policies that undermine the achievement of diversity in post-secondary contexts.

Another way to make percent plans effective is to responsibly place more students of color into gifted programs. Gifted or exceptional students are those who “deviat[e] either intellectually, physically or emotionally so markedly from normally expected growth and development patterns that [they are] or will be unable to progress effectively in a regular school program.”¹³⁶ Although not all gifted and talented students will necessarily be in the top ten or twenty percent of their class under this definition, this can serve as a platform from which to launch reform. The largely ignored issue of underrepresented minorities in gifted and talented programs is a matter of legitimate concern from the standpoint of educational equity.¹³⁷

¹³⁵ See Kathryn Raines, *The Diversity and Remedial Interests in University Admissions Programs*, 91 KY. L.J. 255, 280 (2002).

¹³⁶ CONN. GEN. STAT. § 10-76a(3) (2002).

¹³⁷ See generally Donna Y. Ford & Michelle Frazier Trotman, *The Office for Civil Rights and Non-Discriminatory Testing, Policies, and Procedures: Implications for Gifted Education*, ROEPER REV., Dec. 2000, at 109 (discussing the role that the Office for Civil Rights played in securing protections for culturally and linguistically diverse students); Frances A. Karnes & Ronald G. Marquardt, *The Fragmented Framework of Legal Protection for the Gifted*, PEABODY J. EDUC., May 1997, at 166 (mentioning dispute procedures employed in resolving disagreements related to gifted students); Donna Y. Ford, *The Underrepresentation of Minority Students in Gifted Education: Problems and Promises in Recruitment and Retention*, J. SPECIAL EDUC., May 1998, at 4 (focusing on students in urban settings); Thomas P. Herbert & Sally M. Reis, *Culturally Diverse High-Achieving Students in an Urban High School*, URB. REV., Nov. 1999, at 428 (examining the experiences of eighteen high-ability, over-achieving students).

For discussions concerning the underrepresentation of minority students in gifted and talented programs, see Cynthia N. Brown, *Gifted Identification as a Constitutional Issue*, ROEPER REV., Mar. 1997, at 157 (noting that African American, Latino, and Native American children were underrepresented in thirty-four states according to data from 1980 and 1992); Donna Y. Ford, *Desegregating Gifted Education: A Need Unmet*, J. NEGRO EDUC., Winter 1995, at 52; James J. Gallagher, *Education of Gifted Students: A Civil Rights Issue?*, PHI DELTA KAPPAN, Jan. 1995, at 408; J. John Harris III & Donna Y. Ford, *Hope Deferred Again: Minority Students Underrepresented in Gifted Programs*, EDUC. & URB.

It is also, therefore, implicitly a concern for admission officials interested in achieving greater college diversity while maintaining standards of academic excellence. Black children, for instance, are less likely to enroll in advanced placement math, science, and computer science courses.¹³⁸ This holds particularly significant implications for percent plan admission schemes aimed at capturing the most talented students in public schooling.

Colleges have significant systemic concerns to address in tackling minority underrepresentation in gifted and talented programs. To begin with, the need for ability-appropriate education for gifted students may militate against their mainstream inclusion¹³⁹ that may otherwise promote academic achievement of underperforming students.¹⁴⁰ There is also the issue of potential political fallout by parents in local communities who have a vested stake in maintaining academic distinctions to ensure that their children maintain their advantage in admission selections. Oddly, it is the college admission process that drives this behavior in the first place. This suggests that universities have greater influence over school reform than they otherwise exercise.

VII. OTHER FILTERS IN THE SELECTION PROCESS: THE UNIVERSITY OF CALIFORNIA SYSTEM

The college selection process entails a series of filters that progressively winnow the applicant pool. For example, admission to the University of California system requires that students take the SAT or ACT. Accordingly, those who fail to take either test remove themselves from the pool of potential students.¹⁴¹ This filter is nearly universal among selective colleges and universities nationwide. Next, students are screened to determine their eligibility for admission, which is based on primarily three criteria.¹⁴² First, GPA and SAT-I scores are combined on a sliding scale to

Soc'y, Feb. 1999, at 225; June C. Maker, *Identification of Gifted Minority Students: A National Problem, Needed Changes and a Promising Solution*, GIFTED CHILD Q., Winter 1996, at 41; Donna Y. Ford & Karen S. Webb, *Desegregation of Gifted Educational Programs: The Impact of Brown on Underachieving Children of Color*, J. NEGRO EDUC. Summer 1994, at 358; Ronna Vanderslice, *Hispanic Children and Giftedness: Why the Difficulty in Identification?*, DELTA KAPPA GAMMA BULL., Spring 1998, at 18.

¹³⁸ U.S. DEP'T OF EDUCATION, OFFICE FOR CIVIL RIGHTS, 1994 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS COMPLIANCE REPORT: PROJECTED VALUES FOR THE NATION 1 (1994).

¹³⁹ FRANCES S. DUBNER, HANDBOOK FOR ADVOCACY OF GIFTED EDUCATION (2002), available at <http://www.dekalbgifted.com/images/Handbook%20for%20advocacy.doc>.

¹⁴⁰ See Mark Robinson, *One Size Fits All?: Age Based Tracking Versus Ability Grouping in Elementary School Mathematics* (Dec. 1998), at <http://www.msu.edu/user/robiso12/Grouping.htm>.

¹⁴¹ In California, ninety-eight percent of students who apply to the University of California system take the SAT. See S. GEISER, REDEFINING UC'S ELIGIBILITY POOL TO INCLUDE A PERCENTAGE OF STUDENTS FROM EACH HIGH SCHOOL: SUMMARY OF SIMULATION RESULTS (1998); Koretz et al., *supra* note 26.

¹⁴² Previously, each campus was allowed to allocate up to six percent of its spaces to

set minimum requirements.¹⁴³ For example, students with GPAs of at least 3.29 are eligible as long as their combined SAT-I scores are at least 570, while students with GPAs of 3.0 are required to have a combined SAT-I score of at least 1270.¹⁴⁴ Second, students are required to take a set of required courses. Third, students have to take three SAT-II tests on writing, mathematics, and one of the following areas: English literature, foreign languages, science, or social studies.¹⁴⁵ Applicants, however, are not required to attain a specific score on these tests.¹⁴⁶ In addition, students who elect not to apply to an institution remove themselves from the potential applicant pool. Finally, there are varying degrees of selectivity. Berkeley and UCLA have the highest selectivity; Irvine, Davis, Santa Barbara, and San Diego have moderate selectivity; and Santa Cruz and Riverside are the least selective.¹⁴⁷

VIII. THE EFFECTS OF CURRENT AND RACE-NEUTRAL SELECTION ON RACIAL/ETHNIC COMPOSITION IN CALIFORNIA

Daniel Koretz and his colleagues examined the effects of admission policies on student diversity. They observed that the first filter, students' decision to take the SAT, substantially decreased the percentage of Latino students and increased the percentage of Asian American students attending college.¹⁴⁸ In 1998, thirty-one percent of California high school graduates were Hispanic, but only nineteen percent of those taking the SAT were Latino. Conversely, fifteen percent of graduates and twenty-three percent of SAT-takers were Asian American.¹⁴⁹ This filter only slightly reduced the presence of black students, who constituted roughly seven percent of both graduates and SAT-takers.¹⁵⁰ The decision to take the SAT also slightly reduced the representation of white students, who constituted forty-five percent of graduates and forty-two percent of SAT-takers. However, research indicates that students who decide against taking the SAT are gen-

otherwise system-ineligible students. Up to two-thirds of these slots could be used for admitting disadvantaged students. Office of the President, Univ. of Cal., *1996 Guidelines for Implementation of University Policy on Undergraduate Admissions*, at <http://www.ucop.edu/sas/exguides.html> (last visited Apr. 11, 2003); Koretz et al., *supra* note 26.

¹⁴³ SAT-I refers to the basic verbal and mathematics tests, while SAT-II refers to a number of optional, subject matter tests. The College Board, *Frequently Asked Questions*, at <http://www.collegeboard.com/student/testing/sat/about/aboutFAQ.html> (last visited Feb. 27, 2003).

¹⁴⁴ Koretz et al., *supra* note 26.

¹⁴⁵ *Id.*

¹⁴⁶ SAT-II language tests have benefited minority students who speak a second language at home, but have done little to help African Americans in admission policies that place greater emphasis on SAT-II scores. See Schuck, *supra* note 89, at 175-76. See also Office of the President, Univ. of Cal., *Admission as a Freshman*, at <http://www.ucop.edu/pathways/impinfo/freshx.html> (last modified Nov. 8, 2002).

¹⁴⁷ Koretz et al., *supra* note 26.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

erally lower-achieving than those who take it.¹⁵¹ Thus, if all students took the SAT, many of those who currently do not take the test would fail to gain admission because of low scores. If the SAT were no longer used in admissions, some would fail to gain admission because of weaker academic records.

The University of California system eligibility screen had a very different effect. This filter reduced the percentage of black students substantially and the percentage of Hispanic students more modestly. In 1998, seven percent of students taking the SAT in California were black, in contrast to four percent of those deemed system-eligible in terms of SAT scores and GPA. Hispanics constituted nineteen percent of all SAT-takers but fifteen percent of those eligible to attend University of California schools.¹⁵² In contrast, the eligibility screen slightly increased the representation of whites and Asian Americans.¹⁵³ These statistics debunk the theory that seats that would “belong” to white students are being taken by blacks and Latinos. Under an affirmative action regime, those seats would go to whites that perform at high levels. Under percent plans, Asian Americans would be the primary beneficiaries.¹⁵⁴

The final filtering mechanism of race-neutral admissions, based solely on GPA and SAT scores, significantly reduced Hispanic and black representation. Black students dropped from four percent to two percent of the pool at this stage, while Hispanics dropped from fifteen percent to nine percent.¹⁵⁵ Here again, the offsetting increase was among white students, not Asian Americans. This race-neutral model had major effects at the two most selective campuses in the University of California system, but had much smaller effects at both moderate- and low-selectivity campuses.¹⁵⁶ National statistics reveal similar patterns.¹⁵⁷ Both black and Latino populations were also noticeably underrepresented in environments that were moderately and less selective, but this underrepresentation stemmed primarily from factors other than the actual admission process—in particular, whether a student decided to take the SAT and whether the student met the minimum eligibility criteria for the system. Once students passed these two hurdles, admission decisions had a substantial impact on the representation of black and Latino students only for highly selective campuses.¹⁵⁸ These results show the limits of percent plans and the need for further targeted efforts.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Century Foundation, *supra* note 21 (discussing the false perception that people of color are responsible for whites losing spots in selective colleges).

¹⁵⁵ Koretz et al., *supra* note 26.

¹⁵⁶ *Id.*

¹⁵⁷ See Kane, *supra* note 8.

¹⁵⁸ See Koretz et al., *supra* note 26.

IX. THE PERCENT PLUS APPROACH

Targeted university recruitment and enrichment programs at the secondary education level represent the limits of percent plans in achieving diversity.¹⁵⁹ Targeted financial aid, recruitment outreach, and academic enrichment efforts—or as I refer to them, Percent Plus approaches—are typically used as supplemental strategies for enhancing diversity.

Texas, for instance, has chosen to supplement its percent plan with aggressive recruitment and an assortment of scholarship programs aimed at high schools that serve mostly Latino and black populations.¹⁶⁰ The plan implemented by the University of Texas at Austin increased diversity in 1999 among the incoming class in large part because of efforts encouraging minority high school students to attend. Some of the innovative recruitment and retention programs include alumni-sponsored minority scholarships and a new scholarship initiative that targets students in the top ten percent.¹⁶¹ In addition, Texas State Senators Rodney Ellis and Royce West initiated a partnership between the University of Texas at Austin and Bank of America called the Texas Longhorn PREP (Partners Responding to Educational Priority) Program.¹⁶² The program is available to the top ten percent of students at each high school in Houston and Dallas, and its goal is to assist in their academic success in college. The University of Texas at Austin also sent its president and assorted college students as university ambassadors to non-traditional feeder schools in predominantly minority areas to encourage applicants.¹⁶³

Likewise, in Florida officials have aimed their recruitment efforts at high schools serving mainly blacks and Latinos, and have created scholarships for minority students.¹⁶⁴ Florida State University has begun recruiting more heavily in southern Florida's primarily black and Hispanic areas. Such race-targeted recruitment allows university officials to watch applications more closely, purchase the names of potential minority students from the College Board, conduct more high school visits, recruit students via telephone, provide academic counseling to potential students, and extend deadlines where necessary to accommodate students.¹⁶⁵ Florida State University merged two minority retention programs,

¹⁵⁹ See HORN & FLORES, *supra* note 7.

¹⁶⁰ Michael A. Fletcher, *College "Percent" Plans May Not Help Diversity*, WASH. POST, Feb. 11, 2003, at A2.

¹⁶¹ HORN & FLORES, *supra* note 7, at 53–54.

¹⁶² *Id.* at 53.

¹⁶³ MARIN & LEE, *supra* note 86, at 33–35. Texas also has other promising initiatives. The Charles A. Dana Center's AmeriCorps Community Engagement and Education Project, for instance, was launched in 1997. The project provides two inner-city elementary schools in Austin with approximately thirty trained AmeriCorps members who assist students having difficulty reading. Participants also provide bilingual literacy intervention to elementary school students.

¹⁶⁴ Fletcher, *supra* note 160.

¹⁶⁵ HORN & FLORES, *supra* note 7, at 52–59.

namely Summer Enrichment and Horizons Unlimited, which originally constituted part of the state's desegregation plan.¹⁶⁶ The new Center for Academic Retention and Enhancement (CARE) provides programs and services to first-generation college students to "facilitate their preparation, recruitment, adjustment, retention and graduation from college."¹⁶⁷

X. A NEW MODEL FOR UNIVERSITY ADMISSIONS AND RECRUITMENT

Who is to say what university recruitment, outreach, and support should look like? Even though universities have the obligation to develop an intellectual culture and cultivate curious minds, when should such a mission begin? After high school? Why not during seventh or eighth grade? The answer depends on the objective we wish to meet and the population we desire to reach. Learning institutions should be guided by the experience they have acquired over time, not by bureaucratic ease. Likewise, it ought to be the focus of institutions to bolster educational reforms and foster an intellectual environment.

Redefining the concept of university admissions and recruitment is just one key step. In the face of shrinking state budgets that are beginning to test the efficacy of percent plans, having the requisite political will is increasingly important. How then will educational equity proponents address this very real limitation? It is a well-regarded rule in the world of policymaking that self-interest dictates who will cooperate and comply with policies.¹⁶⁸ What self-interest can be effectively articulated in a way that speaks not only to university and school officials but to judicial actors alike in ensuring their mutual cooperation with efforts to enhance student diversity?

Universities can garner state support by procuring agreements from families and underrepresented students that stipulate that a certain period of employment time within the state will be dedicated after graduation from high school. This may help provide a monetary return on investment for prospective state employers seeking a diverse and skilled workforce.¹⁶⁹ Higher education institutions can also encourage their alumni and students, perhaps for credit or work study, to mentor students of color in non-traditional feeder schools. It may even be advisable for each college to "adopt" a school district, focusing on elementary, middle school, and pre-school initiatives. Such efforts would include targeted and creative programming by teachers, alumni, and students to reorient social identity and transfer valuable social capital to students of color and those from

¹⁶⁶ MARIN & LEE, *supra* note 86, at 35.

¹⁶⁷ *Id.*

¹⁶⁸ See MILTON FREIDMAN & ROSE FREIDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1980).

¹⁶⁹ See Peter Schmidt, *How Michigan Won Corporate Backing for Its Defense of Affirmative Action*, *CHRON. HIGHER EDUC.*, Nov. 24, 2000, at A21.

lower socioeconomic backgrounds. Positive social relationships formed with alumni and students may provide those mentored with significant incentives to attend school, even when faced with challenging school work. Additional support may come from the Talented Tenth of successful blacks and Latinos who mentor the other ninety percent of their comparatively disadvantaged counterparts.

Outreach need not only come from university ambassadors, as students of color can benefit from sustained and committed relationships formed with local teachers. These relationships represent an “important source of social capital available to adolescents in considering whether to stay or leave school.”¹⁷⁰ They are also critical ingredients in obtaining academic achievement, as evidenced by test scores.¹⁷¹ As Robert Croninger and Valerie Lee observe, such relationships may “serve as a safety value for adolescents providing them emotional support, encouragement, and actual assistance when academic or personal problems threaten to overwhelm them.”¹⁷²

Even though teachers, administrators, guidance counselors, teacher aides, coaches, clerical workers, and peers provide important social networks and resources for navigating K–12 education and preparing for college, these supports should be supplemented with targeted intervention and mentoring. Successful collaborations, however, require fostering an institutional culture that encourages academic achievement.

XI. UNIVERSITY-DRIVEN REFORM

Institutions of higher education have the potential to use their market influence strategically and obtain greater accountability in achieving educational equity. Universities have the capacity to encourage makers of standardized tests to retool exams to be more valid instruments¹⁷³ for

¹⁷⁰ *Id.* Under this model, adults are key conduits for social capital transference to low-income students.

¹⁷¹ See Pedro A. Noguera, *Transforming Urban Schools Through Investment in Social Capital*, IN MOTION MAG., May 20, 1999, available at <http://www.inmotionmagazine.com/pncap5.html>.

¹⁷² Robert G. Croninger & Valerie E. Lee, *Social Capital and Dropping Out of High School: Benefits to At-Risk Students of Teachers' Support and Guidance*, TCHRS. C. REC., Aug. 2001, at 548.

¹⁷³ See, e.g., U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, THE USE OF TESTS AS PART OF HIGH-STAKES DECISION-MAKING FOR STUDENTS: A RESOURCE GUIDE FOR EDUCATORS AND POLICYMAKERS 25 (2000) (stating that “[c]onstruct validity refers to the degree to which the scores of test takers accurately reflect the constructs a test is attempting to measure”); AM. EDUC. RESEARCH ASS'N ET AL., THE 1999 STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999); Samuel Messick, *Foundations of Validity: Meaning and Consequences in Psychological Assessment*, ETS RES. REP. No. 1, 9 (1993) (stating that construct validity “comprises the evidence and rationales supporting the trustworthiness of score interpretation in terms of explanatory concepts that account for both test performance and score relationships with other variables”); Samuel Messick, *Validity*, in EDUCATIONAL MEASUREMENT 13, 42 (Robert L. Linn ed., 3d ed. 1989) (“In-

measuring achievement of diverse test takers.¹⁷⁴ For instance, the University of California faculty advisory panel made a series of recommendations regarding the SAT I that prompted the College Board to make significant revisions.¹⁷⁵ Greater changes are needed, however, especially in the current environment of constitutional hostility toward race-based measures. Universities can also support targeted intervention and accountability reform at high school and middle school levels. Admission offices can and should discourage the use of tracking, placement, and testing policies that are discriminatory in effect or undermine public confidence in institutional improvement for students of color. Colleges need to go beyond simply giving students additional points for coming from disadvantaged schools. Instead, they should create institutional links to those schools. Further, universities can enhance and build a community of educated children by holding local schools morally accountable through a rating system based on equity factors. Skeptics may counter that ranking high schools reduces complex dimensions of institutional life to a single indicator.¹⁷⁶ Such rank-

deed, the substantive component of construct validity entails a veritable confrontation between judged content relevance and representativeness, on the one hand, and empirical response consistency, on the other.”)

¹⁷⁴ See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 870 (E.D. Mich. 2001). See also *Grutter v. Bollinger*, 288 F.3d 732, 769 (6th Cir. 2002) (Clay, J., concurring); NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999); Claude M. Steele, *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 439, 440 (1999) (arguing that standardized admission tests are of limited value when evaluating the merit of applicants, particularly with respect to minority applicants); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *THE BLACK-WHITE TEST SCORE GAP* 401, 402 (Christopher Jencks & Meredith Phillips eds., 1998) (arguing that African American students “know that any faltering could cause them to be seen through the lens of a negative racial stereotype” which may then impair their test performance). For an overview of the stereotype threat literature, see Claude M. Steele, *Thin Ice: “Stereotype Threat” and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44; Clark D. Cunningham et al., *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 GEO. L.J. 835, 839 (2002) (summarizing stereotype threat research and concluding that “stereotype threat theory is now widely accepted within the field of psychology”); 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, 1085–89 (2001). For more detailed research, see, for example, Jim Blascovich et al., *African Americans and High Blood Pressure: The Role of Stereotype Threat*, PSYCHOL. SCI., May 2001, at 225; Steven J. Spencer et al., *Stereotype Threat and Women’s Math Performance*, J. EXPERIMENTAL SOC. PSYCHOL., Jan. 1999, at 4; Joshua Aronson et al., *When White Men Can’t Do Math: Necessary and Sufficient Factors in Stereotype Threat*, J. EXPERIMENTAL SOC. PSYCHOL., Jan. 1999, at 29; Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, AM. PSYCHOL., Jun. 1997, at 613.

¹⁷⁵ See Office of the President, Univ. of Cal., *College Board Considers Revisions to SAT I* (2002), at <http://www.ucop.edu/pathways/ucnotes/apr02/collegeboard.html> (noting that the College Board has agreed to revise the SAT I so as to place greater emphasis on essay writing).

¹⁷⁶ See, e.g., American Educational Research Association, *AERA Position Statement Concerning High Stakes Testing in PreK–12 Education* (July 2000), at <http://www.aera.net/about/policy/stakes.htm> (arguing that basing institutional and student rewards on a single factor, such as test performance, is inherently flawed).

ings are, therefore, inherently flawed as a tool for accountability and improvement despite the fact that they may be based on accurate information. However, this critique applies with equal force to college and law school rankings, which have become a fact of life.¹⁷⁷

Diversity can only be sustained by meaningful affirmative access to quality education for students of color beginning far before any admission determination is made at the university level. By starting educational reform at earlier grades, we can begin to create a system where students are not set up for failure upon entering college. Better preparation and mentoring can enhance college retention as well. Overall, the case for targeted college intervention at the elementary and middle school levels is a compelling one. Educational quality does not have to be sacrificed in the name of diversity, as some have recently contended.¹⁷⁸

XII. RECOMMENDATIONS

The following actions may help to increase minority enrollment in universities:

- Have student representatives and administrative personnel visit local schools regularly to encourage the pursuit of higher education. Also, initiate periodic on-campus college visits.
- Arrange telephone calls and home visits to encourage potential applicants, as mass mailings may be insufficient. Minority radio spot announcements and targeted television advertisements may also be useful.
- Provide financial aid packages that are sizable enough to make college an attractive option for students from traditional working families.
- Establish long-term mentoring programs where alumni and students are assigned to small groups of potential applicants.
- Provide intensive tutoring and academic enrichment for students in middle and high school. Such programs should employ active, cooperative learning that draws on culturally relevant models.
- Provide low-cost, targeted testing preparation coupled with sustained encouragement of black and Latino students.
- Leverage market power to encourage test makers to review and revise admission tests so that they are more responsive to the diverse set of students taking the exams.

¹⁷⁷ See David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 SUFFOLK U. L. REV. 249, 251 (1997) (discussing the use and existence of different ranking services); Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools* (Feb. 18, 1998), at <http://www.aals.org/validity.html>.

¹⁷⁸ See Jeffrey Selingo, *Study Questions Educational Benefits of Diversity, a Common Defense of Affirmative Action*, CHRON. HIGHER EDUC., Mar. 17, 2003.

- Emphasize to school administrators and educators that diversity and equity are institutional priorities that will shape future admission determinations and local applicant pools.
- Work closely with school administrators to align high school curriculum with college expectations.
- Collaborate with state lawmakers and educational leaders to align state assessments with college expectations of freshman readiness.
- Lobby for elementary and secondary education Title I funding. This will facilitate collaborative remedial and intervention efforts with local school districts by providing needed financial support.
- Encourage review and revision of tracking, testing, and other placement policies as implemented in non-traditional minority feeder schools.
- Eliminate or reduce student repetition of grades in elementary and middle school.
- Provide local teachers with professional development training and allow them to work with professors to promote creative lesson planning through block scheduling.
- Provide schools with financial incentives for developing advanced course work enrichment programs designed to help minorities.
- Encourage elementary and middle schools to adopt accelerated learning and intensive literary intervention programs.
- Host town hall meetings, reach out to local parents, and encourage children to get involved in after-school activities.
- De-link summer college enrichment programs from the admission process by explicitly making them post-admission programs, preferably by state mandate, similar to Texas' Ten Percent Plan.
- Keep flexible application deadlines and establish rolling admissions.
- Create one application for the entire state system so as to reduce the burden on applicants.
- Permit students deemed eligible for admission to a state school system to choose the institution that they will attend, subject to normal space limits. Encourage peer schools to compete for these students through financial aid, recruitment, and campus initiatives.
- Provide thorough and early academic advising about required pre-college courses in middle school and high school.
- Foster a culture of tolerance, awareness, and appreciation for diversity on college campuses to attract minority candidates.
- Encourage students to take the SAT and ACT. Provide intensive assistance to students of color, should it be necessary.
- Develop and support existing district pre-kindergarten initiatives and neo-natal care projects.

XIII. THE SURVIVAL OF PERCENT PLANS AND ENRICHMENT PROGRAMS
UNDER EQUAL PROTECTION ANALYSIS

The fact that minority academic enrichment programs, such as those of Princeton and MIT, have been dissolved recently following complaints by anti-affirmative action activists indicates that percent plans can be effectively dismantled simply by targeting these supplemental efforts.¹⁷⁹ Despite President George W. Bush's praise of percent plans as a means to achieve race-neutral diversity, some affirmative action critics are poised to target percent plans next.¹⁸⁰ Outspoken anti-affirmative action critic Ward Connerly has already asserted, "If you're picking a number because you know that number is going to favor one group or another based on race, that's no different than a system of explicit preferences. It's a lawsuit waiting to happen."¹⁸¹ Similarly, John Findley, principal attorney of the Pacific Legal Foundation, which advocates eliminating race as an admission factor, observed that litigation might ensue "if the indications were that the policy was being used to stack the deck and admit students who were substantially less qualified than students who were being rejected, and statistics indicated a large racial disparity."¹⁸² This argument appears to have some currency with key affirmative action proponents, most notably the University of Michigan, which was forced to demonstrate that its admission process was narrowly tailored with no equally effective alternatives. Counsel for the school observed: "[U]niversities themselves measure the success of these percentage plans by examining a single, race-driven data point, that is, the level of minority representation in the student body—the very same criterion petitioners would . . . ignore."¹⁸³

Surviving such constitutional challenges will necessarily implicate established Supreme Court equal protection jurisprudence. Precedent has already established the requisite level of discriminatory purpose or intent. In *Personnel Administrator of Massachusetts v. Feeney*, the Court stated, "'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."¹⁸⁴ In light of this standard, some pronouncements by state governors and educational leaders draw into question the legality of percent plans under the Equal Protection Clause. Considering that timing is evi-

¹⁷⁹ See *supra* note 23.

¹⁸⁰ HORN & FLORES, *supra* note 7, at 59.

¹⁸¹ Stephanie Francis Cahill, *Skirting the "Race Quota" Label: Schools Try To Boost Minorities and Avoid Legal Challenges*, 2 No. 3 A.B.A. J. E-REPORT 3 (Jan. 24, 2003).

¹⁸² *Id.*

¹⁸³ Brief for Respondents at 44, *Gratz v. Bollinger*, _____ U.S. _____ (2003) (No. 02-516), 2002 U.S. Briefs 516, available at <http://www.umich.edu/~urel/admissions/legal/gratz/UM-Gratz.pdf>.

¹⁸⁴ 442 U.S. 256, 279 (1979) (citation omitted).

dence of motive, opposing parties may point out that percentage plans were adopted just as race-conscious affirmative action was being rejected.¹⁸⁵ The Court in *Village of Arlington Heights v. Metropolitan Housing Development* set forth a non-exhaustive list of factors that can support a finding of discriminatory purpose: (1) “the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes,” (2) “the specific sequence of events leading up to the challenged decision,” (3) “departures from normal procedural sequences,” (4) “substantive departures . . . particularly if the factors usually considered important by the decision maker strongly favor a policy contrary to the one reached,” and (5) “the legislative or administrative history . . . especially where there are contemporary statements by members of the decision making body.”¹⁸⁶ As Professor Adams notes, a putative plaintiff could argue that such a quick transition is indicative of the fact that the same discriminatory purpose animates both the recently discarded race-conscious, preferential affirmative action regime and the newly discovered race-neutral affirmative action program.¹⁸⁷ The argument here would look very similar to that employed in *United States v. Fordice*, where the Supreme Court held that Mississippi’s use of ACT cut-off scores in admissions was constitutionally suspect because it retained aspects of respondent’s prior dual system and restricted a student’s choice based on race.¹⁸⁸ Accordingly, percent plans are most vulnerable, if at all, under the intent standard of the Equal Protection Clause.

However, percent plans may be slightly less vulnerable to attack under the Title VI disparate impact test. While there is minority representation on percent plan campuses, the amount of diversity that is actually traceable to such percent plans is negligible. As a result, this may undermine a disparate impact claim brought by white plaintiffs. In fact, admission officers at Florida State University dismissed claims that the Talented Twenty program accounted for increased minority enrollment, as the admissions office itself did not receive notification of who was in the Talented Twenty pool until well after the entire class was admitted.¹⁸⁹ This remained true for the second year of the policy, where more than three-fourths of the class were admitted before the list of the Talented Twenty had been received.¹⁹⁰ The admissions director candidly admitted that the policy had “zero effects on admissions” and that Florida State University had not been instructed to admit any student on the Talented Twenty list.¹⁹¹ If these statements are accurate, then the “substantial intensification of the

¹⁸⁵ Adams, *supra* note 70, at 1761.

¹⁸⁶ 429 U.S. 252, 267–68 (1977).

¹⁸⁷ Adams, *supra* note 70, at 1761.

¹⁸⁸ 505 U.S. 717, 718 (1992).

¹⁸⁹ MARIN & LEE, *supra* note 86, at 37.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

other types of race-conscious affirmative action—recruitment, financial aid, fostering a positive image of the campus, and supporting successful diversity on campus” did more than the Talented Twenty program itself.¹⁹²

XIV. THE LEGALITY OF TARGETED FINANCIAL AID UNDER TITLE VI

A college may make awards of financial aid to disadvantaged students, without regard to race or national origin, even if that means that these awards are dispersed disproportionately to minority students. Financial aid may be earmarked for students from low-income or single parent families, from school districts with high dropout rates, or from families in which few or no members have attended college. These and other race-neutral ways of identifying and providing aid to disadvantaged students do not present Title VI problems. Universities can also promote diversity by considering factors other than race and national origin, such as geographic origin, diverse experiences, and socioeconomic background.¹⁹³ Likewise, Title VI does not prohibit an individual or an organization that is not a recipient of federal financial assistance from directly giving scholarships or other forms of financial aid to students based on their race or national origin.

In *Alexander v. Sandoval*, the Supreme Court departed from circuit court precedent and held that there is no private right of action to enforce disparate impact regulations promulgated under Title VI.¹⁹⁴ The State of Alabama amended its constitution in 1990 to declare English the official state language. Pursuant to this provision, Alabama began administering state drivers license examinations only in English. Martha Sandoval brought suit in federal court to enjoin the English-only policy, arguing that it violated Title VI because it had the effect of subjecting non-English speakers to discrimination based on their national origin.¹⁹⁵ The trial court agreed, enjoined the policy, and ordered the state agency to accommodate non-English speakers.¹⁹⁶ Pursuant to § 602 of Title VI, which authorizes federal agencies to effectuate § 601 by issuing regulations, the Department of Justice, in an exercise of this administrative authority, promulgated a

¹⁹² *Id.*

¹⁹³ Approximately one in six students deemed as qualified low-income applicants are African American. See Kane, *supra* note 8, at 450; WILLIAM G. BOWEN, SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 46–50 (1998).

¹⁹⁴ 532 U.S. 275, 285 (2001). The implications of this holding for civil rights groups and private litigants are significant, since the rights and remedies under the implementing regulations of Title VI are the same as those under Title II of the Americans With Disabilities Act of 1990 (ADA) (codified as amended in 42 U.S.C.A. §§ 12101–1223 and in scattered sections of 29 U.S.C.A. and 47 U.S.C.A.), Section 504 of the Rehabilitation Act of 1973 (current version at 29 U.S.C.A. § 794 (West 1999 & Supp. 2002)), and Title IX of the Higher Education Amendments of 1972 (codified at 20 U.S.C. § 1681 (1994)).

¹⁹⁵ *Sandoval*, 532 U.S. at 275.

¹⁹⁶ *Id.*

regulation forbidding fund recipients from utilizing criteria or administrative methods that discriminate on prohibited grounds.¹⁹⁷ When the case reached the Supreme Court, it set forth three aspects of Title VI that in its view were well settled. First, the Court reiterated that private individuals may sue to enforce § 601.¹⁹⁸ Second, the Court confirmed that § 601 prohibits only intentional discrimination.¹⁹⁹ Third, the Court assumed for purposes of deciding the case that “regulations promulgated under § 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities might be permissible under § 601.”²⁰⁰ The Court did not conclude, however, from these three premises that Congress intended to create a private right of action to sue for violations of § 602. *Sandoval* firmly stated that although a private right of action exists to enforce § 601, there is no accompanying right for a private party to enforce regulations promulgated pursuant to § 601.²⁰¹ The search for congressional intent in this case began and ended with Title VI’s text and structure.

In *Cannon v. University of Chicago*,²⁰² the Court held that a private right of action existed to enforce Title IX of the Education Amendments of 1972.²⁰³ However, the Court observed that the rights-creating language critical to its § 601 analysis was completely absent from § 602.²⁰⁴ Whereas § 601 decreed that “[n]o person shall be subjected to discrimination,”²⁰⁵ both § 601 and § 602 direct civil rights federal enforcement agencies to effectuate rights created by § 601.²⁰⁶ This language focuses neither on the individuals protected nor on the funding recipients being regulated. Rather, the statute is addressed solely to the regulating agencies. Moreover, the methods of enforcement specified in § 602 place elaborate restrictions on the agencies and, thereby, suggest a congressional intent not to create an alternative enforcement mechanism of a private cause of ac-

¹⁹⁷ Section 602 authorizes federal agencies “to effectuate the provisions of section 601 by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. § 2000d-1 (1999). In an exercise of its authority, the Department of Justice promulgated a regulation forbidding funding recipients to “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.” 28 CFR § 42.104(b)(2) (1999). See also 49 CFR § 21.5(b)(2) (2000) (a similar Department of Transportation regulation).

¹⁹⁸ *Sandoval*, 532 U.S. at 275.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* By treating this point as an “assumption” warranted by the procedural posture of the case and supported by some authority, the Court seemed to invite an open-ended assault on the disparate impact regulations themselves.

²⁰¹ *Id.* at 276.

²⁰² 441 U.S. 677 (1979).

²⁰³ 20 U.S.C. § 1681 (1994).

²⁰⁴ *Cannon*, 441 U.S. at 677–78.

²⁰⁵ Section 601 provides that “[n]o person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” covered by Title VI. 42 U.S.C. § 2000d (1999).

²⁰⁶ *Cannon*, 441 U.S. at 685.

tion.²⁰⁷ Hence, the Court concluded that there is no reason to infer a private remedy in favor of individual persons from § 602.²⁰⁸ Since the holding was based on statutory, as opposed to constitutional grounds, Congress has the power to overturn this decision, but the likelihood of this happening remains dubious.²⁰⁹

These reforms, however, cannot fully succeed without political will in Congress and effective federal enforcement. Private advocacy organizations should therefore rethink their litigation strategy and place greater reliance on legislative advocacy, grassroots organizing, and civil disobedience, if necessary. However, these options fall outside of the scope of the present inquiry.

Notwithstanding *Sandoval*'s prohibition against private Title VI actions, is there any chance of a workable solution to maintaining an action indirectly under § 1983? Recent litigation suggests not. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection II (SCCIA II)*,²¹⁰ the court held that the *Sandoval* decision did not bar the plaintiffs from using § 1983 to enforce federal rights set forth in the Environmental Protection Agency's Title VI § 602 disparate impact regulations.²¹¹ In this environmental justice suit, neighborhood groups challenged the placement of a cement plant in a minority neighborhood in South Camden, New Jersey, calling into question *Sandoval*'s impact on § 1983 claims. The *SCCIA II* court correctly noted that the *Sandoval* plaintiffs' disparate impact discrimination claim was based exclusively on a direct private right of action under § 602 of Title VI and, therefore, did not im-

²⁰⁷ *Id.* at 723–24, 728 (Rehnquist, J., joined by Stewart, J., concurring).

²⁰⁸ *Id.* at 677–78. The majority reserved the question of whether § 1983 applies to agency regulations, such as the Department of Education's Title VI implementation regulations. Although Title VI applies to private entities that receive federal funds, one limitation to suing under § 1983 is that these cases must involve state action. *See* 42 U.S.C. § 1983 (1994). The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action by law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id.

²⁰⁹ In the early 1990s, Congress overturned several Supreme Court rulings that narrowed the scope of civil rights laws through the Civil Rights Restoration Act of 1987. 20 U.S.C. § 1681.

²¹⁰ 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001).

²¹¹ *Id.* at 532–35. In *Alexander v. Sandoval*, Justice Scalia stated: “[W]e must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.” 532 U.S. 275, 281 (2001).

plicate § 1983.²¹² As noted above, the Court in *Sandoval* never addressed the issue of whether § 602 disparate impact regulations are enforceable rights under § 1983. The Court also failed to address the fundamental issue of whether § 602 confers authority on federal agencies to issue disparate impact regulations.²¹³ Accordingly, *SCCIA II* concluded that “*Sandoval* does not foreclose Plaintiffs from seeking to vindicate the rights they allege § 602 and its implementing regulations create through § 1983.”²¹⁴

The *SCCIA II* decision, however, was recently revisited and reversed by the court of appeals in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection (SCCIA III)*.²¹⁵ The appeals court took issue with the lower court’s conclusion that *Wright v. City of Roanoke Redevelopment and Housing Authority* stands for the proposition that valid federal regulations may create rights enforceable under § 1983.²¹⁶ The majority noted that the Supreme Court’s primary concern in considering enforceability of federal claims under § 1983 had been to ensure that Congress intended to create the federal right being litigated.²¹⁷ Accordingly, it held that a federal regulation may not create a right enforceable through § 1983 not already found in the enforcing statute.²¹⁸ Similarly, the court rejected the argument that enforceable rights may be found in any valid administrative implementation of a statute that creates some enforceable right.²¹⁹ Consequently, the appellate court reversed the district court’s order to grant preliminary injunctive relief.

Similarly, in late March 2002, the district court dismissed claims brought under Title VI in *Ceaser v. Pataki*.²²⁰ Following the Supreme Court’s decision in *Sandoval*, the plaintiffs pursued their disparate impact claims under § 1983. They maintained that *Wright* stood for the proposition that “regulations are enforceable if [they] are valid and meet the traditional § 1983 doctrinal standards.”²²¹ For the reasons articulated in *SCCIA III*, the *Ceaser* court held that plaintiffs have no right to sue under § 1983 for alleged violations of disparate impact regulations.²²² Since the regulations promulgated pursuant to Title VI go beyond what Congress proscribed in the actual statute, they are not enforceable under § 1983.²²³ Consequently,

²¹² *SCCIA II*, 145 F. Supp. 2d at 514.

²¹³ *Id.*

²¹⁴ *Id.* at 517.

²¹⁵ 274 F.3d 771 (3d Cir. 2001).

²¹⁶ 479 U.S. 418 (1987).

²¹⁷ *SCCIA III*, 274 F.3d at 779–80.

²¹⁸ *Id.* at 790–91. The court distinguished *SCCIA III* from *Wright* because it believed that the statute and its implementing regulations in *Wright* created a right enforceable through § 1983. Congress’ intent to benefit tenants was “undeniable.” *Wright*, 479 U.S. at 430.

²¹⁹ *SCCIA III*, 274 F.3d at 774.

²²⁰ No. 98 CIV. 8532, 2002 WL 472271 (S.D.N.Y. Mar. 26, 2002).

²²¹ Pls.’ Mem. in Opp’n at 20, *Ceaser v. Pataki*, No. 98 CIV. 8532, 2002 WL 472271 (S.D.N.Y. Mar. 26, 2002).

²²² *Ceaser*, 2002 WL 472271, at *1.

²²³ *Id.* at *3.

the very legitimacy of disparate impact litigation has been called into question. Ironically, anti-percent plan plaintiffs will therefore have a more difficult time successfully bringing challenges under the same disparate impact theory that they sought to eliminate in the first place.

CONCLUSION

Notwithstanding their shortcomings, percent plans such as the one adopted by Texas A&M University challenge and redefine traditional notions of what constitutes academic merit. In order to achieve true affirmative access, universities must embark on a new institutional mission. This requires colleges to become partners in local educational reforms. Given shrinking school budgets, universities' collaboration is not just a good idea, but a necessity. We should also recognize that academic excellence is, in fact, compatible with the ideal of an inclusive American society. It is also consistent with our national pledge to leave no child behind. What would be inconsistent with society's proclaimed educational values is contenting ourselves with attracting only the Talented Tenth to colleges, while abandoning the remaining ninety percent of students who are often relegated to underperforming schools. Accordingly, the new imperative of the diversity rationale should be to improve underperforming schools in racially isolated, low-income neighborhoods. By reforming education in this manner, society moves closer to accepting the proposition that:

Diversity . . . is not polite accommodation. Instead, diversity is, in action, the sometimes painful awareness that other people, other races, other voices, other habits of mind, have as much integrity of being, as much claim upon the world, as you do. No one has an obligation greater than your own to change, or yield, or to assimilate into the mass. . . . Being strong in life is being strong amid differences while accepting the fact that your own self can be a considerable imposition upon everyone you meet. I urge you to consider your own oddity before you are troubled or offended by that of others. And I urge you, amid all the differences present to the eye and mind, to reach out and create the bonds that will sustain the commonwealth that will protect us all. We are meant to be here together.²²⁴

²²⁴ William M. Chace, *The Language of Action*, WESLEYAN, Fall 1989, at 36.