KEEP IT QUIET: HOW FACIALLY NEUTRAL AFFIRMATIVE ACTION PASSES CONSTITUTIONAL SCRUTINY

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Diversity in higher education has many positive implications for both minority and nonminority students alike. Unfortunately, the equal protection clause has been a barrier to many state policies that have sought to enhance diversity in higher education. While the Supreme Court has struck down facially discriminatory affirmative action plans under a standard of strict scrutiny, it is possible that there will be a shift in jurisprudence that allows facially neutral admissions policies to pass constitutional muster. Many states, Texas specifically, have instituted "percentage plans," which are facially nondiscriminatory policies that aim to increase diversity in higher education by automatically admitting a certain percentage of top students from every high school to a state university. This Note analyzes these percentage plans and discusses whether a potential shift in the Supreme Court's jurisprudence will allow facially neutral admissions policies to prevail under a strict scrutiny standard. Additionally, this Note recommends that facially neutral admissions policies should be analyzed under a standard of intermediate scrutiny in order to facilitate the goal of diversity in higher education.

I. INTRODUCTION

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.[1]

* J.D. Candidate 2011, University of Illinois College of Law. I would like to dedicate this Note to the memory of my grandfather, Edward Wendler Sr., who spent his life fighting for equality and justice. I would also like to thank my father Stuart, my mother Sharon, my sisters Nancy and Stacy, my brother Marcus, and my friend and mentor Betty Blackwell, along with the rest of my family and friends who have always supported and cared for me. I would never have had this opportunity without you all.

1. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring).

Research has shown that diversity in higher education produces many positive qualitative[2] and quantifiable[3] results for minority and nonminority students alike. In order to obtain these benefits for their students, educational institutions strive for diversity in their faculties and student bodies.[4] Despite these efforts, many institutions have struggled to maintain student bodies that reflect the racial and ethnic diversity of the general population.[5]

In the wake of the uncertain constitutionality of traditional affirmative action plans, California, Florida, and Texas have adopted facially neutral admissions policies for their state university systems.[6] These "percentage plans" automatically admit a given top percent of graduating high school seniors to undergraduate programs.[7] By admitting the top students from schools that are traditionally underrepresented, percentage plans foster a student body that encompasses a greater cross section of a state's general population.[8]

These facially neutral admission policies, however, appear to be inconsistent with the U.S. Supreme Court's treatment of racial classifications.[9] The Court traditionally reviews facially neutral laws with discriminatory purpose under the same strict scrutiny that applies to laws that are discriminatory on their face.[10] Should percentage plans be subject to strict scrutiny given that they were adopted, at least in part, to increase the admission of racial minorities?[11] If so, can they survive stringent constitutional review?

Since the adoption of percentage plans, there have been several major decisions from the Supreme Court that shed light on their constitutional validity. The twin cases of *Grutter v. Bollinger*[12] and *Gratz v. Bollinger*[13] recognized a compelling government interest in maintaining

2. *See* Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143, 143–45 (Gary Orfield & Michal Kurlaender eds., 2001) (surveying students' impressions and experiences with diversity).

3. *See* Patricia Gurin et. al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 331–33 (2002) (analyzing how diversity effects educational outcomes).

4. *See id.*

5. *See* Derrick Darby, *Educational Inequality and the Science of Diversity in* Grutter*: A Lesson for the Reparations Debate in the Age of Obama*, 57 U. KAN. L. REV. 755, 755–56 (2009).

6. *See* Jennifer L. Shea, Note, *Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions*, 78 IND. L.J. 587, 588 (2003).

7. *See id.* at 606–14.

8. Mark C. Long et al., *Policy Transparency and College Enrollment: Did the Texas Top Ten Percent Law Broaden Access to the Public Flagships?*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 82, 82–83 (2010).

9. *See infra* Part II.A.

10. *See infra* Part II.A.

11. *See infra* Part III.A.

12. 539 U.S. 306 (2003).

13. 539 U.S. 244 (2003).

student diversity.[14] Moreover, these cases provide factors for determining when admission policies are narrowly tailored.[15]

More recently, in *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy indicated that he would support an intermediate standard of review for "race-conscious" government action.[16] This shift may create a new majority in the Court that would be willing to apply something less than strict scrutiny to facially neutral affirmative action.[17]

This Note examines the constitutionality of percentage plans in the wake of these recent cases, using the Texas Top Ten Percent Rule (Texas Rule)[18] as a primary example. Part II discusses the Court's treatment of facially neutral government action and "benign" racial classifications as well as background on the various percentage plans. Part III analyzes the applicability of strict scrutiny to percentage plans and discusses the possibility of a less stringent intermediate standard for "race-conscious" government action. Part IV recommends adopting an intermediate standard of review for percentage plans and similar race-conscious government actions modeled on the Court's gender classification precedent.

II. BACKGROUND AND HISTORY

This Part explores the background and history surrounding facially neutral affirmative action. First, it discusses the Court's traditional treatment of facially neutral laws with discriminatory purposes. Second it discusses the Court's holdings on affirmative action in higher education admissions. Finally, this Part concludes by discussing the history surrounding the adoption of percentage plans with particular focus on the Texas Rule.

A. Background on Facially Neutral Laws and Practices

In the wake of Reconstruction and Redemption, many southern states adopted "Jim Crow Laws" designed to perpetuate the segregation codified in the old "black codes."[19] As the courts began to strike down these facially discriminatory statutes, state and local governments enacted laws and practices that were nondiscriminatory in name but maintained segregation or discrimination once enforced.[20] The states hoped that by not having discrimination officially codified in their laws,

14. *See infra* Part III.B.1.
15. *See infra* Part III.B.2.
16. *See infra* Part III.D.1.
17. *See infra* Part III.D.
18. TEX. EDUC. CODE ANN. § 51.803 (West 2011).
19. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 7–10 (3d ed. 2002).
20. *See,* RICHARD KLUGER, SIMPLE JUSTICE 750–54 (1975).

courts would be unwilling to strike down discriminatory practices under the equal protection clause.[21] The Supreme Court saw through the ruse and has traditionally reviewed facially neutral state action that has a demonstrable discriminatory purpose under the same standard used to review overt discrimination.[22]

In *Yick Wo v. Hopkins*, San Francisco regulated the construction and operation of laundries, requiring operators to obtain approval from a board of supervisors.[23] The ordinance did not prescribe that any group would be excluded, nor did it use racial or ethnic classifications in its language.[24] The board of supervisors, however, had refused to approve applications from over two hundred citizens of Chinese ancestry, while accepting all but one application from other operators.[25] The Supreme Court found that the city, through its board of supervisors, violated the equal protection clause.[26] The Court stated that "[t]hough the law itself [was] fair on its face, and impartial in appearance," it was "applied and administered by public authority with an evil eye and an unequal hand."[27] The Court noted that the disparity in the acceptance of applications could only be explained by ethnic discrimination and thus violated the Constitution.[28] While the Court did not initially use this rationale to strike down Jim Crow Laws, *Yick Wo* became foundational precedent for subsequent scrutiny of facially neutral laws and policies.[29]

In *Washington v. Davis*, the Court took up the issue of facially neutral laws that had disparate impact along racial and ethnic lines.[30] In *Davis*, an applicant sued the Metropolitan Police Department, claiming that the test score requirements for acceptance disproportionately excluded minority applicants.[31] The applicant claimed that this disparate impact was evidence of discriminatory motive, and therefore the test requirement was unconstitutional.[32] The Court, however, declined to treat disparate impact as conclusive evidence that the exam had a sinister motive.[33] The Court stated that facially neutral laws may still be discriminatory in application and subject to stricter review, but first there

21. *Id.*

22. *See, e.g.*, Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 240–42 (1991); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 7–11 (1971) (describing remedial measures used to desegregate school districts).

23. 118 U.S. 356, 356 (1886).

24. *Id.*

25. *Id.* at 360.

26. *Id.* at 373–74.

27. *Id.*

28. *Id.*

29. *See* L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281, 293–94 (1997).

30. 426 U.S. 229, 229–30 (1976).

31. *Id.* at 232–34.

32. *Id.*

33. *Id.* at 239–40.

must be a demonstration of discriminatory purpose.[34] Absent a showing of discrim-inatory purpose, laws and procedures would be judged by a much less stringent "rational basis" standard.[35]

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court attempted to provide a set of factors for determining when state action has a discriminatory purpose.[36] The first factor the Court considered was disparate impact, noting that a "clear pattern, unexplainable on grounds other than race," is strong evidence of "invidious purposes."[37] The Court went on to consider historical background, noting that change in regulation in response to racial integration may imply an attempt to perpetuate previous discriminatory practices.[38] In addition, deviations from the normal procedural or substantive decision-making process could imply improper motives.[39] Finally, the Court hypothesized that "legislative or administrative history may be highly relevant, especially where there are contemporary statements . . . of the decisionmaking [sic] body" that indicate racial motivation.[40]

Under these factors,[41] and potentially others under the circumstances,[42] courts seek to determine when a facially valid state action has an invidious purpose. In the absence of a showing of discriminatory purpose, state legislation is given its usual high level of deference.[43] When a discriminatory purpose is found, however, facially neutral laws are subject to the same strict scrutiny as any other racially discriminatory act.[44]

B. Affirmative Action in Collegiate Admissions

In a separate series of cases, courts have addressed educational institutions' attempts to ameliorate gaps in diversity through the admissions process. While this form of racial classification appears to be aimed at benefiting traditionally disenfranchised groups, courts have treated these "benign" programs with skepticism.

In *University of California v. Bakke*, the Supreme Court struck down a medical school's decision to set aside a number of seats for

34. *Id.* at 241–42 (noting that discriminatory purpose can be inferred from "the totality of the relevant facts").

35. *Id.* at 243–47 (describing the governments "legitimate" interest in having law enforcement officers who pass the literacy requirements of the test).

36. 429 U.S. 252, 266–70 (1977).

37. *Id.* at 266–67 (noting that evidence of such gross disparate impact would be rare).

38. *Id.* at 267.

39. *Id.*

40. *Id.* at 268.

41. *See id.* at 266–70.

42. *See* Washington v. Davis, 426 U.S. 229, 241–42 (1976) (noting that discriminatory purpose can be inferred from "the totality of the relevant facts").

43. *See id.* at 245–47.

44. *See Village of Arlington Heights*, 429 U.S. at 266.

minority applicants.[45] The Court could not reach a majority opinion. Justice Powell argued that set-asides violated the equal protection clause[46] while the other Justices based their ruling on statutory grounds.[47] The Court also could not agree on what standard of review should be applied to racial classifications benefiting minorities. Justice Powell argued for a continuation of the strict scrutiny standard, arguing that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[48] Justice Brennan, writing for the dissent, urged for intermediate scrutiny for racial classifications benefiting minorities.[49] So far, Justice Powell's stricter approach has prevailed.[50]

In the twin cases of *Grutter v. Bollinger*[51] and *Gratz v. Bollinger*,[52] the Supreme Court again took up the issue of affirmative action in higher education admissions. While recognizing student diversity as a "compelling government purpose," the Court reached different conclusions on the constitutionality of the two admission programs.[53] As a result, scholars were left unsure about what a school must do to keep narrowly tailored affirmative action in admissions.[54]

In *Grutter*, the Court upheld the University of Michigan Law School's "holistic approach" in considering an applicant's race as one factor among many factors.[55] Justice O'Connor, writing for the majority, wrote that applicants with the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters" bring an element of diversity that is important for the educational experience of all.[56] The Court stressed that race must be used in a "flexible, nonmechanical way," unlike the quota system of *Bakke*, so as to ensure individual consideration of candidates.[57]

In contrast, the Court struck down the automatic point allocation employed by the University of Michigan's undergraduate admissions

45. 438 U.S. 265, 271 (1978).

46. *Id.* at 269–70 (Powell, J., writing for the plurality).

47. *Id.* at 408–10 (Stevens, J., concurring).

48. *Id.* at 289–90 (Powell, J., writing for the plurality).

49. *Id.* at 328–29 (Brennan, J., concurring in part, dissenting in part).

50. *Compare id.* at 289 (Powell, J., writing for the plurality), *with* Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (holding that strict scrutiny is the proper test for even benign racial classifications).

51. 539 U.S. 306 (2003).

52. 539 U.S. 244 (2003).

53. *See Grutter*, 539 U.S. at 331–34; *see also Gratz*, 539 U.S. at 270 (acknowledging student diversity as a compelling interest, and holding that the means used were not narrowly tailored enough to achieve that interest).

54. *See, e.g.*, Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 544–45 (2007).

55. 539 U.S. at 337.

56. *Id.* at 333.

57. *Id.* at 333–34 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–16 (1978)).

process.[58] The undergraduate admissions plan automatically awarded minority applicants twenty points out of a 150 point scale, making race decisive "for virtually every minimally qualified underrepresented minority applicant."[59] The Court acknowledged that the sheer volume of applications makes an individualized holistic approach more difficult in an undergraduate setting.[60] The Court, however, held that "administrative challenges do[] not render constitutional an otherwise problematic system."[61]

Recently, the case of *Parents Involved in Community Schools v. Seattle School District No. 1* signaled a potentially significant shift on the Court's treatment of benign racial classifications.[62] Justice Kennedy, in his concurrence in the judgment, wrote that "[t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."[63] Justice Kennedy went on to write that "race-conscious" mechanisms "unlikely . . . demand strict scrutiny to be found permissible."[64]

While not explicit, Justice Kennedy's concurrence suggests that he may support a lower standard of review for "race-conscious" government action so long as it does not "tell[] each student he or she is to be defined by race."[65] Justices Breyer, Ginsburg, and Sotomayor have supported a less-stringent standard for benign racial classifications.[66] Furthermore, while Justice Kagan has not authored a ruling on benign racial classifications, her personal notes in the margins of an internal White House document strongly suggest that she supports affirmative action both as good law and good policy.[67] Therefore, with the addition of Justice Kennedy,

58. *Gratz*, 539 U.S. at 251.

59. *Id.* at 272.

60. *Id.* at 275 (citing *Grutter*, 539 U.S. at 337).

61. *Id.*

62. 551 U.S. 701 (2007).

63. *Id.* at 788 (Kennedy, J., concurring).

64. *Id.* at 788–89. Justice Kennedy listed "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race" as possible mechanisms for taking race into account. *Id.* at 789.

65. *Id.*

66. *See Gratz*, 539 U.S. at 282 (Breyer, J., concurring in part and dissenting in part) ("[By] implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion."); *id.* at 301 (Ginsburg, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."); *Confirmation Hearing on the Nomination of the Hon. Sonia Sotomayor, to be an Assoc. Justice of the Supreme Court of the U.S. Before the S. Comm. on the Judiciary*, 111th Cong. 92 (2009) (statement of Sotomayor, J.) (quoting *Hayden v. County of Nassau*, 189 F.3d 42, 48–49 (2d Cir. 1999), which held that "racial motive" is distinguishable from racial classification).

67. In the margins of an internal memorandum, Justice Kagan, then Deputy Director of President Clinton's Domestic Policy Counsel, handwrote "[For Your Information], I think this is exactly the right position—as a legal matter, as a policy matter, and as a political matter." Memorandum from Solicitor General Walter Dellinger on *Piscataway Twp. Bd. of Educ. v. Taxman*, (July 29, 1997) (on

it is possible that a majority of the Supreme Court would support adopting an intermediate standard for "race-conscious" government policies.[68]

C. History of Percentage Plans

Within the last twenty years, California, Florida, and Texas have adopted various percentage plans for undergraduate admissions.[69] Percentage plans guarantee admissions to state universities for students who graduate within given percentages of their high school classes.[70] Thus, students from underrepresented high schools, such as those in the inner city, gain automatic admission to state universities.[71] Given that many of these underrepresented areas traditionally have high concentrations of minority students, percentage plans can have the effect of increasing minority admissions.[72] Because percentage plans are facially race neutral, policy makers hope that their implementation will preserve student diversity without relying on traditional affirmative action plans.[73]

The catalysts that led to the adoption of each percentage plan vary by state. California adopted its "Four Percent Plan" in the wake of Proposition 209, which forbade the state from granting preferential treatment on the basis of race.[74] Florida adopted its "Talented 20" program in response to an executive order eliminating affirmative action.[75] The Texas Rule,[76] however, was adopted in response to a federal court's ruling.

In *Hopwood v. Texas*, the Fifth Circuit struck down the University of Texas School of Law's affirmative action admissions program.[77] This was the first case since *Bakke* to invalidate an affirmative action policy for student admissions.[78] The Fifth Circuit held that "the government

file with the William J. Clinton Presidential Library), *available at* http://www.clintonlibrary.gov/kagan.html (follow "Domestic Policy Council" hyperlink; then follow "Race-Affirmative Action" hyperlink). The memorandum discussed then Solicitor General Walter Dellinger's attempt to persuade the Supreme Court to resolve a pending case on "narrow grounds" so that the Court would not affirm the "Third Circuit's broad opinion that Title VII *never* permits non-remedial affirmative action." *Id.* at 2–3 (citing Piscataway Twp. Bd. of Educ. v. Taxman, 91 F.3d 1547, 1557–58 (3d Cir. 1996)). Given Justice Kagan's opinion that this was "exactly the right position" both legally and politically, it is reasonable to conclude that she supports affirmative action for nonremedial purposes and therefore may support an intermediate standard of review for "race conscious" government action. *See id.* at 1.

68. *See Parents Involved in Cmty. Sch.*, 551 U.S. at 789 (Kennedy, J., concurring).
69. *See* Shea, *supra* note 6, at 588.
70. *Id.*
71. *See* Long et al., *supra* note 8, at 82.
72. *See id.* at 83.
73. *See* Shea, *supra* note 6, at 588.
74. *See id.* at 606–10.
75. *See id.* at 588.
76. TEX. EDUC. CODE ANN. § 51.803 (West 2011).
77. 78 F.3d 932, 934 (5th Cir. 1996).
78. *See id.*; *see also* Shea, *supra* note 6, at 592–93.

cannot constitutionally use racial preferences for the purpose of fostering student body diversity."[79]

In response, Texas's state legislatures sought to adopt a plan that would avoid running afoul of the Fifth Circuit's mandate.[80] Without some form of affirmative action plan, the state would fall back into underrepresentation of minority students.[81] Lawmakers feared that this de facto segregation would bring back vestiges of past explicit discrimination to higher education in Texas.[82]

The year after *Hopwood*, the Texas legislature adopted the Texas Rule.[83] Under the Rule, any Texas student who graduates within the top ten percent of his or her high school class is automatically admitted to the Texas public university of his or her choice.[84] Initially, the Rule had little effect on minority enrollment, forcing the state flagship schools to attempt more aggressive recruitment measures to achieve diversity.[85]

As the program continued, however, minority enrollment in the flagship universities continued to increase, eventually eclipsing pre-*Hopwood* levels of diversity.[86] In fact, the Rule has been so successful that students outside the top ten percent of their class had difficulty gaining admission to flagship schools. In 2008, eighty-one percent of students enrolled in the University of Texas at Austin undergraduate freshman class were admitted under the Texas Rule.[87] This led the university to have difficulty recruiting other students within the state, as well as qualified out-of-state and international students.[88] In 2009, the Texas legislature amended the Rule to allow the University of Texas at Austin to limit its acceptance of top ten percent students to seventy-five percent of its entering class.[89]

79. Hopwood v. Texas, 236 F.3d 256, 275 (5th Cir. 2000).

80. *See* Shea, *supra* note 6, at 612–13.

81. *See id.*

82. *See* Sweatt v. Painter, 339 U.S. 629 (1950) (striking down University of Texas Law School's use of separate minority facility as unequal to main campus law school); Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 252–53 (1999).

83. *See* TEX. EDUC. CODE ANN. § 51.803 (West 2011); Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996).

84. TEX. EDUC. CODE ANN. § 51.803. Admission is only guaranteed for any university but the plan does not guarantee acceptance into particular majors. *Id.*

85. *See* Shea, *supra* note 6, at 613.

86. Long et al., *supra* note 8, at 89–90.

87. *See id.*

88. Press release, William Powers, Jr., President of Univ. of Tex. at Austin, President Powers on the Issues: April 2008 (April 2, 2008), *available at* http://www.utexas.edu/know/2008/04/02/ontheissues-april/.

89. TEX. EDUC. CODE ANN. § 51.803.

III. DISCUSSION

Despite *Hopwood v. Texas*'s abrogation after *Grutter v. Bollinger*,[90] Texas has maintained its percentage Rule for undergraduate admissions.[91] This Part discusses the possible constitutional complications of percentage plans. First, it examines whether the Texas Rule has an invidious purpose under the factors of *Village of Arlington Heights*.[92] Next, it discusses whether the Texas Rule is narrowly tailored under the *Grutter* and *Gratz* analysis.[93] Finally, this Part discusses whether percentage plans in general may qualify as "race-conscious" state action that is subject to intermediate scrutiny.

A. Do Percentage Plans Have Discriminatory Purpose?

The mere fact that percentage plans disparately benefit minorities does not mean that they are subject to heightened scrutiny.[94] When racially disparate impact is not the result of "invidious purpose," it is subject to rational basis review.[95] When a discriminatory purpose can be shown, however, even facially neutral laws are reviewed under heightened scrutiny.[96]

The Texas Rule does not reference race or ethnicity and, on its face, has no discriminatory purpose.[97] Moreover, disparities in admissions under percentage plans are not so great that they are "unexplainable on grounds other than race."[98] Given that percentage plans operate by drawing from various high schools mechanically, it is unlikely that the administration of the plan shows evidence of procedural discrimination.[99] The timing of the adoption of the California, Florida, and Texas percentage plans, however, strongly indicates racial motivation. All of the plans were adopted within a year of their respective catalysts.[100] Under *Village of Arlington Heights*, this is strong evidence of discriminatory purpose.[101]

90. *Hopwood*'s holding that student diversity is not a compelling government interest is inconsistent with *Grutter*. *Compare* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996), *with* Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

91. TEX. EDUC. CODE ANN. § 51.803.

92. *See supra* notes 36–40 and accompanying text.

93. *See infra* Part III.C.

94. *See* Washington v. Davis, 426 U.S. 229, 239–40 (1976).

95. *See id.* at 239–42.

96. *Id.* at 240–42.

97. TEX. EDUC. CODE ANN. § 51.803 (West 2011).

98. The Texas Rule has not caused a substantial overrepresentation of any racial or ethnic group, so it is unlikely that racial animas could be inferred from the demographics of the school. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977); Long et al., *supra* note 8, at 82–83.

99. *See, e.g.*, *Vill. of Arlington Heights*, 429 U.S. at 266–70; Yick Wo v. Hopkins, 118 U.S. 356, 356 (1886).

100. *See* Shea, *supra* note 6, at 606–13.

101. 429 U.S. at 266–70.

In addition, policy makers were not attempting to hide the racial motivations behind their percentage plans. Representative Rangel, sponsor of the House version of the Texas Rule, said that the bill was "authored in direct response to the Fifth Circuit's *Hopwood* decision and to the growing South Texas population, which has a large Mexican American population."[102] During committee testimony, Professor Gerald Torres praised the Texas Rule, pointing out that under the pre-*Hopwood* affirmative action, minority students in the top of their classes at "predominantly minority high schools might not have applied or been admitted to schools like [the University of Texas at Austin] on account of low standardized test scores."[103] There were even clear statements of racial diversity as a primary consideration in the Rule's 2009 amendment. The adopted legislation includes a section authorizing the publication of an annual report detailing the amendment's effect on minority enrollment.[104]

These public statements, coupled with the historic timing of adoption, make the purpose behind percentage plans unmistakable. Under *Village of Arlington Heights*, this demonstrable discriminatory purpose should make percentage plans subject to strict scrutiny.[105]

There is an argument that percentage plans would not be subject to strict scrutiny if race was not the "predominant factor" behind the legislatures' decisions.[106] In *Bush v. Vera*, a plurality of the Supreme Court stated that strict scrutiny would not apply to state redistricting if "race-neutral, traditional districting considerations predominated over racial ones."[107] In *Vera*, the Court struck down a Texas gerrymandering plan because it unreasonably consolidated racial minority voters into a few voting districts.[108] The plurality noted that strict scrutiny should only be applied where race is the "predominant factor" behind the redistricting decisions.[109] Nonetheless, the plurality in *Vera* applied strict scrutiny because lawmakers admitted they intended to create majority-minority districts using detailed racial data.[110]

Assuming that the plurality approach in *Vera* is controlling,[111] it is unlikely that states could make a credible showing that percentage plans were predominantly adopted for race-neutral reasons. While percentage

102. *See* Holley & Spencer, *supra* note 82, at 252–53.
103. *Id.* at 257.
104. TEX. EDUC. CODE ANN. § 51.803 (a-6)(4) (West 2011).
105. *See* 429 U.S. 252 at 263–65 (1977).
106. *See* Bush v. Vera, 517 U.S. 952, 964–65 (1996).
107. *Id.*
108. *Id.* at 954–55.
109. *Id.* at 952.
110. The Court emphasized that the computer program used in drawing the congressional districts provided "block-by-block" break downs of racial data which were far more detailed than any other political or socioeconomic statistics. *Id.* at 961–62.
111. Justice O'Connor was only joined by Chief Justice Rehnquist and Justice Kennedy, and therefore the predominant factor test is not controlling precedent. *See id.* at 952.

plans benefit diversity in more ways than just race,[112] the public record and the timing of adoption strongly show that the Texas Rule was adopted as a direct response to *Hopwood*.[113] As in *Vera*, lawmakers admit that racial diversity was a significant goal behind the adoption of percentage plan.[114] Moreover, the Texas Rule requires universities to make annual reports that show the effect of percentage plans on racial diversity, further highlighting the importance of race in the adoption of these policies.[115] Given the evidence of racial motivation, it is likely that a court would find that race was a predominant factor in the adoption of the Texas Rule.

B. Why Affirmative Action Struggles with Strict Scrutiny

The Supreme Court has proffered several reasons why various forms of admissions based affirmative action fail strict scrutiny analysis. First, Justices have been skeptical about whether diversity in education is a compelling government interest.[116] Additionally, various affirmative action policies have been rejected because they are not narrowly tailored.[117] To determine whether facially neutral affirmative action survives strict scrutiny, it is important to examine the various reasons that other affirmative action plans have failed or succeeded in the past.

1. Finding a Compelling Government Interest

Several reasons have been proffered for why affirmative action policies serve a compelling government interest. Advocates have emphasized everything from remedying past discrimination[118] to creating role models[119] to maintaining diversity[120] as reasons to accept benign racial classifications. These rationales had limited success before the Supreme Court.

The Court has been reluctant to find that universities have a compelling interest in remedying past state discrimination.[121] Given that a university cannot clearly show that *its* past discrimination has caused cur-

112. *See* Long et al., *supra* note 8, at 82–84.

113. *See supra* notes 79–84 and accompanying text.

114. *Compare supra* notes 101–103 and accompanying text, *with Vera*, 517 U.S. at 964–65.

115. TEX. EDUC. CODE ANN. § 51.803(a-6)(4) (West 2011).

116. *See infra* Part III.B.1.

117. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 270 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–18 (1978).

118. *See* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2364 (2000).

119. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274–75 (1986) (rejecting the role modeling theory).

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

121. *See, e.g.*, *id.* at 323–24; Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.").

rent disparities in applicant pools, courts have held that universities cannot remedy past discrimination through current admissions.[122] Similarly, the Court has held that schools do not have a compelling interest to increase the number of minority role models for future generations.[123]

Thus, universities have had to justify their affirmative action plans on the only interest the Supreme Court has recognized as compelling—maintaining student diversity.[124] In *Grutter*, the Court listed several benefits that classroom diversity provides, including an enriched educational experience and "cross-racial understanding."[125] The Court has reaffirmed diversity in higher education as a compelling interest in subsequent cases,[126] solidifying it as one of the few compelling interests served by affirmative action.[127]

While discussed in neither *Grutter* nor *Gratz*, it is likely that the Supreme Court would find another compelling government interest that could justify affirmative action. In his concurrence in *Parents Involved in Community Schools*, Justice Kennedy wrote that "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."[128] Justice Kennedy stated that "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children," and thus the government may take steps to dismantle both de facto and de jure segregation.[129] While the plurality rejected this new rationale,[130] it is likely that the majority of justices would acknowledge avoiding racial isolation as a compelling government interest.[131]

122. *Compare* Hopwood v. Texas, 78 F.3d 932, 948–49 (5th Cir. 1996) (noting that the law school's history of discrimination did not cause current racial inequality), *with* United States v. Paradise, 480 U.S. 149, 167 (1987) (holding that Department of Public Safety had compelling interest to remedy their past discrimination which justified policy of hiring fifty percent minorities).

123. *See Wygant*, 476 U.S. at 274–75.

124. *See Grutter*, 539 U.S. at 328–29.

125. *Id.* (discussing value of keeping pathways to success visibly clear and getting the point of view from a person who has been a minority.).

126. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 722 (2007); Gratz v. Bollinger, 539 U.S. 244, 268–69 (2003).

127. *See* Michael P. Pohorylo, Note, *The Role of* Parents Involved *in the College Admissions Process*, 42 CONN. L. REV. 693, 710 (2009).

128. *Parents Involved in Cmty. Sch.*, 551 U.S. at 797 (Kennedy, J., concurring).

129. *Id.* at 797–98.

130. *Id.* at 725–27 (Roberts, C.J., writing for the plurality).

131. *See supra* notes 65–67 and accompanying text.

2. *Finding a Narrowly Tailored Approach*

The twin cases of *Grutter* and *Gratz* highlight many of the Supreme Court's concerns about the use of affirmative action.[132] While the Court was willing to accept the University of Michigan Law School's inclusion of race as an amorphous plus factor,[133] they rejected the University of Michigan undergraduate's point allotment approach.[134] Given that both cases involved the same interest of diversity in higher education, the divergent holdings must be based on the narrow tailoring prong of strict scrutiny analysis.[135]

One distinction the Court emphasized is that assigning a uniform number of points to every minority applicant is too mechanical to satisfy narrow tailoring.[136] Like the set-aside number of seats in *Bakke*,[137] the approach in *Gratz* did not allow for individualized consideration.[138] Justice O'Connor, in particular, took serious issue with the fact that the undergraduate admissions process "precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter* . . . requires: consideration of each applicant's individualized qualifications."[139]

This same concern was echoed by Justice Kennedy in *Parents Involved in Community Schools*.[140] In that case, race became a tiebreaker in determining which students were admitted to the school of their choice.[141] Kennedy wrote that this "mechanical formula which has denied hundreds of students their preferred schools" could not be reconciled with the Courts holding in *Gratz*.[142]

Similarly, the Court emphasized that the *Gratz* point allotment was not narrowly tailored because it became determinative for undergraduate admissions.[143] As Chief Justice Rehnquist noted, the twenty point allotment "has the effect of making 'the factor of race . . . decisive' for

132. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

133. *Grutter*, 539 U.S. at 334–45.

134. *Gratz*, 539 U.S. at 270–71.

135. *See* Patrick S. Shin, *Compelling Interest, Forbidden Aim: The Antinomy of* Grutter *and* Gratz, 82 U. DET. MERCY L. REV. 431, 431–32 (2005).

136. *Gratz*, 539 U.S. at 270.

137. Justice Powel discussed how "[t]he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat because he was not the right color or had the wrong surname." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).

138. *Compare Bakke*, 438 U.S. at 317–18, *with Gratz*, 539 U.S. at 270.

139. *Gratz*, 539 U.S. at 277 (O'Connor, J., concurring) (citing Grutter v. Bollinger, 539 U.S. 306, 334 (2003)). O'Connor's vote resulted in the different outcomes of *Grutter* and *Gratz*. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (5-4 decision); *Gratz*, 539 U.S. 244 (5-4 decision).

140. *See* Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1, 551 U.S. 701, 793 (2007) (Kennedy, J., concurring).

141. *Id.* at 733–34.

142. *Id.* at 793 (citing *Gratz*, 539 U.S. at 247).

143. 539 U.S. at 247.

virtually every minimally qualified underrepresented minority applicant."[144] Justice Rehnquist went on to contrast the point allotment system with Harvard College's often-vaunted admissions program, noting that even a student with artistic talent that "rivaled that of Monet and Picasso . . . would receive, at most, five points."[145] Justice Rehnquist noted that the "extraordinarily talent[ed]" artist from his example would receive at most five points for his contribution to diversity while all minority applicants would receive twenty points just for applying.[146]

This concern was raised again by Chief Justice Roberts in *Parents Involved in Community Schools*.[147] In that case, assuming two students were alike in all other factors, race would be the tipping point for deciding which student got his or her choice of assignment.[148] Justice Roberts noted that "under each [Seattle and Louisville] plan when race comes into play, it is decisive by itself."[149] Thus, when affirmative action regimes have the effect of making race a determinative qualification, the Court may likely find that the methods chosen are not narrowly tailored.

Finally, the Court expressed concern that the plan in *Gratz* too openly categorizes people based on their race.[150] Unlike the law school's use of race as a vague, amorphous plus factor without quantifiable weight,[151] the undergraduate point allotment clearly defined the educational value of an applicant's race.[152] Moreover, the point allotment system made it clearly discernable when one candidate was chosen over

144. *Id.* Chief Justice Rehnquist made this similar point in *Grutter*, noting that schools must take care that "race does not become a predominant factor in the admissions decisionmaking [sic]." *Id.* at 392–93 (Rehnquist, C.J., dissenting).

145. *Gratz*, 539 U.S. at 273. The Harvard Plan was an example of what Justice Powell considered to be a constitutionally acceptable form of race-based admissions policy. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316–17 (1978). Justice Rehnquist described an example from the Harvard Plan as follows:

> The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it*."

Gratz, 539 U.S. at 272–73 (quoting *Bakke*, 438 U.S. at 324 (1978)).

146. *See Gratz*, 539 at 272–73.

147. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 703 (2007).

148. *Id.* at 703–04.

149. *Id.* at 703. Assuming two candidates were alike in all other factors, race would be the tipping point for deciding who got their choice of assignment. *Id.* at 703–04.

150. *See Gratz*, 539 U.S. at 270.

151. Grutter v. Bollinger, 539 U.S. 306, 334–45 (2003).

152. *Gratz*, 539 U.S. at 270.

another based on race.[153] Therefore, the admissions policy in *Gratz* clearly labeled students based on race and gave their race a concrete value.[154]

This issue, perhaps more than any other, was at the core of Justice Kennedy's concurrence in *Parents Involved in Community Schools*.[155] Justice Kennedy wrote that "[u]nder our Constitution the individual, child or adult, can find his own identity, can define his own persona, without state intervention that classifies on the basis of his race or the color of her skin."[156] He went on to express concern that "[c]rude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand."[157] This evocative language underscores Justice Kennedy's serious apprehensions regarding the effects of racial labeling on an individual's identity.

Thus, these three concerns: (1) mechanical application without individual consideration, (2) race as a determinative factor, and (3) the effects of labeling students based on their race, are at the heart of the Court's objections to various affirmative action plans. Therefore, for an affirmative action plan to be sufficiently narrowly tailored, it likely must first contend with and satisfy these concerns.

C. Facially Neutral Affirmative Action Under Strict Scrutiny

Professor Forde-Mazrui discussed facially neutral affirmative action plans in the wake of *Hopwood*.[158] Writing before the *Grutter* decision, Forde-Mazrui proposed that "race-neutral affirmative action" might satisfy the compelling government purpose of remedying past discrimination.[159] The Supreme Court's holding in *Grutter*, however, shows this is a likely losing argument.[160]

Nonetheless, *Grutter* and *Parents Involved in Community Schools* provide two alternative compelling interests that are served by percentage plans. In *Grutter*, racial diversity for the purpose of maintaining a diverse student body is found to be a compelling government interest that warrants racial classification.[161] Similarly, Justice Kennedy's concurrence in *Parents Involved in Community Schools* strongly suggests that a majority of the Court would find that "avoiding racial isolation" is a

153. The applicant who initially challenged the University of Michigan's undergraduate admissions demonstrated that if he had been a member of a minority group, he would have been accepted. *See id.* at 262.

154. *See id.* at 270.

155. Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1 551 U.S. 701, 796–97 (2007) (Kennedy, J., concurring).

156. *Id.* at 797.

157. *Id.* at 798.

158. Forde-Mazrui, *supra* note 118, at 2332–34.

159. *Id.* at 2364.

160. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (stating that remedying past discrimination is not a compelling interest in higher education).

161. *See supra* text accompanying notes 123–126.

compelling interest that is served by affirmative action in education.[162] Given that percentage plans were adopted to maintain diversity in higher education,[163] it is unlikely the Court would have difficulty finding that percentage plans serve recognized compelling state interests.

In contrast, percentage plans are strained to satisfy the narrow tailoring requirement of strict scrutiny. As Justice O'Connor wrote, "The purpose of the narrow tailoring requirement is to ensure that the means chosen fit . . . so closely that there is little or no possibility that the motive . . . was illegitimate racial prejudice or stereotype."[164] In order to satisfy narrow tailoring, percentage plans must address the various concerns that arose from previous college admission schemes.[165]

1. Mechanical Nature of Percentage Plans

In *Gratz*, the Court held that the mechanized application of the University of Michigan's undergraduate admissions policy was impermissible.[166] The Court noted that the program did not provide individualized consideration and awarded the same number of points to every minority applicant.[167]

Similarly, the Texas Rule is completely mechanical. Any students who finish within the top ten percent of their high school class gain automatic admission to the state university of their choice.[168] In contrast, an applicant outside of the top ten percent would never get any individualized consideration unless there were remaining seats available.[169] This would make percentage plans less narrowly tailored than even *Gratz*, given that if a student qualifies for the plan, no other individualized consideration occurs.[170]

It is possible, however, that percentage plans are not mechanical in the way that has traditionally concerned the Court. Given the overwhelming number of applications universities receive each year,[171] most admissions programs likely involve some mechanical point allocation based on high school grade point average and standardized admission

162. *See supra* text accompanying notes 127–130.

163. *See supra* Part II.C.

164. *See Grutter*, 539 U.S. at 333 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)(quotation marks omitted)).

165. *See supra* Part III.B.2.

166. *See* Gratz v. Bollinger, 539 U.S. 244, 270, 275–76 (2003).

167. *Id.* at 271.

168. TEX. EDUC. CODE ANN. § 51.803(a) (West 2011).

169. At the University of Texas at Austin, as many as eighty-five percent of incoming freshman were admitted under the Texas Rule. *See supra* notes 86–87 and accompanying text.

170. In comparison, percentage plans base admission on a single criterion, excluding considerate of test scores, personal statement, and background. *Cf. Gratz*, 539 U.S. at 270–72. The admissions policy in *Gratz* also included a review board that could examine individual qualifications, which provided more individualized consideration. *Id.* at 273–74.

171. *See, e.g.*, *id.* at 275.

test scores. Ostensibly, percentage plans are mechanical in exactly the same way, giving automatic and conclusive weight to high school class rank. Given that class rank is not itself a racial factor, and percentage plans mechanically accept or reject minority and nonminority applicants alike, it is possible that percentage plans are not mechanical strictly on the basis of race.

This argument belies the fact that percentage plans are still mechanical for a racial purpose.[172] Justice O'Connor expressed this concern, writing that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[173] Given that the narrow tailoring inquiry would only arise after a court had determined that percentage plans were subject to strict scrutiny, it is unlikely a court would be convinced that the application of percentage plans was nonmechanical just because it appeared facially neutral.

2. Percentage Plans As Determinative in Admissions

Percentage plans may not be narrowly tailored when they engulf all admission decisions to ensure the acceptance of a few groups.[174] While percentage plans have succeeded in increasing minority enrollment,[175] they can have the concurrent effect of determining the admission decisions for the majority of applicants.[176] Like Chief Justice Rehnquist's example, an applicant whose artistic ability "rivaled that of Monet or Picasso" could be rejected if their class rank fell outside a given percentage.[177]

A major distinction, however, is that under percentage plans it is not the applicant's race that is determinative. While gifted artists may be denied admission,[178] those who qualify under a percentage plan would be admitted not because of their race, but because of their class rank. This is distinguishable from Chief Justice Rehnquist's concern in *Gratz*.[179] Percentage plans do not accept "every minimally qualified underrepresented minority applicant" based on race[180] but rather accept every minimally qualified minority and nonminority applicant based on class rank. In fact, a gifted minority painter would be subject to the same rejection if their class rank fell outside a given percentage. Even if unfairly deter-

172. *See supra* Part III.A.
173. Grutter v. Bollinger, 539 U.S. 306, 340 (2003).
174. *See supra* notes 86–87 and accompanying text.
175. *See* Long et al., *supra* note 8, at 89–90.
176. Among nonsuspect applicants, percentage plans are still determinative. For example, a white male applicant may lose a seat to another white male applicant based purely on class ranking, even when one may have better test scores or bring some other element of diversity.
177. *See supra* notes 144–145 and accompanying text.
178. *See supra* notes 144–145 and accompanying text.
179. *See supra* notes 144–145 and accompanying text.
180. *See* Gratz v. Bollinger, 539 U.S. 244, 272 (2003).

minative, percentage plans are unfairly determinative on a neutral basis. While a court may think that the weight given to class rank is unwise, it is unlikely to overturn a nonsuspect factor simply because it is not one that the court would have chosen.[181]

3. Percentage Plans Avoid Racial Labeling

Possibly the greatest benefit percentage plans have over other affirmative action admissions policies is that they avoid direct labeling. When considering whether a student qualifies for admission, a percentage plan would not acknowledge an applicant's race. The mechanical nature of percentage plans allows students to be accepted or denied without reference ever being given to them as a member of a particular group. A white applicant who was denied admissions could not point to a less qualified minority applicant who was accepted under a percentage plan because there would be any number of white applicants accepted for the same reason.[182] Percentage plans do not even need to rank those students they admit because admission would be automatic, and thus no student could claim that another was admitted because of his or her race.

In this way, percentage plans may alleviate many of Justice Kennedy's concerns about labeling individuals.[183] Under percentage plans, students are labeled by their high school performance and not their race. While the underlying policy justification for percentage plans may have a racial component,[184] individual students would not be harmed by being labeled and traded as members of a given race.[185] In fact, no students admitted under a percentage plan would have reason to believe that anything other than their high school performance secured their admissions.

This security in knowing that each individual is measured by his or her own accomplishments and not by his or her associations may encourage a student to "find his own identity" and "define her own persona" free from government-imposed racial labels.[186]

Thus, it is unclear whether percentage plans are narrowly tailored. While they are extremely mechanical in application,[187] they do not make race a determinative factor[188] and avoid the problem of labeling individu-

181. Courts typically defer to colleges and universities about what are important qualifications when making admissions decisions. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

182. In contrast, the white applicant in *Gratz* could clearly show that he would have been admitted had he been a minority. *See* 539 U.S. at 262.

183. *See supra* text accompanying notes 154–156.

184. *See supra* Part III.A.

185. This is in contrast to the admissions policies in *Parents Involved in Community Schools* which "reduce children to racial chits valued and traded according to one school's supply and another's demand." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring).

186. *See id.* at 797–98.

187. *See supra* Part III.C.1.

188. *See supra* Part III.C.2.

al applicants.[189] Each of the Justices may weigh the importance of these factors differently. Even Justice Kennedy, who would likely be the swing vote, showed disdain for "mechanical formula[s]"[190] but appeared very concerned about the impact of labeling.[191] Given that the costs and benefits of percentage plans weigh differently for these two concerns, it is difficult to surmise whether Justice Kennedy would hold that percentage plans are narrowly tailored.

D. Percentage Plans As Race-Conscious Government Action

Despite their uncertainty under strict scrutiny, percentage plans may be the first racially motivated government action to qualify for an intermediate standard of scrutiny. Percentage plans are potentially clear examples of "race-conscious" government action, ushering in a new standard for government programs aimed at alleviating racial disparities.

1. Intermediate Review for Race-Conscious Government Action

Justice Kennedy has indicated that he is open to treating government action aimed at benefiting minorities under less than strict scrutiny so long as it does not "tell[] each student he or she is to be defined by race."[192] Justice Kennedy's concern appears closely tied to the notion that benign classifications still carry the badge of inferiority.[193] When is such a program "race-conscious" without crossing the line into harmful labeling?

Justice Kennedy gave some insight into what he considered acceptable "race conscious" alternatives.[194] Justice Kennedy wrote that "[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means . . . ."[195] Justice Kennedy states that a program's effect on race should be discussed "with candor and with confidence that a *constitutional violation does not occur*" whenever a decision maker considers the impact on race.[196] By that rationale, schools can openly discuss concerns over racial diversity and impacts on segregation as long as the methods employed do not specifically label students.[197]

Some scholars have concluded that Justice Kennedy's concurrence is merely "consistent with the rule that government action always triggers

189. *See supra* Part III.C.3.
190. *See supra* notes 139–141 and accompanying text.
191. *See supra* notes 154–156 and accompanying text.
192. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).
193. *Compare id.* at 789, *with* Forde-Mazrui, *supra* note 118, at 2354–55.
194. *Parents Involved in Cmty. Sch.*, 551 U.S. at 788–89 (Kennedy, J., concurring).
195. *Id.* at 789.
196. *Id.* (emphasis added).
197. *See id.*

strict scrutiny when a primary motivating factor is based on discrimination by race."[198] This analysis is based on Justice Kennedy's reference to *Bush v. Vera*, which critics take to imply an adoption of the "predominant motivation standard."[199] While Justice Kennedy does reference *Vera* in his concurrence, he does not mention the predominant motivation standard in his analysis.[200] In fact, Justice Kennedy states that "[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through" race-conscious methods.[201] Justice Kennedy's list of acceptable methods, including "recruiting students and faculty in a targeted fashion," would almost certainly be predominantly motivated by race.[202] Justice Kennedy put much more emphasis on "different treatment" of individual students than on overall motivations, which indicates he was not merely advocating the *Vera* standard.[203]

2. Applicability to Percentage Plans

Under an intermediate standard, percentage plans would not be subject to strict scrutiny merely because policy makers adopted them for the purpose of achieving higher diversity. Justice Kennedy did not, however, reference percentage plans as an example of acceptable race-conscious government action.[204] In order to satisfy Justice Kennedy, percentage plans must first establish that they are race conscious and not a racial classification.[205]

Nonetheless, percentage plans likely do qualify as race-conscious government action that does not cross into suspect classification. Given that percentage plans do not label students on the basis of race, it is unlikely that students will feel they are "defined by race."[206] Under percentage plans, applicants would know that it is their class rank, not their membership in a racial group, which gained them admission to college. Thus, students would be secure in the knowledge that personal achievement, and not race, was the reason they were granted or denied admission.[207]

198. George La Noue & Kenneth L. Marcus, *"Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 CATH. U. L. REV. 991, 10–13 (2008).

199. *Id.*(internal quotation marks omitted); *see supra* notes 105–109 and accompanying text.

200. *See Parents Involved in Cmty. Sch.*, 551 U.S. at 789 (Kennedy, J., concurring).

201. *Id.* at 789–90.

202. *Id.* at 789. Racial hiring and recruiting goals would be similar to proposed hiring goals in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282–83 (1986).

203. *Compare Parents Involved in Cmty. Sch.*, 551 U.S. at 789 (Kennedy, J., concurring), *with* La Noue & Marcus, *supra* note 198, at 1012–13.

204. *See Parents Involved in Cmty. Sch.*, 551 U.S. at 789 (Kennedy, J., concurring).

205. *See id.* at 783–84.

206. *See* TEX. EDUC. CODE ANN. § 51.803 (West 2011); *Parents Involved in Cmty. Sch.*, 551 U.S. at 789 (Kennedy, J., concurring).

207. *See supra* notes 182–185 and accompanying text.

Even policy makers' open discussion of a percentage plan's purpose of maintaining diversity[208] would not make the plan invalid. According to Justice Kennedy, open and frank discussions of impacts on race should be permitted, if not encouraged.[209] This would allow policy makers to openly examine the effects of percentage plans on college diversity and more accurately fine-tune policies to achieve various goals.

Reading Justice Kennedy's concurrence suggests that a challenge to percentage plans may create a new majority within the Court.[210] Justices Breyer and Ginsburg have expressed their approval of less restrictive scrutiny for "policies of . . . inclusion."[211] Assuming Justices Sotomayor and Kagan could be brought on board,[212] the five member majority could approve intermediate scrutiny for "race-conscious" government action.[213]

IV. RECOMMENDATION

Percentage plans provide a viable example of what Justice Kennedy described as race-conscious government action.[214] This Part recommends the adoption of an intermediate standard of review for race-conscious policies similar to the standard for gender classification. Finally, this Part addresses various criticisms leveled at the effectiveness of percentage plans.

Opponents of percentage plans have a cognizable and even compelling equal protection claim. Percentage plans run afoul of much of the Supreme Court's precedents regarding racial classifications benefiting minorities.[215] The Court could not reasonably be persuaded that percentage plans are race neutral. The history behind their adoption clearly shows that the California, Florida, and Texas plans were reactions to various executive, legislative, and judicial restrictions on affirmative action.[216]

Each plan was an attempt to maintain racial diversity in higher public education.[217] State legislators openly discussed the racial purpose behind the adoption of percentage plans and their motivations are part of the public record.[218] This overwhelming evidence shows that race was a

208. *See supra* Part III.A.

209. *See supra* text accompanying notes 193–195.

210. *See Parents Involved in Cmty. Sch.*, 551 U.S. at 789–90 (Kennedy, J., concurring); *see also supra* note 66 and accompanying text.

211. *See* Gratz v. Bollinger, 539 U.S. 244, 299 (2003) (Ginsburg, J. dissenting, joined by Breyer, J. and Souter, J.).

212. *See supra* notes 66–67 and accompanying text.

213. The new majority would include Justices Kennedy, Breyer, Ginsburg, Sotomayor, and Kagan. *See also supra* notes 66–67 and accompanying text.

214. *See supra* Part III.D.2.

215. *See supra* Parts III.A, III.C.

216. *See* Shea, *supra* note 6, at 606–14; *see also supra* Part III.A.

217. Shea, *supra* note 6, at 606–14.

218. *See supra* Part III.A.

"motivating factor" in the adoption of percentage plans and thus they likely fail the most forgiving application of the factors in *Village of Arlington Heights*.[219] Nonetheless, percentage plans have a reasonable chance of surviving strict scrutiny.[220] More importantly, percentage plans may be among the first examples of race-conscious legislation to receive an intermediate standard of review.[221]

A. Adopting an Intermediate Standard

In order for the government to realistically grapple with the persistent issue of racial disparity, the Supreme Court should adopt an intermediate standard when reviewing percentage plans. Justice Kennedy's concurrence eloquently describes the government's "moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all."[222] In order to allow governments to seek the most effective race-conscious means, lawmakers should be allowed to openly discuss how various actions may foster or hinder progress towards an integrated society. Moreover, lawmakers should be allowed to have those discussions confident in the fact that their decisions will not be subject to the most stringent of judicial reviews.

Even though strict scrutiny may not be "fatal in fact," proving a compelling interest and narrow tailoring places too high a burden on governments when they adopt facially neutral affirmative action programs.[223] While percentage plans may survive strict scrutiny,[224] other race-conscious programs may face a more difficult road.[225]

Moreover, the costs associated with surviving strict scrutiny challenges may deter many lawmakers from openly deliberating race-conscious programs. Lawmakers may be forced to avoid public discussion of racial impact, relying on their assumptions and intuitions rather than actual information or frank discussions.[226] In this way, strict scrutiny likely fosters a more costly form of race-conscious government action as lawmakers would be making race-conscious decisions based on inaccurate information.

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219. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–70 (1927); *see also supra* Part III.A.

220. *See supra* Part III.C.

221. *See supra* Part III.D.

222. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring).

223. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003); *see also supra* Part III.B.

224. *See supra* Part III.C.

225. For example, race-conscious hiring decisions may fail strict scrutiny because the Court may be less willing to recognize diversity in the workplace as a compelling government interest.

226. *See Parents Involved in Cmty. Sch.*, 551 U.S. at 789 (Kennedy, J., concurring).

Nonetheless, percentage plans should be subject to some heightened scrutiny. It is unlikely that any Justice would recommend applying rational basis review to a program so clearly motivated by racial concerns.[227] Given that race is a fundamental suspect classification that was at the heart of the adoption of the Fourteenth Amendment,[228] no racially motivated state action, benign or otherwise, should escape some heightened standard of review.[229]

Therefore, the Court should adopt the intermediate standard implied in Justice Kennedy's concurrence in *Parents Involved in Community Schools*.[230] Under this new category of judicial review, government action which is race conscious without explicitly labeling individuals based on their race should be subject to intermediate scrutiny. The Court could model a workable test based around precedents involving gender classification.[231] This intermediate standard would require the government to show that its decisions "serve important governmental objectives" and are "substantially related to achievement of those objectives."[232]

This two-prong approach, like strict scrutiny, would place the initial burden on the government to prove that its action is constitutional.[233] The government, however, would not be limited to the most narrow and constrained means when attempting to satisfy important objectives.[234] Lawmakers would be able to tailor their race-conscious decisions to coincide with other considerations of public policy. Thus, an intermediate standard would allow important race-conscious objectives to be achieved without sacrificing other legitimate public concerns.

Critics may claim that race is such a "highly suspect tool" that race-conscious decisions necessitate strict scrutiny in order to "'smoke out' illegitimate uses."[235] This argument is flawed, however, because an inter-

227. Even Justice Ginsburg has stated that while benign classifications should not be held to strict scrutiny, the Court "should not immunize a race-conscious measure from careful judicial inspection." Gratz v. Bollinger, 539 U.S. 244, 301–02 (2003) (Ginsburg, J., dissenting).

228. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

229. "Close review is needed 'to ferret out classifications in reality malign, but masquerading as benign' and to 'ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups.'" *Gratz*, 539 U.S. at 301–02 (Ginsburg, J., dissenting) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 275–76 (1995) (Ginsburg, J., dissenting)).

230. *See supra* Part III.D.

231. *See*, *e.g.*, Orr v. Orr, 440 U.S. 268, 278–79 (1979); Craig v. Boren, 429 U.S. 190, 198–99 (1976).

232. *Craig*, 429 U.S. at 197.

233. *See id.* at 197–99.

234. For example, Justice Thomas suggested that if the University of Michigan Law School wanted to increase minority enrollment it must relax its admission criteria, even if it would result in the school falling in prestige. Grutter v. Bollinger, 539 U.S. 306, 361 (2003) (Thomas, J., dissenting). Schools may find that the resulting damage to prestige is too high a price to pay for diversity. Under an intermediate standard, however, a university would not be left with such extreme choices.

235. Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

mediate standard still gives courts the opportunity to screen for "illegitimate racial prejudice or stereotype."[236]

Intermediate scrutiny has proven effective in looking beyond facetious rationales to find the "actual purposes underlying a statutory scheme."[237] In *Mississippi University of Women v. Hogan*, the Supreme Court rejected the state's assertion that a nursing school's exclusion of male applicants was intended to eliminate gender disparity.[238] The Court found that the actual motivation was to "perpetuate the stereotyped view of nursing as an exclusively woman's job."[239] Thus, an intermediate standard can look beyond proffered rationales and uncover actual motivations behind government action.

This heightened scrutiny could just as effectively root out illegitimate racial motivations.[240] By examining the actual motivation behind race-conscious policy decisions, courts could determine whether lawmakers were actually striving to achieve racial diversity or merely perpetuating racial isolation. Moreover, an intermediate standard can scrutinize whether the means chosen "substantially relate to the achievement" of an important governmental interest.[241] Therefore, courts could examine whether the means chosen for race-conscious government policy actually support the achievement of integration and diversity.[242]

B. Response to Criticisms of Percentage Plans

Percentage plans have been criticized as an inadequate substitute for traditional affirmative action. These criticisms relate to the quality of results produced by percentage plans rather than their constitutionality. Assuming these criticisms have merit, percentage plans still have value as a first stride toward more refined race-conscious admissions processes.

Professors George La Noue and Kenneth L. Marcus express concern that percentage plans may be used only to achieve "racial balance, rather than the constitutionally sanctioned goal of multi-factored diversity."[243] Their article states that universities would measure the success of race-conscious programs "according to their ability to increase minority enrollment" rather than seeking a "critical mass" of minority representation.[244] The percentage plans can, however, be effective in achieving

236. *See id.*
237. *E.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982).
238. *Id.* at 729–31.
239. *Id.* at 729.
240. For example, the discriminatory practice in *Yick Wo* would have failed intermediate scrutiny because a court would recognize the actual discriminatory intent behind the facially neutral ordinance. *Compare* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886), *with Miss. Univ. for Women*, 458 U.S. at 729–31 (1982).
241. Craig v. Boren, 429 U.S. 190, 197–99 (1976).
242. *See id.*
243. La Noue & Marcus, *supra* note 198, at 1015–16.
244. *See id.* at 1016.

more than just racial diversity. By fostering admissions from high schools across the state, the Texas Rule has achieved increases in racial, geographic, and socioeconomic diversity.[245]

Additionally, critics claim that the "very success [of percentage plans] to produce a diverse student body depends on continuing de facto segregation of Texas high schools."[246] This criticism claims that percentage plans exploit the poor public education in urban areas to "ensure diversity on college campuses while doing nothing to improve the quality of secondary education."[247] This argument assumes, however, that percentage plans in higher education would be done at the exclusion of race-conscious alternatives in primary and secondary schools. If the Court is willing to adopt an intermediate standard of review, school districts and state legislatures would be free to adopt race-conscious programs like those suggested by Justice Kennedy to improve primary and secondary education.[248]

Finally, percentage plans are criticized as overwhelming the admissions process and preventing otherwise desirable minority and nonminority applicants from gaining admissions.[249] This "displacement effect," however, can be countered by a more targeted race-conscious approach.[250] For example, universities may find that by restricting percentage plans to applicants from underrepresented school districts or urban areas they can maintain desired racial diversity while freeing up more seats to the general application process.[251]

The constitutionality of percentage plans offers more than just an effective means of increasing racial diversity in higher education. By creating a test case for the application of a less-stringent race-conscious standard, percentage plans could be among the first steps towards a new, more open dialogue about race in government programs. Given the chance, the Supreme Court should use percentage plans as an opportunity to embrace this intermediate standard.

245. Long et al., *supra* note 8, at 101–02.

246. Shea, *supra* note 6, at 614–15 (citation omitted).

247. *Id.*

248. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).

249. *See* Shea, *supra* note 6, at 615–16; *see also supra* notes 86–87 and accompanying text.

250. *See* Shea, *supra* note 6, at 615–16.

251. Universities may find that they are overrepresented by students from suburban school districts at the expense of inner-city schools and could alter percentage plans to accept a larger percent from high schools in urban centers while decreasing the percentage of automatically accepted suburban students. This could possibly decrease the overall percentage of students admitted through percentage plans but maintain racial and socioeconomic diversity.

V. CONCLUSION

Facially neutral affirmative action should be the next step in equal protection clause jurisprudence. There is strong reason to believe that a majority of the Supreme Court would support a new intermediate level of scrutiny for benign "race-conscious" government action. If correct, this new standard could allow large educational institutions to achieve diversity in more cost-efficient ways. Moreover, this could signal that other government action, such as public contracting and economic developments, may be able to more openly discuss goals of integration and equality. Given the opportunity, courts should use a challenge to percentage plans as a chance to adopt a more flexible, workable approach for race-conscious government action.