

RACING TO NEUTRALITY: HOW RACE-NEUTRAL ADMISSIONS PROGRAMS THREATEN THE FUTURE USE OF RACE-BASED AFFIRMATIVE ACTION IN HIGHER EDUCATION

Comment*

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* [Editor’s Note: This Comment was written prior to the passing of Justice Scalia and the United States Supreme Court’s decision in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016)].

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I. MISSING THE MARK: AN INTRODUCTION

As Natasha Scott, a half Asian, half African-American high school senior, began filling out college applications, she found herself in a personal predicament—which racial box does she check?¹ Does she deny her Asian heritage, with which she identifies, so as to look more appealing to college admissions?² Or, does she proudly claim her Asian identity, or perhaps even both ethnicities, knowing that it could hinder her chances of acceptance?³ Questioning the morality of her decision, she sought advice from an online message board regarding college admissions.⁴ Hesitantly, she wrote,

I just realized that my race is something I have to think about It pains me to say this, but putting down black might help my admissions chances and putting down Asian might hurt it.
. . . I sort of want to do this but I'm wondering if this is morally right.⁵

Understanding the reality of today's world, it is no surprise that every board commenter, and even her own Asian mother, advised her to choose "black."⁶ Following their advice, she checked only the black box and landed

1. Susan Saulny & Jacques Steinberg, *On College Forms, a Question of Race, or Races, Can Perplex*, N.Y. TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/us/14admissions.html>.

2. RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 185 (2012) ("Checking 'black' versus 'Asian' could easily mean the difference between getting into a 5th-ranked or 105th-ranked college.").

3. *Id.*

4. Saulny & Steinberg, *supra* note 1.

5. *Id.*

6. *Id.*

an offer from a prestigious university.⁷ She admitted, however, feeling guilty for her decision because she purposely denied half of her identity to help her chances of getting into college.⁸

Natasha's moral dilemma, experienced by many others in her position, is a consequence of race-based affirmative action—a movement that began with admirable and worthy intentions but has since lost its way.⁹ Affirmative action in higher education began as a noble program, focusing on racial integration and fostering equal opportunities for disadvantaged minorities—people like the “young Sonia Sotomayor, who grew up in public housing, and the young Michelle Obama, whose parents did not go to college.”¹⁰ Over the decades, however, the program has devolved into a system that gives preferential treatment based on race to reach arbitrary levels of racial diversity within student bodies.¹¹ While opponents and supporters alike commonly agree that racial and ethnic diversity is a desirable goal, the greater part of the problem lies within the means through which universities generate diversity.¹²

Nonetheless, knowing that for decades universities have relied on race-based affirmative action programs to produce a diverse student body, applicants cannot be blamed for seizing every opportunity to gain an admissions boost to secure a spot at their desired college.¹³ Yet, rather than applicants feeling as though they are taking advantage of the system or questioning whether universities only accepted them because they belong to certain racial groups, universities should be the ones doing the self-reflecting. Universities should be evaluating their own admissions programs to determine the adverse consequences of using race-based affirmative action. Furthermore, universities should explore whether race-neutral alternatives could ensure diversity within their student bodies and should strongly consider the long-term benefits that accompany those alternatives.

This Comment considers race-based affirmative action in higher education and the legal and political challenges the controversial policy continues to face.¹⁴ Specifically, this Comment illustrates that there are

7. *Id.*

8. *Id.*

9. See SANDER & TAYLOR, *supra* note 2, at 3; Susan Saulny & Jacques Steinberg, *Mixed-Race Students Wonder How Many Boxes to Check*, N.Y. TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/us/14students.html> (explaining that multiracial students wonder whether universities will perceive their answer to the race question on applications as gamesmanship or a reflection of reality).

10. Richard D. Kahlenberg, *The Future of Affirmative Action*, ATLANTIC (Dec. 8, 2015), <http://www.theatlantic.com/education/archive/2015/12/class-based-affirmative-action/419307/>; accord SANDER & TAYLOR, *supra* note 2, at 3.

11. SANDER & TAYLOR, *supra* note 2, at 3. By the 1980s, colleges and universities admitted more than 75% of African-American students through racial preferences. *Id.* at 16.

12. Kahlenberg, *supra* note 10.

13. See *id.* (“Underrepresented minority students receive a 28-percentage-point boost in their chances of being admitted.”)

14. See discussion *infra* Parts II–VI.

viable and successful race-neutral admissions alternatives whose effectiveness threaten to eliminate the future use of race-based affirmative action.¹⁵ Part II briefly focuses on the historical background and legal decisions that have attempted to shape the application of race-based affirmative action programs. Part III examines the history of affirmative action in Texas, from the courts to the Legislature, leading to the most current challenge—*Fisher v. University of Texas at Austin*. Next, Part IV discusses the movement by various states taking the initiative to ban race-based affirmative action, followed by the race-neutral programs that universities have implemented while also analyzing the effects those programs have on creating racial diversity. Part V recommends that universities that continue to use race in admissions get a head start by developing race-neutral alternative means to achieve diversity and considers the positive long-term benefits of implementing such alternatives.

II. NO SHORTCUTS ALLOWED: HOW AFFIRMATIVE ACTION PROGRAMS VEERED OFF COURSE

A. *Starting on the Right Track: The Executive Branch's Role in Creating Affirmative Action*

The phrase “affirmative action” originated in 1961 when President John F. Kennedy directed government-funded employers to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”¹⁶ In an effort to level the playing field, President Kennedy intended to promote fair employment and equal opportunities for underprivileged minorities by urging employers to avoid discriminating in the workplace.¹⁷ In the years following, President Lyndon B. Johnson signed the Civil Rights Act into law, prohibiting discrimination on the basis of race, color, or national

15. See discussion *infra* Parts II–VI.

16. Exec. Order No. 10,925, 3 C.F.R. 448 (1956–1963); see also Judson MacLaury, *President Kennedy's E.O. 10925: Seedbed of Affirmative Action*, FED. HIST. J. 42, 42 (2010), http://shfg.org/shfg/wp-content/uploads/2011/01/4-MacLaury-design4-new_Layout-1.pdf (discussing the history and progression of President Kennedy's Executive Order). On the same day President Kennedy announced his Order, Arthur Goldberg, the Secretary of Labor and Vice Chair of the President's Committee on Equal Employment Opportunity, issued a memo to the Department of Labor stating he intended to give minority groups the opportunity to work within the Department. MacLaury, *supra*, at 45–46. Fearing that employers might deprive qualified white students of certain job opportunities if affirmative action was “improperly implemented, Goldberg stressed that the department would follow the same staffing procedures, and qualify [the black students] in the same examinations or evaluations as others seeking employment or promotion” because “[t]o do otherwise would in itself be a form of discrimination.” *Id.* at 46.

17. See *id.* at 42–44 (explaining that President Kennedy's Executive Order, rather than prohibiting discrimination, provided little direction beyond the requirement of “taking the initiative” to help the disadvantaged).

origin.¹⁸ President Johnson then enforced affirmative action in the workplace by requiring government contractors to increase employment opportunities for prospective minority employees.¹⁹ If the government contractor did not comply with the nondiscriminatory hiring and employment procedures, the contractor lost its contract and was declared ineligible for further government contracts.²⁰ Shortly after the government required employers to take affirmative action in hiring decisions instead of bypassing traditionally disadvantaged groups, many universities also began adopting affirmative action programs to create opportunities and jump-start diversity within their student bodies.²¹ It was not long, however, before these admissions programs faced legal challenges after students began questioning whether giving preferences based on race amounted to discrimination in admissions.²²

B. Coaching the Participants: Affirmative Action in the Judiciary

In the late 1970s, the United States Supreme Court began a quarter-century long tradition of addressing the pressing issues of race-based affirmative action policies in a number of critical cases, beginning with *Regents of the University of California v. Bakke*.²³ The controversial decision allowing universities to consider race in admissions hung by a thread until 2003 when the Court, in *Grutter v. Bollinger*, affirmed *Bakke*'s holding that a university's interest in achieving diversity justifies affirmative action.²⁴ On the same day, however, the Court, in *Gratz v. Bollinger*, invalidated an affirmative action program that failed to individually consider each applicant.²⁵ These decisions, while attempting to solve the persistent legal challenges, left many unanswered questions regarding the creation and application of race-based affirmative action programs in institutions of higher education.²⁶ To better understand the Court's decisions regarding affirmative

18. Borgna Brunner & Beth Rowen, *Timeline of Affirmative Action Milestones*, INFOPLEASE, <http://www.infoplease.com/spot/affirmativetimeline1.html> (last visited Oct. 31, 2016).

19. See *id.*; Exec. Order No. 11,246, 3 C.F.R. 167 (Supp. 1965).

20. See Exec. Order No. 11,246, 3 C.F.R. 167.

21. See SANDER & TAYLOR, *supra* note 2, at 3.

22. See discussion *infra* Section II.B.

23. See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

24. See *Grutter*, 539 U.S. at 335–36; *Bakke*, 438 U.S. at 290–91, 314–15.

25. See *Gratz*, 539 U.S. at 275–76.

26. See Luiz Antonio Salazar Arroyo, *Tailoring the Narrow Tailoring Requirement in the Supreme Court's Affirmative Action Cases*, 58 CLEV. ST. L. REV. 649, 651–52 (2010) (discussing the Court's challenges in defining the scope of the strict scrutiny test's narrow tailoring requirement, which all affirmative action programs must satisfy); Shira Galinsky, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in Grutter and Gratz and Beyond*, 7 N.Y. CITY L. REV. 357, 373 (2004) (stating that the Court's decisions resulted in an incomplete discussion of affirmative action).

action programs, it is important to first examine the legal principles that the Court used in framing its decisions.²⁷

1. *The Equal Protection Clause*

The biggest challenge to race-based affirmative action programs lies within the Equal Protection Clause of the Fourteenth Amendment.²⁸ The Equal Protection Clause states that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²⁹ More specifically, the Equal Protection Clause prohibits government actions that impermissibly distinguish between different classes (e.g., races) of persons.³⁰ Although the Equal Protection Clause was initially created to abolish racial discrimination, the framers wrote the Clause in general terms; thus, it applies to all “persons.”³¹ In effect, “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”³² As a result, courts subject all race-based classifications to the same standard of review under the Equal Protection Clause regardless of which race the government’s program benefits or burdens.³³ After initially struggling with what standard of review courts should use to examine race-based affirmative action programs, in 1989, the Supreme Court declared that because “[c]lassifications based on race carry a danger of stigmatic harm,” all race-based classifications must survive strict judicial scrutiny.³⁴

27. Scott Warner et al., *The U.S. Supreme Court’s Decision in Fisher v. University of Texas at Austin: What It Tells Us (and Doesn’t Tell Us) About the Consideration of Race in College and University Admissions and Other Contexts*, 60 FED. LAW., Aug. 2013, at 48, 50.

28. See, e.g., *Gratz*, 539 U.S. at 252; *Grutter*, 539 U.S. at 317; *Bakke*, 438 U.S. at 277–78 (all cases in which plaintiffs challenged race-conscious admissions programs on equal protection grounds).

29. U.S. CONST. amend. XIV, § 1.

30. Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context That Matters*, 82 WASH. L. REV. 897, 930 (2007).

31. See Arroyo, *supra* note 26, at 656 (explaining that the Equal Protection Clause applies equally to all races); Lloyd Peake & John Sealander, *Societal Impact Reports: The Paradox of Legalized Inequality and a Revised Context for Race Based Affirmative Action*, 29 W. ST. U. L. REV. 57, 60 (2001) (discussing the reasoning behind the Fourteenth Amendment).

32. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229–30 (1995).

33. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (determining which standard of review courts should apply to race-based classifications); Arroyo, *supra* note 26, at 656; see also *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying the “most rigid scrutiny” to strike down the laws that banned interracial marriage).

34. *J.A. Croson Co.*, 488 U.S. at 493–94; accord Galinsky, *supra* note 26, at 358 (noting that after initial uncertainty, the Court decided strict scrutiny was the correct test); Reginald Oh, *Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305, 1317 (2004) (“[T]he Court had been sharply divided over what standard of review to use to examine the constitutionality of affirmative action programs.”); John Cocchi Day, Comment, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CALIF. L. REV. 59, 62 (2001) (explaining that the Court inconsistently grappled with the issue for over a decade).

2. *Strict Scrutiny*

To survive strict scrutiny, universities have the burden of demonstrating that their affirmative action programs are narrowly tailored with the purpose of advancing a compelling governmental interest.³⁵ The purpose of the rigid standard is to prevent “illegitimate uses of race by assuring that the [university] is pursuing a goal important enough to warrant use of a highly suspect tool.”³⁶ The strict scrutiny test essentially involves two considerations: whether the governmental action actually serves a compelling interest, and if it does advance that interest, whether an alternative or less suspect classification would work to serve the compelling interest.³⁷ If there is a less restrictive alternative, the racial classification is not narrowly tailored to achieve its goal.³⁸ In applying both prongs of the test, the Supreme Court is often strongly divided when determining whether universities can satisfy the heavy burden of proving that their race-based affirmative action programs satisfy strict scrutiny.³⁹

In examining the first prong of the test, courts have generally held that a university’s goal of achieving a diverse student body satisfies the compelling interest requirement.⁴⁰ It is in the second prong—narrow tailoring—in which most issues arise.⁴¹ To be narrowly tailored, the means of achieving the compelling governmental interest must be “precisely tailored” or “necessary.”⁴² A look at the crucial cases surrounding race-based affirmative action programs evidences the uncertainty and polarizing opinions that result when applying the strict scrutiny test’s narrowly tailored requirement.⁴³

35. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Pena*, 515 U.S. at 227.

36. *J.A. Croson Co.*, 488 U.S. at 493.

37. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326 (2007).

38. *Id.*

39. Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 78 (1986).

40. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (holding that “the interest of diversity is compelling in the context of a university’s admissions program”). *But see* *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that remedying the effects of past racial discrimination is the only compelling governmental interest to satisfy strict judicial scrutiny).

41. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003) (determining whether awarding twenty extra points to minorities during admissions was narrowly tailored); *Bakke*, 438 U.S. at 317–19 (discussing whether the use of strict racial quotas was narrowly tailored); see also Arroyo, *supra* note 26, at 651 (stating that the Court has been unclear in describing the narrow tailoring requirement).

42. Arroyo, *supra* note 26, at 654. Justice Powell, in *Bakke*, used the phrase “precisely tailored” to refer to the second prong of the strict scrutiny test. *Bakke*, 438 U.S. at 299. In 1980, the Court began using the words “narrowly tailored” rather than “necessary.” Arroyo, *supra* note 26, at 655–56.

43. See discussion *infra* Section II.C.

C. Photo Finishes: Crucial Decisions Regarding Race-Based Affirmative Action in College Admissions

1. Regents of the University of California v. Bakke

In the United States Supreme Court's landmark decision regarding race-based affirmative action, *Regents of the University of California v. Bakke*, a divided Court determined the university's race-conscious program was constitutional but ultimately held that the use of strict racial quotas was impermissible.⁴⁴ The case began when the University of California Davis School of Medicine denied Allan Bakke's admission twice, even though his impressive academic qualifications were substantially higher than those of minority applicants admitted under the university's affirmative action program.⁴⁵ In its admissions program, the university's medical school took a shortcut in its efforts to achieve diversity by reserving sixteen out of one hundred seats for certain racial minorities.⁴⁶ When Bakke, a white male, learned four of the reserved spots were unfilled at the time the university rejected his application, he claimed the medical school discriminated against him on the basis of his race.⁴⁷ He challenged the race-conscious program, contending that it violated both Title VI of the Federal Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.⁴⁸

The issues presented in *Bakke* sharply divided the Supreme Court and left Justice Powell with the crucial determinative vote.⁴⁹ With the Court evenly divided, Justice Powell, rather than completely joining either side, announced the judgment of the Court in his stand-alone opinion and ultimately held race could be a factor in college admissions programs provided that the program survived strict scrutiny.⁵⁰ In this particular case,

44. *Bakke*, 438 U.S. at 317–19.

45. *Id.* at 276–78. Bakke was a National Merit Scholar in high school, graduated from the University of Minnesota with a 3.51 GPA, served in Vietnam, and worked as an engineer at NASA. *Regents of the University of California v. Bakke*, BOUNDESS.COM, <https://www.boundless.com/political-science/textbooks/boundless-political-science-textbook/civil-rights-5/affirmative-action-43/regents-of-the-university-of-california-v-bakke-251-4230/> (last visited Oct. 31, 2016).

46. *Bakke*, 438 U.S. at 275. The university defined the minority groups as “‘Blacks,’ ‘Chicanos,’ ‘Asians,’ and ‘American Indians.’” *Id.* at 274.

47. *Id.* at 276–78.

48. *Id.* at 277–78. Title VI of the Federal Civil Rights Act of 1964 states, “No person in the United States 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 receiving Federal financial assistance.” 42 U.S.C. § 2000d (2016).

49. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW. PRINCIPLES AND POLICIES 752–53 (4th ed. 2011). Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens believed that the program violated the federal statute, whereas Justices Brennan, White, Marshall, and Blackmun believed that the program did not violate either the federal statute or the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 752.

50. *Bakke*, 438 U.S. at 290–91, 314–15. Justice Powell agreed with four Justices that courts must apply strict scrutiny to race-based preferences, and he also agreed with the opposing four Justices in

the university's goal of a diverse student body was a compelling interest that could justify the consideration of race in the admissions process; however, the admissions program's racial quota system did not satisfy the narrowly tailored requirement.⁵¹ By reserving a certain number of seats for racial minorities, the admissions program focused solely on ethnic diversity, making race the determinative factor.⁵² Although Justice Powell held that a university can consider race in admissions, he concluded that a university can only consider race as a *single* factor in addition to others and that race cannot "insulate the individual from comparison with all other candidates for the available seats."⁵³ In other words, the admissions program would have to give individual consideration to every applicant for each available seat, and race could not be used as an automatic denial or admittance.⁵⁴ As a result, because the university excluded Bakke from a certain number of seats, the Court held the admissions program was unconstitutional and ordered the university to admit Bakke to the Davis Medical School.⁵⁵

Producing six separate opinions, the far from unanimous decision in *Bakke* left unanswered questions and did very little to resolve the difficult issues surrounding race-based affirmative action programs.⁵⁶ Unsurprisingly, in the following decades, the debate over affirmative action continued to make its way to the highest Court.

2. Grutter v. Bollinger

In 2003, the Court, in *Grutter v. Bollinger*, barely upheld race-based affirmative action in college admissions.⁵⁷ In this case, Barbara Grutter, a white Michigan resident, applied to the University of Michigan Law School, but the school rejected her even though her grades were higher than some of

holding that a university can consider race as a single factor, which resulted in his stand-alone opinion. *Id.*

51. *Id.* at 314–15.

52. *Id.* at 307, 317–19. Justice Powell reiterated that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id.* at 307.

53. *Id.* at 317–19 (emphasis added). Justice Powell stressed that a university can consider race along with other factors, such as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." *Id.* at 317.

54. *Id.* at 307, 317–18.

55. *Id.* at 319–20.

56. See *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (acknowledging that *Bakke* produced six separate opinions); see also SANDER & TAYLOR, *supra* note 2, at 215 (discussing how Justice Powell's ban on quotas failed to impose any specific requirements that universities must follow when using racial preferences); Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 881 (1996) (explaining that universities have struggled with how to apply *Bakke*'s holding in admissions programs).

57. *Grutter*, 539 U.S. at 343–44.

the minority students who were admitted.⁵⁸ Believing the law school had discriminated against her on the basis of race, Grutter sued, arguing that the admissions policy was unconstitutional.⁵⁹ The law school claimed it did not set an impermissible strict quota (found unconstitutional in *Bakke*); rather, it aspired to achieve a diverse student body by enrolling a “critical mass” of underrepresented minorities.⁶⁰

In another closely divided decision, Justice O’Connor wrote for the 5–4 majority, concluding that the goal of attaining a critical mass of minority students did not transform the program into a quota system; thus, the program was constitutional.⁶¹ Justice O’Connor supported Justice Powell’s view in *Bakke* that pursuing diversity is a compelling governmental interest if the racial preferences are narrowly tailored to that interest.⁶² The dissent believed the majority failed to apply the strict scrutiny test because the majority did not require the university to show that its admissions program was necessary to promote the compelling interest; rather, the majority simply deferred to the school’s judgment as to whether the admissions program satisfied the test.⁶³ Moreover, the dissent stated that if the program were strictly scrutinized, the Court would have held that the law school’s program of achieving a critical mass essentially set quotas based on race, making it unconstitutional, which would have caused universities to “seriously explore race-neutral alternatives.”⁶⁴

Justice O’Connor, however, encouraged universities to seriously pursue such race-neutral alternatives and noted that race-based affirmative action programs should be limited in time to satisfy the narrow tailoring requirement.⁶⁵ Specifically, Justice O’Connor stated, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to

58. *Id.* at 316. Grutter graduated from Michigan State University with a 3.8 GPA and scored a 161 on the LSAT, placing her in the 86th percentile. *Id.*

59. *Id.* at 317. Grutter claimed the program violated the Equal Protection Clause of the Fourteenth Amendment, which forbids states from denying “to any person within its jurisdiction the equal protection of the laws.” *Id.* at 326.

60. *Id.* at 318. “[T]he concept of ‘critical mass,’ defined more or less as the ‘meaningful numbers’ of underrepresented minority students that a school needs to enroll to produce the kind of educational benefits that the government finds compelling.” Ting Wang, *Protecting Diversity in the Ivory Tower with Liability Rules*, 35 PACE L. REV. 661, 673 (2014).

61. *Grutter*, 539 U.S. at 335–36.

62. *Id.* at 333–34.

63. *Id.* at 380, 387 (Rehnquist, J., dissenting). Chief Justice Rehnquist wrote the dissenting opinion, and Justices Scalia, Kennedy, and Thomas joined. *Id.*

64. *Id.* at 394. Justice Kennedy also stated that the “concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.” *Id.* at 389.

65. *Id.* at 339–43 (majority opinion). Even the law school agreed that it would “‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.” *Id.* at 343. The law school stated that “[s]teady improvement in the quantitative credentials of the minority applicant pool will make such [race-neutral] alternatives possible.” Brief for Respondents at 34, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

further the interest [in a diverse student body] approved today.”⁶⁶ Even though the *Grutter* Court held that race-based admissions were constitutional, the Court limited the application of affirmative action programs in *Gratz*.⁶⁷

3. *Gratz v. Bollinger*

On the same day the Court decided *Grutter*, the Court revisited the narrow tailoring requirement of affirmative action in *Gratz v. Bollinger*.⁶⁸ In this case, the University of Michigan’s undergraduate admissions program used a 150-point scale to rank applicants and awarded twenty extra points to applicants from designated minority groups.⁶⁹ The university denied admission to two white Michigan residents: Jennifer Gratz, who had a 3.8 GPA and an ACT score of 25, and Patrick Hamacher, who had a 3.0 GPA and an ACT score of 28.⁷⁰ They sued, challenging the constitutionality of the undergraduate affirmative action policy.⁷¹

Unlike *Grutter*, the Court, in a 6–3 vote, held that the undergraduate admissions scoring system violated the Equal Protection Clause because it was not narrowly tailored to achieve a compelling interest in a racially diverse student body.⁷² Specifically, because the admissions program automatically gave twenty points to designated minority groups—which virtually guaranteed their admission if they met minimal standards—the program did not individually consider each applicant.⁷³ The Court stated, “Justice Powell’s opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education.”⁷⁴ Moreover, the Court indicated that the university had an alternative program it could implement at that time to provide individualized consideration, like the program upheld in *Grutter*.⁷⁵ As a result, the scoring system did not survive strict judicial scrutiny because it was not narrowly tailored.⁷⁶

66. *Grutter*, 539 U.S. at 343.

67. *See id.* at 335–36; *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003).

68. *See Gratz*, 539 U.S. at 275–76.

69. *Id.* at 255. The designated minority groups included African Americans, Hispanics, and Native Americans. *Id.* at 253–54.

70. *Id.* at 251; *see also* Pete Williams, *Gratz v. Michigan: Undergraduate Affirmative Action Program Struck Down*, NBC NEWS (June 9, 2003, 3:58 AM), <http://www.nbcnews.com/id/3071007/t/gratz-v-michigan/#.VjUhdWAVQb4> (reporting the academic credentials of Jennifer Gratz and Patrick Hamacher).

71. *Gratz*, 539 U.S. at 252.

72. *Id.* at 275.

73. *Id.* at 271–72.

74. *Id.* at 271.

75. *See id.* at 275.

76. *Id.* at 275–76.

These three decisions—*Bakke*, *Gratz*, and *Grutter*—attempted to lay out the requirements and constitutionality of race-based affirmative action programs in college admissions, but with the lack of direction and the increasing number of race-neutral programs available, the Supreme Court was far from finished in weighing in on the issue.⁷⁷

III. RUNNING IN CIRCLES: HOW AFFIRMATIVE ACTION IN TEXAS IS HAVING TROUBLE KEEPING ITS PACE

There is no shortage of confusion and unpredictability surrounding affirmative action programs in Texas.⁷⁸ From the prohibition of race-based affirmative action programs, to the implementation of alternative means to achieve diversity, to the repeal of the prohibition, to the whirlwind that encompasses *Fisher v. University of Texas at Austin*, the future of race-based affirmative action programs in Texas is certainly in doubt.⁷⁹

A. *False Start*: Hopwood v. Texas

In 1996, seven years before *Grutter* affirmed the constitutionality of using racial preferences, public universities in Texas were prohibited from considering race in admissions programs as a result of *Hopwood v. Texas*.⁸⁰ The Fifth Circuit's decision—which the United States Supreme Court declined to review—created confusion because it appeared to overturn the Supreme Court's ruling in *Bakke*, which permitted the use of race in admissions.⁸¹ Prior to *Hopwood*, the University of Texas School of Law had an admissions process that accepted African-American and Mexican-American students pursuant to a lower standard than for all other candidates.⁸² As a result, four rejected applicants sued, asserting that the university violated the Equal Protection Clause of the Fourteenth Amendment because it discriminated against them on the basis of race.⁸³

77. See generally *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 133 S. Ct. 2411 (2013) (challenging the university's race-based admissions plan by contesting whether it was narrowly tailored because the university also used a race-neutral alternative that generated racial diversity).

78. See *id.* at 2421; TEX. EDUC. CODE ANN. § 51.803 (West 1997); *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

79. See TEX. EDUC. § 51.803; *Fisher II*, 133 S. Ct. at 2421; *Hopwood*, 78 F.3d at 962.

80. *Hopwood*, 78 F.3d at 962.

81. Courtney A. Hueser-Stubbs, Note, *Hopwood v. Texas: Ramifications and Options for University Affirmative Action Programs*, 65 UMKC L. REV. 143, 143–44 (1996).

82. See *Hopwood v. Texas*, 861 F. Supp. 551, 557–63 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996). For example, a white or Asian-American student could have substantially higher academic credentials compared to an African-American student and still be denied, while the African-American student would be admitted. See Hueser-Stubbs, *supra* note 81, at 146.

83. *Hopwood*, 78 F.3d at 938.

The Fifth Circuit, stating, “Justice Powell’s view in *Bakke* is not binding precedent,” held that “any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”⁸⁴ Specifically, the court recognized that remedying the effects of past racial discrimination was the only compelling governmental interest.⁸⁵ Because the law school’s race-based admissions program was not designed to remedy its own past racial discrimination, the court held that the school did not have a compelling interest in using race as a factor when deciding which applicants to admit.⁸⁶ The court’s prohibition of race-based affirmative action programs and the Supreme Court’s refusal to review *Hopwood* prompted public, and some private, universities in Texas to pursue race-neutral avenues of achieving a racially diverse student body.⁸⁷ It also prompted the Texas Legislature to react.⁸⁸

B. Alternate Route: The Ten Percent Plan

In response to *Hopwood*, the Texas Legislature enacted Texas House Bill No. 588, known as the “Ten Percent Plan.”⁸⁹ The plan requires public universities to automatically admit an applicant as an undergraduate student if the applicant graduated in the top ten percent of the student’s high school class.⁹⁰ Aside from rewarding the values of effort, fortitude, and merit, the purpose of this plan was to “‘ensure a highly qualified pool of students each year in the state’s higher educational system’ while promoting diversity among the applicant pool so ‘that a large well qualified pool of minority students [are] admitted to Texas universities.’”⁹¹ The supporters of the Ten

84. *Id.* at 944. The Fifth Circuit held that *Bakke* was not binding precedent because no other Justice joined Justice Powell in finding that racial diversity is a compelling interest. *Id.*

85. *Id.* at 945. The Supreme Court has held that a state actor may justify an affirmative action program if the actor shows it is remedying the present effects of past discrimination by the governmental entity itself rather than remedying the present effects of past societal discrimination. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

86. *Hopwood*, 78 F.3d at 962. The law school argued that it was remedying past discrimination on behalf of the Texas school system as a whole rather than its own discrimination. *Id.* at 953–54.

87. See Hueser-Stubbs, *supra* note 81, at 151 (noting that private universities, like Baylor University, Southern Methodist University, and Rice University, accept some federal funding and that *Hopwood* would thus apply to them as well); Marc Levin, *Texas A&M Slaps Down Reverse Discrimination*, FRONTPAGEMAG.COM (Dec. 11, 2003), <http://archive.frontpagemag.com/readarticle.aspx?ARTID=15044> (explaining how Texas A&M experimented with aggressive outreach efforts).

88. Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 245 (1999).

89. *Id.*; Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1602 (2003) (explaining that African-American and Latino legislators, who have historically advocated for racial diversity, helped create the Ten Percent Plan).

90. TEX. EDUC. CODE ANN. § 51.803 (West 1997).

91. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 645 F. Supp. 2d 587, 592 (W.D. Tex. 2009), *vacated and remanded by* 133 S. Ct. 2411 (2013). Then-Governor George W. Bush, in signing House Bill No. 588 into law, stated,

Percent Plan stated that it would be an effective alternative to race-based affirmative action programs because it would admit minority students.⁹² On the other hand, opponents argued that because most universities have responded quickly to the recent changes throughout higher education admissions by implementing programs that target diversity, each university should be allowed to determine its own admissions policy.⁹³ The Ten Percent Plan, which is still in effect today, has led some supporters and opponents alike to agree on at least one thing: the pursuit of diversity in a student body can be achieved through means other than race-based affirmative action programs.⁹⁴

In 2003, however, Texas universities seeking racial diversity no longer had to stick to race-neutral alternatives because the prohibition on an admissions program's consideration of race ended as a result of *Grutter*, which abrogated *Hopwood*.⁹⁵ Universities continued using the Ten Percent Plan, but some universities, such as the University of Texas, revised their admissions policy to include the consideration of race as a factor for applicants who did not graduate within the top ten percent of their high school graduating class.⁹⁶ Despite the Court ruling that universities could once again consider race as a factor, Texas admissions programs continue to face constitutionality challenges.⁹⁷

C. *The Latest Hurdle: Fisher v. University of Texas at Austin*

Although the University of Texas saw an increase in minority enrollment when using the Ten Percent Plan, the university sought a higher critical mass of underrepresented minorities and began considering race in its

This legislation says to Texas high school students, if you work and study hard enough to rank in the top ten percent of your high school class, you can earn the right to go to college. We want all our students in Texas to have a fair shot at achieving their dreams and this legislation gives them that fair shot if they are willing to work for it. We want our universities to reach out to students from all walks of life, and this legislation gives them the flexibility to do just that.

Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729, 1738 (2001).

92. HOUSE RESEARCH ORG., HB 588, at 5 (1997), <http://www.hro.house.state.tx.us/pdf/ba75r/hb0588.pdf>. The supporters of the Ten Percent Plan concluded that the students admitted under the plan would be diverse because about two-thirds of graduating seniors in 1996 represented minority groups. *Id.* at 4.

93. *Id.* at 6. Some of these university programs or policies that were initiated to increase diversity included scholarships aimed towards diverse students, outreach efforts to high schools in underrepresented areas of Texas, and increased attention to and resources for recruitment efforts in low-performing schools. *Fisher I*, 645 F. Supp. 2d at 592.

94. See HOUSE RESEARCH ORG., *supra* note 92, at 5–6; Holley & Spencer, *supra* note 88, at 256, 260 (noting the bill allows universities to consider other factors, including socioeconomic factors, for students not admitted under the plan, which would help promote diversity).

95. See *Grutter v. Bollinger*, 539 U.S. 306, 335–36 (2003).

96. See *Fisher I*, 645 F. Supp. 2d at 593–94.

97. See *Fisher II*, 133 S. Ct. 2411, 2416 (2013).

admissions program once again.⁹⁸ The latest challenge to the university's admissions program began when it denied admission to Abigail Fisher, a white student who fell just outside the top ten percent of her high school's graduating class.⁹⁹ She claimed the university discriminated against her on the basis of race because the university accepted nonwhite students with worse grades.¹⁰⁰ She challenged the university's consideration of race all the way to the United States Supreme Court, arguing the admissions program violated her right to equal protection under the Fourteenth Amendment.¹⁰¹

In one of the most anticipated—yet, anticlimactic—rulings in recent years, the Supreme Court declined to revisit its previous decisions that allow universities to consider race in admissions programs.¹⁰² The Court's decision came as a shock to many who expected the Court to end college admissions race-based affirmative action.¹⁰³ Rather than revisiting the constitutionality of affirmative action, the Court focused on whether the Fifth Circuit correctly applied the strict scrutiny test, which the Court held requires a showing that “no workable race-neutral alternatives would produce the educational benefits of diversity.”¹⁰⁴ The Court, in a 7–1 decision, ultimately remanded the case to the Fifth Circuit to reevaluate whether the program was narrowly

98. Mark S. Brodin, *The Fraudulent Case Against Affirmative Action—The Untold Story Behind Fisher v. University of Texas*, 62 BUFF. L. REV. 237, 268 (2014). The university claimed its minority students did not achieve a critical mass because its student body did not align with the state's population. David F. Forte, *Supreme Court Preview: Fisher*, FEDERALIST SOC'Y (Oct. 22, 2015), <http://www.fed-soc.org/blog/detail/supreme-court-preview-fisher-by-david-forte>. The university later dropped this justification for using the race-conscious program because it amounted to a quota the university sought to achieve, which is unconstitutional. *Id.*

99. *Fisher I*, 645 F. Supp. 2d at 590. Fisher graduated in the top twelve percent of her high school class, specifically eighty-second in a high school class of 674. Second Amended Complaint for Declaratory, Injunctive, and Other Relief at 3, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS).

100. *Fisher I*, 645 F. Supp. 2d at 590. Fisher had a 3.6 high school GPA and scored 1180 out of 1600 on the SAT. Matthew Watkins, *Supreme Court to Again Hear Challenge to UT's Admissions Rules*, TEX. TRIB. (June 29, 2015, 8:42 AM), <http://www.texastribune.org/2015/06/29/supreme-court-decides-whether-university-texas-aff/>.

101. *Fisher II*, 133 S. Ct. at 2412. Fisher did not challenge the university's use of the Ten Percent Plan; rather, she argued the plan achieved racial diversity and thus the consideration of race was not narrowly tailored because there was a race-neutral alternative. Linda Greenhouse, *With All Due Deference: Ruling Defends Affirmative Action from New Challenges*, N.Y. TIMES (July 23, 2014), http://www.nytimes.com/2014/07/24/opinion/ruling-defends-affirmative-action-from-new-challenges.html?_r=0.

102. See *Fisher II*, 133 S. Ct. at 2421; Warner et al., *supra* note 27, at 48.

103. See *Fourteenth Amendment—Equal Protection Clause—Public-University Affirmative Action—Fisher v. University of Texas at Austin*, 127 HARV. L. REV. 258, 258 (2013).

104. *Fisher II*, 133 S. Ct. at 2420; accord Chris Chambers Goodman, *Net (Race) Neutral: An Essay on How GPA + (Reweighted) SAT – Race = Diversity*, 59 ST. LOUIS U. L.J. 303, 308 (2015). Justice Scalia would have preferred to overrule *Grutter*, stating that he “adhere[d] to the view [he] expressed in *Grutter v. Bollinger*: ‘The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.’” *Fisher II*, 133 S. Ct. at 2422 (Scalia, J., concurring) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part)). But because Fisher did not ask the Court to overrule *Grutter*'s holding, Justice Scalia joined the Court's opinion. *Id.*

tailored to serve its compelling interest in a diverse student body or whether there were race-neutral alternatives available.¹⁰⁵ In effect, Justice Kennedy ordered the lower court to stringently scrutinize the mechanics of the university's admissions process—rather than take the university's word—to determine whether the university met its heavy burden of proving that it had taken the adequate steps to assess each individual's potential diversity contribution as opposed to simply relying on a system of racial preferences in the pursuit of a set critical mass.¹⁰⁶

On remand, the Fifth Circuit applied the strict scrutiny test, and in a divided 2–1 decision, the court determined the program was sufficient to satisfy the narrow tailoring requirement.¹⁰⁷ In a strong dissent, Judge Garza focused on the lack of clarity in the university's goal of achieving a critical mass of diversity among students.¹⁰⁸ Specifically, he wrote that the University of Texas had “failed to define th[e] term [critical mass] in any objective manner.”¹⁰⁹ As a result, it was “impossible to determine whether the University's use of racial classifications in its admissions process [was] narrowly tailored” or whether a race-neutral alternative would have been sufficient to achieve the educational benefits of a diverse student body.¹¹⁰ After the long-running case made its way to the Supreme Court and then back to the Fifth Circuit, some thought the Fifth Circuit's decision would be the end of the latest chapter in Texas's affirmative action programs.¹¹¹ The *Fisher* saga, however, was far from over.¹¹²

On June 29, 2015, the United States Supreme Court agreed to hear *Fisher v. University of Texas at Austin* for a second time.¹¹³ Although the Supreme Court's membership has not changed since the first *Fisher* opinion, the Court's decision could provide significant challenges to Texas's

105. *Id.* at 2420–21 (majority opinion). Justice Thomas concurred because he agreed that the Fifth Circuit did not apply the strict scrutiny test to the university's admissions program. *Id.* at 2422 (Thomas, J., concurring). Further, Justice Thomas declared that he would also overrule *Grutter* and hold that the Equal Protection Clause prohibits race-based consideration. *Id.* Justice Ginsburg argued, in a solitary dissent, that the admissions program satisfied the Court's previous holdings. Greenhouse, *supra* note 101. Justice Kagan did not partake in the decision because she worked on the case while serving as the solicitor general for President Obama's first Administration. *Id.*

106. Wang, *supra* note 60, at 702.

107. *Fisher v. Univ. of Tex. at Austin (Fisher III)*, 758 F.3d 633, 657 (5th Cir. 2014). (“We are satisfied that UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission—as described by *Bakke* and *Grutter*.”).

108. *Id.* at 661 (Garza, J., dissenting).

109. *Id.*

110. *Id.* at 661–62; accord Wang, *supra* note 60, at 703 (explaining Judge Garza's dissent).

111. See Greenhouse, *supra* note 101 (expressing that the majority opinion made the case an unlikely candidate for further Supreme Court review).

112. See generally *Fisher v. Univ. of Tex. at Austin (Fisher IV)*, 135 S. Ct. 2888 (2015).

113. See generally *id.*

race-based affirmative action policies.¹¹⁴ In light of the fact that at least four Supreme Court Justices believe affirmative action is unconstitutional,¹¹⁵ a recent book about Justice Sotomayor disclosed that the original vote in the *Fisher* decision was 5–3 to disallow the University of Texas’s race-conscious admissions policy.¹¹⁶ The book reported that Chief Justice Roberts assigned Justice Kennedy to write the majority opinion, while Justice Ginsburg, the senior justice in the dissent, assigned Justice Sotomayor to write the dissenting opinion for Justices Ginsburg, Breyer, and Sotomayor.¹¹⁷ After Justice Sotomayor wrote a passionate and polarizing dissent, Justice Kennedy, in a months-long effort to lower the tension of the Court, narrowed his opinion to keep the central holding of *Grutter* intact.¹¹⁸ As a result, Justice Sotomayor dropped her dissenting opinion, and she and Justice Breyer joined the majority.¹¹⁹

With *Fisher v. University of Texas at Austin* being named one of the top “three [Supreme Court] cases to watch” for in the fall 2015 term, it is likely the Court will “deliver a definitive ruling on the constitutionality of UT’s affirmative action policy.”¹²⁰ It is unclear whether the Court will revisit its holding in *Grutter*, which would go beyond *Fisher*’s contentions in the case, but because the Supreme Court has agreed to hear *Fisher* for a second time, it is likely the Court will at least “provide further guidance . . . on the application of strict scrutiny in education.”¹²¹ Regardless of the Court’s ultimate decision, the number of states moving towards eliminating

114. See Michael Poreda, *Perspectives on Fisher v. University of Texas and the Strict Scrutiny Standard in the University Admissions Context*, 2013 BYU EDUC. & L.J. 319, 322 (stating that it is likely the Court grants certiorari when it considers overruling the lower court’s ruling).

115. See *Fisher II*, 133 S. Ct. 2411, 2422–29 (2013) (Scalia, J., concurring) (“The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003)); see also *id.* at 2428–29 (Thomas, J., concurring) (“The Equal Protection Clause strips States of all authority to use race as a factor in providing education. All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.”); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (majority opinion, Roberts, C.J.) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 BYU EDUC. & L.J. 1, 87–88 (“[Justice] Alito’s . . . records both as a judge on the U.S. Court of Appeals for the Third Circuit and as a lawyer for the Reagan administration, leave little hope of solicitude for affirmative action . . .”).

116. Greenhouse, *supra* note 101.

117. *Id.*

118. *Id.*; John P. Elwood & Conor P. McEvily, *Looking Ahead: October Term 2015*, 2014–2015 CATO SUP. CT. REV. 395, 400. The Court’s decision in *Fisher* was the longest pending decision of the term: 257 days after oral argument. Elwood & McEvily, *supra*.

119. *Id.*

120. Damon Root, *3 Supreme Court Cases to Watch in Fall 2015*, REASON.COM: HIT & RUN (Oct. 5, 2015, 10:14 AM), <https://reason.com/blog/2015/10/05/3-supreme-court-cases-to-watch-in-fall-2>.

121. Elwood & McEvily, *supra* note 118, at 401–02. *Fisher*’s lawyers are separately challenging the constitutionality of race-based affirmative action in claims against Harvard University and the University of North Carolina at Chapel Hill. *Id.* at 401.

race-based affirmative action programs in favor of race-neutral alternatives is likely indicative of the future of affirmative action.¹²²

IV. THE FRONT RUNNERS: EXAMINING THE STATES THAT ARE TAKING THE LEAD IN ELIMINATING RACE-BASED AFFIRMATIVE ACTION

While the United States Supreme Court is slated to consider the pressing issues that accompany affirmative action in Texas institutions of higher education, the Court had to recently decide whether voters could prohibit race-conscious affirmative action programs in their own states.¹²³ This matter began when Michigan responded to the Court's decision in *Grutter* by introducing Proposal 2.¹²⁴ In 2006, Michigan voters approved the proposal, which amended Michigan's constitution to prohibit race-based affirmative action programs not only in public education but also in government contracting and public employment.¹²⁵ The Court ultimately held that Michigan had the right to ban affirmative action programs because the prohibition did not have a racially discriminatory purpose.¹²⁶ Specifically, the Court stated, a "law that prohibits the State from classifying individuals by race . . . does not classify individuals by race"; thus, the law did not violate the Equal Protection Clause of the Fourteenth Amendment.¹²⁷ Moreover, Justice Scalia stated that it would be a shame for the Court to stand in the way of the states that wish to make their constitutions color-blind, similar to the United States Constitution.¹²⁸ This decision effectively endorsed the acts of seven other states that had also prohibited the consideration of race in public universities by way of either legislation or popular vote.¹²⁹ Those states include California, Washington, Florida, Nebraska, Arizona, New

122. See Richard Pérez-Peña, *To Enroll More Minority Students, Colleges Work Around the Courts*, N.Y. TIMES (Apr. 1, 2012), <http://www.nytimes.com/2012/04/02/us/college-affirmative-action-policies-change-with-laws.html?pagewanted=all> (discussing that the states outlawing race-conscious college admissions give the "best glimpse of a future without the current version of affirmative action").

123. *Schuetz v. Coal. to Defend Affirmative Action Integration & Immigration Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1624 (2014). Justice Kennedy said, "This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it." *Id.* at 1638.

124. *Id.* at 1623–24.

125. *Id.* at 1628. Groups that favored affirmative action initiated a lawsuit on equal protection grounds regarding the prohibition of race-conscious admissions in higher education. *Id.* at 1628–30.

126. *Id.* at 1648 (Scalia, J., concurring). Justice Breyer reasoned the United States Constitution permits race-conscious admissions programs, but it does not require them. *Id.* at 1649 (Breyer, J., concurring).

127. *Id.* at 1648 (Scalia, J., concurring) (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997)). Justice Scalia noted that the question this case presented was strange because it asked the Court to determine whether "the Equal Protection Clause forbid[s] a State from banning a practice that the Clause barely—and only provisionally—permits." *Id.* at 1639.

128. *Id.* at 1648.

129. See Goodman, *supra* note 104, at 313–14; Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES (Apr. 22, 2014), <http://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html>.

Hampshire, and Oklahoma.¹³⁰ Although these states banned race-based affirmative action policies in institutions of higher education, universities in those states did not abandon the goal of seeking diverse student bodies—they just found other ways.¹³¹

A. Making Strides: Race-Neutral Alternatives That Achieve Racial Diversity

In the eight states that have banned race-based affirmative action, universities initially saw a decline in minority enrollment.¹³² These universities, however, “responded by experimenting ‘with a wide variety of alternative approaches’” to promote diversity in their student bodies.¹³³ As a result, eliminating race-based affirmative action did not have the detrimental effect that some critics feared because the universities implemented successful alternatives.¹³⁴ The success of these alternatives could present

130. Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1087–89 (2009). In 1996, California banned racial preferences with Proposition 209. *Id.* Ward Connerly, a leading proponent of Proposition 209, asserted that race-based preference programs had become too powerful throughout the state government and that they were being abused. SANDER & TAYLOR, *supra* note 2, at 118–19. Washington banned racial preferences with Initiative 200, in 1998. West-Faulcon, *supra*. In 1999, Florida banned racial preferences with Executive Order No. 99-281. Richard M. Ellis, *Rule-Challenge Standing After NAACP, Inc. v. Florida Board of Regents*, 78 FLA. B.J. 58, 58 (2004). In 2008, Nebraska banned racial preferences with Measure 424. Dan Frosch, *Vote Results Are Mixed on a Ban on Preference*, N.Y. TIMES (Nov. 7, 2008), <http://www.nytimes.com/2008/11/08/us/politics/08affirm.html>. Arizona banned racial preferences with Proposition 107 in 2010. Scott Jaschik, *Arizona Bans Affirmative Action*, INSIDE HIGHER ED (Nov. 3, 2010), <https://www.insidehighered.com/news/2010/11/03/arizona>. In 2012, New Hampshire banned racial preferences with Legislative House Bill 623. Kekaplan, *New Hampshire House Bill 623 (2012)*, C.R. MOVEMENT: BLOG (Feb. 17, 2015), <http://civilrightsmovement.blogs.wm.edu/2015/02/17/new-hampshire-house-bill-623-2012/>. In 2012, Oklahoma banned racial preferences with State Question 759. *Election 2012: Oklahoma*, N.Y. TIMES, elections.nytimes.com/2012/results/states/oklahoma (last visited Oct. 31, 2016).

131. See discussion *infra* Section IV.A (discussing the different race-neutral alternatives that university admissions use to achieve diversity).

132. Goodman, *supra* note 104, at 314. Combined, these eight states educate 29% of all high school students in the United States. Ben Backes, *What Happens If Affirmative Action in College Admissions Is Banned?*, BROOKINGS (Oct. 21, 2015), <https://www.brookings.edu/blog/brown-center-chalkboard/2015/10/21/what-happens-if-affirmative-action-in-college-admissions-is-banned/>.

133. *Schutte*, 134 S. Ct. at 1624 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003)). Alternative approaches are race-neutral admissions policies that universities implement to “provide educational opportunities to a diverse group of students without” considering an applicant’s race during admissions. Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1, 8 (2005); see also Kahlenberg, *supra* note 10 (noting that the alternatives include class-based affirmative action programs, expanded financial aid budgets, percentage plans, programs that allow students to transfer from community colleges to four-year institutions, and elimination of legacy preferences).

134. Pérez-Peña, *supra* note 122 (stating that African-American and Hispanic enrollment in California dropped the first year after the ban but that in years since, the numbers eventually rose); Halley Potter, *What Can We Learn from States That Ban Affirmative Action?*, CENTURY FOUND. (June 26, 2014), <http://www.tcf.org/work/education/detail/what-can-we-learn-from-states-that-ban-affirmative-action>. Race-neutral alternatives have tended to benefit Hispanics more than African Americans, mostly because

serious questions as to the constitutionality and future use of race-based affirmative action policies in higher education.¹³⁵

1. Percentage Plans

As Section III.B discussed, percentage plans guarantee admission into a state's university system for students that graduate in the top given percentage of their high school class. These plans award high-achieving high school seniors an automatic acceptance without regard to their race.¹³⁶ Nonetheless, these plans also result in enhanced racial diversity because most high schools are geographically segregated by race.¹³⁷ Universities in California and Florida have implemented percentage plans similar to Texas's Ten Percent Plan to restore diversity in their student bodies as an alternative to using race-based affirmative action programs.¹³⁸

After California voters took the initiative to ban race-based affirmative action in college admissions, the University of California system created a percentage-based program, "Eligibility in the Local Context," which guarantees admission to the top nine percent of high school seniors.¹³⁹ Because the ban had an immediate impact on minority enrollment, the state adopted the program as a mechanism to "combat the inequality of educational opportunities across the state."¹⁴⁰ For example, when the state allowed the use of racial preferences, African-American students at the University of California accounted for roughly 4% of freshman, and Hispanic students totaled 14%–15%.¹⁴¹ During the first year after the ban, the number of African Americans fell to 3%, while the number of Hispanics fell to 12%.¹⁴² Those numbers, however, began to rise as a result of the state's implementation of the percentage-based program.¹⁴³ This program has been effective for the university because in recent years, the number of African

the Hispanic population is greater than the African-American population in the states where alternatives have been applied. Pérez-Peña, *supra* note 122.

135. Marvin Lim, Article, *Percent Plans: A "Workable, Race-Neutral Alternative" to Affirmative Action?*, 39 J.C. & U.L. 127, 132–33 (2013).

136. Adams, *supra* note 91, at 1730.

137. *Id.*; Potter, *supra* note 134.

138. See Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 3 (2001).

139. *Eligibility in the Local Context (ELC) Program*, U. CAL. OFF. PRESIDENT, <http://www.ucop.edu/student-affairs/programs-and-initiatives/undergraduate-admissions/eligibility-local-context.html> (last visited Nov. 1, 2016) (stating that qualifying students are guaranteed admission to one of the eight campuses of the University of California system). California's percentage plan became effective in 2001. Eang L. Ngov, *Following Fisher: Narrowly Tailoring Affirmative Action*, 64 CATH. U. L. REV. 1, 11 (2014). In 2009, California changed its percent plan from the top four percent to the top nine percent, which became effective in 2012. Lim, *supra* note 135, at 149.

140. Adams, *supra* note 91, at 1741.

141. Pérez-Peña, *supra* note 122.

142. *Id.*

143. *Id.*

Americans now amounts to 4%, while Hispanics account for 22%, a number that far surpasses the race-conscious percentage.¹⁴⁴

Although the recent implementation of Florida's percentage-based program and lack of centralized data collection has left limited results, the reported statistics show Florida has seen similar successes with its "Talented 20 Program," which admits the top 20% of graduating high school seniors.¹⁴⁵ The Governor of Florida proposed the program in conjunction with the elimination of race-based affirmative action, promising that "the Talented 20 program will result in a net increase in minority enrollment in the state university system."¹⁴⁶ His promise seemed to deliver as Florida State University system's enrollment of minorities increased by 62.56% when comparing enrollment before the ban on racial preferences in 1998 to enrollment using only race-neutral alternatives in 2011.¹⁴⁷

Not only are percentage plans increasing racial diversity in California and Florida, but the Ten Percent Plan proved successful in Texas as an alternative to race-based affirmative action programs after the Fifth Circuit ruled such programs unconstitutional.¹⁴⁸ In 1997, the first year that Texas could no longer use race as a consideration in admissions, minority enrollment figures decreased in the incoming freshman class.¹⁴⁹ For instance, the total percentage of minorities at the University of Texas dropped from roughly 35% to 33%.¹⁵⁰ In 1998, however, the first year after the Ten Percent

144. *Id.* The population growth in California could have also contributed to this increase in Hispanics at the university, but as minority populations grow and even surpass nonminority populations in some states, the effectiveness of percentage plans grows as well. See STELLA M. FLORES & CATHERINE L. HORN, TEXAS TOP TEN PERCENT PLAN: HOW IT WORKS, WHAT ARE ITS LIMITS, AND RECOMMENDATIONS TO CONSIDER 15 (2015), http://www.ets.org/Media/Research/pdf/flores_white_paper.pdf (reporting the population growth among Hispanics); Holley & Spencer, *supra* note 88, at 278 (discussing that percentage plans will significantly increase minority enrollment as the number of minority high school graduates increase).

145. Ngov, *supra* note 139, at 14–15; *Talented Twenty Program*, FLA. DEP'T. EDUC., <http://www.fldoe.org/Talented20> (last visited Nov. 1, 2016). In 1999, Florida implemented its percentage plan. Ngov, *supra* note 139, at 11–12. The Talented 20 Program guarantees admission to one of eleven state universities. *Talented Twenty Program*, *supra*.

146. Jeb Bush, *New Initiative Aims to Replace Disparity with Opportunity*, SUNSENTINEL (Nov. 11, 1999), http://articles.sun-sentinel.com/1999-11-11/news/9911100928_1_minority-businesses-race-and-ethnicity-race-neutral-program; accord Adams, *supra* note 91, at 1745.

147. Ngov, *supra* note 139, at 14–15.

148. Alan Wendler Hersh, Note, *Keep It Quiet: How Facially Neutral Affirmative Action Passes Constitutional Scrutiny*, 2011 U. ILL. L. REV. 1885, 1893 (explaining the effectiveness of the Ten Percent Plan).

149. Holley & Spencer, *supra* note 88, at 251. At the University of Texas, Hispanic enrollment dropped by 4.3%, and African American enrollment dropped by 33.8%. *Id.* At Texas A&M University, Hispanic enrollment dropped by 12.6%, while African-American enrollment dropped by 29%. *Id.*

150. *Id.* at 252. The nonwhite groups make up the total minority percentage, including Native Americans, African Americans, Asian Americans, Hispanics, and international ethnicities. OFFICE OF ADMISSIONS, UNIV. OF TEX. AT AUSTIN, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN 4–6 (2007), available at <https://utexas.app.box.com/s/jie61tqplwb45kexwoefowwgz99wsqro/1/7736553677/23476772175/1>.

These percentages include Asian Americans because the University of Texas incorporates its number of

Plan went into effect, minority enrollment began to rise, with a total percentage of 34%.¹⁵¹ Moving forward, minority enrollment continued to grow even more to a total of 43% in 2004, exceeding pre-*Hopwood* levels of diversity.¹⁵² In fact, at one point during the race-based affirmative action prohibition, the president of the university praised the Ten Percent Plan's impact on diversity.¹⁵³ He indicated, "[T]he Top 10 Percent Law has enabled us to diversify enrollment at UT Austin with talented students who succeed. Our 1999 enrollment levels for African-American and Hispanic freshmen have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies."¹⁵⁴

The implementation and successes of these percentage plans demonstrate that merit-based measures provide a viable, race-neutral alternative that has a sizable effect on creating racial diversity.¹⁵⁵ Yet, critics argue that percentage plans are just as race conscious as race-based affirmative action because states created the plans for the purpose of increasing racial diversity.¹⁵⁶ However, while percentage plans do have an effect on racial diversity due to racial segregation by geography, percentage plans are ultimately based on merit and the degree of effort each student puts forth.¹⁵⁷ As a result, utilizing percentage plans not only increases the opportunity for universities to have a diverse student body, but it also creates opportunities for minorities to attend their desired universities—the ultimate prize for the highest achieving students.¹⁵⁸

Asian-American students when flaunting its minority enrollment successes even though the university does not include Asian Americans when defending its use of race-based affirmative action. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment at 4, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 1:08-cv-00263-SS).

151. OFFICE OF ADMISSIONS, *supra* note 150, at 4–5.

152. *See id.*; Hersh, *supra* note 148. In 1996, before *Hopwood*, Hispanics accounted for 14.5%, and African Americans accounted for 4.1% of enrollment; however, in 2004, Hispanics totaled 16.9%, while African Americans totaled 4.5%. OFFICE OF ADMISSIONS, *supra* note 150, at 4.

153. Larry Faulkner, *The "Top 10 Percent Law" Is Working for Texas*, U. TEX. AUSTIN (Oct. 19, 2000), <http://www.test.admissions.utexas.edu/research/faulknerstatement.html>.

154. *Id.*

155. *See* Ngov, *supra* note 139, at 22 (noting that studies show percentage plans can reach or exceed racial diversity levels attained through race-based affirmative action). While percentage plans have the greatest impact at the undergraduate level, "there is no evidence that a modified version of the percent concept will not be effective at the graduate or professional level." L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-Economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT. 297, 332–33 (2005).

156. *See* Adams, *supra* note 91, at 1730 (noting that some critics believe "percentage plans are little more than a thinly-disguised attempt to achieve the same ends as race-conscious, preferential affirmative action").

157. *See* Pérez-Peña, *supra* note 122 ("Officials acknowledge that the aim is race-conscious but that the mechanism is race-neutral.").

158. *See supra* note 91 and accompanying text (discussing how the Ten Percent Plan awards high-achieving students the right to attend college).

2. Consideration of Socioeconomic Factors

In addition to percentage plans, some universities have also considered the socioeconomic background of each applicant as a race-neutral alternative.¹⁵⁹ Admissions programs that consider an applicant's socioeconomic status attempt to provide an educational opportunity to those students who have faced various social and economic challenges.¹⁶⁰ Socioeconomic status usually refers to a combination of factors, such as information about a person's education, occupation, household and parental income, wealth, single-parent status, neighborhood demographics, high school performance, and parents' education levels.¹⁶¹ Research shows that considering socioeconomic factors as an alternative to considering race produces racial diversity.¹⁶² Specifically, universities that construct admissions programs using a wide array of socioeconomic factors, rather than income alone, are more likely to achieve greater racial and ethnic diversity results because such varying factors are more indicative of past and ongoing racial discrimination.¹⁶³ Because racial discrimination often shapes economic disadvantages, considering an applicant's socioeconomic hardships is an effective alternative to generate racial and ethnic diversity.¹⁶⁴

When *Grutter* overruled *Hopwood* and its ban on race-based consideration in Texas, rather than reinstating its race-based program like the University of Texas, Texas A&M chose to continue making strides using race-neutral alternatives.¹⁶⁵ These alternatives included considering socioeconomic factors, such as "whether an applicant has overcome socioeconomic disadvantage and other obstacles."¹⁶⁶ This decision produced a substantial increase in minority student enrollment.¹⁶⁷ In 2004, the year following *Grutter*, African-American freshmen enrollment increased by 35%, while Hispanic enrollment increased by 26% from the prior year.¹⁶⁸

159. Michele Sherretta, Note, *An Alternative to Affirmative Action: Attributing Lack of Diversity in Undergraduate Institutions to a Failing Education System*, 65 U. PITT. L. REV. 655, 666 (2004).

160. Nelson, *supra* note 133, at 9.

161. See Halley Potter, *Transitioning to Race-Neutral Admissions: An Overview of Experiences in States Where Affirmative Action Has Been Banned*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 75, 83 (Richard D. Kahlenberg ed., 2014), <https://tcf.org/assets/downloads/FOAA.pdf>; SANDER & TAYLOR, *supra* note 2, at 249.

162. See Richard D. Kahlenberg, *Achieving Better Diversity: Reforming Affirmative Action in Higher Education*, CENTURY FOUND. (Dec. 3, 2015), <http://apps.tcf.org/achieving-better-diversity>.

163. *Id.*

164. See *id.* ("Discrimination helps explain why black and Hispanic Americans on average have smaller savings than whites do, and why even middle-class blacks live in neighborhoods with higher poverty rates than low-income whites.").

165. See Nelson, *supra* note 133, at 20.

166. *Id.* (quoting Levin, *supra* note 87)

167. See *id.* at 9.

168. *Id.*

As a result of California's ban on race-based affirmative action, UCLA School of Law adopted a socioeconomic preference admissions system.¹⁶⁹ The system—which considered the education level of each parent, parental income and net worth, and the poverty rate and dropout rate in the zip code in which the applicant lived during high school—proved to be a successful alternative to race-based preferences in admissions.¹⁷⁰ The law school class not only resembled the socioeconomic distribution in America, but nearly one-third of the class was nonwhite and included more underrepresented minorities than any other race-neutral alternative of any other University of California professional school.¹⁷¹ Notably, the students admitted also proved to be academically successful when the class achieved the highest bar passage rate in the school's history.¹⁷²

A research study also suggested that when considering socioeconomic status, the most highly selective 146 undergraduate institutions would produce a class of 10% African Americans and Hispanics, which is impressively close to the 12% that would likely result by adding race to the simulation.¹⁷³ Even further, the researchers did not use wealth as a factor in their study because doing so would likely raise the number of minorities to greater than 10%.¹⁷⁴ In addition, a more recent simulation found that the most selective 193 universities could combine socioeconomic consideration with percentage plans to achieve the current levels of racial diversity so that race-based preferences are achieved while also substantially increasing socioeconomic diversity.¹⁷⁵

Furthermore, because socioeconomic status, unlike race, is not a protected class, classifications based on an applicant's socioeconomic status are not subject to strict scrutiny.¹⁷⁶ Instead, socioeconomic classifications are subject to a rational basis test, which requires a legitimate state interest and a rationally related means of achieving the interest—a much easier burden to satisfy.¹⁷⁷

169. SANDER & TAYLOR, *supra* note 2, at 255. The University of California also began considering socioeconomic status as a result of the ban on the use of race in admissions. Richard D. Kahlenberg, *Reflections on Richard Sander's Class in American Legal Education*, 88 DENV. U. L. REV. 719, 724 (2011). While the university initially saw a drop of underrepresented minorities in the first year of using the race-neutral alternative, from 18% in 1997 to 15% in 1998, it has since increased its number of minorities admitted to 24% in 2008. *Id.*

170. *See* SANDER & TAYLOR, *supra* note 2, at 255–56.

171. *Id.* at 255.

172. *Id.*; *see infra* Section V.C.1. (discussing the notion that race-neutral alternatives can better place students in environments that foster more success compared to race-based affirmative action programs).

173. Kahlenberg, *supra* note 169, at 724.

174. *Id.*

175. *See* Kahlenberg, *supra* note 10.

176. Sherretta, *supra* note 159. Immutable traits, such as race and national origin, are protected classes. Leslie Yalof Garfield, *The Inevitable Irrelevance of Affirmative Action Jurisprudence*, 39 J.C. & U.L. 1, 41 (2013).

177. *Id.* at 41–42. Research shows that low-income students are less likely to reach the same level of academic achievements compared to their financially well-off counterparts. *Id.* at 42. As a result,

Moreover, admitting socioeconomically disadvantaged students “push[es] schools to focus on individual hardship and barriers to opportunity rather than group entitlements and racial balancing.”¹⁷⁸ Two Supreme Court Justices have supported this view in considering an applicant’s hardships rather than race during the admissions process.¹⁷⁹ One of the reasons advocates support socioeconomic consideration is because race-based affirmative action programs often “fail to help those individuals who truly need assistance because they grant preferences on the basis of race, without regard to whether an individual has actually experienced discrimination or has an underrepresented viewpoint to contribute.”¹⁸⁰ For example, Martin Luther King, Jr. was a proponent of offering assistance to the disadvantaged.¹⁸¹ Likewise, President Obama endorsed this perspective in response to the question of whether his daughters should get affirmative action when they go to college.¹⁸² He responded by stating,

I think that my daughters should probably be treated by any admissions officer as folks who are pretty advantaged, and I think that there’s nothing wrong with us taking that into account as we consider admissions policies at universities. I think that we should take into account white kids who have been disadvantaged and have grown up in poverty and shown themselves to have what it takes to succeed.¹⁸³

universities can maintain that utilizing a socioeconomic admissions policy is the rationally related means of achieving the legitimate interest of creating equal opportunities for students of all income. *Id.*

178. SANDER & TAYLOR, *supra* note 2, at 10; *see also* Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 48 (1992) (“Affirmative action that takes into account individual circumstances such as racial discrimination, economic hardship, or family disintegration, which the applicant has worked hard to overcome, asks the right question—a question about the individual. This brand of affirmative action is a far cry from the program that simply awards points on the basis of race.”).

179. *See* Antonin Scalia, Commentary, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race”* 1979 WASH. U. L. REV. 147, 153–54, 156 (“I strongly favor—what might be called . . . ‘affirmative action programs’ of many types of help for the poor and disadvantaged.” “I am not willing to prefer the son of a prosperous and well-educated black doctor or lawyer—solely because of his race—to the son of a recent refugee from Eastern Europe who is working as a manual laborer to get his family ahead.”); Clarence Thomas, Commentary, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL’Y REV. 402, 410–11 (1987) (“Any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals’ paths, rather than on the basis of race or gender, or on other characteristics that are often poor proxies for true disadvantage.”).

180. Nelson, *supra* note 133, at 9.

181. *See* Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1062 (1996). Martin Luther King, Jr. proposed a class-based remedy as compensation for the discrimination against the disadvantaged. *Id.* Specifically, Martin Luther King, Jr. wrote, “[I]t is obvious that if a man is entered at the starting line in a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner.” *Id.*

182. *See* Kevin Drum, *Obama and Affirmative Action*, WASH. MONTHLY (May 14, 2007, 7:04 PM), <http://washingtonmonthly.com/2007/05/14/obama-and-affirmative-action/>.

183. *Id.*

Not only do past and present leaders in our nation support socioeconomic-based preferences, but Americans also approve of the race-neutral alternative with a 2–1 ratio, while roughly the same number of Americans oppose race-based preferences.¹⁸⁴ Nonetheless, as the number of universities focusing on socioeconomic factors increases, admissions programs have simultaneously created countless opportunities for economically disadvantaged students while also creating racial and ethnic diversity.¹⁸⁵

3. *Funding Financial Aid and Scholarship Programs*

In an effort to increase student body diversity, states have also created targeted financial aid and scholarship programs.¹⁸⁶ These programs provide substantial support to low-income students, which can significantly influence an applicant’s decision on where to enroll.¹⁸⁷ Not only does funding financial aid and scholarship programs provide an incentive to attend participating universities, but it also allows universities to create opportunities for specific underrepresented populations.¹⁸⁸

For example, after Nebraska voters banned race-based affirmative action, the University of Nebraska Board of Regents created a financial aid program for qualifying students, “Collegebound Nebraska,” which offers free tuition at all four University of Nebraska campuses.¹⁸⁹ The program is available to all Nebraska residents who are Pell Grant recipients and maintain a full-time course schedule with a minimum GPA of 2.5.¹⁹⁰ Likewise, in California, the University of California’s program, the “Blue and Gold Opportunity Plan,” fully covered tuition and fees for students from families with income below \$80,000 for the 2011–2012 school year.¹⁹¹

In addition, at the University of Washington, 200 underrepresented minorities with both significant academic potential and financial need received over \$7 million in scholarships within the first two years of creating a privately funded diversity scholars program.¹⁹² Also looking to increase diversity, the University of Florida began offering full scholarships to first-generation freshmen from low-income families in the years following the ban

184. See Kahlenberg, *supra* note 162.

185. See *id.*

186. See Potter, *supra* note 161, at 84.

187. See *id.*

188. See *id.* at 84–85.

189. *Id.* at 85.

190. *Id.* The federal government provides Pell Grants to students from low-income families. Scott Jaschik, *Who Are Pell Grant Recipients?*, INSIDE HIGHER ED (July 22, 2009), <https://www.insidehighered.com/news/2009/07/22/pell>.

191. Potter, *supra* note 161, at 85.

192. *Id.*

on racial preferences.¹⁹³ Similarly, the University of Michigan started offering scholarships aimed at community college transfer students, who “are more likely to be low-income and members of underrepresented minority groups than applicants who are first-time college students.”¹⁹⁴ These efforts prove that by creating educational opportunities for minorities and students who could not have otherwise afforded to attend college, universities are also contributing to the goal of enhancing diversity through race-neutral means.¹⁹⁵

4. *Improving Recruitment and Outreach Efforts*

As another race-neutral alternative, universities have spent more time implementing recruitment and outreach plans to target underrepresented students.¹⁹⁶ Recruitment and outreach efforts are relatively noncontroversial and are also reportedly an effective alternative to enhancing minority enrollment.¹⁹⁷

In Washington, for example, after the state banned race-based consideration in admissions, the University of Washington implemented a wide range of measures to restore and promote student diversity.¹⁹⁸ One of the ways the university contributed to achieving its goal was by massively expanding its recruitment and outreach efforts.¹⁹⁹ These efforts included inviting minority students to campus for overnight visits while introducing the university’s educational opportunities; placing college counselors in local high schools to recommend courses that would qualify them for admission and also to assist them in applying for admission and financial aid; and sending personal letters from the university’s president to high-achieving minority students encouraging them to attend the university.²⁰⁰ Most

193. *Id.*

194. *Id.* at 85–86.

195. See Ellison S. Ward, Note, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U. L. REV. 609, 617–18 (2009). Many of these universities have combined financial aid and scholarship programs with other race-neutral alternatives to maximize minority enrollment. See Nelson, *supra* note 133, at 42–45.

196. See Potter, *supra* note 161, at 85.

197. Kahlenberg, *supra* note 162; see also SANDER & TAYLOR, *supra* note 2, at 155–56 (noting that universities have expanded the pool of eligible minority students through outreach programs).

198. Richard L. McCormick, *Converging Perils to College Access for Racial Minorities: Examples of Responses that Work from Washington State and New Jersey*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra* note 161, at 110, 170.

199. *Id.* The stated mission of the University of Washington Multicultural Outreach and Recruitment Program is “to serve as a resource for historically underrepresented (African American, Latino, American Indian, Pacific Islander and Southeast Asian) students of color as well as students who have been historically disenfranchised from higher education.” *About Us, Multicultural Outreach & Recruitment*, U. WASH., <http://depts.washington.edu/reach/about-us/> (last visited Nov. 1, 2016). Further, the program states, “We provide programs and opportunities to attract, prepare, and increase the number of racially and ethnically underrepresented students who successfully matriculate at the University. It is our belief that enrolling students with a multiplicity of interests and experiences, intellectual and cultural perspectives enrich the learning environment for everyone.” *Id.*

200. McCormick, *supra* note 198, at 117–18.

effectively, the students at the university created an ambassador program that targeted minority high school students to help instill in them an attitude that a college education was possible.²⁰¹ These outreach efforts contributed to a successful increase in diversity in the student body, whereas within five years of banning the consideration of race, the university's racial and ethnic diversity of its freshmen class returned to its pre-race-based prohibition levels.²⁰²

Additionally, other universities, such as the University of Michigan and University of Nebraska at Lincoln, have taken the same approach of reaching out to racial minorities as well as economically disadvantaged students.²⁰³ The University of Michigan provides tenth-grade students the opportunity to get a taste of the college experience by offering a three-day, overnight program in which university students serve as mentors.²⁰⁴ The university also reaches out to middle school and high school students to participate in its summer programs.²⁰⁵ At the University of Nebraska at Lincoln, a recruitment program provides certain high school students with academic support, counseling, summer courses, and science camps.²⁰⁶ Students who participate in the program receive full scholarships to attend the University of Nebraska at Lincoln or a partnering community college.²⁰⁷

While some argue that outreach programs are too costly, the University of California, Berkeley researched different approaches to offset this expense.²⁰⁸ In 1996, a University of California, Berkeley student poll showed that most students opposed racial preferences, but they had no issues voting for a \$3 increase in student fees to support improved minority outreach.²⁰⁹ With more universities offering recruitment and outreach programs that aim to attract and retain minority students, it is no surprise that these efforts have made a real difference in increasing diversity.²¹⁰

In light of the foregoing statistics, universities have proven to be successful in applying race-neutral alternatives to produce racial diversity. Not only do these alternatives help universities achieve racially diverse student bodies, but they also result in other positive attributes. With percentage plans awarding admission to high-achieving students, socioeconomic status admissions programs creating opportunities for disadvantaged applicants, scholarship programs allowing deserving students

201. *Id.* at 118.

202. *Id.*

203. Potter, *supra* note 161, at 87.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. See SANDER & TAYLOR, *supra* note 2, at 156.

209. *Id.*

210. See Richard Sander, *A Collective Path Upward: Working Smarter and Cooperatively to Improve Opportunity and Outcomes*, in *THE FUTURE OF AFFIRMATIVE ACTION*, *supra* note 161, at 215, 222.

the chance to attend college, and recruitment programs giving high school students the incentive to attend college, these beneficial alternatives should encourage other universities to start reflecting on their own admissions programs to determine whether, in fact, considering race in admissions is the necessary and best option.²¹¹

V. ON YOUR MARK, GET SET, GO!: UNIVERSITIES SHOULD GET A HEAD START BY USING RACE-NEUTRAL ALTERNATIVES

It is likely only a matter of time before universities will have no choice but to focus all of their admissions efforts on race-neutral practices. As more admissions departments develop and implement successful race-neutral alternatives, universities that use race as a factor in admissions will encounter increasing difficulty in demonstrating that their programs pass strict scrutiny.²¹² Because strict scrutiny requires race-based programs be *necessary* to achieve racial diversity, universities that continue using racial preferences face a more credible threat of litigation as the number of universities using race-neutral alternatives to achieve diverse student bodies continues to grow.²¹³ In addition, with the Supreme Court moving toward a more stringent strict scrutiny analysis, requiring a “careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications” rather than relying on a university’s “good faith consideration of workable race-neutral alternatives,” it will likely phase out the use of race in admissions programs.²¹⁴ Furthermore, the university’s ultimate burden of proving its program is in conformance with strict scrutiny will likely also foster a greater urgency to develop and test race-neutral alternatives.²¹⁵ As a result, the increase of these alternatives will make it more difficult for universities to prove that the use of race-based affirmative action programs are actually necessary or narrowly tailored to produce racial diversity.²¹⁶

Universities, especially in Texas, facing these legal concerns are entering an era in which the use of race-based affirmative action does not

211. See discussion *supra* Section IV.A (explaining race-neutral alternatives to achieve racial diversity).

212. *Fourteenth Amendment—Equal Protection Clause—Public-University Affirmative Action—Fisher v. University of Texas at Austin*, *supra* note 103, at 266–67.

213. *Id.* at 258; see also Ngov, *supra* note 139, at 13 (explaining that race-neutral alternatives “place[] the burden on other institutions to show why a similar program would not work at their school”).

214. *Fisher II*, 133 S. Ct. 2411, 2420 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); accord *Fourteenth Amendment—Equal Protection Clause—Public-University Affirmative Action—Fisher v. University of Texas at Austin*, *supra* note 103, at 265–66.

215. *Fourteenth Amendment—Equal Protection Clause—Public-University Affirmative Action—Fisher v. University of Texas at Austin*, *supra* note 103, at 266.

216. *Id.* at 265.

look promising.²¹⁷ Seeing the writing on the wall combined with the Court’s notion that race-neutral admissions programs are preferred, universities should get a head start by exploring and implementing race-neutral alternatives.²¹⁸ Rather than urgently conforming, universities fortunately have the opportunity to determine the right combination of available legally defensible race-neutral options that will optimally foster a diverse student body.²¹⁹ The following recommendations provide an effective starting point for universities to consider in their pursuit of achieving diversity through race-neutral means.

A. Encouraging More Minority Applicants to Approach the Starting Line

Most importantly, a university cannot be successful in creating a diverse student body unless a sufficient number of diverse applicants apply for admission.²²⁰ A university’s goal of attracting minority students should start with its recruitment and outreach efforts. While high-ranking universities may entice minorities to apply based on their prestige, these universities should not solely rely on prominence to guarantee that minorities will accept admittance.²²¹ In addition, less selective universities have to compete with higher ranked universities when seeking capable and diverse students.²²² Thus, developing a comprehensive recruitment and outreach strategy can aid all universities in broadening the pool of minority applicants.

Specifically, universities should engage in recruitment efforts that target students who have experienced socioeconomic challenges. Recent research has proven that “vast numbers of very talented low- and moderate-[socioeconomic status] students do not even make it into the applicant pool for selective colleges and universities.”²²³ Many of these

217. See discussion *supra* Part III (discussing the legal challenges that race-based affirmative action programs in Texas continue to face).

218. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring) (stating that racial classifications “may be considered legitimate only if they are a last resort to achieve a compelling interest”); *Grutter*, 539 U.S. at 339–43 (encouraging universities to explore race-neutral alternatives before using racial preferences); Kahlenberg, *supra* note 162 (discussing the Supreme Court’s stance that workable alternatives are preferred over race-based preferences).

219. See D. Frank Vinik et al., *Affirmative Action in College Admissions: Practical Advice to Public and Private Institutions for Dealing with the Changing Landscape*, 26 J.C. & U.L. 395, 421 (2000).

220. See Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851, 875 (2010) (asserting that even if a university used race-based affirmative action, “a failure to attract a sufficient number of minority applicants who meet an institution’s academic qualifications makes it impossible for an institution to enroll a diverse student body”).

221. See Nelson, *supra* note 133, at 43 (noting that minorities chose not to enroll after applying due to a lack of personal attention and inadequate financial aid packages).

222. See Richard Sander & Aaron Danielson, *Thinking Hard About “Race-Neutral” Admissions*, 47 U. MICH. J.L. REFORM 967, 977 (2014) (examining the effects of competition among college admissions for minority students).

223. *Id.* at 996; accord Maurice Dyson, *In Search of the Talented Tenth: Diversity, Affirmative Access, and University-Driven Reform*, 6 HARV. LATINO L. REV. 41, 47 (2003) (“Most applicants are from

students never apply because they do not realize that they have the option to attend.²²⁴ As a result, if universities were to focus their outreach strategies on socioeconomic status and inform low-income students that they have the option, admissions would have a greater pool of applicants and therefore a greater opportunity of increasing diversity.²²⁵ The fact that high-achieving students who face economic hardships are less apt to apply to select schools should encourage flagship universities in Texas, such as the University of Texas and Texas A&M, to improve recruitment efforts that specifically reach a larger number of well-prepared, low-income students.²²⁶

In addition, universities should engage in outreach efforts on campuses. These efforts could include recruiting events designed to attract minority students, such as hosting respected minority guest speakers.²²⁷ Inviting a successful and esteemed minority guest to speak at an on-campus event provides the unique opportunity to particularly attract minority students on campus while also fostering relationships with prospective applicants.²²⁸ As an additional opportunity, universities could create mentorship programs in which the university pairs current students with similarly situated high school students.²²⁹ This effort should provide prospective students with a better understanding that attending that particular college is a feasible and worthwhile goal, which could positively affect a minority student's desire to apply for admission.²³⁰ Furthermore, these recruitment measures are not simply limited to undergraduate universities. In fact, programs that encourage minority students to apply and attend graduate programs could have a substantial effect on the pool of minority applicants because a

the wealthiest ten percent of school districts, which spend ten times more per student than the poorest ten percent.”).

224. David Leonhardt, *A Simple Way to Send Poor Kids to Top Colleges*, N.Y. TIMES (Mar. 29, 2013), http://www.nytimes.com/2013/03/31/opinion/sunday/a-simple-way-to-send-poor-kids-to-top-colleges.html?_r=0.

225. See Sander & Danielson, *supra* note 222, at 998.

226. *Id.*; see also Holley & Spencer, *supra* note 88, at 264 (“The Ten Percent Plan’s effectiveness could be enhanced by using recruitment policies and procedures to maximize the number of eligible minority students applying to the universities.”). To reach the greatest number of students that are not likely to apply but are academically deserving of admission, a university should recruit students “who score[] at or above the 90th percentile on the ACT comprehensive or the SAT I (math and verbal) and who ha[ve] a high school [GPA] of A- or above” and are also from low income families, which refers to the bottom “quartile[] of the income distribution of families with a child who is a high school senior.” Caroline Hoxby & Christopher Avery, *The Missing “One-Offs”: The Hidden Supply of High-Achieving, Low-Income Students*, BROOKINGS PAPERS ON ECON. ACTIVITY 2 (2013), http://www.brookings.edu/~media/projects/bpea/spring-2013/2013a_hoxby.pdf.

227. See Catherine E. Smith, *Seven Principles: Increasing Access to Law School Among Students of Color*, 96 IOWA L. REV. 1677, 1692–94 (2011) (discussing that hosting Justice Sotomayor as a guest speaker where the law school strategically reserved a number of tickets for high school students proved an incredible opportunity to strengthen and build relationships between the law school and area students).

228. See *id.*

229. See Ward, *supra* note 195, at 645.

230. See James, *supra* note 220, at 874 (explaining that a university’s positive reputation makes it more likely that minorities will apply).

disproportionate number of minority college graduates choose not to pursue enrollment in postgraduate programs.²³¹

These examples illustrate just a few of the many recruitment and outreach efforts available to universities that will encourage a greater number of underrepresented students to apply, giving admissions programs the opportunity to select from as many qualified candidates as possible. Although recruitment and outreach efforts are only one part of the process, these efforts provide a crucial starting point for universities and graduate programs seeking to achieve racial and ethnic diversity while using race-neutral alternatives.²³²

B. Moving Disadvantaged Applicants to the Front of the Starting Line

The goal of expanding the number of minorities that apply for admission is just one key step towards the ultimate goal of attaining a diverse student body. The next step is for universities to create educational opportunities for qualified students who have been truly disadvantaged by their social and economic obstacles.²³³ Universities should seek to achieve this goal by considering applicants' socioeconomic status and giving preference to those applicants who have encountered and overcome economic hardships.²³⁴

All institutions of higher education, including graduate programs, can benefit from socioeconomic-based policies; however, less selective schools in Texas and universities that do not utilize percentage plans should especially focus admissions efforts on socioeconomic status. Highly selective universities using percentage plans, such as the University of Texas, are already making large strides in attaining racial and socioeconomic diversity because prestigious universities benefit the most from these plans.²³⁵ Accordingly, less selective schools in Texas and universities in other states that do not reap the benefits of percentage plans should try to facilitate sufficient levels of diversity through socioeconomic-based admissions practices.²³⁶ Nonetheless, highly selective universities that are

231. See Nelson, *supra* note 133, at 29.

232. See *id.* at 44 (“Aggressive recruiting has been invaluable to institutions in their efforts to establish and maintain student bodies that are racially and ethnically diverse.”).

233. See Kahlenberg, *supra* note 162 (stressing that “[t]o be economically competitive and socially just, America needs to draw upon the talents of students from all backgrounds”).

234. See *id.* (explaining that because “Americans broadly recognize that economically disadvantaged students of all races have overcome significant obstacles,” they are much more likely to support a socioeconomic-based system over a race-based system).

235. See *id.* (discussing how the Ten Percent Plan has produced substantial socioeconomic diversity at University of Texas and Texas A&M); *supra* notes 148–54 and accompanying text (examining the Ten Percent Plan’s success in increasing diversity).

236. See T. Vance McMahan & Don R. Willett, *Hope from Hopwood: Charting a Positive Civil Rights Course for Texas and the Nation*, 10 STAN. L. & POL’Y REV. 163, 167 (1999) (“The [Ten Percent Plan] applies across-the-board to all of Texas’ 35 state universities but is aimed chiefly at prestigious

benefitting the most from percentage plans should also incorporate an applicant's socioeconomic status in admissions considerations to help ensure diversity within their student bodies.²³⁷

To optimize successful results, universities need to shape their socioeconomic-based admissions programs as broadly as possible.²³⁸ Stated another way, admissions should consider a variety of socioeconomic variables, which include the applicant's parents' income, education, occupation, and net worth as well as the applicant's quality of secondary education, neighborhood influences, and family structure.²³⁹ Studies have shown that recognizing this assortment of measures during the admissions process can contribute to a university's racial and ethnic diversity.²⁴⁰ Moreover, combining these factors with an applicant's academic criteria can help universities find students who have the ability and willpower to succeed but whose hardships and challenges have hindered the path to reaching their full potential of success.²⁴¹

Phasing out the use of racial preferences and determining the most efficient combination of race-neutral alternatives will take time.²⁴² Because the finish line for race-based affirmative action programs appears to be getting closer, universities should start the transition now.²⁴³ While these recommendations serve as an initial starting point for producing diversity through race-neutral means, each university will have to find its ideal solution. Fortunately, with the rising number of states—including Texas—that now have minority populations that surpass nonminority populations, universities have an even greater opportunity to develop a solution that will help attain the goal of a diverse student body.²⁴⁴

schools like UT, which have a cap on enrollment, not less-selective schools that routinely accept lower-ranking students.”)

237. *See id.*

238. *See* Kahlenberg, *supra* note 181, at 1074, 1083.

239. *See id.* at 1079–83 (providing a thorough analysis the importance of each factor).

240. *See supra* notes 162–64 and accompanying text (explaining why considering a broad range of socioeconomic factors can increase diversity). A socioeconomic-based policy also satisfies the individual consideration requirement of *Bakke*. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307, 317–19 (1978).

241. *See* S.H., *Race-Blind Affirmative Action: Identifying the Disadvantaged*, *ECONOMIST* (June 18, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/06/race-blind-affirmative-action> (stating that class-based affirmative action programs have “increased the diversity of the student bodies at top universities by helping the poor without increasing the risk of admitting unqualified applicants”).

242. *See* Eastland, *supra* note 178, at 47.

243. *See supra* Sections III.C, IV.A (discussing how the upcoming *Fisher* decision and the number of states finding race-neutral alternatives to achieve diversity could jeopardize the future use of race in admissions).

244. *See* FLORES & HORN, *supra* note 144, at 15. Texas, California, Hawaii, New Mexico, and Washington, D.C. have minority populations that exceed nonminority populations. *Id.* Arizona, California, Delaware, Florida, Georgia, Hawaii, Maryland, Mississippi, New Jersey, New Mexico, New York, Nevada, Texas, and Washington, D.C. also have majority–minority child populations under the age of five years old. *Id.*

C. Putting Race-Neutral Alternatives to Practice and the Positive Benefits That Result

Maintaining racial and ethnic diversity is not an easy undertaking.²⁴⁵ Admissions programs can be complex and costly.²⁴⁶ Yet, with great sacrifice comes great reward. Thus, while using racial preferences may be the easier option, universities should utilize race-neutral alternatives that ultimately provide students with unmatched long-term benefits.²⁴⁷

1. A Better Environment to Foster Crossing the Finish Line

One benefit of implementing race-neutral alternatives is that universities will more likely provide students with a better environment for furthering success.²⁴⁸ As researchers have indicated, one of the biggest downfalls of race-based affirmative action is the tendency to harm its intended beneficiaries.²⁴⁹ A leading scholar in the area of affirmative action, Richard Sander, found that race-based affirmative action programs “often fail[] to match students with the academic environments that are most likely to foster their success”²⁵⁰—a problem he has coined “mismatch.”²⁵¹ This downfall can place affirmative action students at risk for receiving much lower grades than other students whose race was not a factor in admissions, ranking near the bottom of the class, and dropping out.²⁵²

For instance, at the University of Texas, the average African-American student scored in the 52nd percentile of the SAT while the average Caucasian student scored in the 89th percentile, indicating the average

245. McCormick, *supra* note 198, at 115–16.

246. *Id.*

247. Kahlenberg, *supra* note 162.

248. See Richard Sander & Stuart Taylor, Jr., *The Painful Truth About Affirmative Action*, ATLANTIC (Oct. 2, 2012), <http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/>.

249. *Id.*

250. Sander, *supra* note 210, at 217; accord Dan Slater, *Does Affirmative Action Do What It Should?*, N.Y. TIMES (Mar. 16, 2003), <http://www.nytimes.com/2013/03/17/opinion/sunday/does-affirmative-action-do-what-it-should.html> (noting that Justice Clarence Thomas has also stated that affirmative action places students in programs above their abilities). The fact that “blacks are nearly two-and-a-half times more likely than whites not to graduate from law school, are four times more likely to fail the bar on their first attempt, and are six times more likely to fail after multiple attempts” played a role in Richard Sander’s mismatch conclusions. Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1964–65 (2005).

251. Sander & Taylor, *supra* note 248.

252. See *id.*; see also Gail Heriot, *The Sad Irony of Affirmative Action*, 14 NAT’L AFF. 78, 82 (2013) (“It is a fact that in virtually all selective schools . . . where racial preferences in admission is practiced, the majority of African American students end up in the lower quarter of their class”) (quoting STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 124 (2003)).

African-American student may not be as academically prepared.²⁵³ This type of environment leads to a mismatch because the university is putting lower scoring affirmative action recipients in a position that requires them to compete amongst the most highly competitive students.²⁵⁴ Moreover, these students find themselves at universities “where the professors are not teaching at a pace designed for [them]—they are teaching to the ‘middle’ of the class, introducing terms and concepts at a speed that is unnerving even to the best-prepared student.”²⁵⁵ As a result, these students will likely struggle to stay afloat and learn less, which cannot only affect the way these students perceive themselves but can also affect their graduation rates and career opportunities.²⁵⁶

Universities in Texas should especially pursue race-neutral alternatives that place minorities in better environments to aid their chances of success because Texas ranks 33rd in overall public college graduation rates among the states.²⁵⁷ Contributing to that number are the low graduation rates among African Americans and Hispanics—the two groups that affirmative action has “benefited” the most.²⁵⁸ While 34.1% of white students graduated in four years from public universities, only 14.3% of African-American students and 19.6% of Hispanic students achieved the same accomplishment.²⁵⁹ These numbers endorse the notion that perhaps the current use of racial preferences is counterproductive to a staggering majority of minorities who are not graduating at the same rate as students whose race did not factor into admissions.²⁶⁰

The mismatch idea does not set out to prove that minority students will not succeed at high-ranking competitive universities.²⁶¹ Rather, it maintains that race-based affirmative action does not always benefit the minorities it intends to aid by helping them get their feet in the doors of universities where their academic qualifications are below the median level of their

253. Sander & Taylor, *supra* note 248. Research has shown that an African-American student compared to a white student with similar admissions applications receives the equivalent of a 310-point bump in SAT scores when race is a factor in admissions. *See* Slater, *supra* note 250.

254. Sander & Taylor, *supra* note 248.

255. *Id.*

256. *See* Peter Arcidiacono et al., *A Conversation on the Nature, Effects, and Future of Affirmative Action in Higher Education Admissions*, 17 U. PA. J. CONST. L. 683, 698 (2015) (discussing the mismatch hypothesis and the effects it can have on students admitted through large racial preferences). Grades can greatly predict the in-depth learning one achieves during school. *Id.* at 700. It is likely that a student learns more at a school where the academic credentials gap is small rather than large. *See* Gregory Camilli & Kevin G. Welner, *Is There a Mismatch Effect in Law School, Why Might It Arise, and What Would It Mean?*, 37 J.C. & U.L. 491, 503 (2011).

257. *Texas Public Colleges (4-Year) College Completion*, CHRON. HIGHER EDUC., http://college.completion.chronicle.com/state/#state=TX§or=public_four (last visited Nov. 1, 2016).

258. *Id.*

259. *Id.*

260. *See* Sander & Taylor, *supra* note 248.

261. *See* Slater, *supra* note 250.

classmates.²⁶² As a result, a ban on racial preferences in favor of a race-neutral system will better match minority students with environments in which their academic preparations are more proportionate to their classmates' preparations, leading to an increased likelihood of individual success.²⁶³

2. *Leaving Stigma in the Dust*

Eliminating race-based affirmative action programs in favor of race-neutral alternatives will also eliminate any stigma that racial minorities may experience as a result of such programs.²⁶⁴ This stigma can hinder those who gain admission through race-conscious programs because it can lead to self-doubt about their qualifications and ability to compete with others.²⁶⁵ As one sociology professor who has studied the issue of stigmatization put it,

If white students believe that many of their black peers would not be at a college were it not for affirmative action and, more important, if black students perceive whites to believe that, then affirmation action may indeed undermine minority-group members' academic performance by heightening the social stigma they already experience because of race or ethnicity²⁶⁶

While some affirmative action supporters argue that the stigma does not exist around minorities, other affirmative action recipients have experienced it firsthand.²⁶⁷ Clarence Thomas, an African-American United States Supreme Court Justice and opponent of race-based affirmative action, is one of them.²⁶⁸ Justice Thomas, whose race was taken into consideration when

262. *See id.* Conversely, some argue mismatch can be a good thing because it places students in a position where they are striving alongside people more capable. *Id.*

263. *See* Sander & Taylor, *supra* note 248.

264. *See* SANDER & TAYLOR, *supra* note 2, at 97–106 (identifying the stigma that can result from race-based affirmative action).

265. *See* Purvi Badiani, Student Research, *Affirmative Action in Education: Should Race or Socioeconomic Status Be Determinative?*, 5 GEO. J. ON FIGHTING POVERTY 89, 91–92 (1997).

266. Michelle Wu, *Affirmative Action Stigmatizes Minority Students, Study Finds*, DAILY PRINCETONIAN (Apr. 2, 2009), <http://dailyprincetonian.com/news/2009/04/affirmative-action-stigmatizes-minority-students-study-finds/>; accord Badiani, *supra* note 265, at 91–92 (quoting Justice Powell who stated that “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection”).

267. *See* Linda Chavez, *Who Needs the Stigma of Affirmative Action?*, CHI. TRIB. (Feb. 3, 1999), http://articles.chicagotribune.com/1999-02-03/news/9902030119_1_discrimination-harvard-law-school-whites (“Proponents of affirmative action don’t want to talk about the stigma of affirmative action, and some even deny it exists.”); *e.g.*, Eastland, *supra* note 178, at 42 (quoting Sonia Nazario, a Latino officer at Bank of America, who stated, “Sometimes I wonder: Did I get this job because of my abilities, or because they needed to fill a quota?”); Ariane de Vogue, *‘Silent’ Justice Outspoken on Affirmative Action*, ABC NEWS (Sept. 30, 2007), <http://abcnews.go.com/TheLaw/story?id=3667079&page=1> (discussing Justice Thomas’s view on his personal experience with affirmative action).

268. *de Vogue, supra* note 267; *see also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal*

he applied to Yale Law School, stated, “Once it is assumed that everything you do achieve is because of your race, there is no way out.”²⁶⁹ He further acknowledged that his Yale degree “bore the taint of racial preference” after struggling to get a job upon graduation from Yale.²⁷⁰ In addition, some affirmative action recipients feel a sense of defeat.²⁷¹ For instance, three African-American students at the University of Virginia Law School felt defeated after making it on to the school’s law review because race was a factor in the selection process.²⁷² Even though they were confident that they were capable of making it on to their school’s law review had race not been a factor, one student said, “Affirmative action was a way to dilute our personal victory[.] It took the victory out of our hands.”²⁷³ Affirmative action opponents successfully used this negative stigmatization effect to persuade citizens to vote in favor of prohibiting race-based affirmative action in California and Michigan.²⁷⁴ Seeing race-based affirmative action programs reportedly stigmatize its recipients should encourage other states and universities to take the initiative to prevent this stigma by using race-neutral programs.²⁷⁵

3. *Going for Gold: Incentive for Students to Reach Their Highest Academic Potential*

Using race-neutral alternatives rather than race-based admissions programs will likely give students—both white and minority—the incentive to reach their highest potential, which will help bolster their chances of achieving admittance into their preferred universities.²⁷⁶ To illustrate, an African-American student, John McWhorter, described his own youth stating that by the time he was ten years old, he knew that schools admitted black students under lower standards than white students.²⁷⁷ Thus, he deliberately

Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (advising “that those who have experienced discrimination speak with a special voice to which we should listen”).

269. de Vogue, *supra* note 267.

270. *Id.* Attaining a degree without any affirmative action stigma will likely produce long-term benefits in securing employment that values higher education. SANDER & TAYLOR, *supra* note 2, at 140.

271. See Eastland, *supra* note 178, at 42.

272. *Id.*

273. *Id.* (quoting William Raspberry, *Affirmative Action That Hurts Blacks*, WASH. POST (Feb. 23, 1987), https://www.washingtonpost.com/archive/opinions/1987/02/23/affirmative-action-that-hurts-blacks/e933a68f-a9f7-4df8-b7e4-a97deffaa214/?utm_term=.e072a358197b).

274. Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1306–07 (2008).

275. See *id.* at 1306.

276. See SANDER & TAYLOR, *supra* note 2, at 141; Jeffrey Folks, *How a Race-Neutral Admissions Policy Will Promote Minorities’ Success*, AM. THINKER (Dec. 16, 2015), http://www.americanthinker.com/articles/2015/12/how_a_raceneutral_admissions_policy_will_promote_minorities_success.html (stating that “a minority student is not as likely to work to her maximum potential in high school” when she knows she will gain admission to college no matter how poorly she performed).

277. SANDER & TAYLOR, *supra* note 2, at 141–42.

refrained from working to his highest potential in secondary school because he knew he would be accepted to top universities without doing so.²⁷⁸ John's story is just one of many.²⁷⁹ This lack of ambition as a result of race-based affirmative action should encourage universities to forgo using racial preferences.

Scholars, in fact, tested whether banning racial preferences would have an effect on high school achievement for minority students.²⁸⁰ The results so far have indicated that African-American and Hispanic students' high school performance have modestly improved, with the greatest improvement occurring at the top of the achievement distribution.²⁸¹ Specifically, in California from 1994 to 1997 (before the ban on racial preferences), roughly 2.5% of African Americans taking the SAT reached the highest academic distribution, which would have made them eligible for admission to the University of California through race-neutral policies.²⁸² After the people of California voted to ban race-based affirmative action, that percentage grew and continued to grow.²⁸³ In 2001, the number of African Americans to reach the highest academic indices jumped to 3.5%—a number that is 35% higher than the national average.²⁸⁴ The positive benefit of inspiring students to maximize their highest academic potential adds to the list of reasons why universities should implement race-neutral alternatives in lieu of racial preferences.

VI. MAINTAINING ENDURANCE

The obstacles that race-based affirmative action recipients encounter should motivate universities to critically examine current admissions practices in an effort to find a more positive solution.²⁸⁵ Before long, it is likely that universities, particularly in Texas, may have an obligation to do so.²⁸⁶ Getting a head start will aid in the challenging pursuit of attaining a racially diverse student body.²⁸⁷

At the heart of the challenge is finding the optimal number of academically qualified minority students that will provide a beneficially

278. *Id.*

279. *See* Folks, *supra* note 276. A student with mediocre grades and the potential to make higher grades stated, "Why should I [do better]? I'm going to get a good job when I graduate, no matter what." *Id.* She figured out that the affirmative action system would advance her regardless of her performance. *Id.*

280. *See* SANDER & TAYLOR, *supra* note 2, at 142.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *See supra* Section V.C.

286. *See supra* Sections III.C, IV.A.

287. *See supra* Part V.

diverse environment for all students.²⁸⁸ Fortunately, race-neutral alternatives provide a promising resolution.²⁸⁹ With viable race-neutral alternatives available, universities no longer have to seek diversity goals at the risk of harming certain students.²⁹⁰ Additionally, if the Supreme Court permits the use of racial preferences for the time being, race-neutral alternatives avoid the looming threat of litigation that race-based affirmative action programs cannot escape.²⁹¹ As a result, implementing race-neutral alternatives should be at the forefront of higher education admissions practices.²⁹²

Although there is not a one size fits all, race-neutral solution, pursuing aggressive recruiting and outreach strategies while also considering the socioeconomic background of applicants provides a good starting point for universities.²⁹³ Moving forward, universities should not get impatient with efforts in the quest to attain the ideal number of minority students to accomplish a diverse student body. It will likely take years to determine which race-neutral alternative or combination of alternatives will suffice.²⁹⁴ In the end, by maintaining endurance in the pursuit of achieving diversity through race-neutral means, universities and minority students will together cross the finish line strong.

288. *See supra* Parts IV, V.

289. *See supra* Parts IV, V.

290. *See supra* Part V.

291. *See supra* Parts III, IV.

292. *See supra* Part V.

293. *See supra* Part V.

294. *See supra* Part V.

