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## The Eyes of Texas Are Upon You: Will Affirmative Action In Texas Survive Its Endless Constitutional And Legislative Attacks?

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## COMMENTS

### THE EYES OF TEXAS ARE UPON YOU: WILL AFFIRMATIVE ACTION IN TEXAS SURVIVE ITS ENDLESS CONSTITUTIONAL AND LEGISLATIVE ATTACKS?

KATHRYN L. CANTU\*

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\*St. Mary's University School of Law, J.D., May 2023. University of Texas, B.B.A., 2020. I wrote this piece to remind everyone of the importance of creating opportunities for disadvantaged students to attend higher education institutions, and to also remind everyone that the fight to protect affirmative action initiatives is not over. While these discussions may seem difficult, or there may not seem to be an answer, my hope is that we never give up on trying to make our society a better place by embracing and encouraging diversity.

Thank you to the Volume 24 and 25 Editorial Board for allowing me to share my thoughts on affirmative action and for working with me to make this piece a reality. A special thank you to my Editor in Chief and friend, Brianna Chapa (and her family), for always believing in me and supporting me throughout law school. I truly could not have survived without you.

I would also extend my sincerest gratitude to Professor Al Kauffman, and the many civil rights warriors like him, for paving the way for students like me to attend their dream university in the state of Texas. Thank you for taking the time to share your reflections on such a crucial issue.

I dedicate this piece to all the amazing educators in my family, especially my mother Sylvia Ledesma, and sister Kristina Rodriguez. Thank you for instilling the importance of higher education in me, and for always being my biggest supporters. You are the reason I persevere. I am truly blessed by their love and support. There will never be enough words or actions to thank my mom and sisters for shaping me into the person I am today, but I will spend my lifetime trying.

Finally, I also dedicate this piece to the many Latina law students and professionals, who have been told that the "only reason" that they have earned their success is because of the "color of their skin." May we continue to prove to those that this is simply *not* true. We are strong, intelligent, beautiful women, and it is my hope that you believe that *this* is true too.

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## INTRODUCTION

Each academic year, high school seniors begin to feel the immense pressure of deciding their future and applying to college.<sup>1</sup> This pressure includes: preparing personal statement essays, compiling impressive resumes, taking dreaded standardized tests, and requesting letters of recommendation.<sup>2</sup> These preparations are made only after three long years of cultivation in taking advanced courses, participating in various school activities, and dedicating time to the community for volunteer hours.<sup>3</sup> There is a collective relief for some seniors in such applications

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1. See Jessica Binkley, *Colleges and High Schools Need to Change the Way They are Creating Needless Pressure on Students*, INSIDE HIGHER ED. (Apr. 19, 2021), <https://www.insidehighered.com/admissions/views/2021/04/19/its-time-high-schools-and-colleges-cut-pressure-they-create-students> [<https://perma.cc/L7JG-YB3A>] (challenging the current university selection process for high school seniors because it is creating unnecessary stress on students that is not reflective in their later performance at undergraduate institutions).

2. See generally *How to Apply for College*, PRINCETON REVIEW, <https://www.princetonreview.com/college-advice/college-application> [<https://perma.cc/P9PH-X2HE>] (describing the general process for high school seniors to prepare their applications for undergraduate institutions).

3. See *id.* (proposing actions that high school students may take to prepare for the college admission process).

because they *already know* they will receive an acceptance at a Texas public university of their choice based on their class rank alone.<sup>4</sup> These lucky few seniors, fall within the scope of the Texas “Top Ten Percent” Rule (hereinafter referred to as the “Rule”), which calls for automatic admission to any public college or university in the state if they are in the top percentile of their graduating class.<sup>5</sup> However, for as many joyful seniors that are certain they will be attending the college of their dreams, there remains the ninety percent who are not guaranteed such certainty.<sup>6</sup> The remaining ninety percent will likely face heartbreak upon receiving news that they were not accepted into the school they had been planning to attend their entire life.<sup>7</sup>

This is the reality of the use of affirmative action in higher education.<sup>8</sup> For purposes of this Comment, affirmative action means the effort employed by a university to attain a critical mass of underrepresented groups in an educational institution by giving due preference to those groups over nonminority applicants.<sup>9</sup>

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4. See *Fisher v. Univ. of Tex.*, 579 U.S., 365, 371-372 (2016) (explaining that the Top Ten Percent Rule guarantees admission for students who graduate in the top ten percent of their class may choose to attend any public university in Texas).

5. See generally *How to Apply for College*, *supra* note 2 (describing the general process for high school seniors to prepare their applications for undergraduate institutions); see TEX. EDUC. CODE ANN. § 51.803 (2020) (requiring general academic teaching institutions in the State of Texas to admit applicants who graduated with a grade point average and place them in the top ten percent of their high school graduating class).

6. See generally Angela M. Hough, *All Deliberate Ambiguity: The Question of Diversity, College Admissions, and the Future of the Texas Top-Ten-Percent Plan*, 39 TEX. TECH L. REV. 197, 198 (2006) (illustrating the dynamics of how the Rule affects students who are in the remaining ninety percent of their high school class).

7. See *id.* (demonstrating the reality and disappointment of a student not earning a place at the University of Texas because she was among the second decile of her high school class).

8. See generally Patricia Hart, *Imperfect 10*, TEX. MONTHLY (Apr. 2001), <https://www.texasmonthly.com/articles/imperfect-10/> [<https://perma.cc/E3CD-84SN>] (explaining the notion that for every top ten percent student with mediocre standardized test scores who gets accepted to a Texas university, another student with high test scores but mediocre grades will get left out under the Rule).

9. See generally Louis Menand, *The Changing Meaning of Affirmative Action*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action> [<https://perma.cc/8ZJP-SQ2D>] (expanding on the development of the phrase “affirmative action” by the Kennedy Committee of Equal Employment Opportunity).

One such institution utilizing affirmative action policies is the world-renowned University of Texas at Austin (University).<sup>10</sup> As a beneficiary of affirmative action, I have always wondered whether I would have been accepted into the highest-ranked public university in Texas without the Rule.<sup>11</sup> These self-reflective inquiries are not without merit.<sup>12</sup> The University's admission policy has been the subject of various lawsuits due to its unique process of filling its freshman class with more than the statutory "Top Ten" applicants.<sup>13</sup> Such attacks lead me to further question whether I would have been worthy of the non-top-ten admissions process, and further, whether the law itself is a sound policy.<sup>14</sup>

The various attacks on affirmative action raise the following additional inquiries: (1) is the Rule working the way it is intended, and (2) will it survive in the years to come?<sup>15</sup> These questions of worthiness amplify when individuals who "do not benefit" from affirmative action nor the Rule make statements such as: "There were people in my class with lower

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10. See Erica Grieder, *The Top 10 Percent Rule on Trial*, TEX. MONTHLY (Dec. 11, 2015), <https://www.texasmonthly.com/burka-blog/the-top-10-percent-rule-on-trial/> [<https://perma.cc/R9KQ-7KPE>] (illustrating The University of Texas at Austin has been the most affected university by the Texas Rule; eighty-one percent of its incoming class in 2008 had been admitted under the percentage rule).

11. See generally *Texas's Best Public Colleges & Universities of 2021*, ACAD. INFLUENCE (2021), <https://academicinfluence.com/rankings/by-state/texas/best-public-colleges> [<https://perma.cc/HK2K-7FB>] (ranking the University of Texas at Austin as the first-place public university in the State of Texas).

12. See Gail Heriot, *The Sad Irony of Affirmative Action*, NAT'L AFFS. (2013), <https://www.nationalaffairs.com/publications/detail/the-sad-irony-of-affirmative-action> [<https://perma.cc/DL2E-JXHE>] (representing those Hispanic and African American students accepted into universities through affirmative action have lower academic credentials than their White counterparts).

13. See *Fisher v. Univ. of Tex.*, 579 U.S. 365, 373-74 (2016) (4-3 decision) (providing that The University of Texas at Austin fills up to seventy-five percent of its freshman class with students that are actually in the top seven or eight percent of their class and the remaining twenty-five percent with its holistic approach, which is unique to the University).

14. See Nicholas Webster, *Analysis of the Texas Ten Percent Plan*, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, at 8 (2007), [http://kirwaninstitute.osu.edu/wp-content/uploads/2012/05/Texas-Ten-Percent\\_style.pdf](http://kirwaninstitute.osu.edu/wp-content/uploads/2012/05/Texas-Ten-Percent_style.pdf) [<https://perma.cc/CW4F-MPDG>] (questioning whether the Plan is targeting the right students to achieve diversity in higher education institutions).

15. See *id.* at 9 (predicting that there are unintended consequences to the Top Ten Percent Plan); see also Matthew Watkins, *Texas Senators Mull Eliminating Top 10 Percent Rule*, TEX. TRIB. (Apr. 5, 2017, 6:00 PM), <https://www.texastribune.org/2017/04/05/texas-senators-mull-eliminating-top-10-percent-rule/> [<https://perma.cc/C84G-EXY2>] (noting the past and current proposed legislature, being made by Senator Kel Seliger, that would eliminate the Top Ten program).

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grades who weren't in all the activities I was in, who were being accepted into UT, and the *only other difference between us was the color of our skin.*"<sup>16</sup> The individual who made this comment is none other than Abigail Fisher, the prime plaintiff in the notable affirmative action case *Fisher v. University of Texas at Austin*.<sup>17</sup>

Unsurprisingly, minorities who "benefitted" from affirmative action took offense to the insinuation that they did not earn their respective spots at Texas universities, or that they only did so "because of the color of their skin."<sup>18</sup> Despite being perceived to embody the antagonist of "[W]hite opponents" to affirmative action and receiving a great deal of animosity, Fisher's sentiment is not made in isolation.<sup>19</sup> It is important to note that many individuals, including minority students, wish to repeal not only affirmative action, but specifically the Rule, arguing it "unfairly disadvantages students who attend schools with rigorous academic standards."<sup>20</sup> Thus, it is important to assess the validity and the survival probability of such a higher education admissions structure.<sup>21</sup>

Since the first affirmative action case heard in the Supreme Court, *Regents of University of California v. Bakke*, there have been approximately five prominent cases heard in federal courts challenging

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16. FairRepresentation, *Abigail Fisher vs. Univ. of Tex. at Austin*, YOUTUBE (Sept. 4, 2012), <https://www.youtube.com/watch?v=sXSpX9PZZj4> [<https://perma.cc/36ZV-6NE4>].

17. *See id.* (justifying the purpose and objectives of filing suit against the University of Texas to remove racial considerations in college admissions).

18. *See generally* Yanan Wang, '#StayMadAbby': African American Graduates Respond to Supreme Court Affirmative Action Case with Humor, Pride, WASH. POST (Dec. 11, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/12/11/staymadabby-african-american-graduates-respond-to-supreme-court-affirmative-action-case-with-humor-pride/> [<https://perma.cc/J7T5-B65X>] (relating the fury felt by members of the African American community toward Abigail Fisher because she suggested that she deserved to attend The University of Texas at Austin more than they did).

19. *See generally* Emma Berdanier, *Top Ten Percent Rule Proves Ineffectiveness*, DAILY TEXAN (Apr. 12, 2017), <https://thedailytexan.com/2017/04/12/top-ten-percent-rule-proves-ineffectiveness/> [<https://perma.cc/B96H-3NH7>] ("This rule is not fair to students who choose to take more rigorous courses to better prepare them for college and miss out on making the top [ten] percent.").

20. *See* RITA BARR, FOCUS REPORT: SHOULD TEXAS CHANGE THE TOP 10 PERCENT LAW? 4 (HOUSE RSCH. ORG. 2005) (identifying unintended consequences of the Top Ten Plan such as students taking lighter courses or moving to less demanding high schools solely to remain in the top percentage of their class).

21. *See id.* at 4-5 (noting the multiple opponents to the Plan and the actions being taken by Texas legislative members and public university leadership members to alter the current Plan in the state of Texas).

the constitutionality of public universities' uses of affirmative action in their admissions: (1) *Gratz v. Bollinger*; (2) *Grutter v. Bollinger*; (3) *Fisher v. University of Texas at Austin*; (4) *Schuette v. Coalition to Defend Affirmative Action*; and once again (5) *Fisher v. University of Texas at Austin* (II).<sup>22</sup> This Comment will examine the creation and narrowing of affirmative action in federal courts, and the survival of the unique Rule.<sup>23</sup> Additionally, this issue is of particular and current importance, given the Supreme Court will be considering yet another affirmative action case, *Students for Fair Admissions v. Harvard*, which could potentially lead to a definitive end of this practice in higher education that would not only affect Texas, but the entire country.<sup>24</sup>

Despite the constant attacks on the practice of considering race in admissions, the underlying purpose of affirmative action is important because it addresses the decades-long effects of discrimination in higher education; in other words, affirmative action aims to “level the playing field.”<sup>25</sup>

The survival of affirmative action impinges upon the Equal Protection Clause of the Fourteenth Amendment, which provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>26</sup>

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22 See generally Kramer, *supra* note 22 (highlighting the key cases in which the Supreme Court has weighed in on affirmative action through the decades); see also Editorial Board, *False Equality in Michigan*, N.Y. TIMES (Oct. 13, 2013), <https://www.nytimes.com/2013/10/14/opinion/false-equality-in-michigan.html> [<https://perma.cc/C8LS-S2K3>] (discussing the affirmative action case out of Michigan in 2003 where the Court upheld the race-conscious admissions policy of the University of Michigan Law School).

23 See Adam Harris, *This Is the End of Affirmative Action*, ATLANTIC (July 26, 2021), <https://www.theatlantic.com/magazine/archive/2021/09/the-end-of-affirmative-action/619488/> [<https://perma.cc/7UKR-SH4Z>] (“If the majority dismisses what remains of the nation’s experiment with affirmative action, the United States will have to face the reality that its system of higher education is, and always has been, separate and unequal.”).

24 See *id.* (stressing that current race-conscious admissions policies are weak due to the need to pacify opponents to affirmative action).

25 See Driver, *In Defense of Affirmative Action: By Any Means Necessary*, AMA J. OF ETHICS at 489, 490–91, <https://journalofethics.ama-assn.org/article/defense-affirmative-action-any-means-necessary/2014-06> [<https://perma.cc/9DWE-6GJP>] (recognizing that consideration of race in a beneficial way tries to address racial discrimination from the past).

26 U.S. CONST. AMEND. XIV, § 1 (emphasis added).

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Keeping the Fourteenth Amendment in mind to see what the future holds for constitutionally permissible race-conscious admission policies in Texas, Part II of this Comment first examines the History of affirmative action.<sup>27</sup> Additionally, Part II will discuss the events leading to the creation of the Rule to provide a contextual background.<sup>28</sup> Part III will assess the Supreme Court's scrutiny requirements on the burden universities bear in partaking in race-conscious admission plans.<sup>29</sup> Additionally, a unique analysis is needed to determine the likelihood of the Rule's survival based on the behavior of the rule's critics and the Texas Legislature.<sup>30</sup> Finally, Part IV will provide a solution recognizing the legitimacy and importance of affirmative action and the Top Ten Rule, and ensure that the benefits it seeks to confer on students entering higher education continue.<sup>31</sup>

## I. HISTORY

### A. Affirmative Action in the Supreme Court.

In *Bakke*, the University of California, Davis, School of Medicine created an admissions scheme in the 1970s as an effort to secure a certain subset of minority and economically disadvantaged students in each

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27. See Foy Meyer, *The Rise and Fall of Affirmative Action*, 8 TEX. REV. LAW & POL. 437, 438 (2004) (detailing the method of tracking the rise of affirmative action through history to explain its anomalous existence today).

28. See Steven T. Poston, *The Texas Top Ten Percent Plan: The Problem It Causes for the University of Texas and a Potential Solution*, 50 S. TEX. L. REV. 257, 261 (2008) (supporting the importance of the events in Texas leading up to the adoption and implementation of the Texas legislative plan).

29. See *Fisher v. Univ. of Tex.*, 579 U.S. 365, 378-79 (emphasizing the University's continuing obligation to satisfy the burden of strict scrutiny considering changing circumstances).

30. See David G. Hinojosa, *Of Course the Texas Top Ten Percent Is Constitutional – And It's Pretty Good Policy Too*, 22 TEX. HISP. J. L. & POL'Y 1, 19 (2016) (disagreeing with the legal scholars who have targeted the rule and argued it likely violated the equal protection clause of the Fourteenth Amendment, despite the law's apparent racial neutrality and its impact on geographic diversity).

31. See generally Altheria Caldera, *Equity Should Be Upheld in Top Ten Percent Plan: IDRA Testimony Against SB 1091*, INTERCULTURAL DEV. RSCH. ASS'N (Apr. 28, 2021), <https://www.idra.org/wp-content/uploads/2021/04/4.28-Testimony-Against-SB-1091-w-infographic.pdf> [<https://perma.cc/D2RF-AJVB>] (providing recommendations to maintain Texas' current rule to incentivize higher education institutions to adopt programs supporting diverse students and faculty, and to increase recruiting efforts at high schools with historically low numbers of students attending public universities).



medical school class.<sup>32</sup> Specifically, the Medical School set aside sixteen of one hundred “places” in the class for minority students only.<sup>33</sup> The admissions scheme became subject to a suit by a White applicant claiming that judgment of applicants based on race violated his rights protected by the Equal Protection Clause of the Fourteenth Amendment.<sup>34</sup> Making its first decision on affirmative action in higher education, the Supreme Court held that racial quotas were unconstitutional.<sup>35</sup> However, the Court did rule that race and ethnic diversity *may* be an appropriate factor in higher education admissions, among other various factors a university may consider.<sup>36</sup> Most notably, Justice Powell identified four possible justifications for consideration of race given by the Medical School, which included the following:

. . . (i) ‘reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,’ . . . (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.<sup>37</sup>

This decision was also the first instance in which the Court applied a strict scrutiny level of review to these types of matters, requiring the universities to demonstrate a compelling government interest and a narrowly tailored means utilized to achieve such an interest.<sup>38</sup>

Thus, the Court legitimized affirmative action in California’s higher education system and set parameters outlining how courts can consider

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32. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 272 (1978) (holding that while the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under certain circumstances, a university may not foreclose on non-race considerations).

33. See *id.* at 278 (rejecting the use of explicit racial quotas in admissions programs to achieve diversity in higher education).

34. See *id.* at 278 (recognizing the White applicant’s rights under the Equal Protection Clause of the Fourteenth Amendment).

35. See *id.* at 278 (proclaiming that some specified percentage of a particular group given preference because of race or ethnicity must be rejected as it is facially invalid).

36. See *id.* at 314 (concluding that ethnic diversity is an element in a range of factors that a university properly may consider in attaining the goal of a heterogeneous student body).

37. *Id.* at 306.

38. See *id.* at 299 (“When they touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”).

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race on an individualized basis in higher education admission cases in the future.<sup>39</sup>

Twenty-five years later, the Supreme Court once again considered affirmative action in *Gratz v. Bollinger*.<sup>40</sup> The Court deliberated the constitutionality of the University of Michigan's undergraduate admission policy, which considered race as a factor in admissions decisions.<sup>41</sup> Among the various factors considered, applicants received "points" for their "underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying."<sup>42</sup> Two years later, the University of Michigan took it further by automatically awarding twenty points to applicants from underrepresented racial or ethnic minority groups.<sup>43</sup>

The Court ultimately determined that the undergraduate policy did not provide for individualized consideration, which was emphasized as essential in Justice Powell's opinion in *Bakke*.<sup>44</sup> The University of Michigan's use of race in its admission policy was found not to be narrowly tailored to achieve the compelling interest in diversity.<sup>45</sup>

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39. *See id.* at 320 (recognizing that states may serve a substantial interest by considering race and ethnic origin in admissions decisions); *see also* Nancy L. Zisk, *The Future of Race-Conscious Admissions Programs and Why the Law Should Continue To Protect Them*, 12 NE. U. L. REV 56, 67 (2020) (summarizing the historical analysis of the *Bakke* opinion).

40. *See Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (finding that the manner in which the University of Michigan considered the race of applicants in its undergraduate admissions guidelines violated the Fourteenth Amendment).

41. *See id.* at 260 (identifying the issues that the petitioners raised in their course of litigation to challenge the constitutionality of the use of race in university admissions).

42. *See id.* at 255 (introducing the troublesome nature of the use points for race in the University of Michigan admissions procedures).

43. *See id.* at 256 (discussing the constant changes in the University's Office of Undergraduate Admissions policy during the 1990s that led to certain applicants receiving a higher "index score").

44. *See id.* at 271 (recognizing the importance of considering each particular applicant as an individual to assess their ability to contribute to the higher education setting); *see also* Regents of Univ. of California v. Bakke, 438 U.S. 265, 315 (1978) (asserting "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element).

45. *See Gratz*, 539 U.S. at 275 (condemning the University's consideration process because applicants with differing backgrounds, experiences, and characteristics would not be reviewed. Instead, the applicants would merely receive "points," and this does not purport to achieve diversity in higher education).

Therefore, the Michigan undergraduate admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.<sup>46</sup>

Decided on the same day was *Grutter v. Bollinger*; *Grutter* differed from *Gratz* because it dealt with the University of Michigan Law School's different type of admissions program.<sup>47</sup> The Law School's policy required admissions to consider each applicant individually based on *all the information available in the file*.<sup>48</sup> The Court concluded that the Equal Protection Clause of the Fourteenth Amendment did not prohibit the law school's narrowly tailored use of race as a factor in admissions "to further a compelling interest in obtaining the education[al] benefits that flow from a diverse student body."<sup>49</sup> Thus, the Court upheld the admission program, but expressed that race-conscious admissions policies are required to be limited in time and have a logical endpoint.<sup>50</sup> Specifically, the Court implored a requirement upon the law school that there must eventually be a termination point in race-conscious admissions policies to assure all citizens that the deviation from the norm of equal treatment of all racial groups is temporary and only done so in the goal of equality itself.<sup>51</sup>

Of importance, Justice O'Connor made the bold assumption: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>52</sup> Whether the Court or this country will have an answer in 2028, twenty-five years from the

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46. *See id.* at 275 (upholding the equal protections afforded to all persons absent a justified compelling interest of diversity in higher education and a narrowly tailored method to achieve such an interest).

47. *See Grutter v. Bollinger*, 539 U.S. 306, 315 (2003) (distinguishing how the flexible, yet still individualized, assessment of the applicant's potential to contribute to the educational environment was different than the admissions policy in *Gratz*).

48. *See id.* at 315 (emphasis added) (describing how the holistic admissions policy considers the entirety of the applicant's available information to deepen understanding of their potential contribution to university life).

49. *See id.* at 343 (finding that the individualized inquiry into the possible diversity contributions of the law school's applicants does not unduly harm nonminority applicants).

50. *See id.* at 342 (implying that the Court will prefer the use of race-neutral alternatives as they develop over the years in higher education).

51. *See id.* ("In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.").

52. *See id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

date of *Grutter*, remains to be determined.<sup>53</sup> What is certain, is that *Grutter* authenticated the constitutionality of public universities utilizing race-conscious, holistic admissions programs to further serve their compelling interests of promoting diversity and achieving a critical mass, which paved the way for affirmative action programs in the years to come.<sup>54</sup>

The following Supreme Court case was *Schuetz v. Coalition to Defend Affirmative Action*.<sup>55</sup> In response to *Gratz* and *Grutter*, Michigan voters took action.<sup>56</sup> In 2006, Michigan voters passed a ballot initiative known as Proposition 2 to amend their State Constitution to ban affirmative action policies.<sup>57</sup> Two important groups came together to argue the constitutionality of the amendment to the Michigan Constitution: (1) Coalition to Defend Affirmative Action, Integration, and Immigrant Rights; (2) Fight for Equality By Any Means Necessary (BAMN).<sup>58</sup> In taking the case, the Court stated the following at the outset: “[This case] is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education.”<sup>59</sup> This case is distinct from prior affirmative action cases because the Court did not consider *permissibility* of race-conscious admissions policies under the

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53. See Zisk, *supra* note 30 (articulating that Justice Kennedy’s opinion in *Fisher* did not make any firm prediction as to when a consideration of race would no longer be necessary but may have done more to unsettle the law than to clarify it).

54. *E.g.* *Grutter*, 539 U.S. at 325, 343 (acknowledging that the use of race to further an interest in student body diversity in the context of public higher education has in fact yielded necessary results).

55. See generally *Fourteenth Amendment - Equal Protection Clause Political-Process Doctrine* - *Schuetz v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 128 HARV. L. REV. 281 (2014) (categorizing the case as involving the political-process doctrine, which prohibits subjecting benefiting racial minorities to a more burdensome political process than that imposed on other legislation).

56. See *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 298–99 (2014) (referring to the statewide debate that ensued in Michigan following the used of race-based preferences in undergraduate admissions processes).

57. See Driver, *supra* note 25 (addressing the filed lawsuit the day immediately following the vote on the state constitutional ban on affirmative action policies through Proposition 2).

58. See *Schuetz*, 572 U.S. at 299 (naming the plaintiffs of the suit that challenged the constitutionality of the amendment in the interest of students and faculty that would be affected).

59. See *id.* at 300 (highlighting that the Court would not be discussing the complex questions that race considerations present in admissions processes).

Constitution.<sup>60</sup> In *Schuette*, the Court considered whether voters in the states may choose to prohibit the consideration of racial preferences in governmental decisions, such as school admissions, and if so, in which manner.<sup>61</sup>

The Court concluded that the Judiciary did not have the authority to set aside the Michigan law chosen by the state voters.<sup>62</sup> In Justice Kennedy's argument to uphold self-government, he opined it would be possible for voters to determine when to adopt race-based preferences.<sup>63</sup> This decision was a major setback for affirmative action because, in effect, a majority-White state electorate could ban measures to "level the playing field" for long-disadvantaged minority students in higher education admissions.<sup>64</sup>

In 2013, the Supreme Court decided the landmarked case, *Fisher I*.<sup>65</sup> However, the Court's decision did not provide an ultimate answer to the question of the constitutionality of affirmative action or the Rule.<sup>66</sup> Rather, the Court took the opportunity to instruct the Fifth Circuit that it erred in applying a less stringent standard and remanded the case for further consideration under the appropriate level of scrutiny.<sup>67</sup> Though, in *Fisher I*, Justice Kennedy seemingly acknowledged that the attainment of a student body serves "values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and

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60. *Id.* at 300–01 (distinguishing the issue in this case from previous affirmative action cases).

61. *See id.* (referring to the other states that have also decided to prohibit race-conscious admissions policies that may serve as examples in the case being heard by the Court).

62. *See id.* at 314 (determining the subject of affirmative action is within the reach of issues that State voters may make decisions upon through a democratic system).

63. *See id.* at 310 (emphasizing "[T]he holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow.").

64. *See Driver, supra* note 25 (reporting the demographics of the Michigan electorate, which was a White majority, that made the decision on the state constitutional amendment).

65. *See* Katey Psencik, *Both Sides Claim Victory in Fisher v. UT*, USA TODAY (Jun. 23, 2013, 7:07 PM), <https://www.usatoday.com/story/news/nation/2013/06/25/fisher-ut-supreme-court/2457939/> [<https://perma.cc/UY55-SG4X>] (explaining that the Supreme Court did not decide on the affirmative action policy, but rather remanded the case to the Fifth Circuit to apply the appropriate standard of scrutiny).

66. *See Fisher v. Univ. of Tex.*, 570 U.S. 297, 314 (2013) (remanding the case so the correct standard can be applied and limiting the University's good faith use of racial classification).

67. *See id.* at 303 (vacating and remanding the Fifth Circuit's decision which affirmed the District Court's grant of summary judgment).

stereotypes.”<sup>68</sup> With new instructions, the Fifth Circuit once again made a ruling that would subject the case to be heard in front of the Supreme Court three years later.<sup>69</sup>

Finally, *Fisher v. University of Texas II* arrived in front of the Court and is the standing legal precedent today regarding whether a race-conscious program is lawful under the Equal Protection Clause.<sup>70</sup> The University of Texas researched and found that its admissions policies were not providing the educational benefits of a diverse student body.<sup>71</sup> The University created a new system to give race “weight” as a subfactor of their Personable Achievement Index (PAI) – a numerical score based on the holistic review of an application.<sup>72</sup>

The Court notes that what makes the University’s admissions system particularly unique is the use of race- consciousness accounts for only twenty-five percent of the admissions decision and the other seventy-five percent is based on the Rule.<sup>73</sup> Texas Education Code § 51.803(a-1) contains the *sui generis* type Plan utilized by the University.<sup>74</sup> The Court

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68. See *id.* at 308 (“[V]alues beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes.”).

69. See Matthew Adams, *Supreme Court Hears Fisher v. University of Texas II*, DAILY TEXAN (Dec. 9, 2015), <https://thedailytexan.com/2015/12/09/fisher-v-university-of-texas-ii-is-heard-in-supreme-court/> [<https://perma.cc/XTC7-9S92>] (reporting on the presentation of oral arguments made in front of the Supreme Court for a second time concerning the use of affirmative action at the University of Texas and the implications of such arguments for the future of race as a factor in admissions).

70. See *Fisher II.*, 579 U.S. at 373 (recognizing that the Court is once again considering the admissions program at the University of Texas under the Equal Protection Clause).

71. See Claire Parker, *UT-Austin Has No Plans to Drop Affirmative Action Policy, Despite New Trump Administration Guidelines*, TEX. TRIB. (July 3, 2018), <https://www.texastribune.org/2018/07/03/UT-Trump-affirmative-action/> [<https://perma.cc/M8XT-FK9T>] (asserting that UT Austin has argued its affirmative action policy used in admissions is a necessary proactive measure to compensate for past racism at the University).

72. See *Fisher II.*, 579 U.S. at 373 (expanding on how the University of Texas makes its admissions decisions based on both the applicant’s Academic Index (AI) and Personal Achievement Index (PAI) in the remaining twenty five percent of the incoming class not subject to the Rule).

73. See *id.* at 372-73 (identifying that the Court will not be able to assess the validity nor impact of the Plan on Fisher’s case nor the methods employed by the University to achieve its critical mass for diversity purposes).

74. See TEX. EDUC. CODE ANN. § 51.803(a-1) (1997) (distinguishing the unique requirements imposed on the University of Texas’ admission capacities to allow for a maximum of seventy-five percent admissions through the Rule); see also *Fisher II.*, 579 U.S., at 378 (referring to the University of Texas admissions Plan as *sui generis*, which is defined as unique).

even acknowledged that Fisher did not assert a claim on the Plan itself, which Justice Kennedy opined had an outsized effect on her chance of admission; therefore, the Court did not assess the validity of the state law.<sup>75</sup> The Plan was artificially taken as a “given premise,” yet the program complicated matters because the University was not required to keep extensive data on the Plan or the students that were admitted under it, thus, courts could not consider this type of evidence.<sup>76</sup>

As proscribed in *Fisher I*, not only is strict scrutiny the applicable standard of review, but “no deference is owed to universities when determining whether the use of race is narrowly tailored to achieve the university’s permissible goal.”<sup>77</sup> Using this rigid requirement in its analysis, the Court determined the University was still able to meet its burden in proving their admissions policy was narrowly tailored because it showed no other means were workable nor available to meet its educational goals.<sup>78</sup>

In this important case, the *Fisher II* Court reaffirmed the following affirmative action notions: (1) it is permissible for a university to institute a race-conscious admissions program as a means of obtaining “the educational benefits that flow from student body diversity”; however, (2) a “university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan.”<sup>79</sup> As long as universities use race as “a factor of a factor of a factor,” its consideration in admissions will meet the Court’s interpretation of what is constitutionally acceptable.<sup>80</sup>

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75. See *Fisher II*, 579 U.S. at 378 (“Despite the Top Ten Percent outsized effect on petitioner’s chances of admission, she has not challenged it.”).

76. See *id.* at 378 (articulating that the University of Texas has assumed the validity of the Rule by emphasizing the University lacks authority to alter the Rule in the admissions process).

77. See *id.* (enforcing the rigid requirements on the University to protect the guarantees of the Equal Protection Clause).

78. See *id.* at 387 (holding that the University established definite educational goals that, at the time, could only be achieved through its current admissions policy).

79. *Id.* at 380-82.

80. See Patricia Guadalupe, *A Sprinkle of Hope for Latinos in SCOTUS Affirmative Action Decision*, NBC NEWS (June 23, 2016, 5:19 PM), <https://www.nbcnews.com/news/latino/sprinkle-hope-latinos-scotus-affirmative-action-decision-n597816> [<https://perma.cc/MS9C-EMHY>] (claiming the Court’s decision will ensure more talented students from all backgrounds will get a fair shot at the school of their choice).

*Fisher II* also left multiple open-ended questions as to the future of race-conscious policies.<sup>81</sup> Specifically, the Court stated: “But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.”<sup>82</sup> The Court also warned the University of its ongoing obligation to deliberate and reflect on its admissions policies, insinuating there will come a time when such race-conscious policies are no longer appropriate in higher education admissions.<sup>83</sup>

*B. The Texas Top Ten Percent Rule.*

Following a constant shortage of minority students in higher education institutions within the state, the Texas Legislature created the Texas Top Ten Rule, otherwise known as Texas Education Code Section 51.803. Automatic Admission: All Institutions.<sup>84</sup> It reads in pertinent part:

. . . [E]ach general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated with a grade point average in the top ten percent of the student’s high school graduating class in one of the two school years preceding the academic year for which the applicant is applying for admission<sup>85</sup>

The enactment afforded a race-neutral alternative policy to higher education institutions while still making an impact in minority populations—given the disparity in high schools throughout the State.<sup>86</sup> Particularly, the Rule was designed to allow for greater access to public higher education institutions in Texas by “promoting greater geographic, socioeconomic, and racial and ethnic representation” without expressly

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81. *See Fisher II*, 579 U.S. 365 at 387-89 (providing that the University has a special opportunity to learn and teach in the ways it utilizes race-consciousness in its admissions plan, so that one day it may be able to use different approaches to foster diversity that do not include such considerations).

82. *See id.* at 387 (expounding the importance of Equal Protection for all members of our nation, even those that are not disadvantaged minorities).

83. *See id.* at 388 (urging that the affirmance of the admissions policy does not mean that the University will be allowed to indefinitely rely on the same policy without refinement).

84. *See* TEX. EDUC. CODE ANN. § 51.803 (2020) (describing the promulgation of the Rule).

85. *Id.*

86. *See Webster, supra* note 14 at 8, (representing the Ten Percent formula seems “apparent” as an effort for “race-neutrality” of the law and serves as an alternative to race-conscious affirmative action programs).



using race as an admissions criterion.<sup>87</sup> House Bill 588 sought to use class rank as the sole measure of merit and have the law apply to all public and certain private high schools.<sup>88</sup> Although the inception of the Rule can be credited to various political players, it can also be credited as a direct response to the *Hopwood v. Texas* ruling of the Fifth Circuit.<sup>89</sup>

Prior to both the enactment of the Rule and the Supreme Court's decisions in *Gratz* and *Grutter*, the University of Texas already utilized discretionary considerations when reviewing minority candidate applications for its law school.<sup>90</sup> However, in 1992, four White residents, including Hopwood, were denied admission to the University of Texas School of Law and thereafter claimed they were subjected to unconstitutional racial discrimination.<sup>91</sup> The claim arose partly due to the applicants receiving a less thorough review and discussion compared to minority candidates that received an "extensive" review.<sup>92</sup> Utilizing a strict scrutiny standard of review, the Fifth Circuit concluded "the classification of application on the basis of race for diversity purposes in higher education frustrates, rather than facilitates, the goals of equal protection."<sup>93</sup> Here, the Court inappropriately ignored the principles of the compelling interest of diversity in the context of higher education put forth by Justice Powell in *Bakke*.<sup>94</sup> The Fifth Circuit generalized the case as an admissions program that amounted to illegal reverse discrimination.<sup>95</sup> It failed to recognize the benefits of diversity among

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87. See BARR, *supra* note 20 at 3 (pointing to the initial neutrality of the Rule created by the seventy fifth Texas Legislature).

88. See *id.* (reporting that the Rule has increased minority representation at the University of Texas and Texas A&M University at College Station).

89. See Webster, *supra* note 14 (describing the history of *Hopwood v. Texas* and the effects of its ruling that lead to the development of Texas House Bill 588).

90. See *Hopwood v. Texas*, 78 F.3d 932, 937 (5th Cir. 1996) (summarizing the methods used by the University of Texas Law School to review minority applications that differed from the White applicants).

91. See *id.* at 938 (suggesting that the plaintiffs should have been entitled to more relief than they received in the district court).

92. See *id.* at 937 (detailing the "extensive" review process for Black and Mexican American law school applicants by a subcommittee in comparison to the White applicants' process).

93. *Id.* at 944.

94. See *id.* (proposing Justice Powell's argument presented in *Bakke* never represented the law to be followed in decisions regarding affirmative action in higher education).

95. See BARR, *supra* note 20 (analyzing the court ruling in *Hopwood* that challenged the use of any affirmative-action policy in the State of Texas prior to the Top Ten Percent Law).

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higher education; instead, it made the fundamentally wrong assumption as follows:

Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility. The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.<sup>96</sup>

The Fifth Circuit's language in the opinion showed hostility towards affirmative action: "[t]he beneficiaries of this system are blacks and Mexican Americans, to the *detriment of [W]hites and non-preferred minorities.*"<sup>97</sup> This language clearly shows the interest of the Fifth Circuit in preserving the guarantees of equal protection for White students, in particular.<sup>98</sup> Further, the case misappropriately asserted that diversity interest is never sufficient to support affirmative action.<sup>99</sup>

Shortly after the Fifth Circuit made its decision, former Attorney General of Texas, Dan Morales, expanded the *Hopwood* decision to apply to all higher education institutions in Texas.<sup>100</sup> Other public educational institutions in the Fifth Circuit, including schools in Mississippi,

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96. *Hopwood*, 78 F.3d at 945.

97. *See id.* at 934 (implying that the Fifth Circuit did not condone the law school's use of racial preference given to minority students who were an abysmally low percentage of the incoming law school class).

98. *See id.* at 940–41 (suggesting the Equal Protection Clause seeks ultimately to render the issue of race *irrelevant* in governmental decision making).

99. *See id.* at 944 (claiming "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"); *see also* Albert Kauffman, *The Hopwood Case – What It Says, What It Doesn't Say, The Future of the Case and "The Rest of the Story,"* INTERCULTURAL DEV. RSCH. ASS'N (Aug. 1996), <https://www.idra.org/resource-center/the-hopwood-case/> [<https://perma.cc/D4B5-E3RW>] (reviewing the *Hopwood* decision to find that the decision mandates that a particular institution involved in affirmative action can only look to its own history to support this type of admissions program in efforts to address past discrimination).

100. *Compare* Texas Observer Staff, *Political Intelligence*, TEX. OBSERVER (Mar. 19, 1999, 12:00 AM), <https://www.texasobserver.org/992-political-intelligence/> [<https://perma.cc/9594-GS52>] (criticizing the former attorney general's broad interpretation of the *Hopwood* decision resulting in the prohibition of minority consideration in admissions, scholarship recipient decisions, and financial aid distribution in all higher education institutions in Texas), *with* *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996)(deciding specifically that the University of Texas Law School could not use race as a factor in law school admissions).

Louisiana, and Texas, began to question whether race was a permissible factor in admission decisions and other institutional considerations.<sup>101</sup>

Accordingly, the former Attorney General made the following conclusion in an opinion letter in 1997:

Hopwood proscribes the use of race or ethnicity, in the absence of a factual showing by an institution or the legislature which establishes: (1) either that the institution has discriminated in the not too distant past against the racial group benefited by the preference or that the institution has been a passive participant in acts of private discrimination by specific private actors against the benefited racial group; (2) that there exist present effects of the past discrimination that are not due to general societal discrimination; and, (3) that the scholarship is narrowly tailored to remedy those present effects. Unless or until these facts can be established, the consideration of race or ethnicity is expressly prohibited. Although, as always, individual conclusions regarding specific programs are dependent upon their particular facts, Hopwood's restrictions would generally apply to all internal institutional policies, including admissions, financial aid, scholarships, fellowships, recruitment, and retention, among others.<sup>102</sup>

Certain critics articulated that Morales's directive was a much broader interpretation of the Fifth Circuit's decision than necessary.<sup>103</sup> However, for a brief time, Morales's interpretation of *Hopwood* was the controlling law in the State of Texas.<sup>104</sup> *Hopwood* was later overruled by the Supreme Court in 2003 as a result of the *Grutter* decision; however, the

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101. See Peter Applebome, *Texas is Told to Keep Affirmative Action in Universities or Risk Losing Federal Aid*, N.Y. TIMES (Mar. 26, 1997), <https://www.nytimes.com/1997/03/26/us/texas-told-keep-affirmative-action-universities-risk-losing-federal-aid.html> [<https://perma.cc/HUB3-BYY7>] (illustrating the confusion amongst universities as a result of Hopwood. For example, the University of Houston was continuing some race-based scholarships even though other state universities had decided they were not permitted).

102. Office of the Attorney General of Texas, Opinion Letter on Effect of *Hopwood v. State of Texas* on various scholarship programs of the University of Houston (Feb. 5, 1997).

103. See *id.* (providing the opinion of Norma Cantu, head of the Office of Civil Rights at the Education Department, that universities had a legal obligation to use race as a factor in admissions to remedy current and past discrimination).

104. See PENDA D. HAIR, LOUDER THAN WORDS: LAWYERS, COMMUNITIES, AND THE STRUGGLE FOR JUSTICE 23 (2001) [https://advancementproject.org/wp-content/uploads/2017/11/3c05747f6d2c6cb749\\_mlbrgfwlo.pdf](https://advancementproject.org/wp-content/uploads/2017/11/3c05747f6d2c6cb749_mlbrgfwlo.pdf) (describing the Hopwood decision as being at the "extreme anti-affirmative-action end of the spectrum" which resulted in a drop of enrollment among African American and Latino students at Texas universities).

Texas Legislature was able to act beforehand.<sup>105</sup> Immediately following *Hopwood*, the University of Texas at Austin and Texas A&M University, the only institutions in Texas that made race-conscious admissions decisions prior to the ruling, saw an unfortunate decline in the number of minority applicants and matriculating students.<sup>106</sup>

Various policymakers took action to unravel the detrimental effects of the *Hopwood* decision and subsequent prohibition of race-based admissions.<sup>107</sup> Proponents of said action included organizations such as the Mexican American Legal Defense and Educational Fund (MALDEF).<sup>108</sup> MALDEF played a fundamental part in organizing a group of individuals throughout Texas to develop a race-neutral plan that would not violate the Fourteenth Amendment.<sup>109</sup>

Additionally, the Commissioner of the Coordinating Board, Dr. Kenneth Ashworth, brought together a group—the Higher Education Coordinating Board Advisory Committee on Criteria—to study ways to achieve racial and ethnic diversity among Texas higher education institutions without having to use race.<sup>110</sup> Other prominent figures involved in creating a new system included Professor David Montejano, state Representative Irma Rangel, and state Senators Gonzalo Barrientos

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105. 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, 320 (2013) (detailing how the University of Texas preserved racial diversity on campus through the Texas Legislature's Top Ten Percent Plan until *Grutter* overruled *Hopwood*).

106. See Webster, *supra* note 14 (pointing to the ramifications of the *Hopwood* ruling coupled with the prohibition by Attorney General of Texas', Dan Morales, of higher education institutions from considering race or ethnicity in admission or financial aid decisions).

107. See HAIR, *supra* note 104 at 19 (commenting how *Hopwood* “sent shock waves through the higher education and civil rights communities”).

108. See *id.* (describing the coalition of attorneys, academicians, and activists, including MALDEF and CMAS, that came together to develop the Top Ten Percent Plan).

109. See generally Webster, *supra* note 14 at 5 (referring to the plans introduced by attorneys from MALDEF, including Al Kauffman, that were combined to form Texas House Bill 588).

110. See Jorge Chapa, ET AL., *The Hopwood Decision in Texas as an Attack on Latino Access to Selective Higher Education Programs*, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS: UNIV. OF TEX. AT AUSTIN at 8 (Jan. 1, 2001), <https://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-hopwood-decision-in-texas-as-an-attack-on-latino-access-to-selective-higher-education-programs> (explaining the background on the development of the report named Alternative Diversity, Criteria: Analyses and Recommendations where factors were listed to identify methods to improve minority admissions).

and Royce West.<sup>111</sup> These prominent people came up with a solution to aid minorities in higher education in a manner that would be accepted by most Texas Legislators.<sup>112</sup>

What came to be House Bill 588 (HB 588) encompassed two plans: (1) admitting a list of factors admissions officers could consider outside of the top percentage admissions scheme, and (2) admitting the top ten percent of high school graduating seniors.<sup>113</sup> The Top Ten Percent Rule came known to be Texas Education Code § 51.803, and the list of consideration factors came known to be Texas Education Code § 51.804—“Other Admissions.”<sup>114</sup> HB 588 passed through the Texas House of Representatives because it appealed to both leaders of minority-majority districts, and rural White-majority districts whose high school students would also benefit from the Rule.<sup>115</sup>

However, the motivation behind creating the Rule was increasing diversity in higher education in Texas that was regrettably “lost” due to *Hopwood*.<sup>116</sup> Further, those that had been advocating for affirmative action for many years knew the lack of diversity was “going to get worse” after the *Hopwood* decisions and actions of the Attorney General.<sup>117</sup> In fact, Texas Education Code § 51.805 reads in pertinent part: “[b]ecause of changing demographic trends, diversity, and population increases in

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111. See Interview with Albert Kauffman, Professor of Law, St. Mary’s University School of Law (Oct. 29, 2021) [hereinafter Kauffman Interview] (“[W]e started working with some of the legislators so Representative Irma Rangel, Rep Kingsville Senator Gonzalo...Senator West from Dallas.”).

112. See generally Webster, *supra* note 14, at 5 (introducing the task force that was formed to address the Hopwood ruling and the legislators that carried the plans into both the Texas House of Representative and Senate).

113. See *id.* (breaking down HB 588 into the Top Ten Percent Plan and the list of racially neutral factors to be considered by admissions when students fell outside the ambit of the Top Ten Rule, proposed by MALDEF attorney Al Kauffman); see also Kauffman Interview, *supra* note 111 (advocating for Latino Involvement and ability to go to Texas public universities as the purpose of coming up with some non-racial factors that would help achieve those goals).

114. See Tex. H.B. 588, 75th Leg., R.S. (1997) (promulgating socioeconomic indicators or factors in making first-time freshman admissions for those students not admitted under Section 51.803).

115. See Webster, *supra* note 14 at 9 (supporting the position that the Rule, coupled with scholarship opportunities, grants access to Whites from poor and rural areas that earn a spot in the top ten percent of their class that would not otherwise have had access to higher education).

116. See Kauffman Interview, *supra* note 111 (explaining how organizations worked “to try to improve the diversity UT system, all of a sudden we’ve lost with diversity.”).

117. See *id.* (recognizing that after Hopwood, “some way to respond to that was very important.”).

the state, each general academic teaching institution shall also consider all of, any of, or a combination of the following socioeconomic indicators or factors,” which purposefully did not include race.<sup>118</sup>

Even though the Rule itself was in fact racially neutral—applying to any student in the top ten percent of their class regardless of race—the rule improved the racial compositions of universities in the State of Texas.<sup>119</sup> That profound impact was especially significant because of the discriminatory composition of school districts across the state.<sup>120</sup> Because school districts are still quasi-segregated for various reasons, the composition of school districts in Texas allowed the race-neutral Rule to have an important diversity impact.<sup>121</sup> Particularly, the Rule’s impact in the year following its enactment demonstrated that it worked the way it was intended.<sup>122</sup> For example, at the University of Texas at Austin, the number of Black students in the 1999 freshman class skyrocketed by forty-four percent, while the number of Hispanics jumped almost ten percent.<sup>123</sup>

118. TEX. EDUC. CODE § 51.805 (2013) (setting out the formal language of § 51.805).

119. *Id.* (“[T]he arguments were that it was racial neutral...the people behind it [the Rule] were aware it would improve the racial compositions.”).

120. Marta Tienda & Sunny Niu, CAPITALIZING ON SEGREGATION, PRETENDING NEUTRALITY: COLLEGE ADMISSIONS AND THE TEXAS TOP 10% LAW, AM. LAW AND ECON. ASS’N 3 (2006) (“Ironically, the success of the top 10% law in restoring ethno-racial diversity at the Texas public flagships requires segregation, namely the pernicious arrangements that the historic *Brown v. Board of Education* ruling sought to dismantle in order to equalize educational opportunities.”); accord Webster, *supra* note 14 (relaying the argument that the Top Ten Rule promotes segregation in Texas school districts).

121. See Jacob Kuntz, *Segregation is Alive and Well in Texas’ Public Schools*, DAILY TEXAN (Nov. 2, 2017), <https://thedailytexan.com/2017/11/02/segregation-is-alive-and-well-in-texas-public-schools/> [<https://perma.cc/NBX4-DZDU>] (“Segregation of schools and neighborhoods by race and class is rising across America, with the number of schools where 1 percent or less of the student body was white has more than doubled in the last 20 years. Texas is home to four of the 10 cities where this disparity is greatest.”); see also Kauffman Interview, *supra* note 111 (opining that the Rule would not have worked if Texas weren’t such a racially discriminatory state).

122. See generally Matthew Watkins & Neena Satija, *How an Attempt to Boost Diversity at Texas Colleges Could Kill Affirmative Action*, TEX. TRIB. (Mar. 29, 2016), <https://apps.texastribune.org/price-of-admission/> [<https://perma.cc/X67R-8HBV>] (discussing the immediate impact of the Texas Rule because in 1998 the decline in minority students at UT-Austin completely halted).

123. See *id.* (explaining that despite critics’ fear that the Rule “would allow unqualified and unprepared students into Texas universities,” data showed that among the freshman class entering The University of Texas at Austin in 1999, those in the top ten percent performed better than those admitted outside the Rule).

The Rule has been amended seven times since its enactment twenty-four years ago.<sup>124</sup> Notably, in 2009, Texas Senate Bill 175 (SB 175) amended the Rule to provide a specific statutory scheme for The University of Texas at Austin.<sup>125</sup>

## II. ANALYSIS

### A. *The Supreme Court's Mandates on Universities are Burdensome.*

As identified in the history of affirmative action cases heard by the Supreme Court, there are rigid scrutiny requirements creating an onerous burden on the universities partaking in these race-conscious admission plans.<sup>126</sup> Thus, it is imperative to look at the survival probability of the admissions schemes utilized by public institutions in the State of Texas.<sup>127</sup>

The last time the Court heard an affirmative action case, *Fisher II*, the Court imposed another requirement on universities in addition to those in *Grutter*—whether the University fully considered race-neutral alternatives to attain a diverse student body.<sup>128</sup>

As of now, the justified compelling interest that a university is allowed in these types of cases is: “obtaining a critical mass.”<sup>129</sup>

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124. See generally TEX. EDUC. CODE § 51.803 (providing the history of the legislative acts that comprise the Rule today and how it applies to high school seniors).

125. See generally, REPORT TO THE GOVERNOR, THE LIEUTENANT GOVERNOR, AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES ON THE IMPLEMENTATION OF SB 175, 81ST LEGISLATURE FOR THE PERIOD ENDING FALL 2018, UNIV. OF TEX. AT AUSTIN, at 2 (Dec. 31, 2018) (indicating the 81<sup>st</sup> Texas Legislature modified the automatic admissions law to allow for UT Austin to be more flexible in their admissions plan).

126. See Roger Pilon, *Judicial Deference and Affirmative Action*, CATO INST. (June 24, 2013, 12:36 PM), <https://www.cato.org/blog/judicial-deference-affirmative-action> [<https://perma.cc/WMR7-GHLD>] (analyzing the Court's decision to vacate the *Fisher* court of appeals and send back for further consideration, based on the more exacting standards of strict scrutiny—showing how rigid the Court applies such a scrutiny).

127. Compare *Grutter*, 539 U.S. at 333–34 (requiring a narrowly tailored type of strict scrutiny analysis in affirmative action cases), with *Fisher II*, 579 U.S. at 380, 388 (imposing an obligation on universities to continuously assess their race-conscious admissions plans and change the plans if necessary).

128. See generally Vinay Harpalani, *The Supreme Court and the Future of Affirmative Action*, AM. CONST. SOC'Y (Oct. 28, 2019), <https://www.acslaw.org/expertforum/the-supreme-court-and-the-future-of-affirmative-action/> [<https://perma.cc/F7PU-54K2>] (warning that if the Court requires universities to fully exhaust race-neutral alternatives to achieve diversity, the narrow tailoring standard would be virtually impossible to meet).

129. See Jessica Rose Kalbfeld, *Critical Mass for Affirmative Action: Dispersing the Critical Cloud*, 53 LAW & SOC'Y REV. 1266, 1274 (Dec. 2019) (articulating that *Grutter v.*

In *Grutter*, Justice O'Connor cited the testimony of the Director of Admissions, which suggested that "critical mass" means "meaningful numbers" or "meaningful representation."<sup>130</sup> Erica Munzel, the Director of Admissions, understood the representation to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.<sup>131</sup> However, the Court raised important questions: When will critical mass be achieved?<sup>132</sup> *Will critical mass ever be achieved?*<sup>133</sup> How is critical mass calculated or evaluated?<sup>134</sup> If critical mass is ever achieved—or if it is not necessary—does that mean that affirmative action will no longer be constitutionally permitted?<sup>135</sup>

At least for now, the use of racial considerations is deemed necessary to accomplish the goal of achieving a critical mass.<sup>136</sup> As the Court has repeatedly stated, utilizing racial quotas is unconstitutional to obtain a

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*Bollinger* established the concept of critical mass as the rationale behind affirmative action and pointed towards a new goal of achieving diversity as opposed to, as previously viewed, a remedy for historical discrimination).

130. See *Grutter*, 539 U.S. at 318 (using testimony from the school's Director of Admissions defining critical mass as "meaningful numbers" or "meaningful representation" in the context of minority student acceptance for the purpose of achieving a diverse student body).

131. See *id.* at 318 (explaining the definition of critical mass and how to represent the specific measurement).

132. See generally Justin Pope, 'Critical Mass' Key to Affirmative Action Case, MPR NEWS (Oct. 7, 2012, 9:30 AM), <https://www.mprnews.org/story/2012/10/07/critical-mass-key-to-affirmative-action-case> [<https://perma.cc/4KXC-JVLX>] (defining critical mass as the point where there is enough diversity on campus to provide a rich educational environment. However, critics still find this definition incredibly vague).

133. See *id.* (citing to Justice O'Connor's decision in *Grutter* where the Court allowed universities leeway to define critical mass in their own terms to achieve their educational goals and use race as a plus factor to get there).

134. Cf. *id.* (providing that universities are not constitutionally allowed to give a target number in achieving diversity).

135. See generally Dawinda S. Sidhu, *A Critical Look at the 'Critical Mass' Argument*, CHRON. OF HIGHER ED. (Feb. 18, 2013), <https://www.chronicle.com/article/a-critical-look-at-the-critical-mass-argument/> [<https://perma.cc/P4GL-U53A>] (opining that critical mass actually validates racial stereotypes and perpetuates notions of racial inadequacy, which is why colleges may need to find alternative means to achieve a critical mass).

136. See generally Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html> [<https://perma.cc/B53E-GYNW>] (asserting that university admissions officials may continue to consider race as one factor amongst many to ensure a diverse student body).



critical mass.<sup>137</sup> This means any admissions policy that bases its consideration or acceptance of applicants on satisfying a certain percentage of races in the university's incoming class is per se unconstitutional.<sup>138</sup> While there are no current lawsuits demonstrating this type of goal-percentage university policies, arguably, the rule might be deemed to be doing so.<sup>139</sup> This may be found as the Court describes the rule by stating, "as a matter of raw numbers, minority enrollment would increase under such a regime."<sup>140</sup>

As universities bear the "heavy burden" of overcoming the Court's traditional strict scrutiny requirements, universities must demonstrate that available and workable race-neutral alternatives do not suffice.<sup>141</sup> In essence, colleges are no longer afforded a good faith understanding that they have tried all other race-neutral admissions policies to achieve their desired critical mass before they turn to affirmative action policies.<sup>142</sup> This raises questions as to how often a university must conduct these types of findings and to whom it should report these determinations to.<sup>143</sup> Universities need to present targeted evidence to the courts over a certain period of time that the race-neutral examples do not work.<sup>144</sup>

For example, in the *Fisher*, the University of Texas presented evidence of its outreach and recruitment efforts to fulfill its goal of obtaining a

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137. See Kramer, *supra* note 22 (introducing the Court's concept in *Bakke* that race may be a narrowly tailored factor in admissions policies. However, racial quotas go too far).

138. See *id.* (describing the *Gratz* point system that did not meet the strict scrutiny requirements in an affirmative action matter).

139. See generally *Fisher II*, 579 U.S. at 373 (recognizing that the University of Texas admissions plan caps its admissions of the top percent students at seventy-five percent, but not necessarily including certain races or particular percentages of such in that scheme).

140. See *id.* at 385 (highlighting the Petitioner's inability to find support for the proposition that class rank alone can improve minority college admissions numbers).

141. See *id.* at 381-82 (mandating that a university must show "that it had not obtained the education benefits of diversity before it turned to a race-conscious plan").

142. See Leah Shafer, *The Case for Affirmative Action*, HARVARD GRADUATE SCH. OF EDUC. (July 11, 2018), <https://www.gse.harvard.edu/news/uk/18/07/case-affirmative-action> [<https://perma.cc/4VE6-DVfy>] ("[I]f asked in court, colleges need to be able to show that they tried all other race-neutral alternatives to creating a diverse student body, and those alternatives failed.").

143. See generally Pilon, *supra* note 126 (addressing the confusion that will be created in the lower courts on how courts below apply the Supreme Court's *Fisher* ruling, giving "some, but not complete judicial deference" to the universities).

144. E.g., *Implications from Fisher II: The U.S. Supreme Court's Guidance for Institutions of Higher Education Regarding Race-Conscious Enrollment Practices*, COLLEGEBOARD 11, 17 (Aug. 2016) <https://professionals.collegeboard.org/pdf/adc-fisher-ii-guidance.pdf> (recommending universities gather quantitative and qualitative data that speak to the institution's own context).

more diverse incoming class.<sup>145</sup> The effort included visits to high schools known to enroll high percentages of students of color and those with low socioeconomic backgrounds.<sup>146</sup> The University was required to prove that its creation of three new scholarship programs, opening new regional admissions centers, increasing its recruitment budget by half-a-million dollars, and organization of over one thousand recruitment events were *not successful efforts* on its part to recruit a diverse class.<sup>147</sup> This onerous burden required the University's extensive efforts in a fact-finding expedition: conducting research over a period of years and expending significant financial resources in preparation of proving to the Court that race-neutral alternatives do not suffice.<sup>148</sup>

Aside from the requirements imposed on universities, courts have determined the use of judicial deference is proper in these types of affirmative action cases.<sup>149</sup> Meaning, courts are allowed to use their own discretion in considering the admissions program, instead of relying on the expertise of the university.<sup>150</sup> While the universities whose admission policies are challenged must present evidence to support those policies' consideration of race, universities are granted no deference of knowing

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145. See Fisher II, 579 U.S. at 385 (noting the University of Texas' submission of extensive evidence regarding the ways outreach programs were intensified); see also Liliana M. Garces, *After Supreme Court's Fisher Decision: What we Need to Know About Considering Race in Admissions*, THE CONVERSATION (June 23, 2016, 1:06 PM), <https://theconversation.com/after-supreme-courts-fisher-decision-what-we-need-to-know-about-considering-race-in-admissions-59784> [<https://perma.cc/3R5A-JWNQ>] (assessing the Supreme Court's concern in the *Fisher* matter that the lower court had relied solely on the university's judgment, without requiring further evidence that the institution had sufficiently considered race-neutral approaches).

146. See Garces, *supra* note 145 (noting the types of extrinsic evidence the University of Texas submitted).

147. See Fisher II, 579 U.S. at 385 (requiring the University to submit a written, thirty-nine-page proposal following a year-long study to prove the use of race-neutral policies and programs has not been successful in providing an educational setting that fosters cross-racial understanding).

148. See *id.* (describing the University's extensive evidentiary process); see generally *Implications from Fisher II*, *supra* note 144 (discussing the University of Texas' seven-year burden of keeping research as to the race-neutral alternatives).

149. See Pilon, *supra* note 126 (stating that lower courts are instructed that they must not "defer to state college and university representations when deciding whether those institutions have unconstitutionally granted racial preferences in their admissions decisions.").

150. See *id.* ("'Strict scrutiny,' the Court said, 'does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.'").

precisely what their classrooms need.<sup>151</sup> Therefore, courts will ultimately be the “decision makers” on the type of policies universities can use—not the universities themselves.<sup>152</sup>

The divisive requirements the Supreme Court has implemented throughout its affirmative action jurisprudence demonstrates that the trend is to limit the ways in which a university may use affirmative action policies and for how long.<sup>153</sup> Therefore, something ought to be done to clarify and guide universities of the practices they are engaging in to better serve those minorities that have a long-standing history of being discriminated against.<sup>154</sup>

### *B. Citizen Opponents to Affirmative Action are Gathering Momentum.*

Another threat to the survivability of affirmative action in this nation is the existence of a group of individuals whose sole mission is to bring suit against universities utilizing affirmative action.<sup>155</sup> These groups claim that such schemes deny them equal protection under the Fourteenth Amendment.<sup>156</sup> Because the Fourteenth Amendment provides that

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151. *See id.* (“The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. . . . The reviewing court must ultimately be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity.”).

152. *See id.* (describing the decision-making process to be one of no deference when made by the university; however, the judicial analysis of such a decision is afforded ‘judicial deference’).

153. *See generally* Kramer, *supra* note 22 (highlighting the changes throughout the history of affirmative action cases in the Supreme Court).

154. *See generally* Valerie Strauss, *Why Race-Based Affirmative Action is Still Needed in College Admissions*, WASH. POST (Jan. 30, 2022, 2:24 PM), <https://www.washingtonpost.com/education/2022/01/30/needed-affirmative-action-in-college-admissions/> [<https://perma.cc/WYN3-4A97>] (justifying the use of affirmative action as a means to reverse historical discrimination, but also to provide diversity to individual students and American society. Affirmative action helps to rectify historical and contemporary inequities).

155. *See generally* Sarah Hinger, *Meet Edward Blum, the Man Who Wants to Kill Affirmative Action in Higher Education*, ACLU (Oct. 18, 2018, 3:00 PM), <https://www.aclu.org/blog/racial-justice/affirmative-action/meet-edward-blum-man-who-wants-kill-affirmative-action-higher> [<https://perma.cc/PK7P-R253>] (“But make no mistake about it—the engineer behind this litigation is intent on sowing divisiveness amongst communities of color in an effort to dismantle diversity programs and civil rights protections that benefit all people of color. Students for Fair Admissions is the creation of Edward Blum. Blum is not a lawyer, but he has a long history of crafting legal attacks on civil rights.”).

156. *See generally* About, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/about/> [<https://perma.cc/667M-VK8S>] (defending the mission to engage in litigation against affirmative action because “[a] student’s race and ethnicity

people cannot be discriminated on the basis of their race, nationality or origin, those who are not a “minority” are claiming the affirmative action admissions policies are discriminatory against them—even though they are the group who have never experienced systematic segregation and discrimination.<sup>157</sup>

One of the major opponents of affirmative action is “Students for Fair Admission” (SFFA), created in 2014 with the primary goal of ending the consideration of race in university admissions because “racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional.”<sup>158</sup> The goal is simple—SFFA wants the current Supreme Court to overturn *Grutter v. Bollinger*.<sup>159</sup>

Unsurprisingly, Abigail Fisher is a member of the SFFA board along with her father.<sup>160</sup> The man running the show, Edward Blum, is the President of SFFA ; further, he funded Fisher’s lawsuits starting back in 2008.<sup>161</sup> He alone has been an instrumental part of numerous lawsuits made within the past twenty-five years on behalf of students against affirmative action.<sup>162</sup> Heading the nonprofit organization, SFFA, has

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should not be factors that either harm or help that student to gain admission to a competitive university.”).

157. See Hinger, *supra* note 155 (“Not talking about race doesn’t erase discrimination; it reinforces the privileges of white applicants by ignoring the ways in which deep-seeded structural racial inequality impacts individuals.”).

158. E.g., STUDENTS FOR FAIR ADMISSIONS, *supra* note 156 (discussing the mission of the non-profit to negate race as a factor for college admissions).

159. E.g., Kathryn S. Kuhar, *A Case for Truly Fair Admissions*, THE HARVARD CRIMSON (Mar. 16, 2021), <https://www.thecrimson.com/article/2021/3/16/case-for-truly-fair-admissions/> [<https://perma.cc/2YDG-EUQX>] (pointing to the efforts of Edward Blum and the anti-affirmative action group, SFFA, to push a case into the Supreme Court docket with the explicit intent of overturning *Grutter*).

160. See Stephanie Mencimer, *Here’s the Next Sleeper Challenge to Affirmative Action*, MOTHER JONES (July 19, 2016), <https://www.motherjones.com/politics/2016/07/abigail-fisher-going-stay-mad/> [<https://perma.cc/F2VQ-NNYZ>] (identifying the members of the Board of Students for Fair Admissions, being all-White at the time).

161. See Audrey Anderson, *Case Challenging Race-Conscious Admissions at the University of Texas is Dismissed*, JD SUPRA (July 28, 2021), <https://www.jdsupra.com/legalnews/case-challenging-race-conscious-2029521/> [<https://perma.cc/5NNV-KUL2>] (“Blum was really the moving force behind the suit in Fisher, having funded the litigation, found the lawyers and identified Fisher as an appropriate plaintiff to bring the claims he envisioned.”).

162. See Nicholas Lemann, *Can Affirmative Action Survive?*, NEW YORKER (July 26, 2021), <https://www.newyorker.com/magazine/2021/08/02/can-affirmative-action-survive>

allowed Blum and Fisher to bring suit in opposition to affirmative action making them better able to mobilize and fight against the few public institutions that consider race.<sup>163</sup>

Over the past eight years, SFFA filed four significant lawsuits challenging admissions programs at Harvard University, University of North Carolina, Yale University—and the University of Texas—again.<sup>164</sup> Each time, the district courts have ruled in favor of the attacked university—or avoided the question altogether.<sup>165</sup>

In *Students for Fair Admissions v. Harvard*, both the district court for the District of Massachusetts and First Circuit Court of Appeals granted victory to Harvard.<sup>166</sup> Aside from the normal Fourteenth Amendment claims that SFFA usually makes, the organization included a claim that Harvard *intentionally discriminates* against Asian American applicants.<sup>167</sup> Because Blum realized his “normal” affirmative action plaintiffs—sympathetic White persons—were not producing successful verdicts in the federal courts, he sought out a different type of plaintiff: Asian Americans.<sup>168</sup> Specifically, the claim was that Harvard’s

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[<https://perma.cc/M3KD-VRMR>] (describing Blum as a financial adviser who has initiated affirmative action cases over the past twenty-five years).

163. See generally Anderson, *supra* note 161 (indicating that Blum, Fisher, and the SFFA are making the same arguments made in the prior Fisher case—now under the guise of the organization rather than a named plaintiff).

164. See *id.* (stressing “[A]ny one of the [current lawsuits] could have a significant impact on race-conscious admissions programs at colleges and universities across the country.”).

165. See *id.* (reporting on the decisions made in the U.S. District Court for the Middle District of North Carolina, U.S. District Court of the District of Connecticut, and U.S. District Court of the Western District of Texas).

166. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 397 F. Supp. 3d 126, 139–40 (D. Mass. 2019) (ruling in favor of Harvard’s current admissions plan and finding that the Ivy League university did not discriminate against Asian Americans); see also *Equal Protection-Affirmative Action-First Circuit Holds That Harvard’s Admissions Program Does Not Violate the Civil Rights Act - Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 980 F.3d 157, 134 HARV. L. REV. 2630 (2021) (discussing that there may be a new form of strict scrutiny to affirmative action left open by the First Circuit).

167. See Joan Biskupic, *Supreme Court Effectively Delays Challenge to Harvard Affirmative Action Policies for Several Months*, CNN POL. (June 14, 2021), <https://www.cnn.com/2021/06/14/politics/supreme-court-harvard-admissions-lawsuit/index.html> [<https://perma.cc/W3YP-TVNK>] (including Harvard’s counter contention that there are no limits imposed for the number of Asian American students accepted).

168. See generally Joan Biskupic, *A Litigious Activist’s Latest Cause: Ending Affirmative Action at Harvard*, REUTERS (June 8, 2015, 2:45 PM), <https://www.reuters.com/investigates/special-report/usa-harvard-discrimination/> [<https://perma.cc/4SP2-TCRB>] (expressing the criticism that “Blum is using Asian Americans ‘for another misguided attack on affirmative action.’”).

admissions scheme was discriminatory against Asian Americans because the University allegedly “holds Asian Americans to a higher standard and essentially caps their numbers.”<sup>169</sup> However, the argument was not satisfactory in the courts at that time.<sup>170</sup>

The initial decision in favor of Harvard was rendered in November 2020.<sup>171</sup> Thereafter, SFFA filed a petition of writ, which the Supreme Court initially postponed consideration.<sup>172</sup> Particularly, in June 2021, the Court deferred its decision on whether to accept the *Harvard* case by asking the current Department of Justice what its views are on affirmative action policies.<sup>173</sup> This request by the Court—seeking more information before granting certorari—foreshadowed that the Justices were interested in hearing the *Harvard* case.<sup>174</sup>

In December 2021, the Department of Justice under the Biden administration released its view on the matter and urged the Supreme Court to decline hearing the *Harvard* case; taking the stance that race *should be used*, to some extent, as a factor in student admissions to boost and facilitate diversity.<sup>175</sup> Not only did the Department of Justice urge

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169. See Biskupic, *supra* note 167 (stating the new argument SFFA is making to attack affirmative action policies, including intentional discrimination claims).

170. See *id.* (reiterating that allowing for affirmative action is settled Supreme Court law; further, there is no split among other U.S. courts as to the larger issue).

171. See John S. Rosenberg, *Students for Fair Admissions Loses North Carolina Case*, HARVARD MAG. (Oct. 21, 2021), <https://www.harvardmagazine.com/2021/10/sffa-loses-unc-case-appealing-harvard-decision> [<https://perma.cc/RJ9N-XUXX>] (explaining the District Court and First Circuit Court of Appeals decisions, allowing Harvard to take applicants’ race into consideration).

172. See Biskupic, *supra* note 167 (reporting the Supreme Court has issued an order to the President’s Department of Justice (DOJ) to supply the Court with the administration’s view on the Harvard case).

173. See Nate Raymond, *Biden Administration Asks U.S. Supreme Court to Reject Harvard Affirmative Action Case*, REUTERS (Dec. 8, 2021, 6:46 PM), <https://www.reuters.com/world/us/biden-administration-asks-us-supreme-court-reject-harvard-affirmative-action-2021-12-09/> [<https://perma.cc/32RQ-LXP7>] (addressing the change in administration had the opportunity to influence the DOJ’s supportive stance on affirmative action).

174. See generally Lawrence Hurley, *U.S. Supreme Court Seeks Biden Views on Harvard Admissions Dispute*, REUTERS (June 14, 2021, 5:11 PM), <https://www.reuters.com/world/us/us-supreme-court-seeks-biden-views-affirmative-action-case-2021-06-14/> [<https://perma.cc/2P6M-DFZV>] (signaling the Court may likely take on the appeal as it is placing special consideration on the matter by including the Department of Justice. Usually, the Court will make a decision on its own accord whether to accept an appeal).

175. See Raymond, *supra* note 173 (outlining the importance that the current administration does not want to end the practice of affirmative action as compared to the prior administration).

the Court to not accept the appeal, but Solicitor General Elizabeth Prelogar also warned the Court that it would be an “extraordinary step” to reconsider its past rulings and that it would be disruptive for the universities that have relied on valid Supreme Court precedent to restructure their admissions policies.<sup>176</sup> Unfortunately, the Court did not listen to the appropriate plea and sensible reasons to decline.<sup>177</sup> Now that the Court has rendered its decision to take up the appeal, the Court has created reasonable uncertainty for the future of affirmative action in our nation.<sup>178</sup>

In conjunction with the *Harvard* suit, SFFA also filed suit against the University of North Carolina by making their usual Equal Protection claim but coupling that with an asserted violation of the Civil Rights Act of 1964.<sup>179</sup> Once again, SFFA lost its case—and the District Court judge did not shy away from reprimanding SFFA’s relentless attacks on affirmative action.<sup>180</sup> According to Judge Loretta C. Biggs of the District Court for the Middle District of North Carolina:

Ensuring that our public institutions of higher learning are open and available to all segments of our citizenry is not a gift to be sparingly given to only select populations, but rather is an institutional obligation to be broadly and equitably administered. While no student can or should be

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176. *See id.* (addressing Prelogar’s belief that the Harvard case is a “poor vehicle” for the Court to reconsider its past cases—perhaps in light of the fact that the university is a private institution).

177. *See generally* Joan Biskupic, *Supreme Court to Consider Landmark Challenge to Harvard and UNC Affirmative Action Policies*, CNN POL., <https://www.cnn.com/2022/01/24/politics/supreme-court-harvard-unc-affirmative-action/index.html> [<https://perma.cc/2FJX-2KRS>] (last updated Jan. 24, 2022, 12:36 PM) (reporting that the Supreme Court will reconsider race-based affirmative action in college admissions).

178. *See* Raymond, *supra* note 173 (acknowledging the chance that the newly conservative Court will have to render a decision that will affect affirmative action policies throughout the country); *see also* Ian Millhiser, *The Supreme Court Will Hear Two Cases that are Likely to End Affirmative Action*, VOX (Jan. 24, 2022, 9:32 AM), <https://www.vox.com/2022/1/24/22526151/supreme-court-affirmative-action-harvard> [<https://perma.cc/6JL7-YPED>] (reporting that the Supreme Court taking the Students for Fair Admissions cases “present[s] an existential threat to affirmative action in university admissions.”).

179. *E.g.*, Nate Raymond, *University of North Carolina Defeats Challenge to Race-Based Admissions Policies*, REUTERS (Oct. 19, 2021, 5:03 AM), <https://www.reuters.com/world/us/university-north-carolina-defeats-challenge-race-based-admissions-policies-2021-10-19/> [<https://perma.cc/KY6L-5EHW>] (addressing the argument SFFA made accusing UNC of making race the predominant factor in its admissions process to favor Black and Hispanic students to the detriment of White and Asian American candidates).

180. *Cf.* Rosenberg, *supra* note 171 (including Judge Bigg’s language used in her opinion to reflect that the evidence clearly favors the university’s use of race conscious admissions).

admitted to this University, or any other, based solely on race, because race is so interwoven in every aspect of the lived experience of minority students, to ignore it, reduce its importance and measure it only by statistical models as SFFA has done, misses important context to include obscuring racial barriers and obstacles that have been faced, overcome and are yet to be overcome. As the Court in *Grutter* explained, by virtue of our Nation's struggle with racial inequality, such minority students, as in this case, are both likely to have experiences of particular importance to an institution's mission and less likely to be admitted in meaningful numbers on criteria which ignore those experiences. As articulated by one of UNC's experts, "the work associated with diversity and inclusion is complicated and challenging and is an ongoing iterative process." While the University's current admissions program has captured the context described in *Grutter*, UNC continues to have much work to do.<sup>181</sup>

Thus, affirming the use of affirmative action for another day and allowing the university to claim it has the facts and law on its side.<sup>182</sup>

Nevertheless, in November 2021, SFFA asked the Supreme Court to hear both its *Harvard* and *University of North Carolina* cases together.<sup>183</sup> In his opinion, Blum believes the consolidated cases provides the opportunity for the Supreme Court to "begin the restoration of the colorblind legal covenant that holds together Americans of all races and ethnicities."<sup>184</sup> Moreover, because the University of North Carolina (UNC) is a public institution, the Court is now able to hear both a Title VI of the Civil Rights Act and Fourteenth Amendment case together.<sup>185</sup> This effort ultimately proved to be successful for SFFA as the Supreme Court decided to accept the appeal and hear these consolidated cases in

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181. *Id.* (interpreting the ruling as a clear win for UNC with the proper adherence to Supreme Court precedence).

182. *See id.* (providing the importance for universities to rely on current affirmative action holdings to develop their admissions policies).

183. *See* Vivi E. Lu & Dekyi T. Tsotsong, *SFFA Petitions Supreme Court to Hear Harvard and UNC Cases Together*, HARV. CRIMSON (Nov. 16, 2021), <https://www.thecrimson.com/article/2021/11/16/sffa-petition-combine-cases/> [<https://perma.cc/S8E3-V242>] (explaining that the merge of these cases would allow the SFFA's UNC case to advance to the Supreme Court).

184. *See id.* (providing SFFA President Edward J. Blum's statements in a press release that the cases have similar issues of importance already pending before the Supreme Court).

185. *See id.* (referring to the belief that the cases "go hand-in-hand" while also invoking the Equal Protection Clause of the Fourteenth Amendment).



the upcoming Fall 2022 term, the implication of which will be discussed below.<sup>186</sup>

Before the Court released its decision to hear the SFFA cases, the organization had already filed other cases in federal courts.<sup>187</sup> In February 2021, SFFA filed yet another discrimination lawsuit against Yale University, a private institution, on behalf of White and Asian American applicants.<sup>188</sup> This lawsuit echoed one that was filed in 2020 by the Department of Justice (DOJ) under the Trump administration against Yale, which alleged the same type of discrimination.<sup>189</sup> Fortunately, the DOJ dropped the lawsuit against Yale after the Biden administration took office.<sup>190</sup> Once the current DOJ dropped the suit—initiated by its prior administration—in February 2021, SFFA swooped in to make the same legal arguments that the prior administration had made, including arguments that Yale's claims were meritless and based on factual errors.<sup>191</sup> Originally, SFFA had requested a motion to intervene in the DOJ's prior case, but the motion was later denied.<sup>192</sup> The

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186. *E.g.*, Millhiser, *supra* note 178 (“[B]arring an extraordinary surprise from at least two members of the Court’s 6-3 conservative majority, affirmative action is probably doomed.”).

187. *Compare* Amelia Davidson, *Students for Fair Admissions Sues Yale, Petitions to Escalate Harvard Case to Supreme Court*, YALE DAILY NEWS (Feb. 25, 2021, 11:58 PM), <https://yaledailynews.com/blog/2021/02/25/students-for-fair-admissions-sues-yale-petitions-to-escalate-harvard-case-to-supreme-court/> [https://perma.cc/4SSG-486W] (reporting the SFFA filed a complaint against Yale in the District Court of Connecticut in late February 2021) *with* Millhiser, *supra* note 178 (relaying the Supreme Court’s January 2022 announcement that it would consolidate and hear the Harvard and UNC cases).

188. *See* Davidson, *supra* note 187 (reporting the lawsuit alleges Yale violates Title VI of the Civil Rights Act, “which prohibits any education institution for receiving federal funding from discriminating on the basis of race, color, or national origin”).

189. *See id.* (addressing Yale President Pere Salovey’s statements that Yale “look[ed] forward to defending [the] policies in court”).

190. *Compare* Melissa Quinn, *Biden Administration Urges Supreme Court to Reject Harvard Affirmative Action Case*, CBS NEWS (Dec. 9, 2021, 9:31 AM), <https://www.cbsnews.com/news/supreme-court-harvard-affirmative-action-case-justice-department/> [https://perma.cc/GC9M-6JHY] (noting Biden’s administration stands in support of those higher-education institutions trying to better foster diversity in their universities) *with* Michael Stratford, *Trump Administration Sues Yale Over Use of Race in Admissions*, POLITICO, (Oct. 8, 2020, 8:41 PM), <https://www.politico.com/news/2020/10/08/trump-administration-sues-yale-428235> [https://perma.cc/HE3J-VQD8] (referring to the DOJ’s lawsuit as the most drastic action the Trump administration has taken to attack the use of race in university admissions).

191. *See* Davidson, *supra* note 187 (relaying an education policy specialist’s remarks that Yale clearly complies with Supreme Court precedent regarding affirmative action and that the lawsuits are based on fallacious claims).

192. *See id.* (reporting SFFA’s actions to get involved in the process to end up in front of the Supreme Court to present their case against affirmative action).

SFFA case against Yale is currently on hold until the Supreme Court issues a ruling in the *Harvard* suit—meaning that if the Court renders a decision in favor of SFFA, the *Yale* court will follow suit.<sup>193</sup> This demonstrates that federal courts around the country will be awaiting the Supreme Court decision to apply the same law to future affirmative action cases.<sup>194</sup>

Finally, in another desperate and relentless attempt to scratch its way to the Supreme Court, SFFA filed another suit against the University of Texas.<sup>195</sup> However, the United States District Court for the Western District of Texas appropriately dismissed the action, and the court concluded SFFA's claims were barred by *res judicata* because the organization “had already brought essentially the same claims against the same university admissions policy as in a prior action.”<sup>196</sup> This second-stab at the University demonstrates SFFA's unwavering efforts to get the outcome they desire—to eliminate the use of race in admissions programs and overrule *Grutter*.<sup>197</sup> Nevertheless, they are one step closer.<sup>198</sup>

The problem these zealous affirmative action opponents pose to race-conscious admissions schemes is that their never-ending lawsuits have

193. See Megan Vaz, *Supreme Court, Federal Courts to Hear Cases that Could End Affirmative Action*, YALE DAILY NEWS (May 22, 2022, 11:27 PM), <https://yaledailynews.com/blog/2022/05/22/supreme-court-federal-courts-to-hear-cases-that-could-end-affirmative-action/> [<https://perma.cc/F5YB-R762>] (reporting that Yale lawyers' May 2021 petition to hold the SFFA suit until a decision is rendered in the Harvard case was approved).

194. See *id.* (describing the District Court of Connecticut—where the SFFA instituted suit against Yale—and the rest of the nation as “await[ing] the Supreme Court's review of the Harvard and UNC cases . . .”).

195. Cf. Allyson Waller, *Federal Judge Tosses Lawsuit that Sought to End UT-Austin's Affirmative Action Policy*, TEX. TRIB. (July 27, 2021, 11:00 AM), <https://www.texastribune.org/2021/07/27/ut-austin-affirmative-action/> [<https://perma.cc/T7GD-59VJ>] (citing the Western District of Texas' finding that the plaintiffs brought arguments similar to those already made in a prior case that reached the U.S. Supreme Court twice. In those cases, the courts upheld UT-Austin's admissions policies).

196. See *Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin*, No. 1:20-CV-763-RP, 2021 U.S. Dist. LEXIS 138349, at \*35 (W.D. Tex. July 26, 2021) (“SFFA has brought essentially the same claims against the same university admissions policy as in *Fisher*. The alleged changes that SFFA brings forward about UT's admissions program do not rise to the level of being ‘significant’ such that they ‘create ‘new legal conditions,’ that would allow for relitigation of these claims.”).

197. See *id.* (condemning SFFA's attempt to relitigate the same lawsuit that Blume and Fisher were involved in during *Fisher*).

198. See generally Millhiser, *supra* note 178 (referring to the culmination of years-long strategy by the conservative activists to bring a court decision invalidating affirmative action).

eventually delivered a case to the front door of the Supreme Court.<sup>199</sup> This means that there will now be another opportunity for the new conservative comprised Court to assess the validity of affirmative action in higher education now that the Court has plans to hear the *Harvard* and *UNC* consolidated cases.<sup>200</sup> Specifically, Justice Brett Kavanaugh and Justice Amy Coney Barrett could be the deciding votes in this upcoming lawsuit that would be different than how their predecessors—Justice Anthony Kennedy and Justice Ginsburg—voted in the last affirmative action case.<sup>201</sup> Further, Justice Breyer’s decision to retire also affects the cases’ outcome; it is uncertain whether a Supreme Court nomination will be accepted and finalized before the Court hears the consolidated cases.<sup>202</sup>

In April 2022, Justice Ketanji Brown Jackson was nominated to the Supreme Court as the first Black woman to serve on the highest court.<sup>203</sup> However, this historic milestone will have no effect on the outcome of the affirmative action cases on the Court’s docket, as Justice Jackson indicated that she would recuse herself from the forthcoming *Harvard*

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199. See Bianca Quilantan, *An Anti-Affirmative Action Group is Trying to Erase Race from College Admissions*, POLITICO (Dec. 1, 2020, 4:30 AM), <https://www.politico.com/news/2020/12/01/affirmative-action-race-college-admissions-441475> [<https://perma.cc/R5WF-57KV>] (“Lower court losses for Students For Fair Admissions get legal strategist Edward Blum closer to his ultimate goal: returning to the Supreme Court.”).

200. See *id.* (suggesting that it would only take two of the new Justices—Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett—to side with Roberts, Thomas, and Alito to grant SFFA their “long-awaited victory”); see also Millhiser, *supra* note 178 (describing the Court that will hear the two new cases as very different than the one that considered affirmative action back in 2016).

201. See e.g., Joan Biskupic, *Supreme Court Conservatives May Have Their Chance to End Affirmative Action at Universities*, CNN POL., <https://www.cnn.com/2021/12/09/politics/affirmative-action-supreme-court-conservatives-harvard/index.html> [<https://perma.cc/G3B8-RQNE>] (last updated Dec. 9, 2021, 5:07 AM) (commenting that the legal writings of several justices in today’s conservative majority suggests they would “be ready to take up the racially charged dispute and possibly change the look of college enrollment across the country”).

202. See Adam Liptak, *Justice Breyer to Retire from Supreme Court*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/us/stephen-breyer-retire-supreme-court.html> [<https://perma.cc/49A7-RLSD>] (conceding that because conservatives are now in full control of the Court, replacing Justice Breyer with another liberal will likely not change the Court’s ideological balance or affect its rightward trajectory in an affirmative action case).

203. See Eric McDaniel, *The Senate Confirms Ketanji Brown Jackson to the Supreme Court*, NPR, <https://www.npr.org/2022/04/07/1090973786/ketanji-brown-jackson-first-black-woman-supreme-court> [<https://perma.cc/FW6V-ASJ6>] (last updated Apr. 7, 2022, 3:39PM) (noting the historic milestone that Justice Jackson will be the first Black woman to ever serve on the Supreme Court).

matter during her Senate Judiciary Committee confirmation Hearing.<sup>204</sup> This development arises out of the potential conflict of interest seeing as Justice Jackson is a Harvard graduate and is a current member of the private university's Board of Overseers.<sup>205</sup> If Justice Jackson does in fact follow through with the planned recusal, the Court would be missing a key player in upholding affirmative action jurisprudence.<sup>206</sup>

The Court being comprised of only eight Justices to hear the matter, six of which are conservative, does not bode well for the proponents of affirmative action.<sup>207</sup> This points to grave danger for the survivability of such an important admissions scheme, which seeks to level the playing field for those students who are at a disadvantage—by no fault of their own.<sup>208</sup>

The hope of safeguarding affirmative action admissions policies is affected and diminished now that the Court has accepted SFFA's petition for writ of certiorari, which is unsurprising based on the sheer number of attempts made to get to the Court.<sup>209</sup> To provide some hope, there is still speculation as to how the Court would ultimately decide on a SFFA

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204. See Nate Raymond, *U.S. Supreme Court Pick Jackson to Recuse from Harvard Race Case*, REUTERS, <https://www.reuters.com/legal/government/us-supreme-court-pick-jackson-recuse-harvard-race-case-2022-03-23/> [<https://perma.cc/CFE9-D4LY>] (last updated Mar. 23, 2022, 3:21 PM) (reporting statements made by potential Justice Jackson in the Senate Judiciary Committee confirmation hearings on her nomination to the Supreme Court).

205. See *id.* (referring to the joined *Harvard* and *North Carolina* case to be heard in the court's October 2022 Term. Because the *North Carolina* case will also be before the Court, the door is open as to whether Justice Jackson may hear that matter).

206. See *id.* (pointing to the line of questioning by conservative Senator Ted Cruz about Justice Jackson's recusal).

207. See Millhiser, *supra* note 178 (commenting that conservative judges typically believe that the collective benefits society gains from having more diverse campuses must bow to the individual interests of college applicants and predicting this conservative viewpoint is likely to prevail given the Court's current 6-3 divide).

208. See generally Driver, *supra* note 25 (describing affirmative action as an acknowledgement by the government and society at large that the only way to end institutional racism was through taking positive, conscious action).

209. See Quilantan, *supra* note 199 ("With a healthy collection of cases, SFFA's legal machine looks like it doesn't have any plans to stop waging war on universities' race-conscious admissions practices until the Supreme Court rules in its favor.").

case.<sup>210</sup> However, the nationwide impact of a ruling against affirmative action would affect the State of Texas.<sup>211</sup>

As UNC Chapel Hill law professor, Theodore M. Shaw, has wisely expressed: “This is the most conservative Supreme Court that we have seen, certainly during our lifetime . . . It could do a lot of damage to opportunity for Black and [B]rown students to attend selective institutions of higher education.”<sup>212</sup> Thus, the Court—even in the current conservative composition—should do everything in its power to prevent this type of damage and maintain affirmative action.<sup>213</sup>

### *C. The Top Ten Percent Rule Was Not “Really” Considered by the Supreme Court.*

With respect to the Texas Top Ten Percent Rule, the Supreme Court has only referred to it once.<sup>214</sup> Specifically, the Court articulated that the rule “merely reflects the fact that privileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court’s cases have defined

210. See generally Sheryll Cashin, *Biden’s SCOTUS Pledge Is a Model of How Affirmative Action Should Work*, POLITICO (Feb. 10, 2022, 4:30 PM), <https://www.politico.com/news/magazine/2022/02/10/supreme-court-affirmative-action-black-woman-good-thing-00007442> [<https://perma.cc/E9SQ-ZBTX>] (discussing President Biden’s current plan to nominate an African-American woman to the Supreme Court. “In doing so, Biden also reminds us why affirmative action in college admissions should be upheld in a pending Supreme Court case.”).

211. See generally Amy Howe, *Justices Request Government’s Views on Harvard Affirmative-Action Dispute*, SCOTUSBLOG (June 14, 2021, 12:40 PM), <https://www.scotusblog.com/2021/06/justices-request-governments-views-on-harvard-affirmative-action-dispute/> [<https://perma.cc/Q3G9-VE7F>] (describing the “very different” Court than the ones that decided *Fisher* and *Grutter* due to the various successions of certain Justices).

212. See Lu & Tsotsong, *supra* note 183 (acknowledging that SFFA’s goal is to “strike a death blow” to affirmative action in the United States).

213. See Meredith Deliso, *What’s at Stake As Supreme Court Revisits Affirmative Action in College Admissions*, ABC NEWS (Jan. 28, 2022, 5:06 AM), <https://abcnews.go.com/US/stake-supreme-court-revisits-affirmative-action-college-admissions/story?id=82468299> [<https://perma.cc/6JAJ-LU47>] (showing the findings from a university which concluded that without considering race as an admissions factor by using race-neutral protocols, African-American students admitted into the class of 2019 would have likely dropped from fourteen percent to six percent. Hispanics and “other” type of students would have dropped from fourteen percent to nine percent. This decrease in minority students would create an increase in the White student population, creating a less diverse student environment.).

214. See generally *Fisher II*, 579 U.S. at 386-87 (referring to the Texas Rule, but not as a basis of analysis for the Court’s ruling).

it.”<sup>215</sup> Thus, demonstrating even the highest Court itself does not believe the rule works to achieve diversity in higher education.<sup>216</sup> Further, the Court criticizes the rule as “a blunt instrument that may well compromise the University’s own definition of the diversity it seeks.”<sup>217</sup> This type of language foreshadows that if the Court were to hear an action against the rule, the Court might declare it unconstitutional if the proffered purpose for the rule is to “achieve diversity” or “achieve a critical mass.”<sup>218</sup>

In *Fisher II*, when discussing the rule, the Court expressed that universities admitting students based on class rank alone is in “deep tension with the goal of educational diversity” as the prior affirmative action cases have defined diversity.<sup>219</sup> This brief discussion on the rule was brought to the Court in light of Fisher’s proposed argument that the University of Texas could perhaps “uncap” the percentage plan, and admit more of its students through such a percentage plan—extending beyond the seventy-five percent that the University already uses.<sup>220</sup> However, the Court expressly rejected this argument, which shows its lack of support for the Texas Rule.<sup>221</sup>

If the validity of the rule was up to the Court, as it stands, it is unlikely that the rule would survive constitutional muster because the Court does not believe it is narrowly tailored to serve the compelling interest of

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215. *Id.* at 386-87.

216. *See id.* at 387 (explaining the Top Ten Plan does not serve diversity in the way affirmative action considerations do since the Plan leaves out unique students, not only based on race but other essential values that universities care for, solely because they were not at the top ten percent of their class).

217. *Id.*

218. *See* Kauffman Interview, *supra* note 111 (discussing the possible repercussions of the Supreme Court hearing the merits of the Texas Rule); *see also* Fisher II, 579 U.S. at 387 (inferring how the Top Ten Percent Plan does not serve the purpose of diversity).

219. *See* Fisher II, 579 U.S. at 387-88 (asserting diversity should include diversity among *all the qualities* valued by the university).

220. *See id.* at 386 (declining to accept Petitioner’s percentage argument because the Top Ten Percent Plan, although “facially neutral, cannot be understood apart from its basic purpose to boost minority enrollment.” The percentage argument on the other hand is not facially neutral since they are “adopted with racially segregated neighborhoods and schools front and center stage.”).

221. *See id.* (“A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.”).

attaining a critical mass.<sup>222</sup> Therefore, it is important to assess what can be done to protect and improve such a vital scheme.<sup>223</sup>

*D. Members of Texas Legislature are Also Attacking the Rule.*

Part of the concern for the survivability of the rule stems from the internal issues of the Texas Legislature.<sup>224</sup> Seemingly, members of the Texas Legislature are often proposing new legislation to remove the rule and change how Texas universities achieve diverse student bodies.<sup>225</sup>

In 2017, a Texas educational committee attempted to repeal the rule by introducing Senate Bill 2119 (SB 2119) to allow publicstate universities to judge all applicants based on their own admissions criteria.<sup>226</sup> This effort was led by Republican Senator Kel Seliger, and garnered support among the educational committee—both Republicans and Democrats alike.<sup>227</sup> After realizing there were not enough votes to get SB 2119 onto the Senate floor, Seliger changed the Bill to reflect that each university could cap automatic admissions at thirty percent for its incoming freshman class.<sup>228</sup> Additionally, this change did not pass into the next

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222. See *Implications from Fisher II*, *supra* note 144 (“Justice Kennedy has now confirmed that the advancement of percent plans is not a panacea, legally or educationally, for the achievement of institutional diversity goals”).

223. See generally Elizabeth Bell, *Alternative Affirmative Action: Evaluating Diversity at Flagship Universities Under Race Blind Admissions*, RAMAPO COLL. OF L. (Jan. 26, 2016), <https://www.ramapo.edu/law-journal/files/2016/01/Alternative-Affirmative-Action.pdf> [<https://perma.cc/R88G-75V5>] (distinguishing the Texas Top Ten percent law with standardized testing. Standardized testing is known to negatively impact students that lack resources to prepare for the exams, so the Texas Top Ten percent law is supposed to be a solution that considers disenfranchised students).

224. See Watkins, *supra* note 15 (demonstrating lawmakers from suburban areas disapprove of the Rule because their constituents are in competitive school districts, which supposedly makes it more difficult for those students to be accepted into the “flagship” universities).

225. See *id.* (discussing the proposed bill by Senator Kel Seliger, chairman of the higher education committee, that seeks to eliminate the top ten percent program in the State of Texas).

226. See Berdanier, *supra* note 19 (comparing the Top Ten Rule as a harmful restriction with the proposed Bill as a “freeing” mechanism for universities to create their own individualized admissions scheme. This “free” mechanism would prefer “more qualified candidates” over minority students.).

227. See Watkins, *supra* note 15 (stating Republicans and Democrats supported the bill, but not enough Republicans were on board); see generally Berdanier, *supra* note 19 (opining that getting rid of the rule is the only way to keep Texas universities competitive at a national level and to ensure that the best students are admitted—a view commonly shared by those opposed to the rule).

228. See Watkins, *supra* note 15 (reporting “Seliger couldn’t get the [nineteen] votes needed to get the item up for consideration on the floor of the [thirty-one] member Senate. He said the

phase of the 86th Texas Legislature.<sup>229</sup> However, it is important to note that there was at least some support and efforts to keep the Bill rolling during this time.<sup>230</sup>

In 2021, members of the Senate Higher Education Committee considered a new bill that would significantly change the state's automatic college admission standard.<sup>231</sup> Senator Brandon Creighton opposed the rule and proposed the recent bill known as Senate Bill 1091 (SB 1091).<sup>232</sup> Particularly, the following concerning remarks have been made concerning the rule:

“The Higher Education Coordinating Board has determined it’s very difficult to distinguish the effect of the top ten percent rule from other policies, initiatives, and trends over the last 20 years,” he said. Creighton said that it has also skewed the admissions process at the state’s premiere universities, crowding out other qualified students that didn’t rank as high in their graduating class. “Class rank is just one way to measure a student’s potential, but sometimes it shouldn’t be the sole or only deciding factor . . . .”<sup>233</sup>

This latest attack against the rule shows the disposition that many new Texas lawmakers and important members of higher education share—the rule does not work, and it should be abolished or changed.<sup>234</sup> Efforts to depose the rule are grounded on the assumption that the rule is not making

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reason the bill wasn’t getting the necessary votes ‘is because of self-professed small government Republicans.’”).

229. *See id.* (noting that even the modification of the proposed bill did not survive).

230. *See id.* (recognizing that while there were not enough votes to get the Bill on the floor, there certainly was enough interest to get it involved in committee discussions).

231. *See Panel Debates Automatic Admission Rule*, TEX. SENATE NEWS (Apr. 28, 2021), <https://www.senate.texas.gov/news.php?id=20210428a> [<https://perma.cc/G42W-SXRZ>] (considering the top ten percentage acceptance threshold to be lowered to thirty percent from seventy-five percent of any incoming class).

232. *See id.* (“The automatic admission rule was crafted as a race-blind way to offer a path to higher education for underrepresented African-American and Hispanic students, as well as students from small, rural high schools without the same access to resources as those in larger urban districts. Creighton told members it [is] unclear how much the law has contributed to that goal.” Creighton believed the bill was not effective in its purpose of fostering diversity because it primarily focused on class rank and no other factors.)

233. *Id.*

234. *See generally* Watkins, *supra* note 15 (highlighting Texas lawmakers, including the chairman of higher education committee, are working to eliminate the rule due to the disparity between their constituents and individuals from rural areas).



a significant change in the numbers of minority students enrolled in Texas institutions.<sup>235</sup> However, the evidence shows there has been a vast improvement in the number of minority students attending these flagship institutions due to the implementation of the rule.<sup>236</sup> For example, among the 2016 Texas graduating class of “Top-Ten Percenters,” eighty-one percent were Hispanic, seventy-two percent were Asian, and seventy percent were Black.<sup>237</sup>

This is precisely why the proposed SB 1091 should not be allowed to continue further into the Texas Legislature.<sup>238</sup> The rule should be left alone to continue providing disadvantaged students the automatic opportunity to attend a Texas university of their choice.<sup>239</sup>

The recent denial of the critical race theory by the Texas Legislature could subsequently lead to the decline of the rule due to the trend against discussing race.<sup>240</sup> Particularly, lawmakers throughout Texas are

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235. See Webster, *supra* note 14 (“Although raw numbers of minority students appear equal at UT and A&M pre-*Hopwood* and post-Ten Percent Plan, percentages continue to fall, especially when measured against the rising number of minority students in Texas.”).

236. See *id.* at 9 (noting the University of Texas enrollment data from 1996 through 2006 “show that admissions rates among top ten percent students climbed across ethnicities in the years following *Hopwood* and the implementation of the plan”).

237. See Neena Satija, *Has the Top 10 Percent Rule Impacted Diversity at UT-Austin? It's Complicated.*, TEX. TRIB. (Apr. 11, 2017), <https://www.texastribune.org/2017/04/11/ut-austin-top-ten-percent-impact/#:~:text=That%20data%20shows%20that%20the,boost%2C%20compared%20with%20white%20applicants> [https://perma.cc/58S6-6GJD] (communicating the demographic makeup of the graduating class of 2016 top-ten percent individuals).

238. See Manuel Grajeda, *Protect the Top 10% Rule for Texans: A Critical Law Providing Opportunities for Students Across Texas*, UNIDOSUS (Apr. 28, 2021), <https://www.unidosus.org/publications/2154-protect-the-top-10-rule-for-texans-a-critical-law-providing-opportunities-for-students-across-texas/> [https://perma.cc/SKM4-LNME] (opining that the cap put into place by SB 1091 “would make attending public universities more difficult for high school students across the state who have worked hard and done their best with the opportunities they have. It would also reduce the racial, socioeconomic, and geographic diversity that are so important in schools.”).

239. See Caldera, *supra* note 31 (explaining how the rule opens the door for students from families with limited means because their admittance rate through the rule is more than twice the rate for non-Ten Percenters. Further, the Top Ten Percent Plan accounts for eighty-five percent of admitted rural students at the University of Texas.).

240. See Talia Richman & Emily Donaldson, *Gov. Abbott Signs ‘Anti-Critical Race Theory’ Bill into Law Over Objections from Educators and Civic Groups*, DALLAS MORNING NEWS (June 15, 2021, 8:20 PM), <https://www.dallasnews.com/news/education/2021/06/15/gov-abbott-signs-anti-critical-race-theory-bill-into-law-over-objections-from-educators-and-civic-groups/> [https://perma.cc/PFB4-MCRK] (explaining the intent behind banning critical race curriculum is to not “burden our kids with guilt for racial crimes they had nothing to do with.” Thus, showing the tendency of Texas Legislators to avoid the discussion of race at all.).

currently going through a “frenzy” as to what is being taught in public education systems throughout the state regarding race and racism.<sup>241</sup> In fact, even after contentious nationwide debate, Texas Senate Bill 3 went into effect in 2021 to “abolish critical race theory.”<sup>242</sup> The concept of “race” is immediately seen as a negative or unnecessary consideration by some lawmakers who refuse to acknowledge that our nation’s history is embedded with deep and severe discrimination.<sup>243</sup> Rather than confronting the issue of equality and justice, they seek to avoid discussing the underlying truth of our nation’s history.<sup>244</sup> Further, it is important to remember that what is being taught in our schools goes hand in hand with the students that eventually end up in our higher education institutions.<sup>245</sup>

Ultimately, the proponents of the rule have an important job in securing the future of the rule, if not affirmative action policies themselves, at the state legislative level.<sup>246</sup>

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241. See Brian Lopez, *Republican Bill that Limits How Race, Slavery and History Are Taught in Texas Schools Becomes Law*, TEX. TRIB. (Dec. 2, 2021, 6:00 PM), <https://www.texastribune.org/2021/12/02/texas-critical-race-theory-law/> [https://perma.cc/F3RM-ESUP] (defining critical race theory as the idea that racism is embedded into our legal systems. The conservatives have commonly defined the phrase to include anything about race taught or discussed in public secondary schools).

242. See *id.* (“Under the new law, a ‘teacher may not be compelled to discuss a widely debated and currently controversial issue of public policy or social affairs.’ The law doesn’t define what a controversial issue is. If a teacher does discuss these topics, they must ‘explore that topic objectively and in a manner free from political bias.’”).

243. See Emerson Sykes & Sarah Hinger, *State Lawmakers Are Trying to Ban Talk About Race in Schools*, ACLU (May 14, 2021), <https://www.aclu.org/news/free-speech/state-lawmakers-are-trying-to-ban-talk-about-race-in-schools/> [https://perma.cc/6QFC-F5R6] (“What these lawmakers claim [as] ‘harmful ideologies’ are actually concepts used to educate individuals on systemic barriers and [the] discrimination people of color and other marginalized groups still face in this country across our institutions.”).

244. See *id.* (describing the trend of proposed legislation as a nationwide attempt to censor discussions of race in the classroom).

245. See *id.* (condemning the bills censoring discussion of race in the classroom because doing so robs students of an inclusive education).

246. See Caldera, *supra* note 31 (providing a multitude of reasons why students who benefit from the rule should be protected in admissions policies. These students are generally students of color, economically disadvantaged, and are likely to be first-generation students. “They cannot draw upon money or legacy for admission to Texas’ top institutions. They do not have fraternal connections or hidden knowledge to grant them access.”).

### III. SOLUTION

Both affirmative action and the Texas Rule are necessary instruments to foster diversity in public institutions across the state by providing access to these institutions that a majority of minority students would not otherwise receive.<sup>247</sup> While controversial and subject to debate, the rule is working as intended.<sup>248</sup> Through these initiatives, more students of color and students from lower socioeconomic classes have the opportunity to go to their dream schools.<sup>249</sup> As such, it is important to assess the next steps to legitimize and strengthen the use of affirmative action in the state of Texas.<sup>250</sup>

#### A. *What can the Supreme Court do?*

The first recommendation is for the Supreme Court to follow its own well-established precedent in affirmative action in the cases it will be hearing next Term.<sup>251</sup> Specifically, the recommendation is to leave *Grutter* intact and *not* deem affirmative action policies *per se* unconstitutional under the Fourteenth Amendment.<sup>252</sup>

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247. See Hinojosa, *supra* note 30 (reporting that the Rule admits and enrolls a more socioeconomically diverse group of students based on statistics provided by the Texas Education Agency).

248. See *id.* at 21–22 (clarifying the Plan clearly creates a more racially diverse student population. For example, in 2010, Latino students were admitted twenty percent more with the Rule compared to admission without the Rule).

249. See generally Neena Satija & Matthew Watkins, *At High Schools Just Miles Apart, a World of Difference in College Paths*, TEX. TRIB. (Mar. 29, 2016), <https://apps.texastribune.org/price-of-admission/tale-of-two-high-schools/> [<https://perma.cc/6T25-853V>] (reiterating then Texas Governor George W. Bush's sentiments said in 1997, as he signed the Top 10 Percent Rule into law: "We want all our students in Texas to have a fair shot at achieving their dreams").

250. See generally Hinojosa, *supra* note 30 (offering funding and redistribution ideas for the Texas Legislature to consider in order to fortify affirmative action measures to ensure better diversity in higher education institutions).

251. See generally Quinn, *supra* note 190 (highlighting that the Supreme Court has cited Harvard's approach to admissions in decisions addressing other institutions' policies for over forty years, which is why the Court should not take the case).

252. See generally Cashin, *supra* note 210 (urging the Supreme Court to use its four decades of precedent in holding that universities may consider race as one factor among many because this exercise is correct as a matter of constitutional law. Particularly, framers of the Fourteenth Amendment drafted the amendment to reconstruct former discriminatory states and "create new societies premised on equal participation in civic and public institutions.").

The Court has long recognized the importance of precedent of the law in matters extending far beyond affirmative action alone.<sup>253</sup> Once a ruling is decided, the Court will only overturn prior law after considering the following factors: (1) the quality of the past decision's reasoning; (2) its consistency with related decisions; (3) legal developments since the past decision; and (4) reliance on the decision throughout the legal system and society.<sup>254</sup>

In terms of affirmative action cases, the reasoning used by the Court in each case seems to be solid enough—universities have a compelling interest in achieving a critical mass.<sup>255</sup> The outcome of these challenges suggests that the Court should continue to recognize this compelling interest because each university that has been sued has already demonstrated that race-neutral alternatives are not as effective as affirmative action policies.<sup>256</sup>

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253. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting) (“Stare decisis is not, like the rule of *res judicata*, universal inexorable command. ‘The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. . . .’ Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”); see generally *Fisher v. Univ. of Tex.*, 579 U.S. 365, 385 (2016) (affirming that the Court’s precedent makes clear that Universities are constitutionally permitted to use affirmative action policies in their admissions. Further, “[t]he Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence.”).

254. See Henry Gass, *Overruled: Is Precedent in Danger at the Supreme Court*, CHRISTIAN SCI. MONITOR (June 25, 2019), <https://www.csmonitor.com/USA/Justice/2019/0625/Overruled-Is-precedent-in-danger-at-the-Supreme-Court> [<https://perma.cc/5YPL-RVZ9>] (commenting that the Supreme Court must balance overturning bad law with an obligation to not create too much uncertainty over what the law of the land will be because at stake is public confidence in the court itself); see also Audrey Anderson, *United States Urges Supreme Court to Decline Review of Harvard Case*, JD SUPRA (Dec. 15, 2021), <https://www.jdsupra.com/legalnews/united-states-urges-supreme-court-to-5243914/> [<https://perma.cc/6Q6T-4Z5L>] (explaining that the *Harvard* lower court decision does not conflict with other federal court decisions and does not raise an important question of federal law that the Court has not already addressed).

255. See generally Pope, *supra* note 132 (reiterating the longstanding notion of critical mass in affirmative action cases).

256. See Genevieve Bonadies Torres, *Affirmative Action in Higher Education: Relevance for Today’s Racial Justice Battlegrounds*, AM. BAR ASS’N (Jan. 6, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future-part-ii/affirmative-action-in-higher-education—relevance-for-today-s-ra/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education—relevance-for-today-s-ra/) [<https://perma.cc/PY53-GC2E>] (explaining why minority students need to have diversity surrounding them in university settings to truly prosper and not feel isolated).

Further, overturning the *Grutter* decision would result in severe consequences in all institutions throughout the country.<sup>257</sup> For example, Yale University has continuously maintained that its admissions policies firmly follows the policy approved by the *Grutter* court.<sup>258</sup> A change in the law concerning affirmative action will require every university that considers race as a factor—or in any way at all—to create new policies or rely on less effective policy measures to try to achieve the diversity it seeks.<sup>259</sup> This will be costly and burdensome to all parties involved in these changes—the university admission offices, state educational committees, and the students seeking to obtain admission themselves.<sup>260</sup> Therefore, the first recommendation is that the Supreme Court should *reaffirm* the legal requirements for affirmative action and not change existing law in the pending SFFA cases—or any challenge to affirmative action for that matter.<sup>261</sup> Long recognized by the Supreme Court, principles of fair play and substantial justice favor keeping the affirmative action policies intact.<sup>262</sup>

Second, and in the alternative, if the Court does decide to make changes to the principles of affirmative action in the SFFA cases, the Court should take the opportunity to establish clear guidelines for the use and future of affirmative action.<sup>263</sup> This recommendation recognizes that the conservative Court may make modifications to the current affirmative

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257. *See generally* Harris, *supra* note 23 (using Michigan, where affirmative action was banned, as a model to demonstrate that despite their imperfections, affirmative action measures are effective, and their diminution has negative consequences. Before Michigan's ban on affirmative action, Black students made up approximately nine percent of the University of Michigan population. After the ban, this number was reduced to four percent a few years after the ban went into effect and has "hovered there ever since.").

258. *See* Davidson, *supra* note 187 (describing the way Yale has consistently maintained that its admissions process complies with federal law).

259. *See id.* (echoing how SFFA's lawsuit includes misleading statistics and factual errors, leading to less effective policy measures).

260. *See generally* Torres, *supra* note 256 (describing how the "racially-blind" alternatives do not work to promote diversity and inclusion for the minority students attending university).

261. *See generally* Anderson, *supra* note 254 (explaining how the current standards of precedent do not support the action of the Supreme Court to take on the affirmative action case).

262. *See generally* Strauss, *supra* note 154 (claiming racial inequality continues to exist, so affirmative action provides more equitable opportunities for college education).

263. *See generally* Harris, *supra* note 23 (describing the guidelines for compelling interests in affirmative action policies established by *Bakke*. Thus, the Court has an opportunity to do the same.).

action law.<sup>264</sup> However, such changes do not need to be extremely disruptive to current university expectations.<sup>265</sup>

As the Court has already done in *Fisher*, it may impose new evidentiary requirements on universities that choose to utilize race-conscious admission policies.<sup>266</sup> This will not disrupt university expectations so long as there are clear and succinct requirements for a university to create new policies in conformance with judicial requirements.<sup>267</sup> This means the Court should either set reasonable guidelines that instruct universities on how often the universities are to conduct research in order to demonstrate race-neutral alternatives are unsuccessful or guidelines as to what race-neutral factors must be given priority over race.<sup>268</sup>

Additionally, the argument that universities are “intentionally” discriminating against certain racial groups will be a new consideration

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264. See Deliso, *supra* note 213 (evaluating the Court could rule in several ways. First, the Court could conclude the use of race in admissions violates the Fourteenth Amendment and overturn *Grutter*. Second, the Court could uphold *Grutter* and find that the use of race in Harvard and UNC’s particular admissions policies was constitutional. Third, the Court could still uphold *Grutter*, yet determine that the use of race in these contexts are not constitutional).

265. See Robert Barnes & Nick Anderson, *Race-Conscious University Admission Policies to Face Supreme Court Review*, WASH. POST (Jan. 24, 2022, 6:18 PM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-affirmative-action/2022/01/24/908fb92e-7d1e-11ec-8d71-0e9ca350d4b1\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-affirmative-action/2022/01/24/908fb92e-7d1e-11ec-8d71-0e9ca350d4b1_story.html) [<https://perma.cc/W96X-WCKA>] (“For decades, colleges and universities have relied on guidance from the Supreme Court that it is acceptable to take race into account as one factor among many in a holistic review of an application . . . But there are important caveats. The court has said that colleges must consider whether race-neutral admission practices can achieve their diversity goals. And it has forbidden the use of racial quotas to fill seats in a class.”).

266. See Deliso, *supra* note 213 (quoting Michael Olivas, the emeritus William B. Bates Distinguished Chair in Law at the University of Houston Law Center that the court could also potentially further restrict the practice of affirmative action “or require ‘higher standards’ for schools to use it” rather than eliminating the practice completely).

267. See *id.* (acknowledging that “the world has changed, but . . . common law [has not].” Therefore, universities are likely aware of possible changes to affirmative action requirements as Justice Anthony Kennedy last required institutions to first exhaust *all race-neutral* means of achieving racial diversity before turning to consider race).

268. See Garces, *supra* note 145 (representing that universities and colleges have turned to race-neutral approaches in light of the *Fisher II* holding and the evidence presented by the University of Texas. Such alternatives include outreach and recruitment efforts, such as visits to high schools that enroll high percentages of students of color and those with low socioeconomic backgrounds. Additionally, admission schemes can also place greater weight on a student’s socioeconomic status, instead of their race, in the process).

for the Court in the affirmative action area of jurisprudence.<sup>269</sup> Particularly, the *Harvard* case alleges that Asian-Americans are intentionally being discriminated against in the current policies because of their low acceptance rates.<sup>270</sup> If the Court entertains this type of argument, it could open the door that the rule intentionally discriminates against certain racial or ethnic groups because it predominantly serves minority students.<sup>271</sup> Therefore, the Court should be clear in declaring the intentional discrimination argument invalid in these types of cases.<sup>272</sup> This is the appropriate conclusion because Harvard provided sufficient evidence to the courts to prove Asian Americans are *not receiving racial animus or conscious prejudice*.<sup>273</sup>

Therefore, the second recommendation is for the Court to do the following in the SFFA consolidated cases: (1) hold that the affirmative action policies do not intentionally discriminate against a particular racial group; and (2) provide either a clear timeframe for the future of affirmative action or remove any time limitation completely.<sup>274</sup> The Court's clear explanation of the principles of affirmative action will

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269. See Torres, *supra* note 256 (distinguishing the Harvard affirmative action case from the others because it was the first affirmative action case against a private university. However, “[b]eyond these distinctions, the lawsuits largely rehash the same arguments of prior cases, asserting: Colleges should give greater weight to socioeconomic status in lieu of race; standardized tests provide the benchmark for who deserves admission; and there are sufficient levels of racial diversity across campus.”).

270. See *id.* (condemning Blum's racially divisive strategy that tries to pit Asian Americans against other minority groups in these new lawsuits).

271. See generally Kauffman Interview, *supra* note 111 (discussing the possibility of an intentional discrimination lawsuit that could potentially cause problems for the future of the Texas Rule).

272. See generally Torres, *supra* note 256 (addressing that the Harvard case was the first case to claim a university's race-conscious policy intentionally discriminated against Asian Americans. However, without affirmative action policies, this racial group would be most harmed).

273. See Barnes & Anderson, *supra* note 265 (representing that U.S. District Judge Allison D. Burroughs rejected claims that Asian Americans were discriminated or penalized for lack of “personal qualities,” such as leadership and compassion under affirmative action rating policies).

274. See Evan Gerstmann, *The Supreme Court Gets Ready to End Affirmative Action*, FORBES (Jan. 24, 2022, 1:30 PM), <https://www.forbes.com/sites/evangerstmann/2022/01/24/the-supreme-court-gets-ready-to-end-affirmative-action/?sh=773f62eb5e38> [https://perma.cc/A2DK-X3ND] (considering *Grutter*'s twenty-five year “limitation” to conclude in 2028. Thus, if the Court truly wants universities to wind down their use of affirmative action, the Court will have to provide exact guidance to do so).

provide clarity and some form of relief for the numerous minority students that aspire to attend the universities of their dreams.<sup>275</sup>

Third, if the Court outright rejects race-conscious admission policies, the Court should at least provide viable race-neutral alternatives in its opinion that universities may employ.<sup>276</sup> For example, the most cited alternative is for admissions officers to give special consideration to low-income students who deserve financial support.<sup>277</sup> Therefore, the Court should explicitly announce socioeconomic factors as justified race-neutral considerations for admission purposes.<sup>278</sup>

Moreover, with respect to the Texas Rule, the Court has an opportunity to address automatic acceptance percentage schemes.<sup>279</sup> Given that neither Harvard nor UNC use such plans, the Court is unlikely to specifically discuss the rule in either of those cases, but the Court could rely upon it—in dicta—as an example of a legitimate race-neutral alternative.<sup>280</sup> By legitimizing the percentage plans in its pending cases,

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275. See generally Torres, *supra* note 256 (“[Affirmative action] remains a vital tool for ensuring talented students of all backgrounds can access quality higher education.” Further, there would be immediate, adverse consequences of ending race-conscious policies).

276. See generally Bell, *supra* note 223 (indicating the threat of removing race-conscious admission policies placed indirect pressure on universities experiencing drops in admission of racial minorities. The race-neutral alternatives included pursuing outreach programs, scholarship programs, and banning legacy preferences that advantage White students. “All of these efforts have been proven to increase minority and low-income enrollment.”).

277. See Emily DeRuy, *Are There Good Alternatives to Affirmative Action?*, ATLANTIC (June 24, 2016), <https://www.theatlantic.com/education/archive/2016/06/are-there-good-alternatives-to-affirmative-action/488567/> [<https://perma.cc/2FMV-8DLQ>] (exploring that income is an area where admissions offices have discretion to consider as it is unlikely to be questioned in court).

278. See *id.* (reporting that only three percent of students at elite colleges in our country come from the poorest twenty-five percent of families, while a staggering seventy-two percent come from the richest twenty-five percent).

279. See Grieder, *supra* note 10 (analyzing the arguments made by Fisher’ with respect to the rule. According to the argument last made in Court, the top ten rule has been so effective that it undermines the argument in support of affirmative action).

280. See generally Fisher II, 579 U.S. at 387 (addressing the Texas Rule sporadically, while it was not subject to the lawsuit at hand); see also Scott Jaschik, *Affirmative Action Fight Shifts to UNC*, INSIDE HIGHER ED (Jan. 22, 2019), <https://www.insidehighered.com/admissions/article/2019/01/22/legal-fight-over-affirmative-action-shifts-unc-chapel-hill> [<https://perma.cc/LK39-D2Y4>] (indicating neither the private institutions nor UNC have embraced a set percentage plan of students from every high school. However, “UNC offers evidence that it considered such a plan but that it would [not] work”).



Texas guarantees the survival of its state legislature, which might inspire other states to adopt similar legislation.<sup>281</sup>

To avoid losing ground on minority enrollment at universities due to the end of affirmative action, the Court should provide viable alternatives, such as percentage plans, for universities to consider.<sup>282</sup>

*B. What can the State of Texas do?*

The fourth recommendation is for the Texas Legislature to continue denying any proposed legislation made *against* the rule.<sup>283</sup> Despite the political climate of the current legislature, affirmative action could be written into Texas law—race as a factor of a factor.<sup>284</sup> In light of Senator Creighton's current Senate Bill 1091 proposal, it is essential for the Texas Legislature to strike down the bill, provide new measures to expand diversity in public universities, or make it known the rule is here to stay.<sup>285</sup> Additionally, the legislature can strengthen the impact of the rule by promulgating supplemental laws or allocating additional educational funds and resources where needed.<sup>286</sup>

The Texas Legislature can improve the rule by considering equitable policies to complement the Top Ten Percent Plan and support increased

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281. See Grieder, *supra* note 10 (“The top 10 percent rule is officially blind to race, or socioeconomic status, or the educational attainment of one’s parents. For obvious reasons, though, it was bound to expand opportunity in practice, and it has.”); see also Bell, *supra* note 223 (analyzing Florida following in Texas’ footsteps by creating the “One Florida Plan” as an alternative to affirmative action. The Florida plan considers socioeconomic factors instead of race).

282. See generally Bell, *supra* note 223 (“Based on this comparative case study it seems that state flagship universities can increase racial diversity by banning legacy preferences, instituting outreach programs to disadvantaged schools, and increasing financial aid and scholarships. *All of these university measures have the potential to foster racial diversity without having to consider race as a factor in the college application.*” (emphasis added)).

283. See Watkins, *supra* note 15 (describing how past proposed Texas bills have not succeeded in eliminating the rule).

284. See generally Hinojosa, *supra* note 30 (suggesting the Texas Legislature should focus on providing pipeline support for the flagships and expanding the number of flagships in the state in order to better address how the Rule is working and offer more opportunities for minority students).

285. See Grajeda, *supra* note 238 (encouraging all Senators on the committee to vote no on the proposed bill to change the rule).

286. See Caldera, *supra* note 31 (recommending the Texas legislature do more than merely rejecting SB 1091 to benefit students that are at a disadvantage for higher education opportunities, such as maintaining the rule, providing equitable funding for underperforming schools, and expanding access to higher education opportunities through funding programs).

college enrollment.<sup>287</sup> For example, in its testimony to the Senate Higher Education Committee, the Intercultural Development Research Association urged the committee “to fully fund state financial aid programs for students from families with limited incomes like the TEXAS Grant program, and support SB 1709, a current bill designed to enhance student success through recruiting and retaining a diverse faculty.”<sup>288</sup>

It is unlikely these measures will ever be adopted in Texas due to the conservative nature of the state and the lawmakers who control the Senate.<sup>289</sup> As is recognized in the critical race discussion, the current trend of the Texas Legislature to limit the conversation around race does not shed a positive light on the use of affirmative action in Texas.<sup>290</sup> However, that does not mean that it will be impossible to save the practice in Texas as the overall benefits of affirmative action—and the rule specifically—are not and should not be a partisan issue because students are the ones ultimately affected.<sup>291</sup>

Another possibility is for the Attorney General to make a blanket decision concerning the use of affirmative action that Texas could follow, as was once done by Attorney General Morales.<sup>292</sup> Given that 2022 is the current election year, it will be interesting to see if any significant changes occur in Texas’ current political composition that will result in

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287. *See id.* (claiming economic contributions would enable the rule to work in the way it was intended regarding effectively assisting minority student).

288. *See id.* (describing the Intercultural Development Research Association (IRDA) as “an independent, non-partisan, education non-profit committed to achieving educational opportunity for every child through strong public schools that prepare all students to access and succeed in college.” IDRA claims the Rule alone, while important, is simply not enough to foster and cultivate diversity in higher education institutions).

289. *See generally* Michael Powell, *In Texas, a Battle Over What Can Be Taught, and What Books Can Be Read*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html> [<https://perma.cc/9X9T-8VEY>] (highlighting decades worth of legislative acts and concerns made by Republicans regarding various aspects of the Texas educational system).

290. *See id.* (illustrating Texas lawmakers’ misguided attempts to control what is discussed in Texas curriculum without truly understanding what the repercussions are).

291. *See* Torres, *supra* note 256 (describing how diversity across and within racial groups provides indispensable support for students of color who faced overt and subtle forms of racial hostility on campus, and how this is achieved through affirmative action and other similar policies).

292. *See* Webster, *supra* note 14 (pointing to Attorney General Morales’ opinion release that affect the use of race-neutral policies in higher education prior to the Grutter decision and enactment of the rule).

beneficial changes in higher education policies regarding affirmative action and the rule.<sup>293</sup>

#### CONCLUSION

The uncertainty and unpredictability of the future of affirmative action in the United States should have Texas high school seniors worried.<sup>294</sup>

Without affirmative action admissions policies, thousands of students may never have the chance to attend a Texas higher education institution of their choice.<sup>295</sup> This result directly correlates to the decades of discrimination stacked against them.<sup>296</sup> While the reality is that students who benefit from these programs may always wonder if their academic credentials are competitive enough to secure admission without race being considered, the benefits of such programs outweigh the burdens.<sup>297</sup>

With the Supreme Court opening the doors to end the practice of affirmative action policies in educational institutions, legal scholars should begin preparing for alternatives to ensure institutions of high education can maintain minority student populations.<sup>298</sup> Ultimately,

“[a]ny ruling that calls into question the legality of race-conscious admissions would be a reversal of more than 40 years of S[COTUS] decisions that have repeatedly and consistently confirmed the

293. See generally Brooke Crum, *Straus Urges Support of Public Education, Mental Health in 2022 Elections*, S.A. REPORT (Jan. 12, 2022), <https://sanantonioreport.org/joe-straus-urges-public-education-mental-health-2022-elections/> [<https://perma.cc/P25A-NJJB>] (“Public education should be a central issue in all of those elections . . . Our commitment to public education can go a long way in determining not only the opportunities available to students but also the long-term durability of our economy. After all, investments in public education are investments in our very future.”).

294. See generally Satija & Watkins, *supra* note 249 (sharing the stories of two high school seniors—one a minority at the top of her class and another a White student not in the top percentage of her class—who both fear they will not get into the right fit school for them).

295. See Hough, *supra* note 6 (detailing the story of a high school senior who was unable to attend the University of Texas because she was not in the Top Ten percent of her high school graduating class).

296. See generally Hinojosa, *supra* note 30 (“Texas has historically struggled with integration of its public school system at all levels as evidenced by the mandated segregation in the Texas Constitution that lasted until 1969.”).

297. See *id.* at 19 (determining that the Rule is fair for students attending schools across Texas and has the potential to be much more inclusive than any other constitutionally permissible admissions program out there.).

298. See generally Bell, *supra* note 223 (recommending race-neutral policies to increase racial diversity by banning legacy preferences, instituting outreach programs to disadvantaged schools, and increasing financial aid and scholarships to minority students).

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THE EYES OF TEXAS ARE UPON YOU

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constitutionality and legality of race-conscious admissions in higher education.”<sup>299</sup>

Additionally, it is important to defend and advocate for the rule because not all high schools in Texas are created equally.<sup>300</sup> Students who are at a disadvantage of obtaining admissions at their dream school should not be punished based on decades of discriminatory circumstances out of their control.<sup>301</sup> This is precisely why both affirmative action and the Texas Top Ten Percent Rule should be protected at all costs.<sup>302</sup> Therefore, the eyes of Texas are upon *you*, Supreme Court and members of our Texas legislature.<sup>303</sup>

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299. See Lauren Aratani, *US Supreme Court Will Hear Challenge to Affirmative Action in College Admission*, GUARDIAN (Jan. 24, 2022, 4:43 PM), <https://www.theguardian.com/law/2022/jan/24/us-supreme-court-affirmative-action-cases-college-admission> [<https://perma.cc/3FQC-5XBC>] (reiterating the statement made by the Legal Defense Fund, a prominent civil rights law organization that fights for racial justice in affirmative action matters).

300. See Watkins, *supra* note 15 (explaining that not all high schools are equal in Texas because schools in poor urban or rural areas tend to have fewer resources than the wealthy suburban schools. The poorer students come from less-educated families and tend to do worse on the SAT. Sometimes they can't afford extracurricular activities. "But none of those disadvantages matter under the Top 10 Percent Rule.").

301. See Hinojosa, *supra* note 30 (reiterating the positive impact on students who benefit from affirmative action. In turn, these students end up being leaders of our communities).

302. See *id.* at 19 (2016); see also Torres, *supra* note 256 ("Affirmative action remains vital for recognizing that race continues to play a role in individuals' lived experiences and opportunities, and that racial diversity ensures tomorrow's future leaders come from all walks of life and learn to thrive in our stunningly diverse world.").

303. See generally "The Eyes of Texas" History, UNI. OF TEX. AT AUSTIN, <https://eyesoftexas.utexas.edu/about/> [<https://perma.cc/JJ9Q-S89X>] (justifying the use of the "The Eyes of Texas" as the alma mater for the University of Texas because it can hold members of the community accountable to the institution's core values).