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Following Fisher: Narrowly Tailoring Affirmative Action

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FOLLOWING *FISHER*: NARROWLY TAILORING AFFIRMATIVE ACTION

Eang L. Ngov⁺

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It has been sixty years since the Supreme Court decided *Brown v. Board of Education*,¹ yet schools in some states remain racially divided, and the debate

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1. 347 U.S. 483 (1954). *Brown* held that the segregation of children in public schools solely on the basis of race deprives them of equal educational opportunities and violates the Fourteenth Amendment. *Id.* at 494–95.

over affirmative action continues. Previously, the contest over affirmative action centered on whether remedying past discrimination² and diversifying student populations in schools were compelling justifications for using racial classifications.³ The Court has found both purposes compelling.⁴

After *Grutter v. Bollinger*,⁵ in which the Court held that race may be implemented as a “plus factor” in higher education admissions practices in order to attain the educational benefits that flow from a diverse study body,⁶ schools began implementing complex admissions criteria that take an applicant’s race into consideration. Colleges and universities in Texas responded to *Grutter* by resuming the use of race in their admissions procedures, a practice the schools previously eliminated.⁷ The University of Texas at Austin (UT Austin) maintained dual admissions policies: the race-neutral “Texas Top Ten Percent Plan,” and a different race-based policy that considered race as one of many factors.⁸

In *Fisher v. University of Texas at Austin*,⁹ Abigail Fisher, a white applicant denied admission under the race-based policy, challenged the University’s continued use of race in making admissions decisions when a race-neutral alternative, the Texas Top Ten Percent Plan, already produced a diverse student body.¹⁰ Fisher argued that the University’s race-based admissions policy was no longer necessary to achieve diversity and, thus, the University no longer had a compelling interest to justify using race as a consideration for admission.¹¹ In a show of deference to the University, the Fifth Circuit upheld the program.¹² The Supreme Court, however, held that the Fifth Circuit

2. See, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 468, 496–97 (1989) (distinguishing the goal of remedying a government actor’s past discrimination from the impermissible goal of remedying general societal discrimination); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276, 280 (1986) (differentiating between societal discrimination, which is impermissibly vague, and a narrowly tailored program that remedies the effects of prior discrimination); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1977) (finding that a state has a legitimate interest in remedying identified discrimination, but not “societal discrimination”).

3. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that attaining the educational benefits of diversity is a compelling government interest).

4. See, e.g., *id.* at 329 (finding that a diverse student body is a compelling reason to consider race in state university admissions decisions); *Bakke*, 438 U.S. at 314 (holding that diversity is a compelling reason for considering race in college admissions decisions).

5. 539 U.S. 306 (2003).

6. *Id.* at 334.

7. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2415–16 (2013).

8. *Id.* at 2416.

9. 133 S. Ct. 2411 (2013).

10. *Id.* at 2433 (Ginsburg, J., dissenting).

11. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 603 (W.D. Tex. 2009), *vacated*, 133 S. Ct. 2411 (2013).

12. *Fisher*, 133 S. Ct. at 2417.

incorrectly applied strict scrutiny when it deferred to the University.¹³ The Court insisted that the lower court must rigorously scrutinize whether a school has proven that no workable race-neutral alternatives exist in order to show that its race-based program is necessary, and therefore, narrowly tailored.¹⁴

The purpose of this Article is to explore the available race-neutral options that colleges and universities can use to achieve diversity and whether, following *Fisher*'s mandate, schools must consider those alternatives. To that end, Part I of this Article notes that the emphasis of the Court's affirmative action jurisprudence has changed, and that the pivotal issue is now whether an institution's affirmative action program is narrowly tailored.

The question of whether a program is narrowly tailored is now refined, after *Fisher*, to an inquiry of whether there are race-neutral alternatives that will work "about as well"¹⁵ as racial affirmative action. *Fisher* shifts the affirmative action discussion from the normative issue of whether schools should consider race as a factor, to the doctrinal question of whether there are workable race-neutral alternatives. Now, a school must prove there are no workable race-neutral alternatives in order to use race-based affirmative action. The next frontier in affirmative action litigation will focus on how much diversity is sufficient to conclude that a race-neutral alternative is workable and which race-neutral alternatives schools must consider. Part I addresses those questions and argues that there are many race-neutral alternatives with demonstrated success that higher education institutions must consider before they can implement an admissions policy that uses race as a factor.¹⁶

Part II discusses the race-neutral alternatives available to higher education institutions, including percentage plans; class-based affirmative action; the elimination of legacy and development admissions acceptances; university-based recruitment, retention, and financial aid plans;¹⁷ and community

13. *Id.* at 2421.

14. *Id.* at 2420–21. Throughout this Article, the term "narrowly tailored" is intended to also encompass the requirement of showing necessity.

15. *Id.* at 2420 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)) (internal quotation marks omitted).

16. This Article does not focus on whether there is a greater imperative to achieve the objectives underlying a particular race-neutral alternative, such as socioeconomic diversity over racial diversity. Rather, this Article explores the impact of *Fisher* on affirmative action programs in higher education and whether *Fisher* mandates race-neutral alternatives, such as socioeconomic affirmative action or percentage plans, and whether those alternatives work as well as race-based programs. Thus, if any discussion about comparisons between race-neutral and race-based programs can be construed as favoring a race-neutral program, it should be understood as resulting from doctrinal analysis—not from a normative assessment.

17. Institutions should also consider implementing recruitment, retention, and financial aid programs that will increase diversity. Constitutionally speaking, institutions may engage in race-

outreach.¹⁸ In fact, some universities have already explored the viability of race-neutral percentage plans and class-based admissions policies.¹⁹ A comparison of the levels of diversity in California, Texas, and Florida when race was a component of admissions policies to levels of diversity when racial admissions were eliminated shows that percentage plans are effective.²⁰ Even at those states' premier universities, underrepresented minority enrollment reached, or even exceeded, the levels from when racial bans were in effect.²¹

Class-based plans focus on the socioeconomic status of applicants in recognition that a student's socioeconomic status is highly correlated with

conscious policies that treat everyone fairly. For example, Justice Kennedy previously opined that fair race-conscious procedures are permissible:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring in part and concurring in judgment). Therefore, in order to retain minority students, institutions may target low-income neighborhoods or high schools during recruiting, provide substantial financial aid to low-income students, and offer counseling and additional academic assistance to students from underperforming high schools.

18. Community outreach programs, such as partnering with K-12 schools, mentoring, providing summer programs and Boot Camps, enhancing teacher education, increasing Advance Placement courses, and initiating science-based reading practices help children from underrepresented communities and low-performing schools gain college admission. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION 5 (2004) [hereinafter U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY], available at <https://www2.ed.gov/about/offices/list/ocr/edlite-raceneutral-report2.html>.

19. See *infra* Part II.A–B.

20. See GARY M. LAVERGNE & BRUCE WALKER, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN: DEMOGRAPHIC ANALYSIS FALL 2003, ACADEMIC PERFORMANCE OF TOP 10% AND NON-TOP 10% STUDENTS ACADEMIC YEARS 1996-2002 3–4 (2003) [hereinafter LAVERGNE & WALKER, IMPLEMENTATION], available at <http://www.utexas.edu/student/admissions/research/HB588-Report6-part1.pdf> (discussing diversity levels at Texas attributable to the Texas Top Ten Percent Plan); THE UNIV. OF CAL., OFFICE OF THE PRESIDENT, STATISTICAL SUMMARY OF STUDENTS AND STAFF: FALL 2012 27 tbl.7k (2012) [hereinafter UNIV. OF CAL., STATISTICAL SUMMARY: FALL 2012], available at <http://legacy-its.ucop.edu/uwnews/stat/statsum/fall2012/statsumm2012.pdf> (illustrating enrollment numbers by ethnicity, gender, and academic level); *infra* note 101 and accompanying text (demonstrating that Florida universities admitted more minority students when a percentage plan was in place).

21. See, e.g., Bruce Walker & Gary Lavergne, *Affirmative Action and Percent Plans: What We Learned in Texas*, COLL. BOARD REV., May 2001, at 18, 20 [hereinafter Walker & Lavergne, *What We Learned in Texas*] (noting that UT Austin regained pre-racial admissions ban diversity levels).

school and test performance.²² Schools that implement class-based affirmative action demonstrate that giving a boost to economically disadvantaged applicants increases the level of diversity compared to the diversity level race-based affirmative action creates.²³ The benefits of class-based admission programs are that they change our perspective on how to view deservedness and address the problem of structural mobility for the impoverished.

Institutions need not implement these plans, but at a minimum, they should be required to articulate to a court why these plans would not work “about as well” as race-based admissions policies. Schools subjected to the rigorous judicial scrutiny required by *Fisher* will have difficulty rejecting, for example, percentage plans and class-based affirmative action without identifying the school’s unique circumstances that would limit the feasibility of these alternatives.

Relatedly, schools focused on attaining diversity must eliminate legacy and development admissions. Policies allowing preferences for legacy and development applicants are not per se unconstitutional.²⁴ But when coupled with race-based affirmative action, these preferences cannot be justified. Studies reveal that legacy and development applicants are overwhelmingly white and come from privileged families. Therefore, those preferences reduce a school’s level of diversity.²⁵ Even if these privileged admissions represent a small percentage of all admissions, a school must prove to a court that it considered workable, race-neutral steps to increase diversity before it can justifiably rely on racial admissions. This logically entails eliminating policies that work against diversity.²⁶ Thus, colleges and universities must choose

22. Richard D. Kahlenberg, *Reflections on Richard Sander’s Class* in American Legal Education, 88 DENV. U. L. REV. 719, 724 (2011) [hereinafter Kahlenberg, *Reflections*] (citing Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access is Increasing Inequality, and What to Do About It*, in REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE 71, 173 (Richard D. Kahlenberg ed., 2010) [hereinafter Carnevale & Strohl, *Increasing College Access*]) (noting that researchers have found “most of the predictors of low SAT scores are socioeconomic in nature”).

23. Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL’Y REV. 367, 392 (2013).

24. Steve D. Shadowen, Sozi P. Tulante & Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 52 & n.3 (2009).

25. Richard Kahlenberg, *Online Fisher Symposium: Race-Neutral Alternatives Work*, SCOTUSBLOG (Sept. 4, 2012, 4:36 PM), <http://www.scotusblog.com/2012/09/online-fisher-symposium-race-neutral-alternatives-work/> [hereinafter Kahlenberg, *Race-Neutral Alternatives Work*].

26. Eliminating preferences for legacy applicants is feasible for universities because doing so does not financially cripple a school. See Chad Coffman, Tara O’Neil, & Brian Starr, *An Empirical Analysis of the Impact of Legacy Preferences on Alumni Giving at Top Universities*, in

between implementing racial admissions policies and giving preferences to legacy and development applicants.

Additionally, schools should implement university-based programs that recruit and retain minorities and make higher education a financial possibility. Further, colleges and universities should reach out beyond the school's walls into the community to build a pool of applicants prepared for undergraduate and graduate education. The Court's affirmative action jurisprudence supports the expectation that before schools resort to racial affirmative action, they will take steps to reduce the financial barriers to higher education and to remedy the problems that underlie minority access.²⁷

Part III discusses that, in order for schools to follow *Fisher's* instruction that they must prove there are no workable race-neutral alternatives to implementing a race-based admissions policy, schools must be transparent in their admissions policies. Before a court is able to evaluate rigorously whether a school's racial admissions policy is narrowly tailored, schools must publicly disclose the details of its policies, resources, and limitations.

In this regard, as discussed in Part IV, *Fisher* changed and clarified the boundaries of academic freedom. In fact, *Fisher* limits academic freedom to a school's prerogative in choosing its educational mission. Although schools may choose the methods by which to attain their missions, *Fisher* imposes restraint on the chosen methods. Schools may no longer choose their manner of operation without regard to narrow tailoring.

I. THE JURISPRUDENCE OF "NARROW TAILORING"

The debate over affirmative action no longer centers on the justification for race-based decision making.²⁸ Rather, it focuses on whether racial actions are narrowly tailored. Government actors using racial classifications must pass strict scrutiny by showing that the classifications are "necessary to further a compelling governmental interest" and "narrowly tailored to that end."²⁹ Most racial classifications with a compelling purpose are defeated by the

AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS 101, 101 (Richard D. Kahlenberg ed., 2010) (studying the relationship between legacy admissions and donations at the top 100 universities from 1998 to 2008); Richard D. Kahlenberg, *10 Myths about Legacy Preferences in College Admissions*, CHRON. HIGHER EDUC., Sept. 22, 2010, <http://chronicle.com/article/10-Myths-About-Legacy/124561/> [hereinafter Kahlenberg, *10 Myths*] (characterizing the idea that "[l]egacy preferences are a necessary evil" as a myth).

27. See *infra* Part II.D–E.

28. The Court has recognized two interests as compelling justifications for using racial classifications: the remedy of past discrimination caused by the actor and the attainment of a diverse student body in higher education. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–22 (2007).

29. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring) (quoting *Johnson v. California*, 543 U.S. 499, 514 (2005)).

necessity/narrowly tailored requirement.³⁰ Therefore, the meaning of narrowly tailored is the critical question.

Before a court may deem a race-based concept narrowly tailored, the government must engage in “truly individualized consideration” in which race is used “in a flexible, non-mechanical way.”³¹ The mandate for individualized consideration necessarily prohibits putting racial groups on separate tracks and insulating them from competition.³² Thus, individualized consideration cannot be performed through the use of quotas.³³ In *Regents of University of California v. Bakke*,³⁴ the Court invalidated the University of California at Davis (UC Davis) Medical School’s admissions program that reserved 16 out of 100 seats for minorities in each entering class.³⁵ The rigid quota did not afford each applicant individualized consideration whereby the school could assess how the applicant’s unique qualities and abilities would contribute to the student body and educational setting.³⁶ Similarly, in *Richmond v. J. A. Croson Co.*,³⁷ the Court held that Richmond’s practice of setting aside thirty percent of city construction contracts for minority business enterprises was not narrowly tailored.³⁸ Quotas, such as those in *Bakke* and *Croson*, are inconsistent with the narrow tailoring requirement because they do not allow competition on equal footing.³⁹

Additionally, an automatic distribution of points to a candidate because the candidate is a minority does not meet the requirement of individualized decision making when those points are decisive. In *Gratz v. Bollinger*,⁴⁰ the Court invalidated the University of Michigan’s undergraduate admissions policy because it awarded twenty points to every underrepresented minority applicant simply because of his or her race.⁴¹ Because the twenty points

30. Eang L. Ngov, *When “the Evil Day” Comes, Will Title VII’s Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535, 539 (2011) (“It is said that strict scrutiny is ‘strict in theory and fatal in fact,’ but a review of the Supreme Court’s equal protection cases reveals that perhaps strict scrutiny is fatal because of narrow tailoring.”).

31. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

32. *Id.*

33. *Id.*

34. 438 U.S. 265 (1978).

35. *Id.* at 275.

36. *See id.* at 318 (suggesting that admissions programs that consider race as only one among many admissions factors are not facially infirm).

37. 488 U.S. 469 (1989).

38. *Id.* at 507–08.

39. *See Bakke*, 438 U.S. at 317 (noting that the quota insulated minority applicants from comparison with other applicants).

40. 539 U.S. 244 (2003).

41. *Id.* at 270.

represented one-fifth of the points necessary for a guaranteed admission, race played a decisive role in an applicant's consideration.⁴² Although the admissions office considered other "soft" variables, such as "leadership and service, personal achievement, and geographic diversity," the points awarded for those variables were "capped" such that "[e]ven the most outstanding national high school leader could never receive more than five points"⁴³

In contrast to quotas and point allocations, narrow tailoring permits consideration of race as a "plus" factor.⁴⁴ In *Grutter v. Bollinger*,⁴⁵ the Court upheld the University of Michigan Law School's admission procedures, which used race as a plus factor to enhance diversity, against an equal protection challenge.⁴⁶ Recognizing diversity as a compelling purpose,⁴⁷ the Court noted that the school's policy neither defined diversity "solely in terms of racial or ethnic status" nor restricted the manner in which an applicant could contribute to the school's diversity.⁴⁸ The law school's admission procedures were narrowly tailored because race was not a decisive factor.⁴⁹ By using race as a plus factor, the policy was flexible, and each applicant received individualized consideration.⁵⁰

In addition to individualized consideration, narrow tailoring requires the government to show that its reliance on racial classification is necessary to achieve the government's purported purpose.⁵¹ In order to prove necessity, the government must show "serious, good faith consideration of workable race-neutral alternatives."⁵² If a neutral approach can achieve the same objective "about as well and at tolerable administrative expense," then a race-based approach is impermissible.⁵³ In *Croson*, the Court criticized the city of Richmond for not availing itself of race-neutral options to increase access to the city's contracting opportunities.⁵⁴ Likewise, in *Parents Involved in Community Schools v. Seattle School District Number 1*,⁵⁵ the school districts

42. *See id.*

43. *Id.* at 279.

44. *Bakke*, 438 U.S. at 317.

45. 539 U.S. 306 (2003).

46. *Id.* at 343.

47. *Id.* at 329.

48. *Id.* at 316.

49. *Id.* at 334.

50. *Id.*

51. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013)

52. *Id.* (quoting *Grutter*, 539 U.S. at 339).

53. *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276, 280 n.6 (1986)) (internal quotation marks omitted).

54. *Richmond v. J. A. Croson Co.*, 488 U.S. 468, 509–10 (1989).

55. 551 U.S. 701 (2007).

failed to consider race-neutral alternatives before using racial classifications to assign students to schools.⁵⁶

Thus, the burden of proving an admissions procedure is narrowly tailored falls on the government.⁵⁷ The *Fisher* Court made clear that although a court may consider a school's "experience and expertise in adopting or rejecting certain admissions processes[,]” the school is not entitled to any deference on the issue of narrow tailoring.⁵⁸ In *Fisher*, an applicant to UT Austin challenged the school's use of race as one factor in determining admissions.⁵⁹ The University maintained that the racial admissions procedures were necessary because, although the student body as a whole was diverse, the University lacked diversity in small classes consisting of five to twenty-four students.⁶⁰ The lower courts held that courts must provide substantial deference to a school's educational interest in defining diversity and whether the school's plan is narrowly tailored.⁶¹ The Supreme Court concluded that the lower courts failed to apply the correct standard of strict scrutiny⁶² because a University should not receive deference as to whether the means it chose were narrowly tailored to its diversity goals.⁶³ Writing for the Court, Justice Kennedy emphasized that “[s]trict scrutiny 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.”⁶⁴ Thus, “strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”⁶⁵

The effect of *Fisher*, for which Justice Kennedy urged in his earlier *Grutter* dissent, is to “force educational institutions to seriously explore race-neutral alternatives.”⁶⁶ Although a school need not exhaust every possible alternative,⁶⁷ *Fisher* makes clear that the Court intends race to be “a last resort.”⁶⁸ The question that remains is what race-neutral alternatives are

56. *Id.* at 735.

57. *Fisher*, 133 S. Ct. at 2419.

58. *Id.* at 2420.

59. *Id.* at 2415.

60. *Id.* at 2416.

61. *Id.* at 2417.

62. *Id.* at 2415.

63. *Fisher*, 133 S. Ct. at 2420.

64. *Id.* at 2421.

65. *Id.* at 2420.

66. *Grutter v. Bollinger*, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting).

67. *Id.* at 339.

68. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring in part and concurring in judgment).

“workable” and can achieve the benefits of diversity “about as well” as racial affirmative action?

II. RACE-NEUTRAL ALTERNATIVES

The requirement to consider race-neutral alternatives applies equally to public and private institutions of higher education because “[v]irtually every private college” receives federal funding, and thus, will be restrained by the Supreme Court’s limitations on race-based programs.⁶⁹ Satisfactory alternatives are “polic[ies] that serve[] the same function as what [they] replace[.]”⁷⁰ Race-neutral alternatives can include approaches that target an admissions procedure itself; focus on other internal programs at an institution, beyond the admissions procedure, that provide support to enable students to succeed; or reach beyond the institution’s walls to broaden the pipeline of applicants who are prepared for higher education.

A. High School Rank: Percentage Plans

1. A Retrospective of Percentage Plans

As discussed, one race-neutral option schools should explore before relying on race-based admissions programs is a percentage plan, which admits students solely on the basis of their class rank within their high school graduating class. To date, Texas, California, and Florida have implemented percentage plans.⁷¹

Percentage plans have originated as a response to a court order, state referendum, or executive branch initiative to prohibit race-based affirmative action in higher education.⁷² Texas’s percentage plan was conceived in

69. Erwin Chemerinsky, *The Future of Diversity*, 69 NAT’L LAW. GUILD REV. 193, 195 (2012).

70. Richard Ford, *Online Fisher Symposium: A Response to Richard Kahlenberg*, SCOTUSBLOG (Sept. 17, 2012, 11:40 AM), <http://www.scotusblog.com/2012/09/online-fisher-symposium-a-response-to-richard-kahlenberg/>. Professor Ford suggests that socio-economic class is not “an alternative” to race-conscious affirmative action, but instead a distinct policy that must be evaluated on its own merits Race- and class-based admissions policies are not “alternatives” in the sense of being mutually exclusive or hydraulically related—the level of one rising as the other falls.

Id.

71. See Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1818 (2004).

72. See CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES 16–23 (2003), available at <http://civilrightsproject.ucla.edu/research/college-access/admissions/percent-plans-in-college-admissions-a-comparative-analysis-of-three-states2019-experiences/horn-percent-plans-2003.pdf>

response to a court order. In *Hopwood v. Texas*,⁷³ after four white students challenged the admissions procedure of the University of Texas as violating the Fourteenth Amendment, the Fifth Circuit banned race-based admissions programs.⁷⁴ Consequently, a task force comprised of faculty from the Center for Mexican-American Studies at the University of Texas and the University of Houston, and the Mexican-American Legal Defense and Education Fund answered State Senator Gonzolo Barrientos's call to address the ramifications of *Hopwood*.⁷⁵ The task force's work resulted in the Texas Top Ten Percent Plan, which became effective in the fall of 1997.⁷⁶ Texas's percentage plan guarantees admission into the student's choice of public universities if a student ranks within the top ten percent of her high school graduating class.⁷⁷

In California, voters approved Proposition 209 (Prop. 209), also known as the California Civil Rights Initiative, which amended California's Constitution to prohibit racial preferences in public employment, education, and contracting.⁷⁸ After the Supreme Court denied further appeal in 1997,⁷⁹ Prop. 209 became effective for the fall 1998 entering class.⁸⁰ In 1999, Governor Gray Davis proposed a four percent plan similar to Texas's percentage plan, which became effective in fall 2001.⁸¹ California's percentage plan, known as the "Eligibility in Local Context," guarantees admission to one of California's public universities to students ranking in the top four percent of their high school graduating class.⁸²

In Florida, the ban on racial preferences was a preemptive step that former Governor Jeb Bush took in response to Ward Connerly's efforts to initiate a voter referendum in Florida.⁸³ In 1999, by executive order, Governor Bush implemented "One Florida," which prohibited racial preferences in

(providing a history and detailing the mechanics of percentage plans in Texas, California, and Florida).

73. 78 F.3d 932 (5th Cir. 1996).

74. See *id.* at 934 (holding that there was no justification for the school to "elevate some races over others").

75. HORN & FLORES, *supra* note 72, at 16.

76. *Id.* at 16–17.

77. *Id.* at 17.

78. *Id.*; Office of Equal Opportunity and Diversity, *A Brief History of Affirmative Action*, OEOD, <http://www.oeod.uci.edu/aa.html> (last visited Sept. 25, 2014) [hereinafter *A Brief History of Affirmative Action*].

79. *A Brief History of Affirmative Action*, *supra* note 78.

80. HORN & FLORES, *supra* note 72, at 17.

81. *Id.* at 18.

82. *Id.*

83. Peter T. Kilborn, *Jeb Bush Roils Florida on Affirmative Action*, N.Y. TIMES, Feb. 4, 2000, at A1. See also HORN & FLORES, *supra* note 72, at 19 (noting that the Florida program resembled California's).

employment, contracting, and education, but allowed race-conscious scholarships, outreach, and summer programs.⁸⁴ Governor Bush also implemented the “Talented 20 Plan,” which guaranteed students ranking in the top twenty percent of their graduating class admission into one of Florida’s public colleges and universities, but not necessarily admission to the applicant’s first choice.⁸⁵ The Talented 20 program became effective for the entering fall 2000 class.⁸⁶

2. Percentage Plan Advantages and Disadvantages

Percentage plans succeed in creating a diverse student population. By allowing each high school in the state to send its top ranked students to the state’s public universities and colleges, percentage plans have greatly increased geographic diversity.⁸⁷ At UT Austin, for example, before *Hopwood*, the entering class was comprised of graduates from 622 high schools, but half of those students represented only sixty-four high schools.⁸⁸ In 2013, the number of high schools feeding into UT Austin increased to 1,102.⁸⁹

Statistical evidence also shows that percentage plans have achieved comparable levels of racial diversity as when race-based programs were in place. When UT Austin revised its admissions program to exclude race and include the Top Ten Percent Plan, the result was the most diverse entering class in the school’s history.⁹⁰ In 2003, the University of Texas’s incoming class was comprised of sixteen percent Hispanics, compared with fourteen percent pre-*Hopwood*.⁹¹ The percentage of African Americans enrolled

84. HORN & FLORES, *supra* note 72, at 19.

85. *See id.*

86. *Id.*

87. Marta Tienda & Sunny Xinchun Niu, *Flagships, Feeders, and the Texas Top 10% Law: A Test of the “Brain Drain” Hypothesis*, J. HIGHER EDUC. 712, 713 (2006) (noting that “benefits include greater geographic diversity of incoming students”).

88. DAVID MONTEJANO, ACCESS TO THE UNIVERSITY OF TEXAS AT AUSTIN AND THE TEN PERCENT PLAN: A THREE-YEAR ASSESSMENT 1 (2006), available at <http://www.utexas.edu/student/admissions/research/montejanopaper.html>.

89. WILLIAM POWERS JR., THE UNIVERSITY OF TEXAS AT AUSTIN: 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 2013 6, available at http://www.utexas.edu/student/admissions/research/SB_175_Report_for_2013.pdf. This number is based on the admitted students, as opposed to the enrolled students. *See id.* at 7.

90. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2416 (2013); LAVERGNE & WALKER, IMPLEMENTATION, *supra* note 20, at 3.

91. *See* LAVERGNE & WALKER, IMPLEMENTATION, *supra* note 20, at 4. However, increasing diversity in Texas’s statewide population may have contributed to the success of Texas’s percentage plan. Kahlenberg, *Race-Neutral Alternatives Work*, *supra* note 25.

through the percentage plan in 2003 was equal to pre-*Hopwood* levels.⁹² Even Texas's flagship, UT Austin, regained its pre-*Hopwood* diversity levels by 1999.⁹³ The University admits its percentage plan has been successful. The University of Texas at Austin concedes that that the percentage plan produced more students who were "the first in their families to attend college" than holistic reviews that consider race.⁹⁴ In 2008, eighty-one percent of students in the University's entering class were admitted through the percentage plan,⁹⁵ which, as a testament to the percentage plan's success, led the Texas legislature to cap the number of Top Ten Percent students admitted to UT Austin at seventy-five percent.⁹⁶

Such evidence of the University of Texas's success, achieved without relying on race as a factor, makes it difficult for the University to argue that it is necessary to implement raced-based programs because there are no workable race-neutral alternatives. It also places the burden on other institutions to show why a similar program would not work at their school.

In California, there were substantial increases in underrepresented minority enrollment after Prop. 209 compared to prior enrollment numbers.⁹⁷ The following table aggregates data from the University of California's admissions reports and provides a side-by-side comparison of admission rates by ethnicity in 1997⁹⁸ (before Prop. 209) and in 2012.⁹⁹

92. LAVERGNE & WALKER, IMPLEMENTATION, *supra* note 20, at 3.

93. Walker & Lavergne, *What We Learned in Texas*, *supra* note 21.

94. In its brief, UT Austin stated,

And, in fact, admissions data show that African-American and Hispanic students admitted through holistic review are, on average, more likely than their top 10% counterparts to have attended an integrated high school; *are less likely* to be the first in their families to attend college; tend to have more varied socioeconomic backgrounds; and, on average, have higher SAT scores than their top-10% counterparts.

Brief for Respondents at 33–34 *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345) (emphasis added).

95. 11 OFFICE OF ADMISSIONS, THE UNIV. OF TEX. AT AUSTIN, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN: DEMOGRAPHIC ANALYSIS OF ENTERING FRESHMEN FALL 2008, ACADEMIC PERFORMANCE OF TOP 10% AND NON-TOP 10% STUDENTS ACADEMIC YEARS 2003-2007 9 tbl.2b (2008), available at <https://www.utexas.edu/student/admissions/research/HB588-Report11.pdf>.

96. Gaertner & Hart, *supra* note 23, at 375; Intercultural Dev. Research Ass'n, *Update on Texas Top 10% Plan for Your Students*, IDRA, http://www.idra.org/Education_Policy.htm/Access_to_Higher_Education/Update_on_Texas_Top_10%_Plan_for_Your_Students/ (last visited Sept. 25, 2014).

97. See UNIV. OF CAL., STATISTICAL SUMMARY: FALL 2012, *supra* note 20, at 27 tbl.7k.

98. Univ. of Cal., *Statistical Summary of Students and Staff*, U. CAL. OFFICE PRESIDENT, <http://legacy-its.ucop.edu/uwnews/stat/enrollment/enr1997/97sst7j.html> (last updated Jan. 16, 1998).

Table 1

	Enrollment for 1997 (before Prop. 209)	Enrollment for 2012	Percentage change in enrollment
American Indian	1,201	1,290	7.41%
African American	5,003	6,817	36.26%
Chicano/Chicana	12,354	28,898	133.92%
Latino/Latina	4,841	8,503	75.65%
Filipino/Pilipino	5,659	8,016	41.65%
Chinese	16,705	27,604	65.24%
Japanese	2,658	3,355	26.22%
Korean	6,674	8,046	20.56%
Other Asian	10,202	14,672	43.81%
Pakistani/East Indian/Other	5,621	7,444	32.43%
White	50,552	51,098	1.08%

Although it is difficult to determine whether the increase in minority enrollment is due to population growth in California, the enrollment of whites showed the lowest growth compared to underrepresented minorities from the time its percentage plan went into effect.

Due to Florida's Talented 20 program's recent implementation and lack of centralized data collection, limited data exists regarding Florida's admission rates.¹⁰⁰ A search of the State University System of Florida shows the following results, compiled from data aggregated through a customized search using an interactive search tool.¹⁰¹

99. UNIV. OF CAL., STATISTICAL SUMMARY: FALL 2012, *supra* note 20, at 27 tbl.7k.

100. HORN & FLORES, *supra* note 72, at 44.

101. Fall Enrollment in State University System Institutions, ST. U. SYS. FLA. BOARD GOVERNORS, http://www.flbog.edu/resources/iud/enrollment_search.php (select "2007" for Show ten (10) years prior to and "ALL" for 2 digit CIP Code, then follow "continue" hyperlink; then select "ALL" for 6 digit CIP Code and follow "continue" hyperlink; then select "ALL" for all search queries and follow "continue" hyperlink; then select "ALL" for all search queries and follow "continue" hyperlink; then select "Race") (last visited Sept. 26, 2014) (displaying 2002-2011 fall enrollment data by race for the State University System of Florida).

Table 2

	Enrollment for fall 1998 (before the racial ban)	Enrollment for fall 1999	Enrollment for fall 2011	Percentage change in enrollment from fall 1998 to 2011
Asian	9,212	9,674	14,975	62.56%
Black	31,413	33,002	45,069	43.47%
Hispanic	30,792	32,769	70,368	128.53%
Native American	795	820	984	23.77%
NonRes Alien	8,506	9,635	13,784	62.05%
White	142,231	145,382	172,879	21.55%
Pacific Island	0	0	472	
Multiple	0	0	5,581	

As the table shows, the enrollment of minorities within Florida's State University System increased from the academic years beginning in fall 1998 and fall 1999, the years before the ban on racial preferences, to fall 2011. Therefore, percentage plans in all three states regained or exceeded underrepresented minority enrollment prior to the states' ban on racial admissions becoming effective.

Moreover, at the University of California, Berkeley (Berkeley) and the University of California, Los Angeles (UCLA), underrepresented minority enrollment either remained steady from pre-Prop. 209 levels or exceeded diversity levels when racial admissions were used.¹⁰² A comparison of enrollment at Berkeley in 1997 (the last year that schools used race-based admissions) with enrollment rates in 1998 (the first year Prop. 209 became effective) shows a drop in white enrollment from 35.2% to 29.2% and in Asian

102. HORN & FLORES, *supra* note 72, at 36 tbl.12.

enrollment from 40.9% to 37.1%.¹⁰³ Hispanic enrollment at Berkeley remained the same at 12.2%, while African American enrollment was relatively stable, changing from 4.9% to 4.8%.¹⁰⁴ Similarly, white enrollment rates at UCLA dropped from 34% to 28.9%, and Asian enrollment fell from 41.3% to 37.2%.¹⁰⁵ Similar to Berkeley, the enrollment for African Americans and Hispanics at UCLA remained steady, changing from 4.9% to 4.3% and from 13.9% to 13.6%, respectively.¹⁰⁶ In 2001, four years after Prop. 209's implementation, white and Asian enrollment continued to decline at both UCLA and Berkeley compared to 1997 (the year before Prop. 209 was enacted), whereas African American enrollment remained steady, and Hispanic enrollment increased.¹⁰⁷ Comparatively, at the University of Florida, the levels of diversity remained relatively stable between 2000, the year before Florida's ban on racial admissions, and 2001, when the ban was implemented.¹⁰⁸ During the same time frame at Florida State University, white enrollment dropped, African American and Asian enrollments were steady, and Hispanic enrollment increased by three percentage points.¹⁰⁹ Percentage plans, therefore, can attain the same level of diversity for underrepresented minorities as race-based plans, even at premier institutions.

However, percentage plan critics question the efficacy of percentage plans at achieving racial diversity at flagships schools.¹¹⁰ Some researchers point out that "[i]n . . . premier institutions [in Florida], . . . whites and Asians were overrepresented and blacks and Latinos highly underrepresented relative to the 15- to 19-year old population of the state."¹¹¹ They similarly note that at UCLA and Berkeley, "blacks and Latinos [were] underrepresented relative to the 15- to 19-year old population."¹¹²

Any objection to a percentage plan based upon the premise that the levels of diversity do not mirror the general population is irrelevant and

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 37 tbl.13.

109. *Id.*

110. The University of Texas at Austin, ranked fifty-second among the nation's top colleges and universities, and Texas A&M, ranked sixty-ninth, are Texas's flagship universities. *National University Rankings*, U.S. NEWS & WORLD REP., <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/spp+50> (last visited Sept. 26, 2014). Berkeley and UCLA are California's premier institutions. Berkeley is ranked twentieth nationally and UCLA is ranked twenty-third. *Id.* The University of Florida, ranked forty-ninth, and the Florida State University, ranked ninety-first, are Florida's flagship universities. *Id.*

111. HORN & FLORES, *supra* note 72, at 36.

112. *Id.* at 35.

unconstitutional. In order to obtain the educational benefits of diversity, colleges and universities may aspire to attain a critical mass of minority students. Critical mass is defined as the number of minorities needed to “encourage[] underrepresented minority students to participate in the classroom and not feel isolated.”¹¹³ Critical mass can be achieved, even when diversity levels at the school do not reach levels similar to the general population. As long as there is a critical mass of minorities, minorities can feel engaged in the classroom without being among a student body as diverse as the population.

Criticisms about the disparity between levels of diversity in the population and the student body of a university imply that a program that results in student diversity levels unequal to the population is unsuccessful.¹¹⁴ However, such a call to reach population levels for underrepresented minorities borders on insistence for racial balancing. Thus, designing admissions procedures for the purpose of reflecting a population’s diversity would violate the Court’s prohibition on racial balancing.¹¹⁵ In *Croson*, the Court invalidated a quota because it was not narrowly tailored to any goal except racial balancing.¹¹⁶ The Court emphasized that it is “completely unrealistic” to expect that “minorities will choose a particular trade in lockstep proportion to their representation in the local population.”¹¹⁷ It is similarly unrealistic that minorities will enroll in a particular university in exact proportion to the state’s minority population. As the Court previously stated,

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that “[r]acial balance is not to be achieved for its own sake.”¹¹⁸

Additionally, percentage plan opponents are concerned that students who rank, for example, within the top ten percent, and thus are guaranteed admission to a university, may not be as qualified as other students who attend more academically challenging high schools but rank below the top ten percent

113. *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003).

114. *See Gaertner & Hart, supra* note 23, at 372 (“The educational mission of colleges and universities includes a commitment to prepare their graduates to lead in diverse workplaces in a complex society. To effectively achieve this goal, schools must ensure that they serve a population whose diversity bears some connection to the diversity of . . . society . . .”).

115. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729–30 (2007).

116. *Richmond v. J. A. Croson Co.*, 488 U.S. 468, 507 (1989).

117. *Id.* (internal quotation marks omitted).

118. *Parents Involved*, 551 U.S. at 729–30 (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

of their class.¹¹⁹ A comparative analysis of the academic performance of students admitted through a percentage plan to those admitted outside of the plan, however, appears to rebut this presumption.¹²⁰ In one study, researchers found that the average freshman year GPA of students admitted to the University of Texas outside of the percentage plan was 2.90, compared to 3.24 for students admitted through the percentage plan.¹²¹

Percentage plans that require students to take specific courses can also help control the extent a student's GPA and class rank are affected by the rigor of the student's course load. The University of California (UC) system, for example, calculates GPA based on seven different subject areas, known as a-g courses, and awards additional credit toward the GPA calculation for honors and Advanced Placement courses.¹²² By requiring a-g courses, California's percentage plan removes the incentive for students to enroll in less challenging high school courses. However, the disadvantage of this approach is that it exacerbates the socioeconomic disparity among schools. The fifteen required college-prep courses considered in the UC system's GPA calculation are less likely to be available in schools located in disadvantaged neighborhoods.¹²³ Notably, as a result of litigation, California recently sought to remedy the disparate availability of college preparatory and advanced placement classes among its high schools.¹²⁴

Critics also argue that percentage plans fail to address the systemic racial barriers facing minorities.¹²⁵ However, percentage plans may offer an

119. See HORN & FLORES, *supra* note 72, at 18; Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1731 (2001); Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1, 35 (2005).

120. See Nelson, *supra* note 119, at 35 (citing LAVERGNE & WALKER, IMPLEMENTATION, *supra* note 20, at 3).

121. LAVERGNE & WALKER, IMPLEMENTATION, *supra* note 20, at 3.

122. Jennifer M. Chacón, *Race as a Diagnostic Tool: Latinas/os and Higher Education in California*, Post 209, 96 CALIF. L. REV. 1215, 1228 (2008).

123. *Id.*

124. See generally Alan E. Schoenfeld, Note, *Challenging the Bounds of Education Litigation: Castaneda v. Regents and Daniel v. California*, 10 MICH. J. RACE & L. 195 (2004) (discussing the effects of two cases on equalizing educational resources, particularly college preparatory and Advanced Placement courses, in disadvantaged schools). Texas and Florida offer incentive programs to encourage schools to offer Advanced Placement courses. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY, *supra* note 18, at 9. In Florida, teachers receive a fifty dollar bonus for each student scoring three and above on Advanced Placement exams, and \$500 if they have at least one student in underperforming schools who score three or higher. *Id.* The College Board observed that "Florida is now the leader in the number of black students taking advanced placement courses." *Id.*

125. See, e.g., Adams, *supra* note 119, at 1735, 1772 (discussing percentage plans' failure to address racial segregation).

advantage beyond race-based programs that rely on traditional standards of merit such as standardized test scores and GPAs. The advantage of percentage plans is that they change the metric for determining merit from standardized scores to long-term performance in high school. To some extent, percentage plans equalize the opportunities for underrepresented minorities to compete for college admissions by eliminating reliance on SAT and ACT performance. The plans assure that students with GPAs and test scores that normally cannot compete with the greater pool of applicants¹²⁶ have the opportunity to attend college because they compete in a smaller pool of applicants with the same educational opportunities.¹²⁷ Percentage plans open doors for students who attend high schools in districts that are not feeder schools for colleges.¹²⁸

A related criticism of percentage plans is that they do not serve students who need it most.¹²⁹ Percentage program critics are concerned about the “creaming” effect; only the most affluent students will rise to the top, even those students from disadvantaged schools.¹³⁰ Princeton University Professor Marta Tienda found that those accepted through the Texas Top Ten Percent Plan would have been admitted without the program, and that the percentage plan fails to help Hispanic and African American students graduating in the top twenty percent and thirty percent of their class gain admission at Texas A&M and UT Austin.¹³¹

Likewise, a study of Florida’s percentage plan found that a majority of the students who benefitted from the program did not need it to gain admission

126. Studies show African Americans, Hispanics, and low-income students score the lowest on those standardized tests. Walker & Lavergne, *What We Learned in Texas*, *supra* note 21, at 20.

127. See Nelson, *supra* note 119, at 37 (noting that percentage plans provide more educational opportunities for minorities).

128. Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View From a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1602 (2003).

129. *C.f.* Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 458 (1997) [hereinafter Malamud, *Assessing*] (“[A]ffirmative action programs tend to benefit the best-off among those who have been deemed sufficiently disadvantaged to be eligible for affirmative action.”).

130. See, e.g., Gaertner & Hart, *supra* note 23, at 375 (citing Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA’S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101, 150–51 (Richard D. Kahlenberg ed., 2004) [hereinafter Carnevale & Rose, *Socioeconomic Status*]; Malamud, *Assessing*, *supra* note 129, at 458).

131. Tienda & Niu, *supra* note 87, at 731–32; Press Release, Princeton Univ., Study: Tex. “10 Percent Plan” Fails to Sustain Diversity at Flagship Univs. (Jan. 23, 2003), available at <http://www.princeton.edu/pr/news/03/q1/0123-tienda.htm>.

into Florida's college and university system.¹³² The study found that in 2000 and 2001, only 150 and 177 students, respectively, benefited from the Talented 20 program because they had a GPA below 3.0, the necessary GPA for "regular system-wide admission consideration."¹³³ A simulation study of the potential impact of California's percentage plan showed a more positive effect in California: "between 60 and 65 percent of students in the top 4 percent already met current UC eligibility criteria."¹³⁴

The problem with these studies is that they focus on the minimum eligibility criteria of the state university systems, and ignore the fact that, prior to percentage plans, students competed based on their grades and standardized test scores. Percentage plans potentially help those students who perform poorly on standardized tests, and those individuals often belong to underrepresented minorities.¹³⁵ When colleges eliminate standardized scores

132. HORN & FLORES, *supra* note 72, at 43 (citing PATRICIA MARIN & EDGAR K. LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA 22–23 (2003)).

133. HORN & FLORES, *supra* note 72, at 43. See also Mark C. Long, *Race and College Admissions: An Alternative to Affirmative Action?*, 86 REV. ECON. & STAT. 1020, 1032 (2004) (finding that Florida's percentage plan only affected "4% [of applicants] . . . denied by all of the Florida public colleges to which they applied").

134. HORN & FLORES, *supra* note 72, at 43.

135. In 2013, the College Board reported the following mean SAT scores by ethnicity in critical reading, mathematics, and writing:

Ethnicity	Reading	Mathematics	Writing
American Indian or Alaska Native	480	486	461
Asian, Asian American	521	597	527
Black or African American	431	429	418
Mexican or Mexican American	449	464	442
Puerto Rican	456	453	445
Other Hispanic	450	461	443
White	527	534	515

THE COLL. BD., 2013 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 3 tbl.8 (2013). See also Walker & Lavergne, *What We Learned in Texas*, *supra* note 21 ("There is

from admissions criteria, the schools “reaffirm[] the superiority of performance-based over test-based merit criteria.”¹³⁶

Another concern with implementing percentage programs is that they depend on the racial and economic segregation of high schools.¹³⁷ In fact, percentage plans may succeed in Texas, California, and Florida as a result of the racial segregation of schools in those states.¹³⁸ It might take considerable time before the problem of racially segregated schools is remedied.¹³⁹ In the interim, because percentage plans increase the possibility for minority students attending segregated schools to attend college, critics should embrace percentage plans as one targeted solution to a broader systemic problem. Although percentage plans are “by no means a national panacea, [they] offer[] a useful example of experimental and democratic decision making that changed admissions practices to expand opportunities for structural mobility.”¹⁴⁰

A final argument against percentage plans is that the Supreme Court has never required them. Although the *Grutter* Court dismissed the suggestion of percentage plans as an alternative to affirmative action,¹⁴¹ the concerns that troubled the Court have since largely been addressed. The Court did not require the adoption of percentage plans because it was apprehensive that “these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.”¹⁴² As studies show,

overwhelming evidence that African American, Hispanic, and low-income students do not score as well on standardized tests as do white and high-income students.”)

136. Tienda & Niu, *supra* note 87, at 732.

137. See Adams, *supra* note 119, at 1734 (discussing the relationship of percentage plans to segregated schools).

138. As of 2003, “[o]n average, whites in Texas, California, and Florida are in schools comprised of 66, 58, and 69 percent whites, respectively, making them the most isolated racial/ethnic group.” HORN & FLORES, *supra* note 72, at 27.

139. Professor David Orentlicher suggests that percentage plans may provide an unintended benefit through the spill-over effect. See Adams, *supra* note 119, at 1775 (citing David Orentlicher, *Affirmative Action and Texas’ Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181, 181–82 (1998)). He projects that parents might move their children to less rigorous schools to provide their children a competitive edge, and in doing so, schools in disadvantaged neighborhoods might benefit financially and politically from the migration of wealthier students. *Id.*

140. Lani Guinier, Comment, *Admissions Rituals As Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 217 (2003).

141. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

142. *Id.* The concerns over diversity and academic quality would have been more relevant to the suggested lottery system than to percentage plans as a race-neutral alternative. See *id.* (discussing the use of lottery systems). At the time the Court decided *Grutter*, there was evidence available regarding the Berkeley School of Law’s (Boalt Hall’s) success in implementing a race-

however, percentage plans jeopardize neither diversity nor academic quality.¹⁴³ To the contrary, studies demonstrate that diversity levels can reach or exceed levels attained through racial admissions,¹⁴⁴ and that students who are accepted through percentage plans outperform other students.¹⁴⁵ Researchers found that even at UT Austin, students admitted under the percentage plan “not only outperform their lower-ranked counterparts with test scores 200-300 points higher, but they also defy predictions that high-achieving students from underperforming schools are destined for failure because they are ill-prepared for college level work.”¹⁴⁶ As the President of UT Austin attests, “students in the top 10 percent of their high school class make much higher grades in college than those who weren’t in the top 10 percent.”¹⁴⁷

The *Grutter* Court also noted the concern that percentage plans preclude universities from performing individualized reviews to attain diverse students.¹⁴⁸ But individualized assessments are not required for race-neutral programs; they are only necessary when race is a factor. Also, the use of percentage plans is not mutually exclusive of programs that incorporate a holistic review of an applicant. Texas, in the period after *Hopwood*’s racial ban and before *Grutter*, implemented two admissions systems at different times: one based on high school rank and one based on individualized review

neutral admissions program, which the University of Michigan Law School apparently ignored. Justice Thomas noted that

[t]he sky has not fallen at Boalt Hall Prior to [Prop.] 209’s [constitutional amendment], which bars the State from “grant[ing] preferential treatment . . . on the basis of race . . . in the operation of . . . public education,” Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt’s entering class enrolled 14 blacks and 36 Hispanics. Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. Apparently the [University of Michigan] Law School cannot be counted on to be as resourceful. The Court is willfully blind to the very real experience in California and elsewhere, which raises the inference that institutions with “reputation[s] for excellence[]” rivaling the Law School’s have satisfied their sense of mission without resorting to prohibited racial discrimination.

Grutter, 539 U.S. at 367 (Thomas, J., concurring in part and dissenting in part) (citations omitted).

143. See, e.g., Tienda & Niu, *supra* note 87, at 732.

144. See *supra* Part II.A.

145. See, e.g., Tienda & Niu, *supra* note 87, at 732.

146. Tienda & Niu, *supra* note 87, at 732 (citation omitted).

147. Larry R. Faulkner, “Top 10 Percent” Helps Students, SAN ANTONIO EXPRESS-NEWS, Oct. 25, 2000, <http://www.texastop10.princeton.edu/publicity/general/San%20Antonio%20EN.10.25.00.pdf>. See also Larry R. Faulkner, *Class Rank Predicts Student Success*, USA TODAY, Apr. 5, 2002, <http://www.texastop10.princeton.edu/publicity/general/USA%20Today.0405.05.pdf>.

148. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003). See also Laycock, *supra* note 71, at 1818 (noting percentage plans’ effect on individualized review).

without regard to race.¹⁴⁹ Texas's race-neutral multivariate model took into account standardized SAT/ACT scores, high school curriculum, essays, leadership qualities, extracurricular activities, geography, characteristics of the high school, awards and honors, work experience, community service, and special family circumstances such as socioeconomic status and responsibilities for the family.¹⁵⁰

In fact, the lack of individualized assessment is one of the advantages of percentage plans, as they allow institutions to save money by avoiding the administrative costs of individualized reviews. For example, when the University of Michigan implemented its holistic review of applications in response to *Grutter*, it expected to hire twenty additional personnel as application readers and counselors, with an expected cost of \$1.5 to \$2 million dollars, a thirty-three percent increase in the University's standard operating costs.¹⁵¹

Moreover, universities and colleges have long employed race-neutral admissions programs without individualized review.¹⁵² As Justice Thomas previously observed, "[T]here is nothing ancient, honorable, or constitutionally protected about 'selective' admissions."¹⁵³ Prior to selective admissions, universities customarily relied on certificate programs in which students were offered admission into a graduate school if they completed course work in a certified secondary school.¹⁵⁴ Entrance exams later replaced the certificate program, but the "'percent plans' now used in Texas, California, and Florida are in many ways the descendants of the certificate system."¹⁵⁵

B. Socioeconomic Status: Class-Based Affirmative Action

Class-based affirmative action, which admits students on the basis of their socioeconomic status, is a second race-neutral option that colleges and universities should explore. Research has identified socioeconomic status¹⁵⁶ as

149. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2415–16 (2013) (describing Texas's evolving admissions program in response to *Hopwood* and *Grutter*).

150. *Id.*; Tienda & Niu, *supra* note 87, at 715.

151. Greg Winter, *U. of Michigan Alters Admission Use of Race*, N.Y. TIMES, Aug. 29, 2003, at A12.

152. *Grutter*, 539 U.S. at 368 (Thomas, J., concurring in part and dissenting in part).

153. *Id.*

154. *Id.* at 368–69 (explaining the history of certificate programs for graduate schools).

155. *Id.* at 369 (citation omitted).

156. Some scholars use "class" and "socioeconomic status" interchangeably. Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 DENV. U. L. REV. 807, 808–09 (2011). Others consider "class" and "socioeconomic status" distinct in that "class" means one's economic or social status whereas "socioeconomic status" necessarily contemplates one's race. *Id.* at 809.

a salient factor in performance on standardized tests;¹⁵⁷ a link is visible as early as primary school and carries through high school.¹⁵⁸ Studies show that low-income students lag behind their more economically advantaged peers in reading and math: only fourteen percent of low-income fourth graders are proficient in reading, as compared to forty-one percent of their economically advantaged cohorts, and nine percent of low-income fourth graders are proficient in math, as compared to thirty-three percent of their economically advantaged peers.¹⁵⁹

Additionally, researchers Anthony Carnevale and Jeff Strohl discovered that low socioeconomic status was a prevalent predictor of low SAT scores.¹⁶⁰ Coming from a low socioeconomic background impacted students by 399 points on the SAT, as compared with race (being African American as opposed to white), which had an average impact of fifty-six points.¹⁶¹ Georgetown University researchers found that the link between socioeconomic status and standardized test performance is “seven times as significant as racial ones.”¹⁶²

Despite the significant impact socioeconomic status has on students’ performance on standardized tests, which affects students’ college admissions, studies show that elite schools do little to compensate for socioeconomic status when making admission decisions.¹⁶³ A survey of nineteen law schools by Professor Richard Sander shows those schools provided no admission preference for students having parents with lower education backgrounds (an

157. See U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *ACHIEVING DIVERSITY*, *supra* note 18, at 6.

158. *Id.*

159. *Id.* (citing NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEPARTMENT OF EDUCATION, *THE NATION’S REPORT CARD: MATHEMATICS 2000 60–61* (2001)).

160. Kahlenberg, *Reflections*, *supra* note 22, at 724.

161. *Id.* (citing Carnevale & Strohl, *Increasing College Access*, *supra* note 22, at 173). In 2013, there was a 388 point disparity between the average total SAT scores for students with family income less than \$20,000 (435 mean score for critical reading, 462 mean for mathematics, and 429 mean for writing) and students coming from families with income more than \$200,000 (565 mean score for critical reading, 586 mean for mathematics, and 563 mean for writing). COLL. BD., 2013 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 tbl.11 (2013). This disparity has been consistent over the years. In 2011 and 2012, the disparity between the two income groups resulted in a difference of 398 and 400 SAT points, respectively. COLL. BD., 2012 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 tbl.11 (2012); COLL. BD., 2011 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 tbl.11 (2011). See also Leslie Yalof Garfield, *The Inevitable Irrelevance of Affirmative Action Jurisprudence*, 39 J.C. & U.L. 1, 45–46 (2013) (discussing the College Board 2011 study).

162. Richard Kahlenberg, *Online Fisher Symposium: In Defense of Race-Neutral Alternative Jurisprudence*, SCOTUSBLOG (Sept. 11, 2012, 11:27 AM), <http://www.scotusblog.com/2012/09/online-fisher-symposium-in-defense-of-race-neutral-alternative-jurisprudence/>.

163. See Richard H. Sander, *Class In American Legal Education*, 88 DENV. U. L. REV. 631, 656 (2011) [hereinafter Sander, *Class in American Legal Education*].

indicator of low socioeconomic status).¹⁶⁴ Similarly, Carnevale and scholar Stephen Rose found no socioeconomic status preference among the top 146 undergraduate schools, compared with a three-fold racial preference.¹⁶⁵ Research by authors William Bowen, Martin Kurzweil, and Eugene Tobin also showed that students from low socioeconomic backgrounds received no preferences, whereas racial preferences accounted for 27.7 percentage points.¹⁶⁶

Thus, it is unsurprising that elite law schools have dismal enrollment numbers for students of low socioeconomic status. Professor Sander found that low socioeconomic status students (the bottom quarter of the population) only represent about two percent of students at the top twenty law schools compared to over seventy-five percent of students from the wealthiest socioeconomic group (the top quartile of the population) who attend these elite law schools.¹⁶⁷ Other researchers found similar trends at elite undergraduate schools as well. Carnevale and Rose discovered that, of the students who attended the most selective 146 undergraduate colleges and universities, three percent represented the poorest socioeconomic quartile while seventy-four percent represented the most affluent.¹⁶⁸ Among the general population of students entering postsecondary education from 1989 to 1990, researchers found that only fifteen percent of students were from families in the lowest socioeconomic quartile while forty percent of students came from the highest quartile.¹⁶⁹

Relatedly, minorities who benefit from race-based affirmative action come from the most affluent backgrounds. According to Professor Sander's study of elite law schools, eighty-nine percent of African Americans and sixty-three percent of Latinos admitted into those highly selective schools come from the top socioeconomic half of the population.¹⁷⁰ Likewise, a study conducted by authors Derek Bok and William Bowen found that at twenty-eight elite colleges and universities, eighty-six percent of African Americans represented

164. *Id.* at 655–57.

165. Kahlenberg, *Reflections*, *supra* note 22, at 721 (citing Carnevale & Rose, *Socioeconomic Status*, *supra* note 130, at 141–42, 148–49).

166. Kahlenberg, *Reflections*, *supra* note 22, at 721–22 (citing WILLIAM G. BOWEN, MARTIN A. KURZWEIL & EUGENE M. TOBIN, EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 105 tbl.5.1, 166 (2005)).

167. See Sander, *Class in American Legal Education*, *supra* note 163, at 639 tbl.1.

168. See Kahlenberg, *Reflections*, *supra* note 22, at 719 (citing Carnevale & Rose, *Socioeconomic Status*, *supra* note 130, at 106 tbl.3.1).

169. PATRICK T. TEREZINI, ALBERTO F. CABRERA, & ELENA M. BERNAL, SWIMMING AGAINST THE TIDE: THE POOR IN AMERICAN HIGHER EDUCATION v (2001).

170. See Sander, *Class in American Legal Education*, *supra* note 163, at 651 tbl.8.

middle or high socioeconomic status.¹⁷¹ The explanation for why few minorities are represented in the lower socioeconomic strata of the student body at elite schools is that “minorities are *minorities*”; in other words, there are more poor white students whose numbers, simply by being the majority, reduce the representative impact of poor minorities.¹⁷²

Although schools do little to give admissions preferences for students from low socioeconomic backgrounds, one would expect schools to provide significant financial aid to the few low-income students actually admitted. Yet, studies show elite schools provide more financial help to the wealthy.¹⁷³ Professor Sander’s research indicates that affluent whites receive twice the amount of grants and scholarships than low-income whites, and affluent African Americans receive four times that amount.¹⁷⁴

Recognizing the impact of socioeconomic status on university admissions rates and the failure of schools to compensate for socioeconomic status, some scholars have suggested designing socioeconomic status affirmative action programs to achieve diversity.¹⁷⁵ An affirmative action program premised on socioeconomic status raises two questions: 1) Does achieving socioeconomic status diversity result in racial diversity? 2) Do students with low socioeconomic status enrich the educational environment, act as community or political leaders, act as role models, or provide community service?¹⁷⁶

The debate surrounding use of socioeconomic status as a factor, and proxy, for race centers on whether it sufficiently furnishes schools with racially diverse students or whether it should be embraced as a separate factor.¹⁷⁷

171. See Kahlenberg, *Reflections*, *supra* note 22, at 720–21 (citing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 341 tbl.B.2 (1998)).

172. Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENV. U. L. REV. 729, 732 (2011) [hereinafter Malamud, *Class Privilege*].

173. See Sander, *Class in American Legal Education*, *supra* note 163, at 661 tbl.12.

174. See *id.*

175. See, e.g., Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1930 (1996); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 473 (1997) [hereinafter Sander, *Experimenting*]. For criticisms of socioeconomic affirmative action programs, see William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 55–56 (2013); Deborah C. Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 504, 504 (1997) [hereinafter Malamud, *A Response*]; Malamud, *Class Privilege*, *supra* note 172.

176. See Richard Lempert, *Reflections on Class in American Legal Education*, 88 DENV. U. L. REV. 683, 688 (2011) (expressing doubt about the contribution that students with low socioeconomic status can make in and outside of the classroom).

177. Kali Borkoski, *Ask the Author: Richard Sander and Stuart Taylor, Jr. on Mismatch*, SCOTUSBLOG (Oct. 16, 2012, 9:39 AM), <http://www.scotusblog.com/2012/10/ask-the-author-richard-sander-and-stuart-taylor-jr-on-mismatch/> (“The moral for our broader national debate is that SES [socioeconomic status] preferences work best if we value socioeconomic diversity for its

Race-based affirmative action advocates argue that socioeconomic status should not replace race consideration,¹⁷⁸ but instead, work in conjunction with race¹⁷⁹ because consideration of socioeconomic status alone does not provide sufficient racial diversity.¹⁸⁰ One explanation scholars provide for the limited effectiveness of class-based programs is that socioeconomic status and minority membership are not perfectly correlated.¹⁸¹ Although twenty-five

own sake.”). Some scholars advance socioeconomic affirmative action on meritocratic principles. See, e.g., Fallon, *supra* note 175, at 1934–51. Others value socioeconomic diversity for more varied reasons:

(1) Greater socioeconomic diversity in law schools can produce a richer education for all students, by making the range of experiences brought to law school closer to the “real” world. (2) Bringing more low-SES people into law school, and hence into the legal profession, confers more legitimacy on the profession and makes it better able to respond to the needs of the public. (3) Increased access to low-SES applicants actually improves the quality of the student body, because test scores and other admissions criteria understate the ability of low-SES applicants. (4) Helping low-SES people to enter higher education increases social mobility and thus helps, however modestly, to reduce poverty and increase equality.

Sander, *Experimenting*, *supra* note 175, at 475.

178. Professor Douglas Laycock argues that any proxy for race is inherently less effective than considering race itself in admission decisions:

Proxy selectors would be race-neutral admission criteria that benefit minority applicants disproportionately. Such proxy selectors avoid the explicit consideration of race, but that is their only virtue. In every other way, they are far inferior to the direct consideration of race. They achieve far less diversity and do far more damage to admission standards. This is for quite general reasons inherent in the basic approach.

Laycock, *supra* note 71, at 1808.

179. Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 DENV. U. L. REV. 751, 787 (2011).

180. Gaertner & Hart, *supra* note 23, at 377 (citing Mark C. Long, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 PUB. ADMIN. REV. 315, 321–23 (2007)); T. Vance McMahan & Don R. Willett, *Hope from Hopwood: Charting a Positive Civil Rights Course for Texas and the Nation*, 10 STAN. L. & POL’Y REV. 163, 166–67 (1999) (“[A] study released by the Coordinating Board’s Advisory Committee on Criteria for Diversity, a group of sociologists and demographers from Texas schools, found that any criteria besides race would affect only half the number of minorities helped by affirmative action programs.”).

181. Bowen, *supra* note 179, at 754 (“[D]ata indicat[es] that class and race are not interchangeable.”); Gaertner & Hart, *supra* note 23, at 378 (citing Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 293, 296–303 (2005)); Michael A. Olivas, *Constitutional Criterion: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1095, 1117 (1997) (“There is no good proxy, no more narrowly tailored criterion, no statistical treatment that can replace race.”); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 468–78 (2004). Paradoxically, if there is a strong correlation between race and socioeconomic status, the question that schools must confront is whether using socioeconomic status will be challenged as a proxy. Professor Laycock surmises that “the stronger a proxy’s correlation with race, the more likely it is to be challenged as a sham.” Laycock, *supra* note 71, at 1810.

percent of Hispanics and African Americans live in poverty,¹⁸² by virtue of being a majority, there are more whites that are impoverished.¹⁸³

The effectiveness of class-based programs depends on how a school defines economic disadvantage. One definition is simply to focus on the applicant's parents' income.¹⁸⁴ Another method is to consider parents' income, education, and occupation.¹⁸⁵ A third approach evaluates those factors, but also whether the applicant attends a disadvantaged school, lives in a poor neighborhood, and comes from a single-parent household.¹⁸⁶ A fourth, more comprehensive, option is to define socioeconomic status by the preceding factors and wealth.¹⁸⁷

Measuring socioeconomic status in its broadest form is the best solution to increase diversity.¹⁸⁸ Some argue wealth should be included in the determination of socioeconomic status because wealth can access education and facilitate social networks.¹⁸⁹ Further, research suggests that wealth is an important consideration because when wealth and other socioeconomic factors are controlled, the racial disparity in educational outcomes, like high school and college graduation, is less visible.¹⁹⁰

When properly defined, socioeconomic affirmative action programs are successful at achieving diversity. One study shows that using socioeconomic status as a boost can increase underrepresented minority enrollment even more than race-based programs alone.¹⁹¹ The University of Colorado at Boulder investigated the effects of class-based affirmative action at a "moderately selective" university using admission decisions rather than enrollment decisions.¹⁹² The study found that class-based admission criteria increased the

182. Bowen, *supra* note 179, at 766. See also Lempert, *supra* note 176, at 690 & n.17 (suggesting "wealth may be the most important indicator of a family's social class").

183. Many scholars have made this observation. See, e.g., TEREZINI, CABRERA & BERNAL, *supra* note 169, at 3; Malamud, *Assessing*, *supra* note 129, at 465.

184. Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1074–75 (1996) [hereinafter Kahlenberg, *Class-Based*]. Using income as the sole metric of socioeconomic status has engendered debate regarding the benefits and disadvantages of defining socioeconomic status narrowly or broadly. See *id.* (discussing the various ways socioeconomic status can be measured). Professor Deborah Malamud cautions that defining socioeconomic status too broadly may dilute the classroom presence of minorities and those most economically disadvantaged. See Sander, *Experimenting*, *supra* note 175, at 501–02 (addressing Professor Malamud's critique of class-based affirmative action).

185. Kahlenberg, *Class-Based*, *supra* note 184, at 1074–78.

186. *Id.* at 1078–82.

187. *Id.* at 1074.

188. *Id.* at 1083.

189. Bowen, *supra* note 179, at 770–71.

190. See Kahlenberg, *Class-Based*, *supra* note 184, at 1083.

191. Gaertner & Hart, *supra* note 23, at 386–70, 397–98.

192. *Id.* at 369–70.

admission rates for African Americans, Latinos, and Native Americans more than race-based programs did.¹⁹³ The researchers explained this unexpected finding: “The class-based approach at [the subject university] is comparatively privileged in this context. Under the [study’s] Disadvantage and Overachievement Indices, identification can grant *primary* factor consideration. Under race-conscious affirmative action at [the university], [underrepresented minority] status is always a *secondary* factor.”¹⁹⁴ As this study reveals, the success of a class-based program with increasing racial diversity depends on how much weight universities afford socioeconomic status.¹⁹⁵ Professor Richard Sander recommends that socioeconomic status receive equal consideration as race.¹⁹⁶

Class-based programs at three University of California law schools have also increased racial diversity.¹⁹⁷ Responding to Prop. 209’s ban on race considerations in 1996, California’s undergraduate and graduate schools were forced to implement race-neutral programs.¹⁹⁸ Using class-based affirmative action, Hispanic enrollment in California’s law schools increased from 7.2% in 1997 (before Prop. 209 became effective) to 11.9% in 2003, and African-American enrollment increased from 1.9% to 4.7% in the same years.¹⁹⁹

Another class-based study at the UCLA School of Law found that adjusting for socioeconomic status could bring increased racial diversity.²⁰⁰ When UCLA Law School implemented its socioeconomic affirmative action program, although the percentage of black and American Indian enrollment fell,²⁰¹ when fluctuations in applications were taken into account, Latino enrollment remained steady and underrepresented Asian American enrollment increased.²⁰² Overall, “minority groups benefitted disproportionately from the

193. *Id.* at 392.

194. *Id.* at 393.

195. *Id.*

196. Sander, *Experimenting*, *supra* note 175, at 476. More selective schools provide greater weight to race. Gaertner & Hart, *supra* note 23, at 399 (“At many selective private and public schools, the admissions boost for minority status is quite large.”). In law schools, the top ten schools employ “the most aggressive use of affirmative action.” Bowen, *supra* note 179, at 768. *See also* Nelson, *supra* note 119, at 26 (suggesting affirmative action programs should be broadened).

197. Nelson, *supra* note 119, at 18, 22.

198. *Id.* at 18.

199. *Id.*

200. *See* Sander, *Experimenting*, *supra* note 175, at 473 (describing UCLA Law School’s class-based affirmative action program).

201. *See id.* at 497 n.46 (suggesting one reason for the decline in African American and American Indian enrollment was due to the decline of applications).

202. *Id.* at 473.

class-based preferences.”²⁰³ Fifty-five percent of the students admitted to the UCLA Law School received a socioeconomic status preference, and among these admits, the school’s acceptance rates for African American and Latino applicants were particularly high.²⁰⁴ In addition to attaining racial diversity, UCLA Law School’s program reached new academic heights. In 2000, students who were part of the entering class that benefited from a socioeconomic preference achieved the highest bar passage rate in the school’s history.²⁰⁵

At the undergraduate level, underrepresented minority school enrollment in California increased from eighteen percent in 1997 to twenty-four percent in 2008.²⁰⁶ Although enrollment of underrepresented minorities at Berkeley and UCLA, two of California’s most elite public undergraduate institutions, suffered the year following Prop. 209’s enactment, their minority enrollment has grown to twenty percent under class-based affirmative action, compared with twenty-three percent under race-based affirmative action.²⁰⁷ The elite University of Michigan Law School considered an increase from 13.55% to 20.1% minority students in its entering class a “critical mass,”²⁰⁸ and thus a successful program. Therefore, by the University of Michigan Law School’s standard, these socioeconomic status programs have largely been successful.

Putting aside the debate on how socioeconomic status should be operationalized,²⁰⁹ studies show that preferences for socioeconomic status “*can* achieve racial diversity.”²¹⁰ The success of class-based programs depends on

203. *Id.*

204. *Id.* at 486.

205. Sander, *Class in American Legal Education*, *supra* note 163, at 663.

206. Kahlenberg, *Reflections*, *supra* note 22, at 724.

207. *Id.* (citing Tongshan Chang & Heather Rose, *A Portrait of Underrepresented Minorities at the University of California, 1994-2008*, in *EQUAL OPPORTUNITY IN HIGHER EDUCATION: THE PAST AND FUTURE OF CALIFORNIA’S PROPOSITION 209* 83, 84–89 (Eric Grodsky & Michal Kurlaender eds., 2010)).

208. *Gutter v. Bollinger*, 539 U.S. 306, 389–90 (2003) (Kennedy, J., dissenting); Kahlenberg, *Reflections*, *supra* note 22, at 726.

209. Professor Malamud argues for a broader conception of economic impact beyond wealth and income because when black students’ performance on tests are affected by stereotype threats, “something ‘economic’ has taken place.” Malamud, *A Response*, *supra* note 175, at 508. Therefore, she concludes that “no program of class-based affirmative action can hope to capture the ways in which race exacerbates economic disadvantage and stands in the way of the full enjoyment of economic privilege.” *Id.* at 509. Professor Malamud explains, “The reason is that being black in America compounds economic disadvantage, undercuts economic progress, and depresses academic performance in ways too profound and too complex for any reasonable race-blind system to capture.” *Id.*

210. *Id.* at 509.

the magnitude of the socioeconomic status preference²¹¹ and the breadth of measuring socioeconomic status.²¹²

Institutions may be tempted to reject socioeconomic status programs because a particular school's diversity success might be due to its unique circumstances. For example, UCLA Law School's success at attaining diversity, while relying solely on socioeconomic status, was attributed to the unique circumstance of California's "substantial number of low-[socioeconomic status], high-achieving Asian students, many of them immigrants or the children of immigrants."²¹³ Although there may be unique circumstances that make some socioeconomic-based programs successful in some places, *Fisher's* mandate that schools use workable race-neutral alternatives puts the burden on schools to justify why a class-based program would be unworkable. While UCLA's decision to exclude wealth as part of the socioeconomic status calculation can be criticized,²¹⁴ if wealth had been part of the calculus, UCLA's program would have attained even greater diversity because African Americans have significantly less wealth than whites with the same income level.²¹⁵ The University of California at Los Angeles Law School's achievement of a diverse entering class without considering wealth further supports the potential of socioeconomic affirmative action programs as a race-neutral alternative. Schools need to study existing programs and critically assess what characteristics of the program and the state's population make it unlikely that the school can successfully implement a similar socioeconomic program.

As part of its consideration, schools should weigh the costs of a socioeconomic affirmative action program. Perhaps the greatest burden on schools undertaking a socioeconomic affirmative action program will be the financial cost. Although UCLA's operating costs were minimally affected by integrating socioeconomic status into its admissions program, its financial aid system could have been greatly impacted.²¹⁶ Anticipating that the school

211. Socioeconomic affirmative action programs' success at achieving diversity compared with that of race-based programs depends largely on how much preference is given to race. Professor Sander explains that

[w]hat varied was the *size* of the old racial preference; the greater the traditional preference, the less effectively class worked as a "substitute" for race. How the class-for-race tradeoffs would operate in other schools or other contexts, then, depends on the magnitude of current racial preferences in those settings.

Sander, *Experimenting*, *supra* note 175, at 473.

212. See Malamud, *A Response*, *supra* note 175, at 511.

213. Sander, *Class in American Legal Education*, *supra* note 163, at 663 n.89.

214. See Malamud, *A Response*, *supra* note 175, at 507 (providing a critical analysis of the UCLA Law School's socioeconomic admissions program).

215. *Id.*

216. Sander, *Experimenting*, *supra* note 175, at 499.

would need to provide larger financial grants if it increased the enrollment of students from lower income families, UCLA “scaled down its grant levels enough to offset the higher burdens.”²¹⁷ As UCLA’s program demonstrates, a school must be earnest in finding solutions to support its socioeconomic affirmative action program.²¹⁸ Therefore, in order to show that socioeconomic preference is an unworkable race-neutral alternative, it is insufficient for schools to merely identify the costs; they must also explain why the costs are too burdensome and why they are unable to offset those costs in order to satisfy *Fisher*.

C. Legacy Preferences and Development Admits

In addition to including neutral factors that correlate with racial/ethnic diversity, in order to comport with the narrowly tailored requirement, schools should eliminate legacy preferences that disproportionately help white students from privileged families or with alumni connections.²¹⁹ Ninety-six percent of Ivy League alumni are white.²²⁰ In particular, at Harvard, legacy applicants enjoy a forty percent admission rate while only fifteen percent of non-legacy applicants are admitted.²²¹ Similarly, in 2003, Princeton extended offers to thirty-five percent of legacy applicants compared with ten percent of overall applicants, the University of Pennsylvania admitted fifty-one percent of legacy applicants despite only admitting twenty-one percent of overall applicants, and Notre Dame extended legacy preferences to twenty-three percent of legacy applicants in 2003²²² and fifty percent in 2005.²²³ Legacy preferences account

217. *Id.*

218. *Id.* (discussing how UCLA supported its socioeconomic affirmative action program by scaling down grant levels).

219. Kahlenberg, *Race-Neutral Alternatives Work*, *supra* note 25. Daniel Golden of the *Wall Street Journal* has written a series of Pulitzer Prize-winning articles exposing the admissions advantages white students receive. See Daniel Golden, *At Many Colleges, the Rich Kids Get Affirmative Action*, WALL ST. J., Feb. 20, 2003, at A1 [hereinafter Golden, *Rich Kids*]; Daniel Golden, *Bill Would Make Colleges Report Legacies, Early Admissions*, WALL ST. J., Oct. 29, 2003, at B1; Daniel Golden, *For Groton Grads, Academics Aren’t Only Keys to Ivies*, WALL ST. J., Apr. 25, 2003, at A1 [hereinafter Golden, *Groton Grads*]; Daniel Golden, *For Supreme Court, Affirmative Action Isn’t Just Academic*, WALL ST. J., May 14, 2003, at A1; Daniel Golden, *Preference for Alumni Children in College Admission Draws Fire*, WALL ST. J., Jan. 15, 2003, at A1 [hereinafter Golden, *Draws Fire*].

220. Bowen, *supra* note 179, at 774 (citing TIM J. WISE, AFFIRMATIVE ACTION: RACIAL PREFERENCE IN BLACK AND WHITE 122 (2005)).

221. *Id.*

222. Golden, *Draws Fire*, *supra* note 219. Other universities similarly admit legacies at almost double, and sometimes more than double, the rate of their overall admissions, as demonstrated by the following chart compiled by researchers Steve Shadowen, Sozi Tulante, and Shara Alpern:

for ten to twenty-five percent of the student population at elite colleges and universities, compared with, for example, the California Institute of Technology, where there are no legacy preferences and only 1.5% of admitted students are children of alumni.²²⁴

Although legacy applicants are generally admitted at higher rates, they are less qualified than other applicants²²⁵ and are outperformed by affirmative action students.²²⁶ A 1990 report by the United States Department of Education described Harvard legacy admits as “significantly less qualified”

School	Year	Overall Admit Rate (%)	Legacy Admit Rate (%)
Amherst	2005	20	50
Bowdoin	1980	21	52
Columbia	1993	32	51
Dartmouth	1991	27	57
Harvard	2002	11	40
Middlebury	2006	27	45
Notre Dame	2005	20	50
Pennsylvania	2004	21	51
Princeton	2002	10	35
Stanford	2006	13	25
Yale	2002	11	29

Shadowen, Tulante & Alpern, *supra* note 24, at 57 tbl.1. See also Daniel Golden, *An Analytic Survey of Legacy Preference*, in AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS 71, 76 (Richard D. Kahlenberg ed., 2010) [hereinafter Golden, *Analytic Survey*] (detailing enrollment rates for legacies at top universities).

223. Shadowen, Tulante & Alpern, *supra* note 24, at 57 tbl.1.

224. Kahlenberg, *10 Myths*, *supra* note 26.

225. See Jodi S. Cohen et al., *Clout Goes to College*, CHI. TRIB., May 29, 2009, <http://www.chicagotribune.com/news/local/chi-uofi-clout,0.6326007.story> [hereinafter Cohen et al., *Clout*] (“In 2008, for example, freshmen on average ranked in the [eighty-eighth] percentile in their high school class, while clouted students ranked in the [seventy-sixth] percentile.”).

226. Bowen, *supra* note 179, at 774–75. A study by Duke Professor Kenneth Spenner and Duke graduate student Nathan D. Martin revealed that legacy applicants at Duke University were admitted despite having lower academic credentials compared to other applicants with parents who hold degrees from other colleges. Scott Jaschik, *Legacy Admits: More Money, Lower Scores*, INSIDE HIGHER ED (Aug. 4, 2008), <http://www.insidehighered.com/news/2008/08/04/legacy>. Compared to that same group, Duke’s legacy admits also had lower first year grades. *Id.*

than non-legacy students in all areas, except perhaps sports.²²⁷ During its investigation of the admissions procedures of Harvard and UCLA, the Department of Education's Office for Civil Rights found that, in some instances, the legacy preference "was the critical or decisive factor."²²⁸ Other research showed that highly selective colleges admitted approximately fifteen percent of white applicants who failed to meet the minimum standards.²²⁹ Carnevale and Rose discovered that when they compared the admissions criteria of the top 146 colleges and universities with the academic profiles of admitted students,²³⁰ white students were twice as likely to be admitted, despite lacking minimum standards, as compared to black and Hispanic students admitted based on race.²³¹

Like legacy admits, development admits²³² are accepted because they are related to rich, influential, or famous people whom the school intends to cultivate as major donors.²³³ Some development admits do not necessarily have alumni relatives, but the two frequently overlap.²³⁴ Given their potential to lead to significant institutional endowments, development admits enjoy the

227. MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 42 (2011).

228. Peter Schmidt, *A History of Legacy Preferences and Privilege*, in *AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS* 33, 62 (Richard D. Kahlenberg ed., 2010) [hereinafter Schmidt, *A History*].

229. Peter Schmidt, *At the Elite Colleges—Dim White Kids*, BOS. GLOBE, Sept. 28, 2007, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/09/28/at_the_elite_colleges_dim_white_kids/?page=full [hereinafter Schmidt, *Dim White Kids*] (discussing studies by "[r]esearchers with access to closely guarded admissions data").

230. The irony of aspiring to achieve a meritocratic system that treats applicants fairly while still allowing legacy preferences has not escaped scholars' attention. Justice Thomas, for example, has criticized legacies for this reason:

The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities.

Grutter v. Bollinger, 539 U.S. 306, 367–68 (2003) (Thomas, J., concurring in part and dissenting in part).

231. Schmidt, *Dim White Kids*, *supra* note 229.

232. See Golden, *Rich Kids*, *supra* note 219 ("The formal practice of giving preference to students who parents are wealthy—sometimes called 'development admits'—has implications for the legal challenge to affirmative action . . .").

233. See Golden, *Analytic Survey*, *supra* note 222, at 72 (describing development admits as "children of major donors, trustees, politicians, celebrities, and others").

234. *Id.*

same favors as privileged legacy admits: admission despite failing to meet academic standards of the school.²³⁵ For example, Pulitzer Prize-winning journalist Daniel Golden reports that Duke University “relaxed [its] standards to admit 100 to 125 students annually as a result of family wealth or connections, up from about 20 a decade ago.”²³⁶ Previously, these students were tentatively rejected or placed on the wait list.²³⁷ Harold Wingood, former Senior Associate Director of Admissions at Duke, and later Dean of Admissions at Clark University, provides an insider’s perspective about Duke’s procedures: “We’d take students in some cases with SAT scores 100 points below the mean, or just outside the top 15% of their class. . . . They weren’t slugs, but they weren’t strong enough to get in on their own.”²³⁸

Legacy preferences and development admissions act as more than mere tiebreakers on an applicant’s chances of acceptance.²³⁹ Princeton University’s Senior Scholar Thomas Espenshade concludes that being a legacy admit is equivalent to adding 160 SAT points to a candidate’s score (on the former SAT scale of 400-1600).²⁴⁰ Similarly, William Bowen and colleagues from the Andrew W. Mellon Foundation found that legacy preferences increased a candidate’s chances of being admitted to an elite institution by 19.7%.²⁴¹ For example, the University of Michigan awards up to twenty discretionary points, out of a total 150 point system, to applicants related to donors, legislators, faculty, and other notables.²⁴²

Aside from the admission preference, legacy applicants enjoy an array of other advantages because of their legacy associations. Some of the extra benefits include “well-developed mechanisms for providing the children of alumni with coaching and ‘insider’ information to improve their odds of

235. See Golden, *Rich Kids*, *supra* note 219.

236. *Id.*

237. *Id.*

238. *Id.* One parent of a Duke applicant recognized that her daughter’s academic record did not meet Duke’s typical standards:

She’s bright, she had good grades, but she doesn’t meet the superstar status Did my normal child take the place of somebody who could really make a difference in the world? Sure, yes, to an extent. But there are so many things you can lose sleep over. I’m happy for me and my child.

Id. The daughter also acknowledged her acceptance “wasn’t necessarily on [her] own merits.” *Id.* (internal quotation marks omitted).

239. Golden, *Analytic Survey*, *supra* note 222, at 74 (citing BOWEN, KURZWEIL & TOBIN, *supra* note 166); Kahlenberg, *10 Myths*, *supra* note 26.

240. Kahlenberg, *10 Myths*, *supra* note 26. *Accord* Shadowen, Tulante & Alpern, *supra* note 24, at 56 (finding that, at some elite universities, legacy admits receive a boost of twenty to 160 SAT points).

241. Kahlenberg, *10 Myths*, *supra* note 26.

242. Golden, *Rich Kids*, *supra* note 219.

acceptance; formal policies affording a second or even third chance to legacies who fail to make the cut; and scholarships and tuition discounts”²⁴³ Brown University, the University of Pennsylvania, and the University of Miami have advising programs or admissions counseling for legacy applicants.²⁴⁴ Some schools, such as the University of Miami, also afford legacy applicants interviews unavailable to regular applicants.²⁴⁵

The high admissions rate of legacy preferences and developmental admits results from the close communication between a school’s development and admissions offices; the admissions office is made aware of any applicant with family members who are major donors.²⁴⁶ Stanford Admissions Dean Robin Mamlet admits, “I will certainly factor in a history of very significant giving to Stanford”²⁴⁷ Other admissions deans at selective colleges make similar acknowledgements. For example, Brown University’s Admissions Dean Michael Goldberger shares that “having a building named after your family on [Brown’s] campus would be a plus factor.”²⁴⁸ The University of Miami makes clear on its webpage the priority it gives to legacy applications: “As admission to UM becomes increasingly more selective, it is important that we pay special attention to [the school’s] relationship with alumni and take exceptional care in evaluating legacy applications.”²⁴⁹

There is simply no justification for legacy preferences and development admits other than to garner donations from alumni or favors from influential people. At one prestigious law school, it was reported that children of powerful politicians were specially admitted in exchange for the politicians providing jobs for the school’s students.²⁵⁰ At that same university, “more than 800 undergraduate applicants [within a span of] five years received special consideration because they were backed by [the university’s] trustees, legislators, and others in powerful posts.”²⁵¹

243. Schmidt, *A History*, *supra* note 228, at 34.

244. Golden, *Analytic Survey*, *supra* note 222, at 75.

245. *Id.* at 82.

246. Golden, *Groton Grads*, *supra* note 219.

247. *Id.* (internal quotation marks omitted).

248. *Id.* (internal quotation marks omitted).

249. *Legacy Admission*, U. MIAMI, <http://www6.miami.edu/alumni/umaa/legacy.htm> (last visited Sept. 27, 2014). See also Golden, *Analytic Survey*, *supra* note 222, at 82.

250. See Cohen et al., *Clout*, *supra* note 225 (exposing the formalized system of special favoritism given to well-connected applicants); Jodi S. Cohen et al., *U. of I. Jobs-for-Entry Scheme*, CHI. TRIB., June 26, 2009, <http://www.chicagotribune.com/news/local/chi-ui-trustees-26-jun26,0,3541380.story> [hereinafter Cohen et al., *Jobs-for-Entry*]. See also Onwuachi-Willig & Fricke, *supra* note 156, at 831–32; Justin Pope, *Illinois Scandal Exposes Favoritism in Admissions*, USA TODAY, (June 4, 2009, 8:43 PM), http://usatoday30.usatoday.com/news/education/2009-06-04-illinois-favoritism_N.htm.

251. Cohen et al., *Jobs-for-Entry*, *supra* note 250.

Defenders of legacy preferences and development admissions justify the preferences because resulting donations “help[] [schools] provide financial aid to students in need.”²⁵² Yet the Chronicle of Higher Education found that at colleges receiving more than \$500 million in endowments, disproportionately few low-income students benefit.²⁵³

Others might defend legacy preferences and development admits on the basis that those admits lead to essential financial support for colleges and universities. For example, “one state university that had eliminated legacy preference hurriedly recanted for fear of jeopardizing a multibillion-dollar fundraising campaign.”²⁵⁴ However, there is no statistically significant evidence showing a causal relationship between legacy preferences and donations by alumni at the top 100 universities.²⁵⁵ Equally significant is that the seven institutions that stopped giving legacy preferences during the study suffered “no short-term measurable reduction” in donations from alumni as a result of ceasing legacy preferences.²⁵⁶ The study demonstrates that “[t]he data that is currently publicly available refutes the received wisdom that the preferences result in increased private giving.”²⁵⁷

Further, those legacy preferences supporters argue there is little difference between giving legacy preferences and state institutions setting aside seats for in-state students because their parents pay state taxes.²⁵⁸ This argument ignores the stark statistical data about race. Setting aside seats for in-state students affords any state resident’s child an equal chance at admittance and

252. Schmidt, *Dim White Kids*, *supra* note 229.

253. *Id.*

254. Golden, *Analytic Survey*, *supra* note 222, at 72.

255. See Coffman, O’Neil & Starr, *supra* note 26, at 101 (studying the relationship between legacy admits and donations at the top 100 universities from 1998-2008); Kahlenberg, *10 Myths*, *supra* note 26.

256. Kahlenberg, *10 Myths*, *supra* note 26 (internal quotation marks omitted). See also Shadowen, Tulante & Alpern, *supra* note 24, at 131 (noting “[t]he only school that experienced a decrease, Texas A&M, started experiencing a decline years before it announced the end of legacy preferences”). Texas A&M’s drop in donations was similar to that experienced by other top Texas universities, which did not alter their legacy preferences during the time of the study. *Id.* at 131–32. The study concluded that the decline in donations to Texas universities was a result of the slow economy. *Id.* at 132. After Texas A&M yielded to pressure to eliminate its legacy preference in 2004, donations dropped to \$61.9 million from \$65.6 million in 2003. Golden, *Analytic Survey*, *supra* note 222, at 93. But in 2005, donations to Texas A&M skyrocketed to \$92 million, then \$95.2 million in 2006 and \$114 million in 2007. *Id.*

257. Shadowen, Tulante & Alpern, *supra* note 24, at 132.

258. See Rebecca R. Ruiz, *Debating Legacy Preferences in Admissions*, N.Y. TIMES (Nov. 15, 2011, 7:49 PM), http://thechoice.blogs.nytimes.com/2011/11/15/legacy-admissions/?_php=true&_type=blogs&_r=0 (quoting Debra J. Thomas and Terry L. Shepard, former college administrators, each of whom defends legacy admissions).

does not perpetuate racial disadvantages. Moreover, to compare legacy preferences to in-state preferences is to ignore the impact of prior discriminatory barriers to education for minorities.²⁵⁹ Elite schools established legacy preferences as a discriminatory response to the admission of the “‘wrong’ types of students.”²⁶⁰ In the 1920s, an overwhelming number of Jewish applicants qualified on the merits for admission into elite schools.²⁶¹ Consequently, the colleges applied quotas that capped the number of Jewish admits, but later sought other ways to limit Jewish enrollment when the quotas became controversial.²⁶² Legacy preference at schools such as Yale, Harvard, and Princeton was one such method.²⁶³

Additionally, legacy preferences perpetuate the oppression suffered by minorities. That minorities may now be admitted to top colleges does not account for the generations that could not enter segregated colleges and universities. In fact, “no selective college or university was making determined efforts to seek out and admit substantial numbers of African Americans’ before 1960.”²⁶⁴ In Mississippi, for example, “[i]t was not until 1962 that the first black student, James Meredith, was admitted to a white public college in [the state], and then only under the court order and with the protection of federal troops.”²⁶⁵ Until 1969, the University of Texas Law

259. See Onwuachi-Willig & Fricke, *supra* note 156, at 831 (discussing the discriminatory effect of legacy preferences).

260. Shadowen, Tulante & Alpern, *supra* note 24, at 56.

261. See Schmidt, *A History*, *supra* note 228, at 39 (discussing the rise of Jewish enrollment at Harvard and Yale); Shadowen, Tulante & Alpern, *supra* note 24, at 56 (tracing the origin of legacy preferences to anti-Semitism); Kahlenberg, *10 Myths*, *supra* note 26 (suggesting “legacies originated following World War I as a reaction to an influx of immigrant students, particularly Jews, into America’s selective colleges”). The increase in Jewish immigrants led to a corresponding rise in Jewish applicants at elite schools:

The first German Jews who came were easily absorbed into the social patten; but at the turn of the century the bright Russian and Polish Jewish lads from the Boston public schools began to arrive. There were enough of them in 1906 to form the Menorah Society, and in another fifteen years Harvard had her “Jewish problem.”

SAMUEL ELIOT MORISON, *THREE CENTURIES OF HARVARD: 1636-1936* 417 (1946).

262. See Schmidt, *A History*, *supra* note 228, at 40–41; Kahlenberg, *10 Myths*, *supra* note 26.

263. Schmidt, *A History*, *supra* note 228, at 42.

264. Beatrice L. Bridglall, *A Misguided Debate About Affirmative Action?*, 67 OHIO ST. L.J. 15, 22 (2006) (citing BOWEN & BOK, *supra* note 171, at 74–78; ELIZABETH A. DUFFY & IDANA GOLDBERG, *CRAFTING A CLASS: COLLEGE ADMISSIONS & FINANCIAL AID, 1955-1994* 138–39 (1998)).

265. Gil Kujovich, *Desegregation in Higher Education: The Limits of a Judicial Remedy*, 44 BUFF. L. REV. 1, 4 (1996). “[I]n 1965, of the one percent of law students who were African-American, more than one-third were in all-black law schools . . .” Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 491 (2005).

School offered scholarships exclusively to whites.²⁶⁶ The University of Houston did not graduate its “first black law student until 1970 and fewer than one dozen Mexican Americans graduated before 1972.”²⁶⁷ Notably, at selective law schools, the number of black students admitted was dismal:

[I]n the early 1960s at schools like Boalt Hall, Michigan, and . . . [UCLA], the “inexorable zero” routinely characterized African American enrollment patterns. In the fall of 1965, Boalt, Michigan, New York University . . . , and UCLA had a combined total of four African Americans out of 4843 students, which, shockingly, is one fewer than the University of Mississippi . . . , where the law school begrudgingly enrolled five [b]lacks in 1965 to avoid jeopardizing a substantial grant from the Ford Foundation. Similarly, between 1948 and 1968, the University of Texas enrolled a total of 8018 [w]hite first-year law students and only 37 African Americans. Between 1956 and 1967, there were between zero and two African American enrollments at [the University of Texas Law School] annually.²⁶⁸

The exclusivity of white institutions of higher learning²⁶⁹ resulted in generations of white alumni who could pass on the benefit of their admission to their progeny.²⁷⁰

On the other hand, some may support legacy preferences because they consider the preference a way to benefit minorities. During oral arguments in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary*,²⁷¹ Justice Sotomayor

266. HORN & FLORES, *supra* note 72, at 14.

267. Michael A. Olivas, *Governing Badly: Theory and Practice of Bad Ideas in College Decision Making*, 87 IND. L.J. 951, 958 (2012) [hereinafter Olivas, *Governing Badly*].

268. William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 9–10 (2003) (citations omitted).

269. State senator Rodney Ellis previously noted that “[r]ace was used in Texas over a long period of time to keep people of color, especially African-Americans, out of the higher education system” John Brittain & Eric L. Bloom, *Admitting the Truth: The Effect of Affirmative Action, Legacy Preferences, and the Meritocratic Ideal on Students of Color in College Admissions*, in AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS 123, 140 (Richard D. Kahlenberg ed., 2010) (internal quotation marks omitted).

270. Boyce F. Martin, Jr. & Donya Khalili, *Privilege Paving the Way for Privilege: How Judges Will Confront the Legal Ramifications of Legacy Admission to Public and Private Universities*, in AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS 199, 200 (Richard D. Kahlenberg ed., 2010). *See also* Olivas, *Governing Badly*, *supra* note 267, at 958 (“Children of early 1970s UTLS [University of Texas Law School] minority graduates, if born while their parents attended law school, would now be eligible for the alumni preference, but they would be in competition with the thousands of white applicants who could and would also invoke the privilege.”).

271. 134 S. Ct. 1623 (2014).

expressed concerns that if colleges or universities eliminated these preferences, minorities would suffer: “It’s always wonderful for minorities that they finally get in, they finally have children and now you’re going to do away for that preference for them. It seems that the game posts keeps changing every few years for minorities.”²⁷²

To the contrary, minorities are disproportionately harmed by legacy preferences.²⁷³ Underrepresented minorities comprise 6.7% of legacy applicants compared to 12.5% of total applicants to elite universities.²⁷⁴ At Texas A&M, for example, the university enrolled 321 white legacy admits in 2002, compared with three black and twenty-five Hispanic legacy admits.²⁷⁵ At the University of Virginia, the population of legacy admits accepted during early admission was 91% white, 1.6% black, and .05% Hispanic.²⁷⁶ In the 2000-01 academic year, Princeton accepted ten Hispanic and four African American legacy admits out of a total 567 legacy applicants.²⁷⁷ If one were to “[j]uxtapose the numbers of white alumni parents whose children apply to college with those few minorities who are in a position to pass it on, . . . [the data would suggest that] such admissions will never improve to the point where alumni privilege produces points for a substantial number of minority students.”²⁷⁸ While some may doubt whether eliminating legacy preferences at elite schools makes a meaningful difference in obtaining greater class equality,²⁷⁹ given the statistics, eliminating legacy preferences will make a difference in obtaining racial diversity.

272. Transcript of Oral Argument at 5–6, *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary*, 134 S. Ct. 1623 (2014) (No. 12-682), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-682_1537.pdf; Scott Jaschik, *Surprise on Legacy Admissions*, INSIDE HIGHER ED (Oct. 16, 2013), <http://www.insidehighered.com/news/2013/10/16/unexpected-exchange-supreme-court-alumni-child-preferences> [hereinafter Jaschik, *Surprise*].

273. Kahlenberg, *10 Myths*, *supra* note 26.

274. *Id.*

275. *Id.*

276. *Id.*

277. Golden, *Analytic Survey*, *supra* note 222, at 77.

278. Olivas, *Governing Badly*, *supra* note 267, at 957. One study predicts that legacy admissions for African Americans may rise to nine percent by the year 2020, but the study relies on assumptions about the fertility rates of minority alumni and whether alumni will intermarry. See Cameron Howell & Sarah E. Turner, *Legacies in Black and White: The Racial Composition of the Legacy Pool*, 22–23 (Nat’l Bureau of Econ. Research, Working Paper No. 9448, 2003), available at <http://www.nber.org/papers/w9448>.

279. Malamud, *Class Privilege*, *supra* note 172, at 742.

Although the practice of legacy preferences and development admits itself might not be subject to the demands of strict scrutiny,²⁸⁰ schools that desire to use race-based admissions are subject to strict scrutiny and should not be permitted to give these types of preferences. Because *Fisher* mandates that schools demonstrate that race-neutral alternatives are not workable before they rely on racial admissions criteria,²⁸¹ schools must show they have done all they can to increase diversity without using race. Such a process should include the schools' discontinuation of policies such as legacy preferences and development admits that predominately benefit whites,²⁸² which decrease a school's diversity.²⁸³

Although eliminating legacy preferences may not achieve an equivalent level of diversity as race-based programs,²⁸⁴ "a large legacy population on campus limits racial and economic diversity."²⁸⁵ Therefore, a school should not prevail on using race-based admissions when it has declined to take measures that reduce racial disparity, such as eliminating legacy and development admits.²⁸⁶ As Justice Clarence Thomas stated, "Were this court to have the courage to forbid the use of racial discrimination in admissions,

280. *Grutter v. Bollinger*, 539 U.S. 306, 368 (2003) (Thomas, J., concurring in part and dissenting in part) (noting that "[t]he Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences" and "legacy preferences can stand under the Constitution").

281. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013).

282. See Golden, *Analytic Survey*, *supra* note 222, at 98 (noting that "[a]s with legacies in general, most development cases are white").

283. Michigan's Solicitor General made a similar argument during *Schuette* oral arguments. See Jaschik, *Surprise*, *supra* note 272.

284. Researchers Thomas J. Espenshade and Chang Y. Chung concluded that even though athlete and legacy applicants are disproportionately white and despite the fact that athlete and alumni children admission bonuses are substantial, preferences for athletes and legacies do little to displace minority applicants, largely because athletes and legacies make up a small share of all applicants to *highly selective* universities. Espenshade & Chung, *supra* note 181, at 304 (emphasis added).

285. Golden, *Analytic Survey*, *supra* note 222, at 77.

286. Interestingly, the University of Michigan's race-based admissions program was invalidated in *Gratz*, but the school continues to give legacy preferences. See Jaschik, *Surprise*, *supra* note 272. Its admission policy provides:

The University of Michigan values the relationship it has with current and former students. These students and alumni are part of the Michigan community; they provide service and support to the larger university community. As such, application reviewers take into consideration applicants who have a direct relationship, or stepfamily relationship, with someone who has attended the University of Michigan-Ann Arbor as a degree-seeking student.

College Admissions FAQ, MICH. ALUMNI ASS'N, <http://alumni.umich.edu/learning/college-admissions-faq#q7> (last visited Sept. 28, 2014).

legacy preferences . . . might quickly become less popular”²⁸⁷ Perhaps the courage to refrain from giving preferences to legacies and development admits must begin at the institution.²⁸⁸

D. Other University-Based Programs: Recruitment, Retention, and Financial Aid

Schools use recruiting, retention, and financial aid programs in conjunction with their admissions programs to enroll and retain racially diverse students.²⁸⁹ Researchers conclude “the success of percent plans in broadening educational opportunity beyond high school requires strong outreach efforts to encourage rank-eligible students to apply for admission.”²⁹⁰ For example, the University of Texas, with the aid of the private sector, made considerable efforts to recruit potential minority applicants and benefitted from privately funded minority scholarships.²⁹¹ It also funded public scholarships through the Longhorn Opportunity Scholarship and the Century Scholars Program for students who graduate within the top ten percent of their class from high schools that are traditionally underrepresented at universities and colleges.²⁹² The University of North Carolina at Chapel Hill enables economically disadvantaged students to attend college debt-free by working ten to twelve hours a week in a federal work-study program.²⁹³ Other universities aggressively recruit from high schools with high minority population by informing students about higher education opportunities, the application process, and the admission process.²⁹⁴

The Court’s affirmative action jurisprudence supports the requirement that universities implement recruitment, retention, and financial aid programs that would enhance their diversity before relying on racial classifications.²⁹⁵ The Court has insisted on consideration of race-neutral alternatives, even those outside the challenged program’s parameters, to comply with strict scrutiny. In

287. *Grutter v. Bollinger*, 539 U.S. 306, 368 n.10 (2003) (Thomas, J., concurring in part and dissenting in part).

288. See Golden, *Analytic Survey*, *supra* note 222, at 72 (noting that, in undertaking post-legacy admissions fundraising, “[i]nstitutional courage is also required”).

289. See Laycock, *supra* note 71, at 1811 (discussing schools’ use of recruiting, scholarships, and other programs in encouraging minority application and enrollment).

290. Tienda & Niu, *supra* note 87, at 732.

291. See HORN & FLORES, *supra* note 72, at 52–55; Laycock, *supra* note 71, at 1834–35.

292. HORN & FLORES, *supra* note 72, at 52–54.

293. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *ACHIEVING DIVERSITY*, *supra* note 18, at 19.

294. HORN & FLORES, *supra* note 72, at 52–55.

295. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in judgment) (discussing race-neutral options to diversity schools’ student bodies); *Richmond v. J. A. Croson Co.*, 488 U.S. 468, 509–10 (1989) (highlighting available race-neutral alternatives).

Croson, the Court summarized a broad array of race-neutral alternatives and noted the city should have contemplated that

[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.²⁹⁶

Although *Croson* involved remedial discrimination as a basis for the city's program, its lessons are equally applicable to affirmative action programs premised on diversity. The Court's identification of financial aid as a race-neutral alternative in *Croson* demonstrates that it is not unrealistic to expect institutions of higher learning to assist students in funding their education in order to increase the institutions' diversity. Similarly, the expectation that training can ameliorate low diversity levels is easily transferable to universities and colleges. In order to maintain its diversity, a university can provide mentoring and academic assistance programs to retain its minority students and facilitate their matriculation. Also, schools must address the "formal barriers to new entrants"²⁹⁷ by recruiting from underperforming high schools and training students who attend those schools about the college application process. Therefore, like *Croson*, universities have at their disposal race-neutral programs that target financing, training, and recruitment to increase diversity. A university's failure to consider these options should render its racial program invalid for failing the narrow tailoring requirement.

E. The Pipeline: Community Outreach

Although colleges and universities are not required to "exhaust[] . . . every conceivable race-neutral alternative,"²⁹⁸ approaches that focus on increasing the pipeline of applicants prepared for higher education contribute to diversity at colleges and universities. Institutions of higher learning recognize that relying on university-based programs to recruit from minority schools and

296. *Croson*, 488 U.S. at 509–10.

297. *Id.* at 510.

298. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003)) (internal quotation marks omitted).

providing adequate financial assistance is not enough to retain diversity.²⁹⁹ Some higher education institutions seek to increase diversity by improving the structural underpinnings of education.³⁰⁰ The U.S. Department of Education has recognized colleges' and universities' success in designing race-neutral programs:

Many colleges and universities around the country are partnering with elementary and secondary schools, recognizing that these partnerships expand their educational mission by giving them an opportunity to put into practice education theory. Moreover, institutions recognize that helping to better educate young people who attend traditionally low-performing schools will broaden the pool of students who can qualify for admission to college.³⁰¹

Models of these successful outreach programs can be found across the nation. The University of Houston, for example, supports a K-12 technology charter school on its campus, and thereby provides 200 students exposure to "scientific methodology, technological literacy, leadership, and other skills."³⁰² Texas Tech University reaches out to twenty-six elementary schools by inviting disadvantaged and minority students to participate in the Future Scholars program, which pairs students with professors who emphasize college readiness.³⁰³ Baylor University hosts several programs to improve the education of minority children, such as Science Discovery Week, a summer camp where students live on campus to take part in science and engineering activities, and the Center for Learning Abilities and Talent Development, which provides events such as the February Interdisciplinary Creative Problem Solving Conference throughout the year.³⁰⁴ Florida offers the College Reach Out Program for low-income, underperforming students in grades six to twelve; seventy-two percent of the students served are African American and ten percent are Hispanic.³⁰⁵

Graduate schools also reach out to the community to improve racial diversity at their schools. The University of Texas at El Paso Law School founded the

299. See, e.g., McMahan & Willett, *supra* note 180, at 171 (noting that "many universities are focusing on helping *improve the quality of K-12 education* to increase the number of qualified, college-ready minorities") (emphasis added).

300. *Id.* at 171-72 (describing outreach programs directed at grades K-12 schools).

301. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY, *supra* note 18, at 12.

302. McMahan & Willett, *supra* note 180, at 171.

303. *Id.* (citing Cathy Allen, *Texas Needs to Improve Access to College*, DALLAS MORNING NEWS, Jan. 1, 1999, at A31).

304. *Id.*

305. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY, *supra* note 18, at 12.

Law School Preparation Institute to help students, especially minorities, prepare for the law school application process and legal studies.³⁰⁶ The success of the Law School Preparation Institute is demonstrated by student-participants' acceptance at top schools: seventy-three percent attend top 100 law schools, fifty-eight percent attend top fifty law schools, and thirty-three percent attend top fifteen law schools.³⁰⁷ Additionally, the King Hall Outreach Program at UC Davis provides participants with classes in writing, logic, and LSAT preparation.³⁰⁸ Students also have the opportunity to participate in Moot Court and Mock Trial and meet with tutors and admission personnel.³⁰⁹ The UC Davis School of Law provides another approach by offering a Pre-Law Boot Camp "designed to assist high potential undergraduate students from underrepresented communities with their undergraduate performance and preparation for admission to law school."³¹⁰ Harvard Law School has partnered with New York University Law School and the Advantage Testing Foundation to support their TRIALS program, a residential scholarship program that helps minority and economically disadvantaged students gain admission to the nation's leading law schools.³¹¹

At the University of Texas, combining outreach programs with race-neutral admissions programs is effective at achieving diversity. Responding to *Hopwood's* prohibition against consideration of race, UT Austin expanded its outreach programs to increase minority enrollment while it implemented the Top Ten Percent plan.³¹² The school achieved a more diverse entering class under the post-*Hopwood* system (that did not explicitly consider race), compared to when the school implemented a plan that accounted for race.³¹³ Although there has been no study on how much of the school's increased diversity can be attributed to community outreach, the University's record makes it difficult to ignore that outreach programs are a race-neutral alternative that can supplement other race-neutral admissions programs.

The importance of outreach programs is widely supported: "[O]utreach and aid programs that target minority communities and, as a result, double or triple

306. *Mission and Goals*, U. TEX. EL PASO L. SCH. PREPARATION INST., <http://academics.utep.edu/Default.aspx?tabid=67363> (last visited Sept. 28, 2014).

307. *LSPI at UTEP*, U. TEX. EL PASO, <http://academics.utep.edu/Default.aspx?alias=academics.utep.edu/law> (last visited Sept. 28, 2014).

308. *KHOP—King Hall Outreach Program*, UC DAVIS SCH. L., <https://law.ucdavis.edu/outreach/khop.html> (last visited Sept. 28, 2014).

309. *Id.*

310. *Pre-Law Boot Camp*, UC DAVIS SCH. L., <http://law.ucdavis.edu/prospective/outreach/pre-law-boot-camp.html> (last visited Sept. 28, 2013).

311. TRIALS, <http://trials.atfoundation.org/index> (last visited Sept. 28, 2014).

312. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2415–16 (2013).

313. *Id.* at 2416.

applications from minority students can contribute strongly to gains.”³¹⁴ However, the problem with promoting outreach programs is convincing colleges and universities that costs and administrative burdens are justified.³¹⁵ Higher education institutions should be obligated to consider outreach programs as a supplement to other race-neutral programs because, as previously discussed, the Supreme Court has mandated that race-based programs be a last resort.³¹⁶ Further, those race-neutral alternatives should target increasing opportunities to reach a diverse population of students who are prepared for higher education. It is widely understood that one underlying problem with attaining racial diversity in higher education is the dearth of an applicant pool.³¹⁷ As the United States Department of Education has advocated, “developmental approaches . . . demonstrate the wide range of

314. HORN & FLORES, *supra* note 72, at viii–ix. *See also* Nelson, *supra* note 119, at 26–28 (advocating for higher education schools to include programs that increase access to educational opportunities for disadvantaged students before they apply); Torres, *supra* note 128, at 1599 (“Activities like outreach, recruitment, and financial aid are critical to a university in making a diverse student body possible.”).

315. *See* Malamud, *Class Privilege*, *supra* note 172, at 741 (expressing doubt that “elite-school admissions offices would find more outreach to be cost justified, given its likely returns”).

316. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in judgment) (“[I]ndividual racial classifications . . . may be considered legitimate only if they are a last resort to achieving a compelling interest.”). In *Croson*, Justice O’Connor articulated an expectation that race-neutral alternatives be considered:

As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations . . . First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. . . . Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race-neutral. If [minority-owned businesses] disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation.

Richmond v. J. A. Croson Co., 488 U.S. 469, 507 (1989). The Court’s recommendation that the city could finance small firms recognizes that race-neutral alternatives should go beyond the eligibility criteria and remedy the root of the problems that have traditionally kept minority-owned businesses from competing in construction subcontracts. In *Parents Involved*, Justice Kennedy pointed out the available race-neutral alternatives to diversify K-12 schools: “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment). The alternatives Justice Kennedy suggested highlight that schools should be open-minded to solutions that exist beyond their walls.

317. Bowen, *supra* note 179, at 766 (lamenting that “it is this lack of available applicants that is the problem”).

efforts that can be undertaken to enrich the pipeline of applicants prepared to succeed in any academic setting”³¹⁸

III. TRANSPARENCY

To evaluate whether an alternative works “about as well” as a raced-based program, one needs to clearly understand the race-based program. Unfortunately, higher education institutions have not made the details of their programs transparent.³¹⁹ Justice Ginsburg warned that precluding schools from explicitly using race as a factor might cause them to “resort to camouflage’ to ‘maintain their minority enrollment.”³²⁰ Similarly, Justice Kennedy feared that “[i]f universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review.”³²¹ By outlawing the use of race as a sole or predominate factor in school admission programs, the Court has traded in transparency for a holistic review.³²² As Justice Ginsburg observed, “the vaunted alternatives suffer from ‘the disadvantage of deliberate obfuscation.”³²³

Fisher may, in fact, remedy the schools’ temptation to obfuscate their admissions process. In *Fisher*, the Court reiterated that “[s]trict scrutiny 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.”³²⁴ Compliance with strict

318. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY, *supra* note 18, at 5.

319. Borkoski, *supra* note 177.

320. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) (“As for holistic review, if universities cannot explicitly include race as a factor, many may ‘resort to camouflage’ to ‘maintain their minority enrollment.’”).

321. *Grutter v. Bollinger*, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting).

322. Scholars have similarly observed that the Court’s earlier educational affirmative action jurisprudence has caused a negative unintended consequence with respect to transparency. See, e.g., Vikram Amar, *Online Fisher Symposium: The Court Needs to Explain Better Why Using Race in a Softer, Less Visible, Way is Preferable*, SCOTUSBLOG (Sept. 4, 2012, 11:54 AM), <http://www.scotusblog.com/2012/09/online-fisher-symposium-the-court-needs-to-explain-better-why-using-race-in-a-softer-less-visible-way-is-preferable/> (acknowledging that “[i]n *Bakke*, for example, Justice Powell never really addresses Justice Brennan’s argument that a race-based program’s inscrutability to the public should not count in favor its constitutionality”); Roger Clegg, *Commentary: Thoughts on the Oral Argument in Fisher v. University of Texas*, SCOTUSBLOG (Oct. 10, 2012, 7:20 PM), <http://www.scotusblog.com/2012/10/thoughts-on-the-oral-argument-in-fisher-v-university-of-texas/> (“The Court’s understandable refusal to accept quotas, point systems, and the like has the perverse effect of encouraging admission policies that lack transparency.”).

323. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

324. *Id.* at 2421 (majority opinion).

scrutiny's necessity requirement would likely lead schools to be more transparent about their programs because they would need to articulate their objective and the measures of success for their program. In order to avoid being found "feeble in fact,"³²⁵ a school must make sufficient disclosure of its program to satisfy the demanding requirements of narrow tailoring and necessity.³²⁶ According to one commentator, "[a]s both logic and experience have shown, *Grutter's* narrow-tailoring requirements are largely meaningless without full disclosure of the operation and effects of preferences. Secret admissions can't possibly be narrow tailoring."³²⁷

IV. ACADEMIC FREEDOM

The Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."³²⁸ The Court's recognition of academic freedom has extended to a number of cases. Beginning with *Sweezy v. New Hampshire*,³²⁹ Justice Frankfurter highlighted "four essential freedoms" of the university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."³³⁰

The Court emphasized the commitment to protecting academic freedom in *Keyishian v. Board of Regents*,³³¹ acknowledging that doing so has

325. *Id.*

326. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 784 (2007) (Kennedy, J., concurring in part and concurring in judgment) (stating that "[a]s part of [the government's] burden it must establish, in detail, how decisions based on an individual student's race are made in a challenged program").

327. See Richard Sander, *Online Fisher Symposium: A Path to Radical Reform of Racial Preferences Without Banning Them*, SCOTUSBLOG (Sept. 4, 2012, 5:45 PM), <http://www.scotusblog.com/2012/09/online-fisher-symposium-a-path-to-radical-reform-of-racial-preferences-without-banning-them/>. See also Borkoski, *supra* note 177 (explaining Sander's and Taylor's argument that "[t]ransparency would also help preferred-minority students make more informed choices in choosing colleges and would help inform researchers, voters, and policymakers").

328. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). A number of scholars have explored the implications of affirmative action on academic freedom. See, e.g., Steve Sanders, *Legal Scholarship Highlight: Affirmative Action and Academic Freedom*, SCOTUSBLOG (Sept. 14, 2012, 10:06 AM), <http://www.scotusblog.com/2012/09/legal-scholarship-highlight-affirmative-action-and-academic-freedom/>.

329. 354 U.S. 234 (1957).

330. *Id.* at 263 (Frankfurter, J., concurring in result) (quoting senior scholars and Chancellors from the University of Cape Town and the University of the Witwatersrand) (internal quotation marks omitted).

331. 385 U.S. 589 (1967).

“transcendent value to all of us and not merely to teachers concerned.”³³² In *Regents of the University of Michigan v. Ewing*,³³³ the Court acknowledged that “[w]hen judges are asked to review the substance of a genuinely academic decision[,] . . . they should show great respect for the faculty’s professional judgment.”³³⁴ Judges “may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”³³⁵ Further, in its *Curators of the University of Missouri v. Horowitz*³³⁶ decision, the Court observed that “[c]ourts are particularly ill-equipped to evaluate academic performance.”³³⁷ Thus, the Court has embraced the idea that the “educational autonomy” of schools has “a constitutional dimension, grounded in the First Amendment”³³⁸

However, the landscape of academic freedom has changed over the course of the Court’s affirmative action jurisprudence. Academic freedom still permits schools to choose their educational mission, but does not grant schools blind faith to conduct their own admissions procedures. *Fisher* makes clear that the methods a school chooses to attain the educational benefits of diversity are not immunized from rigorous judicial review if those means are not narrowly tailored to the school’s objective.

V. CONCLUSION

The purpose of this Article is not to advocate one program over another. Critics can find flaws in each program, but finding a workable race-neutral alternative does not depend on designing a flawless program. This Article raises the issue that if a school achieves racial diversity using race-neutral means, other institutions will have the burden of showing why a similar program would be unworkable before they can implement race-based admissions programs. While one race-neutral program may not achieve as much racial diversity as a race-based program, a combination of race-neutral programs may nevertheless achieve the desired level of diversity. To follow *Fisher*, narrow tailoring requires, at a minimum, that institutions consult available resources³³⁹ and published studies. Before a school implements a

332. *Id.* at 603.

333. 474 U.S. 214 (1985).

334. *Id.* at 225.

335. *Id.*

336. 435 U.S. 78 (1978).

337. *Id.* at 92.

338. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

339. For example, the U.S. Department of Education published a report that details an array of race-neutral programs employed by higher education institutions across the nation. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *ACHIEVING DIVERSITY*, *supra* note 18, at 5.

race-based admissions policy, it must articulate to the court why any combination of these race-neutral programs is unworkable.

In light of the evidence that race-neutral programs have succeeded in attaining diversity without compromising academic performance, institutions of higher education will be hard pressed to justify using racial admissions. Ultimately, they may not be able to avoid the inevitable conclusion that although diversity is important,³⁴⁰ race-based affirmative action in admissions is unnecessary, at least in terms of how the Court's strict scrutiny jurisprudence has construed "necessary."

Fisher's demanding narrow tailoring analysis mandates that more schools strive to develop innovative programs that enhance student diversity without depending upon racial considerations. As one school has realized, "it takes creativity, a lot of hard work, and a lot of money before an institution can hope to achieve diversity without using affirmative action."³⁴¹ But, "it [is] worth the cost."³⁴²

340. Seventy-four percent of schools responding to the National Association of College Admission Counseling's survey indicated that they embrace diversity, as demonstrated in their mission statements. NAT'L ASS'N OF COLL. ADMISSION COUNSELING, DIVERSITY AND COLLEGE ADMISSIONS IN 2003: A SURVEY REPORT 4 (2003), available at <http://www.nacacnet.org/issues-action/policy/Documents/Diversity%20Report%20Web.pdf>.

341. Walker & Lavergne, *What We Learned in Texas*, *supra* note 21, at 23.

342. *Id.*