

**NET (RACE) NEUTRAL: AN ESSAY ON HOW
GPA + (REWEIGHTED) SAT – RACE = DIVERSITY**

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INTRODUCTION

In 2013, *Fisher v. University of Texas* presented a significant challenge to *Grutter v. Bollinger*, the 2003 U.S. Supreme Court case that upheld diversity as a compelling interest that would justify narrowly tailored race-conscious consideration in the higher education admissions process. While the *Fisher* Court did not revisit the holding of *Grutter*, it remanded the case back to the circuit court to determine whether the University of Texas program met *Grutter*'s mandate of a narrowly tailored use of race, or violated the Equal Protection Clause because race-neutral alternative measures existed.¹

As the circuit court considered the issue,² having conducted oral arguments in fall 2013, this Essay provides some brief thoughts on a race-neutral alternative that may accomplish the goal of enhanced racial and ethnic diversity in the admissions process, thereby rendering the University of Texas admissions program unconstitutional. We have just passed the eleventh anniversary of *Grutter*, and attempts to accomplish *Grutter*'s goal of diversity in elite, and even mediocre, institutions of higher education will be thwarted in the absence of affirmative action.³ While only a handful of states have

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1. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013).

2. The Fifth Circuit issued its decision as this Article was being edited for publication. The circuit court upheld the district court's grant of summary judgment finding that the University of Texas program was sufficiently narrowly tailored to survive strict scrutiny with less deference given to the University. *Fisher v. Univ. of Tex.*, 758 F.3d 633, 636 (5th Cir. 2014).

3. Chris Chambers Goodman, *A Modest Proposal in Deference to Diversity*, 23 NAT'L BLACK L.J. 1, 19 (2010) ("The consensus among academics who support the goal of increasing diversity in classrooms seems to be that race-conscious affirmative action is needed to achieve diversity."); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1043 (1998) (arguing that affirmative action is needed for diversity in elite and mediocre institutions of higher education):

If elite colleges and professional schools lack any significant number of minority students, they revive the dangerous symbolism of an entrenched, racially-defined underclass. On

outlawed affirmative action and the Court narrowly supports it,⁴ successful strikes against race conscious affirmative action may be on the horizon, and race neutral measures that enhance diversity can be beneficial to students of all colors.

I. WHAT THE UNITED STATE SUPREME COURT PERMITS AND SOME STATES PROHIBIT: AFFIRMATIVE ACTION AND FUNDING DISPARITIES BASED ON WEALTH

The Supreme Court's public education jurisprudence has evolved in the sixty years since *Brown v. Board of Education*; the Court specifically denounced de jure segregation, holding that when the government separates students by race in public education, that state action violates the Equal Protection Clause of the Constitution.⁵ In the aftermath of *Brown*, as integration efforts stalled, the Court addressed de facto education segregation, finding in *Missouri v. Jenkins* that de facto education segregation does not violate the Constitution once the school district has complied with the mandate of *Brown* and subsequent court orders to desegregate as much as practicable.⁶ By returning control of schools and districts that achieved "unitary status" to state and local governments, rather than continuing jurisdiction in the federal courts, some say the doors re-opened to resegregation as long as it was in fact, rather than by law.⁷

the other hand, the erosion or destruction of traditional indicia of merit [which would happen if we employ other substitutes for affirmative action that only lower the admissions standards of the institutions] risks undermining the privileged status of the university itself and the willingness of political bodies to support it.

If this political prediction is correct, then continued pressure to eliminate race-based preferences in higher education admissions is likely, in the near term, to produce a variety of efforts [that are] deliberate attempts to achieve the end of racial diversity indirectly through apparently race-neutral means.

Id. at 1043–44. See also Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 2 (1997) (“[A]ffirmative action policies are likely a necessary prerequisite to maintaining a diverse yet capable law school student body.”).

4. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 73 n.43, 88–89 (2013). The insertion of the “25 years” clause in *Grutter* to abandon race-based admissions policies is indicative that the Supreme Court supports the ban of affirmative action in at least a small way. *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003).

5. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). Subsequently, the Civil Rights Act of 1964 helped to end de jure segregation in public schools. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

6. *Missouri v. Jenkins*, 515 U.S. 70, 100–01 (1995).

7. See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1615 (2002).

On the school funding issue, the Court held in *San Antonio Independent School District v. Rodriguez* that an equal education was not a fundamental right under the Constitution and that wealth is not a protected class deserving of heightened scrutiny when state and local laws provided less funding to the school districts with higher concentrations of poverty.⁸ The *Rodriguez* Court did not address the issue of whether there is a fundamental right to education at all.⁹ Nonetheless, in *Plyler v. Doe*, the Court determined that denying free public education to undocumented children in Texas was a constitutional violation, despite reasoning that education was not a fundamental right, and that undocumented children were not a suspect class, despite applying intermediate scrutiny.¹⁰ Thus, under current law, no federal constitutional challenge will stand on the issue of funding disparities in public education within a state.

While the Court in *Grutter* declared diversity in higher education to be a compelling interest justifying narrowly tailored race-based distinctions,¹¹ this compelling interest requires periodic assessments of what is necessary to accomplish the goal of diversifying higher educational institutions and how well-tailored are the means used to reach the goal.¹² The Court has found that

8. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973).

9. *Id.* at 35 (concluding that equal education does not qualify as a fundamental interest because it “is not among the rights afforded explicit protection” under the federal Constitution). There, the Court rejected wealth as a suspect class because of the vague definitions of poor and the deprivation of education. *Id.* at 19. Once the Court decided that no suspect class existed and equal education was not a fundamental right, it concluded that the level of scrutiny for state statutes challenging the Equal Protection Clause was only the rational basis test. *Id.* at 103–04.

10. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

11. *Grutter v. Bollinger*, 539 U.S. 306, 328, 343 (2003) (“Today, we hold that the Law School has a compelling interest in attaining a diverse student body. . . . [T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”). Justice O’Connor found that the enrollment of a critical mass of underrepresented minority students at a Law School is a compelling interest because it “‘promotes cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’” *Id.* at 330 (citation omitted). The Court explained that “[t]o be narrowly tailored, a race-conscious admissions program must not ‘unduly burden individuals who are not members of the favored racial and ethnic groups.’” *Id.* at 341 (citation omitted). The Court declared that it was satisfied by the Law School’s admissions program because it considered “race as one factor among many[] in an effort to assemble a student body that is diverse in ways broader than race.” *Id.* at 340.

12. *See id.* at 342 (indicating that race-conscious admissions policies must be limited in time in order to assure all citizens that the temporary racial preference is not permanent so as not to offend the equal protection principle). The Court held that this durational requirement can be met by sunset provisions and periodic reviews to determine whether racial preferences are still necessary for student body diversity. *Id.*

affirmative action is necessary in some situations, and if practiced properly, a lower court will apply *Grutter* to uphold the program.¹³

Native-born students of Hispanic and African heritage have significantly lower chances of being admitted to the flagship public institutions in California without affirmative action, as well as in Michigan, and perhaps in Texas, the battleground for the latest Supreme Court challenger, Abigail Fisher.¹⁴ In the law school context, for instance, minority enrollments continue to lag behind their percentages in the population.¹⁵ Students of color, overall, have accounted for about 20% of law school enrollments on average over the past decade, and by some reports are up to 25% in 2010–11.¹⁶

13. See, e.g., *Fisher v. Univ. of Tex.*, 631 F.3d 213, 237 (5th Cir. 2011) (concluding that through the University's admissions program, individuals from underrepresented minorities would add unique perspectives that are otherwise absent from its classrooms and ensure that graduates learn to work with members of racial groups in the workforce, especially in a very diverse state like Texas).

14. See Goodman, *supra* note 3, at 19 ("Access is continued by maintaining affirmative action programs. This continued access will increase the legitimacy of those who are admitted through the door—as those admitted subsequently rise to the leadership positions of our governments, courts and businesses."); Wightman, *supra* note 3, at 2 (finding in a study that "affirmative action policies are likely a necessary prerequisite to maintaining a diverse yet capable law school student body").

15. See EMBRACING THE OPPORTUNITIES FOR INCREASING DIVERSITY INTO THE LEGAL PROFESSION: COLLABORATING TO EXPAND THE PIPELINE 15 (2005), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/diversity/pipelinepostreport.authcheckdam.pdf [hereinafter PIPELINE REPORT] (demonstrating the 2005 disproportionate application rate to ABA-accredited law schools by ethnicity: white students composed more than 65% of all applications, while African Americans were only 10.4%, Asians 8.3%, and Hispanic groups were 8.2%). There is attrition at every stage of the timeline from entering students to working in the profession. In 2004, students of color graduating from law school secured 19.7% of the law jobs nationwide. *Id.* In 2005, African Americans were 12.1% of the national population, and received 6.8% of law degrees conferred that year. *Id.* In 2005, Hispanics and Latinos were 12.5% of the national population, and received only 6.9% of law degrees conferred that year. *Id.* In 2005, Native American enrollment in law school was less than 400 students nationwide. In 2010, they were 1.3% of the matriculants. *Id.* See also *Applicants by Ethnic and Gender Group*, LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/ethnic-gender-applicants/archive> (last visited Jan. 5, 2015) (reporting the percentages of white and minority student enrollments in law schools).

16. See PIPELINE REPORT, *supra* note 15 ("In the past decade, law school enrollment for students of color has remained around 19[%]–21% of all law school applicants"). For actual statistics, see *End of Year Summary: ABA Applicants, Applications, Admissions, Enrollments, LSATS, CAS*, LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/lisac-volume-summary> (last visited Jan. 5, 2015); *Applicants by Ethnic and Gender Group*, *supra* note 15 (Applicants in total ranged from 87,500 in 2010, down to 78,800 in 2011, and 67,700 in 2012, and the percentage in change of ethnicity from the prior year was negative 10.7% in 2011 and was negative 13.5% in 2012). See also *Matriculants by Ethnicity and Gender Group*, LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/ethnic-gender-matriculants> (last visited Jan. 5, 2015). From 2010–2012 Asians and African Americans accounted for about 9% of

Tracing the root of these statistical disparities leads back to public schooling and its demise in California since Proposition 13,¹⁷ and nationwide since *Rodriguez* declined to find a fundamental right to equal educational funding and held that “economic” disparities in public education do not violate the Constitution.¹⁸ *Rodriguez*’s legacy is that students from middle and upper socioeconomic classes move to the better public schools (often in the suburbs) or choose private school.¹⁹ However, in many urban school districts, students are largely Latino or African American.²⁰ De facto education segregation in primary and secondary schools remains permissible since *Missouri v. Jenkins*.²¹ This de facto segregation leads to varying quality of education based on variations in wealth, which are closely correlated to variations in race and ethnicity.

the matriculants and Hispanics accounted for about 8.4%, while whites made up between 65%–69%. *Id.* Please note that due to significant changes in data collection methods, race/ethnicity data collected by the Law School Admissions Council after 2009 are not directly comparable to prior data. *Id.* See also *Women and Minorities in Law Firms – By Race and Ethnicity*, NAT’L ASS’N FOR LAW PLACEMENT (Jan. 2012), <http://www.nalp.org/> (search “Women and Minorities in Law Firms”; then follow “Show Bulletin Articles” hyperlink) (discussing the small representation of minority lawyers at law firms).

17. For the actual text of Proposition 13, see CAL. CONST. art. XIII A, and for a brief overview of its impact on school spending in California, see *Proposition 13*, EDUC. DATA P’SHIP, <http://www.ed-data.k12.ca.us/pages/proposition13.aspx> (last updated Apr. 1, 2012).

18. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 54–55 (1973) (concluding that education does not qualify as a fundamental interest because it is “not among the rights afforded explicit protection” under the federal constitution, and “to the extent that the [school financing system] results in unequal expenditures between children who happen to reside in different districts,” disagreeing that “such [economic] disparities are the product of a system that is so irrational as to be invidiously discriminatory.”).

19. See Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1397–98 (1994) (noting a tendency for communities to sort themselves on basis of socioeconomic status); Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1839–40 (2007) (noting that the current discrepancies between rich and poor school districts occurred post-World War II era when many middle and upper class Americans left cities to settle in prosperous homogenous suburbs and that this discrepancy was aggravated with the use of the local property tax for school funding); Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 504–05 (2010) (noting that the U.S. Supreme Court’s subsequent opinions from *Rodriguez*, such as *Milliken v. Bradley*, 418 U.S. 717 (1974), and its progeny, incentivized white flight).

20. During the 2011–12 school year, the enrollment by ethnic groups in the Los Angeles Unified School District (“LAUSD”) included: 72.3% Hispanic, 9.6% African American, 10.1% White American, 4% Asian American, and 3.1% other. *Enrollment by Ethnicity for 2011–12*, CAL. DEP’T EDUC. (Sept. 26, 2012), <http://dq.cde.ca.gov/dataquest/Enrollment/EthnicEnr.aspx?cChoice=DistEnrEth&cYear=2011-12&cSelect=+1932276—CEA+LOS+ANGELES+CO&TheCounty=%u>.

21. *Missouri v. Jenkins*, 495 U.S. 33, 50 (1990) (holding that imposing an increase in property taxes levied by school districts to insure funding for desegregation of district’s public schools violated principles of federal/state comity).

The most recent Supreme Court case on public education is *Fisher*, which presented the question of whether the race-conscious admissions policy at the University of Texas at Austin violated the Equal Protection Clause of the Constitution.²² The Court's analysis focused on whether that affirmative action program was narrowly tailored to serve a compelling interest, and thus satisfies the test of "strict scrutiny."²³ In *Fisher*, the Court upheld the strict scrutiny standard, while *adding* teeth (or bite) and *subtracting* university deference from the narrow tailoring requirement.²⁴ The University of Texas at Austin tried a top ten percent plan ("top 10% plan" or "top 10% GPA plan"), which had some success,²⁵ but since its impact was limited,²⁶ admissions officers re-injected race²⁷ and ethnicity as a "factor of a factor of a factor"²⁸ after the *Grutter* decision permitted this option.²⁹

22. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2415 (2013).

23. See Chris Chambers Goodman, *Beneath the Veil: Corollaries on Diversity and Critical Mass Scholarships from Rawls' Original Position on Justice*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 287, 323 (2007) (noting that although the Supreme Court's rationale to justify the need for affirmative action programs has expanded to include diversity, the narrowly tailored requirement of the strict scrutiny test remains an obstacle for many of these programs).

24. *Fisher*, 133 S. Ct. at 2420. The court held that while narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, "strict scrutiny does require a court to examine with care, and not defer to, a university's 'serious, good faith consideration of workable race-neutral alternatives.'" *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003)).

25. The top ten percent law plan was successful in *some years* at improving student diversity beyond pre-1996 levels, the year *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), struck down the university's previous affirmative action policy. Brief for Petitioner at 4, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345). In 1996, the enrolled freshman class was 18.6% African American and Hispanic. *Id.* at 3. In 2004, the freshman class was 21.4% African American and Hispanic. *Id.* at 5. But in 2002, only 17.6% of the entering freshman class was African American and Hispanic, below 1996 levels. Brief for Respondents at 10, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

26. University officials did not believe the university's demographics were representative of Texas's, a minority-majority state that has experienced high population growth in its Hispanic population. Brief for Respondents, *supra* note 25. Despite up-and-down progress in diversity, 90% of classes with ten to twenty-four students—a class size the university saw as conducive to class discussion—enrolled zero or only one African American and/or Hispanic student in 2002. *Id.*

27. Hours after the *Grutter* decision, the University of Texas at Austin announced it would begin to expressly consider race in applications. Brief for Petitioner, *supra* note 25, at 5.

28. The now famous phrase "factor of a factor of a factor of a factor" originated from U.S. District Judge Sam Sparks' 2009 ruling in *Fisher* that granted summary judgment in the University of Texas at Austin's favor. See *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 608–09 (W.D. Tex. 2009) (explaining that race is one of seven special circumstances; special circumstances, is one of six factors in the personal achievement score, which is one of three factors in the Personal Achievement Index, which is one of two elements of a final score for admission).

29. See *Grutter*, 539 U.S. at 325, 334 (endorsing Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that student body diversity is a

By remanding the case to the Circuit court to re-evaluate the University's compliance with the narrow tailoring requirement—effectively requiring it to prove that there is no race-neutral means to accomplish diversity—the stage was set for a lower court determination that the University of Texas at Austin does *not* meet its burden to show that the top ten percent plan plus race as a “factor of a factor of a factor of a factor” is sufficiently narrowly tailored to satisfy this more rigorous version of strict scrutiny.³⁰ The Fifth Circuit performed the analysis and determined that the evidence presented at the trial court level in support of the summary judgment motion was sufficient to satisfy the narrow tailoring component of the test.³¹

II. WHAT *FISHER* COULD MEAN

A. *The Fisher Factor: Narrow Tailoring with Teeth*

The *Fisher* majority avoided ending affirmative action before Justice O'Connor's suggested 2028 timeline,³² although several justices would have supported such an outcome.³³ The prevalence of 5–4 decisions in recent years,

compelling state interest that can justify the use of race in university admissions under strict scrutiny, and finding that the University of Michigan law school's use of race in admissions is narrowly tailored to advance that interest because it is not a quota, rather, it only considers race as a “plus factor,” and uses race in a “flexible, nonmechanical way” to reach a “truly individualized consideration” of an application).

30. *Fisher*, 133 S. Ct. at 2421.

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

32. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 230–31, 246–47 (5th Cir. 2011) (holding that the university's admissions policy was supported by a compelling interest in achieving a critical mass of diversity, rather than outright racial balancing for its own sake; narrow tailoring did not require exhaustion of Texas Top Ten Percent Law as a constitutionally mandated alternative; and the university had not yet reached critical mass, which would render any race-based consideration unnecessary).

33. See *Fisher*, 133 S. Ct. at 2422 (Scalia, J., concurring); *id.* at 2422–33 (Thomas, J., concurring). In a one-paragraph concurrence, Justice Scalia restated his view in *Grutter* that “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.” *Id.* at 2422 (citations omitted). But because the petitioner did not ask the Court to overrule *Grutter*, Justice Scalia joined the Court's opinion in full. *Id.* Justice Thomas, in an eleven-page concurring opinion, restated his view in *Grutter* that “only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity sufficient to satisfy strict scrutiny.” *Id.* at 2424 (citations omitted). Because there is nothing pressing or necessary about obtaining the benefits of diversity in higher education, Thomas would have overturned *Grutter* and invalidated the UT-Austin program. *Id.* Just as racial discrimination did not justify segregation under *Brown*, racial discrimination did not justify the “alleged” educational benefits of diversity. *Id.*

along with the Court's new roster since *Grutter*, makes it likely that the Court will revisit affirmative action in higher education prior to 2028.³⁴

Although the Rehnquist Court already decided in *Grutter* that diversity in higher education is a compelling interest,³⁵ the Roberts Court could have chosen to reconsider that precedent and revise the interpretation of whether racial and ethnic diversity is indeed a compelling interest. Some would say that it was fortunate that the Court did not reconsider diversity as a compelling interest, while others note that the decision deters affirmative action programs because of its recognition that benign and invidious racial discrimination are held to the same strict scrutiny standard.

Given the Court's desire to avoid overturning itself on such a big question less than a decade later, the decision simply revised its interpretation of what constitutes "narrow tailoring" and what does not.³⁶ The Court's mandate that this university receive less deference than was accorded to the law school in *Grutter* means that the trial court will require additional proof to establish whether there are other options for accomplishing the university's diversity goal.³⁷ Further constricting of the narrow tailoring components of strict scrutiny need not be fatal to the University of Texas at Austin program. Given the current state of public education, the only proven, successful way to increase diversity, some say, is with race-conscious measures, and the Fifth

34. See Goodman, *supra* note 3, at 4 (noting the Court's latest roster change: Justice Alito replaced Justice O'Connor, Justice Roberts was appointed Chief, Justice Sotomayor was the latest appointment, and Justice Souter recently retired). "As the fifth vote in favor of upholding [*Grutter*'s] affirmative action program, the absence of Justice O'Connor could mean that the next diversity case that is presented to the Court could result in a far different decision—such as the overruling or curtailing of the holding in *Grutter*." *Id.*

35. See *Grutter*, 539 U.S. 306, 328–29 (2003).

36. See Goodman, *supra* note 23, at 337.

The U.S. Supreme Court roster has changed in the three years since *Grutter* and *Gratz*, and therefore if a race-conscious financial aid program was granted certiorari, the Court might follow reasoning other than that explained in the majority opinions, on the grounds that *stare decisis* is not implicated because of the differences between admissions and financial aid issues. If the Court notes this distinction, then the argument that the scholarship aid is sufficiently narrowly tailored to satisfy the strict scrutiny test is a stronger one than in the admissions context.

Id. See also Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits That Flow from a Diverse Student Body*, 35 PEPP. L. REV. 663, 667 (2008) [hereinafter Goodman, *Retaining Diversity*] ("As with any narrowly tailored program, any use of race must be limited in extent and duration, so the courts will also examine whether less extensive or less intrusive means are available.").

37. *Fisher*, 133 S. Ct. at 2420 ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.").

Circuit found such measures to be necessary in this case on remand.³⁸ Some scholars have found that socioeconomic status proxies do not produce any significant racial or ethnic diversity at the more elite educational levels,³⁹ and the Fifth Circuit rejected the argument that class, rather than race, should be the focus of affirmative action measures, stating that “[w]e are ill-equipped to sort out race, class, and socioeconomic structures,” or to conclude that “skin color is no longer an index of prejudice; that we would will it does not make it so.”⁴⁰ Recognizing the inter-relationship between race, class, and socioeconomic status does not mean that simply separating out race and leaving the other two classifications intact will lead to an effective race-neutral alternative.

B. A (Potentially) Adequate Race-Neutral Alternative

On the other hand, the *Fisher* decision could have been (almost) fatal to affirmative action if what was narrowly tailored in *Grutter* is no longer so in the post-*Fisher* legal landscape. The Fifth Circuit declined to remand the case back to the trial court,⁴¹ which it could have done if it deemed necessary an evaluation of additional evidence since the case was decided on summary judgment rather than after trial. Nevertheless, other courts seeking to reduce the substantial deference to universities that the *Grutter* court has been accused of providing may perform a different analysis and find that adequate race-neutral alternatives do exist.

38. *Fisher v. Univ. of Tex.*, 758 F.3d 633, 658 (5th Cir. 2014). *See also* Goodman, *Retaining Diversity*, *supra* note 36, at 685–88 (illustrating the benefits reaped from existing diversity education programs in higher education); Sullivan, *supra* note 3, at 1046–48 (explaining the difference between race-neutral programs and affirmative action programs and how the latter is essential for increasing diversity); Wightman, *supra* note 3, at 50 (concluding in a study that there continues to be a need for affirmative action admissions policies in legal education to assure diversity in the student body).

39. *See, e.g.*, Goodman, *supra* note 23, at 326–30 (listing ineffective race-neutral factors in presumptively increasing diversity such as athletic abilities, socioeconomic status, fluency in a second language, and a reverse grandfather clause among others); Wightman, *supra* note 3, at 39–40 (explaining how factors such as socioeconomic status, selectivity of undergraduate school and undergraduate major do not produce a highly qualified ethnically diverse student body like the consideration of race does). *See also* Goodman, *Retaining Diversity*, *supra* note 36, at 684 (explaining why UCLA’s program that included socioeconomic status in its admissions policy failed to increase racial diversity); Sullivan, *supra* note 3, at 1042–43 (using the Texas and UCLA Law School programs to demonstrate how racial proxies are less efficient for increasing diversity).

40. *Fisher*, 758 F.3d at 657.

41. *Id.* at 641 (“There is no clear benefit to remanding this case to the district court . . . [because] there are no new issues of fact that need to be resolved, nor is there any identified need for additional discovery; that the record is sufficiently developed; and that the found error is common to both this Court and the district court. It follows that a remand would likely result in duplication of effort.”).

A brief explanation of the admission process reveals some potential options for other university admissions officers; if any of them are viable, then the use of race will fail under the Court's articulated standard. When a university is considering academic merit, the applicant's high school GPA determines whether he or she is in the top 10% GPAs of the various eligible high schools.⁴² For those not in the top 10%, a university uses the applicant's SAT score and GPA to determine their academic index.⁴³ Universities like UT-Austin, for example, then evaluate personal factors, including race, to determine the applicant's personal index. They then plot these two indices on a matrix, determining where to draw the diagonal line between admission and denial.⁴⁴

Because the top ten percent GPA plan produces some diversity, due to the substantial segregation in public schools in Texas,⁴⁵ a similar percentage plan that uses SAT scores could be another race neutral way of increasing the diversity of students in the pool that is not part of the top 10% GPA. If the applicant's *high school SAT percentile* were factored in, rather than the nationwide SAT percentile or the actual SAT numerical score, those from lower performing schools would not be penalized by lower scores on the SAT. Lower scores are to be expected based on the quality of high school, prior educational preparation, as well as parental education and income levels, school resources and availability of quality extracurricular activities, as well race and ethnicity.⁴⁶ When considering those students, the university could

42. *Id.* at 638.

43. *Id.*

44. Brief for Respondents, *supra* note 25, at 12–15.

45. The Fifth Circuit noted on remand that the “sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system. The de facto segregation of schools in Texas enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions to diversity beyond race.” *Fisher*, 758 F.3d at 649–51. Similar situations exist in other states with percentile plans.

46. A statistical analysis by the College Board, which produces the SAT, found that extracurricular activities had a stronger impact on SAT scores than socioeconomic background. HOWARD T. EVERSON & ROGER E. MILLSAP, BEYOND INDIVIDUAL DIFFERENCES: EXPLORING SCHOOL EFFECTS ON SAT SCORES 8–9 (2004), available at <http://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-2004-3-exploring-school-effects-sat-scores.pdf>. Even when controlling for differences in family income and parental education, African Americans and Hispanics score lower on standardized tests than whites. See WAYNE J. CAMARA & AMY ELIZABETH SCHMIDT, GROUP DIFFERENCES IN STANDARDIZED TESTING AND SOCIAL STRATIFICATION 8–13 (1999), available at <http://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-1999-5-group-differences-standardized-testing-social-stratification.pdf>; Ezekiel J. Dixon-Román et al., *Race, Poverty and SAT Scores: Modeling the Influences of Family Income on Black and White High School Students' SAT Performance*, 115 TCHRS. COLL. REC., Apr. 2013, at 1, 3, available at <http://www.tcrecord.org/content.asp?contentid=16925>; Herbert W. Marsh & Sabina Kleitman, *Extracurricular School Activities: The Good, the Bad, and the Nonlinear*, 72 HARV. EDUC. REV. 464, 464–65 (2002).

index the SAT scores based on the *applicant's percentile for those in their high school who took the SAT test*. Thus, a person who scored at the 60% nationwide on the SAT might be in the top 10% of SAT takers in their particular high school, especially if their high school did not have a large number of well-prepared SAT test-takers.

Following this approach would likely raise the applicants' academic index scores, and combined with already favorable personal index scores, these applicants can be charted over the line into the "Admissible" category, potentially without the need to include their race as a personal index factor.

What this approach would do is to capitalize, much as the top ten percent plans do, on the inequalities in public education within states, by not blaming the students, but rather providing a more equal opportunity for all public school students to prove themselves in a public institution of higher education that their tax dollars support.⁴⁷

SAT test scores are useful in predicting grades in college, and therefore the lower SAT scores relative to their peers suggests lower grades in college; however, more research will need to be done to determine whether high achieving students (for their high school) outperform their SAT nationwide percentiles.⁴⁸ To the extent that top 10% grades at a low performing high school have been sufficient for those students to retain their academic standing at the university level, as for many they have been,⁴⁹ a score in the top tenth SAT percentile may be sufficient to retain academic standing as well. Universities would need to research whether relatively high SAT performance for one's high school could have a similar impact on the ability to achieve solid academic standing as having relatively high grades has had.

C. *Applying This Solution in States That Prohibit Affirmative Action*

Some jurisdictions no longer permit affirmative action in public institutions of higher learning regardless of narrowly tailoring and least restrictive alternatives, having abolished it by legislation or by popular vote,

47. The Texas top 10 percent law also applies to private school students attending schools that are accredited by the state. TEX. EDUC. CODE ANN. § 51.803(a)(1) (West 2013).

48. PAUL R. SACKETT ET AL., SOCIOECONOMIC STATUS AND THE RELATIONSHIP BETWEEN THE SAT AND FRESHMAN GPA: AN ANALYSIS OF DATA FROM 41 COLLEGES AND UNIVERSITIES 6 (2009), available at <http://research.collegeboard.org/sites/default/files/publications/2012/9/researchreport-2009-1-socioeconomic-status-sat-freshman-gpa-analysis-data.pdf>; see Rebecca Zwick & Igor Himelfarb, *The Effect of High School Socioeconomic Status on the Predictive Validity of SAT Scores and High School Grade-Point Average*, 48 J. EDUC. MEASUREMENT 101, 101 (2011).

49. See Kidder, *supra* note 4, at 95.

like Proposition 209 in California,⁵⁰ Proposition 2 in Michigan,⁵¹ and Initiative 424 in Nebraska.⁵² While private schools in these states are still able to use affirmative action under the *Grutter* decision, public schools must refrain from granting any admissions preference to applicants based on race, ethnicity, or national origin (among other factors).⁵³ In these states, race or ethnicity cannot even be a “factor of a factor of a factor.”

The challenge remains for public institutions within the states that have outlawed affirmative action⁵⁴ on several levels. First, most of those institutions have seen a pernicious drop in their domestic minority enrollments with the abolition of affirmative action.⁵⁵ Some of these schools—particularly the more

50. CAL. CONST. art. I, § 31(a) (“The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

51. MICH. CONST. art. 1, § 2 (“No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.”). The convention record of this section notes that the main areas of concern are equal opportunities in employment, education, housing and public accommodations. MICH. CONST. art. I, § 2, Convention Cmts.

52. NEB. CONST. art. I, § 30(1) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

53. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978). The Court in *Bakke* elaborated on this principle, indicating that Title VI of the Civil Rights Act proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies, not a private institution whose activities might not involve sufficient state or federal action. *Id.* at 328–29 (Brennan, J., concurring in part and dissenting in part). *See also* Goodman, *supra* note 23, at 288 (indicating that the Office of Civil Rights of the Department of Education has investigated public universities who continue to apply race conscious scholarship programs that are not race-neutral alternatives).

54. Other states that have outlawed affirmative action include: H. Con. Res. 2019 (Ariz. 2010); Prop. 209 (Cal. 1996); Exec. Order 99-281 (Fla. 1999); Initiative 424 (Neb. 2008); H.B. 623, 2011 Sess. (N.H. 2011); S.R. Res. 33, 54th Leg. 2d Sess. (Okla. 2012); H.B. 588 (Tex. 1997); Initiative 200 (Wash. 1998). *Affirmative Action: State Action*, NAT’L CONF. ST. LEG. (Apr. 2014), <http://www.ncsl.org/issues-research/educ/affirmative-action-state-action.aspx>.

55. *See* PIPELINE REPORT, *supra* note 15, at 14 (noting that in the states that ban affirmative action in public schools, “the admission rates of students of color in post-secondary educational institutions have plummeted.”); *see also* Sullivan, *supra* note 3, at 1041–42 (explaining that if race could no longer be used as a basis for preference in university admissions, then resegregation in public institutions would occur as private institutions who can still use race in admissions would be more attractive to minority applicants) (“[T]he basic scenario would be either that higher education in the aggregate, or elite and flagship institutions in particular, would suffer a considerable and publicly visible drop in black and Latino representation as compared with the current levels achieved under racially preferential admissions policies.”); Pamela Burdman, *UC Breathes Sigh of Relief Over Minority Enrollment*, S.F. CHRON., May 21, 1998, at A26 (reporting that in the first year of the Regents of the University of California system’s race-blind admissions policy, minority enrollments decreased at their most selective institutions).

elite—mitigated the depth of this drop-off by using international students to diversify their incoming classes.⁵⁶ For many of the other schools that do not share an international reputation, increasing minority enrollments in the absence of affirmative action would require lowering admission standards across the board.⁵⁷ Research studies demonstrate that the average SAT and ACT scores of Latino, Hispanic, and African American students are notably below those of Anglos and Asian Americans.⁵⁸

The second level of the challenge is that most universities are unlikely to reduce their academic standards given the increasingly competitive environment in university admissions.⁵⁹ While the efficacy of standardized test scores in the college admissions process is the subject of another debate,⁶⁰ even an increased reliance upon grade point averages could amount to a lowering of academic standards.⁶¹ It is true that grade point averages are not as racially

56. Goodman, *supra* note 23, at 331 (indicating that some elite educational institutions use international students to increase diversity as another race-neutral route).

57. Sullivan, *supra* note 3, at 1042–43. If such policies are banned, universities will seek to achieve diversity in some other way, including abandoning the traditional criteria for selection, like grades and standardized test scores. *Id.* This will occur because the black and Hispanic acceptance rates in higher education are clustered in the low end of the score and grade distributions. *Applicants by Ethnic and Gender Group*, *supra* note 15, at 18. Thus, higher education institutions may decrease the weight given to GPAs and standardized test scores and ultimately lower the admission standards in order to achieve diversity independent of affirmative action policies. *See* Sullivan, *supra* note 3, at 1043.

58. *See* William G. Bowen, Grutter: *Where Do We Go from Here?: The Impact of the Supreme Court Decisions in the University of Michigan Affirmative Action Cases*, 44 J. BLACKS HIGHER EDUC. 76, 79 (2004) (reporting that underrepresented minorities perform significantly less well on test scores of college preparation than do whites and Asians). *See also* PIPELINE REPORT, *supra* note 15, at 15 (noting that the Law School Admission Test and the bar exam passage rate for students of color are generally lower than whites); Kidder, *supra* note 4, at 91, 95.

59. *See, e.g.*, John Bound et al., *Playing the Admissions Game: Student Reactions to Increasing College Competition*, J. ECON PERSPECTIVES, Fall 2009, at 119 (noting the increasing competition to gain entry into American four-year colleges or universities in the last thirty to forty years).

60. *See* Goodman, *supra* note 23, at 316 (pointing to evidence that the SAT has a racial bias because it scores each item equally, which, since white students tend to do better on easy items while African Americans do so on hard items, negatively affects the scores of non-white students); Goodman, *supra* note 36, at 682 (noting that applicants with average LSAT scores can still become good lawyers) (“[S]tudents of any color with lower LSAT scores than the current competitive range for top schools are not necessarily, by virtue of their score, unqualified to attend those law schools, and can succeed, as earlier lawyers did, in spite of their LSAT scores.”); Wightman, *supra* note 3, at 29 (discussing that the LSAT is valid for a limited use, to see the acquired reading and verbal reasoning skills that have been correlated with academic successes in the first year of law school, but using it for a broader purpose “damages its validity”).

61. *See* Wightman, *supra* note 3, at 34 (presenting evidence that overreliance on the university GPA when law schools make admissions decisions will lead to predictable and

skewed, but the great disparities in the quality of public secondary education across the nation often have a larger negative impact on the level of preparedness of students from these underrepresented racial groups, despite their high grades.⁶² Unless the rigor of the specific secondary school curriculum is taken into account, it would be difficult to ensure that high grade point averages coincide with sufficiently rigorous secondary school preparation to lead to successful college placement and performance.⁶³

This leads to the third challenge—that when the rigor of the secondary school is assessed in the college admissions process, those who attend public high schools, especially in urban areas, are likely to have the level of rigor inversely proportional to the percentage of underrepresented minority students in that school.⁶⁴ Studies in several states support this assessment that public secondary schools with higher minority populations often perform at lower levels on standardized measures.⁶⁵ In fact, the only way to create a class with equal SAT score averages between African Americans and Anglos is to “discriminate against blacks.”⁶⁶ Thus, even those students with high grade point averages may not be as ready as their peers with similar grade point averages from other public secondary schools.⁶⁷

systematic exclusion of a large number of minority applicants from legal education when a large proportion of those applicants are qualified to undertake the rigor of a legal education).

62. See, e.g., Linda Darling-Hammond, *The Color Line in American Education: Race, Resources, and Student Achievement*, 1 DU BOIS REV. 213 (outlining current disparities in educational access and illustrating the relationships between race, educational resources, and student achievement). See Bowen, *supra* note 58, at 79 (reporting that underrepresented minorities do significantly less well on traditional measures for college preparation than do whites and Asians); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 103 (1995) (noting that the quality of the educational opportunities offered in the public schools of most American urban centers is “shockingly poor”); Roey Ahram et al., *Framing Urban School Challenges: The Problems to Examine When Implementing Response to Intervention*, RTI ACTION NETWORKS, <http://www.rtinetwork.org/learn/diversity/urban-school-challenges> (last visited Jan. 5, 2015) (indicating that urban school districts across America have the most underrepresented racial groups).

63. See SARAH E. REDFIELD, *DIVERSITY REALIZED: PUTTING THE WALK WITH THE TALK FOR DIVERSITY IN THE LEGAL PROFESSION* 85 (2009). See also MICHAEL J. PUMA ET AL., *PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES*, at v (1997), available at <http://files.eric.ed.gov/fulltext/ED413411.pdf> (“[W]hen measured against standardized test scores, a grade of ‘A’ in a high-poverty school is equivalent to a grade of about ‘C’ in a low-poverty school.”).

64. See PUMA ET AL., *supra* note 63, at 26, 58.

65. *Id.* at 58.

66. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 16 (1998). See also Kidder, *supra* note 4, at 99.

67. Charles Dervarics, *Study: Minority, Low-Income Students Lack Adequate Access to Educational Opportunities*, DIVERSE (Aug. 8, 2011), <http://diverseeducation.com/article/16180/#>.

In order to compensate for the lower levels of diverse student admissions based primarily on SAT scores, schools that increase reliance on grade point averages will in effect be admitting students who are less well prepared than those that they currently admit.⁶⁸ A more diverse class will also be a less prepared class in most cases because of the differences in rigor in their high school educations.⁶⁹ However, one University of Texas study refutes this notion, finding that the top ten percent students from lower-performing schools outperformed their GPA expectations.⁷⁰ If the rigor of the high school educations for applicants is equalized, then under the current system the class will be less diverse (again, in the absence of international students).⁷¹

For those colleges and universities at the upper tiers of the education hierarchy, these admissions decisions are a crucial aspect of self-preservation. Elite institutions cannot maintain their elite status in this global environment without racial and ethnic diversity, hence the move to include international students in their entering classes.⁷² The backlash over affirmative action has helped to increase the representation of diverse students from other nations, often at the cost or expense (literally given that they generally do not qualify for financial aid) of matriculation by students of color who were born in the United States.⁷³

68. Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1820 (2004).

69. See REDFIELD, *supra* note 63, at 51 (showing that underrepresented minorities have higher attrition rates in law school and lower bar passage rates); Patte Barth, *The Importance of High School Rigor*, AM. SCH. BOARD J., Nov. 2012, at 20–21, available at <http://riverside.school.boiseschools.org/modules/groups/homepagefiles/cms/3238147/File/Curriculum%20Information/The%20Importance%20of%20HS%20Rigor%20ASBJ%2011-12.pdf>; *Are High Schools Failing Their Students?: Strengthening Academic Rigor in High School Curriculum*, CTR. FOR COMPREHENSIVE SCH. REFORM & IMPROVEMENT (Oct. 2006), http://www.centerforsri.org/index.php?option=com_content&task=view&id=386&Itemid=5.

70. Marta Tienda & Sunny Xinchun Niu, *Flagships, Feeders, and the Texas Top 10% Law: A Test of the “Brain Drain” Hypothesis*, 77 J. HIGHER EDUC. 712, 732 (2006).

71. See Mark E. Engberg & Gregory C. Wolniak, *Examining the Effects of High School Contexts on Postsecondary Enrollment*, 51 J. ASS’N INST. RES. 132, 140, 146–48 (2010).

72. Goodman, *supra* note 23, at 331 (noting that some of the diversity in elite institutions comes from international students of color); Sullivan, *supra* note 3, at 1043 (arguing that the prospect of returning to zero diversity is “daunting” in higher education, and concluding that a crucial aspect of self-preservation for universities requires diversity).

73. CHRISTINE M. MATHEWS, CONG. RESEARCH SERV., NO. 97-746, FOREIGN SCIENCE AND ENGINEERING PRESENCE IN U.S. INSTITUTIONS AND THE LABOR FORCE 9–10 (2010) (explaining a cost of foreign students in graduate programs has been a subsidy out of U.S. taxpayer funds of foreign doctoral students over all American minority students); Goodman, *supra* note 23, at 331 (indicating that some elite higher education schools have been able to mitigate the drop of minority enrollments by using international students). However:

[d]iversity-based programs may create a false impression that past discrimination is being addressed by benefitting blacks who are not victims of past societal discrimination, such

Since elite institutions are already perceived as very elite, an increasing international rather than domestic enrollment will exacerbate this perception.⁷⁴ For those elite institutions that are also public, such a perception will increasingly undermine public (taxpayer) support of the institution.⁷⁵ Imagine if no California students were admitted to UCLA or University of California, Berkeley one year.⁷⁶ What would be the justification for continued taxpayer and government support for the institutions if they no longer served California resident students? They would employ Californians, of course, and through law and medical schools would serve California residents, but there are much cheaper ways to get such services without financing an elite educational institution or system. In high tax rate states like California and New York, citizens would be reluctant to support additional tax increases that would be necessary to secure additional state funding.

Similarly, imagine if no local students, of any color, could gain admission to UCLA or UC Berkeley. While not as troublesome as no Californians perhaps, admissions decisions with that result likely would have dire consequences and lead to legislative oversight or a proposition on the ballot in the next election cycle (given California's propensity for such things).⁷⁷ Is it much different if students of Hispanic and African heritage are effectively shut out unless they hail from a country other than this one?

CONCLUSION

While there will be some additional challenges in terms of academic preparedness, a top ten percent SAT plan provides a way to equalize educational opportunity and diversify even more, without explicitly using race as a factor of a factor at all. Some may say this proposed Texas top ten percent SAT/GPA compromise gives up too much ground, given that there is likely to be overlap between the top SAT takers and top GPA students at underperforming schools, thus barely increasing the diversity of the eligible or qualified applicant pool.⁷⁸ Others may protest that lower grades combined with

as recent black immigrants. Such programs may thus close the black-white gap with the wrong blacks, that is, with blacks who were not harmed by past societal discrimination. *Id.* at 331.

74. See Sullivan, *supra* note 3, at 1043. See also Goodman, *supra* note 23, at 331.

75. See MATHEWS, *supra* note 73, at 9–10 (explaining the U.S. taxpayer cost of funding foreign students over American minority students in graduate programs).

76. See Kidder, *supra* note 4, at 74–80, 88–89, 103.

77. As of 2010, California voters had approved 80 ballot initiatives. Kevin O'Leary, *How the Initiative Culture Broke California*, TIME (Feb. 26, 2010), <http://content.time.com/time/nation/article/0,8599,1968141-2,00.html>.

78. Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 505–07, 512 (2012); Mark C. Long & Marta

a relatively low SAT score, regardless of high school percentile, may undermine academic standards too significantly by admitting students with decreased potential for academic success,⁷⁹ though at least one study thus far provides contrary evidence of student successes. Taxpayers may be concerned when their high-achieving children are repeatedly declined admission to their state-funded institutions under such a plan because their relative SAT scores for their school will be too low for admission. All of these concerns may be the impetus needed to launch greater efforts to find assessments that result in a net diversity increase. The recent move to revise the SAT and reduce reliance on it for college admissions may become a positive step towards increasing diversity in higher education.

Tienda, *Changes in Texas Universities' Applicant Pools After the Hopwood Decision*, 39 SOC. SCI. RES. 48, 63 (2010).

79. Laycock, *supra* note 68, at 1820.

