THE NEXT ROUND OF LEGAL CHALLENGES AFTER *FISHER V. UNIVERSITY OF TEXAS*: THE FUTURE OF RACE-CONSCIOUS ADMISSIONS PROGRAMS

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This article discusses the element of race and its continued impact in the education system. The author focuses on the legal background of affirmative action or race-conscious admissions into institutions of higher education in addition to providing a theory of future race-conscious admissions plans in universities.

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"In order to get beyond racism, we must first take race into account."

– Justice Harry Blackmun[1]

Introduction

Race remains salient in our education system. The U.S. Census Bureau has documented the underrepresentation of students of color in colleges and universities across the U.S.[2] At the same time, K-12 public school districts throughout the country remain racially segregated.[3] Racially segregated schools are often correlated with higher levels of poverty, less experienced teachers, and lower levels of academic achievement.[4] In response, many universities have attempted to address this issue through affirmative action or race-conscious admissions programs. When employing a race-conscious admission plan, university officials take race into account when assembling their student bodies. One of the main goals of race-conscious policies is to try to ensure that the student

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[1] Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 407 (1978).
[2] Alex Richards, *Census Data Show Rise in College Degrees, but Also in Racial Gaps in Education,* CHRON. HIGHER EDUC. (Jan. 23, 2011), http://www.chronicle.com/article/Census-Data-Reveal-Rise-in/126026/.
[3] *See* Gary Orfield et al., *Brown at 60:* Great Progress, a Long Retreat *and an Uncertain Future*, CIV. RTS. PROJECT (May 15, 2014), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf; *see also* Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L. J. 1015, 1023–27 (2008).
[4] *See* Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus…Separation: Deepening Double Segregation for More Students*, CIV. RTS. PROJECT 19 (Sept. 2012). Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 326 (2009).

body composition at a university is not grossly out of proportion with the racial composition of the U.S.

These policies have attracted legal attention over the years, including examination by the U.S. Supreme Court. In the most recent case, the U.S. Supreme Court upheld the University of Texas' race-conscious admissions policy.[5] This decision has not ended the debate, however. Recently, the U.S. Department of Justice, under the Trump administration, sought a new band of lawyers to initiate lawsuits on behalf of rejected applicants who are alleging discriminatory practices in admissions.[6] Additionally, in July of 2018 President Trump rescinded the Guidance from the U.S. Departments of Education and Justice on race-conscious admissions.[7] To be certain, litigation will remain the reality in this area.[8] In fact, both Harvard University and the University of North Carolina (UNC) have been sued by Asian-American applicants and others who allege that the universities' admissions programs are discriminatory.

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[5] Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).
[6] Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*. N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html.
[7] U.S. Dep't of Educ. & Justice, Dear Colleague Letter on Race-Conscious Admissions (July 3, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf .
[8] *See* Complaint, Students for Fair Admissions v. President & Fellows of Harvard College (Harvard), 308 F.R.D. 39 (D. Mass. 2015) (No. 1:14-CV-14176) (2014); Complaint, Students for Fair Admissions v. University of North Carolina Chapel Hill (UNC), 319 F.R.D. 490 (No. 1:14-cv-00954) (2014).

After providing an overview of current debates surrounding this topic, the legal background, and the previous relevant case law, including the *Fisher* decision,[9] this article considers the future of race-conscious admissions plans in universities. In doing so, the lawsuits involving Harvard and UNC are briefly discussed.[10]

I. Current Debates Involving Race-Conscious Admissions

Race-conscious admissions programs have generated controversy.[11] Proponents of these policies argue that working and understanding people with different backgrounds prepares students for a diverse world, and enhances the learning environment for all students in many ways.[12] Some proponents also suggest that affirmative action programs help level the playing field and attempt to make up for years of discriminatory practices in schools.

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[9] *Fisher*, *supra* note 5.

[10] Complaint, Students for Fair Admissions v. President & Fellows of Harvard College (Harvard), 308 F.R.D. 39 (D. Mass. 2015) (No. 1:14-CV-14176) (2014); Complaint, Students for Fair Admissions v. University of North Carolina Chapel Hill (UNC), 319 F.R.D. 490 (No. 1:14-cv-00954) (2014).

[11] *See* Jamel K. Donnor, *Who's Qualified? Seeing Race in Color-Blind Times: Lessons From Fisher v. University of Texas*, 117 TCHRS. C. REC. 185 PIN CITE? OR ARE YOU CITING GENERALLY? GENERALLY – NO PIN CITE NEEDED (2015).

[12] GARY ORFIELD & ERICA FRANKENBERG, EDUCATIONAL DELUSIONS?: WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR (2013); Richard N. Pitt & Josh Packard, *Activating Diversity: The Impact of Student Race on Contributions to Course Discussions*, 53 SOC. Q. 295 (2012); John R. Logan et al., *The Geography of Inequality: Why Separate Means Unequal in American Public Schools.* 85 SOC. OF EDUC. 287 (2012); AM. COUNCIL ON EDUC. (ACE) & AM. ASS'N OF UNIV. PROFESSORS (AAUP), DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS (2000), https://www.aaup.org/NR/rdonlyres/97003B7B-055F-4318-B14A-5336321FB742/0/DIVREP.PDF; Suzanne Eckes, *Race-conscious admissions programs: Where do universities go from Grutter and Gratz?* 33 J. OF L. AND EDUC. 21 (2004).

Specifically, the effects of inadequate funding for public schools in low-income communities certainly impacts that pipeline of students of color into higher education; these inequities in the education system quietly privilege white students and those from advantaged backgrounds.[13] These inequities start at an early age; students of color are often more concentrated in high poverty schools.[14] Race-conscious admissions try to address some of these disparities.[15] Others argue, however, that race-conscious programs stigmatize students and harm the racial climate on campus.[16] Opponents also posit that race-conscious plans undermine basic meritocratic values and disfavor certain minority groups, such as Asian-Americans.[17] Oftentimes, those opposed to affirmative action policies contend that race is too heavily weighted[18] or that the U.S. Constitution is

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[13] Brief of Association of American Law Schools as Amici Curiae Supporting Respondents, Fisher v. Univ. of Texas, 2015 WL 6690035 (2015) (No. 14-981).
[14] *See* Salvatore Saporito & Deenesh Sohoni, *Mapping Educational Inequality: Concentrations of Poverty Among Poor and Minority Students in Public Schools*. 85 SOC. FORCES 1227 (2007).
[15] *See* Mitchell James Chang, *Quality Matters: Achieving Benefits Associated With Racial Diversity,* KIRWAN INST. (Oct. 2011), http://www.kirwaninstitute.osu.edu/reports/2011/10_2011_Achieving BenefitsAssociatedwithDiversity.pdf.

[16] *See* Angela Onwuachi-Willig, Emily Houh, & Mary Campbell, *Cracking the Egg: Which Came First – Stigma or Affirmative Action*, 96 CAL. L. REV. 1, 1299-1305 (citing that opponents argue that affirmative action programs create a stigma for students).
[17] Brief of Louis D. Brandeis Center for Human Rights Under Law et al. as Amici Curiae Supporting Petitioner, Fisher v. Univ. of Tex., 2012 WL 1961252 (2012).
[18] *See* Althea K. Nagai, *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Michigan*, CTR. FOR EQUAL EDUC. OPPORTUNITY (Oct. 17, 2006), http://www.ceousa.org/attachments/article/548/UM_UGRAD_final.pdf.

colorblind.[19] As a result, race-conscious or affirmative action programs continue to be legally challenged; the *Fisher* decision is the most recent example.[20]

Admissions programs are sometimes challenged due to university officials' consideration of race, but at the same time, there are other factors regularly considered in admissions which receive much less scrutiny. Specifically, in addition to GPA and test scores, some universities consider a variety of factors such as the rigor of courses taken in high school, personal essay quality, residency in underrepresented regions, leadership and service activities, *athletic expertise*, socio-economic status, *if your parent donated money*, or *if you are a legacy* [emphasis added].[21] While at first glance it may appear that when race is considered, students of color are given "unfair" advantages in admissions, but a more nuanced examination highlights that these other admissions factors may also give an unfair advantage. It is indeed curious as to why some of these other factors are not as widely discussed. For example, with regard to legacies, Kahlenberg found that nearly three-quarters of research

[19] Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016), (Justice Thomas dissenting).
[20] *See* Nikole Hannah-Jones, *What Abigail Fisher's Affirmative Action Case Was Really About,* PROPUBLICA (June 23, 2016, 12:28 PM), https://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r.
[21] Richard D. Kahlenberg, *Introduction*, *in* AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS (Richard D. Kahlenberg ed., 2010).

universities use legacy preference policies in admissions.[22] According to Kahlenberg, legacies are likely to be wealthier and whiter than the rest of the student body. In fact, an Office for Civil Rights investigation into legacies at Harvard University revealed that legacies oftentimes have lower credentials than others, and that they were admitted at twice the rate of non-legacies.[23]

A 2005 study found that being a legacy raised a student's potential to be admitted by almost 20% within the 19 selective universities included in the study.[24] Espenshade, Chung and Walling reported that while Hispanic students receive an equivalent of 185 extra SAT points in admissions and African Americans receive an extra 230 points, legacies receive 160 points (on a 1400 point scale).[25] Espenshade and Chung contend that elite universities often permit legacy preferences yet the race-conscious admissions policies remain the most controversial.[26]

Likewise, student athletes have also been found to raise a student's potential to be admitted into a university. For example, at

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[22] *Id*.
[23] Peter Schmidt, *A History of Legacy Preferences and Privilege*, *in* AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS 38 (Richard D. Kahlenberg ed., 2010).
[24] Daniel Golden, *An Analytical Survey of Legacy Preferences*, *in* AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS (Richard D. Kahlenberg ed., 2010).

[25] Thomas J. Espenshade et al., *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*. 85 Soc. Sci. Q. 1422 (2004).
[26] Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*. 86 SOC. SCI. Q. 293 (2005).

some Ivy League institutions, athletes can account for 20% of the class and as a group often have lower test scores and GPAs than other students in the class.[27] To be certain, allowing admission preferences for athletic ability or a parent's alma mater are merely a different type of affirmative action. As discussed below, the legal analysis when considering race is different from the analysis when considering legacy.

Other arguments focus on preferencing race-neutral approaches. Kahlenberg contends that while law schools are relying on race to create diversity, they do not pay close enough attention to socio-economic status.[28] He cited that at the top twenty law schools, the vast majority of their law students come from the top socioeconomic half of the population (89 percent for African Americans and 63 percent for Latinos).[29] Others argue, however, that assembling a more socioeconomically diverse student body

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[27] *See* WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES (2003); Jake New, *A Competitive Disadvantage,* INSIDE HIGHER EDUC. (Nov. 19, 2014), https://www.insidehighered.com/news/2014/11/19/are-selective-colleges-big-time-sports-greater-risk-compromising-academics.

[28] *See* Brief of Richard D. Kahlenberg as Amicus Curiae in Support of Neither Party, Fisher v. Univ. of Texas, 2015 WL 5345843 (Sept. 10, 2015) (No. 14-981).

[29] *See* Emily Bazelon, *Selective Colleges Are Shockingly Bad at Recruiting Poor Kids of All Races*, SLATE, (June 25, 2013, 12:55 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_affirmative_action_case_colleges_are_shockingly_bad_at_recruiting.html. W l; 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 137 (Richard D. Kahlenberg ed., 2010).

does not always result in racial diversity.[30] Krueger et al. observed that "[t]he correlation between race and family income, while strong, is not strong enough to permit the latter to function as a useful proxy for race in the pursuit of diversity."[31]

Some studies have raised concerns that socio-economic status will not be as effective in creating a racially and ethnically diverse class.[32] Howell predicts a 10% decrease in minority enrollment at selective schools if universities may no longer consider race in admissions.[33] For example, California universities may no longer consider race in admissions as a result of a state ballot initiative. After this initiative, minority enrollment at the state's selective schools dropped; African American enrollment at UC-Berkeley fell from 7% to 3%.[34] The consensus among much of this research is that attaining racial diversity at top schools would be difficult if universities resorted to considering only SES as opposed

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[30] Alan Krueger, Jesse Rothstein, and Sarah Turner, *Race, Income and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 AM. L. & ECON. REV. 282, 309 (2006).
[31] *Id*.
[32] *See* SIGAL ALON, RACE, CLASS AND AFFIRMATIVE ACTION (2015); Sean F. Reardon, Rachel Baker, Matt Kasman, Daniel Klasik, Joseph Townsend, *Can Socioeconomic Status Substitute for Race in Affirmative Action College Admissions Policies? Evidence From a Simulation Model,* CTR. FOR EDUC. POL'Y ANALYSIS (2016), https://www.ets.org/Media/Research/pdf/reardon_white_paper.pdf.
[33] Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*. 28 J. LAB. ECONS. 113 (2010), https://www.csus.edu/indiv/h/howellj/papers/JOLEproofs.pdf.

[34] Brief of Association of American Law Schools as Amici Curiae Supporting Respondents, Fisher v. Univ. of Texas, 2015 WL 6690035 (Nov. 2, 2015) (No. 14-981).

to race. Likewise, at the University of Michigan, which prohibited considering race in admissions after the passage of Proposal 2, African American enrollment decreased by over 25% and Latino enrollment fell by 20%.[35] Others cite research to the contrary. For example, one study revealed some success in maintaining or increasing enrollment of African American or Hispanic students after strategies targeting SES were adopted.[36] Others cite to the University of Colorado's admissions formula that increased racial and ethnic diversity when preference was given to those students from socioeconomically disadvantaged backgrounds.[37]

II. Legal Background

There are a few legal avenues for plaintiffs who file lawsuits that challenge affirmative action programs. For example, plaintiffs might allege violations under the U.S. Constitution and federal civil rights law, 42 U.S.C. 1983, when universities employ race-conscious admissions programs. The Equal Protection Clause of the Fourteenth Amendment states "[n]o State shall … deny to any

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[35] Brief of American Social Science Researchers as Amici Curiae Supporting Respondents, Fisher v. Univ. of Texas, 2012 WL 3308200 (Aug. 9, 2012) (No. 11-345).

[36] Halley Potter, *Transitioning to Race-Neutral Admissions: An Overview of Experiences in States Where Affirmative Action Has Been Banned*, *in* THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS 75-7 (Richard D. Kahlenberg ed., 2014).

[37] Matthew N. Gaertner, *Advancing College Access With Class-Based Affirmative Action*, *in* THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS (Richard D. Kahlenberg ed., 2014).

person within its jurisdiction the equal protection of the laws,"[38] requiring that "all persons similarly situated should be treated the same."[39] This clause was drafted by Congress during Reconstruction to ensure that African Americans were treated equally under the law. Given patterns of past discrimination, courts have interpreted the Fourteenth Amendment's Equal Protection Clause as requiring the state to provide more justification for the use of some classifications of individuals than others. In other words, The Court has employed different levels of scrutiny for different classes of people.[40] There are three levels of judicial scrutiny (i.e., strict scrutiny, mid-level scrutiny, and rational basis). For example, race falls under strict scrutiny, which requires both a compelling governmental objective and a demonstration that the classification is necessary to serve that interest.[41] When admissions policies are challenged in court, race would be subject to a different analysis than athletic ability, for example.

The next level is intermediate scrutiny, which is the standard used when the government makes sex-based classifications.[42] The

[38] U.S. CONST. AMEND. XIV, § 1 (1791).
[39] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985).
[40] *See* Grutter v. Bollinger, 539 U.S. 306 (2003).
[41] *See* Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L.J. 661 (2014); U.S. Dep't. of Justice & U.S. Dep't of Educ. (2011), *Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education* (Oct. 28, 2015), http://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html.
[42] Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1981).

government must demonstrate that the classification based on sex serves important governmental objectives and that "'the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[43] For example, it would be easier to justify a program focused on enrolling women in engineering schools than one focused on enrolling racial minorities because of the lower level of scrutiny assigned to sex. The third level of judicial scrutiny is referred to as rational basis review, which requires a legitimate government objective with a minimally rational relation between the means and the ends.[44] Government classifications based on disability, for example, falls under this level of scrutiny. It should be noted that the level of scrutiny applied to the classification does not turn on whether the purpose of the classification is benign or malicious.

As noted, federal statutory law is also oftentimes at issue. Title VI of the Civil Rights Act of 1964 covers discrimination based on race, color, and national origin.[45] It applies to any program or activity receiving federal financial assistance. When a program is found to have discriminated, the federal agency that provides the assistance can initiate fund termination proceedings or can refer the

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[43] *Id.* at 724 (quoting: *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150, (1980)).
[44] JAMES RAPP, EDUCATION LAW, Ch. 4, § 10C.02 (Matthew Bender & Co. 2017).
[45] Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.).

matter to the Department of Justice for appropriate legal action. Also, in order to obtain monetary damages under Title VI, the plaintiff must demonstrate that the institution that received federal funds intentionally violated Title VI. Whereas the Equal Protection Clause would not apply to private schools because there is no state action, Title VI applies to those private institutions that receive federal funding.

To be certain, several significant changes in public schools are a result of constitutional provisions and federal law.[46] While Title VI lifted barriers for students of color, other federal laws have provided protections for individuals with disabilities (i.e., Individuals with Disabilities of Education Act) and females (Title IX of the Education Amendments of 1972) in public schooling. Likewise, major federal court opinions have interpreted the U.S. Constitution to protect students' rights in education.[47] There is no doubt that laws and court opinions influence educational policy matters, and this is especially the case with race-conscious programs in universities. As such, key court decisions addressing race-conscious admissions programs are examined below.

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[46] *See* Patricia Lamiell, *How Should Politics Influence Education Policy?* TCHRS. C. (Feb. 10, 2012), (http://www.tc.columbia.edu/news.htm?articleID=8381.

[47] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

III. Selected Past Affirmative Action Cases in Higher Education

This section highlights five earlier race-conscious admissions cases that reached the Supreme Court. The Supreme Court's first decision addressing a university's consideration of race as part of its admissions program was decided in 1978.[48] In the *University of California Regents v. Bakke*, the plaintiff was a white male who had been rejected by the University of California Davis Medical School. The University had reserved sixteen places out of 100 in each class for "qualified" minorities. He filed a lawsuit, arguing that the medical school's use of race in its admissions program violated the Equal Protection Clause and Title VI. There were six different opinions and none of them had the support of a majority of the Court. Justice Powell, in a plurality opinion, delivered the judgment.[49] In sum, the Court ordered the University to admit Bakke. Four justices posited that racial quotas were impermissible, and Justice Powell did also agree that racial quotas violated the Equal Protection Clause.[50] The other four justices found that considering race was constitutionally permissible. Justice Powell joined this opinion as well, noting that race could be considered as one of many factors in admissions.

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[48] Bakke, *supra* note 1.
[49] *Id*. at 318.
[50] *Id*. at 324-25

Although Justice Powell agreed that diversity could be considered a compelling government interest, he did not find that the University's admissions policy was narrowly tailored. According to Justice Powell, the plan was not tailored enough because minority student admissions were considered separately and the school was perceived as admitting a fixed number of minority students. He asserted that the medical school's quota system, which reserved a specified number of seats for minorities, did not further the goal of diversity because he envisioned the term "diversity" to encompass more than just race. After *Bakke*, schools and universities were still unclear about what was legally permissible when considering race. The Court did, however, suggest that racial classification to remedy past instances of discrimination may not be permissible. Justice Powell stated that a "university's broad mission [of] education is incompatible with making the judicial, legislative, or administrative findings of the constitutional or statutory violations necessary to justify remedial racial classifications."[51] Two cases from the University of Michigan in 2003 provided further clarity to the diversity rationale.[52]

In 2003, in *Grutter v. Bollinger,* Justice O'Connor wrote for the majority upholding the University of Michigan law school's

[51] *Id*. at 308-09.
[52] Grutter v. Bollinger, 539 U.S. 306 (2003).

admissions program because it considered the applicant's characteristics, including race, holistically in the admissions process.[53] After the Court found that diversity was compelling, it next addressed whether the law school's program was narrowly tailored. The Court noted that when race-based action is necessary to further a compelling governmental interest, this action will not violate the Equal Protection Clause as long as the narrow-tailoring requirement is also satisfied. According to the Court, narrow tailoring does not require that every conceivable race-neutral policy must be attempted before an affirmative action program is adopted. Rejecting the race neutral percentage plan arguments advocated by the United States, the Court reasoned that the United States did not explain how such plans would work at the graduate school level. The Court further rejected the percentage plans because "they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[54]

In its analysis, the Court dismissed the Chief Justice's argument that the law school is attempting to achieve "racial balancing" in trying to attain a critical mass of minority students. In response to

[53] *Grutter*, 539 U.S. 306.
[54] *Id.* at 340.

this argument, the majority asserted that there is no quota because the number of underrepresented minority students "[enrolled in] law school differs substantially from their representation in the applicant pool and varies considerably for each group from year to year" (p. 336). Thus, the law school's policy was narrowly tailored because its affirmative action program considered many factors in addition to race when admitting students.

The *Gratz v. Bollinger* (2003) opinion was issued the same day as *Grutter*, but in this case the Court's majority struck down one of the University of Michigan's undergraduate affirmative action programs because it was not narrowly tailored.[55] With Justice Rehnquist writing for the majority, the Court held that the admissions program in the College of Literature, Science and the Arts automatically distributed twenty points to every single applicant from an "underrepresented minority" group. The Court reasoned that Justice Powell's opinion in *Bakke* emphasized taking a more holistic approach to admissions. Specifically, the Court stressed that Justice Powell's reasoning would not permit any single characteristic to automatically ensure an identifiable contribution to a university's diversity. The undergraduate's program of automatically distributing twenty points was not flexible. As a

[55] Gratz v. Bollinger, 539 U.S. 244 (2003).

result, the undergraduate program was found to violate the Equal Protection Clause.

As discussed in *Grutter,* the Court defined how race-conscious university admissions programs must be designed to be narrowly-tailored – as articulated in *Bakke* they cannot be a quota system that insulates certain applicants from competition with others based on race or ethnicity. The law school's admissions program in *Grutter* satisfied *Bakke's* distinction of recognizing race or ethnicity only as a "plus" among other characteristics, even if the school's goal was to attain a critical mass of underrepresented minority students. The law school considered each applicant as an individual, looking at how each may contribute to the diversity of the schools instead of in a more rigid way. Within these two decisions, the Supreme Court clarified that having a diverse student body is a compelling interest. The Court dispelled the notion that diversity in education had been foreclosed, either expressly or implicitly, by its affirmative action decisions since *Bakke*.

As noted, the *Fisher v. University of Texas* opinion is particularly significant not only because it validated existing legal doctrine, but because it reaffirmed that race-conscious admission plans in higher education are still possible.[56] In 2008, two white

[56] *See* Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

students applied for admission to the University of Texas-Austin and were denied. They filed suit, arguing that the university engaged in racial stereotyping and discriminated against them based on their race in violation of the Equal Protection Clause of the Fourteenth Amendment.[57] In order to increase racial and ethnic diversity at the University, in 1997, the state legislature created a plan where 10% of each graduating class in Texas high schools would be accepted at the University of Texas.[58] The university admitted about 81% of the freshman class under this plan in 2008. Those students who did not fall within the top 10% of their graduating high school class, could still enter a separate application pool where university officials would consider other factors (e.g., special talents, race, leadership qualities). This admissions policy has led to increased enrollment for black and Latino students.[59]

While proponents argue that the top 10% plan is useful, it does not permit universities to consider the unique qualities of an individual. For example, due to highly segregated K-12 schools in Texas, minorities in less competitive school districts could receive an unfair advantage. To illustrate, a minority student who actually has a much stronger application (higher test scores, GPA, better written personal statement) might be in the top 20% of his class and

[57] *Id*. at 2202-3.
[58] *Id*. at 2218.
[59] *Id*.

not be admitted under the 10% policy. This student who has a lot of potential would be denied because he attended a very competitive and high achieving high school. At the same time, a student of color in a very low performing school with a much weaker application would be admitted if he was in the top 10% of his class. Thus, in addition to the more rigid 10% plan, a flexible and holistic process was designed for university officials to consider such imperfect situations and assemble a class that advances its educational goals, including diversity. The university believed that its plan aligned with the Supreme Court's earlier ruling in *Grutter v. Bollinger*.

The lead plaintiff in this case, Abigail Fisher, was in the top 12% of her high school class and was considered within this pool for admission. She had a 3.59 GPA and an 1180 on the SAT.[60] The 25th and 75th percentile of the incoming class scored between 1120 and 1370 on the SAT.[61] Ms. Fisher also participated in her high school orchestra, Habitat for Humanity, and math competitions.[62] The second plaintiff eventually withdrew from this case. The federal district court upheld the University's admissions policy, finding that it was consistent with the holding in *Grutter v.*

[60] Plaintiff's Second Amended Complaing, Abigail Noel, FISHER v. UNIV. OF TEXAS AT AUSTIN, 2007 WL 7318510, AT *33 (W.D. Tex. 2008).
[61] *Id*.
[62] *Id*. at *35.

Bollinger.[63] The Fifth Circuit Court of Appeals affirmed this decision and a request by Fisher for an *en banc* review (e.g. a request to have the case reheard in front of all active judges in that circuit) was denied.[64] The U.S. Supreme Court decided to hear the case and issued an opinion in 2013.[65] In a 7-1 decision, the Supreme Court vacated the Fifth Circuit's opinion and sent the case back to the lower court with instructions to more carefully analyze the University's admissions policies (*Fisher I*).[66] The Court needed the university to demonstrate that its admissions plan was narrowly tailored to obtain the education benefits of diversity.

In June 2016, in a 4-3 decision, the U.S. Supreme Court upheld the University of Texas' race-conscious admissions policy; it found no violation of the Equal Protection Clause (*Fisher II*).[67] Justice Kagan recused herself from this decision because she was involved with this issue when she served as the U.S. Solicitor General. Justice Kennedy wrote the opinion, which was surprising to many because he had never before voted to uphold a race-conscious admission plan.

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[63] Fisher v. Univ. of Texas at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009), aff'd, 631 F.3d 213 (5th Cir. 2011), vacated and remanded, 570 U.S. 297, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013), and aff'd, 758 F.3d 633 (5th Cir. 2014).
[64] Fisher v. Univ. of Texas at Austin, 644 F.3d 301 (5th Cir. 2011).
[65] Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013)
[66] *Id.* at 312-15
[67] Fisher, *supra* note 56, at 2210.

The Court ruled that the University presented sufficient evidence that its 10% policy was not adequate to meets its diversity goals and that race could be considered as part of a broader assessment of qualifications. The Court articulated a few controlling principles to be considered when determining the constitutionality of a university's race-conscious admissions policy. First, "[r]ace may not be considered [by university officials] unless the admissions process can withstand strict scrutiny," which requires university officials to clearly demonstrate that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary. . to the accomplishment of its purpose."[68] Also, after a university gives "a reasoned, principled explanation" for its plan, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals."[69] This deference is not absolute; the majority highlighted that universities maintain a duty to constantly review and refine their affirmative action policies, requiring "periodic reassessment of the constitutionality, and efficacy, of its admissions program."[70] It also

[68] *Id*. at 2208.

[69] *Id*.

[70] *Id*. at 2210.

warned that the university "should remain mindful that diversity takes many forms" and refrain from rigid racial classifications.[71]

The Court further clarified that the compelling interest that justifies consideration of race in college admissions policies is not an interest in enrolling a certain number of minority students. Instead, a university may implement a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity. Justice Kennedy observed that "[a] university is in large part defined by those intangible 'qualities which are incapable of objective measurement but which make for greatness,'" and that "[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.[72] But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."[73] The majority stressed that when considering race in admissions, it should be a "factor of a factor of a factor."[74]

It is important to note that the majority highlighted that the University of Texas' program is unique from other affirmative

[71] *Id*.
[72] *Id*. at 2214.
[73] *Id*. at 2214.
[74] *Id*. at 2207.

action policies because "it combines holistic review with a percentage plan."[75] Significantly, the majority referred to the University's approach as "sui generis," which means that it is one-of-a-kind. The fact that the University first attempted race neutral measures and then carefully considered a race-conscious plan appeared to be an important factor in the decision. The Court asserted that "[t]he component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan."[76]

IV. Discussion and Implications of Previous Court Opinions

Although *Fisher II* (2016) reaffirmed *Bakke* (1978), *Grutter* (2003), and *Fisher* (2013), it does provide a more detailed blueprint to universities that wish to adopt race-conscious plans. For example, Laurence Tribe, Loeb University Professor and professor of constitutional law, commented that:

> . . . *Fisher v. Texas* means that race-conscious affirmative action programs in higher education will be upheld as long as they follow the

[75] *Id*. at 2208.
[76] *Id*. at 2208-09.

> Court's guidelines for avoiding crude racial quotas and for fine-tuning those programs over time on the basis of intelligently articulated educational philosophies targeting the many dimensions of diversity, as Harvard's programs of affirmative action have taken great care to do…. What some feared (and others hoped) would be the death knell for affirmative action in colleges and universities has instead become a new lease on life for affirmative action and a blueprint to follow going forward. Quite apart from the way today's decision will be of help to Harvard in fending off the pending attack on its admissions policies, this is a huge national landmark for racial inclusion, all the more significant because of the bullet the nation dodged. . .[77]

[77] Marina N. Bolotnikova, *Harvard's Stake in the Fisher v. Texas Affirmative Action Case*. HARVARD MAG., p. 1 (June 23, 2016),

Indeed, this straight-forward opinion validated existing precedent. The majority clearly permits educational institutions to adopt affirmative action programs that meet constitutional requirements. Justice Kennedy suggested that the university's goals were clear and that they advanced a compelling interest. The university also was able to demonstrate that the Ten Percent Plan did not produce meaningful diversity. The opinion also signals that universities and schools get some leeway to implement programs that work for them. However, at the same time, the opinion stresses that universities and schools must seriously consider and continuously monitor their race-conscious admissions plan. If circumstances change, the university may need to modify its plan. In *Fisher II*, the record indicated that the University of Texas took a very careful and thoughtful approach when creating and monitoring its race-conscious plan. For example, the administration held interviews and conducted data reviews of the plan.[78] Other universities would be wise to take note. Justice Kennedy included serious language about the need for universities to provide evidence for why their plan is necessary and narrowly tailored but at the same time suggests that universities know their practice better than courts.[79] When employing a race-conscious plan, the Court

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http://harvardmagazine.com/2016/06/supreme-court-rejects-abigail-fisher-s-challenge-to-affirmative-action.

[78] Fisher, *supra* note 56, at 2209-11.

[79] *Id*. at 2210-2214.

continued to emphasize that the careful review of the uniqueness of the applicant is necessary.[80] The court stressed preference for race-neutral policies and emphasized that when no "workable race-neutral alternatives" would achieve the same educational benefits of diversity, a race-conscious plan could be justified.[81]

Although this decision is a win for affirmative action proponents, the decision is narrow. As noted, the Court observed that the University of Texas' program was both complex and unique, which suggests that context matters.[82] While universities will be able to use *Grutter* and *Fisher* as blueprints, they would be wise to justify their unique circumstances for using a race-conscious plan. Justice Kennedy did leave the door open to future litigation in *Fisher II* when he suggested that universities must continue to review the race-conscious policies to evaluate their positive and negative

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[80] Also, private educational institutions would not be directly bound by the Equal Protection Clause because they are not state actors, but many private schools and universities accept federal financial assistance and are therefore constrained by Title VI of the Civil Rights Act of 1964. Further, the reach of this decision does not extend to states that prohibit the consideration of race in admissions, such as California's Proposition 209.

[81] Fisher, *supra* note 56, at 2218. Some scholars argue that admission officers can use socio-economic status (SES) or other means to achieve desirable levels of diversity. The idea is that there are a higher percentage of minorities from low-income families. Advocates also argue that these types of plans are more legally viable. Specifically, unlike race, socio-economic status does not fall under strict scrutiny review. As such, admissions officers only need to demonstrate a legitimate governmental objective with a minimally rational relation between the means and the ends when considering a student's socio-economic status in admissions. In other words, legally, it is a much easier standard to satisfy. *See* Richard D. Kahlenberg, *Introduction*, *in* AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS (Richard D. Kahlenberg ed., 2010).

[82] *Id*. at 2205-14.

effects. Of course, many are speculating that with Justice Kennedy's retirement from the Court, this precedent could be at risk.[83]

V. Future Challenges: What Should We Anticipate Next?

Even though *Fisher* essentially reaffirmed *Grutter*, there will likely be a new frontier of legal challenges. Specifically, universities were given some leeway in designing narrowly tailored race-conscious admissions plans, but admissions factors will continue to be under the microscope. Roger Clegg, the president of the Center for Equal Opportunity, when referring to *Fisher* said that "[t]he court's decision leaves plenty of room for future challenges to racial preference policies at other schools."[84] This section explores the current litigation, other complaints filed with the U.S. Department of Education and recent attention to this issue from the U.S. Department of Justice.

a. Litigation. Even before *Fisher* was decided there were lawsuits filed against Harvard University and the University of North Carolina-Chapel Hill. In these lawsuits, the plaintiffs claim

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[83] Mark Landler & Maggie Haberman, *Brett Kavanaugh is Trump's Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html.

[84] Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, N.Y. TIMES (June 23, 2016), https://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html.

that the admissions plans in place at Harvard and UNC discriminate against high achieving whites and Asian-Americans.[85] In both lawsuits, the Students for Fair Admissions filed the lawsuit, and there are anonymous high achieving applicants who were rejected identified in the lawsuits.

At UNC, the plaintiffs allege violations of the Equal Protection Clause and Title VI, arguing that the policy uses race as a dominant factor in admissions and that racial preferences are unnecessary as race-neutral alternatives are available. In the complaint, the plaintiffs assert that the average high school GPA and SAT scores for Asian-American and white students are 4.57 and 1375 whereas the scores for African-American, Hispanic and American Indian/Alaska Native are 4.40 and 1269.[86] The plaintiffs would like to see a new plan in place that is similar to the University of Texas' top ten percent plan. They contend that with the ten percent plan in place, minority enrollment would dramatically increase.[87]

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[85] *See* William B. Plowman, *Affirmative Action Lawsuits Hit Harvard and UNC*, CBSNEWS (Nov. 17, 2014), http://www.cbsnews.com/news/affirmative-action-lawsuits-hit-harvard-and-unc/; Complaint, Students for Fair Admissions v. President & Fellows of Harvard College (Harvard), 308 F.R.D. 39 (D. Mass. 2015) (No. 1:14-CV-14176) (2014); Complaint, Students for Fair Admissions v. University of North Carolina Chapel Hill (UNC), 319 F.R.D. 490 (No. 1:14-cv-00954) (2014).

[86] Complaint, Students for Fair Admissions v. University of North Carolina Chapel Hill (UNC), 319 F.R.D. 490, 19 (No. 1:14-cv-00954) (2014).

[87] *Id*.

The plaintiffs in the Harvard case argued that the university's affirmative action program uses illegal quotas, employed racial balancing, and that Asian-American students are held to a higher standard.[88] As a result, they contend that Harvard engaged in racial balancing, which violates Title VI and the Equal Protection Clause. In the Harvard complaint, the plaintiffs also discuss that legacy preferences and the children of large donors should be eliminated because these legacy and donor spots preference white, wealthy applicants and disadvantage minority applicants and applicants from low socioeconomic households. Harvard's filings state that each applicant is considered as a whole person where race is used flexibly and only one factor of many.[89] There have been more than 400 legal filings in this case.

The basic argument in both cases is that these admissions programs do not satisfy strict scrutiny requirements.[90] They posit that the Supreme Court has failed to end racial bias in race-conscious programs, and they want to see earlier affirmative action decisions such as *Bakke* and *Grutter* overruled. Although the plaintiffs agree

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[88] *See* Complaint, Students for Fair Admissions v. President & Fellows of Harvard College (Harvard), 308 F.R.D. 39 (D. Mass. 2015) (No. 1:14-CV-14176) (2014).

[89] *See* Students for Fair Admissions v. President & Fellows of Harvard College, Civil Act No: 1:14-CV-14176-ADB (June 14, 2018), Memorandum in Support of Defendants.

[90] Complaint, Students for Fair Admissions v. President & Fellows of Harvard College (Harvard), 308 F.R.D. 39 (D. Mass. 2015) (No. 1:14-CV-14176) (2014); Complaint, Students for Fair Admissions v. University of North Carolina Chapel Hill (UNC), 319 F.R.D. 490 (No. 1:14-cv-00954) (2014).

that racial diversity at university campuses is important, they also contend that race-neutral alternatives should be employed. The media has weighed in on these high profile cases as well; one report pointed out that while Harvard's freshman class has remained between 16 and 19% Asian for the last 20 years, the Asian population in the U.S. has doubled.[91] Others discuss Harvards' issues of privacy that relate to students' admissions records.[92]

Although the *Fisher II* decision was narrow, it will still impact these cases. Specifically, Harvard and UNC will certainly need to demonstrate that they follow the Court's guidelines of carefully reviewing the admissions program to ensure that race is considered flexibly and that an individualistic review of applicants takes place. They would be wise to follow Professor Tribe's advice and demonstrate how over time admissions plans have been refined to target the different dimensions of diversity.[93]

Both of these lawsuits had been put on hold to await the resolution of the *Fisher II* decision, and they are now moving forward. Even though they are only in federal district courts at the time, the plaintiffs appear to be building a case that may eventually

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[91] Jeannie Suk Gersen, *The Uncomfortable Truth about Affirmative Action and Asian-Americans*, THE NEW YORKER (Aug. 10, 2017), https://www.newyorker.com/news/news-desk/the-uncomfortable-truth-about-affirmative-action-and-asian-americans.
[92] Anemona Hartocollis, *Asian-Americans Suing Harvard Say Admissions Files Show Discrimination*, N.Y. TIMES (April 4, 2018), https://www.nytimes.com/2018/04/04/us/harvard-asian-admission.html.
[93] Bolotnikova, *supra* note 59.

reach the Supreme Court. Harvard's trial is scheduled for October 2018[94] and UNC's should take place in April 2019.[95] While these cases focus on the unique facts at Harvard and UNC, they will arguably have implications for other universities that have similar competitive admissions programs. In June 2018, motions for summary judgment were filed in the Harvard case and the Students for Fair Admissions highlight that Asian-American students are given the lowest "personal rating" of any racial group.[96] Personal ratings refer to soft skills where students might be evaluated on characteristics as a "positive personality" and other traits such as helpfulness, courage, and kindness. Harvard rates students based on academics, extracurriculars, athletics, personal traits and an overall score.[97]

It should also be noted that the Students for Fair Admissions filed a lawsuit against the University of Texas-Austin, but this time it is a state case.[98] In the complaint, the plaintiffs allege that university officials are violating the Texas constitution by

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[94] Students for Fair Admission, Inc. v. President & Fellows of Harvard Colllege, Joint Status Report, Civil Action No. 1:14-cv-14176-ADB (Mar. 9, 2018).
[95] Melissa Korn & Nicole Hong, *In Harvard Affirmative Action Suit, Filing to Provide Rare Look at Admissions Process.* WALL STREET J. (June 13, 2018), https://www.wsj.com/articles/court-filings-to-shine-light-on-how-harvard-employs-affirmative-action-in-admissions-1528905750.
[96] *See* Students for Fair Admissions v. President & Fellows of Harvard College, Civil Act No: 1:14-CV-14176-ADB (June 15, 2018), Plaintiff's Memorandum of Reasons in Support of its Motion for Summary Judgment.

[97] *See* Students for Fair Admissions, *supra* note 68.
[98] STUDENTS FOR FAIR ADMISSIONS, Lawsuit Updates (n.d.), https://studentsforfairadmissions.org/updates/.

discriminating against White and Asian students. The Texas Equal Rights Amendment bans discrimination based on "sex, race, color, creed or national origin."[99] They contend that the University of Texas should not give preference to minority students.

b. Complaints Filed with the U.S. Department of Education. In 2016, more than 130 organizations representing Asian-American interests filed a civil rights violation complaint with the U.S. Departments of Education and Justice requesting Yale, Brown, and Dartmouth's admissions policies be investigated due to concerns related to discriminatory practices.[100] The organizations highlight data from the U.S. Department of Education to demonstrate that Asian-American applicants need to score 140 points higher than a White student, 270 points higher than a Hispanic student and 450 points higher than an African American student in order to have the same chance at admission.[101] They argue that these institutions are engaging in racial quotas and caps to create their ideal racial balance.[102] Princeton was also investigated and

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[99] *See* Tex. Const., Art. 1, *§3a (1972)* (last visited Oct. 12, 2018) http://www.constitution.legis.state.tx.us/. Entire constitution? Section?

[100] Douglas Belkin, Asian-American Groups Seek Investigation Into Ivy League Admissions. WALL STREET J. (MAY 23, 2016, 7:29 PM), http://www.wsj.com/articles/asian-american-groups-seek-investigation-into-ivy-league-admissions-1464026150; Chris Fuchs, *Complaint Filed Against Yale, Dartmouth, and Brown Alleging Discrimination*. NBC NEWS (May 23, 2016, 11:06 AM), http://www.nbcnews.com/news/asian-america/groups-file-complaint-against-yale-dartmouth-brown-alleging-discrimination-n578666.

[101] Steve Cohen, *The Secret Quotas in College Admissions*, FORBES (July 6, 2015, 8:46 PM), https://www.forbes.com/sites/stevecohen/2015/07/06/the-secret-quotas-in-college-admissions/#62e2cc32b736

[102] Belkin, *supra* note 100.

cleared in 2015 by the U.S. Department of Education.[103] Throughout the investigation, Princeton maintained that it rejected students from all ethnic backgrounds and that there was evidence of bias. These complaints will no doubt continue in the post-*Fisher* era.

c. Recent Activity of the U.S. Department of Justice. Under the Trump Administration, the U.S. Department of Justice has begun to look into Harvard's admissions practices. It launched its own investigation in summer 2017.[104] This administrative investigation centers on allegations of discrimination against Asian-American applicants at Harvard and is examining whether Title VI has been violated.[105] The Department of Justice supports public disclosure of Harvard's application information and seeks to ensure compliance with Title VI. Harvard acknowledged that there is a public interest involved in this case, but that there should not be unfettered access to these records. Harvard argues that it must protect confidential and highly sensitive personal information of its prospective students.[106]

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[103] Princeton Univ. Office of Commc'ns, *OCR Finds No Evidence of Discrimination in Admissions Process,* PRINCETON UNIV. (Sept. 23, 2015), https://www.princeton.edu/news/2015/09/23/ocr-review-finds-no-evidence-discrimination-admission-process.

[104] Charlie Savage, *Asian-Americans' Complaint Prompted Justice Inquiry of College Admission*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/us/politics/asian-americans-complaint-prompted-justice-inquiry-of-college-admissions.html.

[105] *Id*.

[106] Michael Stratford, *Trump Administration Seeks to Open Harvard Admissions Files*, POLITICO (Apr. 6, 2018), https://www.politico.com/story/2018/04/06/trump-administration-seeks-to-open-harvard-admission-files-470185.

In July 2018, as noted, the Trump administration withdrew the Department's Guidance on race-conscious post-secondary policies.[107] Some speculate that this may begin a new round of litigation over race-conscious admissions programs.[108]

In addition to the litigation, complaints to the Departments of Education, and the activity at the Department of Justice, groups opposed to affirmative action policies will continue to target other areas. To be certain, litigation has not been the only method for challenging race-conscious admissions plans. Race-conscious programs have also been challenged through state ballot initiatives and legislation. For example, as mentioned, Proposition 209 in California, was a proposal to amend the state constitution to forbid any consideration of race or ethnicity in public decision-making, including admissions to state universities.[109] California voters adopted Proposition 209, and the recent *Fisher II* decision does not impact Proposition 209. Although *Fisher II* was a win for affirmative action, the battle is clearly not over in the courts, the departments, or in the state houses.

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[107] U.S. Dep't of Educ. & Justice, *supra* note 6.
[108] Delano R. Franklin & Samuel W. Zwickel, *Experts Disagree on Motivation for DOJ Harvard Probe*, THE HARVARD CRIMSON (Jan. 24, 2018), https://www.thecrimson.com/article/2018/1/24/motivations-DOJ-Harvard-probe/.
[109] Cal. Const. art. I, § 31.