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## COMMENTS

### FISHER'S CAUTIONARY TALE AND THE URGENT NEED FOR EQUAL ACCESS TO AN EXCELLENT EDUCATION

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Debates over race-conscious affirmative action in higher education admissions remain central to discussions about the meaning of equality and the role of education in advancing equal opportunity.<sup>1</sup> These debates continued last Term in the Supreme Court when, for only the second time in the Supreme Court's history, the Court held that an institution of higher education may consider an applicant's race as a factor to achieve diversity's educational benefits.<sup>2</sup> In *Fisher v. University of Texas at Austin (Fisher II)*,<sup>3</sup> the Court held that the University of Texas had presented sufficient evidence to establish that its pursuit of the educational benefits of diversity through a race-conscious admissions policy satisfied the Court's demanding strict scrutiny inquiry.<sup>4</sup> Some view *Fisher II* as cause for celebration and a victory for equal educational opportunity,<sup>5</sup> while those opposed to affirmative action vow to continue their battle against it and decry such policies as dis-

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<sup>1</sup> See Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from Brown to Grutter*, 7 U. PA. J. CONST. L. 809, 834–35 (2005); Lani Guinier, *The Supreme Court, 2002 Term — Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 135, 140, 202–03 (2003).

<sup>2</sup> The first case to uphold the consideration of race in university admissions was *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Grutter* affirmed the contention by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that approved of the consideration of race in the admissions policy of Harvard University as an effort to attain student diversity. See *Grutter*, 539 U.S. at 334–35 (citing *Bakke*, 438 U.S. at 315–17 (opinion of Powell, J.)).

<sup>3</sup> 136 S. Ct. 2198 (2016).

<sup>4</sup> *Id.* at 2210–14.

<sup>5</sup> See, e.g., Press Release, Civil Rights Project, UCLA, Statement by Civil Rights Project on *Fisher* Decision (June 23, 2016), <https://civilrightsproject.ucla.edu/news/news-and-announcements/2016-site-news/statement-by-civil-rights-project-on-fisher-decision> [<https://perma.cc/C752-BAKT>]; Press Release, The Leadership Conference on Civil & Human Rights, Civil and Human Rights Coalition Applauds Supreme Court Decision in College Diversity Case, (June 23, 2016), <http://www.civilrights.org/press/2016/fisher-ruling.html> [<https://perma.cc/9P3X-73PB>]; Sherrilyn Ifill, *U.S. Supreme Court Ruling Reaffirms the Importance of Diversity in College Admissions*, NAACP LEGAL DEFENSE FUND (June 23, 2016), <http://www.naacpldf.org/press-release/us-supreme-court-ruling-reaffirms-importance-diversity-college-admissions> [<https://perma.cc/94ZV-THAV>].

criminary.<sup>6</sup> Harvard University and the University of North Carolina are currently being sued over their consideration of race in admitting students.<sup>7</sup> A coalition of Asian American organizations filed complaints with the United States Department of Education (DOE) against Brown University, Dartmouth College, and Yale University in May 2016, alleging race-based discrimination in admissions at these schools.<sup>8</sup> Arizona, California, Florida, Michigan, Nebraska, New Hampshire, and Washington have banned the consideration of race in admissions by state universities,<sup>9</sup> and the Court has upheld the lawfulness of such bans.<sup>10</sup>

As these debates continue, it is important to understand that the Court's decisions on affirmative action and educational opportunity establish a fundamental conflict. The Court's jurisprudence on affirmative action requires an endpoint for affirmative action. In 2003, the Court in *Grutter v. Bollinger*<sup>11</sup> stated that affirmative action to ensure diversity's educational benefits must eventually come to end and suggested that that end point would be twenty-five years after *Grutter*.<sup>12</sup> In prior opinions, the Court also has noted the importance of an end to the consideration of race.<sup>13</sup> Even if a liberal majority on the Court extends the life of affirmative action in university admis-

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<sup>6</sup> See Robert Barnes, *Justices Deliver Surprising Boost to Backers of Affirmative Action*, WASH. POST, June 24, 2016, at A1; Adam Liptak, *Justices Uphold Race-Aware Admissions*, N.Y. TIMES, June 24, 2016, at A1; Emma Brown & Danielle Douglas-Gabriel, *Affirmative Action Advocates Shocked — and Thrilled — by Supreme Court's Ruling in University of Texas Case*, WASH. POST (June 23, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/06/23/affirmative-action-advocates-shocked-and-thrilled-by-supreme-courts-ruling-in-university-of-texas-case> [https://perma.cc/EK4E-MJ8B].

<sup>7</sup> Complaint, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 1:14-cv-14176 (D. Mass. Nov. 17, 2014); Complaint, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14-cv-00954 (M.D.N.C. Nov. 17, 2014); see also Marina N. Bolotnikova, *Harvard's Stake in the Fisher v. Texas Affirmative Action Case*, HARV. MAG. (June 23, 2016), <http://harvardmagazine.com/2016/06/supreme-court-rejects-abigail-fisher-s-challenge-to-affirmative-action> [https://perma.cc/3GTG-96KJ] (discussing Harvard University's amicus brief in support of the University of Texas in *Fisher II* and the pending litigation against Harvard alleging discrimination against Asian Americans in admissions).

<sup>8</sup> Douglas Belkin, *Ivy Schools Under Fire on Admissions*, WALL ST. J., May 24, 2016, at A2.

<sup>9</sup> See ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26; NEB. CONST. art. I, § 30; N.H. REV. STAT. ANN. § 187-A:16-a (2012); WASH. REV. CODE § 49.60.400 (2014); Fla. Exec. Order No. 99-281 (Nov. 9, 1999) (Governor Jeb Bush's "One Florida Initiative"); David G. Savage, *Court Finds Middle Ground on Race*, L.A. TIMES, June 25, 2013, at A1. For additional information on state ballot initiatives on affirmative action, see *Affirmative Action: State Action*, NAT'L CONF. ST. LEGISLATORS (Apr. 2014), <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx> [https://perma.cc/CH4K-JH5K].

<sup>10</sup> *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014).

<sup>11</sup> 539 U.S. 306 (2003).

<sup>12</sup> *Id.* at 342-43.

<sup>13</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion); *United Steelworkers v. Weber*, 443 U.S. 193, 208-09 (1979).

sions beyond *Grutter*'s 2028 deadline, the natural pendulum swings of the Court's composition are likely to lead to a conservative-leaning Court that eventually insists on an end to affirmative action.

Yet despite insistence on an end point for affirmative action, the Court's jurisprudence on equal educational opportunity has frustrated attempts at reform that might eventually obviate the need for affirmative action. Postsecondary institutions consider the race of applicants in substantial part because of the racial achievement gap between applicants on standardized test scores and the systemic disparities within elementary and secondary education that cause these gaps.<sup>14</sup> The Court closed a powerful door to addressing those gaps in *San Antonio Independent School District v. Rodriguez*.<sup>15</sup> In *Rodriguez*, the Court held that the United States Constitution neither recognizes a right to education nor provides a remedy for funding disparities between districts in a state.<sup>16</sup> While acknowledging the need for state funding reform, *Rodriguez* left such reforms to the laboratory of the states.<sup>17</sup> Although some reform has occurred, this laboratory has too often proven that states are unwilling to provide the equal access to an excellent education that all children deserve.<sup>18</sup> As a result, widespread racial and socioeconomic disparities in educational opportunity persist and remain a principal cause of the achievement gap between low-

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<sup>14</sup> WILLIAM G. BOWEN & DEREK BOK, THE SHARE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 1–3, 18–23 (1998). Counsel for the University of Texas acknowledged these reasons for the University's use of affirmative action at oral argument in *Fisher II*. Transcript of Oral Argument at 49, *Fisher II*, 136 S. Ct. 2198 (No. 14-981), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-981\\_onjq.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-981_onjq.pdf) [<https://perma.cc/US7U-A2SN>]. Justice Sotomayor also acknowledged the standardized test score gap as a factor that made it more difficult to admit African American students. *See id.* at 92. Professor Kimberly West-Faulcon's scholarship has described "improvement in the technology of mental testing," Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1272 (2011), and insightfully demonstrated how standardized tests designed according to more accurate theories of intelligence have been shown to reduce the gap between African American and white test scores from one standard deviation to approximately one half or one fourth of that amount or less with similar and sometimes better predictive power. *See id.* at 1272–77.

<sup>15</sup> 411 U.S. 1, 35 (1973). The Court also foreclosed litigation challenges to the disparate racial impact of educational disparities under Title VI of the Civil Rights Act of 1964 in *Alexander v. Sandoval*, 532 U.S. 275 (2001), when it held that the Act's disparate impact regulations could not be enforced in court. *Id.* at 288–93.

<sup>16</sup> *See Rodriguez*, 411 U.S. at 35–37.

<sup>17</sup> *See id.* at 58.

<sup>18</sup> *See* Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, *Creating New Pathways to Equal Educational Opportunity*, in THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 263, 264, 268–70 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015) [hereinafter THE ENDURING LEGACY OF RODRIGUEZ]; Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 963–64 (2015) (identifying equal access to an excellent education as the proper goal of education reform and defining this phrase).

income and minority students and their more affluent and white peers.<sup>19</sup> Therefore, although the Court insists that affirmative action must eventually end, the Court has washed its hands of the underlying opportunity gaps that lead institutions to rely on affirmative action.

In this Comment, I argue that much greater care and attention must be paid to the educational opportunity gaps and resulting achievement gaps that prompt many colleges and universities to rely on affirmative action. Increased attention to greater equality and excellence in elementary and secondary education can help reduce or eliminate the need for affirmative action, which is an approach that fundamentally aims to ensure equality.<sup>20</sup> Without additional attention to closing opportunity gaps, the Court may declare that the time has come for affirmative action to end, but the United States will not be equipped to maintain diverse, selective postsecondary institutions<sup>21</sup> and the many benefits that they bring.<sup>22</sup>

Before presenting a long-term plan to close educational opportunity and achievement gaps, I explain how, in the near term, it is important to understand the impact that *Fisher II* will have on the ability of institutions to achieve diversity in their entering classes. In this regard, *Fisher II* offers some assistance to institutions that want to employ affirmative action, but also provides a cautionary tale about the demanding evidentiary burden that these institutions must carry to prevail. Thus, *Fisher II* should serve less as a cause for celebration and more as a call to action for those who need to prepare the evidentiary record and research that defending affirmative action will require.

Given the Court's insistence on the importance of considering race-neutral alternatives, I also recommend that universities consider "educational disadvantage" as a race-neutral alternative in admissions. I first describe the educational disadvantages that confront many stu-

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<sup>19</sup> See Robinson, *supra* note 18, at 961–62; Kevin G. Welner & Prudence L. Carter, *Achievement Gaps Arise from Opportunity Gaps*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 1, 1–3 (Prudence L. Carter & Kevin G. Welner eds., 2013) [hereinafter CLOSING THE OPPORTUNITY GAP]; *infra* section II.A, pp. 206–10.

<sup>20</sup> See Grutter v. Bollinger, 539 U.S. 306, 330–33 (2003) (discussing how diversity in higher education institutions helps achieve the important societal aims of making higher education accessible for all races, preparing students for a diverse workforce, and developing diverse leaders); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989) (noting that the ultimate aim of the remedial consideration of race is to advance equality). For an early legal analysis of the efforts of affirmative action to achieve equality, see generally Walter J. Leonard, *Introduction: A Step Toward Equality: Affirmative Action and Equal Employment Opportunity*, 4 BLACK L.J. 214 (1975).

<sup>21</sup> Only an estimated twenty to thirty percent of all four-year institutions are selective. See BOWEN & BOK, *supra* note 14, at 15. Most institutions accept all qualified applicants. *Id.*

<sup>22</sup> *Id.* at 276, 279 (explaining that diverse postsecondary institutions yield such benefits as students learning to interact with individuals of other races in an increasingly diverse society, graduates contributing leadership and civic participation, and the institutions advancing the aims of a democratic society).

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dents, particularly minority and poor students. I contend that the Court should not end affirmative action in higher education until these educational disadvantages are eradicated. I then explore how institutions could consider educational disadvantage in ways that promote the educational benefits of diversity. As discussed below, research reveals that a variety of forms of educational disadvantage inflict greater harm on minority students. Universities could structure their recognition of educational disadvantage in admissions in ways that acknowledge the racial disparities in educational opportunity that cause the achievement gap, while considering the full scope of educational disadvantages in ways that prevent educational disadvantage from serving as a proxy for race.

I then present my long-term theory for how to close opportunity gaps by explaining the need for federal leadership for reform because of the ineffectiveness of state and local efforts. My theory builds on federal policymaking strengths, while also creating new forms of state and local control over education.<sup>23</sup> My approach envisions the federal government serving as the ultimate guarantor of equal access to an excellent education. The federal government would partner with the states in ways that make achieving this essential national goal a reality. In addition, the Court should overturn *Rodriguez* to provide a uniform federal remedy for closing opportunity gaps. Collectively, these efforts can help to reduce reliance on affirmative action to address achievement gaps and prepare selective institutions for the eventual demise of affirmative action.

This Comment proceeds in three parts. Part I describes the admissions program at the University of Texas at Austin and summarizes the *Fisher I*<sup>24</sup> and *II* opinions. Part I also analyzes how *Fisher II* may benefit universities that seek to consider an applicant's race among many factors to assemble a diverse class. Part I examines how, at the same time, *Fisher II* may make it harder for universities that do so to withstand the Court's demanding evidentiary burden. This Comment then turns to both a short- and long-term approach that can help institutions and the nation to prepare for the eventual demise of affirmative action. Part II describes the nature and breadth of the educational opportunity gap and contends that, in the short term, universities should consider educational disadvantage as a positive race-neutral factor that could assist institutions in assembling a diverse class. Turning to a longer-term solution, Part III analyzes how the federal government, including the Supreme Court, should take action that can close the elementary and secondary educational opportunity and

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<sup>23</sup> Robinson, *supra* note 18, at 984–85, 1014–16.

<sup>24</sup> *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (2013).

achievement gaps in ways that can help institutions enroll diverse student bodies even after affirmative action ends.

### I. A CRITIQUE OF *FISHER II*'S MIXED MESSAGES

*Fisher II* sends mixed signals to institutions that employ affirmative action. Several aspects of *Fisher II* can be interpreted to assist institutions that employ affirmative action. However, *Fisher II* also applied a demanding evidentiary burden to establish the constitutionality of affirmative action. This Part begins with a summary of the admissions plan at the University of Texas at Austin and the *Fisher I* and *II* decisions. It then considers the mixed messages within *Fisher II* and concludes that it provides a cautionary tale to institutions that employ affirmative action.

#### A. Fisher I and II

The *Fisher* case challenged admissions standards at the University of Texas at Austin (the University).<sup>25</sup> In its ongoing efforts to admit a diverse student body, the University has employed three programs to admit candidates in recent decades.<sup>26</sup> First, prior to 1997, the University considered an Academic Index (AI) — which assigns a numerical score to the candidate's academic performance in high school and standardized test scores — and the candidate's race.<sup>27</sup> The Fifth Circuit held in *Hopwood v. Texas*<sup>28</sup> that this approach violated the Equal Protection Clause because it did not advance a compelling state interest as required by the Supreme Court for the consideration of an individual's race.<sup>29</sup>

In response to the *Hopwood* decision, the University ended its consideration of race and developed a Personal Achievement Index (PAI) to consider along with the AI.<sup>30</sup> The PAI involves a holistic review of how an applicant can contribute to the University by assessing an applicant's work experience, leadership, extracurricular activities, community service, and awards, as well as any unique circumstances that provide information on the background of a student.<sup>31</sup> The Texas legislature also responded to *Hopwood* in 1997 by adopting the Top Ten Percent Law, which offers automatic acceptance to any state university to any student from Texas who graduates within the top ten percent of

<sup>25</sup> *Id.* at 2415.

<sup>26</sup> *Id.* at 2419–20.

<sup>27</sup> *Id.* at 2415.

<sup>28</sup> 78 F.3d 932 (5th Cir. 1996).

<sup>29</sup> *Fisher I*, 133 S. Ct. at 2415 (citing *Hopwood*, 78 F.3d at 955).

<sup>30</sup> *See id.*

<sup>31</sup> *See id.* at 2415–16.

her or his high school class.<sup>32</sup> In response, the University revised its admissions approach to incorporate the Top Ten Percent Law in 1998.<sup>33</sup> This approach first admitted students under the Top Ten Percent Law and admitted the remaining students by combining consideration of the AI and PAI scores.<sup>34</sup> This approach did not consider race.<sup>35</sup>

After the United States Supreme Court upheld the inclusion of race as a factor that could be considered within a candidate's total application to achieve diversity in *Grutter*,<sup>36</sup> the University initiated a one-year study to determine whether its admissions approach enabled the University to offer diversity's educational benefits.<sup>37</sup> After concluding that it was not providing those benefits, the University revised its admissions approach in 2004 to the approach challenged by Abigail Fisher.<sup>38</sup> This approach includes an applicant's race as one element within the PAI score.<sup>39</sup> Once applicants receive a PAI and an AI score, these combined scores are plotted on a grid and the University admits "[a]ll students in the cells falling above a certain line."<sup>40</sup>

Fisher, who is white, applied to the University of Texas at Austin to be admitted in 2008 and was denied admission. She sued the University for considering race when it admits students.<sup>41</sup> Fisher argued that this admissions approach violated the Equal Protection Clause.<sup>42</sup> A federal district court granted summary judgment to the University, and the Fifth Circuit affirmed this decision.<sup>43</sup> The Fifth Circuit's opinion interpreted *Grutter* to require courts to defer to the

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<sup>32</sup> See *id.* at 2416 (citing TEX. EDUC. CODE ANN. § 51.803 (West 2009)). The percentage admitted each year can vary from the ten percent in the initial law. See TEX. EDUC. CODE ANN. § 51.803(a) (West 2015).

<sup>33</sup> *Fisher II*, 136 S. Ct. at 2205.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 539 U.S. 306, 343 (2003).

<sup>37</sup> *Fisher II*, 136 S. Ct. at 2205.

<sup>38</sup> *Fisher I*, 133 S. Ct. 2411, 2416 (2013).

<sup>39</sup> *Id.* The PAI score is determined by two components: a score on two required essays and a full-file review that determines the Personal Achievement Score (PAS). *Fisher II*, 136 S. Ct. at 2206. The PAS is determined by a whole file review that examines three factors: (1) the applicant's essays; (2) supplemental information, such as recommendation letters, writing samples, and resumes; and (3) an "applicant's potential contributions to the University's student body based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other 'special circumstances,'" with "special circumstances" including "socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race." *Id.*

<sup>40</sup> *Fisher I*, 133 S. Ct. at 2416.

<sup>41</sup> *Id.* at 2415.

<sup>42</sup> *Id.* at 2417.

<sup>43</sup> *Id.*

University's decision regarding both how it defined the benefits of diversity that established a compelling interest and whether the University's admissions approach satisfied strict scrutiny's narrow tailoring requirements.<sup>44</sup>

In *Fisher I*, the Supreme Court overturned the Fifth Circuit's decision and remanded the case.<sup>45</sup> The Court held that the University must satisfy strict scrutiny by proving that the consideration of race advances a compelling government interest and is narrowly tailored to achieve that interest.<sup>46</sup> It reaffirmed that a court should provide some deference to a university's academic decision that diversity's educational benefits form a critical element of its mission.<sup>47</sup> This standard would require a university to offer a "reasoned, principled explanation for the academic decision."<sup>48</sup> In overruling the Fifth Circuit, however, the Court ruled that "no deference" should be given to a university on whether its approach to achieving diversity's educational benefits is narrowly tailored to achieve that goal.<sup>49</sup> Instead, a university must prove that race must be considered to reap diversity's educational benefits, and the court must be convinced that "no workable race-neutral alternatives would produce the educational benefits of diversity."<sup>50</sup> In light of the lower court's erroneous deference to the University on the narrow tailoring inquiry, the Court remanded the case to the Fifth Circuit so it could apply the proper interpretation of strict scrutiny.<sup>51</sup> On remand, the Fifth Circuit again upheld the University's consideration of race in holistic review as necessary to achieve the diversity that assists its academic mission.<sup>52</sup> Fisher again appealed to the Supreme Court.

In *Fisher II*, Justice Kennedy wrote an opinion for the Court that affirmed the Fifth Circuit and highlighted three key legal principles from *Fisher I*. First, strict scrutiny requires a university to articulate "with clarity" that its aim in using race in admissions is both lawful under the Constitution and compelling, and that the use of race is necessary to accomplish that aim.<sup>53</sup> Second, the Court will provide some deference to the academic judgment to seek "the educational benefits

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2421–22. Justice Kagan did not participate in the decision. *Id.* at 2422. Justices Scalia and Thomas wrote separate concurring opinions. *Id.* (Scalia, J., concurring); *id.* at 2422–32 (Thomas, J., concurring). Justice Ginsburg dissented. *Id.* at 2432–34 (Ginsburg, J., dissenting).

<sup>46</sup> *Id.* at 2419 (majority opinion).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2420.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 2421–22.

<sup>52</sup> See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 656–57 (5th Cir. 2014).

<sup>53</sup> *Fisher II*, 136 S. Ct. at 2208.



that flow from student body diversity” and a university’s “reasoned, principled explanation” for its decision “that a diverse student body would serve its educational goals.”<sup>54</sup> Third, the Court will not give any deference to a university during the narrow tailoring analysis of strict scrutiny.<sup>55</sup>

Justice Kennedy then observed that the University’s program is “*sui generis*” because it combines a holistic approach along with a percentage plan.<sup>56</sup> Given Fisher’s failure to earn grades within the top ten percent of her high school class, she did not qualify for over seventy-five percent of the spaces allocated for the entering class.<sup>57</sup> Fisher did not challenge the constitutionality of the Top Ten Percent Plan. As a result, the Court lacked information about the students who were admitted under this plan and how they compared to holistic review admittees in advancing the diversity of the University.<sup>58</sup> The Court declined to remand the case to gather such information because the remand would result in only three years of data about the differences between these students.<sup>59</sup> The Texas Legislature’s adoption of the Top Ten Percent Plan circumscribed the options for the University’s admissions program, a fact that Justice Kennedy noted “may limit [the opinion’s] value for prospective guidance.”<sup>60</sup>

Even though the University was required by law to employ the Top Ten Percent Plan, it still bore the burden to engage in periodic review of the legality and effectiveness of its admissions policy. The Court noted that the University engaged in periodic review of the program.<sup>61</sup> It urged the University to continue its ongoing assessment of data and the experience of students so that the University could modify its admissions program to respond to “changing circumstances” and use race only to the extent necessary.<sup>62</sup>

The Court also rejected Fisher’s principal arguments against the affirmative action plan. The Court disagreed with the contention that the University had not clearly defined its compelling interest.<sup>63</sup> The University had noted a variety of benefits from enrolling a diverse student body, including preparing students for the growing diversity within workplaces and in society, reducing stereotypes, increasing understanding among racial groups, creating leaders with adequate legit-

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<sup>54</sup> *Id.* (quoting *Fisher I*, 133 S. Ct. at 2419).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2209.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2210.

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 2210–11.

imacy in the public's eyes, offering an academic experience that includes a rigorous dialogue, and cultivating experience with other cultures.<sup>64</sup> The University determined that its race-neutral admissions policies had not yielded the educational benefits of diversity. The Court explained:

Increasing minority enrollment may be instrumental to these educational benefits [of diversity], but it is not . . . a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.<sup>65</sup>

The University's justification for pursuing diversity had established the "reasoned, principled explanation" for its pursuit of these goals.<sup>66</sup>

The Court further rejected Fisher's argument that the University had achieved a critical mass of diverse students through the Top Ten Percent Plan combined with holistic review that did not consider race. The Court noted the extensive review that led the University to determine that the race-neutral policies were unsuccessful.<sup>67</sup> The Court also highlighted data that supported the University's conclusion, including the "consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002."<sup>68</sup> Less than a quarter of the courses with five or more students at the University included more than one African American student.<sup>69</sup> Minority students admitted under the race-neutral approaches reported feeling isolated and lonely.<sup>70</sup> The Court acknowledged the careful assessment that the University had undertaken and agreed that the University could reasonably conclude that it had not attained diversity's benefits.<sup>71</sup>

The Court also dismissed the argument that the consideration of race had only a limited impact on diversity, reasoning that after the University adopted race-conscious holistic review, enrollment of Hispanics increased by fifty-four percent and enrollment of African Americans increased by ninety-four percent.<sup>72</sup> The Court also rejected the suggestion that race-neutral alternatives were available to the University given that the University had employed such approaches

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<sup>64</sup> *See id.*

<sup>65</sup> *Id.* at 2210.

<sup>66</sup> *Id.* at 2211 (quoting *Fisher I*, 133 S. Ct. 2411, 2419 (2013)).

<sup>67</sup> *Id.* at 2211–12.

<sup>68</sup> *Id.* at 2212.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

for seven years and had found that they did not achieve the benefits of diversity.<sup>73</sup>

Justices Thomas and Alito dissented. Justice Thomas would have overruled *Grutter* and found that the University's consideration of race is prohibited by the Equal Protection Clause.<sup>74</sup> Justice Alito wrote a lengthy dissent, which Justice Thomas joined, criticizing the University for failing to articulate its goals with sufficient clarity to enable the Court to determine whether the goals had been met and for being unable to prove how the Top Ten Percent Plan did not achieve its goals.<sup>75</sup> He opined that the University could have achieved diversity's educational benefits through such race-neutral alternatives as increasing the number of students that are admitted through the Top Ten Percent Plan beyond seventy-five percent of the entering class, increasing the emphasis on socioeconomic factors, and employing additional outreach measures.<sup>76</sup> Justice Alito contended that given the demanding evidence required to satisfy strict scrutiny, the case should have been remanded for additional fact finding on what occurred during the three years of admissions when the University returned to considering race within its holistic review and what diversity goals were not met by the admission of significant numbers of minority students under the Top Ten Percent Plan.<sup>77</sup>

*B. How Fisher II Helps Institutions that Choose to Employ  
Affirmative Action*

*Fisher II* provides assistance to institutions that must defend affirmative action in admissions policies. Like *Fisher I*, *Fisher II* reaffirmed that diversity's educational benefits can serve as a compelling government interest.<sup>78</sup> *Fisher II* clarified that diversity is not "a goal that can or should be reduced to pure numbers."<sup>79</sup> Therefore, universities are not required to establish numerical goals for their affirmative action plans given the risk of such numbers being labeled quotas.<sup>80</sup> Instead, the Court appears willing to accept such benefits of diversity

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<sup>73</sup> *Id.* at 2212–13.

<sup>74</sup> *Id.* at 2215 (Thomas, J., dissenting).

<sup>75</sup> *Id.* at 2222–24, 2239–40, 2241–42 (Alito, J., dissenting). Along with Justice Thomas, Chief Justice Roberts joined Justice Alito's dissent.

<sup>76</sup> *Id.* at 2236. Justice Kennedy noted that the seventy-five percent limit was set by statute. *Id.* at 2206 (majority opinion).

<sup>77</sup> *Id.* at 2239–40 (Alito, J., dissenting).

<sup>78</sup> *See id.* at 2210–11 (majority opinion); *Fisher I*, 133 S. Ct. 2411, 2419 (2013).

<sup>79</sup> *Fisher II*, 136 S. Ct. at 2210.

<sup>80</sup> *Id.*; 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, 289 (2009) (noting that an elementary or secondary school that identifies desirable levels of diversity will likely be accused of implementing an unconstitutional quota).

as creating a diverse cadre of leaders, increasing understanding among the races, reducing stereotypes, and preparing students to enter a diverse workforce as goals that are sufficiently concrete.<sup>81</sup> This clarification in *Fisher II* will enable universities to avoid what I previously identified as the Scylla of inadequate evidence on the racial composition they need to achieve diversity and the Charybdis of significant specificity on this issue that the program is labeled an unconstitutional quota.<sup>82</sup>

*Fisher II* also lays bare the deficiencies of percentage plans. Justice Kennedy acknowledged the multiple flaws inherent to these plans. He noted that percentage plans rely on a single measure that can prevent universities from considering the broad array of factors that diversity seeks, thereby echoing *Grutter*'s acknowledgment of this same shortcoming.<sup>83</sup> Justice Kennedy also recognized that such plans aim to increase minority enrollment by admitting the top graduates from racially isolated high schools.<sup>84</sup> Given this explicit racial aim, increasing reliance on the Top Ten Percent Plan would not have made the University's admissions policy "more race neutral."<sup>85</sup> He highlighted that such plans create "perverse incentives" for students by discouraging them from selecting challenging classes or a more competitive school.<sup>86</sup> In addition, *Fisher II*'s rejection of the contention that the University should increase its admittees from the Top Ten Percent Plan reaffirms *Grutter*'s instruction that universities and colleges are not required to choose a race-neutral alternative that sacrifices assembling a class with a broad range of characteristics solely to achieve diversity.<sup>87</sup> Justice Kennedy's thorough exploration of the shortcomings of percentage plans suggests that future litigants will not succeed by pointing to such plans as viable race-neutral alternatives.

*Fisher II* did not mention the need for a termination point for affirmative action. Instead, it emphasized that the University should regularly evaluate its admissions policy in light of its ongoing data collection on the need for affirmative action.<sup>88</sup> The Court's silence in *Fisher II* about any durational limits on affirmative action, rather than reaffirming the importance of a termination point or *Grutter*'s 2028 endpoint, may allow institutions to employ affirmative action beyond the 2028 deadline as long as they are engaging in periodic review.

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<sup>81</sup> *Fisher II*, 136 S. Ct. at 2210.

<sup>82</sup> Robinson, *supra* note 80, at 290.

<sup>83</sup> *Fisher II*, 136 S. Ct. at 2213; *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

<sup>84</sup> *Fisher II*, 136 S. Ct. at 2213.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 2214.

<sup>87</sup> *Id.* at 2212–13; *Grutter*, 539 U.S. at 340.

<sup>88</sup> *Fisher II*, 136 S. Ct. at 2210.

Most importantly, *Fisher II* provides much-needed guidance on the types of evidence that colleges and universities will need to present in court to survive a constitutional challenge given the minimal guidance in *Grutter*.<sup>89</sup> For instance, the Court in *Fisher II* reviewed a thorough record on the inefficacy of some race-neutral efforts, such as outreach and scholarship programs.<sup>90</sup> Although each university will likely need to establish that it either attempted such efforts or carefully studied their potential impact and determined that they would be ineffective at enhancing diversity, the Court may be more likely to conclude that such efforts are ineffective after *Fisher II*. In addition, *Fisher II* affirmed that university officials should carefully gather a wide variety of data and evidence about why affirmative action is necessary at their schools.<sup>91</sup> This could include data on the aspects of diversity that race-neutral approaches are not yielding, evidence from faculty on the impact of a lack of diversity in their classes, and surveys and interviews with minority students about their experiences on campus in both diverse and nondiverse settings.

Universities also must be prepared to provide data establishing that their affirmative action programs have a significant effect on admitted and enrolled students, given that the Court in *Fisher II* considered it important that the University of Texas at Austin's data showed a substantial increase in African American and Hispanic enrollment after the University returned to considering race within its admissions process.<sup>92</sup> This contrasts with the Court's decision to strike down the affirmative action plans in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>93</sup> in part because the school districts could not show that the consideration of race had a significant effect.<sup>94</sup> By clearly establishing the evidence that universities must present to successfully defend the constitutionality of their race-conscious admissions programs, *Fisher II* offers an instructive roadmap for university officials.

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<sup>89</sup> See Mark W. Cordes, *Affirmative Action After Grutter and Gratz*, 24 N. ILL. U. L. REV. 691, 732 (2004); Euel W. Elliott & Andrew I.E. Ewob, *Beyond Gratz and Grutter: Prospects for Affirmative Action in the Aftermath of the Supreme Court's Michigan Decisions*, 22 REV. POL'Y RES. 541, 551 (2005); Peter Lehmuller & Dennis E. Gregory, *Affirmative Action: From Before Bakke to After Grutter*, 42 NASPA J. 430, 430 (2005).

<sup>90</sup> *Fisher II*, 136 S. Ct. at 2213.

<sup>91</sup> *Id.* at 2210. *Grutter* also noted that universities need to demonstrate that the use of race was necessary to achieve diversity. See *Grutter*, 539 U.S. at 340–42.

<sup>92</sup> *Fisher II*, 136 S. Ct. at 2212.

<sup>93</sup> 551 U.S. 701 (2007).

<sup>94</sup> *Id.* at 734.

### C. Fisher II's *Cautionary Tale for Affirmative Action*

Despite these potential benefits, however, *Fisher II* also erected new hurdles. *Fisher II* increased the evidentiary burdens for universities and colleges to prove the interrelated requirements that the consideration of race is necessary and that they faithfully assessed workable race-neutral alternatives beyond the standard required in *Grutter*. To understand the heightened evidentiary standard that *Fisher II* imposed, one first has to understand the Court's standard in *Grutter*.

*Grutter* determined that the University of Michigan Law School (the "Law School") satisfied the requirement that considering race was necessary to secure diversity's benefits. The Court noted that "[t]he Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."<sup>95</sup> This statement reflects the Court's deference to the Law School's "experience and expertise" that diversity serves as an essential means for the Law School to accomplish its mission.<sup>96</sup> The Court then acknowledged that it was calibrating its narrow tailoring analysis to the context of university admissions programs by taking account of differences in such programs from other types of affirmative action programs.<sup>97</sup> The defensible rejections of a lottery system, the percentage plans used by undergraduate institutions in several states, and a reduction in reliance on the LSAT and grades supported the Court's conclusion that the consideration of race was necessary for the Law School.<sup>98</sup> The Court also was satisfied that a university's periodic review of its admissions process would help it continue to assess the necessity of considering race, given *Grutter's* requirement that a race-conscious admissions policy must include a reasonable limit on the duration of the policy.<sup>99</sup>

The Court's analysis explicitly extended some deference to the Law School on the necessity requirement. This deference is evidenced by the Court's statement that "[w]e take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."<sup>100</sup> The Court's statement suggests a degree of trust in the Law School's assertions that diversity could not be accomplished by any other means and that the Law School would end af-

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<sup>95</sup> *Grutter*, 539 U.S. at 333.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 333-34.

<sup>98</sup> *Id.* at 340.

<sup>99</sup> *Id.* at 342.

<sup>100</sup> *Id.* at 343 (quoting Brief for Respondents at 34, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 402236, at \*34).

firmative action as soon as it could assemble a diverse class without its race-conscious admissions program.

*Grutter* similarly did not hold the Law School to a demanding standard when it concluded that the Law School had given sufficient consideration to race-neutral alternatives. Instead, the Court agreed with the Law School's reasons for rejecting three other approaches. The Court's opinion confirmed that a lottery approach and a reduction in the weight given to grades and LSAT scores would lead to a substantial reduction in diversity, the academic qualifications of the entering class, or both.<sup>101</sup> The Court also acknowledged that the percentage plans used in Texas, Florida, and California would prevent the Law School from individually assessing each applicant in ways that would enable it to enroll students with a broad range of diverse qualities.<sup>102</sup> The Court additionally questioned whether a percentage plan would work for a professional school, such as the Law School, or for other graduate programs.<sup>103</sup>

*Grutter* did not explain why the rejection of these race-neutral alternatives established that the Law School had given adequate consideration to race-neutral alternatives, nor what would be required for proving good faith consideration in the future.<sup>104</sup> For instance, although *Grutter* noted that the Law School should learn from the approaches used in states that have banned affirmative action, *Grutter* did not describe those approaches, other than percentage plans, and did not explain why those approaches, with the exception of percentage plans, would have been ineffective means for the Law School to enroll a diverse class.<sup>105</sup>

The Court's deference to the Law School is further evident in the Court's statement that a university must prove "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."<sup>106</sup> This formulation of the standard acknowledges that the Court offered credence — rather than skepticism — to the Law School's testimony in this regard. In addition, by taking the Law School "at its word" that it would like to switch to

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<sup>101</sup> *Id.* at 340.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See George La Noue & Kenneth L. Marcus, "Serious Consideration" of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991, 992–93 (2008); Curt A. Levey, *Troubled Waters Ahead for Race-Based Admissions*, 9 TEX. REV. L. & POL. 63, 67 & n.20 (2004).

<sup>105</sup> See *Grutter*, 539 U.S. at 342.

<sup>106</sup> *Id.* at 339. The necessity requirement is related to the good faith consideration of race-neutral alternatives requirement because proving that it is necessary to consider race to achieve diversity's benefits requires showing that race-neutral alternatives could not achieve the goal. See Eang L. Ngov, *Following Fisher: Narrowly Tailoring Affirmative Action*, 64 CATH. U. L. REV. 1, 8 (2014).

race-neutral alternatives, the Court showed great confidence in the Law School's ability to police itself, even though the narrow tailoring analysis is supposed to accomplish a strict judicial policing of the use of race.<sup>107</sup>

Perhaps *Grutter's* approach to race-neutral alternatives is best explained by its instruction that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."<sup>108</sup> Alternatively, this approach might be explained by the fact that the Court seemed to attribute some good faith to the Law School when it assessed the viability of race-neutral alternatives.<sup>109</sup> Whatever the reason, this approach raised the question of how much good faith consideration of race-neutral alternatives was enough to satisfy the Court. *Grutter's* failure to clarify what evidence was needed to show good faith consideration of race-neutral alternatives led some scholars to speculate about the types of evidence that institutions should gather to satisfy this requirement.<sup>110</sup>

The Court in *Fisher I* moved away from this deferential approach, and in *Fisher II* applied a more demanding evidentiary analysis than that of *Grutter*. In *Fisher I*, the Court remanded after rejecting the Fifth Circuit's deference to the University in the narrow tailoring analysis.<sup>111</sup> Scholars noted that this represented a significant shift in the Court's approach to affirmative action.<sup>112</sup> Instead of deferring to institutions on the narrow tailoring inquiry, *Fisher I* installed the courts as the final arbiters of this inquiry.<sup>113</sup>

*Fisher I* also raised the evidentiary bar on the consideration of race-neutral alternatives. *Fisher I* held that a "court must ultimately

<sup>107</sup> See *Fisher I*, 133 S. Ct. 2411, 2421 (2013).

<sup>108</sup> *Grutter*, 539 U.S. at 339.

<sup>109</sup> See Guinier, *supra* note 1, at 179.

<sup>110</sup> See, e.g., Ivan E. Bodensteiner, *Although Risky After Ricci and Parents Involved, Benign Race-Conscious Action Is Often Necessary*, 22 NAT'L BLACK L.J., no. 1, 2009, at 1, 37-38; La Noue & Marcus, *supra* note 104, at 1040-41.

<sup>111</sup> *Fisher I*, 133 S. Ct. at 2419-21 (explaining the judiciary's proper role in examining the narrow tailoring of a race-conscious admissions policy).

<sup>112</sup> See, e.g., Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 814 (2015) (explaining that "the one issue resolved by the Supreme Court in *Fisher*" was that courts should not give deference on the narrow tailoring analysis); Rebecca K. Lee, *Fisher v. University of Texas at Austin: Promoting Full Judicial Review and Process in Applying Strict Scrutiny*, 4 HOUS. L. REV. OFF REC. 33, 34-35 (2013) (commenting that *Fisher I* established that a university does not receive deference on the narrow tailoring analysis); Ngov, *supra* note 106, at 49 (noting that *Fisher I* clearly established that a university is not entitled to deference on the narrow tailoring analysis); Rodney A. Smolla, *Fisher v. University of Texas: Who Put the Holes in "Holistic"?*, 9 DUKE J. CONST. L. & PUB. POL'Y (SPECIAL ISSUE) 31, 51-52 (2013) ("The clear insistence that courts must not defer to that good-faith consideration is *Fisher's* new invention. It does not come from *Grutter*." *Id.* at 51.).

<sup>113</sup> See John A. Powell & Stephen Menendian, *Fisher v. Texas: The Limits of Exhaustion and the Future of Race-Conscious University Admissions*, 47 U. MICH. J.L. REFORM 899, 909 (2014).



be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>114</sup> As several scholars noted, this formulation shifted away from *Grutter*’s good faith assessment of race-neutral alternatives and trust in institutions in undertaking this inquiry, and instead replaced this approach with an exhaustion requirement that increased the difficulty of defending affirmative action.<sup>115</sup>

*Fisher II* applies this searching inquiry to the evidence that the University presented to prove necessity and to show the absence of available race-neutral alternatives. The University actually implemented race-neutral approaches for seven years.<sup>116</sup> It presented various types of evidence to show that it had not achieved diversity’s benefits during this time. It conducted a year-long review to assess this issue.<sup>117</sup> The University engaged in “months of study and deliberation, including retreats, interviews, [and] review of data.”<sup>118</sup> The Court noted that the University experienced ongoing stagnation in the enrollment of minorities when it employed a race-neutral approach.<sup>119</sup> This stagnation undermined the University’s capacity to include a diversity of perspectives within each entering class.<sup>120</sup> The University also provided evidence that minority students admitted using race-neutral holistic review reported significant isolation and loneliness.<sup>121</sup> Furthermore, a study of small classes at the University found that “only 21 percent of undergraduate classes with five or more students in them had more than one African-American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996.”<sup>122</sup> The Court found that the University had conducted a careful assessment of whether it was achieving diversity and had reasonably concluded that considering race was necessary to achieve diversity.<sup>123</sup>

If this is the new evidentiary threshold to establish the necessity of affirmative action, *Fisher II* sets a high bar in several ways. First, in addition to reaffirming the *Fisher I* pronouncement that no deference is applied within the narrowly tailored analysis, the Court in *Fisher II*

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<sup>114</sup> *Fisher I*, 133 S. Ct. at 2420.

<sup>115</sup> See Tomiko Brown-Nagin, *Rethinking Proxies for Disadvantage in Higher Education: A First Generation Students’ Project*, 2014 U. CHI. LEGAL F. 433, 460; Joseph O. Oluwole & Preston C. Green III, *Harrowing Through Narrow Tailoring: Voluntary Race-Conscious Student-Assignment Plans*, *Parents Involved and Fisher*, 14 WYO. L. REV. 705, 758–61 (2014); Powell & Menendian, *supra* note 113, at 909.

<sup>116</sup> *Fisher II*, 136 S. Ct. at 2213.

<sup>117</sup> *Id.* at 2211.

<sup>118</sup> *Id.* (alteration in original).

<sup>119</sup> *Id.* at 2211–12.

<sup>120</sup> See *id.* at 2212.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

reviewed data over the seven years in which affirmative action was suspended.<sup>124</sup> Seven years provided a substantial period of time for the University to assess the impact of its race-neutral efforts. When these efforts did not yield diversity's educational benefits, the University possessed significantly stronger evidence that it must consider race than a university would have based on hypothetical assessments of what might happen if an institution did not consider race. For instance, the Court noted the substantial increase in the percentage of Hispanics and African Americans admitted through holistic review once race was considered, with Hispanics showing a fifty-four percent increase and African Americans showing a ninety-four percent increase.<sup>125</sup> These increases established that considering an applicant's race had a "meaningful, if still limited," impact on the diversity of the University.<sup>126</sup> Although the University of Michigan Law School admissions policy upheld in *Grutter* did not have evidence from several years of eliminating affirmative action, it is unclear whether evidence of the actual impact of race-neutral alternatives will become the effective gold standard. Even if it does not, after *Fisher II* what evidence will be sufficiently persuasive to prove that the use of race is necessary when multiple race-neutral alternatives have not been implemented and proven unsuccessful?

Second, the University presented multiple types of data and research to support its conclusion that it needed to consider race. Even if the Court had rejected one or two types of evidence — such as the study of small classes or student interviews — the Court still had substantial evidence from demographic data and retreats to support its judgment. This suggests the wide array of evidence that the Court will likely expect from future litigants. For instance, the University provided a "39-page proposal" to support its return to affirmative action after its year-long study.<sup>127</sup> The Court's inclusion of the page length of this report suggests that the Court found the proposal's length probative of the thorough and careful nature of its analysis.<sup>128</sup>

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<sup>124</sup> See *id.* at 2211–12.

<sup>125</sup> *Id.* at 2212.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2211.

<sup>128</sup> In contrast, Justice Alito criticized the research and data that the University submitted as inadequate to establish that the University was pursuing a compelling interest consistent with the demands of strict scrutiny. *Id.* at 2224–36 (Alito, J., dissenting). For instance, regarding the study of small classes, he noted that the University did not assess whether holistic admittees were more or less likely to enroll in classes lacking diversity. See *id.* at 2226–27. Justice Alito also disapproved of the majority's acceptance of the University's failure to provide evidence on the differences between the admittees under the Top Ten Percent Plan and the holistic admittees. See *id.* at 2239–40.

Third, *Fisher II* also provides a careful record of the many race-neutral alternatives that the University actually implemented that proved ineffective. For instance, the University increased its recruiting of minority students and its budget for such efforts. It held more than 1000 events to recruit students.<sup>129</sup> The University also established three new scholarships that were aimed at diversifying the student body.<sup>130</sup> It created regional centers to assist with admissions.<sup>131</sup> These efforts demonstrate a substantial commitment of resources, personnel, and finances to admitting a diverse student body.

Justice Kennedy's review of the race-neutral alternatives in *Fisher II* suggests that the Court will be looking for far more extensive efforts from future universities and colleges than the efforts that it accepted from the Law School in *Grutter*. Although Justice Kennedy acknowledged *Grutter's* statement that every race-neutral alternative did not have to be exhausted, he also noted that a university must demonstrate that "workable" and "available" race-neutral alternatives would not accomplish the benefits of diversity.<sup>132</sup> It is unclear what evidence will be required of universities to prove this point, but *Fisher II* suggests that the Court will be expecting a considerable investment of a university's capital and staff to prove that potential race-neutral alternatives are not workable.

It could be the case that, to satisfy the Court on this issue, a university or college must first implement several race-neutral alternatives that ultimately prove ineffective to achieve diversity's educational benefits, and carefully study how other approaches would impact diversity. After *Fisher II*, institutions undoubtedly are admonished to match the University of Texas's deep commitment to pursuing such alternatives in ways that are feasible given the size and resources of each institution. Institutions must also provide persuasive evidence of why these efforts did not yield the educational benefits of diversity.

The fourth reason that *Fisher II* sets a high evidentiary bar is that the opinion acknowledged that race was a "factor of a factor of a factor" in the holistic-review calculus" of the University's admissions policy.<sup>133</sup> However, in states where the consideration of race has not been banned, universities may be employing an approach much closer to the admissions plan upheld in *Grutter* and the Harvard University approach that considered race as one factor among many factors, as dis-

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<sup>129</sup> *Id.* at 2213 (majority opinion).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 2208 (quoting *Fisher I*, 133 S. Ct. 2411, 2420 (2013)).

<sup>133</sup> *Id.* at 2207 (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009)).

cussed approvingly in *Bakke*.<sup>134</sup> Because the University of Texas at Austin considered race as a factor within an admissions factor in a multifaceted process, *Fisher II* raises the possibility that the Court could strike down a plan if a university affords race a significantly greater weight than the University of Texas at Austin did such that race influences substantially more admissions decisions. A harbinger of this approach can be found in the Court's comment that "[t]he fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality."<sup>135</sup> This new hallmark may serve as a stumbling block to institutions that consider race throughout the admissions process.

Finally, the Court repeatedly noted that the University must continually gather and assess additional data and information, and tailor its admissions approach in response to this evidence.<sup>136</sup> For example, the Court's opinion undoubtedly envisions the University gathering information in the future on the types of diversity that the University is able to accomplish through the Top Ten Percent Plan as compared to the race-conscious holistic review. This evidence was not demanded in *Fisher II* because Ms. Fisher did not challenge the Top Ten Percent Plan.<sup>137</sup> This suggests that despite the broad array of evidence provided in *Fisher II*, that same evidence may not be sufficient in a future case challenging the totality of the University's admissions policy.

*Fisher II* suggests that the warm reception that the University of Michigan Law School's admissions plan received in *Grutter* has likely ended. In its place, *Fisher II* offers a cautionary tale of the Court's plans to implement a closer and more demanding scrutiny of evidence and statistical data regarding the necessity to consider an applicant's race and the absence of viable race-neutral alternatives. *Fisher II*'s insistence on such thorough data and research on these issues may chill the use of affirmative action on campuses that want to avoid the risks of litigation or the costs of preparing a potential defense.<sup>138</sup> If *Fisher II* has such a chilling effect, it will contribute to the eventual demise of affirmative action on some college campuses.

In the short term, *Fisher I* and *II* may make it more difficult for institutions to defend affirmative action. Moreover, even if *Fisher II* ultimately guides institutions on how to satisfy strict scrutiny — as I

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<sup>134</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–18 (1978).

<sup>135</sup> *Fisher II*, 136 S. Ct. at 2212.

<sup>136</sup> *Id.* at 2210.

<sup>137</sup> *Id.* at 2209.

<sup>138</sup> See Danielle Holley-Walker, Essay, *Defining Race-Conscious Programs in the Fisher Era*, 57 HOW. L.J. 545, 552 (2014).

hope it does — rather than serves as a cautionary tale, the regular shifts in the Court’s composition along with its jurisprudence that requires an eventual endpoint for affirmative action ultimately will lead to the demise of affirmative action. Given this reality, the United States should adopt comprehensive and far-reaching reforms to remedy the educational opportunity disparities that cause the achievement gaps that lead some institutions to rely on affirmative action. The next Part explores the nature of these gaps and proposes an approach for institutions to explicitly acknowledge opportunity gaps in admissions in ways that may enhance diversity.

## II. UNDERSTANDING EDUCATIONAL OPPORTUNITY GAPS AND HOW THEY CAN SERVE AS RACE-NEUTRAL FACTORS THAT MAY ENHANCE DIVERSITY

Educational opportunities within the United States are not distributed equally, rationally, or fairly. Instead, zip codes, socioeconomic status, race, and geography often define whether a child receives a world-class education or a substandard one.<sup>139</sup> Opportunity gaps leave many students behind as the economy moves away from low-skill jobs and toward jobs that require higher-order thinking.<sup>140</sup> In addition, the United States pays a high cost for the low-quality education that it provides to many children. These costs often take the form of higher health care spending, lost income and tax revenues, increased housing and welfare assistance, greater crime, and less civic participation,<sup>141</sup> as

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<sup>139</sup> EQUITY & EXCELLENCE COMM’N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 14, 17–18 (2013); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 1 (2010); Kimberly Jenkins Robinson, *How Reconstructing Education Federalism Could Fulfill the Aims of Rodriguez*, in THE ENDURING LEGACY OF RODRIGUEZ, *supra* note 18, at 203, 212–13; Welner & Carter, *supra* note 19, at 1, 4–5.

<sup>140</sup> See Thomas Bailey, *Implications of Educational Inequality in a Global Economy*, in THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 74, 78–79, 92–93 (Clive R. Belfield & Henry M. Levin eds., 2007) [hereinafter THE PRICE WE PAY].

<sup>141</sup> Robinson, *supra* note 18, at 974 (citing Enrico Moretti, *Crime and the Costs of Criminal Justice*, in THE PRICE WE PAY, *supra* note 140, at 142, 157; Peter Muennig, *Consequences in Health Status and Costs*, in THE PRICE WE PAY, *supra* note 140, at 125, 137; Cecilia Elena Rouse, *Consequences for the Labor Market*, in THE PRICE WE PAY, *supra* note 140, at 99, 101; Jane Waldfogel et al., *Welfare and the Costs of Public Assistance*, in THE PRICE WE PAY, *supra* note 140, at 160, 173). I have also explored these costs elsewhere. See Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL’Y REV. (forthcoming 2016) (manuscript at 22–24) (citing, for example, PEW RESEARCH CTR., NONVOTERS: WHO THEY ARE, WHAT THEY THINK 2 (2012); Randi Hjalmarsson, Helena Holmlund & Matthew J. Lindquist, *The Effect of Education on Criminal Convictions and Incarceration: Causal Evidence from Micro-Data*, 125 ECON. J. 1290, 1325 (2015); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 183 (2004); Enrico Moretti, *Workers’*

well as a failure to prepare students adequately for military service<sup>142</sup> and to protect our security interests.<sup>143</sup>

Before the Court declares that the time for affirmative action has come to an end, the United States must first close the educational opportunity gaps and the resulting achievement gaps that lead many institutions to rely on affirmative action. Achieving these goals should enhance the ability of institutions to achieve diverse student bodies without affirmative action. In addition, using the achievement of these goals as the predicate for dismantling affirmative action would also prevent the Court from choosing an arbitrary end date that willfully ignores the underlying educational disparities and challenges that lead institutions to turn to affirmative action.

In this Part, I describe some of the disparities in educational opportunity and achievement in the United States with an emphasis on racial disparities. I then explain how postsecondary institutions could consider the nature of an applicant's educational disadvantage as a positive admissions factor that may enhance diversity.

### A. *Educational Opportunity and Achievement Gaps*

Racial minorities more often experience a wide range of disadvantages within schools. These disadvantages are evident in the teacher quality that many minority students receive. Latino and African American students are approximately twice as likely as their white or Asian peers to attend schools with over twenty percent of the teachers in their first year of teaching,<sup>144</sup> and students attending schools with high concentrations of minority students are twice as likely to be assigned to new teachers.<sup>145</sup> Indeed, “[b]y every measure of qualifications — certification, subject-matter background, pedagogical training, selectivity of college attended, test scores, or experience — less-qualified teachers are found in schools serving greater numbers of

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*Education, Spillovers, and Productivity: Evidence from Plant-Level Production Functions*, 94 AM. ECON. REV. 656, 683 (2004).

<sup>142</sup> Gerard Robinson, *The Closing of the Military Mind?*, AEIDEAS (Feb. 24, 2016, 3:00 PM), <http://www.aei.org/publication/the-closing-of-the-military-mind> [<https://perma.cc/LS46-26AS>] (citing CHRISTINA THEOKAS, EDUC. TR., SHUT OUT OF THE MILITARY: TODAY'S HIGH SCHOOL EDUCATION DOESN'T MEAN THAT YOU'RE READY FOR TODAY'S ARMY 1 (2010)).

<sup>143</sup> COUNCIL ON FOREIGN RELATIONS, U.S. EDUCATION REFORM AND NATIONAL SECURITY 7 (2012) (“The Task Force members believe America’s educational failures pose five distinct threats to national security: threats to economic growth and competitiveness, U.S. physical safety, intellectual property, U.S. global awareness, and U.S. unity and cohesion.”).

<sup>144</sup> U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, 2013–2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 9 (2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [<https://perma.cc/3XYJ-K5Q3>].

<sup>145</sup> HEATHER G. PESKE & KATI HAYCOCK, EDUC. TR., TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY 2 (2006).

low-income and minority students.”<sup>146</sup> These disparities in teacher quality adversely affect the achievement of minority and low-income students.<sup>147</sup>

Minority students also typically experience greater access to vocational and remedial courses and less access to challenging academic classes, rigorous curricula, and courses that prepare students for college.<sup>148</sup> Remedial courses often are geared toward lower-level cognitive skills and prepare students for low-status jobs, while more rigorous curricula yield higher-order skills and prepare students with the skills that the “global knowledge economy”<sup>149</sup> demands.<sup>150</sup> Although there has been a significant increase in the number of African American and Hispanic students taking at least one AP exam,<sup>151</sup> African American and American Indian students are more likely to attend high schools without a complete AP program, with complete defined as offering at least one AP class in science, mathematics, social science, and English.<sup>152</sup> In addition, the College Board, which administers AP Exams, found that African American students who graduated in 2013 were “the most underrepresented group in AP classrooms and in the population of successful AP Exam takers.”<sup>153</sup> Only 57% of African American students and 67% of Hispanic students enjoy access to the complete range of science and math courses offered, while 81% of Asian students and 71% of white students enjoy such access.<sup>154</sup> More college counseling is provided to students in rigorous courses, such as

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<sup>146</sup> LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 43 (2010).

<sup>147</sup> *See id.*

<sup>148</sup> *Id.* at 52, 57–59 (noting that minority students enjoy less access to honors, gifted and talented, and advanced placement courses while they experience overrepresentation in special education courses); U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *supra* note 144, at 6–7; Lynne Bland & Anne Neve, *Equity and Access for Minority Students in AP Courses*, 5 J. CROSS-DISCIPLINARY PERSP. IN EDUC. 21, 22–23 (2012).

<sup>149</sup> *See* DARLING-HAMMOND, *supra* note 146, at 52, 54, 56–57 (quoting TONY WAGNER, *THE GLOBAL ACHIEVEMENT GAP: WHY EVEN OUR BEST SCHOOLS DON'T TEACH THE NEW SURVIVAL SKILLS OUR CHILDREN NEED — AND WHAT WE CAN DO ABOUT IT* 8 (2008) (emphasis omitted)).

<sup>150</sup> *See id.* at 52, 54, 56–57.

<sup>151</sup> NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS* 76 (2010).

<sup>152</sup> EDUC. TR., *FINDING AMERICA'S MISSING AP AND IB STUDENTS* 4 (2013).

<sup>153</sup> COLL. BD., *THE 10TH ANNUAL AP REPORT TO THE NATION* 30 (2014), <http://media.collegeboard.com/digitalServices/pdf/ap/rtn/10th-annual/10th-annual-ap-report-to-the-nation-single-page.pdf> [https://perma.cc/7PTD-5JJE].

<sup>154</sup> U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT (COLLEGE AND CAREER READINESS)*, ISSUE BRIEF NO. 3, at 8 (2014), <http://ocrdata.ed.gov/Downloads/CRDC-College-and-Career-Readiness-Snapshot.pdf> [https://perma.cc/X9K2-3274]. The full range of math and science courses are Algebra I, Geometry, Algebra II, Calculus, Biology, Chemistry, and Physics. *Id.*

students in honors, AP, or college preparatory courses.<sup>155</sup> Given the weighting of advanced courses and the complexities of the college application process, these disparities hinder the application and entrance of minority students into colleges and universities.

Minority students also experience higher rates of suspension and expulsion, as well as more exposure to safety concerns in their schools, such as gangs and weapons. Although 42.8% of African American students and 21.9% of Hispanic students have been suspended, only 15.6% of white students have been suspended.<sup>156</sup> Even though only 1% of white students have been expelled, 12.8% of African American students have been expelled.<sup>157</sup> African American and Hispanic students are more than twice as likely to attend a school where gangs are present, with 37.6% of African American and 36.1% of Hispanic students attending such schools compared to 16% of white students.<sup>158</sup> African American and Hispanic students are more likely to be threatened or injured with a weapon in school than white students are.<sup>159</sup> These discipline and safety factors create more difficult learning environments for many African American and Hispanic students in ways that can adversely influence their focus on academic achievement.

Nationally, districts that educate the most minority students receive approximately \$2000 less per pupil than districts that serve the fewest minority students.<sup>160</sup> However, funding disparities vary significantly between states, with eighteen states providing significantly less funding to districts that serve the most minority students while fourteen states provide more money to districts that serve the most minority students.<sup>161</sup> A research consensus has emerged that money matters for education because of the influential resources that it can purchase,<sup>162</sup> and the longstanding debate over whether money matters has shifted to how money should be spent most efficiently to improve student achievement.<sup>163</sup> In addition, research by Professors C. Kirabo

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<sup>155</sup> Andrea Venezia & Michael W. Kirst, *Inequitable Opportunities: How Current Education Systems and Policies Undermine the Chances for Student Persistence and Success in College*, 19 *EDUC. POL'Y* 283, 293 (2005).

<sup>156</sup> NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *supra* note 151, at 93.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 115.

<sup>159</sup> *Id.* at 114.

<sup>160</sup> NATASHA USHOMIRSKY & DAVID WILLIAMS, *EDUC. TR., FUNDING GAPS 2015: TOO MANY STATES STILL SPEND LESS ON EDUCATING STUDENTS WHO NEED THE MOST* 8 (2015); *see also* RAEGEN MILLER & DIANA EPSTEIN, *CTR. FOR AM. PROGRESS, THERE STILL BE DRAGONS: RACIAL DISPARITY IN SCHOOL FUNDING* 3 (2011) ("Meaningful levels of racial disparity clearly exist in the provision of school funds in some states.").

<sup>161</sup> *See* USHOMIRSKY & WILLIAMS, *supra* note 160, at 8.

<sup>162</sup> *See* BRUCE D. BAKER, ALBERT SHANKER INST., *REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION?*, at iv-v (2012).

<sup>163</sup> Ogletree & Robinson, *supra* note 18, at 267.



Jackson, Rucker C. Johnson, and Claudia Persico reveals that increases in funding can result in significant increases in education and earnings as well as reductions in adult poverty.<sup>164</sup> Furthermore, minority students make up a disproportionate share of many large school districts that experience limited access to textbooks, overcrowding, and poorly maintained facilities.<sup>165</sup>

High-poverty learning environments also provide additional disadvantages for a disproportionate number of minority students. Only 7.64% of white students attended high-poverty schools in 2014, while 42.62% of minority students attended such schools.<sup>166</sup> High-poverty learning environments consistently perform worse than other schools and often lack effective teachers, adequate resources, appropriate class sizes, and motivated and engaged parents, as well as other factors that improve student achievement.<sup>167</sup> Such environments also are affected by a host of out-of-school challenges such as higher crime rates, inadequate healthcare, greater mobility, and more instability within the home.<sup>168</sup> High-poverty schools exert a negative influence on student achievement independent of a student's socioeconomic status.<sup>169</sup> These educational opportunity gaps play a substantial role in creating and sustaining the racial achievement gap.<sup>170</sup> While some students are educated in schools that far surpass state learning standards, others are relegated to opportunities that emphasize the basics and teaching to the test.<sup>171</sup> These disparities in opportunity will lead many white and affluent students to higher-order thinking skills while many poor and minority students are left to basic, rote thinking and test preparation.<sup>172</sup> Leading education scholar Professor Linda Darling-Hammond summarizes the connection well, noting that “when the evidence is examined, it is clear that educational outcomes for these [minority] students are at least as much a function of their unequal access to key ed-

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<sup>164</sup> C. Kirabo Jackson, Rucker C. Johnson & Claudia Persico, *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q.J. ECON. 157, 160 (2016).

<sup>165</sup> Linda Darling-Hammond, *Inequality and School Resources: What It Will Take to Close the Opportunity Gap*, in CLOSING THE OPPORTUNITY GAP, *supra* note 19, at 77, 83–84.

<sup>166</sup> *Indicators: School Poverty*, NAT'L EQUITY ATLAS, [http://nationalequityatlas.org/indicators/school\\_poverty](http://nationalequityatlas.org/indicators/school_poverty) [https://perma.cc/9TZZ-93CU].

<sup>167</sup> DARLING-HAMMOND, *supra* note 146, at 37; RYAN, *supra* note 139, at 277–78; Darling-Hammond, *supra* note 165, at 77, 82; GARY ORFIELD ET AL., UCLA CIVIL RIGHTS PROJECT, *E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS* 26–27 (2012).

<sup>168</sup> DARLING-HAMMOND, *supra* note 146, at 37; RYAN, *supra* note 139, at 158.

<sup>169</sup> Darling-Hammond, *supra* note 165, at 82–83.

<sup>170</sup> Welner & Carter, *supra* note 19, at 1–3.

<sup>171</sup> See RYAN, *supra* note 139, at 259.

<sup>172</sup> See *id.* at 260.

educational resources, both inside and outside of school, as they are a function of race, class, or culture.”<sup>173</sup>

Most selective institutions continue to rely on the standardized SAT or ACT.<sup>174</sup> On the SAT, a substantial racial gap exists in all three subject areas.<sup>175</sup> More importantly, the size of the SAT achievement gap has remained relatively stable from 1986–1987 to 2013–2014.<sup>176</sup> On the ACT, a far lower percentage of African American and Hispanic students met the ACT college readiness benchmark, as compared to white or Asian students on math, science, English, and reading.<sup>177</sup> The test score gap on the ACT also has remained relatively stable for the last decade.<sup>178</sup> College entrance exam disparities are unsurprising given the persistence of the gap in elementary and secondary achievement scores.<sup>179</sup> Overall, African American and Latino applicants face

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<sup>173</sup> DARLING-HAMMOND, *supra* note 146, at 30; *see also* John B. Diamond, *Still Separate and Unequal: Examining Race, Opportunity, and School Achievement in “Integrated” Suburbs*, 75 J. NEGRO EDUC. 495, 497 (2006) (“The educational experiences of African Americans are tied to the structural, institutional, and symbolic consequences of being African American in the U.S. It is the cumulative weight of these forces that combine to shape (and at times, undermine) African American opportunity and achievement.”).

<sup>174</sup> Jonathan P. Epstein, *Behind the SAT-Optional Movement: Context and Controversy*, J.C. ADMISSION, Summer 2009, at 8, 9.

<sup>175</sup> For the 2013–2014 school year, on average, whites scored 534 on the math section, Asians and Pacific Islanders scored 598, African Americans scored 429 and non-Mexican American Hispanics scored 459. On critical reading, whites scored 529, Asians and Pacific Islanders scored 523, while African Americans scored 431 and non-Mexican American Hispanics scored 451. On writing, whites scored 513, Asians and Pacific Islanders scored 530, African Americans scored 418, and non-Mexican American Hispanics scored 443. THOMAS D. SNYDER ET AL., NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 2014, at 301 (2016). Beginning with the SAT administrations in 2016, the College Board has designed the SAT to include three sections: evidence-based reading and writing, math, and an essay. Press Release, The College Board, The College Board Announces Bold Plans to Expand Access to Opportunity; Redesign of the SAT (Mar. 5, 2014), <https://www.collegeboard.org/releases/2014/expand-opportunity-redesign-sat> [<https://perma.cc/QF9H-H9HQ>].

<sup>176</sup> *See* SNYDER ET AL., *supra* note 175, at 301.

<sup>177</sup> Fourteen percent of African Americans and 29% of Hispanics met the ACT college readiness benchmark in math, compared to 52% of whites and 69% of Asians. For science, 12% of African Americans and 23% of Hispanics met the benchmark, compared to 48% of whites and 57% of Asians. In reading, 19% of African Americans and 31% of Hispanics met the benchmark, compared to 56% of whites and 57% of Asians. In English, 34% of African Americans and 47% of Hispanics met the benchmark, compared to 75% of both whites and Asians. NAT’L ACT, THE CONDITION OF COLLEGE & CAREER READINESS 2015, at 7 (2015).

<sup>178</sup> NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *supra* note 151, at 85.

<sup>179</sup> *But see* NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., NAEP 2012: TRENDS IN ACADEMIC PROGRESS: READING 1971–2012, MATH 1973–2012, at 16 (2013) (finding that the racial achievement gap on the National Assessment of Educational Progress has narrowed since the early 1970s).

many more hurdles to successful entrance to higher education than whites.<sup>180</sup>

*B. Weighting Educational Disadvantage  
Within Selective Postsecondary Admissions*

Under the Court's current jurisprudence, universities and colleges must consider race-neutral alternatives before resorting to affirmative action.<sup>181</sup> One innovation I propose is that institutions should consider an applicant's educational disadvantage as a positive admissions factor that may enhance diversity.<sup>182</sup> At a minimum, considering this approach will help institutions respond to the Court's insistence that they prove that no viable alternative to affirmative action exists.<sup>183</sup> In addition, if such an approach assists an institution in reducing their reliance on race, an institution could demonstrate that it is relying on race as little as possible.<sup>184</sup> Furthermore, the Court's prior pronouncements on the limited-duration requirement admonish selective postsecondary institutions to prepare for the day when the Court declares that the time has come for affirmative action to end.<sup>185</sup> Considering educational disadvantage can serve as one way to prepare for affirmative action's end. Finally, this approach also enables institutions to mitigate the impact of disparities in educational opportunities for applicants.

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<sup>180</sup> Eric Grodsky & Michal Kurlaender, *The Demography of Higher Education in the Wake of Affirmative Action*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION 33, 57 (Eric Grodsky & Michal Kurlaender eds., 2010). Universities and colleges also could independently consider the racial isolation of high schools. Research reveals that racially isolated schools oftentimes provide inferior educational experiences and produce inferior results, and thus universities and colleges could consider the racial isolation of a high school as one type of disadvantage. See, e.g., NAT'L ACAD. OF EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 18 (Robert L. Linn & Kevin G. Welner eds., 2007); Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 828, 828 (James A. Banks & Cherry A. McGee Banks eds., 2004); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 741–42 (1998); Amy Stuart Wells & Erica Frankenberg, *The Public Schools and the Challenge of the Supreme Court's Integration Decision*, 89 PHI DELTA KAPPAN 178, 180–83 (2007). However, although the racial isolation of an applicant's high school does not consider the race of the applicant, a court might conclude that considering the race of the applicant's high school is sufficiently tied to an applicant's race that this consideration should be considered to be a race-based factor, rather than a race-neutral factor.

<sup>181</sup> *Fisher I*, 133 S. Ct. 2411, 2420 (2013).

<sup>182</sup> During oral argument in *Fisher II*, counsel for Fisher suggested, without elaboration, that institutions should consider educational disadvantage. Transcript of Oral Argument, *supra* note 14, at 28–29.

<sup>183</sup> *Fisher I*, 133 S. Ct. at 2420.

<sup>184</sup> *Fisher II*, 136 S. Ct. at 2212.

<sup>185</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

1. *How to Weight Educational Disadvantage in Postsecondary Admissions.* — Currently, selective colleges and universities consider a broad array of factors when admitting a class. Academic preparedness serves as a key credential.<sup>186</sup> Most institutions consider grade point average (GPA) more heavily than the other factors in a student's record, and admissions officers rely on the courses that a student took to contextualize the GPA.<sup>187</sup> Class rank also typically informs the consideration of GPA because it helps institutions understand a high school's grading policy.<sup>188</sup> Class rank is evaluated in light of the number of students within the high school class as well as the quality of the high school that a student attends.<sup>189</sup> The SAT and ACT also provide critical information for most institutions on college preparedness,<sup>190</sup> although some, including Justice Alito in his *Fisher II* dissent, criticize consideration of these scores because of their adverse impact on minority students.<sup>191</sup> Leadership experience and potential also are desirable qualities for most selective colleges and universities.<sup>192</sup> Additional factors that selective institutions consider include personal essays, past employment, extracurricular participation, family income and background, geographic location, civic engagement, awards, and honors, as well as recommendation letters from teachers.<sup>193</sup> Many institutions also consider an applicant favorably if a parent or other relative attended the institution.<sup>194</sup>

<sup>186</sup> BOWEN & BOK, *supra* note 14, at 23–24.

<sup>187</sup> ROBERT J. STERNBERG, COLLEGE ADMISSIONS FOR THE 21ST CENTURY 35, 40 (2010).

<sup>188</sup> *Id.* at 39.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 44.

<sup>191</sup> See *Fisher II*, 136 S. Ct. at 2233–34, 2234 n.11 (Alito, J., dissenting); see also JAMILLAH MOORE, RACE AND COLLEGE ADMISSIONS: A CASE FOR AFFIRMATIVE ACTION 19 (2005) (noting that relying on tests such as the SAT gives an admissions advantage to white students, that “SAT scores do not reliably predict who will successfully complete a college education,” that many institutions have eliminated reliance on test scores, and that some institutions have eliminated these scores from admissions decisions due to concern regarding the scores’ negative impact on race and gender equity); West-Faulcon, *supra* note 14, at 1295 n.230 (arguing that “universities should just stop relying on . . . theoretically flawed factorist tests” that produce racial disparities in outcomes); cf. *Grutter v. Bollinger*, 539 U.S. 306, 369–70 (2003) (Thomas, J., concurring in part and dissenting in part) (criticizing the University of Michigan Law School for relying on the LSAT despite the relatively low scores of African Americans and then attempting to overcome this through affirmative action).

<sup>192</sup> BOWEN & BOK, *supra* note 14, at 24.

<sup>193</sup> *Id.* at 25; MOORE, *supra* note 191, at 16.

<sup>194</sup> BOWEN & BOK, *supra* note 14, at 24; MOORE, *supra* note 191, at 164. The consideration of “legacy” as a positive admissions factor has been criticized as privileging white, affluent students. See generally AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS (Richard D. Kahlenberg ed., 2010) (presenting critiques of admissions policies that benefit alumni); MOORE, *supra* note 191, at 164 (noting that the limited number of minority

Colleges and universities consider the quality of an applicant's high school based on information that is typically submitted by a counselor that provides a profile for the high school.<sup>195</sup> This profile may include the geographic and demographic makeup of the school, the curriculum and course offerings, an explanation of the grading scale, how enrollment in advanced coursework is determined, average standardized test scores, the colleges and universities prior graduates attended, and awards and honors earned by students.<sup>196</sup> In addition, high schools also may submit information such as teacher credentials, pupil-teacher ratio, and the extracurricular activities provided.<sup>197</sup> An institution also can choose to create a profile for a high school as an aid in university admissions.<sup>198</sup>

Some admissions practices consider the quality of an applicant's high school as information that provides context for a student's application, such as a student's class rank and GPA.<sup>199</sup> In addition to the profiles submitted, admissions officers also may possess informal knowledge of the quality of high schools, sometimes gathered from brief visits to high schools or prior applications from the high school.<sup>200</sup> This information may or may not accurately capture the intellectual rigor of the students and the caliber of the high school.<sup>201</sup> This information may lead an admissions officer to explicitly or subconsciously increase the GPA from a well-regarded school or discount a GPA from an unknown or disfavored school.<sup>202</sup>

A survey of college admissions officers regarding how admissions officers assess a variety of student characteristics indicates that the quality of an applicant's high school sometimes — but not consistent-

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alumni from elite institutions results in very few minority students being able to take advantage of legacy preferences).

<sup>195</sup> Jon Fortenbury, *Does Your High School's Quality Affect Where You Can Get Into College?*, USA TODAY (May 30, 2013, 11:00 AM), <http://college.usatoday.com/2013/05/30/does-your-high-schools-quality-affect-where-you-can-get-into-college> [<https://perma.cc/LRG5-WSWJ>].

<sup>196</sup> The College Board provides a sample high school profile. See *Sample High School Profile*, COLLEGE BOARD, <https://professionals.collegeboard.org/guidance/counseling/profile/sample> [<https://perma.cc/ZHT6-XZX6>].

<sup>197</sup> Fortenbury, *supra* note 195.

<sup>198</sup> For instance, the University of California (UC) Berkeley staff create complex profiles for each California high school that include such information as the percentage of seniors who took AP exams and those who scored three or higher, the average SAT score, the percentage of low-income children, and the percentage of English Language Learners. Admissions officers use this information to compare a candidate's application to those in her high school as well as the entire applicant pool. See BOB LAIRD, *THE CASE FOR AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS* 238 (2005).

<sup>199</sup> STERNBERG, *supra* note 187, at 36–39.

<sup>200</sup> LAIRD, *supra* note 198, at 237.

<sup>201</sup> See *id.* at 231, 237.

<sup>202</sup> STERNBERG, *supra* note 187, at 38.

ly — provides context for assessment of an applicant.<sup>203</sup> The results reveal that 38.9% of colleges give no consideration to the applicant's high school and 33.7% view it as having only limited importance.<sup>204</sup> Only a small percentage — 3.3% — view an applicant's high school as a factor of considerable importance and 24.1% view it as a factor of moderate importance.<sup>205</sup> Interestingly enough, the survey of factors that colleges consider most important for admission does not include an applicant's high school as an admissions factor.<sup>206</sup> Instead, it identifies sixteen factors that focus on grades and standardized test scores, recommendations, extracurricular activities, and an interview.<sup>207</sup> This data, as well as other research,<sup>208</sup> suggests that high school quality sometimes is considered informally to provide context but is not typically considered as a weighty admissions factor by most institutions.

As a race-neutral alternative to affirmative action, admissions officers could consider educational disadvantage as a positive factor in admissions. For instance, attending a high-poverty school should be included as an indicator of educational disadvantage given the research revealing the adverse effects of such schools.<sup>209</sup> Institutions also could assign positive weight to limited access to advanced coursework, the quality and experience of teachers within a school, and high suspension rates as factors that likely hindered a student's achievement and thus deserve positive weight within the admissions decision.

Admissions officers could provide an admissions preference for educational disadvantage in two ways. First, the presence of educational

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<sup>203</sup> MELISSA CLINEDINST, NAT'L ASS'N FOR COLL. ADMISSION COUNSELING, STATE OF COLLEGE ADMISSION 35 (2015).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 28.

<sup>207</sup> The sixteen factors are grades in college prep courses, strength of curriculum, admission test scores (SAT, ACT), grades in all courses, essay or writing sample, student's demonstrated interest, counselor recommendation, class rank, teacher recommendation, extracurricular activities, interview, subject test scores (AP, IB), portfolio, SAT II scores, state graduation exam scores, and work. *See id.*

<sup>208</sup> *See* STERNBERG, *supra* note 187, at 36, 39 (explaining that the meaning of a student's GPA and class rank can vary depending on the quality of the high school and the students in the school); Michal Kurlander et al., *Access and Diversity at the University of California in the Post-Affirmative Action Era*, in AFFIRMATIVE ACTION AND RACIAL EQUITY: CONSIDERING THE FISHER CASE TO FORGE THE PATH AHEAD 80, 86 (Uma M. Jayakumar et al. eds., 2015) (noting that UC Berkeley assesses each applicant "in the specific context of his or her high school circumstances"); Roger E. Studley, *Inequality, Student Achievement, and College Admissions: A Remedy for Underrepresentation* 4 (Ctr. for Studies in Higher Educ.: Research & Occasional Paper Series, CSHE.1.03, Feb. 2003), <http://www.cshe.berkeley.edu/sites/default/files/shared/publications/docs/ROP.Studley.1.03.pdf> [<https://perma.cc/U2KM-PNN7>] (stating that many colleges and universities "instruct application readers to evaluate each candidate with respect to his or her circumstance").

<sup>209</sup> *See supra* notes 166–173 and accompanying text.

disadvantage could expand the pool of students that are identified as academically qualified for admission. For example, an applicant who performed well academically within the context of the opportunities that she was given and who took full advantage of available opportunities could be considered qualified even though she did not take as many AP classes as her competitors because they were not offered at her school. This might lead admissions officers to consider a wider array of GPAs as acceptable given evidence that many students cannot earn the additional points that advanced placement classes provide. Second, once a student is determined to be qualified, if an applicant performed well within available opportunities, admissions officers also could consider educational disadvantage as a factor that supports an admissions advantage.<sup>210</sup>

This proposal would benefit students of all races because all races experience a variety of forms of educational disadvantage.<sup>211</sup> However, this proposal also would particularly assist in increasing the admissions opportunities of minority students because of the frequent convergence of race and inferior educational opportunities within the United States described above.<sup>212</sup> Given that students of all races experience these disadvantages, this approach could not credibly be labeled a proxy for race. But for some institutions, this approach may yield a significant number of admissions for minority students because minority students disproportionately experience these disadvantages.<sup>213</sup>

To implement this proposal, universities and colleges would need to request three additional types of information. First, institutions should include a question to high school counselors that asks them to describe the nature and scope of any educational disadvantages of the school. This question could be added to high school profiles. Admissions counselors typically assess thousands of applications. Such a question would prevent admissions officers from having to discern and calculate educational disadvantage from what is not offered by the high school or by the quality of what is provided. In addition, high school counse-

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<sup>210</sup> This proposal provides a means to operationalize recognition of the adverse impact that educational disadvantage can have on an applicant. John T. Yun & José F. Moreno, *College Access, K-12 Concentrated Disadvantage, and the Next 25 Years of Education Research*, 35 EDUC. RESEARCHER 12, 18 (2006). This proposal also complements the recommendations that colleges and universities consider low socioeconomic status, Studley, *supra* note 208, at 25, as well as first-generation college student status as positive admissions criteria, Brown-Nagin, *supra* note 115, at 498.

<sup>211</sup> See EQUITY & EXCELLENCE COMM'N, *supra* note 139, at 12–14 (noting that students “who attend schools in high poverty neighborhoods are getting an education that more closely approximates school in developing nations,” *id.* at 12).

<sup>212</sup> See *supra* section II.A, pp. 206–10.

<sup>213</sup> See DARLING-HAMMOND, *supra* note 146, at 36–37; Yun & Moreno, *supra* note 210, at 12.

lors would only need to provide this statement annually and it could be included in all student applications.

Second, for an accurate assessment of educational disadvantage to occur, institutions should ask that additional information be included in high school profiles. For instance, although some high school profiles include teacher credentials, the sample profile provided by the College Board does not include teacher credentials or experience.<sup>214</sup> Yet research reveals that teacher quality, including preparation for teaching, experience, certification status, and academic background, has a tremendous impact on student achievement.<sup>215</sup> This information would help colleges assess who was taught by high-quality teachers and who may have been hindered by the quality of her or his instruction. A description of the nature, quality, and access to instructional materials, such as technology, textbooks, library and classroom resources, the pupil-to-counselor ratio, and the quality of the facilities would further enhance an effective assessment of the breadth of educational disadvantage that an applicant experienced.<sup>216</sup>

Finally, colleges and universities should ask counselors to include a few sentences or a paragraph on how long an applicant has experienced educational disadvantages and the disadvantages that the applicant personally experienced. Is the applicant a student who experienced educational disadvantages throughout her education or one who only experienced them early or late in her education? This can help admissions officers determine how much of a positive weight to assign to educational disadvantage.

Some of the state universities that were forced to end the consideration of race have adopted admissions reforms that are consistent with this proposal.<sup>217</sup> The percentage plans in use in Texas, Florida, and California serve as powerful admissions advantages for educationally disadvantaged high schools by automatically admitting students from relatively low-quality high schools.<sup>218</sup> The state university systems of California, Florida, and Washington also consider some aspects of ed-

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<sup>214</sup> See *Sample High School Profile*, *supra* note 196.

<sup>215</sup> DARLING-HAMMOND, *supra* note 146, at 43-44.

<sup>216</sup> Cf. LAIRD, *supra* note 198, at 237-38 (recommending that colleges and universities create complete profiles of high schools from available data).

<sup>217</sup> Many universities also target recruiting to disadvantaged high schools that typically have substantial minority enrollment. Mark C. Long, Essay, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 PUB. ADMIN. REV. 315, 319-20 (2007).

<sup>218</sup> See *id.*



educational disadvantage within their admissions practices.<sup>219</sup> Other universities also may consider educational disadvantage.<sup>220</sup>

For those universities and colleges that currently consider educational disadvantage, the additional information that would be gathered under my proposal would allow admissions officers to make a far more accurate assessment of educational disadvantage. In addition, the dual consideration of educational disadvantage by admissions officers — once when deciding who is qualified and once as an admissions preference of varying degree depending on the scope and duration of the educational disadvantage — would serve as a more effective recognition of the breadth of educational disadvantage suffered by many students than is offered by universities that only consider educational disadvantage in one of these two ways. Although this approach would impose costs on high schools and postsecondary institutions, I demonstrate in the next section how the benefits of this approach would outweigh its costs.

2. *The Costs and Benefits of Weighting Educational Disadvantage.* — Considering educational disadvantage as a positive admissions factor would impose several costs for both secondary schools as well as postsecondary institutions. For high schools, assessing educational disadvantage would increase the burden on high school counselors to create the additional information needed to provide more detailed profiles of high schools. It also would take time for counselors to note on an individual basis how long students had experienced educational disadvantage and any specific noteworthy instances of disadvantage, such as a student being academically prepared to take an advanced course but unable to enroll due to it not being offered at the school. Furthermore, if this approach were used robustly, it might be criticized for incentivizing parents to leave their children in low-quality educational environments, just as the percent plans are criticized for encouraging parents to keep their children in lower-performing schools.<sup>221</sup>

Postsecondary institutions also would bear substantial costs. Postsecondary institutions might choose to develop technology to gath-

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<sup>219</sup> *Id.* at 319; Joni James, *Governor Stands by One Florida*, MIAMI HERALD, Oct. 28, 2002, at 1A.

<sup>220</sup> Studley, *supra* note 208, at 4. Although Roger Studley, the Coordinator of Research and Evaluation for the UC Office of the President, states that many universities and colleges currently instruct admissions officers to consider socioeconomic factors by assessing an application in light of the applicant's circumstances or giving additional points for a disadvantaged educational experience, *id.*, the survey data of college admissions officers noted above indicates that this practice may not be as widespread as he suggests and instead may be more predominant within the UC system than outside of it, *see supra* notes 203–208 and accompanying text.

<sup>221</sup> *Fisher II*, 136 S. Ct. at 2214 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 304 n.10 (2003) (Ginsburg, J., dissenting)).

er the additional information provided by secondary schools. Such technology would require investments in the creation and maintenance of software and training in how to gather and present this information in the most useful format. Admissions officers also would need adequate time to assess the additional information to determine how much weight to give a student's disadvantage.

In addition, institutions would need to conduct assessments of whether this race-neutral alternative would enhance diversity given their particular applicant pools. Creating a model to assess the potential impact of such an approach would also require an investment of resources, personnel, and time. Accepting applicants with lower credentials than the standard applicant could impact an institution's *U.S. News & World Report* ranking — a possibility that may influence an institution's willingness to weight educational disadvantage given that most selective institutions are determined to maintain their rankings.<sup>222</sup>

Finally, the success of such a program would be dependent on offering sufficient academic and financial support for students who were admitted in part due to the educational disadvantage that they experienced. Racial disparities in the quality of high schools have been shown to influence the postsecondary achievement gap.<sup>223</sup> Institutions would need to invest resources in and provide support for students who experienced educational disadvantage to enable these students to succeed.<sup>224</sup> This support would build on research showing that some disadvantaged students can be successful at selective postsecondary institutions.<sup>225</sup> Although socioeconomically disadvantaged students are

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<sup>222</sup> See Guinier, *supra* note 1, at 144–45 (discussing how rankings “exercise significant influence over educational institutions,” *id.* at 145).

<sup>223</sup> Jason Fletcher & Marta Tienda, *Race and Ethnic Differences in College Achievement: Does High School Attended Matter?*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2010, at 144, 161 (“Our main hypothesis — that differences in the quality of high schools attended by minority versus majority students contribute to the collegiate achievement gaps — finds considerable support.”).

<sup>224</sup> Sigal Alon & Marta Tienda, *Assessing the “Mismatch” Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 SOC. EDUC. 294, 309 (2005).

<sup>225</sup> See JENNIFER GIANCOLA & RICHARD D. KAHLENBERG, JACK KENT COOKE FOUND., TRUE MERIT: ENSURING OUR BRIGHTEST STUDENTS HAVE ACCESS TO OUR BEST COLLEGES AND UNIVERSITIES 1, 8–10 (2016), [http://www.jkcf.org/assets/1/7/JKCF\\_true\\_merit\\_report.pdf](http://www.jkcf.org/assets/1/7/JKCF_true_merit_report.pdf) [<https://perma.cc/U4AD-28KC>] (finding that low-income, high-achieving students graduate at similar rates to higher-income, high-achieving students at highly competitive institutions, that graduation rates increase for low-income, high-achieving students as the selectivity of the institution increases, and that low-income students are assisted by the additional retention efforts, particularly counseling, that selective institutions offer); Alon & Tienda, *supra* note 224, at 306, 309. For instance, evidence from Texas indicates that African American and Hispanic students as well as disadvantaged students admitted through the Top Ten Percent Plan typically earned lower test scores than “[w]hite students and graduates from affluent and feeder high schools ranked at or below the third decile of their class.” Sunny X. Niu & Marta Tienda, *Minor-*

less likely to complete college and sometimes experience lower grades than their more advantaged peers,<sup>226</sup> research reveals that the graduation rates of socioeconomically disadvantaged students increase as the selectivity of the institution increases.<sup>227</sup> Furthermore, given that acceptance rates for graduate and professional schools increase as the selectivity of an applicant's postsecondary institution increases and that students at more selective institutions experience a small advantage in wage earnings when compared to students at less selective institu-

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*ity Student Academic Performance Under the Uniform Admission Law: Evidence from the University of Texas at Austin*, 32 EDUC. EVALUATION & POL'Y ANALYSIS 44, 64 (2010). Yet the "top 10% admits consistently performed as well as or better than their lower ranked counterparts." *Id.* at 64–65; see also *id.* at 55–57. But see RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 3–4, 33–48 (2012) (discussing research showing what the authors call "mismatch," that is, research indicating that "large racial preferences backfire against many and, perhaps, most recipients, to the point that they learn less and are likely to be less self-confident than had they gone to less competitive but still quite good schools," *id.* at 3–4). A variety of scholars have criticized and critiqued the work of Professor Richard Sander and his coauthor. See, e.g., Ian Ayres & Richard Brooks, Response, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1809 (2005) ("While the mismatch hypothesis is plausible, this response refutes the claim that affirmative action has reduced the number of black lawyers. We find no persuasive evidence that current levels of affirmative action have reduced the probability that black law students will become lawyers."); David L. Chambers et al., Response, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1898 (2005) ("In his conclusion, Sander claims that 'the production of black lawyers would rise significantly in a world without racial preferences,' because African American law students, no longer 'mismatched' at the schools they attend, would graduate and pass the bar at much higher rates. His conclusions are simple, neat, and wrong. As we have demonstrated here, they rest on a seriously flawed appraisal of the current evidence. We believe that, using the same evidence, we have demonstrated just the opposite: that, without affirmative action, both the enrollment of African American law students (particularly at the fifty or eighty most selective schools) and the production of African American lawyers would significantly decline." (footnote omitted) (quoting Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 476 (2004)); William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind "Mismatch,"* 92 TEX. L. REV. 895, 896 (2014) (reviewing SANDER & TAYLOR, *supra*) ("Our comprehensive review will show that the authors of *Mismatch* cherry-pick the data to support a series of unwarranted claims, for the social science data overall (and particularly the best peer-reviewed works) do not support Sander and Taylor's assertions that affirmative action causes lower overall college graduation rates or earnings for African Americans and Latinos.").

<sup>226</sup> NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., POSTSECONDARY ATTAINMENT: DIFFERENCES BY SOCIOECONOMIC STATUS 1 (2015), [http://nces.ed.gov/programs/coe/pdf/coe\\_tva.pdf](http://nces.ed.gov/programs/coe/pdf/coe_tva.pdf) [<https://perma.cc/L5J4-VAQ8>]; Marvin A. Titus, *Understanding College Degree Completion of Students with Low Socioeconomic Status: The Influence of the Institutional Financial Context*, 47 RES. HIGHER EDUC. 371, 388, 392–93 (2006); MaryBeth Walpole, *Socioeconomic Status and College: How SES Affects College Experiences and Outcomes*, 27 REV. HIGHER EDUC. 45, 63 (2003).

<sup>227</sup> Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101, 108–09 (Richard D. Kahlenberg ed., 2004).

tions,<sup>228</sup> increasing the admission of and support for educationally disadvantaged students could enable more disadvantaged students to experience the benefits of attending a selective institution.

Despite these costs, the benefits of providing an admissions advantage based on a complete picture of the nature and scope of educational disadvantage warrant its consideration by most institutions. Institutions should consider these benefits especially given the widespread nature of educational disadvantage and evidence that many colleges and universities do not consider educational disadvantage.<sup>229</sup> Such an approach would yield numerous benefits. First, an admissions advantage for educational disadvantage recognizes the reality that “individual college opportunity is predicated on K-12 institutional opportunity.”<sup>230</sup> Many students are hindered in their ability to enter and succeed in higher education because their elementary and secondary education prepared them only for low-skilled, low-paying jobs. Economic forecasts indicate that such jobs will continue to diminish and that high-level thinking skills will be essential for successful employment.<sup>231</sup> Postsecondary education provides an essential way to develop these skills.<sup>232</sup> Assigning a positive weight to educational disadvantage helps to mitigate the impact of educational opportunity gaps.

Second, this approach might also encourage more low-income students to apply to selective postsecondary institutions. Research reveals that low-income students are more likely to attend two-year colleges or no college than high-income peers while students with a higher socioeconomic status are more likely to attend a selective four-year college.<sup>233</sup> However, the weighting of educational disadvantage does not guarantee admission as the percentage plans do. Thus, this approach should substantially reduce any perverse incentives to keep children in low-quality schools. Although some parents may be willing to leave their child in an inferior educational environment to gain an admis-

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<sup>228</sup> *Id.* at 109–15.

<sup>229</sup> See CLINEDINST, *supra* note 203, at 27–28, 34–35 (failing to include educational disadvantage on the list of the most important factors for college admissions and finding that 72.6% of colleges considered a student’s high school to be of limited to no importance).

<sup>230</sup> Patricia M. McDonough, *Counseling and College Counseling in America’s High Schools*, in NAT’L ASS’N FOR COLL. ADMISSION COUNSELING, STATE OF COLLEGE ADMISSION 107, 110 (David A. Hawkins & Jessica Lautz eds., 2005).

<sup>231</sup> Bailey, *supra* note 140, at 74, 78–79, 92–93.

<sup>232</sup> McDonough, *supra* note 230, at 108 (“[S]ix out of every 10 jobs in our economy depend on highly trained workers with the requisite advanced skills that are available only to those possessing either a two-year or four-college [sic] degree.”).

<sup>233</sup> JONATHAN SMITH ET AL., COLL. BD. ADVOCACY & POLICY CTR., A REVIEW OF THE CAUSES AND CONSEQUENCES OF STUDENTS’ POSTSECONDARY CHOICES 6 (2012), <https://research.collegeboard.org/sites/default/files/publications/2014/9/literature-causes-consequences-students-postsecondary-choices.pdf> [<https://perma.cc/QHM3-QVCS>].

sions advantage, most parents will understand that obtaining the best educational opportunities for their child is the greatest way to ensure their child's acceptance to and success in postsecondary education.

Third, providing an admissions advantage to students from educationally disadvantaged high schools also allows universities to serve their larger social responsibilities, including supporting democratic ideals of equal opportunity and fairness, promoting societal mobility, and preparing leaders for a wider array of communities.<sup>234</sup> Some colleges and universities are increasing their emphasis on how students contribute to the lives of others at home and in their communities.<sup>235</sup> Acknowledging and valuing educational disadvantage provides a tangible way for universities to signal that they are acting to promote the common good. In addition, this approach would increase the relatively small number of institutions that give a systemic preference to disadvantaged students.<sup>236</sup>

Fourth, by considering educational disadvantage in admissions, universities would be in a stronger position to address the Court's insistence that universities establish that no viable race-neutral alternatives are available to achieve diversity's benefits.<sup>237</sup> Systematic consideration of educational disadvantage would serve as evidence that a university has heeded the Court's instruction to learn from states where affirmative action has been prohibited.<sup>238</sup> The opposition to affirmative action will undoubtedly continue and universities must be prepared with ample evidence that they explored alternative approaches that avoided considering an applicant's race.

Fifth, some universities that consider educational disadvantage as a positive admissions factor could reduce their reliance on affirmative action. Such a reduction would be a positive development for institutions given *Fisher II*'s instruction that "a hallmark of narrow tailoring" should be that "race consciousness played a role in only a small portion of admissions decisions."<sup>239</sup>

<sup>234</sup> See BOWEN & BOK, *supra* note 14, at 23–24; Guinier, *supra* note 1, at 135–36, 223.

<sup>235</sup> MAKING CARING COMMON PROJECT, HARVARD GRADUATE SCH. OF EDUC., TURNING THE TIDE: INSPIRING CONCERN FOR OTHERS AND THE COMMON GOOD THROUGH COLLEGE ADMISSIONS 8 (2016), [http://mcc.gse.harvard.edu/files/gse-mcc/files/20160120\\_mcc\\_ttt\\_report\\_interactive.pdf](http://mcc.gse.harvard.edu/files/gse-mcc/files/20160120_mcc_ttt_report_interactive.pdf) [<https://perma.cc/M69N-VUK5>].

<sup>236</sup> See GIANCOLA & KAHLENBERG, *supra* note 225, at 1 ("Being admitted to a selective institution is actually *harder* for the high-achieving, low-income student than for others. We were also surprised by both the extent of the individual disadvantages and the uniformity of approach across all highly selective colleges and universities reviewed."); see also Carnevale & Rose, *supra* note 227, at 101–02.

<sup>237</sup> *Fisher I*, 133 S. Ct. 2411, 2420 (2013).

<sup>238</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). For a discussion of postsecondary admissions approaches in states that have banned affirmative action, see Long, *supra* note 217, at 319–20.

<sup>239</sup> 136 S. Ct. at 2212.

Finally, the additional assistance required for students who have experienced educational disadvantage also could incentivize university leaders to serve as advocates for effective K-12 reforms that reduce the need for and costs of college and university support of these students. Some universities have already begun to take on such reforms by partnering with elementary and secondary schools in ways that can improve student outcomes.<sup>240</sup> Universities possess a wide array of resources that can help disadvantaged schools, including faculty and staff expertise, extensive libraries, athletic facilities, and student volunteers. Partnerships would be encouraged as universities and colleges increase their understanding of the breadth of educational disadvantage. Furthermore, increasing the number of students at selective institutions who experienced educational disadvantage could expose all students to a broader array of elementary and secondary backgrounds in ways that contribute to the learning experiences in classrooms and on campuses.

Ultimately, the effectiveness of this approach for enhancing diversity will depend on a variety of factors that vary by institution. In some applicant pools, educational disadvantage may disproportionately harm minority applicants, and this approach would enhance the diversity of the entering class. In other applicant pools, educational disadvantage may be spread evenly among the races or may disproportionately impact white applicants such that diversity will not be enhanced by assigning it an admissions preference. A selective state institution in Mississippi or Alabama may have greater success in employing this alternative than a state institution in Massachusetts or Connecticut due to the higher number of minorities<sup>241</sup> and the historical convergence of discrimination and educational disadvantage in the first two states.<sup>242</sup>

Research confirms that some selective institutions have been able to consider socioeconomic disadvantage in ways that enhance diversity.<sup>243</sup>

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<sup>240</sup> GIANCOLA & KAHLBERG, *supra* note 225, at 32; 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. TEXAS* 75, 87 (Richard D. Kahlenberg ed., 2014).

<sup>241</sup> NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *DIGEST OF EDUCATION STATISTICS: TABLE 203.70* (2015), [http://nces.ed.gov/programs/digest/d15/tables/dt15\\_203.70.asp](http://nces.ed.gov/programs/digest/d15/tables/dt15_203.70.asp) [<https://perma.cc/Z9J7-J8AN>].

<sup>242</sup> U.W. Clemon & Bryan K. Fair, *Making Bricks Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940-1980*, 52 ALA. L. REV. 1121, 1138-44 (2001); Crystal R. Sanders, Forum, "Money Talks": *The Elementary and Secondary Education Act of 1965 and the African-American Freedom Struggle in Mississippi*, 56 HIST. EDUC. Q. 361, 362, 364 (2016).

<sup>243</sup> See RICHARD D. KAHLBERG & HALLEY POTTER, CENTURY FOUND., *A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL*

Research also indicates that some selective institutions would not be able to consider socioeconomic disadvantage in ways that enhance diversity, and that consequently these institutions may not benefit from a sophisticated assessment of educational disadvantage.<sup>244</sup> For example, a university with a national applicant pool that receives a larger number of white applicants that have experienced educational disadvantage than minority applicants may have less success employing this tool. The disparate results from the research suggest that, although this approach will not yield diversity's benefits for all institutions, it may prove fruitful at some institutions as a way to reduce or eliminate their reliance on affirmative action.<sup>245</sup>

Ultimately, reducing or eliminating the reliance of postsecondary institutions on affirmative action is unlikely to occur on a wide scale until the nation addresses the opportunity and achievement gaps that lead many institutions to employ affirmative action. Therefore, I offer in the next Part a comprehensive approach for closing these gaps.

### III. A COMPREHENSIVE APPROACH TO CLOSE THE OPPORTUNITY GAPS THAT ENCOURAGE THE USE OF AFFIRMATIVE ACTION

Although numerous scholars have argued that the use of affirmative action should not be of limited duration,<sup>246</sup> the Court's affirmative

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PREFERENCES 12, 15–17, 50 (2012); Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367, 378, 399–400 (2013).

<sup>244</sup> BOWEN & BOK, *supra* note 14, at 46–52, 280; WILLIAM G. BOWEN ET AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 178–86 (2005); SEAN F. REARDON ET AL., CAN SOCIOECONOMIC STATUS SUBSTITUTE FOR RACE IN AFFIRMATIVE ACTION COLLEGE ADMISSIONS POLICIES? EVIDENCE FROM A SIMULATION MODEL 19–20 (2015); William C. Kidder, *How Workable Are Class-Based and Race-Neutral Alternatives at Leading American Universities?*, 64 UCLA L. REV. DISCOURSE 100, 105–09 (2016).

<sup>245</sup> Testing the empirics of whether this approach would work at most selective institutions is beyond the scope of this Comment.

<sup>246</sup> See, e.g., Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 543–44 (2003) (“Diversity, unlike remedy, is a justification that is not temporally linked to past events; whereas remedy looks to the past, diversity looks to the educational benefits today and in the future.” *Id.* at 543.); Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 775–76 (2015) (noting that the reasons cited in *Grutter* for supporting affirmative action — including better preparation for students to participate in a diverse workforce and greater legitimacy of civic institutions — “will probably become even more important as America becomes a more diverse society,” *id.* at 775); Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 183–84 (2004) (“A time limit does not, however, well fit enhancing diversity, which administers not a remedy but an inherent academic value.” (quoting Martin Michaelson, *The Court's Pronouncements Are More Dramatic and Subtle Than the Headlines*, CHRON. HIGHER EDUC., July 18, 2003, at B11)); Ronald J. Krotoszynski, Jr., *The Argot of Equality: On the Importance of Disentangling “Diversity” and “Remediation” as Justifications for Race-Conscious Government Action*, 87 WASH. U. L. REV. 907, 936–37 (2010) (“[D]iversity programs should in theory be relevant so long as we believe

action jurisprudence establishes that the end of affirmative action is more likely a question of when, rather than if. Indeed, the Court's 2003 opinion in *Grutter* stated that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>247</sup> Even if the Court does not demand that all affirmative action in selective admissions end in 2028 because this statement "reflected an expectation . . . rather than a holding or a mere hope" that affirmative action will one day no longer be needed,<sup>248</sup> the Court has consistently required the use of race to be of a limited duration.<sup>249</sup> This requirement helps to move society to the day when government consideration of race will end and reinforces the requirement that race should only be considered as long as it is necessary.<sup>250</sup> Therefore, although *Fisher II*'s guidance and assistance to institutions may help to extend affirmative action beyond 2028,<sup>251</sup> the Court has already tolled the death knell for affirmative action.<sup>252</sup> In addition, as I explored above, the ways that *Fisher II* reinforces and

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that pluralism is relevant to the excellence and success of the government program at issue." *Id.* at 937.); Eang L. Ngov, *When "the Evil Day" Comes, Will Title VII's Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535, 581 (2011) ("If diversity is necessary in order to train competent professionals, for example, it is necessary at any and all times; there is no intrinsic time horizon when this need for diversity will disappear." (quoting Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 67 n.306 (2003))); Christopher J. Schmidt, *Caught in a Paradox: Problems with Grutter's Expectation that Race-Conscious Admissions Programs Will End in Twenty-Five Years*, 24 N. ILL. U. L. REV. 753, 763 (2004) ("In fact, diversity has no built-in time horizon: if diversity is necessary for the quality of education now, it is necessary at all times.").

<sup>247</sup> 539 U.S. 306, 343 (2003).

<sup>248</sup> Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83, 104 (2006); see also THE CIVIL RIGHTS PROJECT, HARVARD UNIV., REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 11 (2003), <https://civilrightsproject.ucla.edu/legal-developments/legal-memos/reaffirming-diversity-a-legal-analysis-of-the-university-of-michigan-affirmative-action-cases/law-scholars-reaffirming-diversity-2003.pdf> [<https://perma.cc/ZWQ7-GWUE>] ("This sentence should be construed as the Court's dictum expressing, by reference to the passage of time since the *Bakke* decision, its aspiration — and not its mandate — that there will be enough progress in equal educational opportunity that race-conscious policies will, at some point in the future, be unnecessary to ensure diversity.").

<sup>249</sup> *Grutter*, 539 U.S. at 342; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237–38 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion).

<sup>250</sup> *Grutter*, 539 U.S. at 341–43.

<sup>251</sup> See *supra* text accompanying note 88.

<sup>252</sup> MARK R. KILLENBECK, AFFIRMATIVE ACTION AND DIVERSITY: THE BEGINNING OF THE END? OR THE END OF THE BEGINNING? 20 (2004), <https://www.ets.org/Media/Research/pdf/PICAFFACTNDIVSTY.pdf> [<https://perma.cc/QG4K-GQT5>]; Cordes, *supra* note 89, at 742; Ashlee Richman, *The End of Affirmative Action in Higher Education: Twenty-Five Years in the Making?*, 4 DEPAUL J. FOR SOC. JUST. 61, 95 (2010).



strengthens the demanding evidentiary burden for affirmative action may help to usher in its demise.<sup>253</sup>

Neither *Fisher I* nor *Fisher II* explicitly mentioned the durational requirement or discussed how the Court will examine this requirement in the future. In *Fisher I*, Justice Kennedy reminded the University that despite some measure of deference to universities on whether pursuing the benefits of diversity was essential to the University's mission, "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts."<sup>254</sup> In *Fisher II*, Justice Kennedy noted that the University engages in periodic review of its admissions program and thus perhaps viewed this as sufficient to satisfy *Grutter*'s durational limit requirement, which merely required "sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."<sup>255</sup> Justice Kennedy twice admonished the University to continue to review data to assess whether its admissions approach is fair, to determine if changing demographics have reduced the need to consider race, and to study the positive and negative effects of its use of affirmative action.<sup>256</sup> Thus, one possible read of *Fisher II* is that the Court was satisfied that this requirement was met in light of its instruction that the University continue its periodic reviews and the fact that 2028 has not yet been reached.

As I argue above, the Court should not consider ending affirmative action until the opportunity and achievement gaps have narrowed such that race-neutral admissions typically produce a diverse student body or until new and effective race-neutral alternatives have been developed.<sup>257</sup> This endpoint recognizes that one of the principal reasons institutions rely on affirmative action is the achievement gap among applicants.<sup>258</sup> However, this suggested endpoint also acknowledges

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<sup>253</sup> See *supra* section I.C, pp. 198–204.

<sup>254</sup> 133 S. Ct. 2411, 2421 (2013).

<sup>255</sup> *Grutter*, 539 U.S. at 342; see also *Fisher II*, 136 S. Ct. at 2209–10.

<sup>256</sup> *Fisher II*, 136 S. Ct. at 2210, 2214–15.

<sup>257</sup> *Supra* Part II, pp. 205–37; see also Goldstein, *supra* note 248, at 95–96 (noting that race-conscious admissions should end only when they "[a]re no longer needed," *id.* at 95, and that this point would be reached "if the performance gap between whites and disadvantaged minorities disappears so that a system of race-blind admissions produces a diverse class" or when "institutions discover alternative feasible strategies to serve well the interests *Grutter* recognized," *id.* at 96); Vijay S. Sekhon, *Maintaining the Legitimacy of the High Court: Understanding the "25 Years" in Grutter v. Bollinger*, 3 CONN. PUB. INT. L.J. 359, 363–64 (2004) ("The evidence leans strongly against Justice O'Connor's implied conclusion that the use of race at competitive institutions of higher education will be unnecessary in 25 years to attain a 'critical mass' of underrepresented minority students. The sheer magnitude of the gap in grades and test scores is formidable to say the least." *Id.* at 363.).

<sup>258</sup> Alan Krueger et al., *Race, Income, and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 AM. L. & ECON. REV. 282, 283 (2006) ("Many colleges and universities attempt to

that even when the achievement gap closes, institutions may need to engage in some limited consideration of race to ensure diversity.

Efforts to close achievement gaps must focus first on closing the opportunity gaps that cause them.<sup>259</sup> Therefore, the United States should undertake a comprehensive reform agenda to close educational opportunity gaps for its own sake, but also as an aid to reducing or eliminating the need for affirmative action. I present two critical aspects of this reform agenda here. First, the federal government should lead the implementation of a comprehensive reform agenda for closing opportunity and achievement gaps. Second, the Court should revisit and overturn the *Rodriguez* decision to provide a federal judicial remedy for disparities in educational opportunity.<sup>260</sup> Neither of these responses alone will end the opportunity and achievement gaps that make affirmative action necessary. However, when considered together, these recommendations could reduce the need for affirmative action and bring us closer to a day when affirmative action is no longer needed.

*A. Embracing a Comprehensive Federal Response  
to the Opportunity and Achievement Gaps*

The federal government must establish equal access to an excellent education as an urgent national priority.<sup>261</sup> This goal insists that educational opportunity be distributed based on both student needs and the common pursuit of excellence for all children in the United States, rather than based on zip code, class, or race.<sup>262</sup> All children deserve no less than equal access to an excellent education that prepares them to succeed in postsecondary education or a career and fully nurtures their abilities.<sup>263</sup> The federal government is well equipped to prioritize educational excellence and equity through the use of the bully pulpit

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offset the gaps in the credentials of black and white applicants by giving an advantage in admission to black applicants over white applicants with similar academic records.”).

<sup>259</sup> See Welner & Carter, *supra* note 19, at 1–3.

<sup>260</sup> These two proposals build on the scholarship that argues that systemic elementary and secondary reform must be undertaken before affirmative action can be eliminated. See Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1261 (2002); Goldstein, *supra* note 248, at 142–43; Johnson, *supra* note 246, at 172–73; see also Schmidt, *supra* note 246, at 783–86 (“Since racial discrimination in social life exists, and presumably will exist in twenty-five years, the abolition of race-conscious programs before that would reestablish government acquiescence to social inequality under a remedial theory. Therefore, under a remedial theory, only when equality is gained should race-conscious programs be terminated in order to provide racial neutrality.” *Id.* at 784 (footnote omitted)).

<sup>261</sup> Robinson, *supra* note 18, at 985–86.

<sup>262</sup> See *id.* at 963–64.

<sup>263</sup> See *id.* at 963. Such an education would include economically and socially integrated schools whenever possible, in light of research that demonstrates the educational, personal, and societal benefits of such schools. See *id.* at 964.

and multimedia outlets that call attention to this issue.<sup>264</sup> Historically, the federal government has demonstrated its capacity to emphasize the importance of education reform to the nation, including during the adoption of the Elementary and Secondary Education Act of 1965<sup>265</sup> and the No Child Left Behind Act of 2001<sup>266</sup> (NCLB).<sup>267</sup>

To lead this effort, the federal government must draw on its strengths in education policymaking, as I have discussed in my prior scholarship proposing a theory for disrupting education federalism.<sup>268</sup> I define education federalism as the balance of power between the federal and state government over education that favors state autonomy over education.<sup>269</sup> I propose substantially shifting this balance of power in ways that enable the federal government to serve as the ultimate guarantor of equity and excellence in education.<sup>270</sup> To accomplish this shift, the federal government would build on such strengths as supporting and disseminating rigorous, objective research on effective state and local approaches for ensuring educational equity and excellence, as well as research on surmounting various obstacles to effective reform.<sup>271</sup> The federal government should also supply technical assistance to states and districts in order to assist them in executing comprehensive reform.<sup>272</sup> NCLB revealed that many state agencies lacked the expertise to implement substantive education reform and instead were more accustomed to distributing funding and monitoring how it was spent.<sup>273</sup> Technical assistance can expand the capacity of states and localities for reform and offer insights from other states and localities that would encourage greater efficiency in reforms.<sup>274</sup> Federal financial assistance also could provide both incentives and assistance for providing equal access to an excellent education.<sup>275</sup> Such assistance will be critical for gaining buy-in for comprehensive reform and for encouraging states and localities to raise the quality of the most disadvantaged schools rather than lowering the quality of more

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<sup>264</sup> See *id.* at 986–88.

<sup>265</sup> Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

<sup>266</sup> Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

<sup>267</sup> See Robinson, *supra* note 18, at 987–88.

<sup>268</sup> See *id.* at 983–1005.

<sup>269</sup> *Id.* at 962.

<sup>270</sup> *Id.* at 1002–05.

<sup>271</sup> See *id.* at 994–96.

<sup>272</sup> See *id.* at 996–98.

<sup>273</sup> See *id.* at 997 (citing PAUL MANNA, COLLISION COURSE: FEDERAL EDUCATION POLICY MEETS STATE AND LOCAL REALITIES 49 (2011)).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 998.

privileged schools.<sup>276</sup> My theory also adds a needed layer of federal accountability for equitable distribution of an excellent education.<sup>277</sup>

By undertaking this substantial shift in education federalism, the United States could implement a comprehensive education reform agenda that ensures equal access to an excellent education.<sup>278</sup> Insistence on state and local control of education and limited federal influence has operated as a shield that has insulated states from meaningful federal accountability, despite the fact that states have refused to implement the extensive reforms that are needed to provide an excellent and equitable education to all children.<sup>279</sup> The nation's longstanding approach to education federalism reveals numerous shortcomings that indicate that a new approach is needed.<sup>280</sup> Education federalism has hindered efforts to advance equal educational opportunity.<sup>281</sup> For instance, education federalism drove the Court's insistence on a quick return to local control of public schools after a relatively short desegregation effort to remedy the longstanding denial and segregation of education for African American children.<sup>282</sup> Education federalism also limited the ability of Congress to establish a national floor for state standards or for teachers in NCLB and thus left the states free to adopt relatively weak academic and teacher-qualification standards.<sup>283</sup>

Education federalism's emphasis on state and local control of education also has not reaped some of the benefits that it is designed to achieve.<sup>284</sup> State and local control can encourage excellence, experimentalism, and responsiveness to local needs.<sup>285</sup> However, local control is not an end in itself but merely a method for achieving these benefits.<sup>286</sup> For example, the funding systems of most states do not distribute greater funding to districts with higher concentrations of poverty, despite research demonstrating that students in these districts need additional resources to compete successfully with their more priv-

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<sup>276</sup> See *id.* at 998–99.

<sup>277</sup> See *id.* at 1016.

<sup>278</sup> *Id.* at 972–1005.

<sup>279</sup> *Id.* at 978–79.

<sup>280</sup> See *id.* at 972–83.

<sup>281</sup> Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 297–305, 309–11, 324–30 (2013).

<sup>282</sup> *Id.* at 297–305.

<sup>283</sup> *Id.* at 324–30.

<sup>284</sup> See Robinson, *supra* note 18, at 972–76.

<sup>285</sup> See *id.* at 970–71 (citing, *inter alia*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>286</sup> DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 179–80 (2001).

ileged peers.<sup>287</sup> Instead, fourteen states deliver less funding to districts with greater concentrations of poverty, eighteen states deliver the same funding, and only sixteen states provide more funding.<sup>288</sup> This reveals a fundamental unwillingness, or at least an inability, of most states to meet the educational needs of students within their states and to distribute funding in an equitable manner. Research also demonstrates that many states provide quite low per-pupil funding levels<sup>289</sup> and do not include mechanisms for overseeing the efficient use of resources.<sup>290</sup> Students within the United States at all income levels perform significantly and pervasively below their international peers in Asia, Europe, and some other countries in the Americas.<sup>291</sup> This evidence indicates that the laboratory of the states is generally failing to provide the excellent and equitable schools that the nation's schoolchildren need and deserve and that the United States needs to thrive.

Local control has greatly diminished in recent decades and thus enjoys only a circumscribed existence in school districts today.<sup>292</sup> Nevertheless, local control that sparks innovation, parental and teacher involvement, and tailoring of educational opportunities to the needs of children must be maintained. While beneficial forms of state and local control of education should be preserved,<sup>293</sup> the United States must simultaneously declare that the autonomy to shortchange some children while privileging others has come to an end. Instead, the United States should adopt a new understanding of education federalism that embraces federal leadership for a federal-state partnership that ensures equal access to an excellent education for all children.

Despite federalism-based concerns over this increase in federal influence over education as too great a reduction in state and local control, my approach would retain a number of features that recognize

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<sup>287</sup> See David G. Sciarra & Danielle Farrie, *From Rodriguez to Abbott: New Jersey's Standards-Linked School Funding Reform*, in *THE ENDURING LEGACY OF RODRIGUEZ*, *supra* note 18, at 119, 120–21.

<sup>288</sup> BRUCE BAKER ET AL., *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 5* (5th ed. 2016), [http://www.schoolfundingfairness.org/National\\_Report\\_Card\\_2016.pdf](http://www.schoolfundingfairness.org/National_Report_Card_2016.pdf) [<https://perma.cc/M3GH-PSM8>] (surveying funding in forty-eight states).

<sup>289</sup> See *id.* at 3–4; Allan R. Odden et al., *A 50-State Strategy to Achieve School Finance Adequacy*, 24 *EDUC. POL'Y* 628, 646–47 (2010).

<sup>290</sup> See ULRICH BOSER, *CTR. FOR AM. PROGRESS, RETURN ON EDUCATIONAL INVESTMENT: 2014: A DISTRICT-BY-DISTRICT EVALUATION OF U.S. EDUCATIONAL PRODUCTIVITY 27* (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/07/ROI-report.pdf> [<https://perma.cc/FF33-DP73>]; EQUITY & EXCELLENCE COMM'N, *supra* note 139, at 17.

<sup>291</sup> Lawrence H. Summers, *Foreword* to ERIC A. HANUSHEK, PAUL E. PETERSON & LUDGER WOESSMANN, *ENDANGERING PROSPERITY: A GLOBAL VIEW OF THE AMERICAN SCHOOL*, at vii (2013); HANUSHEK, PETERSON & WOESSMAN, *supra*, at 39, 43–45, 51–52.

<sup>292</sup> See James E. Ryan, *The Tenth Amendment and Other Paper Tigers: The Legal Boundaries of Education Governance*, in *WHO'S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY* 42, 60 (Noel Epstein ed., 2004).

<sup>293</sup> See Robinson, *supra* note 18, at 1014–16.

federalism's potential benefits. My proposal retains most of the existing forms of state and local control of education. It does not embrace a national schoolhouse or federalize our education system. Instead, it insists that states equitably distribute educational opportunities and provide all children an excellent education. In addition, my theory for disrupting education federalism would empower new forms of state and local control for those communities who have lacked the influence to demand an excellent and equitable education for their children.<sup>294</sup> This theory admittedly and intentionally ends a state's ability to distribute resources in an inequitable and irrational manner that harms both disadvantaged children and the nation's interest in an educated citizenry and workforce. However, states would retain primary control of education as each state would select the best path for it to ensure equal access to an excellent education.

### B. *Overturing Rodriguez*

To be most effective, a comprehensive federal agenda requires the assistance of all three branches of government. The executive branch enjoys the fewest obstacles to reform because it could use its existing authority to accomplish incremental shifts to education federalism through modest reforms that employ its existing authority and resources.<sup>295</sup> Nevertheless, given the full scope of the shift to education federalism that I recommend, reforms instituted without any significant involvement of Congress or the Court would lack the comprehensive nature that ensuring equal access to an excellent education for all schoolchildren will ultimately demand. Legislation consistent with this agenda would send an even more powerful message that the agenda represents the will of the people and thus may encourage greater state and local buy-in.<sup>296</sup> However, the eight-year delay in reenacting the Elementary and Secondary Education Act of 1965, which eventually led to the reduction of the federal role in education in the Every Student Succeeds Act,<sup>297</sup> and the great difficulties that Congress is experiencing in passing legislation<sup>298</sup> suggest that legislative reform consistent with my proposal is unlikely in the near term.

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<sup>294</sup> See *id.* at 1014–15.

<sup>295</sup> Robinson, *supra* note 141, at 25, 34–35.

<sup>296</sup> For my preliminary thoughts on a possible legislative agenda that implements my theory for disrupting education federalism, see *id.* at 233–49.

<sup>297</sup> Valerie Strauss, *The Successor to No Child Left Behind Has, It Turns Out, Big Problems of Its Own*, WASH. POST: ANSWER SHEET (Dec. 7, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/12/07/the-successor-to-no-child-left-behind-has-it-turns-out-big-problems-of-its-own/> [<https://perma.cc/J8J4-E4AS>].

<sup>298</sup> See generally Josh Blackman, *The Supreme Court, 2015 Term — Comment: Gridlock*, 130 HARV. L. REV. 241 (2016).

Fortunately, the Court possesses the authority to unleash a powerful tool that could help to reduce the opportunity and achievement gaps that lead universities and colleges to rely on affirmative action in admissions. It could overturn *Rodriguez*, which held that the Constitution does not protect education as a fundamental right.<sup>299</sup>

For over forty years, *Rodriguez* has served as a roadblock to access to federal courts for those who hope to address the entrenched disparities in funding and resources that relegate many disadvantaged and minority students to inferior educational opportunities in the United States.<sup>300</sup> Because the Court held that education was not a fundamental right, *Rodriguez* applied rational basis review to the funding gaps between districts within Texas.<sup>301</sup> The Court determined that Texas easily met this standard because its funding approach advanced local control of education, the Court lacked the expertise to second-guess the Texas system, and a ruling for the plaintiffs would greatly upset the balance of federalism.<sup>302</sup> The Court nonetheless noted the need for reform of school funding and challenged the states to undertake this reform.<sup>303</sup> Although many states have implemented funding reform since *Rodriguez* and state litigation has resulted in some important victories, these state efforts have fallen far short of the reforms required to provide all children equal access to an excellent education.<sup>304</sup> In light of the continuing disparities in educational opportunity, numerous scholars, myself included, have argued that *Rodriguez* was wrongly decided and should be overturned to provide a consistent and powerful federal remedy to address these disparities.<sup>305</sup>

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<sup>299</sup> 411 U.S. 1, 35 (1973). In making this argument, I agree with now-California Supreme Court Justice Liu's contention that overturning *Rodriguez* could serve as a possible avenue for addressing the inequalities within elementary and secondary education that make affirmative action necessary. See Goodwin Liu, Brown, Bollinger, and Beyond, 47 HOW. L.J. 705, 765–66 (2004). My argument differs from Justice Liu's because I recommend overturning *Rodriguez* as one approach for providing equal access to an excellent education while Justice Liu recommends overturning *Rodriguez* as a way "to eliminate at least the most egregious disparities." *Id.* at 766. I disagree that eliminating only the most egregious educational disparities is a viable avenue for meaningful progress toward equal educational opportunity. In addition, my recommendation for overturning *Rodriguez* is merely one component of a comprehensive approach that involves action by the legislative and executive branches as well as universities and colleges.

<sup>300</sup> Ogletree & Robinson, *supra* note 18, at 264.

<sup>301</sup> 411 U.S. at 37, 44, 54–55.

<sup>302</sup> See *id.* at 47–50, 54–55.

<sup>303</sup> See *id.* at 58.

<sup>304</sup> Ogletree & Robinson, *supra* note 18, at 269–70; Michael A. Rebell, *Rodriguez Past, Present, and Future*, in THE ENDURING LEGACY OF RODRIGUEZ, *supra* note 18, at 65, 72–73.

<sup>305</sup> See, e.g., Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1009–11 (1994) (arguing that *Rodriguez* and *Milliken v. Bradley*, 418 U.S. 717 (1974), are the cases that caused the Court to fail to protect equal educational opportunity); Liu, *supra* note 299, at 765–66; Ogletree & Robinson, *supra* note 18, at 264 (arguing that *Rodriguez* was wrongly decided and that a federal forum is

However, disagreement exists over the scope of the right that the Court should recognize. The Court left the existence of a fundamental right to some minimum education an open question in *Rodriguez*<sup>306</sup> and subsequently acknowledged that the question remains open.<sup>307</sup> If *Rodriguez* is overturned, some scholars envision the Court addressing only extreme forms of educational inequality by providing a federal right to a minimally adequate education.<sup>308</sup> Leading education scholar Professor Derek Black, on the other hand, has argued that such an education today would require that students receive the state-defined minimum of education and that this definition does not have to equal “a minimalist education.”<sup>309</sup>

Given the likelihood that the Court will insist that affirmative action eventually end, the Court should take some responsibility for addressing the conditions that lead institutions to rely on affirmative action by overturning the decision that insulated opportunity gaps from federal accountability. The Court could choose from a variety of constitutional provisions to recognize a right to education.<sup>310</sup> For in-

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needed to close the educational opportunity gaps in the United States); Rebell, *supra* note 304, at 65–68.

<sup>306</sup> See 411 U.S. at 35–37.

<sup>307</sup> See *Papasan v. Allain*, 478 U.S. 265, 285 (1986).

<sup>308</sup> See, e.g., Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 68–72 (1987); Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 479–80 (1998); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 149 (2013); Liu, *supra* note 299, at 765–67; Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 296 (1993); Matthew A. Brunell, Note, *What Lawrence Brought for “Show and Tell”: The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 366 (2005).

<sup>309</sup> Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1408 (2010).

<sup>310</sup> See generally Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 574–630 (1992) (providing an excellent discussion of the possible textual sources for a federal constitutional right to education). A full exploration of the possible constitutional sources for a right to education is beyond the scope of this Comment. For examples of scholarly arguments in favor of a constitutional right to education, see Friedman & Solow, *supra* note 308, at 119 (“When one looks to Due Process Clause cases, one finds not only an open question, but a jurisprudential basis for a federal right to education.”); Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 467 (2014) (arguing “for a human dignity-based, due process clause analysis to recognize the fundamental duty of government to provide high quality, public education”); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 335 (2006) (arguing that a federal right to “adequate educational opportunity for equal citizenship” exists within the Citizenship Clause of the Fourteenth Amendment); Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 90 (2012) (“[L]ow-income students should have a strong claim, under all three tiers of the Supreme Court’s equal protection analysis, to meaningful educational opportunities that include a range of comprehensive services.”); Kara A. Millonzi, Recent Development, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L.



stance, the Court could hold that the Fourteenth Amendment's requirement that states not deny equal protection of the laws<sup>311</sup> serves as a prohibition of the inequitable state disparities in educational opportunity or guarantees students an education that enables them to effectively employ their First Amendment rights and to be competent voters.<sup>312</sup> Recognizing and enforcing a federal right to education would provide greater authority and consistent impact than the state education clauses that vary widely in their protection — or lack thereof — of the right to education.<sup>313</sup> The federal courts have been and will remain an important and powerful avenue for enforcing education rights for all students throughout the United States in ways that do not make the content of a right dependent on the happenstance of geography or state law.<sup>314</sup> A federal constitutional right also would enable the federal courts to address the substantial interstate disparities in funding that currently account for seventy-eight percent of per-pupil spending gaps.<sup>315</sup> This tremendous interstate disparity, which has reached a

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REV. 1286, 1311 (2003) (“The recognition of the right to education under the Privileges or Immunities Clause suggests that public school systems that fail to provide an adequate education to our nation’s youth are unconstitutional. Thus, because educational inadequacy is often linked to lack of financial resources, public school funding systems that fail to provide sufficient financial resources are constitutionally suspect.”).

<sup>311</sup> U.S. CONST. amend. XIV, § 1.

<sup>312</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 83–84, 89 (1973) (Marshall, J., dissenting); *Rebell*, *supra* note 304, at 76–78; see also Black, *supra* note 309, at 1415–16 (arguing that the Equal Protection Clause requires federal courts and Congress to “engage to ensure that the rights states have extended to children are delivered on an equitable and consistent basis,” *id.* at 1415, and that bringing federal enforcement to existing states’ rights could “provide the basis and impetus for the eventual recognition of education as a fundamental right, and further federal support of education,” *id.* at 1416); Robert P. Moses, *Constitutional Property v. Constitutional People*, in *QUALITY EDUCATION AS A CONSTITUTIONAL RIGHT: CREATING A GRASSROOTS MOVEMENT TO TRANSFORM PUBLIC SCHOOLS* 70, 90 (Theresa Perry et al. eds., 2010) (“In the twenty-first century we should pick our constitution up with the concept of a constitutional person thick enough to obligate the nation to secure for all its children a quality public school education as a matter of course, a matter of history, and a matter of our constitutional democracy.”); Penelope A. Prevolos, *Rodríguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 119–20 (1980) (arguing that the Fourteenth Amendment could provide a constitutional basis for a federal right to education).

<sup>313</sup> Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, *Introduction: The Enduring Legacy of San Antonio Independent School District v. Rodriguez*, in *THE ENDURING LEGACY OF RODRIGUEZ*, *supra* note 18, at 1, 12–15; *Rebell*, *supra* note 304, at 72–73.

<sup>314</sup> See JACK JENNINGS, *PRESIDENTS, CONGRESS, AND THE PUBLIC SCHOOLS: THE POLITICS OF EDUCATION REFORM* 206–08 (2015).

<sup>315</sup> See Nora E. Gordon, *The Changing Federal Role in Education Finance and Governance*, in *HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY* 317, 331 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015); see also JENNINGS, *supra* note 314, at 208 (explaining how a federal constitutional right to education could address interstate disparities in educational opportunity).

“historic high” for spending differences,<sup>316</sup> reveals the failure of state courts to close spending gaps on their own.<sup>317</sup>

If the Court chooses to overturn *Rodriguez* in a manner that would help to close opportunity gaps, it should incorporate four essential principles into a constitutional right to education. First, the Court must embrace a robust fundamental right to education that moves beyond guaranteeing a rudimentary floor of educational opportunity. A minimal right would not make a meaningful impact on opportunity or achievement gaps. Instead, the Court should consider recognizing a right to education that requires states to provide an education-based justification for the quality of education provided and any disparities in educational opportunity. Such a standard would enable states to offer disparate opportunities to students with disabilities, English-language learners, and low-income children, but would force states to end the superior opportunities that are provided to wealthier children absent an educational justification for such disparities. Defining a fundamental right to education in this way would help to level the playing field within public schools and insist that states design education systems based on research and students’ needs rather than power, politics, and privilege.

Second, the Court should include safeguards that reduce the likelihood that states level down their educational opportunities<sup>318</sup> or seek to avoid the Court’s requirements.<sup>319</sup> One safeguard could be an instruction to states that guaranteeing a federal right to education should avoid reducing the quality and nature of existing educational opportunities and instead should seek ways to expand the delivery of a high-quality education to those who are currently denied it. The Court also can reduce the likelihood of decreasing the quality of educational opportunities within a state by providing clear requirements on the nature of the education right. In this regard, the Court can learn from decades of school finance litigation that has worked to give meaning to the right to education embodied in state constitutions,<sup>320</sup> while recog-

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<sup>316</sup> Gordon, *supra* note 315, at 331.

<sup>317</sup> See Rebell, *supra* note 304, at 72–73, 85.

<sup>318</sup> Compare RYAN, *supra* note 139, at 175–76 (noting that some favoring funding reform raise concerns that suits that seek equity in funding will cause a state to level down spending but that “the evidence for this proposition is . . . thin” and that despite concerns that such a reduction occurred in California, other successful lawsuits have not caused a leveling down), with Joshua E. Weishart, *Transcending Equity Versus Adequacy*, 66 STAN. L. REV. 477, 501–02 (2014) (noting that overall spending leveled down in some states after some successful equity school funding litigation).

<sup>319</sup> States took such evasive action after the Court’s decision in *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 300–01 (1955). Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 797–803 (2010).

<sup>320</sup> See generally Weishart, *supra* note 318.

nizing that this litigation has had significant shortcomings and has not ultimately resulted in equal access to an excellent education for all children.<sup>321</sup>

Third, the Court must acknowledge that a constitutional right to education would shift education federalism in ways that would increase federal influence over education and reduce some aspects of state control over education. The Court must wrestle with its own prior pronouncements heralding the importance of local control of education.<sup>322</sup> Such a shift in an area of traditional state control must be justified with an explanation for why this shift is both appropriate and warranted.<sup>323</sup>

When the Court provides this explanation, it should remind the states that *Rodriguez* urged state reform of school finance systems in light of the persistent and heavy reliance on property taxes and the disparities in educational opportunity.<sup>324</sup> The limited nature and impact of subsequent reforms remains apparent in light of the Equity and Excellence Commission's finding in 2013 that "students, families and communities are burdened by the broken system of education funding in America."<sup>325</sup> The Commission further noted that over forty years of reforms "have not addressed the fundamental sources of inequities and so have not generated the educational gains desired."<sup>326</sup> Scholars also have recognized the limited success of decades of funding litigation to remedy longstanding inequitable disparities in educational opportunity.<sup>327</sup> School funding data and research also confirm a host of shortcomings in state funding systems despite the Court's invitation to reform funding in ways that increase equal educational opportunities.<sup>328</sup>

In addition to the shortcomings noted above, most states have not designed their funding systems to accomplish their education goals.<sup>329</sup> Instead, politics oftentimes drives the distribution of funding as state

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<sup>321</sup> RYAN, *supra* note 139, at 153; Rebell, *supra* note 304, at 72–73.

<sup>322</sup> See *Freeman v. Pitts*, 503 U.S. 467, 489–90 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991); *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51–53 (1973).

<sup>323</sup> For an extensive discussion of why education federalism should be reexamined and shifted toward greater federal influence over education, see Robinson, *supra* note 18, at 972–85.

<sup>324</sup> *Rodriguez*, 411 U.S. at 58–59.

<sup>325</sup> EQUITY & EXCELLENCE COMM'N, *supra* note 139, at 17.

<sup>326</sup> *Id.* at 19.

<sup>327</sup> See RYAN, *supra* note 139, at 153; Black, *supra* note 309, at 1370–71 (acknowledging that litigation has reduced some funding disparities and increased funding for education but that inequities persist and students are not yet provided the education that they need to reach high outcomes); Robinson, *supra* note 18, 978–80.

<sup>328</sup> Robinson, *supra* note 141, at 6–20.

<sup>329</sup> See Sciarra & Farrie, *supra* note 287, at 125; Paul T. Hill, *Spending Money When It Is Not Clear What Works*, 83 PEABODY J. EDUC. 238, 239 (2008).

politicians assess how much funding is available for a given school year and then bargain over how that amount should be divided among the students in the state.<sup>330</sup> When the Court acknowledges that its decision will result in a shift in education federalism, it also should acknowledge that the laboratory of the states has failed to develop the reforms needed to ensure an equitable and excellent education for every child.

Fourth, the Court must acknowledge that recognizing a constitutional right to education would only begin the process of closing opportunity and achievement gaps. The reform of funding systems and the redistribution of educational opportunity will take a significant amount of time. The Court will need to encourage lower courts to retain jurisdiction over cases enforcing this right, just as state courts typically retain jurisdiction over cases enforcing a state right to education.<sup>331</sup>

In this regard, the Court must avoid the errors of its desegregation cases, which initially insisted on effective desegregation in the late 1960s and early 1970s,<sup>332</sup> but then eventually emphasized the return to local control of schools rather than the effectiveness of desegregation orders. For example, in *Milliken v. Bradley*,<sup>333</sup> the Court overturned an interdistrict desegregation plan for the metropolitan Detroit area in part because the plan's inclusion of districts surrounding Detroit would cause a reduction in local control.<sup>334</sup> The Court took this action in spite of the Sixth Circuit's finding that crossing district boundaries was particularly appropriate given the state's discrimination that maintained racial segregation across school district boundaries and that failing to include the surrounding districts would "nullify" *Brown v. Board of Education*.<sup>335</sup> As I have explored in prior work, the Court's desegregation decisions in *Board of Education of Oklahoma City Public Schools v. Dowell*,<sup>336</sup> *Freeman v. Pitts*,<sup>337</sup> and *Missouri v.*

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<sup>330</sup> See BETTY COX ET AL., THE COSTS OF EDUCATION: REVENUE AND SPENDING IN PUBLIC, PRIVATE AND CHARTER SCHOOLS 158 (2013); Bruce D. Baker, *How State Aid Formulas Undermine Educational Equity in States*, in THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING 13, 37 (Bruce D. Baker & Sean P. Corcoran eds., 2012).

<sup>331</sup> See, e.g., *Abbott ex rel. Abbott v. Burke*, 693 A.2d 417, 421-25 (N.J. 1997) (describing multiple decisions from the case's history in state court); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 328-29 (N.Y. 2003) (same); *DeRolph v. State*, 754 N.E.2d 1184, 1188 (Ohio 2001) (same).

<sup>332</sup> See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 26 (1971); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 438-39, 438 n.4 (1968).

<sup>333</sup> 418 U.S. 717 (1974).

<sup>334</sup> *Id.* at 741-44.

<sup>335</sup> *Bradley v. Milliken*, 484 F.2d 215, 249 (6th Cir. 1973) (en banc), *rev'd*, 418 U.S. 717 (1974).

<sup>336</sup> 498 U.S. 237, 249-50 (1991).

<sup>337</sup> 503 U.S. 467, 489 (1992).

*Jenkins*<sup>338</sup> also reified local control of the schools by focusing on releasing districts from court supervision rather than on effective and lasting school desegregation.<sup>339</sup> Scholars have documented how these cases signaled that the Court had determined that desegregation had gone on long enough and it was time for school boards to regain control even if desegregation was never ultimately accomplished.<sup>340</sup>

If a federal right to education is going to serve as a mechanism to close educational opportunity gaps and to reduce the need for selective institutions to rely on consideration of an applicant's race to achieve diversity's benefits, the Court must learn from how its desegregation decisions undeniably contributed to the racial isolation that pervades so many school districts today.<sup>341</sup> The Court's impatience with the slow nature of desegregation reveals a shallow understanding of the depth of the social ill that the Court declared unconstitutional in *Brown* and an unwillingness to insist upon ongoing federal court investment in the effective dismantling of segregation. Overturning *Rodriguez* will require the Court to confront longstanding and deeply entrenched inequalities within public education. The federal courts will be called upon to oversee reforms that topple the settled expectations of more privileged sectors of society, just as the Court confronted the expectations of racism and white privilege that supported racial segregation. Thus, the reforms required by the Court cannot give a wink and a nod to those who benefit from the status quo while simultaneously claiming to demand reform.

The Court must eschew any approval of unwarranted delay, as occurred in *Brown II*'s command to desegregate with "all deliberate speed,"<sup>342</sup> or any invitation to incomplete or ineffective results, as the Court sanctioned in *Dowell*, *Freeman*, and *Jenkins*.<sup>343</sup> Instead, the Court must insist that states implement the reforms that will ensure

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<sup>338</sup> 515 U.S. 70, 98 (1995).

<sup>339</sup> For a thorough analysis of how the Court did this, see Robinson, *supra* note 319, at 820–29.

<sup>340</sup> See Patricia A. Brannan, Essay, *Missouri v. Jenkins: The Supreme Court Reconsiders School Desegregation in Kansas City, Criteria for Unitary Status, and Remedies Reaching Beyond School District Lines*, 39 HOW. L.J. 781, 781 (1996); Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597, 681 (1996); Donald E. Lively, *Desegregation and the Supreme Court: The Fatal Attraction of Brown*, 20 HASTINGS CONST. L.Q. 649, 662 (1993); Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 767 (1996); Leland Ware, *Foreword: School Desegregation, Civil Rights, and the Supreme Court's 1994–1995 Term*, 15 ST. LOUIS U. PUB. L. REV. 1, 12 (1995); see also Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1161–1210 (2000) (noting the forces that signaled an end to school desegregation but finding from an empirical study that there is little attention paid to terminating most desegregation cases).

<sup>341</sup> See Robinson, *supra* note 319, at 829–32; see also RYAN, *supra* note 139, at 98–108, 110–17; Chemerinsky, *supra* note 305, at 1009–11.

<sup>342</sup> *Brown II*, 349 U.S. 294, 301 (1955).

<sup>343</sup> Robinson, *supra* note 319, at 820–33.

equal access to an excellent education. It must make clear that states will not be released from court oversight until they have done so. Consistent Supreme Court insistence on an excellent and equitable education for all children will provide lower federal courts the support that they will need both to confront state legislatures that resist changing the status quo and to prevent evasive actions similar to those invited by the Court's ambiguous pronouncements in *Brown II*.<sup>344</sup>

In sum, a federal right to education that embraces these principles provides the most promising path toward closing opportunity and achievement gaps such that selective postsecondary institutions may not be required to consider race to achieve diversity's benefits.<sup>345</sup> Unless the Court overturns *Rodriguez*, the Court will remain complicit with the deeply entrenched educational opportunity gaps and should not blame postsecondary institutions that must build diverse institutions despite those gaps.

### CONCLUSION

*Fisher I* and *II* wear two faces: one nodding approvingly at the University of Texas's plan and another casting a skeptical eye toward future challenges. On one face, *Fisher II* placed the Court's imprimatur on the admissions plan at the University in ways that will enable it to serve as a guide for other institutions that must defend their use of affirmative action.<sup>346</sup> *Fisher II*'s analysis regarding the absence of a need to reduce the goal of diversity to actual numbers, the types of evidence that the Court will consider persuasive, and the deficiencies of percentage plans can assist institutions that employ affirmative action. Yet the *Fisher* decisions' other face is one that reinforced and strengthened the evidentiary requirements in *Grutter* in ways that may

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<sup>344</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 354–56 (2004).

<sup>345</sup> Additionally, Congress could take a variety of actions to support the Court's recognition of a constitutional right to education. Congress could embrace the Court's requirements as conditions on funding in the Elementary and Secondary Education Act of 1965 or on any education funding, authorize grants to support reform, extend funding for the DOE to enforce new conditions, and monitor DOE enforcement of the conditions. See Robinson, *supra* note 141, (manuscript at 34–49) (proposing congressional mechanisms that could lead states to offer equal access to an excellent education); Robinson, *supra* note 18, at 1006–12 (describing how Congress can still expand the federal role in education despite the limits *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), placed on congressional spending). The executive branch could issue an executive order on the importance of compliance with the Court's decision recognizing a federal right to education, establish a commission to study and recommend effective responses, enforce any statutory conditions on education funding, and modify education regulations and guidance consistent with the Court's pronouncements. These efforts would provide critical support for the Court's decision to recognize a constitutional right to education by overturning *Rodriguez*. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

<sup>346</sup> See 136 S. Ct. at 2210–14.

make it more difficult for institutions to succeed in constitutional challenges. Ending any possible deference in the narrow tailoring analysis, proving the absence of any viable race-neutral alternatives, expecting numerous types of data to justify the decision to consider race, and identifying the limited impact of race as a “hallmark” of narrow tailoring for affirmative action may create new hurdles for defending affirmative action.<sup>347</sup>

The best response to the mixed message of the *Fisher* cases is to examine and remedy the root causes that lead institutions to rely on affirmative action. Educational opportunity gaps serve as a primary impetus for enduring achievement gaps.<sup>348</sup> As long as opportunity gaps persist, postsecondary institutions could consider educational disadvantage as a positive race-neutral admissions factor that may help them advance diversity. Such an approach might enable an institution to reduce or eliminate its consideration of an applicant’s race, or at minimum provide further evidence that it examined all race-neutral alternatives.

The United States has not undertaken a comprehensive and sustained effort to ensure that all children receive equal access to an excellent education.<sup>349</sup> Furthermore, although the Court has insisted that affirmative action must eventually end,<sup>350</sup> *Rodriguez* closed the federal courthouse to challenges to disparities in educational opportunity.<sup>351</sup> Ultimately, the federal government must undertake a comprehensive effort that partners with states and localities to ensure equal access to an excellent education. The Court should overturn *Rodriguez* as an important component of this comprehensive effort. Until educational opportunity and achievement gaps are closed, the Court should not insist on an end to affirmative action.

Even if the Court declared its willingness for affirmative action to continue indefinitely, the United States should undertake comprehensive reforms that ensure equal access to an excellent education as a matter of fundamental fairness,<sup>352</sup> economic self-interest,<sup>353</sup> democratic

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<sup>347</sup> See *id.* at 2212–13.

<sup>348</sup> See *supra* section II.A, pp. 206–10.

<sup>349</sup> See EQUITY & EXCELLENCE COMM’N, *supra* note 139, at 19.

<sup>350</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003).

<sup>351</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>352</sup> See EQUITY & EXCELLENCE COMM’N, *supra* note 139, at 34.

<sup>353</sup> For a summary of research on the economic costs of an inadequate education, see Robinson, *supra* note 141; and Robinson, *supra* note 18, at 974. See also EQUITY & EXCELLENCE COMM’N, *supra* note 139, at 12–14 (noting the high costs of providing many children a low-quality education).

engagement,<sup>354</sup> national security,<sup>355</sup> and moral imperative.<sup>356</sup> The consequences that the United States currently suffers from its mediocre education system are much too costly<sup>357</sup> and too often are disproportionately borne by those who are socioeconomically disadvantaged, people of color, or both.<sup>358</sup> The urgent need for comprehensive education reform is also undeniable given research showing that even relatively privileged children are performing poorly compared to their international peers.<sup>359</sup> The United States holds within its grasp the power to change the destiny of its children and ultimately the nation. Let us work tirelessly to urge the United States to take hold of this power with both hands and to insist on an excellent and equitable education for all of its children.

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<sup>354</sup> EQUITY & EXCELLENCE COMM'N, *supra* note 139, at 12.

<sup>355</sup> See COUNCIL ON FOREIGN RELATIONS, *supra* note 143, at 7; Robinson, *supra* note 142 (citing THEOKAS, *supra* note 142, at 1).

<sup>356</sup> Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.").

<sup>357</sup> Robinson, *supra* note 18, at 974; Robinson, *supra* note 141, at 22–24.

<sup>358</sup> EQUITY & EXCELLENCE COMM'N, *supra* note 139, at 14; RYAN, *supra* note 139, at 1; Robinson, *supra* note 18, at 961–62.

<sup>359</sup> HANUSHEK, PETERSON & WOESSMAN, *supra* note 291, at vii.