MOVING FORWARD WHILE PUSHING BACK: HOW PRIVATE LAW SCHOOLS CAN HELP PUBLIC LAW SCHOOLS NAVIGATE DIVERSITY, EQUITY, INCLUSION, AND ACCESS IN CHALLENGING TIMES

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INTRODUCTION

On May 25, 2020, the world watched as Minneapolis police officer Derek Chauvin placed his knee on George Floyd's neck for nine minutes and twenty-nine seconds,[1] asphyxiating him.[2] Bystander Darnella Frazer captured George Floyd's murder by cellphone, later posting the video on Facebook. The video quickly went viral as others widely shared it on multiple social media platforms, making Floyd's death impossible to ignore. The video ignited civil unrest in the United States and worldwide protests.[3] As one writer noted, "Floyd's death quickly became 'an inflection-point in the modern civil rights movement.'"[4] There was collective,

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1. Most often reported is that Officer Chauvin kept his knee on George Floyd's neck for eight minutes and forty-six seconds, footage from Chauvin's bodycam showed that it was nine minutes and twenty-nine seconds. Bloomberg Quicktake, *Derek Chauvin Pressed Knee Into George Floyd's Neck for 9 Minutes, 29 Seconds*, YOUTUBE (Apr. 7, 2021), youtube.com/watch?v=G9pssTNgK-g.

2. Chris McGreal, *Doctor Who Tried to Save George Floyd Says Asphyxia was Likely Cause of Death*, THE GUARDIAN (Apr. 5, 2021, 1:31 PM), https://www.theguardian.com/us-news/2021/apr/05/derek-chauvin-trial-george-floyd-doctor-asphyxiation.

3. Erika George, *Racism as a Human Rights Risk: Reconsidering the Corporate 'Responsibility to Respect' Rights*, 6 BUS. & HUM. RTS. J., 576, 576 (2021).

4. Patricia J. Dixon & Lauren Dundes, *Exceptional Injustice: Facebook as a Reflection of Race- and Gender-Based Narratives Following the Death of George Floyd*, 9 SOC. SCIS. 231, 231 (2020).

nationwide outrage.[5] Due to the efforts of Black Lives Matter and its allies, the United States experienced the largest racial justice protest since the Civil Rights Movement,[6] the largest social justice protest in American history. These protests led to a global reckoning[7] with racial injustice and intolerance.[8] The #MeToo movement[9] and #StopAAPIHate movement[10] also forced the nation to confront the social injustices afflicting society.[11] Unlike the latter movements, however, George Floyd's death became the kind of galvanizing force we had not seen since the 1955 murder of Emmit Till,[12] and the Civil Rights movement of the 1960s. For some, it

Social networking sites widely shared commentary about George Floyd's death, many believing the killing constituted clear evidence of oppression, in accordance with what the Black Lives Matter movement had been asserting for some time. *Id.* at 232. *See* Michelle Garcia, *The Monumental Impact of George Floyd's Death on Black America*, NBC NEWS (May 25, 2021, 9:52 AM), https://www.nbcnews.com/news/nbcblk/monumental-impact-george-floyds-death-black-america-rcna1021 (quoting Cedrick Richmond, director of the White House Office of Public Engagement, Garcia asserts that the inflection moment forced Americans to take a hard look at themselves. They were ashamed of what they saw).

5. *What George Floyd Changed*, POLITICO MAG. (May 23, 2021, 7:00 AM), https://www.politico.com/news/magazine/2021/05/23/what-george-floyd-changed-490199; Jason Silverman, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021, 7:39 PM), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/.

6. *See* Silverman, *supra* note 5. *See generally* Paulette A. Meikle & Lekeitha R. Morris, *University Responsibility: Challenging Systematic Racism in the Aftermath of George Floyd's Murder*, 12 ADMIN. SCIS. 1, 36 (2022) (noting that a Pew Research Center study designed to understand Americans' attitudes about race relations and demonstrations sparked by George Floyd's death indicated that two-thirds of adults in the United States supported the BLM movement).

7. Charles Edward Bray, Jr., Diversity, Equity, and Inclusion Post George Floyd and COVID-19: Reflections from Global Business Leaders on a Changing Paradigm (June 2023) (Ph.D. dissertation, Pepperdine University) (Pepperdine Digital Commons).

8. Silverman, *supra* note 5.

9. *See generally* Inbal Peleg-Koriat & Carmit Klar-Chalamish, *The #MeToo Movement and Restorative Justice: Exploring Views of the Public*, 23 CONTEMP. JUST. REV. 239 (2020) (noting that social activist Tarana Burke first used the phrase "Me Too" in 2006. The term went viral, however, when actress Alyssa Milano used it as a Twitter hashtag in response to sexual assault allegations against Hollywood producer Harvey Weinstein. The #MeToo movement began among women in Hollywood, but quickly became worldwide. The movement resulted in the revelation of the perpetrators' names, offenses, and, at times, the punishment they received. In fact, within the first twenty-four hours after the first hashtag #MeToo, 12 million men and women used it to disclose the abuse they endured.).

10. *See* Jennifer Lee, *Asian Americans, Affirmative Action, & the Rise of Anti-Asian Hate*, 150 AM. ACAD. OF ARTS & SCIS. 180, 181 (2021). Lee notes that the Trump administration openly called the coronavirus the "China virus" and "kung flu," blaming China for the spread of COVID-19, scapegoating Asian Americans while ignoring the rise in attacks that followed, including having to endure being stabbed, beaten, spit upon, and vilified. *Id.* at 181. *See also* Jennifer Lee et al., *The Rise in Asian Hate in the Wake of COVID-19*, SOC. SCI. RSCH. COUNCIL: ITEMS (May 21, 2021), https://items.ssrc.org/covid-19-and-the-social-sciences/the-rise-of-anti-asian-hate-in-the-wake-of-covid-19/.

11. Sarah Dong, *The History and Growth of Diversity, Equity, and Inclusion Profession*, GLOB. RSCH. & CONSULTING GRP. INSIGHTS: BERKLEY (June 2, 2021), https://insights.grcglobalgroup.com/the-history-and-growth-of-the-diversity-equity-and-inclusion-profession/.

12. Patricia J. Dixon & Lauren Dundes, *Exceptional Injustice: Facebook as a Reflection of Race- and Gender-Based Narratives Following the Death of George Floyd*, 9 SOC. SCIS. 231, 231 (2020).

reaffirmed the persistent, longstanding pattern of police injustice and brutality against the Black community.[13]

The impact of George Floyd's death extended far beyond a social movement. It forced employers to take a public stand against social injustice and racism.[14] Internally, companies hired diversity, equity, and inclusion ("DEI") leaders to help achieve a balanced workforce.[15] The number of postings for DEI related positions increased by 123% between May and September of 2020.[16] In addition, there was an estimated 55% increase[17] in DEI openings after a 60% drop at the start of the pandemic.[18] This dramatic increase in DEI roles occurred because George Floyd's death arguably "ignited a sense of urgency for organizations to speed up the pace of change toward antiracism…. Many organizations [were] no longer satisfied with applying isolated or 'check-the-box' inventions such as mandatory diversity training on recognizing one's biases."[19] The business community openly responded, expressing outrage and making promises to help communities across the country to address economic and racial inequality.[20] "A broad section of the

13. *Id.*

14. David Hessekiel, *Companies Taking a Public Stand in The Wake Of George Floyd's Death*, FORBES (June 4, 2020, 11:24 AM), https://www.forbes.com/sites/davidhessekiel/2020/06/04/companies-taking-a-public-stand-in-the-wake-of-george-floyds-death/?sh=1f40bc697214. Hessekiel indicated that nearly 100 companies took affirmative steps to denounce the killing of George Floyd. For example, Ben & Jerry's called for the dismantling of "White Supremacy" with other specific calls to action. *Id.* In addition, UnitedHealth Group promised to pay for the college education of George Floyd's children as well as $10 million to help those hurt by the riots after Floyd's death. *Id.* In like manner, Amazon openly expressed support for BLM. *But* see, Jason Del Rey, *Amazon Hit by Five More Lawsuits Alleging Race and Gender Discrimination*, VOX (May 29, 2021, 6:59 PM), https://www.vox.com/recode/2021/5/19/22444177/amazon-five-more-lawsuits-employees-allege-race-and-gender-discrimination-charlotte-newman; Nick Blumberg, *Amazon Workers Stage Walkout, Claiming Racist Harassment and Wrongful Termination*, WTTW NEWS (May 26, 2022, 4:13 PM), https://news.wttw.com/2022/05/26/amazon-warehouse-workers-stage-walkout-claiming-racist-harassment-and-wrongful; Juliana Kim, *Amazon and Contractors Sued Over Nooses Found in Connecticut Construction Site*, NPR (Oct. 3, 2023, 9:51 PM), https://www.npr.org/2023/10/03/1202888463/lawsuit-amazon-nooses-connecticut-construction-site.

15. Curtis Bunn, *Hamstrung by 'Golden Handcuffs': Diversity Roles Disappear 3 Years After George Floyd's Murder Inspired Them*, NBC NEWS (Feb. 27, 2023, 11:46 AM), https://www.nbcnews.com/news/nbcblk/diversity-roles-disappear-three-years-george-floyd-protests-inspired-rcna72026 (indicating that company leaders promised ethnically balanced workforces but did not fulfill these promises).

16. Dong, *supra* note 11. Dong notes that there was concern as to whether the growth in DEI positions would have longevity.

17. Bunn, *supra* note 15.

18. Roy Mauer, *New DE&I Roles Spike After Racial Justice Protests*, SHRM (Aug. 6, 2020), https://www.shrm.org/topics-tools/news/talent-acquisition/new-dei-roles-spike-racial-justice-protests. Mauer noted, however, that those who took DE&I jobs with the intent to create change found there was no true commitment to the company's mission. DE&I was under resourced and hidden within layers of human resources. *Id.*

19. Maileen Dumelod Hamto, *Reflections in Advancing Racial Justice in Diversity and Inclusion*, 16 STUDS. IN SOC. JUST. 280, 286–87 (2022) (noting that racial equity and diversity practitioners had the opportunity to further galvanize focus on advocating for racial justice by mastering skills and tactics of change management.).

20. Gayle Markovitz, *The Legacy of George Floyd: Here's How Business Can Address Inequality and Promote Justice*, WORLD ECON. F.: CORP. GOVERNANCE (June 5, 2020), https://www

business community reacted to the civil unrest in the immediate aftermath of the murder of George Floyd with solidarity statements denouncing racism and pledges to promote racial equality."[21] Corporate brands quickly and openly embraced the #BlackLivesMatter movement in marketing campaigns when they had previously considered the organization untouchable.[22] They created and filled positions for chief diversity officers, announcing their commitment to increasing efforts to hire and retain more underrepresented, underprivileged, and underappreciated segments of the population.[23] These corporate leaders expressed interest in evaluating their policies to determine whether they promoted racial discrimination or supported racial inequality.[24]

While some corporations made progress toward a more equitable and inclusive workplace,[25] others failed to take simple but concrete steps to demonstrate their support of diversity. For example, they failed to file the necessary reports that would reveal their significant lack of diversity in corporate leadership and the failure to represent significant segments of their consumers.[26] These companies outwardly embraced diversity, yet their internal structure often did not support it. They did not follow through on their promises to fully support DEI endeavors,[27] particularly given complaints from some employees that DEI placed them at a disadvantage.[28] Statistics bolster this point. For example, by the end of 2022, the attrition rate for DEI roles was 33%.[29] Employers pledged to impact change but did not follow it with genuine effort.[30] DEI efforts made some progress in 2023.[31] However, given the Supreme Court's decision in college

.weforum.org/agenda/2020/06/the-legacy-of-george-floyd-here-s-how-business-can-address-inequality-and-promote-justice/.

21. George, *supra* note 3, at 576.

22. *Id*. at 576–77.

23. Paola Gaudiano, *Two Years After George Floyd's Murder, Is Your DEI Strategy Performative Or Sustainable?*, FORBES (June 27, 2022, 10:15 AM), https://www.forbes.com/sites/paologaudiano/2022/06/27/two-years-after-george-floyd-is-your-dei-strategy-performative-or-sustainable/?sh=6980065b6aaa.

24. George, *supra* note 3, at 577.

25. Ella Ceron, *Companies That Made DEI Promises After Floyd Murder Still Have Work to Do*, BLOOMBERG (May 25, 2023, 5:00 AM), https://www.bloomberg.com/news/newsletters/2023-05-25/companies-that-made-dei-promises-after-floyd-murder-still-have-work-to-do.

26. George, *supra* note 3, at 580.

27. Ceron, *supra* note 25.

28. Gaudiano, *supra* note 23.

29. Bunn, *supra* note 15.

30. *See* Bunn, *supra* note 15. Bunn noted that according to senior economist, Reyhan Ayas, it is easy to make public statement commitments about diversity because no one would check to see if employers had kept their commitments. *But see The State of DEI: Diversity, Equity, and Inclusion*, CORBAN ONESOURCE: HR BLOG (Dec. 12, 2023), https://corbanone.com/diversity-equity-and-inclusion-jobs/ (noting that while the outlook for DEI employment did not appear to be promising, many companies felt greater pressure to improve their efforts, given the Supreme Court's decision to end affirmative action for college admissions. A Pew Research Center survey indicated that more than 50% of the employees in these companies responded positively to the focus on DEI.).

31. *Id.*

admissions cases, there is likely to be greater legal scrutiny against public and private companies.[32]

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[33] the Supreme Court held affirmative action in both private and public higher education institutions is unconstitutional.[34] At the same time, several states enacted anti-DEI legislation which forbids the inclusion of DEI in public colleges and universities. In some states, including Texas, any violation of these laws could lead to sanctions, including suspension, and permanent loss of employment.[35]

This Article seeks to provide support for public law schools that no longer have direct access to DEI offices and services. Though private law schools are subject to the Supreme Court's decision concerning admissions, anti-DEI legislation does not presently govern these law schools. To this end, private law schools can serve as leaders, helping to fill the gaps in public institutions, while fostering a better understanding of the reasons diversity matters and why inclusivity builds a stronger community. It is an important responsibility. The legal profession requires law schools to train culturally competent law students who will encounter diverse clients whether different due to race, ethnicity, religion, economic status, gender, gender identity, military status, sexual orientation, disability, or any other status. As private institutions move forward, carrying this message, both by teaching and leading, we must open our doors to all who are willing to enter and learn.

This Article begins, in Part I, with a brief overview of affirmative action and its intersection with DEI beginning in the 1960s. Though the movement toward affirmative action began long before this time, the primary focus of this Article begins with the Civil Rights movement. Indeed, the impetus for many of these efforts, particularly as it relates to race, was the Civil Rights Act of 1964. Although early affirmative action efforts began in the employment context with legislative enactments and judicial decisions, these efforts were also necessary for women and minorities to gain access to undergraduate and graduate schools. As this Article indicates, however, while elite colleges and universities took positive steps to include minorities, affirmation action and diversity concerns in public higher education institutions, particularly as they relate to race, did not take hold until the passage of the Civil Rights Act of 1964. These policies did not have a long history of progress and faced constitutional challenges approximately fourteen years after federal legislation mandated them.

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32. Tatyana Monnay, *The Lawyer Who Sued Harvard on Affirmative Action Is Going After Law Firms*, BLOOMBERG NEWS (Aug. 22, 2023), https://www.bnnbloomberg.ca/the-lawyer-who-sued-harvard-on-affirmative-action-is-going-after-law-firms-1.1962268; Britt Morse, *Here Are the Top DEI Trends of 2023-and What They Mean for the Year Ahead*, INC. (Nov. 29, 2023), https://www.inc.com/brit-morse/top-dei-trends-2023-what-they-mean-year-ahead.html.

33. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141 (2023).

34. *Id.* at 2175.

35. S.B. 17, 88th Leg., Reg. Sess. (Tex. 2023) (codified in TEX. EDU. CODE § 51.352) (effective Jan. 1, 2024).

Part II addresses the start of the crusade to end affirmative action. It begins with *DeFunis v. Odegaard*,[36] the first Supreme Court case that addressed discriminatory graduate school admissions practices based on race. *DeFunis* could have determined the trajectory of Supreme Court jurisprudence on affirmative action. Instead, four years later, the Court decided *Regents of the University of California v. Bakke*,[37] and set the parameters for engaging affirmative action in higher education, holding that race could be used as a factor in admissions decisions.[38] Since *Bakke*, however, there has been a steady advancement toward dismantling affirmative action, culminating in the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, which effectively ended affirmative action in public and private colleges and universities, holding that diversity is not a sufficiently compelling interest for institutions of higher education to use race as a factor in admissions decisions.[39]

Part III briefly addresses the parallel legislative efforts that have undercut DEI efforts in public colleges and universities, whether in undergraduate or graduate school education. This legal framework exists in several states, including Florida and Texas. Indeed, Texas has mandated the removal of all considerations of DEI, attaching penalties to schools that violate this legislation.[40]

Lastly, Part IV presents a call to action for private law schools and universities to assist public law schools. Currently, anti-DEI legislation does not apply to private colleges, universities, and graduate schools, including law schools. At least for now, private law schools may continue to provide DEI programming externally for public higher education institutions and the greater community. Private law schools, like South Texas College of Law Houston ("STCL Houston"), where I am a member of the faculty, have a moral obligation to provide diversity, equity, inclusion, and access in the form of counseling and training to those employed by or attending public law schools. It is particularly urgent that we graduate culturally competent students who will be adept at providing legal services to every member of our community. Of course, cultural competency should not be limited to law students who matriculate through private institutions.

As I indicate below, however, there are costs and burdens associated with offering broad access to those who have been denied the ability to benefit from DEI efforts in their institutions. But there will also be substantial benefits. It will take collective public and private efforts to broaden the reach of DEI endeavors for the profession's greater good. It is only when we achieve these goals that we will truly provide access and justice.

36. DeFunis v. Odegaard, 416 U.S. 312 (1974).

37. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

38. *Id.* at 317.

39. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2173 (2023).

40. S.B. 17, 88th Leg., Reg. Sess. (Tex. 2024) (enacted).

I. DIVERSITY, EQUITY, AND INCLUSION AND AFFIRMATIVE ACTION: A BRIEF HISTORY

The adoption of DEI and affirmative action policies did not arise in a vacuum. Instead, they occurred out of necessity. These policies have deep roots in American history, particularly for African Americans who endured the persistent belief that they were racially inferior. For example, southern whites enacted and enforced antiliteracy laws both as a means of preventing slave rebellion[41] and denying the education of slaves.[42]

Dred Scott v. Sandford[43] also confirmed that African American slaves, who counted as three-fifths of a person, were not intended to be included in the promises of the Declaration of Independence.[44] The enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments, along with the Civil Rights Act of 1875, overruled the *Dred Scott* decision, affording greater rights to African Americans and moving the country away from their oppression.[45] The *Civil Rights Cases* of 1883 ended this progress, holding that the Civil Rights Act of 1875 was unconstitutional.[46] The decisions that followed led to *Plessy v. Ferguson*,[47] which held that purposeful governmental discrimination in the form of separate but equal public facilities was constitutionally permissible.[48] *Plessy* also laid the foundation for what was known as Jim Crow[49] and reaffirmed African American inferiority, making it clear that

41. Robin Walker Sterling, *Through A Glass, Darkly: Systematic Racism, Affirmative Action, and Disproportionate Minority Contact*, 120 MICH. L. REV. 451, 466–67 (2021). Sterling further notes that when the South Carolina legislature believed that rebellious slaves had communicated in writing, it passed the Negro Act of 1740. *Id.* at 466. Additionally, she indicates that because there would be "great inconveniences" due to slave literacy, the Act made it illegal to teach or employ a slave in writing. *Id.*

42. *Id.* at 467–68 (citing Christopher M. Span, *Post-Slavery? Post-Segregation? Post-Racial? A History of the Impact of Slavery, and Racism on the Education of African Americans*, 117 TCHRS. COLL. REC. 53, 56 (2015)). Sterling notes that Virginia prohibited Black people from learning to read or write after Nat Turner's Rebellion in 1831; Mississippi and Missouri prohibited schools for both the freed and enslaved; other slave states, including Alabama and Georgia, made it illegal for slaves to learn to read and write; and by the time of the Civil War, all but three states—Arkansas, Kentucky, and Tennessee—made it illegal for Blacks, whether enslaved or free, to assemble for purposes of learning, and the enslaved could not learn to read or write.

43. Dred Scott v. Sanford, 60 U.S. 393 (1857).

44. *Id.* at 410, *superseded by* U.S. CONST. amend. XIV. *See* Damon Christopher Williams, *Black Law Student Attrition in the Age of Affirmative Action: Why American's Current Diversity Framework is Failing*, 52 U. TOL. L. REV. 653, 654–57 (2021), for a detailed discussion of the historical context of affirmative action. Williams notes that from the signing of the Declaration of Independence, which counted slaves as three-fifths of a person, to the decision in *Dred Scott v. Sandford*, African Americans clearly were not intended to be included in the Declaration. *Id.* at 655. In addition, The Civil Rights Cases of 1883 held the Civil Rights Act of 1875 was unconstitutional, clearing the way for the decision in *Plessy v. Ferguson*, reaffirming that Black people were inferior and could not be placed on the same plane with the white race. *Id.*

45. Williams, *supra* note 44, at 655.

46. The Civil Rights Cases, 109 U.S. 3, 7 (1883).

47. Plessy v. Ferguson, 163 U.S. 537 (1896).

48. *Id.* at 552. The Court held that if one race was socially inferior to another, the United States Constitution could not place them on equal footing. *Id*.

49. Williams, *supra* note 44, at 655.

Black people were not on the same footing with the whites.[50] In his dissenting opinion in *Plessy*, Justice Harlan made it clear that the white race considered itself to be the dominant race in the United States and that it would, for all time, be dominate "in prestige, in achievements, in education, in wealth and in power" if it remained true to its so-called noble heritage while holding fast to principles of constitutional liberty.[51] Justice Harlan also maintained that in the eyes of the law and Constitution, all citizens were equal before the law.[52] For Justice Harlan, two principles co-existed: the white race was superior and the superior race could subjugate other races.[53] For Justice Harlan, these positions were not inconsistent. Even if Justice Harlan believed others were inferior, his statement regarding the equality of all people became the principle that united Black people,[54] laying the foundation for African Americans to fight for citizenship rights.

After *Plessy*, Jim Crow laws governed this country for sixty years. The Supreme Court's decision in *Brown v. Board of Education*[55] appeared to loosen the grip of Jim Crow laws by overruling separate but equal in educational settings and holding that separate facilities were inherently unequal.[56] But the *Brown* decision did not mean there would be immediate progress. For example, Southern Democrats issued a manifesto in 1956 defending states' rights to refuse to desegregate.[57] *Brown*'s power was in its potential to rewrite persistent, pernicious narratives about African American inferiority that justified the complete deprivation of generations of enslaved people of the right to an education followed by denying them access to education that matched their talent and potential.[58]

After *Brown*, African American grassroots groups began challenging segregation on different fronts, including public transportation, attempted desegregation in Little Rock Central High School, and successful sit-ins, leading to the integration of lunch counters and the placement of African Americans in non-menial positions.[59] Along with the emergence of the Civil Rights Movement, pre- and post-*Brown* executive orders mandated that employers take positive action in the workplace, requiring employers to hire their workforce without bias.

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50. Sterling, s*upra* note 41, at 472.

51. *Plessy*, 163 U. S. at 559 (Harlan, J., dissenting). Even as he reaffirmed white superiority, Justice Harlan argued that in the eyes of the law and of the color-blind Constitution, there were no recognized or tolerated classes among citizens. *Id.*

52. *Id*. Justice Harlan concluded, "In respect to civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id.*

53. Sterling, *supra* note 41, at 473.

54. *Id.*

55. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

56. *Id.* at 495. The Court held, "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

57. *See* Juliet R. Aiken et al., *The Origins and Legacy of the Civil Rights Act of 1964*, 28 J. BUS. PSYCH. 383, 386 (2013). *See also* Sterling, *supra* note 41, at 473 n.159 (explaining Jim Crow laws and their association with segregated public facilities).

58. Sterling, *supra* note 41, at 476.

59. *Id.*

President Roosevelt issued the first federal order, Executive Order 8802,[60] that required defense contractors to provide full and equitable participation for all workers in defense industries, without discrimination.[61] Similarly, President Truman later issued Executive Order 9980,[62] mandating desegregation in the federal workforce, creating the Fair Employment Board (FEB) to enforce the order.[63] To be clear, while these orders, at least in practice, were enacted to promote antiracism, they did not reference "affirmative action."[64] Instead, the term first arose in the labor law context, with the enactment of the National Labor Relations Act ("Wagner Act") of 1935, not in the context of race.[65] The Act prohibited employers from discriminating against union members or workers who endeavored to form unions.[66] The agency with enforcement authority, the National Labor Relations Board, had the power to force employers who violated the Act to reinstate employees, provide backpay, and "take such affirmative action… as [would] effectuate the policies of this Act."[67]

During the Civil Rights Movement, from 1954 to 1968, affirmative action changed in three critical ways.[68] First, "affirmative action transitioned from providing racial preferences only as a means of enforcing non-discrimination requirements, to providing racial preferences in form, as part of the non-discrimination requirements themselves."[69] Second, affirmative action moved from applying only to public companies to including private companies and universities which began to experiment with these mandates.[70] Finally, affirmative action became more transformative, meaning there was a wholesale change in how universities and employers operated.[71]

As part of the transition in affirmative action policies, President John F. Kennedy issued the first federal order to openly reference race in an affirmative

60. Exec. Order No. 8802, 3 C.F.R. 957 (1938–1943).

61. Jesse Merriam, *Beyond the Law: A Four-Step Explanation of Why Affirmative Action is Here to Stay*, 48 OHIO N. U. L. REV. 95, 106 n.103 (2021).

62. Exec. Order No. 9980, 13 Fed. Reg. 4,311 (July 26, 1948).

63. See Merriam, *supra* note 61, at 106–07, for a detailed discussion of President Truman's Executive Orders 10308 and 10749 and their ultimate impact on the trajectory of affirmative action.

64. *Id.* at 104. Merriam argues the committee charged with enforcing the Order, the Fair Employment Practice Committee (FEPC), was not really concerned with its enforcement in terms of stopping discriminatory intent. The committee did not feel an obligation to comply with the anti-discrimination text of the Order. Rather, it was "inspired by *its goal* to achieve greater racial proportionality." *Id*. at 105.

65. *See* Carol M. Swain, *Affirmative Action: Legislative History, Judicial Interpretations, and Public Consensus*, *in* AMERICAN BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 318, 319–20 (Neil J. Smelser et al., eds., 2001).

66. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935).

67. *Id. See* Merriam, *supra* note 61, at 103-104 (noting that the Wagner Act inspired New York to pass the Fair Employment Practices Act, known as the Ives-Quinn Act, which used language nearly identical to the Wagner Act, but also included antidiscrimination language, making it the first state to ban racial discrimination in employment, prompting other states to adopt similar statutory enactments, which created affirmative action in some form across the country).

68. Merriam, *supra* note 61, at 107.

69. *Id.*

70. *Id.*

71. *Id.*

action framework.[72] Borrowing from the language in the Wagner Act, in 1961, President Kennedy used the term in Executive Order 10925.[73] It was the first official policy to implement "affirmative action," requiring federal contractors to take affirmative steps "to ensure that applicants are employed, and that employees are treated during employment, without regard to race, creed, color, or national origin."[74] Importantly, because President Kennedy did not formally define affirmative action in his order, the term and its implications went largely unnoticed.[75] The order also created the President's Committee on Equal Employment Opportunity which gave federal contracting agencies power to institute proceedings against federal contractors who violated their responsibilities, including cancelling contracts and exclusion from future government contracts.[76]

At the time of President Kennedy's executive order, the African American community actively engaged in widespread protests for equal treatment. As a result, they experienced violence,[77] police brutality against children marching down the streets of Alabama protesting segregation, the nationally televised brutality of the Children's Crusade, and the refusal to desegregate the University of Alabama, prompting Kennedy to send the National Guard to desegregate the university.[78] In one of a series of televised speeches, Kennedy urged the country to take steps to guarantee equal treatment for all Americans, regardless of race.[79] Kennedy followed this appeal by proposing that Congress consider civil rights legislation that would address voting rights, public accommodations, school segregation, and nondiscrimination in programs receiving federal assistance among other changes.[80] In 1963, shortly after committing to push through the Civil Rights Act, Kennedy was assassinated. He laid the groundwork for passage of the Civil Rights Act of 1964, which banned discrimination in public accommodations, theaters, and restaurants.[81] In addition, it authorized the government's withholding of federal funds to schools that had not desegregated as required by the 1954 *Brown* decision.[82] After President Lyndon B. Johnson was sworn in, he immediately

72. *Id.* at 108.

73. Exec. Order No. 10925, 3 C.F.R. 448, 451 (1959–1963).

74. *Id.* § 301. *See also* Swain, *supra* note 65, at 320 (arguing that while Executive Order 10925 had a genuine effect in reducing discrimination in one area, government contracting, it failed to address the concerns of civil rights organizations regarding discrimination in housing, public accommodations government, and private sector employment.).

75. Swain, *supra* note 65, at 320.

76. Wil Del Pilar, *A Brief History of Affirmative Action and the Assault on Race-Conscious Admissions*, EDUC. TRUST (June 15, 2023), https://edtrust.org/resource/a-brief-history-of-affirmative-action-and-the-assault-on-race-conscious-admissions/.

77. Aiken et al., *supra* note 57, at 388.

78. Sterling, *supra* note 41, at 478–79. Sterling also notes the Klan's bombing of the 16th Baptist Church in Birmingham, killing four African American girls, sparked an outbreak of angry, anguished protests. *Id.*

79. *President John F. Kennedy's Message to Congress*, NAT'L ARCHIVES, https://www.archives.gov/legislative/features/march-on-washington/kennedy.html (last visited Mar. 21, 2024).

80. *Civil Rights Act (1964)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/civil-rights-act (last visited Mar. 21, 2024).

81. Swain, *supra* note 65, at 320.

82. *Id.* at 321.

pushed for the passage of the Civil Rights Act as a monument to Kennedy.[83] Title VI of the Civil Rights Act prohibited any program or activity receiving federal financial assistance from discriminating on the basis of race, color, or national origin, including colleges and universities.[84] The Equal Employment Opportunity Commission (EEOC) was created and prohibited large employers from discriminating, regardless of whether they had government contracts.[85]

In 1965, President Johnson issued Executive Order 11246, forbidding federal contractors from discriminating. Additionally, contractors were to take affirmative action to ensure equal opportunity based on race, color, religion, and national origin.[86] In a speech at Howard University, President Johnson explained the basis for affirmative action:

> You do not wipe away the scars of centuries by saying: Now, you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair…. This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.[87]

President Johnson understood what society should have been able to comprehend: those who had been oppressed and, for centuries, deprived of the opportunity for equal rights, could not be expected to compete with those who did not have to overcome seemingly insurmountable burdens.

Additionally, the Department of Health, Education, and Welfare ("HEW") played a critical role in assuring that those who did not have an equal start in pursuing higher education received an opportunity to do so. It revised its implementation of regulations, under Title VI, authorizing affirmative action to help with overcoming the effects that resulted from limiting the participation of those of a specific color or national origin.[88] As a result, colleges and universities implemented affirmative action plans to increase racial minority enrollment.[89]

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83. Aiken et al., *supra* note 57, at 388.

84. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 252 (1964). The Act provided: "No person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal Assistance."

85. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)). Title VII of the Civil Rights Act of 1964 prohibited discrimination in private employment, authorizing the court to take Affirmation Action as the court deemed appropriate, including reinstating or hiring employees, with or without pack pay.

86. Del Pilar, *supra* note 76.

87. *Commencement Address at Howard University: "To Fulfill These Rights."*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights (last visited Mar. 21, 2024).

88. Sterling, *supra* note 41, at 479 n.196.

89. *See* Sterling, *supra* note 41, at 480 and accompanying notes.

It is important to note that from the 1950s to the close of the 1960s, Ivy League schools, commencing with Harvard, began to actively recruit African American students.[90] They justified these policies by stating they were a short-term remedy to address the grievances of the civil rights era.[91] These schools also viewed active recruitment of these students from a liberal perspective, without the legitimacy of bipartisanship or legal authority.[92] Moreover, Ivy League schools reasoned that outreach and admissions of these students were limited to elite institutions, and these students had not been fully integrated into higher education.[93] Finally, Nixon-era policies and a pivotal Supreme Court decision in *Griggs v. Duke Power*,[94] which secured affirmative action under the Civil Rights Act, marked the entrenchment of affirmative action, at least for a time.[95]

II. THE MARCH TOWARD DISMANTLING AFFIRMATIVE ACTION AND THE VALUES OF DIVERSE AND INCLUSIVE HIGHER EDUCATION INSTITUTIONS

As discussed above, the intersectionality of several historic forces led to the implementation of affirmative action in higher education. The purpose was to provide racial minorities a place at the starting line. Arguably, while elite colleges and universities embraced affirmative action in some form, those policies were not really in effect in non-elite higher education institutions and did not have the opportunity to fully develop without interference. Only fourteen years after the passage of the Civil Rights Act, and merely five years after HEW mandated affirmative action to right historic wrongs, affirmative action was under attack.

This section addresses *DeFunis v. Odegaard*,[96] an often-ignored Supreme Court case, which played a significant role in affirmative action jurisprudence. Immediately thereafter, this section addresses Supreme Court decisions, starting with *Regents of the University of California v. Bakke*,[97] that led to the overruling of affirmative action in higher education by rejecting diversity as a compelling state interest, thus leading to the removal of considerations of race and ethnicity in the admissions process in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College ("SFFA")*.[98] While the *SFFA* decision should have come as no surprise, its implications are yet unknown. To be clear, its impact is broader than we imagine because it ties the hands of law school admissions directors who wish to continue to strive for a diverse student body because of its

90. See Merriam, *supra* note 61, at 115–23, for a detailed discussion on affirmative action in Ivy League schools. Merriam notes that Harvard and Yale were the first Ivy League institutions to adopt affirmative action practices. Dartmouth, University of Pennsylvania, and Columbia formally adopted these policies, prompting Princeton to follow suit.

91. *Id.* at 123.

92. *Id.*

93. *Id.*

94. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

95. *See* Merriam, *supra* note 61, at 128–32.

96. DeFunis v. Odegaard, 416 U.S. 312 (1974).

97. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

98. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141 (2023).

positive impact. It is also narrower than we suppose because it nonetheless allows law schools to continue to implement beneficial policies that will lead to a diverse student body. As a result, this section concludes that the decision in *SFFA* does not completely erase all considerations of diversity. Where there is a willingness to do so, there is a constitutional way to achieve it.

A. DeFunis v. Odegaard

Although *Bakke* is often mentioned as the first case to challenge admissions practices based on affirmative action, before that groundbreaking decision, the Supreme Court first examined the issue in *DeFunis vs. Odegaard*.[99] In *DeFunis*, the University of Washington Law School denied admission to Marco DeFunis, Jr., a white male applicant, even though he had a higher GPA and LSAT than some minority students admitted under a special program.[100] The two-track system admitted minority students under a less rigorous process than non-minority students.[101] The Supreme Court granted certiorari to hear the case, but the Court later declared the case moot, indicating that a lower court had ordered DeFunis's admission into the University of Washington, and DeFunis had nearly completed his legal studies.[102] The case is significant because in a dissenting opinion, Justice Douglas denounced race-based admissions policies, stating they branded minority students with the inability to make it on their own.[103] Justice Douglas argued, "That is a stamp of inferiority that a State is not permitted to place on any lawyer."[104] In determining the case to be moot, the Court also avoided making a decision on substantive, politically contentious issues,[105] thereby preserving its institutional authority.[106]

B. Regents of the University of California v. Bakke

Since the *DeFunis* Court avoided making a final decision regarding the propriety of affirmative action, the first case to test the constitutionality of a state's voluntary affirmative action program in higher education was *Regents of the*

99. DeFunis v. Odegaard, 416 U.S. 312 (1974). Defunis was the first Supreme Court case to address affirmative action in higher education. While the Court granted certiorari but later dismissed the case, declaring it moot, it was important because the Court avoided deciding a politically divisive issue and began a pattern in which the Court avoided making "contentious political issues because of a presumed threat to its institutional authority." *See* Joseph Zabel, *Affirmative Action, Reaction, and Inaction: A Positive Political Theory Analysis of Affirmative Action in Higher Education*, 19 CONN. PUB. INT. L. J. 221, 221-22 (2019).

100. *DeFunis*, 416 U.S. at 314.

101. Zabel, *supra* note 99, at 222.

102. *Id.*

103. *DeFunis*, 416 U.S. at 343.

104. *Id.*

105. Vinay Harpalani, *"With All Deliberate Speed": The Ironic Demise (And Hope For) Affirmative Action*, 76 SMU L. REV. F. 91, 93 (2023).

106. Zabel, *supra* note 99, at 222 n.8.

University California v. Bakke.[107] The Supreme Court made its decision only five short years after HEW implemented affirmative action in the context of higher education. Bakke, a thirty-eight-year-old white male engineer, had been twice denied admission to the University of California's Medical School.[108] He alleged that the admissions process discriminated against white applicants because it set aside sixteen seats out of 100 seats for minorities in the first-year class.[109] The medical school neither admitted Bakke under the special admissions program, even though his scores were significantly higher than students in the special admissions program, nor did he receive an offer under the general admissions program where his qualifications were substantially equal to students selected for admission.[110]

Consequently, Bakke sued the medical school alleging its policies violated California's state constitution, Title VI of the Federal Civil Rights of 1964, and the Equal Protection Clause of the Fourteenth Amendment.[111] In a sharply divided decision, Justice Lewis Powell wrote for himself,[112] four other justices voted to strike down the medical school's set aside program for underrepresented students,[113] and four others voted to uphold it.[114]

Justice Powell concluded that although a state may consider race in its admissions process to promote educational diversity, it may do so only when race is considered as one of several other factors on a case-by-case basis.[115] Justice Powell stated that the Constitution does not permit public higher education institutions to use quotas in its admissions decisions.[116] Nonetheless, Justice Powell recognized the importance of diversity on university campuses was a "compelling state interest."[117] While the *Bakke* decision rejected the use of racial quotas in the admissions process, it upheld the university's affirmation action program.[118] Importantly, Justice Powell's view "became the blueprint for race-conscious university admissions."[119]

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107. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

108. *Id.* at 276-77.

109. *Id.* at 277-79. The special admissions program considered applicants who were members of certain racial or ethnic groups: African Americans, Mexican Americans, Asian, or Native Americans.

110. *Id.* at 276-77.

111. *Id.* at 277-78.

112. Harpalani, *supra* note 105, at 93 (noting the Court reached the substance of race-conscious admissions, it did not reach a majority: Four justices voted to strike down the medical school's set aside programs for underrepresented students, four other justices voted to uphold).

113. *Bakke*, 438 U.S. at 265.

114. *Id.*

115. *Id.* at 317-19.

116. *Id.* 288-289. Justice Powell recognized the "semantic[s]" in the Petitioner's use of "goal" while Respondents labeled the admissions set asides as a "quota." Either way, it was a line drawn based on race and ethnicity. He concluded that equal protection applies to everyone. It cannot mean one thing when applied to one person and another when applied to a person of a minority race. It isn't equal if both are not accorded the same protection. *Id.* at 289.

117. *Id.* at 315.

118. *Id.* at 320.

119. Harpalani, *supra* note 105, at 93.

In 1996, nearly twenty years after the *Bakke* decision, California voters passed a state constitutional amendment, Proposition 209,[120] making it illegal for California state institutions—including state universities—to discriminate based on race, color, ethnicity, national origin, or sex. The amendment resulted in lower numbers of minority students in the state's public universities.[121]

C. Gratz and Grutter: Another Test for Constitutionality of Affirmative Action in Higher Education

Although the Supreme Court had the opportunity to decide other affirmative action cases,[122] the Court did not decide another higher education case until twenty-five years later, in 2003, when it heard the Michigan cases, *Grutter v. Bollinger*[123] and *Gratz v. Bollinger*.[124] In *Grutter,* the University of Michigan Law School denied admission to Barbara Grutter, a white, female applicant.[125] Grutter sued, challenging the law school's admission policy, alleging that it was unconstitutional reverse racism against white students.[126] The Supreme Court considered the validity of the law school's race-conscious admissions policy.[127] Justice Sandra Day O'Connor, writing for the majority, upheld the law school's admission policy, finding that it did not guarantee admission to anyone based on numerical standardized test scores or grade point average in an undergraduate or graduate degree program.[128] Rather, the law school individually evaluated every applicant to find a diverse student body to have a critical mass of underrepresented minority races as well as those with differing points of view so that the law school could best train future societal leaders as well as future lawyers.[129] In addition, Justice O'Connor found that diversity in education was a compelling governmental interest and that Michigan's Law School admission program was narrowly tailored to promote that compelling interest.[130] Justice O'Connor concluded her opinion in *Grutter* by indicating that race-based policies, designed to achieve a compelling interest, including racial diversity in higher education institutions, must be limited

120. Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 189 (Nov. 1997). Spann notes that since the constitution constrains this country's formation of social policy, we automatically turn to the courts for resolution of controversial social policy concerns. Surprisingly, however, the Constitution, had very little to say about the validity of Proposition 209. *Id.*

121. *Id.* at 228.

122. *See* Harpalani, s*upra* note 105, at 94. Harpalani points out that the Supreme Court had several opportunities to decide affirmative action issues, particularly the Circuit split on the issue. Even so, the Court did not address the issue until it heard the Michigan cases.

123. Grutter v. Bollinger, 539 U. S. 306 (2003).

124. Gratz v. Bollinger, 539 U.S. 244 (2003).

125. *Grutter*, 539 U.S. at 316.

126. *Id.* at 316-17.

127. *Id.* at 322.

128. *Id.* at 343.

129. *Id.* at 329-30.

130. *Id.* at 335-37. Justice O'Connor found that the admissions policy passed the strict scrutiny test because the law school did not use a quota system, did not set aside seats for racial minorities, and considered each applicant individually.

in time to meet the narrowly tailored requirement under strict scrutiny.[131] She stated, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[132] She reasoned that all such policies must have an ending point.[133]

In *Gratz*, the second of the Michigan cases, the Court invalidated the University of Michigan's undergraduate admissions policy, which relied on a 150-point scale to judge undergraduate admissions.[134] The university automatically admitted students with 100 points.[135] It also automatically awarded twenty additional points to students' admissions score if they were members of a historically disadvantaged ethnic or racial minority group.[136] Under this policy, Michigan denied admission to Jennifer Gratz, a white student with high grades and above average test scores, but admitted minority students with the same academic qualifications.[137] Gratz sued, arguing that the point system violated the Fourteenth Amendment.[138] The majority held that the University's point system did not meet the strict scrutiny test because it failed to show that a compelling state interest justified its admissions system.[139] In addition, it did not demonstrate that the point system was narrowly tailored to meet the compelling interest.[140] While the majority of the Court did not question the University's compelling interest, which was diversity in the student body, it found that it was not narrowly tailored to meet the University's interest in a diverse student body.[141] The Court explained that for a program to be narrowly tailored, the Equal Protection Clause requires the undergraduate school give each individual application individualized consideration[142] rather than using race as a basis for automatic admission.[143]

D. Fisher I and Fisher II: The Court Upholds the University of Texas's Admission Policy

Less than ten years after the *Gratz* and *Grutter* decisions, the Supreme Court heard *Fisher v. University of Texas at Austin* ("*Fisher I*"),[144] where the University

131. *Id.* at 343.

132. *Id.* at 342-43. Two of the concurring justices indicated that Justice O'Connor's statement did not impose a twenty-five-year time limit on the use of race-conscious admissions policies. Rather, it was aspirational, that future generations would not need to use raced-based policies to achieve true equality. *See* Harpalani, *supra* note 105, at 94 nn.45-47. Harpalani notes that Justice O'Connor indicated the twenty-five-year time limit was not binding on any of the justices.

133. *Id.* at 342.

134. Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

135. *Id.* at 277.

136. *Id.* at 278.

137. *Id.* at 251.

138. *Id.* at 252.

139. *Id.* at 275.

140. *Id.* at 275.

141. *Id.* at 270.

142. *Id.* at 270-72.

143. *Id.* Make note that this is what Justice Powell stated in *Bakke*.

144. Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297 (2013).

of Texas denied Abigail Fisher, a white woman, admission into its incoming class.[145] Texas used a "Top Ten Percent Plan" to assist with determining admission.[146] It granted automatic admission to any state college or university to Texas students who graduated in the top 10% of their high school class and met other specified standards.[147] The Plan consumed 81% of the available seats.[148] Fisher did not graduate in the top 10% of her high school class and did not receive automatic admission.[149] Instead, the University considered Fisher under its integrated approach, which did not consider rank.[150] It assessed her application based on achievements and experiences, with race being one among several factors.[151]

Fisher sued the University of Texas, alleging that race improperly influenced the outcome of her admissions decision, arguing that the Top Ten Percent approach already achieved a critical mass of diverse perspectives in the classroom.[152] As a result, any further consideration of diversity was unwarranted. But the University of Texas stood by its two-tiered system, explaining that the Top Ten Percent derived, in large part, from school segregation in Texas public school districts.[153] The second tier permitted "diversity within diversity," allowing another level of diversity to the student body.[154] Both the United States District Court and U.S. Court of Appeals for the Fifth Circuit ruled that the University of Texas's two-tiered approach fit with the constitutional framework set forth in *Bakke* and *Grutter* and was narrowly tailored to satisfy strict scrutiny.[155] Fisher appealed to the United States Supreme Court.[156] In a seven-to-one opinion, the Court remanded the case back to the Fifth Circuit Court of Appeals.[157] Writing for the majority, Justice Kennedy indicated that the academic and professional benefits derived from diversity in the classroom remained a compelling government interest.[158] In addition, he noted that in a limited context, racial preferences were still constitutionally permissible.[159] Importantly, Justice Kennedy instructed colleges and universities to consider race-neutral remedies to achieve a diverse educational

145. *Id.* at 300-02.

146. *Id.* at 305; TEX. EDUC. CODE. ANN. § 53.803. The Texas legislature passed this law in response to *Hopwood v. Texas*. The Top Ten Percent Law originally guaranteed the top ten percent of all high school students' admission into the University of Texas. The law has been amended several times and caps the number of students UT will admit.

147. *Fisher I*, 570 U.S. at 305.

148. Fisher v. Univ. of Tex., 758 F.3d 633, 637 (5th Cir. 2014).

149. *Id.*

150. *Id.*

151. *Id.* (noting that Fisher was one among 17,131 applications for 1,216 remaining spots).

152. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009).

153. Constitutional Rights Foundation, *Affirmative Action in American Colleges After* Fisher v. Texas, 29 BILL OF RTS. IN ACTION 11, 14 (2014), https://www.crf-usa.org/images/pdf/bria_29_2_affirmative_action.pdf.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

environment.[160] In accordance with the *Bakke* decision, the Supreme Court cautioned that higher education institutions could not use race-conscious admissions programs unless they were able to demonstrate a compelling state interest when compared with any other race-neutral alternatives that could not produce the educational benefits of diversity.[161] The Supreme Court also held that although the Fifth Circuit found that University's race-conscious admissions program was patterned after the plan the Court approved in *Grutter* and satisfied strict scrutiny, it defined strict scrutiny too narrowly by deferring to the University's good faith in its use of racial classifications.[162] The remand mandated that the Court consider the admissions process under the proper analysis.[163]

On remand, the Fifth Circuit's reevaluation of the University of Texas's race-conscious admissions program produced the same result: The admissions program survived strict scrutiny and did not violate the Fourteenth Amendment.[164] The Fifth Circuit noted that the University employed a narrow, integrated approach to include students of all races that meet the competitive academic bar for admission to complement those admitted under the "Top Ten Percent Plan."[165] Using race-neutral means, the University also initiated outreach and scholarship efforts targeting under-represented demographics.[166] The Fifth Circuit noted that the University admitted 80% of the students without any facial use of race, which *Grutter* did not require.[167]

Elaine Fisher again appealed to the Supreme Court, hoping for a different outcome.[168] The Supreme Court granted certiorari and in its *Fisher v. University of Texas* ("*Fisher II*")[169] opinion, Justice Kennedy determined that the University of Texas's race-conscious admissions program, the purpose of which was to pursue the benefits of diversity, was constitutionally sound.[170] He noted that our higher education system continues to grapple with pursuing diversity while faced with the constitutional promise of equal treatment and dignity.[171]

160. *Id.*
161. *Id.*
162. *Fisher I*, 570 U.S. 297, 313-14 (2013).
163. *Id.* at 314.
164. Fisher v. Univ. of Tex., 758 F.3d 633, 642 (5th Cir. 2014).
165. *Id.* at 647-49.
166. *Id.*
167. *Id.* at 649.
168. Fisher v. Univ. of Tex., 576 U.S. 1054 (2015).
169. Fisher v. Univ. of Tex. (*Fisher II*), 579 U.S. 365 (2016).
170. *Id.* at 388. Justice Kennedy noted that there are intangible qualities, that are incapable of objective measurement but result in greatness. *Id.* Justice Alito, in his dissent, wrote that the University of Texas ("UT") had failed to demonstrate a compelling state interest in diversity, and had not defined its interest with clarity. He did not believe the admissions policy was narrowly tailored and derided UT's ability to obtain diversity among racial groups. *Id.* at 399, 403-405. *See* Harpalani, *supra* note 105, at 99.
171. *Fisher II*, 579 U.S. at 388.

E. Students for Fair Admissions: The End of Affirmative Action?

On June 29, 2023, the Supreme Court issued its decision in two cases that effectively ended affirmative action in higher education. These two decisions, *Students for Fair Admissions, Inc v. President and Fellows of Harvard College* and *Student for Fair Admissions, Inc. v. University of North Carolina*, (collectively, "*SFFA"*), held that raced-based affirmative action violated the Equal Protection Clause of the Fourteenth Amendment, as well as Title VI of the 1964 Civil Rights Act, which prohibit discrimination based on race, color, or national origin in any program that receives federal funding.[172]

Harvard's admissions process came under scrutiny because its first readers awarded an applicant a numeric score based on six categories, including an "overall" category.[173] When assigning a score to this category, the first reader could consider an applicant's race.[174] Both the subcommittee and full admissions committees considered each applicant's race.[175] Using this process, race was a determining factor for a considerable number of Black and Hispanic students.[176]

Similarly, the University of North Carolina's admissions program assigned a first reader to each applicant's file.[177] The reader assigned a numerical rating to several categories, with race being a required category.[178] A committee considered the first reader's recommendations and could consider race as part of its review.[179] The district courts upheld each program.[180] The First Circuit upheld Harvard's programs, however, the Supreme Court granted certiorari before the Fourth Circuit could rule on the University of North Carolina's appeal.[181]

Writing for the majority, Chief Justice Roberts wrote, the Equal Protection Clause of the Fourteenth Amendment "applies without regard to any differences of race, of color, or of nationality"[182] and therefore must apply to everyone.[183] Chief Justice Roberts wrote that eliminating racial discrimination meant that all of it must be eliminated,[184] that equal guarantees could not mean one thing when applied to one individual and something different when applied to a person of

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172. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2175-76 (2023).

173. *Id.* at 2154.

174. *Id.*

175. *Id.* at 2154-55.

176. Lynn Anderson et al., *Supreme Court Decides Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina et al.*, FAEGRE DRINKER (June 29, 2023), https://www.faegredrinker.com/en/insights/publications/2023/6/supreme-court-decides-students-for-fair-admissions-inc-v-president-and-fellows-of-harvard-college-and-students-for-fair-admissions-inc-v-university-of-north-carolina-et-al.

177. *Students for Fair Admissions*, 143 S. Ct. at 2155.

178. *Id.* at 2155.

179. *Id.* at 2157.

180. *Id.*

181. *Id.* at 2157.

182. *Id.* at 2161-62.

183. *Id.* at 2162.

184. *Id.* at 2161.

color.[185] In addition, Chief Justice Roberts reasoned that "Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review."[186] He concluded that affirmative action programs "lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employed race in a negative manner, involved racial stereotyping, and lacked meaningful ending points. [The Court] never permitted admissions programs to work in that way."[187] Justice Roberts' Opinion effectively rejected Justice O'Connor's declaration in *Grutter*—that affirmative action programs would, of necessity, end twenty-five years after the decision, in 2028.[188]

Chief Justice Roberts indicated that consistent with the Equal Protection Clause, race-conscious admissions programs must satisfy three aspects. The first aspect requires that a program meet strict scrutiny, meaning it must be narrowly tailored to meet a compelling state interest.[189] Chief Justice Roberts found that outside of higher education, only two compelling interests meet strict scrutiny: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," or "avoiding imminent and serious risks to human safety in prisons, such as a race riot."[190] According to these two examples, the Court found compelling state interests to be elusive and admissions programs may not use race as a stereotype or a negative.[191] Finally, although no party requested the Court to revisit its decision in *Gratz v. Bollinger*[192]—that discrimination under the Equal Protection Clause constituted discrimination under Title VI of the Civil Rights Act, which prohibits discrimination under any program or activity receiving federal financial assistance—it chose to reaffirm this proposition.[193]

The Court did not eliminate the use of race, however. Instead, colleges and universities could consider an applicant's discussion of the impact of race on his or her life, through "discrimination, inspiration, or otherwise."[194] Through essay or other permissible means, students may address race and its impact on their individual, lived experiences, background.[195] The Court concluded that "[a] benefit to a student who overcame racial discrimination… must be tied to *that student's* courage and determination."[196] Additionally, a benefit to an applicant "whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the

185. *Id.* at 2162.
186. *Id.* at 2168.
187. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2175 (2023).
188. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).
189. *Students for Fair Admissions*, 143 S. Ct. 2141 at 2162.
190. *Id*. at 2162.
191. *Id.* at 2167.
192. Gratz v. Bollinger, 539 U.S. 244 (2003).
193. *Students for Fair Admissions*, 143 S. Ct. at 2151, 2165-73.
194. *Id.* at 2176.
195. *Id.*
196. *Id.*

university."[197] Despite the Court's narrow parameters for students to address race in the application process, the Court emphasized that higher education institutions cannot use this occasion to return to the race-conscious process the Court found unconstitutional.[198]

The Court's reasoning in *SFFA* will not be confined to prohibiting affirmative action and diversity initiatives in higher education institutions. Currently, opponents of these policies have begun to target private employers utilizing the reasoning in *SFFA*.[199] American Alliance for Equal Rights, for instance, has already sued private, large law firms that offer diversity fellowships to underrepresented law students, alleging that such incentives discriminate against white and Asian law students.[200] Additionally, the same organization recently sued venture capitalists that offer grants to women of color.[201]

The Court's juxtaposition of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981[202] empowers opponents of affirmative action and diversity to eliminate these endeavors in every sector of society, notwithstanding whether there is legitimate,

197. *Id.*

198. *Id.*

199. *See* Noam Scheiber, *Affirmative Action Ruling May Upend Diversity Hiring Policies, Too*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2023/06/30/business/economy/hiring-affirmative-action.html; Wyatte Grantham-Phillips et al., *Fortune 100 Companies Are Getting Swarmed by Republican AGs Using The Supreme Court Affirmative Action As A Lever Into The Workplace*, FORTUNE (July 15, 2023, 1:47 PM), https://fortune.com/2023/07/15/affirmative-action-13-republican-attorney-general-letter-corporate-ceos-fortune-100/.

200. Julain Mark & Taylor Tedford, *Conservatives are Suing Law Firms Over Diversity Efforts: It's Working*, WASH. POST (Dec. 9. 2023, 7:00 AM), https://www.washingtonpost.com/business/2023/12/09/conservatives-sue-law-firms-dei/. The authors note that three big law firms opened their fellowships to all students, when they originally targeted students of color. Additionally, after receiving a letter from the American Alliance for Equal Rights threatening a lawsuit, another law firm ended its diversity fellowship program. *Id.*

201. *See* HOANG PHAM ET AL., STUDENTS FOR FAIR ADMISSIONS FAQ 5 (Dec. 12, 2023), https://law.stanford.edu/wp-content/uploads/2024/02/SFFA-v-Harvard-FAQ_SCRJ.pdf. The authors indicate that the underpinnings for the Supreme Court's decision is the Equal Protection Clause (EPC). The Court also interpreted Title VI of the Civil Rights Act of 1964 to embody the same prohibitions as the EPC. As a result, the question becomes whether opponents of affirmative action can make the same arguments in the employment context relying on Title VII of the Civil Rights Act. For example, In *American Alliance for Equal Rights v. Fearless Fund*, conservative activists have already targeted a venture capitalist, Fearless Fund, which awards grants to women of color led businesses with one grant awarded only to African American women. This same organization has targeted large law firms that offer diversity scholarships to underrepresented minority candidates, arguing that these fellowships exclude white and Asian candidates. In both cases, they rely on 42 U.S.C. § 1981, which guaranteed to all citizens rights historically given only to whites, namely the right to hold property and the right to contract. The authors reason that it is possible the Court will interpret this statute as it interpreted the EPC. *Id.*

202. 42 U.S.C. § 1981 states, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens[.]" Ironically, the very law Congress enacted to provide all people with the same rights white citizens enjoyed is the law affirmative action and DEI opponents used to deny African Americans and other people of color these very same rights.

targeted, and measurable need for taking positive steps to equally protect all citizens.

III. ANTI-DEI LEGISLATION AND ITS IMPACT ON PUBLIC UNIVERSITIES

Before the Supreme Court decided that diversity was not a compelling interest and effectively ended affirmative action, there were parallel anti-DEI legislative efforts across the country. At least twenty-two states either considered or passed more than thirty bills that limited or ended DEI programs in public, state-funded colleges and universities.[203] The Chronicle of Higher Education recently reported that there is a new wave of legislation, with nineteen anti-DEI bills being considered in the coming months.[204] Recently, the Regents of the University of Wisconsin, who initially rejected DEI bans, came to an agreement with conservative legislators to limit DEI efforts in exchange for hundreds of millions of dollars in new funding.[205]

Moreover, Florida[206] and Texas[207] took the lead in anti-DEI efforts, appearing to rely on the Manhattan Institute's proposed model of anti-DEI legislation.[208] Some have characterized the bills as purposely vague, from their enactment, with broad sweeping language, but lacking specific guidance.[209] As one scholar warned, Florida's anti-DEI legislation had the potential to serve as the blueprint for the Supreme Court to use in the *SFFA* cases, allowing the court to "Florida-ize" the

203. For a detailed list of each state's legislation and whether it has been enacted, proposed, or proposed with no legislation, see *Employment, Comparison Table - DEI-Restrictive Laws: A State-by-State Review*, BLOOMBERG L., https://www.bloomberglaw.com/document/X472R9DK000000 (last visited Feb. 3, 2024); Jessica Bryant & Chloe Appleby, *These States' Anti-DEI Legislation May Impact Higher Education*, BEST COLLS., http://www.bestcolleges.com/news/anti-dei-legislation-tracker/ (last visited Feb. 3, 2024).

204. J. Brian Charles, *Amid National Backlash, Colleges Brace for a Fresh Wave of Anti-DEI Legislation*, THE CHRON. OF HIGHER EDUC. (Jan. 16, 2024), https://www.chronicle.com/article/amid-national-backlash-colleges-brace-for-fresh-wave-of-anti-dei-legislation.

205. *See* Michael T. Nietzel, *University of Wisconsin Regents Flip-Flop; Approve Deal with Legislature to Limit DEI Efforts*, FORBES (Dec. 14, 2023, 8:16 AM), https://www.forbes.com/sites/michaeltnietzel/2023/12/14/university-of-wisconsin-regents-flip-flop-approve-deal-with-legislature-to-limit-diversity-efforts/?sh=2074d9ea4dfb.

206. H.B. 999, 2023 Leg., Reg. Sess. (Fla. 2023); S.B. 266, 2023 Leg., Reg. Sess. (Fla. 2023); H.B. 931, 2023 Leg., Reg. Sess. (Fla. 3034); S.B. 958, 2023 Leg., Reg. Sess. (Fla. 2023).

207. S.B. 17, 88th Leg., Reg. Sess. (Tex. 2024).

208. *See* Christopher F. Rufo et al., *Abolish DEI Bureaucracies and Restore Colorblind Equality in Public Universities*, MANHATTAN INST. (Jan. 18, 2023), https://manhattan.institute/article/abolish-dei-bureaucracies-and-restore-colorblind-equality-in-public-universities; Eric Kelderman, *The Plan to Dismantle DEI: Conservatives Take on Colleges' "Illiberal" Bureaucracy*, THE CHRON. OF HIGHER EDUC. (Jan. 20, 2023), https://www.chronicle.com/article/the-plan-to-dismantle-dei.

209. Megan Zahneis & Beckie Supiano, *Fear and Confusion in the Classroom: Vaguely Worded Legislation in Florida and Texas is Already Affecting How Professors Teach*, THE CHRON. OF HIGHER EDUC. (June 9, 2023), https://www.chronicle.com/article/fear-and-confusion-in-the-classroom; Katheryn Russell-Brown, *The Multitudinous Racial Harms Caused by Florida's Anti-DEI and "Stop WOKE" Laws*, 51 Fordham Urb. L. J. 785, 796 (2024).

nation, notwithstanding legislation in individual states.[210] At least in some general sense, the Court has generally followed the legislative blueprint.

Anti-DEI initiatives run the spectrum, ranging from defunding DEI offices to prohibiting spending of public funds on these efforts to removing diversity statements from hiring practices.[211] Additionally, in some states, the legislation also applies to forbidding employers from including DEI in their hiring and promotion practices.[212]

For example, Texas Governor, Gregg Abbott, signed anti-DEI legislation, Texas Senate Bill 17 ("SB 17"), into law on June 14, 2023.[213] It became effective January 1, 2024.[214] In summary, "The bill prohibits all state-funded colleges and universities from establishing or maintaining diversity, equity, and inclusion offices, and bans the hiring or assignment of an employee to perform the duties of a DEI office."[215] Additionally, the bill prohibits these institutions from seeking DEI statements from candidates for employment; giving preferences to applicants based on "race, sex, color, ethnicity, or national origin"; and bars all mandatory training "implemented in reference to race, color, ethnicity, gender identity, or sexual orientation."[216] Importantly, the bill does not impact private higher education institutions.

Supporters of the bill allege, without substantiation, that DEI offices foster discriminatory hiring.[217] They conclude that "Texas universities improve and the educational environment is enhanced when we recruit the best faculty based on merit and equal opportunity, not arbitrary quotas based on equity."[218] While there

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210. Marc Spindelman, *Sunsetting Racial Justice in the Sunshine State and Florida-izing the Nation*, THE AM. PROSPECT (Mar. 10, 2023), https://prospect.org/justice/2023-03-10-race-legislation-florida-supreme-court/.

211. *See Employment, Comparison Table - DEI-Restrictive Laws*, *supra* note 203.

212. Kate McGee, *Governor Abbott Tells State Agencies to Stop Considering Diversity in Hiring*, TEX. TRIB. (Feb. 7, 2023, 7:00 PM), https://www.texastribune.org/2023/02/07/greg-abbott-diversity-equity-inclusion-illegal/.

213. Marcela Rodriguez, *Gov. Abbott Signs DEI Bill Into Law, Dismantling Diversity Offices at Colleges*, DALL. MORNING NEWS (June 15, 2023, 10:30 AM), https://www.dallasnews.com/news/education/2023/06/14/gov-abbott-signs-dei-bill-into-law-dismantling-diversity-offices-at-colleges/.

214. *Bill Targeting Diversity in Higher Education Takes Effect*, TEXAS AFT (Jan. 11, 2024, 5:25 PM), https://www.texasaft.org/membership/higher-ed/bill-targeting-diversity-in-texas-higher-education-takes-effect/; Lily Kepner, *The Ban on DEI At Texas Colleges Went Into Effect Monday: Here's How Some Groups are Reacting*, AUSTIN AM. STATESMAN, (Jan. 2, 2024, 4:02 PM), https://www.statesman.com/story/news/education/2024/01/02/texas-dei-ban-in-colleges-in-effect-students-groups-react/72084761007/.

215. Monique Welch, *Texas' Anti-DEI Law Is Wreaking Havoc Before It Takes Effect Next Year. Here's What to Know*, HOUS. LANDING (Aug. 24, 2023), https://houstonlanding.org/texas-anti-dei-law-is-wreaking-havoc-before-it-takes-effect-next-year-heres-what-to-know/.

216. *Id.*

217. *Id.*

218. *Id. See also* Katy Marshall, *Texas Governor Signs Law Requiring Public University to End DEI Hiring*, TEX. SCORECARD (June 19, 2023), https://texasscorecard.com/state/texas-governor-signs-law-requiring-public-universities-to-end-dei-practices/; *LT. Gov. Dan Patrick, Statement on the Passage of Senate Bill 17-Banning Discriminatory "Diversity, Equity, and Inclusion" (DEI) Policies in Higher Education*, OFF. OF THE LIEUTENANT GOVERNOR (Apr. 19, 2023), https://www.ltg

is evidence to the contrary, the persistent message from Texas officials is that diversity means its beneficiaries are less qualified, receive special benefits, and possess less merit to enter places of higher education or employment. SB 17 had an immediate impact on the University of Houston Law Center, even before its effective date. The community experienced a "premature" and "unauthorized"[219] action when an unknown party taped a flyer to the LGBTQ Resource Center's door indicating that in accordance with SB 17, the Center had been disbanded.[220]

Violation of the Texas law is not without penalties. For example, if a higher education institution violates SB 17, it has 180 days to find a remedy before suffering financial penalties, including disqualification from future funding and institutional developments.[221] Additionally, there is a profound harshness to SB 17. It provides that any professor or administrator found to be in violation of the DEI ban on mandatory DEI training will be suspended for the first infraction.[222] Upon the second violation, he or she will be discharged from the institution and placed on a do-not-hire list for five years.[223] SB 17 allows employees and students to sue their institution if their university requires them to participate in mandatory DEI training.[224] It further permits anyone to inform officials from the Attorney General's ("AG") Office of an alleged violation, allowing the AG to institute proceedings against the institution.[225]

Opponents of SB 17 argue that the law will erode the foundation educators and administrators require to create diverse and welcoming campuses, threatening the quality of higher education.[226] Additionally, they argue that Texas higher education institutions will experience negative student outcomes, including retention and graduation rates from underrepresented populations.[227] Faculty and students argue that anti-DEI measures hurt recruitment and retention.[228] These negative outcomes decrease the number of students who enroll and the number of

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ov.texas.gov/2023/04/19/lt-gov-dan-patrick-statement-on-the-passage-of-senate-bill-17-banning-discriminatory-diversity-equity-and-inclusion-dei-policies-in-higher-education/.

219. Welch, *supra* note 215.

220. *Id.*

221. *Id.*

222. *Analysis of Texas SB 16, 17 & 18*, AM. ASS'N OF UNIV. PROFESSORS, https://www.texasaft.org/wp-content/uploads/2023/03/Texas-SB-16-17-18-analysis.pdf (last visited Feb. 3, 2024).

223. *Id.*

224. *Id.* SB 17 also permits the Texas Higher Education Coordinating Board to withhold "the lesser of $1 million dollars or one percent of the amount of the institution's operating expenses" for the proceeding the violation.

225. *Id.*

226. Monique Welch, *'The Perfect Space': UH Students Protest Closure of Their Beloved LGBTQ, DEI Centers Over SB 17*, HOUS. LANDING (Aug. 24, 2023), https://houstonlanding.org/the-perfect-space-uh-students-protest-closure-of-beloved-lgbtq-dei-centers-over-sb-17/.

227. *Id.*

228. Kate McGee, *For Higher Education in Texas, this Year's Session Was a Mixed Bag of Interference and Investment*, TEX. TRIB. (June 5, 2023), https://www.texastribune.org/2023/06/05/texas-legislature-universities-higher-education/. McGee notes that faculty and students expressed concerns that anti-DEI bills targeting higher education would make it difficult to recruit and retain top faculty. These bills would also "make students of color feel unwelcome and walk back years of progress in opening universities to everyone in the state." *Id.*

those who want to remain at the institution because they don't feel safe enough to graduate from an institution that does not represent who they are.[229] Further, Texas students expected their universities to stand up for DEI and expressed disappointment when their institutions did not do so. Students with the group Texas Students for DEI argued that by standing up for DEI, university leadership would have affirmed their dedication to "upholding values that make our universities places of academic excellence and community."[230]

Then, On May 15, 2023, Florida passed anti-DEI House Bill 999 ("HB 999").[231] The law bans DEI training, programs, and institutional frameworks in Florida's public colleges and universities.[232] It states:

> [Colleges and universities] may not expend any state or federal funds to promote, support, or maintain any programs or campus activities that… [a]dvocate for diversity, equity, and inclusion, or promote or engage in political or social activism[.][233]

After HB 999 became law, Florida colleges and universities "removed, reassigned, or reclassified employees who had been hired to work in DEI-related positions."[234] Additionally, before HB 999's enactment, every public college and university in Florida had staff and faculty members who held DEI related positions.[235] Approximately 100 state employees held these posts.[236]

Florida has enacted several race-related laws, for example, House Bill 7 ("HB 7"), Stop WOKE legislation,[237] that, taken together, have a detrimental impact on those required to follow them. Importantly, HB 7 and HB 999, result in denigration, suspicion,[238] and diminishment of race scholars.[239] Both bills are "part of a larger web of laws that signify racial entrenchment. [They] identify what counts as acceptable scholarship. In doing so, they signal that some scholars are legitimate, and others are not."[240] They cause professors to struggle with what to teach and how to teach it,[241] and whether their course content is in the "danger

229. Kirk McDaniel, *Texas House Approves Bill That Would Ban Higher Education Diversity and Inclusion Offices*, COURTHOUSE NEWS SERV. (May 22, 2023), https://www.courthousenews.com/texas-house-approves-bill-that-would-ban-higher-education-diversity-and-inclusion-offices/.

230. McGee, *supra* note 228.

231. H.B. 999, 2023 Leg., Reg. Sess. (Fla. 2023).

232. Russell-Brown, *supra* note 209, at 788.

233. H.B. 999, at 13, 2023 Leg., Reg. Sess. (Fla. 2023).

234. Russell-Brown, *supra* note 209, at 796.

235. *Id.*

236. *Id.* (noting that several university departments removed their diversity statements from their websites. Further, did not clarify what speakers and programs were now acceptable).

237. H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022). *See* Russell-Brown, *supra* note 209, at 7-9. Russell-Brown notes that this legislation regulates, in part, how race related subject matter may be taught and finds that it is discriminatory for a teacher to compel or encourage students to endorse certain perspectives regarding specified topics.

238. Russell-Brown, *supra* note 209, at 806-08.

239. *Id.* at 814-17.

240. *Id.* at 821.

241. *Id.* at 817.

zone."[242] Some instructors will change or remove their materials even though they do not think the content of their course curriculum violates the law, and even when there is uncertainty as to whether the laws are constitutional.[243]

Like Texas, Florida's anti-DEI legislation has unintended consequences. As one scholar notes, there is a "brain drain"[244] in response to Florida's legislative curtailment of how race is taught in Florida,[245] meaning that intellectual talent is leaving the state.[246] Indeed, professors now indicate they feel neither professionally nor physically safe in the state, while other residents feel compelled to leave because they do not want to live in a state that deliberately places people in danger,[247] devalues them, and, therefore, diminishes students' educational opportunities, which could constitute a Fifth Amendment taking.[248] Because this legislation is in its infancy, its overall impact remains uncertain. It is clear, however, that many public law schools in Texas have dismantled their DEI offices, LGBTQAI+ Resource Centers and other offices that welcome students and provide a safe space and a sense of community and belonging.[249] Though these same universities do not prevent students from organizing and supporting themselves, students will not have the university support they need.

IV. PRIVATE LAW SCHOOLS' RESPONSIBILITIES TO ASSIST PUBLIC LAW SCHOOLS

As DEI bans proliferate, their proponents do not seem to understand that these bills target those who are least likely to support them: Generation Z ("Gen Z"). This generation comprises a substantial percentage of students who will seek a legal education.[250] They are said to be the most diverse generation the United

242. *Id.*

243. *Id.*

244. *Id.* at 821. Russell-Brown describes "brain drain" as "the process of intellectual talent that migrates from one location to another, such as from one state to another." She acknowledges that because the law is new, there is no reliable estimate of the number of faculty who have left the state. There is, however, substantial evidence that college instructors, students, and administrators are choosing to leave Florida rather than live under the new educational regime. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 821-22 n.180.

248. *Id.* at 833-39.

249. *See* Welch, *supra* note 215; Johanna Alonso, *Texas Colleges Prepare for the End of DEI*, INSIDE HIGHER ED, (Dec. 19, 2023), https://www.insidehighered.com/news/students/diversity/2023/12/19/texas-institutions-prepare-anti-dei-law-go-effect#. Staff members of now-dissolved DEI and LGBTQIA offices indicated their voices were excluded from conversations as to how to move forward. Additionally, they asserted that resources and spaces for queer students and students of color will likely disappear. *Id.*

250. Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 42 U. ARK. LITTLE ROCK L. REV. 29, 40 (2018). Graham notes that when compared with Baby Boomers where Caucasians represented 72% of the population, they represent only 55% of Gen Z. Additionally, Gen Z has grown up where diversity is the norm. They, in fact, demand more diverse and inclusive law school spaces. *Id.* at 40.

States has ever produced.[251] They are more likely to embrace diversity and differences and less likely to define themselves or their peers in terms of ethnicity, gender, race, or sexual orientation.[252] Importantly, they have always lived in an era when the Civil Rights Act, the Voting Rights Acts, the Fair Housing Act, and the Americans with Disabilities Act were the norm.[253] Scholars characterize them as using their voices and platforms to fight against discrimination based on race, gender, sexual orientation, and other identities.[254] In short, "[o]ne of their central concerns is racial inequality and discord, and they aim to do something about it."[255] Additionally, they are more likely to apply to colleges where recruiters and recruitment materials reflect diversity.[256] Accordingly, one in four college applicants did not apply to higher education institutions if they feared they would not be treated fairly[257] and they were more likely to reject educational institutions that do not value diversity.

The emergence of anti-DEI legislation in the context of law schools is troubling, particularly given that these laws negatively impact the very generation that demands to be seen, heard, and valued. Like private higher education institutions, diversity, equity, inclusion, and belonging efforts in public law schools should serve as a mirror to law students who expect to see themselves reflected in their communities. Upon entering their chosen institutions, students expect to see a community that understands and supports their causes and speaks their diverse languages, whether about race, ethnicity, national origin, first generation or veteran status, gender, sexuality, disability—whether physical or psychological—and other expressions of identity. They expect their institutions to understand their intersectionality, that they are multidimensional, and that each dimension fully represents aspects of who they are. During their tenure in law school, students want to feel they belong.

A practical reason for fostering and celebrating a diverse community is that legal institutions must graduate law students who are culturally competent.[258] Indeed, under ABA Standard 303(c) an ABA accredited law school must graduate culturally competent law students.[259] Standard 303(c) requires law schools to send

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251. Daniel Takeda, *What Are "Gen Z Values"? Vol. 1 Four Key Topics That Shape the Discourse*, TOKION (Nov. 13, 2020), https://tokion.jp/en/2020/11/13/what-are-gen-z-values-vol1/.

252. Graham, *supra* note 250, at 40.

253. *Id.*

254. Crystal Harrell, *7 Gen Z Trends That Are Changing the World*, BRAINZ (Mar. 20, 2023), https://www.brainzmagazine.com/post/7-gen-z-trends-that-are-quickly-changing-the-world.

255. Graham, *supra* note 250, at 40.

256. Matt Zalaznick, *Gen Z Say Diversity is Key in College and Work*, UNIV. BUS. (Oct. 23, 2020), https://universitybusiness.com/gen-z-teens-say-diversity-is-key-in-college-and-work/.

257. *Id.*

258. *See Definitions of Cultural Competence*, NAT'L CTR. FOR CULTURAL COMPETENCE: GEO. UNIV. CTR. FOR CHILD & HUM. DEV., https://nccc.georgetown.edu/curricula/culturalcompetence.html (last visited Feb. 3, 2024) (defining cultural competence as "a set of values behaviors, attitudes, and practices within a system, organization, program [,] or among individuals and which enables them to work effectively cross culturally.").

259. AM. BAR ASS'N SECTION OF LEGAL EDUC & ADMISSIONS TO THE BAR, REVISIONS TO THE 2021-2022 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2 (2022).

students into the profession firmly rooted in the ability to effectively interact with clients having different experiences.[260]

Additionally, we cannot underestimate the impact lawyers have on the greater society. Professionally, and in other capacities, law school graduates disproportionately undertake significant public roles.[261] As a result, they often wield substantial influence.[262] They are indispensable when it comes to upholding the rule of law, shaping policy, ensuring that our government functions democratically, and empowering the community in its relationships with local, state, and federal governments and with other individuals.[263] Law schools are uniquely positioned, and indeed obligated, to prepare law students for citizenship by cultivating, shaping, and empowering them to enter the legal profession.[264] Scholars refer to aspects of this process as "deliberative democracy."[265] Under this theory, law schools are responsible "for supporting the capacity of [law] students to engage in and facilitate inclusive, informed and mutually respectful argument oriented toward the common good."[266]

The critical consideration is how we prepare law students for the often herculean tasks that lay ahead of them as lawyers. We cannot ignore that students in an ever-growing number of states attend public, state-funded law schools that experience the burdens of DEI bans that prohibit them from developing critical skills DEI initiatives provide. Moreover, these institutions often take little responsibility for ensuring their students feel safe and welcome. Private law schools like my school, STCL Houston, must take the lead in assisting public law schools to meet the needs of their students. Further, independent law schools are uniquely situated to offer diversity training to students, faculty, and staff at public law schools. Failing to do so is a "profound disservice"[267]

As a private, independent law school, STCL Houston is unaffiliated with a university. Like other such institutions, it does not receive broad state funding and is not subject to the current anti-DEI legislation. This means private institutions maintain the privilege to engage with their communities on numerous DEI endeavors and do so on a more profound level. STCL Houston received one of the largest gifts of its kind from one of its alumni to establish a diversity center. As a result, the law school opened the Agosto Diversity Center ("Diversity Center"),

260. *See* Graham, *supra* note 250, at 40; Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 150 (2018).

261. Jeffrey Kennedy, *Deliberative Experience and the Civic Aspirations of Legal Education*, 19 INT'L J. L. IN CONTEXT 498, 498 (2023).

262. *Id*. at 499.

263. *Id*.

264. *Id.*

265. *Id.*

266. *Id*.

267. Nathan Long, *President Speaks: With DEI Under Siege, Independent Colleges Must Advance Conversations on Diversity*, HIGHER ED DIVE (Aug. 7, 2023), https://www.highereddive.com/news/dei-diversity-private-colleges-saybrook-president-speaks/689994/. Long argues that if political forces muzzle state institutions, independent colleges must step in and serve the public, leveraging different perspectives and backgrounds to fully engage the meaning of cross-cultural differences. *Id.*

which continues to be fully operational.[268] It offers optional training to the internal community. This includes the opportunity to engage in continuous dialogue and education to increase the depth of understanding about the meaning of DEI and its connection to the legal profession. Through training and resources, the goal is to provide a comprehensive appreciation of DEI and how it impacts those who will look to the legal profession for guidance.

STCL Houston's Diversity Center is small in that it presently employs only two full-time staff members.[269] Despite its size, it offers services, numerous initiatives, and training to nearly 1,000 law students in addition to faculty, staff, administrators, and the broader community. However, as the magnitude of the work it undertakes demonstrates, the Diversity Center's size limits neither its work nor its commitment to creating a diverse, welcoming, and inclusive community. It customizes independent workshops for student organizations and departments within the law school. It also partners with them, demonstrating the interconnectedness within the underlying community.

In the current climate, one cannot measure STCL Houston's Diversity Center's effectiveness solely by its internal success. Instead, STCL Houston and other private, independent law schools must be committed to reaching outside their borders to help public institutions graduate culturally competent students. Gen Z is diverse, but this does not necessarily translate into a generation of students equipped to meet the requirements cultural competence demands. Private law schools must take specific steps to assist those who are subject to DEI bans. For instance, they must offer students at public institutions the opportunity to transfer from schools subject to DEI bans. Beyond this step, however, there are other measures they must take to help these communities. First, private law schools having operational diversity centers can and should open their doors to students, staff, and faculty from public law schools with agreed upon parameters. Private law schools must offer student counseling and coaching for faculty and staff who are now uncertain as to how to navigate the difficult terrain DEI bans present. Also, private law schools must make their physical resources available. They must be willing to extend invitations to join DEI trainings and workshops that help with development of critical skills. They can host CLEs, other joint programming, and receptions with internal and external thought leaders. In addition, unless in violation of the state's DEI ban, students from public law schools must be given an opportunity to take for-credit, race-related classes and seminars at private law schools, particularly since public and private institutions presently permit students to take classes which are not taught at their home institutions.

When private law schools open their doors to public institutions, it will not be without human and monetary costs. Simply put, private institutions have limited resources and cannot absorb the cost of supporting these institutions and preparing

268. *The Benny Agosto, Jr. Diversity Center*, S. TEX. COLL. OF L. HOUS., https://www.stcl.edu/academics/centers-institutes/the-benny-agosto-jr-diversity-center/ (last visited Mar. 14, 2024).

269. The Agosto Diversity Center presently employs a Vice President, Shelby Moore, a tenured faculty member who teaches first-year classes, and a Senior Director, Donna Davis, who is responsible for implementing workshops and programming and who does so with a high degree of skill. It also employs Diversity Fellows who serve as the liaisons between the Center and students, among other responsibilities.

their students for cultural competence in the profession. They will not have to. Proponents of antidiscrimination and DEI likely are willing to support private institutions as they seek to fulfill their moral obligation to graduate culturally competent lawyers. Out of a sense of social responsibility, private corporations, monetarily or through grants, can make contributions to assuage the costs, by co-sponsoring public events and sharing resources. Additionally, law firms may be willing to support these endeavors knowing they are in their best interests to hire lawyers who can appropriately represent their national and international clients' interests. Finally, state and local bar associations likely will support DEI endeavors to ensure lawyers will reflect the communities they will one day represent. Private law schools can partner with local and state bars, particularly their affinity bars. They can also partner with these bars to sponsor pro bono events. When engaging in a cost-benefit analysis to determine whether private law schools and their allies should support public law school communities, for the future of the legal profession, the benefits are worth the costs.