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Dismantling the Master's House: Establishing a New Compelling Interest in Remedying Systemic Discrimination

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Dismantling the Master's House: Establishing a New Compelling Interest in Remedying Systemic Discrimination

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This Article proposes a new compelling interest to justify affirmative action policies. Litigation has been successful, to a point, in preserving affirmative action, but public support of the diversity and inclusion rationales for race-conscious policies is waning. Equity abhors a vacuum, and so this Article promotes a return to remedial justifications for affirmative action programs and policies. It begins with an overview of the strict scrutiny standard, providing background on what constitutes compelling government interests, and what meets the narrowly tailoring element. After exploring the Court's dismantling of the societal discrimination justification for affirmative action programs, this Article makes the case that remedying systemic discrimination is equivalent to remedying past and present discrimination. Therefore, it should qualify as a compelling government interest. Next, it analyzes the evidence showing how existing affirmative action policies help combat the effects of institutional discrimination through the lens of the litigation at the University of North Carolina, and the Harvard trial, and contrasts the outcomes at the UCs after Proposition 209. The potential sunset of the diversity justification in higher education means that other strategies must be developed now, to fill the void that could occur by 2028, or much sooner as petitions for review are being considered by the Supreme Court as this Article is going to print. The Article concludes by opening the door to the discussion of alternative, non-litigation strategies for maintaining and enhancing affirmative action with a model statute, building off the requirements in Title VI.

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INTRODUCTION

Then: Proposition 187 denies services to undocumented immigrants in California.[1] Aspiring gubernatorial candidate Pete Wilson champions Proposition 209, which eliminated affirmative action in California public education, employment, and contracting. Similar initiatives carried over to other states.[2]

Now: Black Lives Matter. DACA continues. Qualified immunity for misuses of deadly force is up for review. In higher education, the use of affirmative action has been repeatedly upheld, but the Supreme Court is considering whether to grant a hearing in the latest case involving Harvard College.[3] In California, Proposition 16, which would have overturned Proposition 209, was voted down on the November 2020 ballot, thus continuing the state's prohibition on considering race, ethnicity, color, national origin, or gender in public contracting, employment, and education. Polls show that a majority of the public support affirmative action generally,[4] but oppose the specific use of race and ethnicity in making hiring and admissions decisions.[5] Thus, voter initiatives are not the best way to try to entrench and preserve affirmative action in higher education.

Recent litigation brought cause for concern, but Harvard successfully defended the anti-affirmative action lawsuit at the trial and appellate stages. The University of North Carolina (UNC) had its trial in November 2020, where the Court found that the University did not discriminate against white and Asian American applicants in admission.[6] Thus, litigation has been successful, to a

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1. *California Proposition 187, Prohibit Undocumented Immigrants from Using Public Healthcare (1994)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_187,_Prohibit_Undocumented_Immigrants_from_Using_Public_Healthcare,_Schools,_and_Social_Services_Initiative_(1994) (last visited Jan. 24, 2022)

2. Including Michigan, despite the apparent victory retaining affirmative action in *Grutter v. Bollinger*. Grutter v. Bollinger, 539 U.S. 306, 310 (2003) (holding that the Equal Protection Clause does not prohibit the University of Michigan Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body).

3. Vivi E. Lu & Dekyi T. Tsotsong, *Supreme Court Delays Decision on Reviewing Harvard Admissions Lawsuit*, HARV. CRIMSON (June 15, 2021, 12:22 PM), https://www.thecrimson.com/article/2021/6/14/supreme-court-delays-hearing-admissions-lawsuit.

4. Frank Newport, Opinion, *Affirmative Action and Public Opinion*, GALLUP (Aug. 7, 2020), https://news.gallup.com/opinion/polling-matters/317006/affirmative-action-public-opinion.aspx. In February 2019, Gallup published the results of a November and December 2018 survey and found that support for affirmative action programs was growing. They polled 6,502 people and 65% or respondent favored affirmative action programs for women and 61% favored affirmative action programs for minorities generally.

5. *Id*. Also, in February 2019, the Pew Research Center published the results of a January and February 2019 survey and found that 73% of its respondents said that race or ethnicity should not be a factor in college admissions decisions. Nikki Graf, *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, PEW RSCH. CTR. (Feb. 25, 2019), https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions.

6. Stephanie Saul, *University of North Carolina Can Keep Affirmative Action, Judge Rules*, N.Y. TIMES, Oct. 18, 2021, at A16; *see also*, Kate Murphy, *Trial on UNC-Chapel Hill's Race-Related Admissions Ends, But Ruling Could Take Months*, NEWS & OBSERVER (Nov. 19, 2020, 7:14 PM), https://www.newsobserver.com/news/local/education/article247284969.html. A petition was filed in the United States Supreme Court on

point, in preserving affirmative action. But the composition of the current U.S. Supreme Court suggests that the majority will be receptive to plaintiffs challenging affirmative action programs. Support of the diversity and inclusion rationales may be waning, and the 2028 "sunset" clause language in Justice O'Connor's *Grutter*[7] opinion provides a strong justification for the Court to reconsider diversity as a compelling government interest in higher education before the end of this decade. Equity abhors a vacuum, and so this Article promotes a return to remedial justifications for affirmative action programs and policies.

Since *Wygant v. Jackson Board of Education*[8] and *City of Richmond v. J.A. Croson Co.*,[9] the U.S. Supreme Court has held that remedying "societal discrimination" is not a compelling interest to justify race-conscious programs, but remedying present discrimination is.[10] This Article posits that "institutional discrimination" is past discrimination multiplied and perpetuated. It will analyze how dismantling institutional discrimination meets the compelling government interest in remedying past discrimination. Just as separate was inherently unequal, restricting government actors from taking race-conscious steps to reduce and eventually eliminate institutional discrimination means inequities will remain.

When segregation is *de facto*, which means that it is not based on laws but rather based on individual choices,[11] the current Supreme Court doctrine holds that it violates the Constitution to take racially explicit steps to reverse it.[12] Because the Court majorities have viewed racial discrimination as occurring when a racist individual externalizes, or intentionally acts upon, feelings of bias and prejudice, it is also fair to say that racial discrimination occurs when institutional processes function to unfairly disadvantage a racial group. Thus, *de facto* discrimination should be remediable; it should be considered a compelling interest sufficient to justify a race-conscious remedy under the strict scrutiny test. In the education context, for instance, it illustrates the unfair and

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November 11, 2021, and the issue has been briefed and submitted for conference in January, 2022. *Students for Fair Admissions, Inc. v. University of North Carolina, No. 21-707*, U.S. SUPREME CT., https://www.supremecourt.gov/docket/docketfiles/html/public/21-707.html (last updated Jan. 10, 2022).

7. *Grutter*, 539 U.S. at 310.

8. 476 U.S. 267, 294 (1986) (applying strict scrutiny to invalidate the Jackson Board of Education's layoff scheme under which nonminority teachers were laid off while minority teachers with less seniority, including probationary teachers, were retained; known as the seminal case for the "strong basis in evidence standard" for affirmative action programs).

9. 488 U.S. 469, 561 (1989) (holding that the minority set-aside program of Richmond, Virginia, which gave preference to minority business enterprises (MBE) in the awarding of municipal contracts was unconstitutional under the Equal Protection Clause).

10. *Id.* at 498; *see also Wygant*, 476 U.S. at 277.

11. Parents Involved in Cmty. Schs. v. Seattle School Dist. No. 1, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring).

12. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (holding that contested segregation is *de facto,* or not created by government policy, and taking racially explicit steps to reverse *de facto* segregation would violate the Constitution).

discriminatory treatment many minority students experience under a school district's "race-neutral policies."[13]

Part I of this Article begins with an overview of the strict scrutiny standard, providing background on what are and are not compelling government interests, and what meets the narrowly tailored element. After exploring the Court's dismantling of the societal discrimination justification for affirmative action programs, Part II makes the case that remedying institutional discrimination is equivalent to remedying past and present discrimination and therefore should be a compelling government interest. The artificial distinction between *de jure* and *de facto* discrimination[14] ignores the law's complicity in constructing institutional and systemic discrimination. As *Adarand*[15] deconstructed the distinction between invidious and benign preferences, years of social science research and data have shown that the present effects of past discrimination have maintained racial disparities along nearly every facet of American life, including employment, wealth, education, home ownership, health care, and incarceration.[16] Part II also explains how a different and more inclusive outcome regarding the Court's interpretation of *de facto* segregation would be an appropriate change to reduce the impact of current systemic discrimination in our nation's public education system.

Part III analyzes the evidence showing how existing affirmative action policies help combat the effects of institutional discrimination through the lens of the current litigation at the University of North Carolina, the recent Harvard trial, and the outcomes at the University of California schools (the "UCs") after the elimination of affirmative action in 1996, which undermined that system's ability to realize the compelling government interest in obtaining the educational benefits that flow from diversity. The potential sunset of the diversity justification in higher education means that other strategies need to be developed now to fill the void that could occur before 2028. Part IV concludes the Article with a brief discussion of why U.S. Supreme Court litigation is not likely to

13. Anna J. Egalite & Brian Kisida, *The Many Ways Teacher Diversity May Benefit Students*, BROOKINGS: BROWN CNTR. CHALKBOARD (Aug. 19, 2016), https://www.brookings.edu/blog/brown-center-chalkboard/2016/08/19/the-many-ways-teacher-diversity-may-benefit-students (A recent study by the Brookings Institution demonstrates that the potential benefits of increased teacher diversity extend well beyond standardized test scores, raising important questions about lost opportunities caused by the underrepresentation of minority teachers in America today).

14. The former refers to those distinctions that the law requires to be made, such as the separate but equal laws during the Jim Crow period, as the Latin term means "by law." The latter refers to distinctions that are "by fact," in Latin, which many believe result not from law, but from the conduct of individuals, institutions, and other policies. The concepts of systemic and institutional discrimination challenge these notions.

15. *Adarand*, 515 U.S. at 241.

16. Dina Gerdeman, *Minorities Who 'Whiten' Job Resumes Get More Interviews*, HARV. BUS. SCH.: WORKING KNOWLEDGE (May 17, 2017), https://hbswk.hbs.edu/item/minorities-who-whiten-job-resumes-get-more-interviews (a recent study by Harvard University found that when Blacks "whitened" their resumes when applying for jobs—for example, by using "American" sounding names—they got more callbacks for corporate interviews; 25% of Black candidates received callbacks from their whitened resumes, while only 10% got calls back when they left ethnic details on their resume).

preserve affirmative action, and suggests that a better route is in drafting model legislation, building off the requirements in Title VI, to mandate affirmative action in public education as a remedy for institutional and systemic discrimination.

I. THE LEGAL STANDARD FOR REMEDYING DISCRIMINATION

This Part provides a summary of the evolution of the strict scrutiny standard, identifying compelling government interests, and which policies and programs meet the narrow tailoring requirement.

A. DEFINING STRICT SCRUTINY

All racial classifications, imposed by any federal, state, or local governmental actor, must be analyzed by the reviewing court under strict scrutiny. Such classifications are constitutional only if they use narrowly tailored means that further compelling governmental interests.[17]

The federal government has long supported affirmative action in federal procurement programs,[18] and these affirmative action programs have been continually expanded and reauthorized.[19] The United States Supreme Court has given deference to race-conscious federal programs—provided originally that the motivation for their implementation was benign. For example, affirmative action programs and minority participation goals, implemented to help underrepresented minorities in a particular area or sector of the economy, gained Supreme Court approval.[20] *City of Richmond v. J.A. Croson Co.* then eliminated the distinction between *benign* and *invidious* racial classifications and determined that the amount of deference afforded to state and local programs would be dependent upon the history of discrimination in a particular state or locality.[21]

Then, in *Adarand Constructors, Inc., v. Pena*, the Court determined that even federal programs enacted for a benign purpose would be subject to strict scrutiny, based on the principles of "skepticism," "consistency," and

17. *See Wygant*, 476 U.S. at 280.

18. Exec. Order No. 11246, 3 C.F.R. 567 (1966) (Executive Order signed by President Lyndon B. Johnson to establish requirements for non-discriminatory practices in hiring and employment and the duty on the part of U.S. government contractors to take affirmative steps to ensure non-discrimination).

19. *See SBA's Minority Business Development Program: Hearing Before the H. Comm. on Small Bus.*, 102d Cong. 2-3 (1992) (statement of Hon. John J. LaFalce empathetically recognizing the need for implementation of the Minority Business Development Reform Act of 1988 and explaining that much more effort is required in order to achieve the Act's goal of assisting minority businesses to the extent that they are able to compete for government contracts).

20. *See* Fullilove v. Klutznick, 448 U.S. 448, 490 (1980) (affording latitude to Congressional programs in which race-based classifications are motivated for remedial purposes).

21. *Croson*, 488 U.S. at 499–504 (characterizing a race-based program where a pattern of invidiously discriminatory acts are present as legitimate by claiming that since there is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons in any aspect of the city's construction industry, the Plan's random inclusion of those groups strongly impugns the city's claim of remedial motivation).

"congruence."[22] While a substantial debate remains about the role that the motivation behind governmental acts should play in determining whether a preference is permissible or unconstitutional,[23] in *Adarand*, the United States Supreme Court settled the issue for the foreseeable future.[24]

A strict scrutiny analysis is now required whenever a race-based classification is enacted by any governmental agency or entity, regardless of whether the classification results in a benefit or a burden to a class of people based on race or ethnicity.[25] The strict scrutiny test has two prongs. The first prong requires the court to determine whether there is a compelling governmental interest sufficient to justify the race-based classification.[26] The second prong of the strict scrutiny test requires a determination that the means used be narrowly tailored to accomplish the compelling governmental interest.[27] Despite the Supreme Court's assertion that strict scrutiny was not "strict in theory, but fatal in fact,"[28] race-based classifications almost always fail the test and are struck down as a result.[29]

There are two types of governmental interests: *remedial interests*, such as remedying the present effects of past discrimination, and *non-remedial interests*, such as promoting educational diversity.

B. REMEDIAL COMPELLING GOVERNMENT INTERESTS

Courts have generally found interests in remedying past acts of discrimination to be compelling to satisfy strict scrutiny.[30] For example, in *United Steelworkers of America v. Weber*, the U.S. Supreme Court upheld the affirmative action program Kaiser Aluminum and Chemical Corporation implemented within their training platform to combat present effects of past

22. *Adarand*, 515 U.S. at 276 (adhering to the use of strict scrutiny for both classifications that are blatantly motivated by notions of racial inferiority as well as for classifications that appear to be benign).

23. *Compare* Charles R. Lawrence, III, *The Id, the Ego, and Unconscious Racism*, 39 STAN. L. REV. 317, 322–24 (1989) (asserting the harm can result regardless of the intent of governmental actors), *with Washington v. Davis*, 426 U.S. 229, 246(1976) (holding that racial discrimination case under the Fourteenth Amendment requires proof of discriminatory motive or intent, and not simply discriminatory impacts).

24. *See* Harvey Gee, *From the Pre-Bakke Cases to the Post-Adarand Decisions: The Evolution of Supreme Court Decisions on Race and Remedies*, 16 GEO. IMMIGR. L.J. 173, 176 (2001).

25. *See Adarand*, 515 U.S. at 227.

26. *Id.* at 235.

27. *Id.*

28. *Id*. at 247.

29. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 433–34 (1997) (noting that the strict scrutiny test has been applied to invalidate preferences in voting districts and government contracts). *But see* United States v. Paradise, 480 U.S. 149, 166–67 (1987) (holding that a program which sought to remedy past discrimination against blacks was sufficiently narrowly tailored).

30. *See Students for Fair Admissions, Inc. v. President of Harv. Coll.*, 397 F.Supp.3d 126, 245 (D. Mass. 2015) (holding that Harvard University's admissions practices meet constitutional requirements and do not discriminate against Asian Americans); *see also Students for Fair Admissions, Inc. v. Univ. of N.C. Chapel Hill*, No. 1:14CV954, 2019 WL 4773908, *1 (M.D.N.C. Sep. 30, 2019) (holding that a trial is required to develop all of the facts necessary to determine whether UNC's practices are narrowly tailored to achieve the goal of diversity because, generally, a university may institute a race-conscious admissions program in an effort to obtain the educational benefits that flow from student body diversity).

discrimination.[31] As part of a collective agreement with the United Steelworkers of America, Kaiser Aluminum and Chemical Corporation implemented an affirmative action program that reserved half of the positions in the program for workers of color until the percentage of such workers in the plant corresponded with the percentage of such workers in the labor force.[32] The U.S. Supreme Court upheld the program as within the scope of the Civil Rights Act of 1964 by approving the manner in which the program was structured to open employment opportunities for African Americans in occupations that had been traditionally closed to them.[33]

It is important to note that a compelling interest does not forever remain compelling. In *Flax v. Potts*, the Fifth Circuit reiterated the principle that court-ordered desegregation plans were designed to remedy constitutional violations only; district courts should, therefore, weigh school districts' compliance with court orders in the light of the original constitutional violation.[34] If the school district paid its "penance," so to speak, and complied with whatever orders the court issued, then the court's jurisdiction would effectively end.[35] The Fifth Circuit further stated that "to continue supervision once the constitutional wrong is righted . . . 'effectively changes the constitutional measure of the wrong itself: it transposes the dictates of the remedy for the dictates of the constitution . . . .'"[36] Thus, a compelling interest apparently dissolves after the discriminating state actor complies with court orders regarding its resolution—even when the harm from the discrimination remains and continues.

C. NON-REMEDIAL COMPELLING GOVERNMENT INTERESTS

The U.S. Supreme Court has been divided over whether non-remedial interests, such as increasing employment opportunities for minority businesses or promoting diversity, are compelling to satisfy strict scrutiny.[37] Thus far,

31. *United Steelworkers of America v. Weber*, 443 U.S. 193, 209 (1979) (holding that Title VII of the Civil Rights Act of 1964 did not bar employers from favoring women and minorities).

32. *Id*. at 198.

33. *Id*. at 209.

34. *Flax v. Pott*s, 915 F.2d 155, 164 (1990) (holding that the remaining portion of the Fort Worth Independent School District's (FWISD) Desegregation Plan, which deals with the busing of second and third grade students at nineteen elementary schools be eliminated at the beginning of the 1988–89 school year because "the stain of white supremacy has been removed").

35. Missouri v. Jenkins, 515 U.S. 70, 100 (1995) (holding that while a school's desegregation plan for their city district could be an appropriate remedy for *de jure* segregation, indefinite extensions of that remedy would not be; a connection to current *de facto* segregation was not established in this case).

36. *Flax*, 915 F.2d at 159.

37. For instance, portions of Justice O'Connor's opinion in *Croson* and her dissenting opinion in *Metro Broadcasting* appear to cast doubt on the validity of non-remedial affirmative action programs. In one passage in her opinion in *Croson*, Justice O'Connor stated that affirmative action must be "strictly reserved for remedial settings." *Croson*, 488 U.S. at 493. Echoing that theme in her dissenting opinion (joined by Chief Justice Rehnquist and Justices Kennedy and Scalia) in *Metro Broadcasting*, Justice O'Connor urged that strict scrutiny also apply to federal affirmative action measures, and asserted that under that standard, only one interest has been "recognized" as compelling enough to justify racial classifications: "remedying the effects of racial discrimination." *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting). However,

diversity in higher education is the only non-remedial interest consistently held to be compelling.[38] The Court has also recognized that the benefits of diversity expand from the university to the larger society.[39]

The Court narrowed its interpretation of permissible compelling governmental interests in support of affirmative action programs in *Adarand*.[40] In 1989, the U.S. Department of Transportation (DOT) awarded a Colorado highway contract to Mountain Gravel and Construction Company.[41] Mountain Gravel subcontracted with the lowest bid coming from Adarand Constructors.[42] Another company, Gonzales Construction, submitted a higher bid.[43] However, Gonzales Construction was certified by the Small Business Administration as a disadvantaged business (a business owned by racial or ethnic minority groups or women); therefore, Mountain Gravel gave Gonzales Construction the contract due to the financial incentives from the DOT for using a disadvantaged business.[44]

Adarand filed suit in federal court, arguing that the subcontracting incentives were unconstitutional.[45] The U.S. Supreme Court ruled in favor of Adarand, holding that the "presumption of disadvantage based on race alone, and consequent allocation of favored treatment, is a discriminatory practice that violates the equal protection principle embodied in the Due Process Clause of the Fifth Amendment."[46]

The principles of *Adarand* were adopted by the California Supreme Court in *Hi-Voltage Wire Works, Inc., v. City of San Jose*.[47] There, the California Supreme Court determined that even meeting the strict scrutiny test is not a sufficient justification for a race-conscious remedy in the state of California,[48] after the passage of Proposition 209, which amended the state constitution to

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in *Wygant*, Justice O'Connor said that there might be governmental interests other than remedying discrimination and promoting diversity in higher education that might be sufficiently compelling to support affirmative action. *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). Justice Kennedy's separate dissent in *Metro Broadcasting* was also quite dismissive of non-remedial justifications for affirmative action; he criticized the majority opinion for "allow[ing] the use of racial classifications by Congress untied to any goal of addressing the effects of past race discrimination." *Metro Broad.*, 497 U.S. at 632 (Kennedy, J., dissenting).

38. *See* Grutter v. Bollinger, 288 F.3d 732, 738 (6th Cir. 2002), *aff'd*, 539 U.S. 306. *See also* Smith v. Univ. of Wash., 392 F.3d 367, 382 (9th Cir. 2004).

39. Elise C. Boddie, *The Future of Affirmative Action*, 130 HARV. L. REV. F. 38, 44 (2016) (explaining that both *Grutter* and *Fisher II* acknowledge that "the benefits of diversity not only inure to students in institutions of higher education but also accrue more broadly to the workforce and to society as a whole").

40. *Adarand*, 515 U.S. at 219.

41. *Id.* at 205.

42. *Id.*

43. *Id.*

44. *Id.* at 205–06.

45. *Id.* at 206.

46. *Id.* at 254.

47. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1097 (Cal. 2000).

48. *Id.* at 1081 (holding that the municipal program designed to increase participation by minority and women businesses in public construction projects violated Article I, Section 31 of the California State Constitution because it accorded an advantage to certain subcontractors based on their race or sex).

outlaw racial and ethnic preferences. Therefore, even when sufficient evidence of past discrimination by a governmental agency or office exists, race-conscious remedies are not permitted. *Hi-Voltage* confirmed the principles elucidated in *Adarand* by stating that race-based discrimination by the state, regardless of whether it is benign or invidious, violated California state constitutional law.[49]

The non-remedial diversity interest has been upheld as compelling only in the educational context—and in higher education more than in primary and or secondary. It began in *Regents of the University of California v. Bakke*, when the plurality opinion of the U.S. Supreme Court suggested that race could be a factor, among many, in higher education admissions processes if the goal of the admissions policy is to promote a diverse student body.[50] As noted by the Court in *Fisher v. University of Texas at Austin (Fisher I)*, "[t]he attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."[51] The academic mission of a university is "a special concern of the First Amendment,"[52] and conduciveness to that mission is intertwined with which students the university admits.[53] This diverse student body standard still governs outside of California and the nine other states[54] that have outlawed affirmative action through statutes or state constitutional amendments.

But, in *Podberesky v. Kirwan,* the Fourth Circuit case in which a freshman at the University of Maryland at College Park (UMCP) challenged the constitutionality of the University's Benjamin Banneker Scholarship Program for African American students, the Court focused on the lack of necessity in the University's program and the lack of pervasive racial discrimination by the University to ultimately strike down the program.[55] In effect, the Fourth Circuit reasoned that the scholarship program was not "remedial" because there was no

49. *Id*. at 1097.

50. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (holding that a university's use of racial "quotas" in its admissions process was unconstitutional, but a school's use of "affirmative action" to accept more minority applicants was constitutional in some circumstances, including for promoting a diverse student body).

51. *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 308 (2013); *see also* Chris Chambers Goodman & Sarah E. Redfield, *A Teacher Who Looks Like Me*, 27 J. CIV. RTS. & ECON. DEVEL. 105, 123–24 (2013).

52. *Fisher I*, 570 U.S. at 308. The court also noted that "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes." *Id.* at 311. The court further explained that "[a]ccording to *Grutter*, a university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer.'" *Id.* at 310 (citing *Grutter*, 539 U.S. at 328).

53. *Id.* at 308 (reasoning that "'the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation,' and this in turn leads to the question of 'who may be admitted to study.'") (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

54. *See* Mark C. Long & Nicole A. Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in Public Universities*, 42 EDUC. EVALUATION & POL'Y ANALYSIS 188 (2020), https://doi.org/10.3102/0162373720904433.

55. Podberesky v. Kirwan, 38 F.3d 147, 160 (4th Cir. 1994) *cert. denied*, 115 S. Ct. 2001 (1995) (holding that a University of Maryland scholarship designated for African American students violated the Constitution's Equal Protection Clause). This case is discussed in more detail *infra* at Part I.E.

pervasive past discrimination to remedy.[56] *Podberesky* was further supported by *Hopwood v. Texas*, the Fifth Circuit case that barred all use of racial preferences in university admissions in the states under that court's jurisdiction by holding diversity is not a compelling interest.[57]

Nonetheless, in *Fisher v. University of Texas (Fisher II)*, the U.S. Supreme Court, which upheld the University of Texas's (UT) use of race in considering applicants for admissions, stated that the use of race served a compelling interest because educational benefits flow from student body diversity.[58] Thus, the compelling interests required to satisfy strict scrutiny will include diversity and the educational benefits that flow from interchanges between students with different backgrounds and perspectives to the entire university population, including to positions of leadership.[59] But the realignment of the U.S. Supreme Court in the past two years has put the status of these benefits that flow from diversity in jeopardy.

D. WHAT IS NOT A COMPELLING GOVERNMENT INTEREST?

In cases involving public contracting and public employment, the U.S. Supreme Court has held that the following goals, among others, are *not* compelling governmental interests: promoting racial balancing/quotas;[60] providing role models for racial minorities;[61] and remedying *de facto* segregation/integration.[62] This Subpart will focus on remedying *de facto* segregation/integration.

In *Parents Involved in Community Schools v. Seattle School District*, the U.S. Supreme Court prohibited two Seattle school districts from implementing their modest, race-conscious desegregation plans on the grounds that taking racially explicit steps to reverse *de facto* segregation and discrimination violates the Constitution.[63] Here, the Court dismantled the use of societal discrimination to establish disparate or discriminatory treatment on the basis that the alleged

56. *Id.*

57. *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (holding that the University of Texas School of Law could not use race as a factor in determining which applicants to admit to the university).

58. *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 136 S. Ct. 2198, 2215 (2016); *see also Grutter*, 539 U.S. at 343 (holding higher education institutions have a compelling interest in considering the race of applicants when making admissions decisions). *But see Gratz v. Bollinger*, 539 U.S. 244, 305 (2002) (holding that the University of Michigan's assignment of points for underrepresented group status during undergraduate admission applications review process did not meet the individual consideration requirement established in *Bakke*).

59. *Students for Fair Admissions, Inc. v. President of Harv. Coll*. 980 F.3d 157, 187 (1st Cir. 2020). This case holding that "Harvard has sufficiently met the requirements of Fisher I, Fisher II, and earlier cases to show the specific goals it achieves from diversity and that its interest is compelling." *Id.*

60. *Adarand*, 515 U.S. at 257.

61. *Wygant*, 476 U.S. at 273.

62. *Croson*, 488 U.S. at 498–506.

63. *Parents Involved in Cmty. Schs*, 551 U.S. at 710 (holding that struck down the Seattle School District's race-conscious desegregation plans on the basis that the contested segregation is *de facto*, or not created by government policy, and taking racially explicit steps to reverse *de facto* segregation would violate the Constitution to take racially explicit steps to reverse it).

"discrimination" does not result from prior deliberate actions of public officials but rather from choices made by private individuals.[64] As the next Subpart will discuss, it may be a "chicken or the egg" type of inquiry as to which came first.

In *Missouri v. Jenkins*, the U.S. Supreme Court overturned a district court ruling that required the State of Missouri to correct *de facto* inequality in schools by funding salary increases and remedial education programs.[65] The Court reaffirmed the principles elucidated in *Adarand* by stating that the point of strict scrutiny is to differentiate between permissible and impermissible government uses of race; once the effects of past discrimination are sufficiently addressed, using race as a compelling interest becomes exceedingly difficult to justify because any racial classifications risk sacrificing the social order of our nation.[66]

Race is not a sufficient condition for presuming disadvantage that would violate the U.S. Constitution.[67] There must be some state action in creating the disadvantage, and it must be because of, not in spite of, race. The Court held that *de facto* racial segregation was not a compelling interest to meet the strict scrutiny standard of review.[68] What the Court has failed to acknowledge is that past *de jure* discrimination by state actors set the stage for perpetuating and exacerbating the disadvantage through the exercise of private biases and private conduct. That private discrimination may be outside the reach of the law (at least in the absence of Title VI or Title VII prohibitions), but the law cannot, directly or indirectly give such conduct effect.[69]

But, giving effect is what courts often do, determining that the appropriate "sentence" has been served and then dismissing further proceedings. For instance, in *Tasby v. Moses*, the Fifth Circuit emphasized that in desegregation cases, district courts should solely focus on the constitutional nature of the wrong.[70] There, a formerly segregated school district, having obtained a declaration of unitary status, moved for release from court supervision.[71] Although there was substantial evidence of *de facto* segregation—such as in student assignment and attendance zones, majority to minority transfers, curriculum transfers, teacher assignments, facilities, allocation of resources, and transportation—the district court granted the motion, finding that the school district had made sufficient progress in providing equal education opportunities

64. *Id.* at 726.

65. *Jenkins*, 515 U.S. at 100 (holding that the lower courts exceeded their authority in creating an intra-district segregation remedial plan with the purpose of attracting nonminority students into the district).

66. *Id.* at 84.

67. *Id.* at 93.

68. *Id.* at 115.

69. *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963).

70. Tasby v. Moses, 265 F.Supp.2d 757, 764, 780 (2003) (holding that the Desegregation Schools in Dallas (DISD) achieved unitary status and therefore judicial orders must terminate because "the segregation prohibited by the United States Constitution, the United States Supreme Court and Federal Statutes no longer exist in the DISD").

71. *Id.* at 765.

for students.[72] The unitary status declaration thus resolved the constitutional wrong, notwithstanding the continuing disadvantage the court deemed it had on the aggrieved students.

E. POLICIES UPHELD AS APPROPRIATELY NARROWLY TAILORED

There is no single test for narrow tailoring, but several courts have relied on a set of factors offered in *United States v. Paradise*, a U.S. Supreme Court case that upheld a court-ordered promotion plan designed to remedy past discrimination in public employment.[73] Using the *Paradise* factors, a court examines: (1) the necessity for the relief and the efficiency of alternative remedies, (2) the flexibility[74] and duration of the relief, including the availability of waiver provisions, (3) the relationship of numerical goals[75] to the relevant market,[76] and (4) the impact of the relief on the rights of third parties.[77] Thus, the Court has generally held that affirmative action programs involving remedial interests—that do not disproportionately harm the interests or unnecessarily trammel the rights of innocent individuals—are narrowly tailored.

For years, the debate behind affirmative action in education policies was regarding the ability of affirmative action to be used to create a diverse student body.[78] However, in more recent years, the debate has shifted to whether

72. *Id*. at 781.

73. United States v. Paradise, 480 U.S. 149, 160 (1987) (holding within a given case, some factors may be weighed more heavily, and the factors may be weighed against each other. Because *Paradise* involved a remedial interest, it is not clear if the same factors apply in non-remedial settings. Some of the factors, such as the duration of the relief, may not be applicable because of an ongoing interest in maintaining the policy such as a permanent interest in having a diverse student body).

74. Loc. 28 of Sheet Metal Workers' Int'l. Ass'n v. EEOC, 478 U.S. 421, 478 (1986) (noting, "[i]n sum, the District Court has implemented the membership goal as a means by which it can measure petitioners' compliance with its orders, rather than as a strict racial quota").

75. *Id.* at 477–78 (explaining that "the District Court's flexible application of the membership goal gives strong indication that it is not being used simply to achieve and maintain racial balance, but rather as a benchmark against which the court could gauge petitioners' efforts to remedy past discrimination").

76. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (explaining that "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court").

77. For examples of cases where remedying past and present discrimination policies have been struck down as "not narrowly tailored," see *Croson*, 488 U.S. at 506 (holding that a policy is not narrowly tailored unless there is a "logical stopping point"); Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1270 (11th Cir. 2001) (holding a policy that awarded bonus points to minority applicants because the policy lacked flexibility and failed to provide sufficient weight to non-racial factors); Wessmann v. Gittens, 160 F.3d 790, 809 (1st Cir. 1998) (holding that "racial balancing" in admissions – i.e. attempting proportionality between admitted students and the school district population – is not narrowly tailored to meet a non-remedial interest in a diverse K-12 student body). *Cf.* Students for Fair Admissions, Inc. v. President of Harv. Coll., F.Supp.3d. 126, 187 (2019) (holding holistic admissions review using race as one, among many factors, is narrowly tailored to foster the tolerance, acceptance, and understanding of a diverse student population).

78. *See, e.g.*, *Grutter*, 539 U.S. 306.

affirmative action policies are narrowly tailored.[79] Because *Paradise* involved a remedial interest, it is not clear if the same factors apply in non-remedial settings. An example of the Court's application of the *Paradise* factors when examining affirmative action programs targeting non-remedial interests can be seen in *Podberesky v. Kirwan*,[80] and the scholarship program at the heart of the case, which was created amid a long-running legal challenge to the University's desegregation efforts.[81] Under the Banneker Program, which was only open to African American applicants, students were to receive full four-year scholarships if they could meet certain academic and leadership standards; the University had a similar program open to all students known as the Francis Scott Key Scholarship.[82]

The Fourth Circuit weighed the lack of necessity in the University's affirmative action scholarship program against the lack of pervasive racial discrimination and ultimately struck down the Banneker program by holding that the University failed to show that it was narrowly tailored to address the past effects of segregation.[83] The U.S. Supreme Court denied certiorari.[84] Thus, *Podberesky* is significant because it reaffirms the notion that general societal discrimination is not legally cognizable and affirmative action programs centered around combating *de facto* segregation will not pass constitutional muster.[85]

Nonetheless, in *Fisher II*, the most recent U.S. Supreme Court decision regarding affirmative action, the concentration shifted to whether the program was narrowly tailored.[86] There, the U.S. Supreme Court stated that schools are required to prove that there are no workable race-neutral alternatives in order to demonstrate that their affirmative action programs are narrowly tailored.[87] Proving that no race-neutral options are workable arguably is a higher evidentiary burden than what was applied in *Grutter* and *Gratz* and suggests less

79. *See, e.g.*, Students for Fair Admissions v. Presidents of Harv. Coll., 308 F.R.D. 39 (2015) (where plaintiffs argued that the Harvard program was not sufficiently narrowly tailored to meet constitutional standards).

80. *Podberesky*, 38 F.3d at 162.

81. *Id.* at 152.

82. *Id.*

83. *Id.* at 155 (holding evidence of ongoing problems within an institutional setting can support a court's finding of present effects, such as evidence of a hostile environment for racial minorities within the institution or evidence of an institution's bad reputation in minority communities, can provide some support for present effects; however, this type of evidence by itself may not be sufficient unless it is linked to past discrimination and it is combined with other evidence).

84. *Id*.

85. *See* Alexander S. Elson, *Disappearing Without a Case—The Constitutionality of Race-Conscious Scholarships in Higher Education*, 86 WASH. U. L. REV. 975, 1024 (2009) (arguing that race-conscious scholarships in higher education are disappearing after *Podberesky*).

86. *Fisher II*, 136 S. Ct. at 2215 (reaffirming prior holding that higher educational institutions have a compelling interest in considering the race of applicants when making admissions decisions).

87. *Id*. at 2208.

deference to the university mission in this regard.[88] In *Fisher II*, the U.S. Supreme Court ultimately upheld UT's use of race in considering applicants for admissions, and essentially endorsed the use of affirmative action to achieve a diverse student body, so long as programs were narrowly tailored to advance this goal.[89] Seeking a critical mass of diverse students can be consistent with narrow tailoring because race is not the only component of diversity.[90] Intra-racial differences can be another component of diversity,[91] particularly for Asians and African Americans.[92]

II. REMEDYING SYSTEMIC AND INSTITUTIONAL DISCRIMINATION

A. THE BASICS OF REMEDYING PAST DISCRIMINATION

Today, the Court traditionally applies the following two-step test for all remedial uses of racial classifications: (1) the discrimination must be identified with some degree of specificity; mere statistical anomalies, without more, do not permit a governmental entity to employ racial classifications, and (2) the institution that makes the racial distinction must have a "strong basis in evidence" to conclude that race-based remedial action is necessary.[93] Courts have uniformly held that institutions can have a compelling interest in

88. *See* Kimberly Jenkins Robinson, Comment, *Fisher's Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 240 (2016). *But see* Boddie, *supra* note 39, at 40 (explaining that "[i]t is not clear, however, that the standard articulated in Fisher I, as applied in Fisher II, is meaningfully different from that in Grutter").

89. *Fisher II*, 136 S. Ct. at 2207 (writing for the majority opinion, Justice Kennedy accurately notes that UT Austin only considered race as "a factor of a factor of a factor," and that the University's consideration of race "may be beneficial to any UT Austin applicant—including whites and Asian Americans").

90. *Grutter*, 539 U.S. at 316 (explaining that "[b]y enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School." The policy does not define diversity "solely in terms of racial and ethnic status." Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool." Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession") (internal quotation marks and citations omitted).

91. Eang L. Ngov, *Qualitative Diversity: Affirmation Action's New Reframe*, 2017 UTAH L. REV. 423, 464 (2017) (cautioning that "[w]e must be prepared for the prospect that qualitative diversity opens the door to greater racial identity construction by all involved and greater manipulation of the admissions process."); *see also* Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007) (explaining the real differences between affirmative action benefits for blacks descended from freed U.S. slaves and those who are immigrants or descended from post-slavery immigrants).

92. Meara E. Deo, *Affirmative Action Assumptions*, 52 U.C. DAVIS L. REV. 2407, 2444–46 (2019) (explaining the differences in educational attainment, poverty, language ability and more between Chinese, Korean and Japanese Asians, compared to those from Cambodia, Laos, Vietnam and Myanmar/Burma).

93. *Croson*, 488 U.S. at 506; *see also* Connerly v. State Pers. Bd., 92 Cal. App. 4th 16, 84 (Cal. Ct. App. 2001) (eliminating goals and timetables for employment of minorities and women under the State of California's affirmative action program); *Adarand*, 515 U.S. at 202, 239 (Scalia, J., concurring) (concurring, Justice Scalia agreed with the majority that, strict scrutiny must be applied to racial classifications imposed by all governmental actors, but concluded that "the government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."). This Article argues that the focus should return to making a distinction between invidious and benign discrimination, where the former has an intent to harm groups subject to the negative impacts of structural and institutional discrimination.

remedying present effects of their own past discrimination so long as there is a showing that there has been past discrimination, that there are present effects, and that the two are linked.[94] Disparate impact alone is not enough to satisfy the strong basis in evidence standard.[95] Combining it with disparate treatment can be sufficient.[96]

Will organizations and institutions admit to discriminating in the past? While the racial awakening of the summer of 2020 led many companies to examine and reassess their diversity, equity, and inclusion practices and policies, the triggering events of that summer may only lead to knee-jerk reactions rather than transformative change.[97] A number of companies made some notable efforts, such as adding Juneteenth as a company holiday or paid vacation day.[98] Efforts like these help employees and local communities temporarily look more

94. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) ("Where racial discrimination is concerned, 'the (district) court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'"); *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 770 (1976).

95. *See Croson*, 488 U.S. at 503.

96. EEOC v. Dial. Corp., 469 F. 3d 735, 745 (8th Cir. 2006). Dial operated a factory producing canned meats. Entry-level employees worked in a packing area, which required physical duties, including lifting and carrying 35 pounds of sausage (up to 18,000 pounds per day) and walking four miles each workday. *Id.* at 739. Dial instituted safety measures aimed at reducing the number of injuries among packing area employees. In 2000, Dial began using a strength test to screen potential employees. The test required potential employees to carry and load 35-pound bars onto a raised platform while an occupational therapist and plant nurse made notations about performance. After the test's introduction, the number of new women hires dropped to 15%, compared with 46% in the previous three years. In 2002, only 8% of female applicants passed. Male applicants passed the test at a rate of 97%. *Id.* After evidence was presented that the plant nurse marked some women as failing when they actually passed, the Circuit Court concluded that the evidence was sufficient for a reasonable jury to find that there was a pattern and practice of intentional discrimination against women and that the District Court did not err in denying Dial's motion for judgment as a matter of law. *Id.* at 740.

97. Laura Morgan Roberts & Ella F. Washington, *U.S. Businesses Must Take Meaningful Action Against Racism*, HARV. BUS. REV. (June 1, 2020), https://hbr.org/2020/06/u-s-businesses-must-take-meaningful-action-against-racism. The Harvard Business Review concludes that the research has shown that the psychological impact of these public events—and the way it carries over into the workplace—proves organizations respond to large scale, diversity-related events that receive significant media attention. However, without adequate support, the manner in which organizations respond to such triggering events can either help employees feel psychologically safe or to contribute to racial identity threat and mistrust of institutions of authority. *Id.*

98. Amid the protests against police brutality and racism after the death of George Floyd, major companies and organizations rushed to recognize Juneteenth as a holiday for their employees. Yelana Dzhanova, *Here's a Running List of All the Big Companies Observing Juneteenth This Year*, CNBC: BUS. NEWS (June 19, 2020, 4:15 PM), https://www.cnbc.com/2020/06/17/here-are-the-companies-observing-juneteenth-this-year.html (Twitter, Nike, National Football League, Adobe, Mastercard, Lyft, Postmates, Quicken Loans, Square, Uber, Best Buy, Target, J.C. Penney, The New York Times, The Washington Post and Vox Media). Best Buy's senior leadership team offered one of the first corporate statements acknowledging the death of George Floyd, the harassment of bird-watcher Christian Cooper, and the death of jogger Ahmaud Arbery. *See* Press Release, Best Buy, A Message From the Senior Leadership Team (May 27, 2020), https://corporate.bestbuy.com/a-message-from-the-senior-leadership-team ("We write this because it could have been any one of our friends or colleagues at Best Buy, or in our personal lives, lying on the ground, struggling to breathe or filming someone as they threatened us."). More examples of acknowledging institutional racism include YouTube pledging $1 million to the Center for Policing Equity, Glossier giving $500K to support racial justice organizations and another $500K to Black-owned Beauty brands. Roberts et al., *supra* note 97. Peloton not only donated $500K to the NAACP but also called for its members to speak up for and learn ways to practice anti-racism. *Id.*

favorably upon corporate America, and can be a small step towards reducing systemic and institutional discrimination.

Although the term "strong basis in evidence" has not been clearly defined by the Court, it typically means that the governmental actor must provide more than a mere assertion but also have supporting evidence—which could include statistical evidence, policy evaluations, social science evidence, documentary evidence, or prior findings of discrimination—in order to justify the policy.[99] The standard is somewhat less than a preponderance of the evidence.[100] The present effects of past discrimination need not be widespread or pervasive; there must only be a strong evidence of *some* present effects.[101]

Disparity studies were one way to provide the requisite "strong basis in evidence." If a disparity study indicates that minority contractors are available and significantly underutilized, then a government has a stronger argument for a compelling interest in using a race-conscious remedy. In addition to statistics, these studies also include anecdotal evidence of discrimination.[102] But the rise in reliance upon anecdotal evidence led courts to subject disparity studies to greater scrutiny, criticizing their methodologies and repeatedly finding that the studies did not support a sufficiently strong basis in evidence of discrimination.[103] In part, this was because so much of the evidence was anecdotal, and consisted largely of general statements of discriminatory conditions or unverified accounts of individual discrimination.[104] To survive strict scrutiny, affirmative action programs must have specific, detailed, and verified information to satisfy the strong basis in evidence standard.[105]

Timing limitations further diminished the effectiveness of disparity studies to establish the strong basis in evidence in the 1996 U.S. Supreme Court opinion in *Shaw v. Hunt.*[106] There, the Court suggested that it will only permit pre-

99. *See Croson*, 488 U.S. at 534.

100. *Id.*

101. *See id.*

102. *See id.* at 499. Justice O'Connor's opinion explained that "where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." *Id.* at 518. Some courts have said that this evidence should rise to the level of prima facie case of discrimination against minorities. *See, e.g.*, O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 424 (D.C. Cir. 1992); Stuart v. Roache, 951 F.2d 446, 450 (1st Cir. 1991) (Breyer, J.); Cone Corp. v. Hillsborough Cnty, 908 F.2d 908, 915 (11th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990).

103. *See, e.g.*, Peightal v. Metro. Dade Cnty., 26 F.3d 1545, 1562 (11th Cir. 1994); Concrete Works v. City and Cty. of Denver, 36 F.3d 1513, 1555 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995); Donaghy v. City of Omaha, 933 F.2d 1448, 1461 (8th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1991).

104. *Croson*, 488 U.S. at 509–10 (reasoning that the relaxing of requirements, procedures and training would allow remedy for those who have merely experienced societal discrimination).

105. *Id.* at 534 (holding that the city failed to demonstrate a compelling interest due to a lack of identifiable and specific discrimination).

106. Shaw v. Hunt, 517 U.S. 899, 951 (1996) (holding that a majority black congressional district drawn to eradicate past discrimination was not narrowly tailored as the appellants did show specific evidence of redress to minorities as a group and not only individuals).

enactment evidence of discrimination to support a strong basis in evidence. The Court emphasized that an institution that makes a racial distinction must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it embarks on an affirmative action program.[107] Thus, post-hoc justifications for existing programs may not be admissible, and local policy makers must ensure that they perform the disparity studies prior to implementing affirmative action programs.

Still, the mere existence of present effects of past discrimination may not justify so-called "reverse discrimination" under U.S. Supreme Court doctrine for disparate treatment claims. In *Ricci v. DeStefano*, the Court considered the process in which the New Haven Fire Department required civil service examinations to fill managerial positions.[108] In 2003, 118 firefighters took the examinations; based on the results, only 19 candidates, who were all white or Hispanic, could be considered for the managerial positions.[109] The New Haven Civil Service Board, considering the disparate impact the results would have on employment, discarded the exams, and a lawsuit was filed.[110]

The U.S. Supreme Court ruled against New Haven, holding an employer cannot engage in intentional discrimination ("disparate treatment") to avoid a disparate impact unless there is a strong basis in evidence that the employer would be subject to disparate impact liability.[111] The Court found that New Haven failed to demonstrate a strong basis in evidence to justify disregarding the exam results when the exams were job-related and consistent with business necessity, and there was no evidence that an "equally valid, less-discriminatory alternative" was available.[112]

In contrast, in *Adams v. Richardson* the D.C. Circuit found that inaction in the face of continuing discrimination was actionable as dereliction of duty imposed under the Civil Rights Act.[113] The specific measures for enforcement were broad: (1) termination of federal financial assistance to noncompliant

107. Builders Ass'n of Chicago v. Cnty. of Cook, 256 F.3d 642, 648 (7th Cir. 2001) (which struck down an MWBE program by citing *Shaw* when holding that the absence of pre-enactment evidence was not narrowly tailored).

108. Ricci v. DeStefano, 557 U.S. 428 (2009). The Court held that by discarding the exams, the City of New Haven violated Title VII of the Civil Rights Act and that it failed to prove it had a "strong basis in evidence" that failing to discard the results of the exam would have subjected it to liability, as the exams were job-related, consistent with business necessity and there was no evidence that an equally-valid, less discriminatory alternative was available. *Id.* at 593.

109. *Id.* at 562.

110. *Id.* at 563.

111. *Id.* at 592.

112. *Id.* at 587.

113. 480 F.2d 1159, 1163 (D.C. Cir. 1973). Black students, citizens, and taxpayers (plaintiffs) sued the department of Health, Education and Welfare and the director of the department's office on civil-rights grounds (defendant), alleging that the office and director were derelict in their duty of ending segregation in schools receiving federal funding under Title VI of the Civil Rights Act of 1964. *Id.* at 1161. Specifically, the plaintiffs alleged that while the department opted for voluntary compliance, the department did not follow up to ensure that the schools actually came into compliance. *Id.* at 1162. The department claimed that its enforcement of the act was a matter of agency discretion and not subject to judicial review. *Id.* at 1161.

schools, or (2) any other means authorized by law, so long as the department had permitted the noncompliant school to come into compliance by voluntary means.[114] The court concluded that if an acceptable plan had not yet been achieved within 120 days, the department had to initiate compliance procedures.[115] In a similar way, affirmative action in K-12 could be used to further desegregation efforts given the low levels of diversity within these schools.[116]

B. INSTITUTIONAL DISCRIMINATION IS PAST DISCRIMINATION

Many argue that institutional/systemic discrimination is not intentional, and because the U.S. Supreme Court has disallowed the use of societal discrimination to justify remedial/race-conscious measures, it is not actionable as an Equal Protection violation.[117] The main rationale is that the "discrimination" does not result from deliberate actions of public officials but rather from choices made by private individuals.[118] The Court dichotomizes contemporary racial discrimination into two categories; either it is a result of isolated, purposeful acts of unlawful discrimination, for which individual remedies are preferable to affirmative action, or it is the effects of general societal discrimination, which it deems to be beyond the scope and jurisdiction of the federal courts.[119] *Adarand* effectively proclaims that the history of intentional and pervasive racial discrimination in the United States has come to an end, thereby rendering continued use of affirmative action remedies for such past discrimination inappropriate.[120]

In part, it is the Court's view that general societal discrimination is not purposeful, which has caused it to perceive the issue of resolving our nation's continuing racial issues as outside the scope of oversight by the federal government. Yet, this institutional/systemic discrimination is *purposeful*.[121]

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114. *Id.* at 1162–64. Although the Act did not provide a specific limit to the time period within which voluntary compliance by educational institutions could be sought, it was clear that a failure to respond within a reasonable time to a request by the department did not relieve the department of the responsibility to enforce Title VI by one of the two alternative means above. The court concluded that a consistent failure to do so was a dereliction of duty reviewable in the courts and also found that the department lacked experience in dealing with colleges and universities; the court also noted that the department had not yet formulated guidelines for desegregation statewide systems of higher learning. *Id*.

115. *Id.* at 1165. The Circuit Court modified the District Court's injunction order and found that the department should call upon the states in question to submit plans within 120 days and then initiate enforcement options. *Id.* at 1162.

116. Deo, *supra* note 92, at 2448 (noting that "many elementary and secondary schools are more segregated than they were before *Brown*").

117. *Wygant*, 476 U.S. at 274.

118. *Parents Involved in Cmty. Schs.*, 551 U.S. at 710.

119. *Id*.

120. *See Adarand*, 515 U.S. at 200.

121. KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER, 131 (2019) (arguing the "[l]aw is one of the most powerful mechanisms by which any society creates, defines and regulates itself; it follows then, that to say race is socially constructed is to conclude that race is at least partially legally produced."); *see also* Elson, *supra* note 85, at 975 (arguing that race-conscious scholarships in higher education are disappearing after *Podberesky*).

Extensive academic research and data document numerous ways that black and brown Americans experience life in the United States differently from their white counterparts.[122] Often referred to as systemic/institutional discrimination, it is ingrained in society through the policies and practices at institutions like schools, government agencies, and law enforcement.[123]

Khiara Bridges defines these four aspects of systemic/institutional discrimination: (1) lack of intentionality; (2) practices that sustain racial inequality are unoriginal and produced by everyday decisions that structure our social, political and economic interactions; (3) neutrality so that there is an absence of any explicit invocation of race; and (4) the irrelevance of the "bad actor" so that there is no evil "man behind the curtain" designing and operating the institutions that form institutional racism.[124] The lack of intent is fatal to race discrimination claims under the Fourteenth Amendment. Everyday decisions also often lack intent to discriminate, even though implicit bias may be operating.

Even more, our nation's institutional norms, practices, and procedures were created during the days of explicit racial discrimination and are not neutral themselves. Neutrality appears on the face of many policies and practices, but a deeper dive shows that bias implicit, and even explicit, operate on another axis. And the backlash over implicit bias awareness training suggests that the evil man is every man, and that if everyone is guilty of some implicit bias, it must all even out in the end. It does not. The only way to terminate this majoritarian inclination is through the use of race-conscious remedial programs that will ensure an equitable distribution of resources.

The law ideologically constructs race, facilitating the attachment of particular racial meaning to racial categories in several areas. For instance, our system of public benefits pathologizes poverty, especially when it intersects with past incarceration, pregnancy, and motherhood.[125] Residential segregation laws and policies contribute to the manufacture of racialized spaces.[126] The War on Terror and the production and perpetuation of discourses describe Muslim individuals and communities as dangers to the nation.[127] Mass incarceration

122. Gerdeman, *supra* note 16 (a recent study by Harvard University found that when Blacks "whitened" their resumes when applying for jobs—for example, by using "American" sounding names—they got more callbacks for corporate interviews; 25% of Black candidates received callbacks from their whitened resumes, while only 10% got calls back when they left ethnic details on their resume).

123. BRIDGES, *supra* note 121, at 147–52.

124. *Id.* at 148 (stating there are four elements to the definition of systemic/institutional discrimination).

125. *Id.* at 151.

126. *Id.* at 150–53; *see also* JORDAN WINTHROP, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO (1968) (arguing we have ideas about black criminality; and then the criminal justice system legitimizes those ideas by vigorously policing black men and incarcerating them at historically high levels).

127. IAN HANEY LOPEZ, WHITE BY LAW (1996) (arguing Immigration laws have functioned to exacerbate the political, economic and social marginalization of groups immigrant groups, especially those from Middle Eastern countries, declared as "white," because it intensifies the subordination of people of non-American descent so that all are treated like second class citizens. In this regard, many minority groups declared as "white," such as those of Middle Eastern descent, have a difficult time availing themselves of antidiscrimination

produces and legitimates discourses that describe men of color, particularly Black and Latino men as social problems. In addition, data collection regarding lack of employment and contracting opportunities has significantly decreased after the institution of Proposition 209 in California which, in turn, exacerbates systemic racism because without data collection, there is no concrete evidence of the problem, and therefore no efforts to remedy it. Each of these past laws and policies constitute past discrimination. The next Subpart addresses the present impacts.

C. INSTITUTIONAL/SYSTEMIC DISCRIMINATION IS ALSO PRESENT/CONTINUING DISCRIMINATION

The contemporary debate about race in the United States is concerning and further exacerbates the issue of continuing discrimination. Some scholars argue that the law no longer constructs race through coercion—compelling individuals to occupy racial categories; instead, they find that the law constructs race through ideology—creating a world where the racial ideas that we have "make sense."[128] The development and legitimization of racial labels and stereotypes in contemporary America is undoubtedly attributed to the societal institutions that have shaped our country for the past century.[129]

Research and data show that the racial and ethnic disparities highlighted above exist along nearly every facet of American life, including employment, wealth, education, home ownership, health care, and incarceration.[130] For example, the employment-population ratio (which measures the share of a demographic group that has a job), consistently reports significantly lower employment rates for African Americans.[131] Even more, the unemployment rate

provisions barring discrimination on the basis of race because they are legally white and "how could white people discriminate against other white people?").

128. *Id*. at 125 (arguing that "legal rules and decisions construct race through legitimation, affirming the categories and images of popular racial beliefs and making it nearly impossible to imagine non-racialized ways of thinking about identity, belonging and difference.").

129. BRIDGES, *supra* note 121, at 141–42 (Although the manner in which the law constructs race in modern times is generally more oblique, the census continues to be a method the government employs to explicitly construct race; the census is sometimes described as an example of the law constructing race, instead of the law merely measuring race- because the census involves the law coercing individuals to self-identify with the racial categories that the government has delineated. For example, although a vast array of individuals identify with the race, "Hispanic," recent research has found that this term is a relatively new invention whose significance is limited to the United States, since the groups subsumed under the label were not "Hispanic" in their countries of origin). The term "LatinX" faces a related criticism.

130. Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 198 (2008) (citing examples of systemic/institutional discrimination including: how (1) public schools are typically funded with property taxes, meaning that schools in poorer neighborhoods, where property values are low, tend to receive less funding than schools in more affluent neighborhoods, where property values are higher; and (2) teachers in schools in poorer neighborhoods are likely to have less experience, shorter tenure, and emergency credentials rather than official teaching certifications).

131. *See* Shayanne Gal, Andy Kiersz, Michelle Mark, Ruobing Su & Marguerite Ward, *26 Simple Charts to Show Friends and Family Who Aren't Convinced Racism is Still a Problem in America*, BUS. INSIDER (July 8, 2020, 10:04 AM), https://www.businessinsider.com/us-systemic-racism-in-charts-graphs-data-2020-6

among Black Americans has been significantly higher—especially in response to the COVID-19 pandemic. [132]

As a result, minority populations continue to be systematically underrepresented, not just in the allocation of educational resources, but also in the allocation of employment, and other economic opportunities. In turn, this underrepresentation has caused racial minorities to have lower standards of living,[133] higher vulnerability to crime,[134] poorer health,[135] and shorter life expectancies[136] than members of the white majority. All of these disadvantages impact educational attainment.

For instance, in the decades following *Adarand*, the U.S. Supreme Court has repeatedly insisted that any use of racial preferences must be treated with "skepticism" and given "a most searching examination," and emphasized the stigma and evils resulting from affirmative action.[137] Skepticism, as *Adarand* and its successor cases illustrate, is one thing that racially preferential programs cannot survive. However, it is undeniable that the historical treatment of racial minorities as inferior has had a pervasive effect on society, causing race to remain an implicit, if not explicit, factor in almost all decision-making. Thus, affirmative action programs should not be treated with skepticism because racial attitudes continue to emanate from our nation's long history of discrimination and maintain profound disadvantages for racial and ethnic minorities.

While many acknowledge past transgressions, they warn of the need for fairness in fashioning remedies, asserting that overt discriminatory acts are rarely committed and thus there are few current and actual victims of

(arguing extensive academic research and data collected by the federal government and researches has documented numerous ways that Black Americans experience life in the United States differently from their white counterparts).

132. Shahar Ziv, *June Jobs Report Shows Uneven Recovery; Black Unemployment Still Tops 15 Percent*, FORBES (July 2, 2020, 12:44 PM), https://www.forbes.com/sites/shaharziv/2020/07/02/june-jobs-report-shows-uneven-recovery-black-unemployment-still-tops-15-percent/?sh=2b09f7e6c97f (showing how Black unemployment during the COVID-19 crisis in 2020 rose to 16.8%—the highest recorded percentage in more than a decade).

133. Jay Shambaugh, Ryan Nunn, & Stacy A. Anderson, *How Racial and Regional Inequality Effect Economic Opportunity*, BROOKINGS: BLOG (Feb. 15, 2019), https://www.brookings.edu/blog/up-front/2019/02/15/how-racial-and-regional-inequality-affect-economic-opportunity.

134. Christopher R Browning, Catherine A. Calder, Jodi L. Ford, Bethany Boettner, Anna L. Smith & Dana Haynie, *Understanding Racial Differences in Exposure to Violent Areas: Integrating Survey, Smartphone, and Administrative Data Resources*, 669 AM. ACAD. POL. SOC. SCI. 41, 72 (2017).

135. *See* CTR. FOR DIS. CONTROL & PREVENTION, CDC HEALTH DISPARITIES AND INEQUALITIES REPORT — UNITED STATES, 2013 (2013), https://www.cdc.gov/mmwr/pdf/other/su6203.pdf.

136. CTR. FOR DIS. CONTROL & PREVENTION, TABLE 15: LIFE EXPECTANCY AT BIRTH, AT AGE 65, AND AT AGE 75, BY SEX, RACE, AND HISPANIC ORIGIN: UNITED STATES, SELECTED YEARS 1900–2016 (2017), https://www.cdc.gov/nchs/data/hus/2017/015.pdf.

137. *See Adarand*, 515 U.S. at 200; *see also* Lino A. Graglia, *Podberesky, Hopwood and Adarand: Implications for the Future of Race-Based Programs*, 16 N. ILL. U. L. REV. 287, 293 (1996) (arguing the era of racial preferences is rapidly coming to an end).

discrimination.[138] They tend to argue that the only way to end racial discrimination is through a prospective commitment to race neutrality.[139]

However, race neutrality can thwart remediation and further exacerbate the issue of continuing discrimination. For instance, the inclusive policy of providing role models for racial minorities centers around the idea that the "targeted recruitment" of male or ethnic minority teachers will provide much-needed "role models" in schools for those groups most likely to experience educational failure and disaffection.[140] Matching teachers and children by gender or ethnicity is seen as a remedy for underachievement because such representation could increase the cultural value students place on academic success.[141] Large-scale diversification of the teacher workforce should be an available remedy because it would greatly increase the potential for a common cultural understanding between racial and ethnic minority students and their teachers to occur, such that the potential benefits of increased teacher diversity extend beyond standardized test scores.[142]

As long as our nation's societal institutions rely on traditional vague methods of practice, they will unmistakably remain discriminatory even under the most unbiased and unprejudiced management. Dismantling societal and systemic discrimination—which are both non-governmental aspects of contemporary racism—should be compelling to justify race-conscious programs undergoing a strict scrutiny analysis because these programs will work to restructure the traditional and exclusionary institutions that have been governing society for centuries, and ultimately create the "neutrality" our courts envision. Thus, remedying present discrimination, in the form of institutional discrimination, is like remedying past discrimination, and therefore is a compelling interest that justifies a narrowly tailored response.

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138. Girardeau A. Spann, *Affirmative Action and Discrimination*, 38 HOW. L. J. 1, 2 (1995) (arguing that racial injustice has always been a problem in the United States and that the most salient victims of the nation's discrimination against racial minorities have included indigenous Indians, Chinese Immigrants, Japanese-American citizens, Latinos, and of course, African Americans).

139. *Id*.

140. Bruce Carrington & Christine Skelton, *Rethinking "Role Models": Equal Opportunities in Teacher Recruitment in England and Wales*, 18 J. EDUC. POL'Y 253 (2003) (finding that a number of countries are running role model recruitment drives under the assumption that like is good for like: ethnic minority teachers should teach ethnic minority children, women should teach girls, and etc. and arguing that previous research suggests that there are academic benefits when students and teachers share the same models, mentors, advocates, or cultural translators).

141. Sabrina Zirkel, *Is There a Place for Me? Role Models and Academic Identity Among White Students and Students of Color*, 104 TCHR. COLL. REC. 357, 376 (2002). Zirkel explains that "[r]elative to students who reported having no role models and those who reported only nonmatched role models, those reporting a race- and gender-matched role model showed consistently more interest in achievement-relevant activities and goals throughout the study; and, in later years, they showed significantly greater academic performance." *Id.* at 374.

142. Anna J. Egalite, Brian Kisida & Marcus A. Winters, *Representation in the Classroom: The Effect of Own-Race Teachers on Student Achievement*, 45 ECON. EDUC. REV. 44, 51 (2015) (arguing that previous research suggests that there are academic benefits when students and teachers share the same models, mentors, advocates, or cultural translators).

III. ESTABLISHING THE STRONG BASIS IN EVIDENCE IN HIGHER EDUCATION

How can universities establish a strong basis in evidence to support race-conscious affirmative action programs to remedy past and present discrimination? Recent litigation provides some examples. Students for Fair Admissions, an anti-affirmative action group, filed two lawsuits seeking to eradicate long-established legal precedent allowing colleges to consider the race of highly-qualified applicants in their admissions processes—one at Harvard College, a private institution, and the other at the University of North Carolina at Chapel Hill, a state public university. This Part discusses these cases as well as the long-term impacts of no affirmative action for the University of California system.

Back in 2014, a coalition of more than sixty Asian American organizations filed federal complaints with the U.S. Department of Education and Department of Justice (DOJ) against Harvard University.[143] The coalition asked for a civil rights investigation into Harvard's allegedly discriminatory admission practices against Asian American undergraduate applicants; however, the complaints were dismissed because a lawsuit making similar allegations was filed by Students for Fair Admissions.[144] Nonetheless, the coalition resubmitted their complaints to the DOJ in 2017; the DOJ opened an investigation into Harvard's admissions policies that was ongoing as of Fall 2020,[145] when the DOJ also filed a lawsuit against Yale University.[146] The DOJ voluntarily dismissed the Yale lawsuit in February 2021, but explained that it would continue the investigation into compliance with Title VI.[147]

143. Greg Piper, *Asian-American Groups Accuse Harvard of Discrimination in Federal Complaint*, COLLEGE FIX (May 15, 2015), https://www.thecollegefix.com/asian-american-groups-accuse-harvard-of-discrimination-in-federal-complaint (arguing that because "[m]any Asian-American students have almost perfect SAT scores," "they are treated as a 'monolithic bloc' that lacks creativity and risk taking under the 'subjective holistic evaluation approach' used by" Harvard University in its undergraduate admissions process). A heavy reliance on high SAT scores produces almost insurmountable negative impacts on diversity of Latinos and Blacks. Sandra E. Black, Kalena E. Cortes & Jane Arnold Lincove, *Efficacy Versus Equity: What Happens When States Tinker with College Admissions in a Race-Blind Era?*, 38 EDUC. EVAL. & POL'Y ANALYSIS 336, 336–363 (2016). The authors note that requiring an "above-average" SAT score eliminates more than "40% of Hispanics, 49% of Blacks, and 39% of low-income students," whereas only it excludes only "8% of White students, 10% off Asian students, and 7% of high-income students." *Id.* at 353.

144. Piper, *supra* note 143.

145. Press Release, Dep't of Just.: Off. of Pub. Affs., Justice Department Files Amicus Brief Explaining that Harvard's Race-Based Admissions Process Violates Federal Civil Rights Law (Feb. 25, 2020), https://www.justice.gov/opa/pr/justice-department-files-amicus-brief-explaining-harvard-s-race-based-admissions-process (filing of an amicus brief by the U.S. Department of Justice in the Court of Appeals for the First Circuit explaining that Harvard University's "expansive use of race in its admissions process violates federal civil-rights law and Supreme Court precedent").

146. Anemona Hartocollis, *Justice Department Drops Suit Claiming Yale Discriminated in Admissions*, N.Y. TIMES (Oct. 18, 2021).

147. *Id*.

A. FAIR HARVARD

Students for Fair Admissions v. Presidents and Fellows of Harvard College, is a U.S. District Court case concerning affirmative action in student admissions.[148] In 2014, anti-affirmative action group, Students for Fair Admissions sued Harvard University for their use of race as a factor in their undergraduate admissions process, because it imposed a racial penalty at the detriment of white and Asian American applicants.[149] Much of their evidence focused on "merit," defined as having higher SAT and GPA scores.[150] Studies have shown that these "objective" criteria and particularly minimum cutoff scores more severely limit access for students of color.[151]

A number of other Asian American groups, including the Asian American Legal Defense and Education Fund, the Asian Americans Advancing Justice – Los Angeles, and the NAACP Legal Defense and Education Fund submitted amicus briefs in support of race-conscious admissions policies and of Harvard. Harvard's proponents assert that the University's individualized admissions programs guard against grouping Asian Americans into one monolithic "Asian" category and blurring the distinct socioeconomic realities faced by different subgroups.[152] In other words, Harvard specifically considers these differences when examining Asian American applicants in its admissions process because low-income Asian applicants receive an admissions "tip" designed to account for the structural inequality they face.[153] While all low-income applicants receive similar tips, the tip given to low-income Asian applicants benefit them more than almost any other racial group—10% of low-income Asian applicants are admitted, as opposed to 7% of non-low-income Asian applicants.[154] Thus, many undergraduate minority applicants applying to Harvard also believed that removing affirmative action would be a loss for everyone on the basis that every

148. *Students for Fair Admissions*, 308 F.R.D. at 39.

149. *Id*. at 39–40 (citing that in February 2015 filed its answer in which it denied any liability; in April 2015, several prospective and then-current Harvard students filed a motion to intervene; although the Court denied the motion to intervene it allowed the students to participate in the action as friends of the court (*amici curiae)*. In September 2016, Harvard moved to dismiss the lawsuit for lack of standing and for seeking judgment on the pleadings; the Court found that SFFA had the associational standing required to pursue this litigation. On that same date, the Court granted Harvard's motion for judgment on the pleadings and dismissed two counts of SFFA's complaint. Following the conclusion of discovery in June 2018, the parties filed cross motions for summary judgments on the four remaining counts, described above, which the Court denied in September 2018. The Case proceeded to trial on all four counts, and in February 2019, the Court made its finding of fact and conclusions of law).

150. *Id.* at 39.

151. Black et al., *supra* note 143, at 338.

152. Brief for Asian American Legal Defense and Education Fund et al., as Amici Curiae Supporting Respondents at 2, Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard College, 397 F.Supp.3d 126 (2019) (No. 19-2005) (Brief of Amici Curiae in support of race-conscious admissions policies like Harvard's, which benefit Asian American applicants and other applicants of color alike).

153. *Id*. at 6.

154. *Id*. at 6–7.

applicant has a different story to tell and any/every race can be a part of that story.

The district court found that (1) Harvard has established a compelling interest in diversity based on sufficient evidence of past discrimination,[155] (2) Harvard considers race as one factor among many,[156] (3) Harvard does not pursue racial balancing in its holistic admissions review process,[157] and (4) Harvard cannot presently achieve its goal of assembling an exceptional and diverse student body using race-neutral alternatives.[158] SFFA appealed and the First Circuit affirmed the district court ruling.[159] It upheld the district court's factual findings about the descriptive statistics,[160] that the personal rating correlation did not equate with causation,[161] and that there was no showing of discrimination against Asian Americans.[162] When the First Circuit announced its decision, Harvard issued a statement declaring:

> Today's decision once again finds that Harvard's admissions policies are consistent with Supreme Court precedent, and lawfully and appropriately pursue Harvard's efforts to create a diverse campus that promotes learning and encourages mutual respect and understanding in our community. As we have

155. *Students for Fair Admissions, Inc.*, 397 F.Supp.3d at 192 (holding that Harvard has made a principled, reasoned explanation for its decision to pursue the educational benefits that flow from student body diversity after determining that those benefits are integral to its mission; in particular, Harvard reexamined the importance of student body diversity in 2015, and it concluded that diversity serves Harvard's curricular goal of exposing students to new ideas, new ways of understanding, and new ways of knowing).

156. *Id*. at 193 (explaining that what matters most is not whether an applicant's race might be important consideration in any particular number of cases, but whether the admissions program remains flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application; the record conclusively establishes that Harvard's consideration of all factors in an applicant's file, including race, is highly flexible).

157. *Id*. at 177 (stating extensive record compiled in this case would not permit a reasonable factfinder to conclude that Harvard pursues quotas, seeks proportional racial representation or even engages in racial balancing; no evidence on the record suggests Harvard seeks to limit the representation of any racial group on campus).

158. *Id*. at 192 (holding the record fully supports the conclusion that it is necessary for Harvard to use race to achieve the educational benefits of diversity because the available, workable race-neutral alternatives do not suffice to promote Harvard's diversity related educational objectives and to maintain Harvard's standards of excellence; eliminating consideration of race in admissions would have a dramatic and detrimental effect on diversity at Harvard – an effect that no combination of race-neutral measures could mitigate while maintaining Harvard's standards of excellence).

159. *Students for Fair Admissions, Inc.*, 980 F.3d at 187 ("Harvard has sufficiently met the requirements of Fisher I, Fisher II, and earlier cases to show the specific goals it achieves from diversity and that its interest is compelling.").

160. *Id*. at 183 ("Harvard does not dispute that SFFA satisfies these requirements, and, for the reasons stated in the district court's opinion, we agree that it does.").

161. *Id*. at 182 ("It found that the correlation between race and the personal rating did not mean that race influences the personal rating."); *see also id*. at 198 (for instance, "[i]f the personal rating is included, as done by Harvard's expert, being Asian American has a statistically insignificant effect on an applicant's chance of admission. If the personal rating is excluded, as done by SFFA's expert, it shows that being Asian American has a statistically significant negative effect on an applicant's chance of admission to Harvard").

162. *Id*. at 202 ("We repeat that the statistical model using the personal rating showed no discrimination against Asian Americans. Rather, it shows that Asian American identity has a statistically insignificant overall average marginal effect on admissions.").

> said time and time again, now is not the time to turn back the clock on diversity and opportunity.[163]

The case has wide implications for affirmative action in higher education for schools across the country because it reaffirms the idea that there are legal ways to incorporate a racial-equity focus to create opportunities and support the success of underrepresented students. While this case involved diversity as a compelling interest, the same data used to justify an institution's race-conscious affirmative action program, in combination with systemic data, can provide a strong basis in evidence to justify a compelling interest in remedying systemic discrimination.

The next challenge involves public institutions. And SFFA has also appealed the Harvard case to the U.S. Supreme Court.

B. UNC TARHEELS

Students for Fair Admissions v. University of North Carolina – Chapel Hill, is a U.S. District Court case claiming that UNC's admissions process violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964.[164] Here, SFFA asserted that UNC unfairly uses race to give significant preference to underrepresented minority applicants to the detriment of white and Asian American applicants, while ignoring race-neutral alternatives for achieving a diverse student body.[165] The bench trial was held in November 2020, and the parties had thirty days to submit their proposed findings of fact and conclusions of law. In October 2021, the trial judge issued the trial findings of fact and conclusions of law. The trial judge found: (1) that the University had a compelling interest in the pursuing the educational benefits of racial diversity;[166] (2) that the use of race was narrowly tailored;[167] (3) that the statistical and non-statistical evidence did not support a finding of discrimination;[168] (4) that UNC demonstrated that "there are no adequate, workable, or sufficient race neutral alternatives";[169] (5) that UNC has "engaged in ongoing, serious, good faith considerations of workable race neutral alternatives";[170] and thus did not discriminate against white and Asian American applicants in its admission process.[171] UNC's holistic admissions process was also considered constitutional because, as the Harvard case reaffirms, the idea that incorporating a racial-equity focus in the efforts to create opportunities for

163. *Harvard Statement on Appeal Opinion*, HARV. UNIV.: HARV. ADMISSIONS LAWSUIT (Nov. 12, 2020), https://admissionscase.harvard.edu/news/harvard-statement-appeal-opinion.

164. *Students for Fair Admissions*, 2019 WL 4773908, at *1.

165. *Id*. at *7–8.

166. Trial Findings of Fact and Conclusions of L. at 131, Students for Fair Admissions v. Univ. of N. C., No. 1:14-cv-00954-LCB-JLW (M.D.N.C Oct. 18, 2021).

167. *Id.* at 137–39.

168. *Id.* at 140, 142.

169. *Id.* at 146.

170. *Id.* at 148.

171. *See* Saul, *supra* note 6 at A16.

underrepresented students can pass constitutional scrutiny. The private-school, public-school distinction should not be significant because as a large research institution that accepts government funding under Title VI, Harvard is equally bound by the anti-discrimination provisions of the Civil Rights Act as UNC.[172]

C. WHAT HAPPENED AT THE UCS?

Race-based affirmative action began at the University of California schools in the mid-1960s, when UC Berkeley became the first UC campus to implement selective admissions—receiving more UC-eligible applications than available seats for the first time.[173] However, controversy around affirmative action increased until the mid-1990s, when it was prohibited first by the UC Regents in July 1995 and then by voter initiative Proposition 209, which was approved by a majority of the electorate in November 1996.[174]

While the Regents' policy was eventually rescinded in 2001, Proposition 209 has continued to prohibit the UC system and other public institutions from discriminating against or granting preferential treatment to any individual on the basis of race, sex, color, ethnicity, or national origin in admissions, financial aid provisions, and other areas since 1998.[175] Thus, the consideration of race in admissions decisions at California public higher education institutions has been effectively banned for twenty-four years—the entire lifetime of most of the current undergraduate students.[176]

After 1996, admission rates for Black, Latino, and Native American applicants fell alongside the average admission rate and remain below average.[177] The UC and California State ("Cal. State") systems then pivoted to pursue race-neutral policies that may enhance diversity.[178] Community college

172. *Students for Fair Admissions*, 2019 WL 4773908, at 6 n.12.

173. *See generally* ZACHARY BLEEMER, THE IMPACT OF PROPOSITION 209 AND ACCESS-ORIENTED UC ADMISSIONS POLICIES ON UNDERREPRESENTED UC APPLICATIONS, ENROLLMENT, AND LONG-RUN STUDENT OUTCOMES 1 (2019), https://www.ucop.edu/institutional-research-academic-planning/_files/uc-affirmative-action.pdf (arguing the legacy of Proposition 209 remains strong at the University of California and across the state).

174. *Id*. at 2.

175. *Id*.

176. UNIV. OF CALIF., SAN DIEGO, UC San Diego Profile 2015-2016 (2015), https://ir.ucsd.edu/_files/stats-data/profile/profile-2015.pdf (shows that the average age of an undergraduate student at UC San Diego in 2015 was 21).

177. Maria Estela Zárate, Chenoa S. Woods & Kelly M. Ward, *Nineteen Years after Prop 209: Are Latino/A Students Equitably Represented at the University of California?*, *in* MOVING FORWARD: POLICIES, PLANNING, AND PROMOTING ACCESS OF HISPANIC COLLEGE STUDENTS 276, 276 (Alfredo De Los Santos ed., 2018) ("When Prop 209 went into effect in 1997, reports documented an immediate decline in the representation of Latinos/as at UC campuses.").

178. William C. Kidder & Patricia Gándara, TWO DECADES AFTER THE AFFIRMATIVE ACTION BAN: EVALUATING THE UNIVERSITY OF CALIFORNIA'S RACE-NEUTRAL EFFORTS at i (ETS Whitepaper 2015) (explaining that UC acted with "race neutral alternatives" and implemented "outreach, partnerships with high minority schools, academic preparation programs (some of which it invented), and targeted information and recruitment efforts. Later it implemented a percent plan and invested heavily in comprehensive review of vast numbers of applications. It modified admissions criteria and gave special attention to low-income students"); *see also* Chris Chambers Goodman, *Examining 'Voter Intent' Behind Proposition 209: Why Recruitment,*

transfer programs increased, hoping to take advantage of the greater percentages of students of color there[179] but still result in a greater number of white students making the transfers to the UCs and Cal. State campuses.[180] The numbers may be even more skewed as a result of the COVID-19 crisis, but the data are not yet available.[181] However, Asian American applicant admission rates have remained above average since the ban of affirmative action such that Asian Americans remain the largest group of admitted freshmen in the entire UC system.[182]

In 2002, all UC campuses switched their admissions process from a two-tiered system—where at least half of students were admitted strictly on the basis of the test scores and grades—to a "Comprehensive Review" where campuses "'evaluate students' academic achievements in light of the opportunities available to them."[183] The program mirrors a holistic review policy in which evaluators craft a single score for the applicant based upon a combination of criteria and no single factor plays a deciding role in how an applicant is evaluated.[184]

Retention and Scholarship Privileges Should Be Permissible Under Article I, Section 31, 27 CHICANO-LATINO L. REV. 59 (2008).

179. Kidder & Gándara, *supra* note 178, at 26 ("A significant portion of the university's undergraduate diversity comes through the transfer of students from community colleges in the junior year.").

180. *Id*. (noting that "apart from the fact that community college transfer students cannot contribute to the diversity of the student body during the critical first 2 years of college when most students who are going to drop out do so, URM students also make up a disproportionately smaller percentage of the students who transfer into the UC"); *see also* HANS JOHNSON & MARISOL CUELLAR MEJIA, PUB. POL'Y INST. OF CAL., *Increasing Community College Transfers: Progress and Barriers*, Sept. 2020, at 3 (noting that (1) "A large gap exists between the number of students who hope to transfer and those who do: 19 percent of students with a stated transfer goal do so within four years; 28 percent do so within six years" and (2) "Equity gaps are a big concern. While Latino students represent 51 percent of students who declare a degree/transfer goal, they represent 35 percent of those who transfer within four years; African American students represent 7 and 5 percent, respectively").

181. JOHNSON & MEJIA, *supra* note 180, at 7 (noting that "limited access to technology required for online courses is a barrier. For others, the online setting is not conducive to learning," and it is "too early to know how this disruption will affect student programs").

182. Jennifer Lu, *Should California Allow Affirmative Action? Here's Why Some Say the UC Is Not Diverse Enough*, L.A. TIMES (Oct. 23, 2020), https://www.latimes.com/projects/prop-16-uc-diversity-evolution (arguing that California's Proposition 16 will positively influence the lack of diversity in the UC system).

183. Kidder & Gándara, supra note 178, at 15, 23, 25 (explaining that "[A]s a consequence of its discouraging outcomes in admissions, in 2007 UCLA adopted a more holistic approach to comprehensive review, that is, the admissions process began to take into account the greater context in which students were prepared—or not—for the university. This process has evolved over time, from a separate comprehensive score attached to the regular review of the application, which was meant to include additional information about a student's personal circumstances, to the practice followed today that results in a single holistic score, which incorporates the whole of a student's record in one number." Kidder concludes that "[i]n sum, comprehensive and holistic review adds a patina of greater fairness to the admissions process, and no doubt increases the representation of underrepresented students at the margins" However, "it by no means equalizes access or even makes a significant difference for those groups that are traditionally excluded from access to the university because of what the BOARS report characterized as bimodal educational environments (UC BOARS, 2014)"); *see also* BLEEMER, *supra* note 173, at 1.

184. BLEEMER, *supra* note 173, at 1 (arguing that UC Berkeley initiated a holistic review policy that uses a race blind single score that is given based on applicants' strengths and how they overcame challenges).

Academic outreach programs are another race-neutral policy. Specifically, Early Academic Outreach Programs (EAOP) were created to prepare students for UC admission.[185] However, these targeted programs were less successful, in part because they target low-performing schools,[186] not individual students, so the assistance goes to those at the top of the class, many of whom may not be underrepresented people of color.[187]

Another approach was to pursue more low-income and first-generation students for admission. However, admitting greater numbers of low-income students is expensive.[188] First-generation students are more diverse and also on average have a lower median income than other students.[189] Within less than a decade, however, these first-generation graduates exceed their parents' median incomes.[190] But that data demonstrate that at selective colleges and universities, "socioeconomic status is not an effective alternative to race-conscious measures."[191]

Although the reformation of policy in the UC system had profound benefits on underrepresented groups, with the *number* of underrepresented groups enrolled in the UC system increasing, the percentage of Latino freshman admitted to the UC system significantly lags behind other public higher education campuses in California, particularly when factoring in the increase in

185. Kidder & Gándara, *supra* note 178, at 7 (noting that "EAOP focuses on four broad program areas—academic advising, academic enrichment (e.g., tutoring, summer classes), college entrance exams (e.g., orientation and preparation programs), and college knowledge (e.g., informational workshops and programs geared to parents)").

186. *Id.* at 11 (explaining that "research over time has shown that by targeting the lowest performing schools in the state, due to segregation patterns and clustering of disadvantage, one is to some extent able to capture students disproportionately from the most underrepresented groups." However, "these are rarely the schools that serve the students of color most likely to succeed at, or go to, UC. And there are particular challenges surrounding the use of race-neutral targeting factors for Native American students for reasons related to their geographic dispersion").

187. *Id.* at 12 (explaining that "[b]ecause the university cannot directly target students but only schools, many of the students who find their way into the programs are not underrepresented minorities, though this varies greatly by program and UC campus"); *see also id.* at 33–34 (concluding that "A college can target areas with substantial numbers of Latino students only to find that the top students in this largely Latino area are, for example, new immigrants from Asia who parents are temporarily low income while their highly educated parents get their credentials and connect with skilled jobs. Since such students are already well represented in the university they do not add to its diversity").

188. *Id.* at 27 (noting that "[o]ne consideration the Court noted in Fisher I is whether race-neutral alternative can be achieved with 'tolerable administrative expense.'" The administrative expense for low-income students is great. "In light of all of the above factors in combination, UC effectively represents an upper-bound limit on commitment to class-based alternatives to affirmative action at highly selective American universities").

189. University of California, "First-Generation Student Success at the University of California," Institutional Research and Academic Planning, UC Office of the President (Aug. 23, 2017), at 4 ("UC's first generation students reflect greater ethnic diversity and come from homes with a lower median income than their undergraduate peers.").

190. *Id*. at 10 and Figure 5A (noting that "[a]s a group, first-generation UC students who entered the university between 2005 and 2014 also surpassed their parents' households in median income just six years after earning their degree").

191. William C. Kidder, *How Workable are Class-Based and Race Neutral Alternatives at Leading American Universities*, 64 UCLA L. REV. DISCOURSE 99, 131 (2016-2017).

the Latino population.[192] Thus, the level of diversity in the existing student body in the UC system reflects that affirmative action is necessary to ensure that California's higher education system reflects the diversity of the state. With the failure of Proposition 16,[193] California will continue to slide farther away from an equitable distribution of public higher education resources.

IV. ENTRENCHING INSTITUTIONAL DISCRIMINATION AS A COMPELLING GOVERNMENT INTEREST

This Part will give a brief snapshot of the affirmative action jurisprudence of the current Justices of the U.S. Supreme Court. Recognizing that litigation is only one tool for changing laws and practices, it then explores the notion that a legislative route may be a more successful strategy for strengthening the foundation for perpetuating affirmative action. This Part concludes with a working draft of model legislation.

A. THE CURRENT JUSTICES OF THE U.S. SUPREME COURT

Several justices are likely to find a compelling interest in remedying systemic discrimination and affirmative action to be a narrowly tailored means to further that interest. Justice Stephen Breyer may take a more moderate approach when analyzing whether a policy is narrowly tailored. In *Fisher v. University of Texas*, Justice Sotomayor joined dissenting Justice Breyer in ruling that strict scrutiny was not a necessary standard of review when race was only one of many factors used by the University in its undergraduate admissions process.[194] If intermediate scrutiny were used, these Justices (and perhaps others) may find racial diversity in higher education to be an important governmental interest, and that the means of affirmative action would be substantially related and therefore constitutionally permissible. Of course, intermediate scrutiny is not the standard likely to be adopted by the current Court. Nevertheless, based on their past opinions, it is likely that Justices Breyer, Kagan, and Sotomayor would find that remedying systemic/institutional discrimination is a compelling governmental interest, and that affirmative action programs like those of Harvard and UNC are narrowly tailored to achieve that interest. These three Justices may also be less inclined to find an expiration date on affirmative action based on the sunset clause language in *Grutter,* and the

192. Zárate et al., *supra* note 177, at 276 (finding that after Proposition 209 passed, Latinos received fewer admission offers than before despite that the percentage of Latinos graduating from high school increased by more than 15%).

193. *California Proposition 16 Repeal Proposition 209 Affirmative Action Amendment*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_16,_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020).

194. *Fisher v. University of Texas at Austin (Fisher II)*, 136 S. Ct. 2198, 2215 (2016).

Court is currently considering a petition to hear the UNC and Harvard cases together.[195]

However, the majority of the current U.S. Supreme Court is unlikely to find a compelling interest in remedying systemic discrimination, and likely to find that the *Grutter* sunset clause is an end date for affirmative action programs in higher education. Based on the holding in *Parents Involved in Community Schools*, which was joined by Chief Justice Roberts, Justice Alito, and Justice Thomas, these Justices may analyze whether a policy is narrowly tailored by using the strictest scrutiny. Under the strictest scrutiny, it is unlikely that remedying systemic/institutional discrimination is a compelling governmental interest, because the Justices may focus on analogizing systemic discrimination to the long disfavored "societal discrimination" described above.

Of the more recent appointees to the Court, one hint that Justice Kavanaugh likely would interpret whether a policy is narrowly tailored by giving more discretion to the government is his recent denial of an application for injunctive relief challenging Illinois Governor, J.B. Pritzker's orders in response to COVID-19,[196] giving the benefit of the doubt to the government in this case. Justice Gorsuch, a proud textualist, may apply the strictest scrutiny to any use of race based on his previous reported decisions, and the fact that he decided the 1964 Civil Rights Act has always prohibited LGBTQ discrimination because of its use of the word "sex."[197] Thus, it is likely that Justice Kavanaugh and Justice Gorsuch would find remedying that systemic/institutional discrimination is not a compelling governmental interest.

In September 2020, the notorious Justice Ginsburg passed away and the Senate confirmed then-Judge Amy Coney Barrett to fill the vacancy.[198] Justice Barrett has already indicated she disagrees with the foundations of the *Roe v. Wade* decision.[199] Even more, Justice Barrett's swearing in gives conservatives

195. *Students for Fair Admissions, Inc. v. University of North Carolina, No. 21-707*, U.S. SUPREME CT., https://www.supremecourt.gov/docket/docketfiles/html/public/21-707.html (last updated Jan. 10, 2022); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, No. 19-2005*, U.S. SUPREME CT., https://www.supremecourt.gov/docket/docketfiles/html/public/20-1199.html (last updated Jan. 10, 2022).

196. *Illinois Republican Party v. Pritzker*, 19A 1068 (2020) (finding that the lower court did not abuse its discretion when it found that none of the allegations sufficed to undermine the Governor's likelihood of success on the merits, or for that matter to undercut his showing that the state would suffer irreparable harm if EO43 were set aside).

197. Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, THE ATLANTIC (July 24, 2020), https://www.theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461 (stating that Justice Gorsuch is a proud textualist who struggles with the interplay between *stare decisis* and textualism). *See generally Bostock v. Clayton County*, 140 S. Ct. 171 (2020) (Justice Gorsuch's majority opinion relied heavily on the dictionary definition of "sex," and therefore he may be similarly inclined to read the term "race" to eschew so-called "race-adjacent" claims, such as those relying upon implicit bias, systemic, and institutional discrimination).

198. Barbara Sprunt, *Amy Coney Barret Confirmed To Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court.

199. Vicky Baker, *Amy Coney Barrett: Who is Trump's Supreme Court Pick?*, BBC NEWS (Oct. 27, 2020), https://www.bbc.com/news/election-us-2020-54303848 (stating that Justice Barrett's legal opinions and

a solid advantage on a Supreme Court that already leaned towards the right regarding affirmative action, education, and many other crucial issues.[200] Although Justice Barrett has never explicitly ruled on the matter, her conservative judicial narrative suggests that she may not find remedying systemic/institutional discrimination to be a compelling interest,[201] given how closely those concepts align with more liberal principles. The Justices in the majority could potentially erect a judicial barrier preventing higher educational systems from using race as a factor in their admissions process and could prevent future administrations and legislatures from even attempting to enact more liberal policies.[202] And so, we turn to immediate legislative options.

B. STRATEGIES FOR PROMULGATING LEGISLATION

The federal election in the fall of 2020 resulted in a change in administrations, and a shift in the balance of power in the U.S. Senate, while the Democrats narrowly held onto a majority in the House of Representatives.[203] Holding onto Congress, though admittedly with a 50-50 split that Vice President Harris can tip with tie-breaking votes,[204] means that the time is ripe. Within the next year (before midterm elections), our legislators must seize this opportunity to perform studies to establish a strong basis in evidence that systemic discrimination has been and continues to operate in the education context, and proclaiming that remedying past and present discrimination is a compelling government interest. A working draft of such a model statute is provided in Appendix A.

CONCLUSION

In conclusion, this Article demonstrates that systemic/institutional racism is past and present discrimination compounded and multiplied. Therefore, remedying institutional discrimination should be considered a compelling government interest to justify race-conscious remedies, and the fake dichotomy of *de jure* and *de facto* segregation and discrimination should be dismantled.

The current U.S. Supreme Court is not likely to consider this claim and thus congressional legislation is the preferred approach. Admittedly, it is a tough

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remarks on abortion and gay marriage have made her popular with the religious right but earned vehement opposition from liberals).

200. *See Fisher II*, 136 S. Ct. at 2215.

201. *See* Kidder, *supra* note 191.

202. Liz Goodwin, *Another Conservative Justice on the Supreme Court Could Mean Big Changes for Abortion and Affirmative Action Cases*, BOS. GLOBE (Sept. 23, 2020, 8:48 PM), https://www.bostonglobe.com/2020/09/23/nation/another-conservative-justice-supreme-court-could-mean-big-changes-abortion-affirmative-action-cases (referencing Jonathan Turley by stating there are a very significant number of cases that are dangling by a 5-4 majority; Justice Barrett's appointment is be the most consequential and transformative appointment in the history of the court).

203. *How Will the 2020 Elections Affect Congress*, AP NEWS (Oct. 19, 2020), https://apnews.com/article/will-general-election-affect-congress-01e40624fd0c3868b9248d3dbf4ad855.

204. *Id.*

sell in the House and Senate, and there are about nine months left to try before the midterm elections. Some may suggest using an Executive Order, but the "policy whiplash" that results from a change in administrations would put a substantial burden on colleges and universities, not to mention students and applicants, especially given the greater financial and other strains due to the COVID-19 crisis.

Given the narrow majorities in Congress, and the fact that not all Democratic congresspersons are supportive of race-based affirmative action, a compromise proposal that combines class and race-based affirmative action might be necessary to obtain support from a majority of the House and Senate. Let us begin. Now is the time to start the negotiations, while the sun remains high in the sky, before sunset arrives.

APPENDIX A

A. DRAFT MODEL STATUTE: REMEDIATING INSTITUTIONAL AND SYSTEMIC DISCRIMINATION ACT (RISDA)

I. Preamble

Extensive academic research and data document numerous ways that Black and brown Americans experience life in the United States differently from their white counterparts.[205] Often referred to as systemic/institutional discrimination, it is ingrained in society through the policies and practices of institutions like schools, government agencies, and law enforcement.[206] Research and data show that these disparities exist along nearly every facet of American life, including employment, wealth, education, home ownership, health care, and incarceration.[207]

Many argue that institutional/systemic discrimination is not intentional, and the U.S. Supreme Court has disallowed the use of societal discrimination to justify remedial/race-conscious measures, on the grounds that the "discrimination" does not result from deliberate actions of public officials but rather from choices made by private individuals.[208]

The Court's failure to find general societal discrimination as purposeful has caused it to perceive the issue of resolving our nation's continuing racial issues as something that lies beyond the responsibility and competence of the federal government.

Thus, the historical treatment of racial minorities as inferior has had a pervasive effect on society. Even more, our nation's institutional norms, practices and procedures were created during the days of explicit racial discrimination and are not neutral themselves.

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205. Gerdeman, *supra* note 16 (a recent study by Harvard University found that when Blacks "whitened" their resumes when applying for jobs—for example, by using "American" sounding names—they got more callbacks for corporate interviews; 25% of Black candidates received callbacks from their whitened resumes, while only 10% got calls back when they left ethnic details on their resume).

206. KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 148 (1st ed., 2019) (there are four elements to the definition of systemic/institutional discrimination, including (1) lack of intentionality, (2) the practices that sustain racial inequality are unoriginal and produced by everyday decisions that structure our social, political and economic interactions, (3) neutrality so that there is an absence of any explicit invocation of race, and (4) the irrelevance of the "bad actor" so that there is no evil "man behind the curtain" designing and operating the institutions that form institutional racism).

207. Devah Pager, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit and Consumer Markets*, 34 ANN. REV. SOC. 110, 198 (2008) (citing examples of systemic/institutional discrimination including: how (1) public schools are typically funded with property taxes, meaning that schools in poorer neighborhoods, where property values are low, tend to receive less funding than schools in more affluent neighborhoods, where property values are higher; and (2) teachers in schools in poorer neighborhoods are likely to have less experience, shorter tenure, and emergency credentials rather than official teaching certifications).

208. *Parents Involved in Cmty. Schs.*, 551 U.S. at 730, 758 (holding that struck down race-conscious desegregation plans of school district on the basis that when segregation is de facto, or not created by government police, it would violate the Constitution to take racially explicit steps to reverse it).

As a result, minority populations continue to be systematically underrepresented in the allocation of employment, education, and political opportunities. In turn, this underrepresentation has caused racial minorities to have lower standards of living, higher vulnerability to crime, poorer health, and shorter life expectancies than members of the white majority.[209]

An affirmative action program is a tool designed to ensure equal opportunity in education. A central premise underlying affirmative action is that, absent discrimination, over time a program's applicant pool generally, will reflect the racial and ethnic profile of the populations from which the program recruits and selects.

Affirmative action programs contain a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the student body and compare it to the composition of the relevant applicant populations.

Affirmative action programs also include action-oriented programs. If applicants of color are not being offered admission at a rate to be expected given their availability in the relevant population, the affirmative action program should include specific practical steps designed to address this underutilization.

Effective and narrowly tailored affirmative action programs also include internal auditing and reporting systems as a means of measuring the progress toward achieving the student body that would be expected in the absence of discrimination.

An affirmative action program also ensures equal opportunity by institutionalizing the institution's commitment to equality in every aspect of the educational process. Therefore, as part of its affirmative action program, monitoring and examining educational policies and practices, as well as their impact on under-represented groups, is crucial.[210]

Therefore, after extensive research, Congressional hearings and fact-finding, Congress hereby declares the following:

That there is a strong basis in evidence that systemic racial and ethnic discrimination is real, and that it continues to impact the lives of people of color.

That there is a strong basis in evidence to conclude that institutional structures, both governmental and non-governmental, have in the past perpetuated, and continue to perpetuate, discriminatory outcomes for people of color.

That Congress has a compelling interest in remedying this past and present discrimination authorizing the use of race-conscious measures, including but not limited to affirmative action.[211]

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209. BRIDGES, *supra* note 206, at 164.

210. This affirmative action portion of the draft regulation is modeled in 41 C.F.R. Subtit. B, Ch. 60, Pt. 60-2.

211. CHRISTINE J. BACK & JD S. HSIN, CONG. RSCH. SERV., R45481, "AFFIRMATIVE ACTION" AND EQUAL PROTECTION IN HIGHER EDUCATION (2019); *see also* Eric Schnapper, Affirmative Action and the Legislative

[Please be advised Congress reserves the right to supplement additional support from congressional studies upon conclusion of further hearings and fact-finding efforts.]

This statute is hereby enacted as *RISDA: Remedying Institutional and Systemic Discrimination Act*

General.

No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to institutional or systemic discrimination under any program to which this part applies.[212]

(b) Affirmative Action.

(1) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.[213]

(2) Even in the absence of prior individual or institutional discrimination, a recipient in administering a program may take affirmative action to overcome the effects of systemic discrimination, and other conditions which resulted in limiting participation by persons of a particular race, color, or national origin.[214]

(3) Institutions that wish to implement affirmative action programs must establish a strong basis in evidence, such as statistical evidence, policy evaluations, social science evidence, documentary evidence or prior findings of discrimination, to justify the remedial policy,[215] OR

(4) May rely upon these Congressional findings of systemic discrimination in education to justify the remedial policy.

History of the Fourteenth Amendment, 71 VA. L. REV. 753, 798 (1985); Edward R. Roybal, *Affirmative Action: A Congressional Perspective*, *in* MINORITIES IN SCIENCE (Vijaya L. Melnick, Frankline D. Hamilton eds., 1977).

212. 34 C.F.R. § 100.3.

213. *Id*.

214. *Id*.

215. *Id.* § 100.6(b)–(c).

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