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A CROWDED ROOM OR THE PERFECT FIT?  
EXPLORING AFFIRMATIVE ACTION TREATMENT  
IN COLLEGE AND UNIVERSITY ADMISSIONS FOR  
SELF-IDENTIFIED LGBT INDIVIDUALS

HERBERT C. BROWN, JR.\*

ABSTRACT

The lesbian, gay, bisexual, and transgendered (LGBT) civil rights movement has made tremendous advances over the years. Many polls show that acceptance of same-sex marriage and other rights for LGBT individuals are at their highest.<sup>1</sup> These polls have also shown that an overwhelmingly large population of younger Americans support and accept LGBT individuals.<sup>2</sup> With this growing acceptance, more Americans are deciding to come out.<sup>3</sup> In fact, some individuals are beginning to come out in application processes for colleges and universities—telling the prospective colleges and universities that they are gay, lesbian, bisexual, or transgendered. One question is whether this information should be used in giving affirmative action treatment to individuals who have identified themselves as a member of the LGBT community.

Affirmative action programs have been around since the early 1960s.<sup>4</sup> Originally created to end discrimination that had plagued the African-American community and to give African Americans equal opportunities, affirmative action programs have now morphed into a way to counter discrimination on several grounds, including national origin, religion, and gender.<sup>5</sup> Affirmative action programs also act as a way to compensate for past discrimination, persecution,

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1. Lydia Saad, *U.S. Acceptance of Gay/Lesbian Relations is the New Normal: For Third Year, Majority Says Gay/Lesbian Relations are Morally Acceptable*, GALLUP (May 14, 2012), <http://www.gallup.com/poll/154634/Acceptance-Gay-Lesbian-Relations-New-Normal.aspx>, archived at <http://perma.cc/MJM5-KKCH>.

2. *Id.* (stating that adults 18-34 are more supportive of gay rights than counterparts).

3. *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times*, PEW RESEARCH CENTER (June 13, 2013), <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/>, archived at <http://perma.cc/5DNT-NLZH>.

4. Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 46–47 (2002) (discussing the origins of affirmative action during the Kennedy administration in 1961).

5. *Id.* at 47 (discussing President Lyndon B. Johnson's addition of women to affirmative action in 1967).

or exploitation by the majority class of a certain minority class, and to address existing discrimination.<sup>6</sup> Often used in government, education, and the private sectors, these programs attempt to ensure that minority groups are adequately represented and have equal opportunities.<sup>7</sup>

Since their inception, affirmative action programs have always been the subject of heated debate.<sup>8</sup> The United States Supreme Court has had to determine the constitutionality of affirmative action programs in many cases.<sup>9</sup> Also, in response to the debate, some states have created constitutional amendments banning affirmative action programs.<sup>10</sup> The debate is even more heated in light of the idea that some see affirmative action programs as reverse discrimination, that may take away opportunities for many individuals that are a part of the majority class.<sup>11</sup>

Even though the debate continues, it has been questioned whether potential students who disclose that they are a member of the LGBT community should be awarded affirmative action treatment in the admission process of colleges and universities.<sup>12</sup> This addition to the idea of affirmative action programs may find support in the oppression and forced invisibility of gay and lesbian individuals throughout American history.<sup>13</sup> Perhaps there may also be support in the “diversity rationale,” which states that there is a compelling interest in student diversity in colleges and universities.<sup>14</sup> Thus, the idea of affirmative action programs for LGBT individuals may not be that

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6. *Id.* at 22.

7. *Id.* at 9–13.

8. *Id.* at 22.

9. See Ricci v. DeStefano, 557 U.S. 557, 557 (2009); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 701 (2007); Grutter v. Bollinger, 539 U.S. 306, 307 (2003); Gratz v. Bollinger, 539 U.S. 244, 245 (2003); Adarand Constr. v. Peña, 515 U.S. 200, 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 266-67 (1979); Griggs v. Duke Power Co., 401 U.S. 424, 424-25 (1971).

10. See B. Drummond Ayres, Jr., *Conservatives Forge New Strategy to Challenge Affirmative Action*, N.Y. TIMES, Feb. 16, 1995, at A1; Steven A. Holmes, *Victorious Preference Foes Look for New Battlefields*, N.Y. TIMES, Nov. 10, 1998, at A25; Sue Anne Pressley, *Florida Plan Aims to End Racial Preference Policies*, WASH. POST., Nov. 11, 1999, at A15.

11. Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 215–17 (2011).

12. Scott Jaschik, *Affirmative Action for Gay Students*, INSIDE HIGHER ED. (Oct. 9, 2006), <https://www.insidehighered.com/news/2006/10/09/gay>, archived at <https://perma.cc/7XTT-GP3T>; see also Annemarie Mannion, *Elmhurst College is Curious: Are You LGBT?*, CHI. SUNTIMES (Aug. 26, 2011), [http://articles.chicagotribune.com/2011-08-26/news/ct-met-elmhurst-college-20110826\\_1\\_lgbt-elmhurst-students-elmhurst-college](http://articles.chicagotribune.com/2011-08-26/news/ct-met-elmhurst-college-20110826_1_lgbt-elmhurst-students-elmhurst-college), archived at <http://perma.cc/KM2A-PF94>.

13. Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POLY REV. 47, 65 (1993).

14. *Id.* at 71 n.103.

far removed from the original foundation of affirmative action programs. However, recently many Americans have noticed the tremendous advances made by gay-rights organizations.<sup>15</sup> In fact, a brief on behalf of the House of Representatives in support of the Defense of Marriage Act states that the LGBT civil rights movement “[has] gained more political ground in less time than just about any other interest group in American political history.”<sup>16</sup> This information is used as the foundation of an argument that LGBT individuals are not in need of protected status because they are not a politically powerless group.<sup>17</sup> Thus, there is no need for programs designed to give them affirmative action treatment.

Furthermore, the addition of LGBT individuals into the idea of affirmative action has not been accepted very well. A 2009 national survey found that fifty-five percent of voters are opposed to affirmative action programs in general.<sup>18</sup> Moreover, the same survey determined that an overwhelming majority of voters, sixty-five to twenty-seven percent, opposed the application of affirmative action programs to LGBT individuals.<sup>19</sup>

Several questions regarding affirmative action programs remain unanswered. However, answers are desperately needed to ease the frustration of colleges and universities seeking to increase student body diversity. To increase student body diversity, some colleges and universities have begun to debate whether students that identify themselves as gay or lesbian, in the application process, should be given affirmative action treatment.<sup>20</sup> In fact, Elmhurst College in Elmhurst, Illinois has begun asking applicants their sexual orientation during the application process,<sup>21</sup> and Yale School of Medicine has begun targeting LGBT applicants in their recruitment efforts.<sup>22</sup>

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15. Robert Barnes, *Same-sex Marriage Cases Wind Their Way to Supreme Court as Political Climate Changes*, WASH. POST (Sept. 25, 2011), [http://www.washingtonpost.com/politics/same-sex-marriage-cases-wind...court-as-political-climate-changes/2011/09/25/gIQABW03wK\\_story.html](http://www.washingtonpost.com/politics/same-sex-marriage-cases-wind...court-as-political-climate-changes/2011/09/25/gIQABW03wK_story.html), archived at <http://perma.cc/S8VC-HLXZ> (quoting a legal brief filed on behalf of the House of Representatives in support of the Defense of Marriage Act (DOMA)).

16. *Id.*

17. *Id.*

18. Peter Brown, *U.S. Voters Disagree 3-1 with Sotomayor on Key Case, Quinnipiac University National Poll Finds; Most Say Abolish Affirmative Action*, QUINNIPIAC UNIV. (June 3, 2009), <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=1307>, archived at <http://perma.cc/H2WF-426Q>.

19. *Id.*

20. Jaschik, *supra* note 12.

21. Mannion, *supra* note 12; see also attached appendix.

22. Mariana Lopez-Rosas, *Medical School Targets LGBTQ Applicants*, YALE DAILY NEWS (Oct. 25, 2011), <http://yaledailynews.com/blog/2011/10/25/medical-school-targets-lgbtq-applicants/>, archived at <http://perma.cc/G5P7-T55N>.

This Article explores affirmative action treatment for self-identified LGBT individuals in college and university admissions. This Article seeks to explain that while granting affirmative action treatment to self-identified students in the admission process is constitutional, under the current affirmative action precedent, there is a lack of sufficient justification for such an expansion. This Article will also explore the advantages and disadvantages should colleges and universities choose to implement affirmative action programs for LGBT applicants.

Section I of this Article will begin by depicting the evolution of affirmative action programs since their inception in the early 1960s. This section will also include a discussion of relevant Supreme Court jurisprudence to date (including the Court's recent rulings in *Fisher v. University of Texas*). Section II will discuss the varying views that support and oppose affirmative action programs and public opinion concerning affirmative action. Next, Section III will discuss LGBT civil rights and the strides that the LGBT community has made in seeking equality (including the Court's recent decisions in *U.S. v. Windsor* and *Hollingsworth v. Perry*). Section IV will provide analysis depicting the parallels and pitfalls of arguments supporting and opposing affirmative action for LGBT individuals. This section will also include a discussion of the constitutionality of extending these programs to benefit self-identified LGBT students. This section will conclude with a discussion of possible pros and cons of extending affirmative action benefits to LGBT students.

## I. A HISTORY OF AFFIRMATIVE ACTION IN AMERICA

### A. *Evolution of Affirmative Action Programs*

### B. *Affirmative Action in Colleges and Universities:*

1. *Regents of University of California v. Bakke*
2. *Post-Bakke*
3. *Grutter and Gratz*
4. *Fisher v. University of Texas*
  - a. *The Fifth Circuit Opinion*
  - b. *The U.S. Supreme Court Decision*
  - c. *Post-Fisher*

## II. THE AFFIRMATIVE ACTION DEBATE AND PUBLIC OPINION

### A. *Justification for Affirmative Action*

### B. *Critics of Affirmative Action*

### C. *Public Opinion on Affirmative Action*

## III. LGBT CIVIL RIGHTS MOVEMENT IN AMERICA

### A. *The Evolution of LGBT Civil Rights*

- B. Windsor v. United States: *The Demise of DOMA*
  - 1. *The District Court's Ruling*
  - 2. *The Appeals Court's Ruling*
  - 3. *The Supreme Court's Decision*
- C. Hollingsworth v. Perry: *The Fall of Proposition 8*
- IV. ANALYZING AFFIRMATIVE ACTION PROGRAMS THAT BENEFIT LGBT INDIVIDUALS IN COLLEGE AND UNIVERSITY ADMISSIONS
  - A. *Origins of Support for Affirmative Action for LGBT Individuals*
  - B. *Analysis in Context of Three Traditional Justifications for Affirmative Action*
    - 1. *Remedial Purpose Justification*
    - 2. *Role Modeling Justification*
    - 3. *Diversity Justification*
  - C. *Constitutionality of Affirmative Action Programs for LGBT Applicants*
    - 1. *Appropriate Level of Scrutiny*
    - 2. *The Need for Programs that Give Affirmative Action Treatment to LGBT Students*
  - D. *Pros and Cons*
  - E. *Cautions*

#### CONCLUSION

##### I. A HISTORY OF AFFIRMATIVE ACTION IN AMERICA

The evolution of affirmative action in America is complex and muddled with several issues. To add more complexity to the already murky area of constitutional law, each political party has left its footprint in the sand that is currently our affirmative action law. This section explains how our current affirmative action law has evolved over the last five decades in an attempt to provide context for the current affirmative action debate.

##### A. *Evolution of Affirmative Action Programs*

What we know today as affirmative action was first termed by President John F. Kennedy in Executive Order 10925 created on March 6, 1961.<sup>23</sup> President Kennedy used the term to describe government programs designed to remedy past discrimination and created the President's Committee on Equal Employment Opportunity

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23. Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

(PCEEO), which would oversee the practices of government hiring.<sup>24</sup> Executive Order 10925 also mandated federal contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”<sup>25</sup> However, this program requiring affirmative action was still unclear.

Shortly after Kennedy’s death, President Lyndon B. Johnson added much needed clarity to affirmative action. First, President Johnson signed into law the 1964 Civil Rights Act, which created the Equal Employment Opportunity Commission (EEOC) under Title VII to enforce the employment provision of the Civil Rights Act.<sup>26</sup> Later in 1965, President Johnson issued Executive Order 11246 which terminated the PCEEO and transferred the responsibility for ensuring that all federal contractors comply with affirmative action to the Department of Labor.<sup>27</sup> Highly noteworthy is the fact that President Johnson justified Executive Order 11246 by stating, “you do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”<sup>28</sup> In 1967, President Johnson went on to add women to the list of groups under affirmative action programs.<sup>29</sup> Executive Order 11246, as amended by Executive Order 11375, was aimed “to correct the effects of past and present discrimination.”<sup>30</sup> The Order prohibited federal contractors and subcontractors from discriminating against an employee or applicant for employment because of race, skin color, religion, gender, or national origin.<sup>31</sup> The order required that contractors take affirmative action to ensure that the protected class, underutilized applicants were employed when available, and that employees were treated without negative discriminatory regard to their protected-class status.<sup>32</sup>

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24. *Id.*

25. *Id.*

26. See 42 U.S.C. § 2000e-4 (1964).

27. Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

28. President Lyndon B. Johnson, Commencement Address at Howard Univ.: “To Fulfill These Rights” (June 4, 1965). President Johnson also stated “[w]e seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.” *Id.*

29. Exec. Order No. 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967).

30. William M. Chace, *Affirmative Inaction*, THE AM. SCHOLAR (Dec. 1, 2011), available at <https://theamericanscholar.org/affirmative-inaction/#.VMFWnd7tDww>, archived at <http://perma.cc/8M8D-DG5X>.

31. Exec. Order No. 11246, 30 Fed. Reg. 12319, 12320 (Sept. 24, 1965).

32. *Id.*

*B. Affirmative Action in Colleges and Universities:**1. Regents of University of California v. Bakke*

In 1978, the Supreme Court had its first opportunity to review affirmative action in the context of higher education. In *Regents of the University of California v. Bakke*,<sup>33</sup> a plurality of the Court held that the University of California at Davis's program of quotas for underrepresented minorities violated the Equal Protection Clause of the United States Constitution.<sup>34</sup> In that case, a white male student brought an action after his application to medical school was rejected.<sup>35</sup> The applicant challenged the school's admission policy of holding 16 of its 100 positions for "disadvantaged" minority students.<sup>36</sup> Justice Powell delivered the splintered decision of the Court and found that the racial quota was unconstitutional.<sup>37</sup> However, Justice Powell asserted that admissions officers could properly consider applicants' racial identities to select student bodies that possess "genuine diversity," when race is not the only factor considered. Instead race or ethnic background is considered a "plus" factor in an applicant's file, that does not insulate the applicant from comparison with other candidates.<sup>38</sup> Justice Powell held that diversity was a compelling interest, but Justice Powell added clarity to the term "genuine diversity" by stating,

It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.<sup>39</sup>

Justice Powell went on to state that a program that focuses solely on ethnic diversity would hinder rather than further attainment of genuine diversity.<sup>40</sup>

The *Bakke* decision was a truly complex decision. In fact, it produced six different opinions<sup>41</sup> as the Court grappled with whether all

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33. 438 U.S. 265, 266–67 (1979).

34. *Id.*

35. *Id.* at 276–77.

36. *Id.* at 272–75.

37. *Id.* at 266–67.

38. *Id.* at 317.

39. *Bakke*, 438 U.S. at 315.

40. *Id.* at 318.

41. *Id.* at 265. Justice Powell's opinion was joined in part by Justices Brennan, White, Marshall, and Blackmun, who also issued a separate joint opinion. *Id.* at 324–79 (Brennan,

racial classifications, even those that seek to remedy past discrimination like affirmative action, are subject to the strict scrutiny standard of review.<sup>42</sup> Some Justices recognized that there should be some other standard of review for racial classification that is not invidious, but instead seeks to remedy past discrimination.<sup>43</sup> Justice Powell's opinion struck the perfect middle ground between the two groups; he held that affirmative action programs were subject to strict scrutiny and that student diversity was a compelling interest.<sup>44</sup>

Prior to the *Bakke* decision, diversity as a compelling interest was not articulated.<sup>45</sup> After the decision, many commentators pointed to the fact that diversity as a compelling interest was Justice Powell's stance and was not shared by the remainder of the four Justices who concurred in his opinion; therefore, it was not binding precedent.<sup>46</sup> Commentators also deeply criticized Justice Powell's opinion as in no way precluding admissions officers from continuing to admit minority students in whatever number they might choose.<sup>47</sup> In particular, Justice Powell's decision condemned a quota system without truly defining a quota system.<sup>48</sup> Instead, the lingering impression from the *Bakke* case is that a quota exists when there is a fixed number or percentage of seats reserved for minority individuals.<sup>49</sup> Thus, it can be argued that a university is not operating a quota if there is no fixed number or percentage of minority students in mind. Other commentators took opposition to Justice Powell's holding that student "diversity" is a compelling interest.<sup>50</sup> As one commentator stated, Justice Powell's "academic diversity justification once accepted could, and should, sustain all forms of special admissions programs designed

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White, Marshall, and Blackmun, J.J., concurring in part and dissenting in part). Justices White, Marshall, and Blackmun authored separate opinions arguing that strict scrutiny should not apply to affirmative action programs. *See id.* at 379–87 (White, J., concurring); *id.* at 387–402 (Marshall, J., concurring); *id.* at 402–408 (Blackmun, J., concurring). Justice Stevens joined by Chief Justice Burger and Justices Stewart and Rehnquist submitted a separate opinion. *See id.* at 408–21 (Stevens, J., concurring in part and dissenting in part).

42. *Id.* at 290 (majority opinion).

43. *Id.* at 360 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part and dissenting in part).

44. *Id.* at 299 (majority opinion).

45. *Constitutional Requirements for Affirmative Action in Higher Education Admissions and Financial Aid*, THE CIVIL RIGHTS PROJECT- HARV. UNIV. (Sept. 23, 2002), available at <http://civilrightsproject.ucla.edu/legal-developments/legal-memos/constitutional-requirements-for-affirmative-action-in-higher-education-admissions-and-financial-aid/constitutional-affirmative-action-financial-aid.pdf>, archived at <http://perma.cc/EXB3-7WNX>.

46. James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 517 (2011).

47. Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 922 (1983).

48. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1979).

49. *Id.*

50. *See* Mishkin, *supra* note 47, at 926–29.

to achieve that objective,” including the very one that the *Bakke* ruling had held unconstitutional.<sup>51</sup> It has even been stated that the *Bakke* decision was a compromise and “amounted to this: ‘You can do whatever you like in preferring racial minorities, so long as you do not say so.’”<sup>52</sup>

## 2. *Post-Bakke*

In the years following the *Bakke* decision, the realm of affirmative action remained murky. Paul J. Mishkin, the senior author of the University of California’s Supreme Court brief, stated “[t]he experience following the *Bakke* decision was that the vast range of race-conscious programs of special admissions to universities continued in full force and effect.”<sup>53</sup> However, with the beginning of the Reagan administration, the evolution of affirmative action would drastically change.

In the years after *Bakke*, several important developments occurred. During the Reagan administration, affirmative action was more politically shaped than ever before. Between 1981 and 1983, Reagan cut the EEOC and the OFCC budgets by ten percent and twenty-four percent, respectively, and their staff by twelve percent and thirty-four percent.<sup>54</sup> Also, Reagan shaped the Supreme Court’s view of affirmative action by appointing at least one Justice who opposed preferences.<sup>55</sup>

During that time, the Court began a harsh turn towards ending affirmative action. First, in *Wygant v. Jackson Board of Education*—just prior to the appointment of Justice Scalia—the Court struck down the Jackson Board of Education’s policy of laying off, in reverse seniority, professors in order to ensure that the percentage of minority teachers equaled the percentage of minority students.<sup>56</sup> It became clear that the policy would result in non-minority teachers with greater seniority being laid off in higher numbers than minority teachers without seniority.<sup>57</sup> The issue resulted in a plurality decision

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51. *Id.* at 929 n.78. The author also states that using Powell’s “plus” programs considering “the size of the ‘plus’ will set that size in terms of the number of minority students likely to be produced at the level set.” *Id.* at 926.

52. John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL, JR. 484 (Macmillian Publ’g Co., 1994).

53. Mishkin, *supra* note 47, at 922.

54. *Affirmative Action*, INC (Jan. 29, 2015), <http://www.inc.com/encyclopedia/affirmative-action.html>, archived at <http://perma.cc/Q9PW-XY7P>.

55. *Biographies of Current Justices of the Supreme Court: Antonin Scalia, Associate Justice* (Jan. 1, 2015), <http://www.supremecourt.gov/about/biographies.aspx>, archived at <http://perma.cc/J98H-6WF4> (stating that President Reagan appointed Justice Antonin Scalia).

56. 476 U.S. 267, 283–84 (1986).

57. *Id.* at 271.

where a majority of the Court held that the layoff provision was unconstitutional under the strict scrutiny method of review.<sup>58</sup> Justice Powell wrote the plurality decision, joined by Chief Justice Burger and Justice Rehnquist. Justice O'Connor only joined in part and wrote a concurring opinion.<sup>59</sup> Justice White also wrote a concurring opinion, which resulted in the fifth vote need to strike the provision down.<sup>60</sup> Justice Brennan and Justice Blackmun joined a dissent written by Justice Marshall.<sup>61</sup> Justice Stevens authored his own dissent.<sup>62</sup>

In the end, the case resulted in a majority holding that curing societal discrimination and providing role models for minorities were not sufficient justifications to pass the strict scrutiny standard of review.<sup>63</sup> The majority of the Court took offense to the fact that the role-modeling theory had no logical stopping point.<sup>64</sup> The Court went on to explain that by tying the discriminatory hiring and firing policy to the number of minority students, the school would have to monitor the number of minority faculty every year and make hiring and firing decisions yearly.<sup>65</sup> The Court also held that using affirmative action to remedy past discrimination required convincing evidence that remedial action is warranted.<sup>66</sup> However, Justice O'Connor believed that the "remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required."<sup>67</sup>

During President Clinton's administration, there was a five-month review of federal affirmative action programs.<sup>68</sup> The administration largely defended affirmative action programs and said that it was too soon to eliminate the measures.<sup>69</sup> During this time, the Supreme Court decided *Adarand Constructors v. Peña*, where the Court held that the strict scrutiny standard of review also applied to race and ethnicity-based federal affirmative action programs.<sup>70</sup>

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58. *See id.*

59. *Id.* at 267.

60. *Id.* 294–95.

61. *Id.* at 295–312.

62. *Wygant*, 476 U.S. at 313.

63. *Id.* at 274–76.

64. *Id.* at 275.

65. *Id.*

66. *Id.* at 277.

67. *Id.* at 286 (O'Connor, J., concurring in part and concurring in judgment).

68. Ann Devroy, *Clinton Study Backs Affirmative Action*, WASH. POST, July 19, 1995, at A01, available at <http://www.washingtonpost.com/wp-srv/politics/special/affirm/stories/aa071995.htm>, archived at <http://perma.cc/AQN5-GUEV>.

69. *See* PRESIDENT CLINTON'S AFFIRMATIVE ACTION REVIEW 3 (1995) <http://clinton2.nara.gov/WH/EOP/OP/html/aa/aa-index.html>, archived at <http://perma.cc/PXV2-SJJF>.

70. 515 U.S. 200, 200–02 (1995).

This put an end to the speculation that another standard of review would apply to so-called benign racial classifications.

However, affirmative action received its most powerful blow in 1996. Proposition 209 was approved by California voters by a margin of fifty-four to forty-six percent.<sup>71</sup> Proposition 209 amended the California Constitution to prohibit public institutions from giving preferential treatment on the basis of race, sex, or ethnicity.<sup>72</sup> Within one year, the percentage of undergraduates at the University of California at Berkeley who were Black, Latino, or Native American dropped from twenty-three to ten percent.<sup>73</sup> At Berkeley and UCLA law schools, Black students' admissions declined by more than eighty percent, and Latino admissions declined by half.<sup>74</sup>

California's Proposition 209 was just the beginning—other states began using Proposition 209 as a model to prohibit public institutions from giving preferential treatment on the basis of race, sex, or ethnicity.<sup>75</sup> First, Washington approved Initiative 200, a statutory ban on affirmative action programs.<sup>76</sup> Then Florida's "One Florida Initiative" was approved.<sup>77</sup> By this time there was a desperate need for more guidance on affirmative action in school admissions.

### 3. Grutter and Gratz

In 2003, the Supreme Court would finally have an opportunity to add clarity to the highly contested area of affirmative action in university and college admissions after the *Bakke* decision. In 2003, the

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71. Samuel Fullwood III & John M. Broder, White House Weighs Suit Over Prop. 209, L.A. TIMES (Nov. 09, 1996), [http://articles.latimes.com/1996-11-09/news/mn-63062\\_1white-house](http://articles.latimes.com/1996-11-09/news/mn-63062_1white-house), archived at <http://perma.cc/XZB5-PEKR>.

72. *Id.*

73. James Traub, *Class of Prop. 209: In the Wake of Affirmative Action on Campuses*, N.Y. TIMES, May 2, 1999, at sm44; see also David Leonhardt, *The New Affirmative Action*, N.Y. TIMES, Sept. 30, 2007, at E76; Charles R. Lawrence, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 929 (2001) (stating that in 1997, only eighteen African American students were admitted at Berkeley Law School, which was fifty-nine fewer than the prior year—before Proposition 209 passed. Only one of the eighteen admitted African American students matriculated.).

74. TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 12, 260 (2004).

75. PRESIDENT CLINTON'S AFFIRMATIVE ACTION REVIEW, *supra* note 69.

76. In November 1998, voters in the state of Washington passed Initiative Measure 200. The measure provided that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." WASH. REV. CODE ANN. § 49.60.400(1) (West 2002).

77. Fl. Exec. Order No. 99-281 (Nov. 9, 1999) "One Florida Initiative" ended affirmative action in state schools by implementing reforms in pre-school through 12th grade and by implementing a top 20% program; see also Sue Anne Pressley, *Florida Plan Aims to End Race-Based Preferences*, WASH. POST, Nov. 11, 1999, at A15.

Supreme Court upheld the University of Michigan Law School's affirmative action admissions program by a 5–4 margin in *Grutter v. Bollinger*.<sup>78</sup> In a companion case, the Court struck down as unconstitutional the University of Michigan undergraduate school's affirmative action program in *Gratz v. Bollinger*.<sup>79</sup>

First, in *Grutter*, the Court reaffirmed diversity as a compelling interest in upholding the University of Michigan Law School's admission policy.<sup>80</sup> In that case, Barbara Grutter, a white Michigan resident, brought suit against the University of Michigan Law School, alleging racial discrimination based on the school's rejection of her application.<sup>81</sup> Grutter also challenged the law school's use of race; she claimed it was not supported by a compelling interest to fulfill the first prong of the strict scrutiny analysis.<sup>82</sup> The school's admission plan focused primarily on GPA and LSAT scores, but high scores did not guarantee admission, nor did low scores guarantee rejection.<sup>83</sup> The school also used other variables to achieve a diverse student body.<sup>84</sup> Although the law school's definition of diversity included more factors than just race, the law school placed a particular emphasis on race.<sup>85</sup>

In a 5–4 opinion written by Justice O'Connor, the Court held that the law school's admission program was constitutional.<sup>86</sup> Justice O'Connor and a majority of the Court "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>87</sup> Justice O'Connor acknowledged that "[n]ot every decision influenced by race is equally objectionable."<sup>88</sup> She reiterated the principle that diversity constitutes a compelling interest when it is more than mere racial or ethnic diversity.<sup>89</sup> She went on to explain the many benefits of a

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78. 539 U.S. 306, 306 (2003).

79. 539 U.S. 244, 244 (2003).

80. See *Grutter*, 539 U.S. at 306.

81. *Id.* at 316–17.

82. *Id.* at 306.

83. *Id.* at 315 ("In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. . . . [t]he policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School.").

84. *Id.* at 315 ("The hallmark of [the] policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'").

85. *Grutter*, 539 U.S. at 316 ("reaffirm[ing] the Law School's longstanding commitment to . . . racial and ethnic diversity with special reference to the inclusion of . . . African-Americans, Hispanics, and Native-Americans.").

86. See *id.*

87. *Id.* at 308, 328 ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").

88. *Id.* at 308.

89. *Id.*

diverse student body.<sup>90</sup> She also stated that while diversity is a compelling interest, race cannot be used as a decisive factor; however, race can be a factor considered in the “holistic” review of an individual applicant.<sup>91</sup>

In applying the strict scrutiny standard and the principles mentioned above in the *Grutter* case, Justice O’Connor held that the law school use of race served a compelling interest and was narrowly tailored because it seriously weighed many factors, including race.<sup>92</sup> Justice O’Connor also held that there were no other race-neutral alternatives available to the law school.<sup>93</sup> She explained that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative or mandate that a university choose between maintaining a reputation for excellence and fulfilling a commitment to provide educational opportunities to members of all racial groups.”<sup>94</sup> Instead, the Court held that all that was required is a “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity that the university seeks.”<sup>95</sup> Additionally, Justice O’Connor also held that the admissions program was narrowly tailored, and it did not unduly burden students that were not members of a racial or ethnic group “[b]ecause the Law School considers ‘all pertinent elements of diversity,’ it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.”<sup>96</sup> While it was argued that the law school’s attention to percentage of minority students in achieving its “critical mass” was unconstitutional as a quota, Justice O’Connor dismissed this argument stating, “attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.”<sup>97</sup> Justice O’Connor went on to define a quota

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90. *Id.* at 330–33.

91. *Grutter*, 539 U.S. at 334 (stating that to comply with narrow tailoring “a race-conscious admissions program cannot use a quota system—it cannot ‘insulat[e] each category of applicant with certain desired qualifications from competition with all other applicants.’”) (quoting Justice Powell in *Bakke*, 438 U.S. at 315)).

92. *Id.* at 309 (“[T]he Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”).

93. *Id.* at 309 (“[N]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”). Justice O’Connor went on to state that “the Law School sufficiently considered workable race-neutral alternatives” because other alternatives “would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.” *Id.* at 340.

94. *Id.* at 309.

95. *Id.* at 339 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1988)).

96. *Id.* at 341 (citing *Bakke*, 438 U.S. 317).

97. *Grutter*, 539 U.S. at 336 (rebutting Justice Kennedy’s position that the law school’s consultation of the ‘daily reports,’ which keep track of the racial and ethnic composition of the class (as well of residency and gender), ‘sugges[t] there was no further attempt at individual review save for race itself’ during the final stages of the admission process”).

system by expanding on the *Bakke* holding. She distinguished a quota system from a goal by stating, “[p]roperly understood, a ‘quota’ is a program in which a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups.’ . . . In contrast, ‘a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself.’”<sup>98</sup>

Of course, *Grutter* was not without its dissenters. In his dissent, Justice Kennedy noted the importance of limited (or no) deference to universities when race is used; he stated that this would ensure that “[p]rospective students, the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation.”<sup>99</sup> Justice Kennedy seemed to be very cautious about the extreme deference given to the Law School and the procedures used to accomplish student diversity. While he endorsed diversity as a compelling government interest, he (and Justice Rehnquist) believed that deference to the law school’s procedures was contrary to the strict scrutiny standard, and did not force the school to prove that its procedures were constitutional and narrowly tailored to meet the compelling interest of diversity.<sup>100</sup> He understood the Court’s holding as inconsistent with the holding in *Bakke*.<sup>101</sup> He believed that the safeguard provided when using race as a factor was the rigorous review under strict scrutiny and the narrowly tailoring component.<sup>102</sup> He declared that this rigorous review could not be accomplished while giving extreme deference to the law school’s procedures.<sup>103</sup> Justice Kennedy stated that “[t]he Court [had] confuse[d] deference to a university’s definition of its educational objective with deference to the implementation of this goal.”<sup>104</sup> Justice Kennedy believed that there should be no deference given to the law school in determining the best way to accomplish diversity.<sup>105</sup>

Furthermore, Justice Kennedy also seemed skeptical about the Court’s distinction between a quota and the “critical mass” that the law school had aspired to obtain.<sup>106</sup> Justice Kennedy believed that there was no difference between the term “critical mass,” which had no numerical value attached to it, and a quota system that sought a particular number or percentage of students.<sup>107</sup> He stated, “the concept

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98. *Id.* at 335 (internal citations omitted).

99. *Id.* at 394 (Kennedy, J., dissenting).

100. *Id.* at 388–90.

101. *Id.* at 389.

102. *Id.*

103. *Grutter*, 539 U.S. at 389.

104. *Id.*

105. *Id.*

106. *Id.* at 389.

107. *Id.* at 389.

of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.”<sup>108</sup>

Justice Scalia “piggy-backed” off this skepticism in his dissent—joined by Justice Thomas—where he questioned when a “critical mass” becomes a quota system.<sup>109</sup> He stated, “[s]ome future lawsuits will presumably focus on whether a university has gone beyond the bounds of a ‘good-faith effort’ and has so zealously pursued its ‘critical mass’ as to make it an unconstitutional *de facto* quota system, rather than merely ‘a permissible goal.’”<sup>110</sup> Justice Scalia believed that the absence of a bright-line rule (either holding that racial preferences were either permissible or impermissible) would prolong the litigation with regards to affirmative action.<sup>111</sup> However, the Court would add more clarity in *Gratz*, the companion decision.

In *Gratz v. Bollinger* (the simpler of the two cases), two unsuccessful white applicants, one female and one male, to the University of Michigan’s undergraduate program filed suit claiming that the school’s use of race in the admission process was unconstitutional.<sup>112</sup> The university’s admission procedure was based upon an index where each student was awarded a maximum of 150 points.<sup>113</sup> Points were distributed based on an applicants’ high school GPA, standardized test scores, relationship with alumni, and Michigan residency, among other things.<sup>114</sup> However, more importantly, an applicant was awarded twenty points if he or she was a member of an “underrepresented racial or ethnic minority group.”<sup>115</sup>

Ultimately, a majority of the Court held that the university’s admission policy was not narrowly tailored and was therefore unconstitutional.<sup>116</sup> Writing for the majority, Chief Justice Rehnquist stated that while race may be considered in admission policies, it cannot be a decisive factor.<sup>117</sup> Justice Rehnquist declared, “the University’s policy, which automatically distributes twenty points, or one-fifth of

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108. *Id.* (joining Chief Justice Rehnquist in his assertion that the “critical mass” goal is merely a quota). *Id.* at 380–81.

109. *Grutter*, 389 U.S. at 348 (Scalia, J., dissenting).

110. *Id.* (declaring that, “[u]nlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today’s *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.” Justice Scalia went on to discuss issues in future litigation.).

111. *Id.*

112. 539 U.S. 244, 251–52 (2003).

113. *Id.* at 253–56.

114. *Id.* at 255.

115. *Id.*

116. *Id.* at 275–76.

117. *Id.* at 270–71.

the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity."<sup>118</sup> The addition of twenty points to a minority student's file created a decisive factor that almost guaranteed admission for a minority student.<sup>119</sup> The Court believed that the case was the exact opposite of what Justice Powell had explained would be constitutional in *Bakke*.<sup>120</sup> Justice Rehnquist stated, "unlike Justice Powell's example, where the race of a 'particular black applicant' could be considered without being decisive, the [school's] automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant."<sup>121</sup>

Moreover, the Chief Justice stated that Powell's opinion "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application."<sup>122</sup> The fatal blow to the undergraduate admission policy in the *Gratz* case was the fact that the majority felt that it did not take into account a holistic view of the applicant; instead, as Chief Justice Rehnquist put it, the award of twenty points for minority status had "the effect of making 'the factor of race . . . decisive.'"<sup>123</sup> This lack of individualized consideration of each applicant worked to disadvantage applicants not from an underrepresented minority, which was unconstitutional.<sup>124</sup>

In a dissent by Justice Souter, which was joined by Justice Ginsburg, it was argued that the undergraduate school's admission policy should be constitutional when compared to that of the Law School's policy.<sup>125</sup> Justice Souter stated that the undergraduate program was "closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record."<sup>126</sup> Justice Souter went on to compare the undergraduate

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118. *Gratz*, 539 U.S. at 270.

119. *Id.* at 271–72.

120. *Id.* at 270–72.

121. *Id.* at 272 (quoting *Bakke*, 438 U.S. at 317) (internal citation omitted) (holding that the University's admission policy did not provide individuals consideration).

122. *Id.* at 271 (citation omitted) (holding that Justice Powell's *Bakke* decision "emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education").

123. *Id.* at 272.

124. *Gratz*, 539 U.S. at 275–76.

125. *Id.* at 293 (Souter, J., dissenting).

126. *Id.* (stating that "[t]he record does not describe a system with a quota like the one struck down in *Bakke*, which insulate[d] all nonminority candidates from competition

program used by the University of Michigan with the set-aside program used in *Bakke*. Souter noted that in *Gratz* the program utilized allowed all applicants to compete for all places available and evaluated the applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, residence, alumni relationships, leadership, and socioeconomic disadvantage, among other things.<sup>127</sup> He stated that “[a] nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20-point bonus.”<sup>128</sup> To Justice Souter the award of the additional twenty points was not the equivalent of setting aside seats for minority students; instead, it was very similar (if not identical) to the “plus” factor identified in *Grutter*.<sup>129</sup> Justice Souter asserted, “[t]he college simply does by a numbered scale what the law school accomplishes in its ‘holistic review.’”<sup>130</sup> Justice Souter believed that simply adding a numerical value to the “plus” factor should not be fatal.

In a separate dissent, Justice Ginsburg reaffirmed the idea of affirmative action as a remedy for past racial discrimination. She stated,

[t]o avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.<sup>131</sup>

In applying these principles, the admission policy did not reserve seats on the basis of race, which would have caused harm to non-minority applicants.<sup>132</sup> Also, the policy did not limit the enrollment

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from certain seats.”). Justice Souter went on to explain that “[t]he *Bakke* plan ‘focused solely on ethnic diversity’ and effectively told nonminority applicants that ‘[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded a chance to compete with applicants from the preferred groups for the [set-aside] special admissions seats,’ as opposed to the plan in *Gratz* that lets all applicants compete for all seats). *Id.* (citing *Bakke*, 438 U.S. at 319).

127. *Id.* at 293–94.

128. *Id.*

129. *Id.* at 295.

130. *Gratz*, 539 U.S. at 295. (explaining that “Justice Powell’s ‘plus’ factors necessarily are assigned some values”).

131. *Id.* at 301–02 (Ginsburg, J., dissenting) (quoting *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1996)) (“Our jurisprudence ranks race a ‘suspect’ category, ‘not because [race] is inevitably an impressible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.’”). She went on to explain that “where race is considered ‘for the purpose of achieving equality,’ no automatic proscription is in order.” *Id.* at 301 (citation omitted).

132. *Id.* at 303.

of minority applicants, which would have caused harm to minority candidates.<sup>133</sup> Finally, non-minority students were not affected by being excluded from seats, which means there was no undue burden imposed upon them.<sup>134</sup> To Justice Ginsburg, this made the policy constitutional.<sup>135</sup>

Both Justice Souter and Ginsburg seemed to appreciate the fully disclosed affirmative action program used by the University of Michigan. Justice Souter compared the program with the percentage requirements used in some states at the time by stating that those systems “are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without directly saying what they are doing and why they are doing it. . . . Equal protection cannot become an exercise in which the winners are the ones who hide the ball.”<sup>136</sup> Justice Ginsburg also warned of clandestine affirmative action programs. Justice Ginsburg stated, “Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”<sup>137</sup> She warned that “[o]ne can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage.”<sup>138</sup>

The *Grutter* and *Gratz* cases provided the landscape with some (as much as possible) clarity on affirmative action programs in college and universities’ admission programs. We now know that diversity is officially a compelling interest, which will pass the strict scrutiny level of review. Race can be used as a “plus” factor in an applicant’s file. While race may be used in admission policies as one factor among many, it still may not be a decisive factor. Finally, the Court favors a holistic review of individual applicants and will strike down an automatic award of a certain number of points to an applicant who is a member of a particular racial group. However, the Court’s opinion seems to indicate that the notion of penalizing candor where affirmative action programs are concerned still remains. Particularly interesting is the idea that “[y]ou can do whatever you like in preferring racial minorities, so long as you do not say so” still seems to

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133. *Id.*

134. *Id.*

135. *Id.* at 302–03.

136. *Gratz*, 539 U.S. at 298.

137. *Id.* at 305.

138. *Id.* at 304.

remain a part of the precedent.<sup>139</sup> Finally, it seems that the Court gives great deference to procedures using race, as long as those procedures do not mention how race is used. In *Grutter*, the exact way race was used in the admission process was unknown, and the Court gave deference to the school's procedures. While in *Bakke* and *Gratz*, the mention of a set-aside or extra points awarded because of race was granted no deference.

#### 4. Fisher v. University of Texas

Race-conscious student admissions in colleges and universities would stay off the Court's radar until 10 years later, in 2013, when the Court decided to hear *Fisher v. University of Texas*.<sup>140</sup> The *Fisher* case was created in the wake of *Hopwood v. Texas*, which was overturned by *Grutter*.<sup>141</sup> Before *Hopwood*, the University of Texas at Austin (U.T. Austin) used two different factors to determine admissions: first, a student's Academic Index (AI) that included the student's academic achievements and test scores; second, the applicant's race.<sup>142</sup> This resulted in an entering class that was 4.1% African American and 14.5% Hispanic.<sup>143</sup> However, in *Hopwood*, the Fifth Circuit held that race-conscious admission policies were unconstitutional.<sup>144</sup> After *Hopwood*, the U.T. Austin stopped using race and instead relied on a Personal Achievement Index (PAI), which considered various factors including work experience, awards, community service, and leadership skills.<sup>145</sup> Under the last year of this plan, U.T. Austin had an entering class that was 4.5% African American and 16.9% Hispanic.<sup>146</sup> In response to *Hopwood*, the Texas Legislature created the Texas Top Ten Percent Plan (the "Plan"), which required that the top ten percent of students graduating from each public high school be guaranteed admission to any public state college, including the University of Texas.<sup>147</sup> After the legislature enacted the Plan, U.T. Austin began using the Plan.

However, in 2003, the University of Texas Board of Regents authorized the institutions within the University of Texas system

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139. David J. Garrow, *The Evolution of Affirmative Action and the Necessity of Truly Individualized Admissions Decisions*, 34 J.C. & U.L. 1, 12 (2007) (quoting JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 484 (1994)).

140. 133 S. Ct. 2411 (2013).

141. *Id.* at 2416 (stating that *Grutter* upheld the use of race as one of many "plus factors" in an admissions program).

142. *Id.* at 2415.

143. *Id.* at 2416.

144. *Id.* at 2415; see also *Hopwood v. Texas*, 78 F.3d 932, 962 (1996).

145. *Fisher*, 133 S. Ct. at 2415–16.

146. *Id.* at 2416.

147. TEX. EDUC. CODE ANN. § 51.803 (1997).

to examine “whether to consider an applicant’s race and ethnicity” in admissions “in accordance with the standards enunciated in *Grutter*.”<sup>148</sup> U.T. Austin employed two studies considering the minority enrollment at U.T. Austin. First, minority representation was studied in undergraduate classes containing between five to twenty-four students.<sup>149</sup> The study showed that ninety percent of smaller classes in the Fall of 2002 had either one or zero African-American students, forty-six percent had one or zero Asian-American students, and forty-three percent had one or zero Hispanic students.<sup>150</sup> A more focused round of study excluded the smallest of classes, only focusing on classes with ten to twenty-four students; this study found that eighty-nine percent of those classes had either one or zero African-American students, forty-one had one or zero Asian-American students, and thirty-seven percent had either one or zero Hispanic students.<sup>151</sup> A second study surveyed students and asked their impressions on diversity on the campus.<sup>152</sup> Minority students reported feeling isolated,<sup>153</sup> and a majority of the student body reported that “there was ‘insufficient minority representation’ in classrooms for ‘the full benefits of diversity to occur.’”<sup>154</sup> U.T. Austin incorporated these findings into a June 2004 internal document entitled *The Proposal to Consider Race and Ethnicity in Admissions* (the “Proposal”).<sup>155</sup> The Proposal explained that U.T. Austin had not reached the “critical mass” of minority students needed to benefit from student diversity.<sup>156</sup> The Proposal went on to recommend that the consideration of race be used as one additional factor within the PAI score, to remedy the lack of a “critical mass.”<sup>157</sup> In 2004, U.T. Austin adopted a policy to include race as one of the many factors considered in admissions.<sup>158</sup> Race is not assigned a specific numerical value, but race was a significant factor.<sup>159</sup>

After the reintroduction of race, U.T. Austin enrollment of African-American students doubled from 165 to 335 students; Hispanic

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148. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 225 (5th Cir. 2011) (citing to the Minutes of the Board of Regents of the University of Texas at Austin, Meeting No. 969, August 6–7, 2003).

149. *Fisher*, 133 S. Ct. at 2416.

150. *Fisher*, 631 F.3d at 225.

151. *Id.*

152. *Id.*

153. *Id.* (discussing that single minority students were thought to be just as troubling as classes with zero students of that minority because a single minority student is apt to feel isolated or like a spokesperson for his or her race).

154. *Id.*

155. *Fisher*, 133 S.Ct. at 2416.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

students' enrollment increased from 762 students to 1,228 students; and Asian-American students' enrollment increased from 1,034 to 1,126.<sup>160</sup> By contrast in 2004, the last year without the use of race in the PAI score, there were only 275 African-American students and 1,024 Hispanic students.<sup>161</sup>

Abigail Fisher applied for admission to the University in 2008 and was rejected.<sup>162</sup> She brought suit to challenge the University's use of race in the admission process as a violation of the Equal Protection Clause.<sup>163</sup> The parties filed cross motions for summary judgment.<sup>164</sup> The District Court granted the University's motion of summary judgment stating that there was no genuine issue of material fact, and that the University was entitled to judgment as a matter of law because its decision to consider race in the admissions process was supported by a compelling interest in diversity and the use of race was narrowly tailored.<sup>165</sup> The district court relied heavily on the fact that the University's admission plan resembled the University of Michigan plan that the Court upheld in *Grutter*; stating, "the Court has difficulty imagining an admissions policy that could more closely resemble the Michigan Law School's admissions policy upheld and approved by the Supreme Court in *Grutter*."<sup>166</sup> Ms. Fisher appealed.<sup>167</sup>

#### *a. The Fifth Circuit Opinion*

The Fifth Circuit Court of Appeals affirmed the district court decision.<sup>168</sup> Justice Higginbotham, writing for the unanimous court, held that the University's use of race was constitutional because it was supported by a compelling interest in achieving student diversity, that narrow tailoring did not require the University to exhaust the Top Ten Percent Law, and that the University had not reached or surpassed a critical mass of underrepresented minority students.<sup>169</sup> The plaintiffs first argued that *Grutter* does not extend deference to a "university's decision to implement a race-conscious admissions policy," whether the school had "attained a critical mass of minority students," or whether "race-conscious efforts were necessary" to achieve the benefits that derived from a diverse student

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160. *Fisher*, 631 F.3d at 226.

161. *Id.*

162. *Fisher*, 133 S.Ct. at 2413.

163. *Id.*

164. *Id.*

165. *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587, 613 (W.D. Tex. 2009).

166. *Id.* at 612.

167. *Fisher*, 631 F.3d at 213.

168. *Id.* at 247.

169. *See id.*

body.<sup>170</sup> However, the court found that proposition belied the holding in *Grutter*, instead finding that “the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University’s . . . expert academic judgment.”<sup>171</sup>

Next, the plaintiffs challenged the University’s need to resort to a race-conscious admissions policy; arguing: (1) the University attempted to achieve “racial balancing”; (2) the University did not give adequate consideration to “race-neutral alternatives like the Top Ten Percent Law; and (3) the University had already surpassed a “critical mass.”<sup>172</sup>

In addressing racial balancing, the court began by explaining that the University’s system was modeled after the system approved in *Grutter*, and that the University “never established a specific number, percentage, or range of minority enrollment that would constitute ‘critical mass,’ nor does it award any fixed number of points to minority students in a way that impermissibly values race for its own sake.”<sup>173</sup> The plaintiffs argued that the University’s program amounted to racial balancing because it “evinces a special concern for demographically underrepresented groups, while neglecting the diverse contributions of others.”<sup>174</sup> However, the court held that this was contrary to the evidence because race could “enhance the [PAI] score of a student from any racial background, including whites and Asian-Americans.”<sup>175</sup> Furthermore, the court held that even though the University made reference to state population data to justify the adoption of the race-conscious admissions measures, *Bakke* and *Grutter* recognized that “there is of course ‘some relationship between numbers and achieving the benefits to be derived from a diverse student body.’”<sup>176</sup> The court held that the University had reached the conclusion that it would benefit from a critical mass of underrepresented minorities and that references to the state demographics was necessary to determine which backgrounds were underrepresented.<sup>177</sup>

Next, the plaintiffs contended that the Top Ten Percent Law was “a facially race-neutral alternative that would allow [the University] to obtain a critical mass of minority enrollment without resorting to race-conscious admissions.”<sup>178</sup> The court responded to this argument

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170. *Id.* at 232.

171. *Id.*

172. *Id.* at 234.

173. *Fisher*, 631 F.3d at 235.

174. *Id.* at 235–36.

175. *Id.* at 236.

176. *Id.*

177. *Id.* at 237.

178. *Id.* at 239.

by finding, as the Court did in *Grutter*, that percentage plans were not “a workable alternative—at least in a constitutionally significant sense—because ‘they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is . . . diverse along all the qualities valued by the university.’”<sup>179</sup> The court went on to explain that even though the Top Ten Percent Law did increase minority student enrollment, it did not produce the educational benefits that the University sought to accomplish.<sup>180</sup>

Finally, the plaintiff argued that the University’s “decision to reintroduce race-conscious admissions was unconstitutional because minority enrollment already met or exceeded ‘critical mass.’”<sup>181</sup> The plaintiff posited the argument on raw percentages of minorities enrolled, arguing that if 13.5 to 20.1% minority enrollment was sufficient diversity in *Grutter*, the 21.4% enrollment the University had obtained before the reintroduction of race was sufficient for critical mass.<sup>182</sup> The court held that this reasoning was flawed because “looking to aggregate minority enrollment . . . lumps together distinct minority groups from different backgrounds who may bring various unique contributions to the University environment.”<sup>183</sup> The court held that “[a]lthough the aggregate number of underrepresented minorities may be large, the enrollment statistics for individual groups when [the University] decided to reintroduce race . . . [did] not indicate critical mass was achieved.”<sup>184</sup> The court also recognized that the University had “given appropriate consideration to whether aggregate minority enrollment [had] transl[ate]d into adequate diversity in the classroom.”<sup>185</sup>

Justice Garza wrote a concurring opinion that painted the *Grutter* decision as a detour from the principle of strict scrutiny, which the court had to unfortunately faithfully apply.<sup>186</sup> In his concurrence—which was reminiscent of Justice Kennedy’s dissent in *Grutter*—Justice Garza began by revisiting the principles of strict scrutiny.<sup>187</sup> In particular, he concentrated on the Fifth Circuit’s deference in *Grutter* to the university administrators’ judgment on how to best achieve racial diversity, and the Supreme Court’s divergence from

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179. *Fisher*, 631 F.3d at 239.

180. *Id.* at 240–41 (explaining that minority students were still clustered into certain programs limiting the diverse interactions in the classroom setting).

181. *Id.* at 242–43.

182. *Id.* at 243.

183. *Id.* at 245.

184. *Id.*

185. *Fisher*, 631 F.3d at 245.

186. *Id.* at 247 (Garza, J., concurring).

187. *Id.*

the narrow tailoring requirement.<sup>188</sup> Justice Garza argued that “the deference called for in *Grutter* seems to allow universities, rather than the courts, to determine when the use of racial preferences is no longer compelling.”<sup>189</sup> Furthermore, Justice Garza argued that under the new narrow tailoring requirement articulated by the Court in *Grutter*, only serious, good faith consideration of workable race-neutral alternatives are required; and that so long as universities have given “serious, good faith consideration” to race-neutral means, “universities are no longer required to use the *most effective* race-neutral means.”<sup>190</sup> Justice Garza also took offense to the Supreme Court’s conclusion that student body diversity was a compelling interest under strict scrutiny.<sup>191</sup>

*b. The U.S. Supreme Court Decision*

Following the circuit court’s decision, the Supreme Court granted the plaintiff’s writ of certiorari in 2012 to determine whether the lower courts’ rulings were consistent with the Supreme Court’s decision interpreting the Equal Protection Clause of the Fourteenth Amendment.<sup>192</sup> In a 7–1 decision written by Justice Kennedy, Justice Kagan took no part in the opinion, the Supreme Court reached the conclusion that the lower courts had inappropriately applied the strict scrutiny standard of review.<sup>193</sup>

In writing for the majority, Justice Kennedy began by explaining the Court’s relevant precedent on race-conscious admission programs.<sup>194</sup> He first addressed Justice Powell’s opinion in *Bakke*. Justice Kennedy reiterated that in *Bakke*, the Court reached the conclusion that all racial classification, including benign classifications, are subject to strict scrutiny, requiring a compelling governmental interest and narrow tailoring to serve that compelling interest.<sup>195</sup> Justice Kennedy went on to explain that “Justice Powell identified one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body.”<sup>196</sup> However, Justice Kennedy made sure to explain that “[i]t is not an interest in simple ethnic diversity . . . . The diversity that furthers a compelling state interest encompasses a far broader array

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188. *Id.* at 249.

189. *Id.*

190. *Id.* at 250–51.

191. *Fisher*, 613 F.3d at 255–56 (Garza, J., concurring).

192. *See Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013).

193. *Id.* at 2421–22.

194. *Id.* at 2415–17.

195. *Id.* at 2417.

196. *Id.*

of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>197</sup>

Next Justice Kennedy moved on to the *Grutter* and *Gratz* decisions. He began by explaining that *Grutter* and *Gratz* endorsed the opinion in *Bakke* by affirming Justice Powell’s conclusion that obtaining the educational benefits of a diverse student body “is a compelling state interest that can justify the use of race in university admissions.”<sup>198</sup> However, he qualified this principle by stating that “[r]ace may not be considered unless the admissions process can withstand strict scrutiny.”<sup>199</sup> He further explained that in *Gratz*, the Court noted that “[n]othing in Justice Powell’s opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.”<sup>200</sup> Justice Kennedy also pointed out that the *Grutter* opinion holds that “[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system, but instead must ‘remain 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.’”<sup>201</sup> Justice Kennedy ended by reiterating the flawed reasoning in *Grutter* by stating, “[a]ccording to *Grutter*, a university’s ‘educational judgment that such diversity is essential to its educational mission is one to which we defer.’”<sup>202</sup>

Justice Kennedy began his discussion of the flaw in the District Court and the Fifth Circuit Court of Appeals’ holding by summarizing the relevant law. He stated that once the University states that it is pursuing the compelling interest of student diversity for the purpose of strict scrutiny, “there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation.”<sup>203</sup> He reiterated that this requires that “[t]he University must prove that the means chosen . . . to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.”<sup>204</sup> He also pointed out that according to *Bakke*, narrow tailoring requires “a reviewing court to verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity.”<sup>205</sup> He further stated, “[narrow tailoring] involves a careful judicial inquiry

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197. *Id.* at 2418 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978)).

198. *Fisher*, 133 S.Ct. at 2418.

199. *Id.*

200. *Id.* (citing *Gratz v. Bollinger*, 539 U.S. 244, 275).

201. *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 334).

202. *Id.* at 2419 (citing *Grutter*, 539 U.S. at 328).

203. *Id.* at 2419.

204. *Fisher*, 133 S. Ct. at 2420.

205. *Id.* at 2414.

into whether a university could achieve sufficient diversity without using racial classification.”<sup>206</sup> Citing *Grutter*, he explained that “[a]lthough [n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative’, strict scrutiny does require a court to examine with care, and not to defer to, a university’s ‘serious, good faith consideration of workable race-neutral alternatives.’”<sup>207</sup> Essentially, this meant that “[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>208</sup> If race-neutral means could accomplish the interest in student diversity about as well, then the university could not resort to consideration of race.<sup>209</sup>

Justice Kennedy went on to demonstrate that the District Court and the Fifth Circuit Court of Appeals had not held the university to strict scrutiny.<sup>210</sup> Instead, he found that the Fifth Circuit “held petitioner could challenge only ‘whether [the University’s] decision to re-introduce race as a factor in admissions was made in good faith.’”<sup>211</sup> Furthermore, in considering a challenge to the good faith of the university, the Fifth Circuit “[presumed] the University acted in good faith and place[d] on petitioner the burden of rebutting that presumption.”<sup>212</sup> Justice Kennedy found that the Fifth Circuit’s decision to grant a degree of deference to the University in the narrow-tailoring requirement was at odds with the commands of strict scrutiny, which requires the University demonstrate that available, workable race-neutral alternatives did not suffice before resorting to race.<sup>213</sup> Justice Kennedy stated, “*Grutter* did not hold that good faith would forgive an impermissible consideration of race.”<sup>214</sup> He went on to explain that because the District Court and the Fifth Circuit had deferred to the University’s good faith in its use of racial classification to affirm the grant of summary judgment, it had not applied strict scrutiny.<sup>215</sup> The decision of the Fifth Circuit Court of Appeals was vacated and the case was remanded to determine whether the University’s use of race was narrowly tailored.<sup>216</sup>

A key point in Justice Kennedy’s majority opinion is that “[t]he parties asked the Court to review whether the judgment below was

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206. *Id.* at 2420.

207. *Id.* (quoting *Grutter*, 539 U.S. at 339–40).

208. *Id.* at 2414.

209. *Id.* at 2420 (citing *Wygant*, 476 U.S. 267, 280 n. 6).

210. *Fisher*, 133 S. Ct. at 2414.

211. *Id.*

212. *Id.* at 2420.

213. *Id.*

214. *Id.* at 2421.

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

216. *Id.*

consistent with ‘this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter*.’”<sup>217</sup> Justice Kennedy pointed out at least two times in the opinion that the parties did not ask the Court to revisit its approval of diversity as a compelling interest for strict scrutiny in *Grutter*.<sup>218</sup> This signaled that the Court was not prepared to overrule its holding in *Grutter*. However, this was indeed a point of contention.

Justice Scalia reiterated in his concurrence his view that “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception”; however, Justice Scalia did agree that the “petitioner in this case did not ask [the Court] to overrule *Grutter*’s holding that a ‘compelling interest’ in the educational benefits of diversity can justify racial preferences in university admissions.”<sup>219</sup> Justice Thomas explained that while he agreed that the lower courts did not apply strict scrutiny, he would “overrule [*Grutter*], and hold that a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”<sup>220</sup> He first posited this argument by explaining how *Grutter* was a “radical” departure from the Court’s strict scrutiny precedent.<sup>221</sup> He explained that in his view the Court has only allowed racial classifications to protect national security and to remedy past discrimination citing *Korematsu v. United States* and *Richmond v. J.A. Croson Co.*<sup>222</sup> He then compared the University’s argument that it had a compelling interest in the educational benefits of diversity to the alleged educational benefits of segregation, which were held to be insufficient to justify racial discrimination.<sup>223</sup> He further explained that the University’s consideration of race injured white and Asian applicants, but more importantly it also injured the Black and Hispanic students admitted to the university.<sup>224</sup> In his view, these students were ill-prepared when compared to their white and Asian counterparts.<sup>225</sup> He ended with reiterating that race-conscious admissions “stamp[s] [blacks and Hispanics] with a badge of inferiority.”<sup>226</sup>

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217. *Id.* at 2415.

218. *Id.* at 2419 (explaining that “[t]here is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity[,] [b]ut the parties here do not ask the Court to revisit that aspect of *Grutter*’s holding”) (citations omitted).

219. *Id.* at 2422 (Scalia, J., concurring).

220. *Id.* (Thomas, J., concurring).

221. *Fisher*, 133 S. Ct. at 2422–23.

222. *Id.*

223. *Id.* at 2424–25.

224. *Id.* at 2431.

225. *Id.*

226. *Id.* at 2432.

Justice Ginsburg was the only dissenting Justice in this case. She agreed that the Court was right to not reconsider *Grutter's* compelling interest in diversity.<sup>227</sup> She took offense to the petitioner's argument that Texas' Top Ten Percent Law was a race-neutral alternative.<sup>228</sup> She explained that the Top Ten Percent Law was not race-neutral because it "was adopted with racially segregated neighborhoods and schools front and center stage."<sup>229</sup> She also took offense to the petitioner's argument that race-blind holistic review was an adequate race-neutral alternative.<sup>230</sup> She once again cautioned that "if universities cannot explicitly include race as a factor, many may 'resort to camouflage' to 'maintain their minority enrollment.'"<sup>231</sup> She dissented because she would not have vacated the Fifth Circuit's judgment and would not have remanded the case.<sup>232</sup> Justice Ginsburg concluded that the Fifth Circuit had adequately applied the strict scrutiny test in accord with the *Bakke* and *Grutter* opinions, and that the University's admission policy had met those requirements.<sup>233</sup> The University was seeking the educational benefits that flowed from student diversity (which qualifies as a compelling interest).<sup>234</sup> Furthermore, she explained that the University's use of race was narrowly tailored because it did not make race a determinative factor; it gave good faith consideration of the Top Ten Percent Law when it conducted the two 2003 studies that resulted in the conclusion that the Top Ten Percent law was insufficient to produce the necessary diversity.<sup>235</sup>

*c. Post-Fisher*

The *Fisher* opinion represents a well negotiated and crafted decision. The opinion brought both conservative Justices and liberal Justices together to decide a central point: that strict scrutiny was not correctly applied in the lower courts.<sup>236</sup> Before the Court's ruling, *Fisher* was believed to be the dreaded end of affirmative action in college and university admissions programs. Many feared that the Court would overrule its holding in *Grutter* and find that the use of

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227. *Fisher*, 133 S. Ct. at 2434 (Ginsburg, J., dissenting).

228. *Id.* at 2433.

229. *Id.*

230. *Id.*

231. *Id.* at 2433.

232. *Id.*

233. *Fisher*, 133 S. Ct. at 2434 (Ginsburg, J., dissenting).

234. *Id.*

235. *Id.*

236. *Id.* at 2414 (demonstrating that the majority opinion included conservative justices such as Thomas, Scalia, Alito, and Roberts).

race-conscious admissions programs was unconstitutional.<sup>237</sup> Even though at least two concurring Justices indicated that they were prepared to overrule *Grutter*,<sup>238</sup> the Court's ruling left a glimmer of hope for universities and colleges that used affirmative action programs in their admissions process. In fact, both proponents and opponents of affirmative action programs were claiming victory.<sup>239</sup> Proponents lived to fight another day while opponents believe that the hurdle colleges and universities must pass to use race has gotten higher.<sup>240</sup> Essentially, the Court held that strict scrutiny is in fact strict scrutiny and all requirements—even the necessary requirement—must be met.<sup>241</sup> As the case heads back to the lower courts, everyone is still left in the dark about the impact that *Fisher* will have on the use of race in college and university admissions.

## II. THE AFFIRMATIVE ACTION DEBATE AND PUBLIC OPINION

### A. *Justification for Affirmative Action*

Since its birth in the 1960s, affirmative action has been a divisive and intensely debated subject. Affirmative action programs have never had overwhelming support; there is even a segment of opposition among those whom these programs seek to benefit.<sup>242</sup> While affirmative action programs have been diluted over time, they still remain a part of college and university admission policies.<sup>243</sup>

Supporters of affirmative action programs in college and university admissions put forth several rationales. Most of these rationales are related to and can be summed up with the quote from President Lyndon B. Johnson: “[y]ou do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others’ and still justly believe that you have been completely fair.”<sup>244</sup> First, supporters justify affirmative action as a means for remedying

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237. See Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, October 11, 2012, at A1.

238. *Id.*

239. John Schwartz & Richard Pérez-Pena, *Lacking Definitive Ruling, Both Sides Claim Victory*, N.Y. TIMES, June 25, 2013, at A12.

240. *Id.*

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

242. Brown, *supra* note 18 (stating that 55% of Americans find that affirmative action should be abolished. Twenty-six percent of black voters oppose affirmative action).

243. See Mary Beth Marklein, *Colleges Can Still Use Race for Admissions—But Carefully*, USA TODAY (June 24, 2013), <http://www.usatoday.com/story/news/nation/2013/06/24/affirmative-action-universities-admissions-supreme-court/2452703/>, archived at <http://perma.cc/V3RL-VDWM>.

244. Johnson, *supra* note 28.

past discrimination and persecution for groups that have been oppressed or victimized by a dominant majority.<sup>245</sup> As Professor Peter Schuck put it, “[t]he restitution rationale applies with special force, of course, to blacks whose ancestors were brought to the United States in chains and suffered unspeakable degradation over many generations, including the era of Jim Crow that ended as recently as the 1950s and 1960s.”<sup>246</sup> This remedial, or restitution, rationale is also justified because legal institutions as well as the government itself have been participants in the discrimination and the subordination of blacks and women.<sup>247</sup>

Supporters also claim that affirmative action is necessary to remedy the current effects of past discrimination and to create role models or mentors within disadvantaged groups to show youth that overcoming disadvantages and adversity is possible.<sup>248</sup> However, in *Wygant*, the Court explicitly held that curing societal discrimination and providing role models for minorities are not sufficiently compelling justifications to pass the strict scrutiny standard of review.<sup>249</sup>

Next, supporters justify affirmative action by stating that affirmative action programs are needed in colleges and universities to correct the inherent bias in admission programs that rely heavily upon standardized test, which work against minorities.<sup>250</sup> As Professor Charles Lawrence asserted, these standardized test scores “[do] a better job predicting the socio-economic status of the test taker’s parents than predicting college performance.”<sup>251</sup> Professor Schuck criticizes the core of this argument as the redefining of merit to include other components, which are not considered such as wisdom, originality, humor, empathy, common sense, or independence, to name a few, instead of the standard scholastic merit.<sup>252</sup>

Finally, affirmative action supporters find solace in Justice Powell’s support of affirmative action programs to promote classroom diversity in higher education. Justice Powell stated, “[t]he atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.”<sup>253</sup> Justice Powell went on to state, “a diverse student

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245. Schuck, *supra* note 4, at 28.

246. *Id.* at 22.

247. *Id.* at 23.

248. *Id.* at 28–32 (citing WILLIAM G. BOWEN & DEREK BOK, *SHAPE OF THE RIVER: THE LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998)).

249. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

250. Lawrence, *supra* note 73, at 945.

251. *Id.*

252. Schuck, *supra* note 4, at 24–25.

253. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (internal quotation marks and citations omitted).

body . . . clearly is a constitutionally permissible goal for an institution of higher education.”<sup>254</sup> Supporters of affirmative action have clung to the “diversity rationale” in supporting affirmative action programs in higher educations. As Michael Selmi states, “diversity has quite clearly become the most heralded of all justifications for affirmative action.”<sup>255</sup> Furthermore, there is the potential for increased acceptance of affirmative action under the “diversity rationale” as Professor Schuck stated, because “depending on how diversity is defined, preferences for middle-class minorities might fall within the rationale, possibly facilitating public acceptance of the policy.”<sup>256</sup>

### *B. Critics of Affirmative Action*

Affirmative action programs have several critics that point out the flaws in the justifications for affirmative action programs. First, critics point out what they believe to be flawed reasoning in using affirmative action programs to remedy the past discrimination because current generations are not the victims of past wrongs.<sup>257</sup> Some of these opponents to affirmative action assert that “affirmative action programs cannot rectify past wrongs because their beneficiaries are not the victims . . . preferences can only commit new wrongs because the cost-bearers are innocent.”<sup>258</sup> However, this argument is also flawed considering that members of the present generation are the victims of past discrimination that has been perpetuated in society. Moreover, opponents assert that American history is full of examples of wrongdoing; “[w]ere we to take the project of restitution seriously, we could not stop with slavery. . . .”<sup>259</sup> The opponents also assert that “the restitution rationale could at most justify affirmative action for the descendants of American slaves and perhaps Native Americans.”<sup>260</sup>

Next, critics attack affirmative action programs as a way of defeating the lack of expanding the term of “merit” in college and university admissions.<sup>261</sup> First, some believe that “[u]niversities . . . are in the best position to define and measure merit in whatever terms they

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254. *Id.* at 311–12.

255. Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 729 (1999).

256. Schuck, *supra* note 4, at 35–36.

257. *Id.* at 23.

258. *Id.*

259. *Id.*

260. *Id.* at 23–24. (“[Restitution] could never justify extending protection to immigrants, linguistic minorities like Hispanics, or geographic origin groups like Asians and Pacific Islanders. Yet tens of millions of immigrants become automatically eligible for preferences the moment they set foot in the United States, competing for preferences with blacks whose families have been in America since ante-bellum times.”).

261. *Id.* at 26.

deem most relevant to their own institutions because they must bear most if not all of any efficiency losses and other costs arising from any errors in definition or measurement.”<sup>262</sup> Moreover, many opponents agree with Justice Thomas, when he stated that under affirmative action programs:

When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.<sup>263</sup>

Justice Thomas believed that affirmative action programs “stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”<sup>264</sup> Critics have pounced on these words to argue that affirmative action programs create a stigma on their beneficiaries and a sense of entitlement that actually works to cripple them.<sup>265</sup>

Furthermore, the “diversity rationale” as a justification for affirmative action is also problematic. In particular, critics point to the fact that diversity does not have a clear meaning and, contrary to what supporters of affirmative action claim, diversity is not just racial diversity.<sup>266</sup> Affirmative action programs in colleges and universities do not consider the idea that “other attributes are also predictive of one’s experiences, outlooks, and ideas.”<sup>267</sup> Religion, political affiliation, and socio-economic status also influence perspectives.<sup>268</sup> Critics also point to the fact that it is difficult, if not impossible, to determine when diversity has been met. Most colleges and universities’ administrators come up with an acceptable number by “simply count[ing] the number of group members in the relevant community (or their percentage of the community total) and demand proportional representation, at least as a default but often, in effect, as the final answer.”<sup>269</sup>

Additionally, some critics ask, “how [do] favored groups in fact confer diversity-value on a community” and “what diversity value does a favored group actually confer?”<sup>270</sup> Opponents of affirmative action

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262. Schuck, *supra* note 4, at 26.

263. *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003).

264. *Id.*

265. Schuck, *supra* note 4, at 27–28.

266. *See id.* at 37–39.

267. *Id.* at 38.

268. *Id.*

269. *Id.* at 39.

270. *Id.* at 40–41.

programs argue that a group can only create diversity value if the group possesses certain desired qualities and if those qualities are inherent in all members of the group, although, generally, no one “is so stupid as to believe that all (or even most) members of any given group necessarily have similar opinions on a variety of important issues.”<sup>271</sup> Professor Schuck asserts that proponents of affirmative action in colleges and universities assume “that black students bring to campus histories and viewpoints that are unique to and universal among black students even though those histories and viewpoints are not racially or genetically hard-wired into them.”<sup>272</sup> The diversity rationale can be said to treat African Americans as a monolithic collection of individuals with the same beliefs and ideas. Whether affirmative action is justified and whether there is actually a “diversity rationale” is still the subject of much debate.

### C. Public Opinion on Affirmative Action

Affirmative Action still lives on despite mounting disapproval over the last five decades. The public opinion on affirmative action shows a steady decline with various nuances.<sup>273</sup> In the 1960s, when President Kennedy, and later, President Johnson, first began using affirmative action programs, very little opposition existed, except mostly by southern Democrats who wanted to prevent racial quotas.<sup>274</sup> In the 1980s, while there was indication that support of affirmative action was down, there was “strong support for civil rights and for special recruitment and training programs for minorities.”<sup>275</sup> The 1990s were also filled with both support and opposition among the American public.

In 2003, a poll conducted by the Pew Research Centers showed that Americans were conflicted, as the Supreme Court prepared to issue another ruling on race-conscious admission policies in the wake of the many uncertainties the *Bakke* case left unresolved.<sup>276</sup> In that 2003 poll, conducted April 30–May 4 among 1,201 adults nationwide, sixty-three said they favored “affirmative action programs designed

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271. Schuck, *supra* note 4, at 42 (citing Sanford Levinson, *Diversity*, 2 U. PA. CONST. L. 573, 577 (2000)).

272. *Id.*

273. See, e.g., Euel Elliott & Andrew I.E. Ewoh, *The Evolution of an Issue: The Rise and Decline of Affirmative Action*, 17 POLY STUD. REV. 212, 221, 225, 230 (2000).

274. *Id.* at 214–15 (quoting DONALD ALTSCHILLER, INTRODUCTION OF AFFIRMATIVE ACTION 8 (Donald Altschiller ed., 1991)).

275. Schuck, *supra* note 4, at 50–51.

276. *Conflicted Views of Affirmative Action: Summary of Findings*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS (May 14, 2003), available at <http://www.people-press.org/2003/05/14/conflicted-views-of-affirmative-action/>, archived at <http://perma.cc/PDL9-8ESE> (discussing results of poll before Supreme Court’s ruling in *Grutter* and *Gratz*).

to help blacks, women, and other minorities get better jobs and education.”<sup>277</sup> The poll also revealed, however, that the devil was in the details. As the poll reported, there was “less support (57%) when the question specifically mention[ed] giving ‘special preference’ to women and minorities.”<sup>278</sup> The poll also found that the idea of affirmative action as racial preferences mattered more for white Americans than for nonwhite Americans.<sup>279</sup> Particularly concerning college admissions, sixty percent thought that affirmative action in college admissions was a good idea; however, less than a majority (forty-seven percent) said that the programs were fair.<sup>280</sup> More importantly, only sixteen percent of the public reported being directly affected by affirmative action programs.<sup>281</sup>

Two years later in 2005, the Gallup Annual Minority Rights and Relations Poll showed that the American public was deeply divided on the issue of affirmative action. The poll found that fifty percent of Americans favored affirmative action programs for racial minorities, while forty-two percent were opposed.<sup>282</sup> The decrease in support was believed to have stemmed from the fact that fifty-nine percent of white Americans believed that African Americans in America have equal job opportunities with white Americans; however, only twenty-three percent of African Americans agreed with this belief.<sup>283</sup> The poll went on to acknowledge that support for affirmative action varies depending on how the question is worded.<sup>284</sup>

Four years later in 2009, in the wake of Justice Sonia Sotomayer’s ruling in the *Ricci* case,<sup>285</sup> a Quinnipiac University Poll found that a majority (55%) of Americans believed that affirmative action should be abolished.<sup>286</sup> One noteworthy portion of the poll indicated that “more than 70% of voters say diversity is not a good enough reason

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277. *Id.*

278. *Id.*

279. *Id.* (showing 86% of nonwhites favored affirmative action in general, and 82% favored racial preferences; among whites, 58% supported the general concept, but only 49% supported preferences for minorities).

280. *Id.*

281. *Id.* (indicating that, overall, 11% of respondents reported they’ve been hurt and 4% reported they have been helped. Also, among blacks, 14% reported that they have been helped, while 5% reported they’ve been hurt. Among other non-whites, 11% reported being helped and 13% reported being hurt).

282. Jeffrey M. Jones, *Race, Ideology, and Support for Affirmative Action: Personal Politics Has Little to do with Blacks’ Support*, GALLUP (Aug. 23, 2005), available at <http://gallup.com/poll/1809/race-ideology-support-affirmative-action.aspx>, archived at <http://perma.cc/59U3-7YUL>.

283. *Id.*

284. *Id.*

285. *Ricci v. Destefano*, 530 F.3d 88 (2d Cir. 2008).

286. Brown, *supra* note 18.

to give minorities preferential treatment.”<sup>287</sup> Peter A. Brown, the polling institute’s assistant director, said, “[t]he American public seems to have gotten to the point where it believes the statute of limitation has run out on the wrongs that led to affirmative action, and it wants these programs ended.”<sup>288</sup>

Most notable was the poll’s results concerning affirmative action for gays and lesbians. When asked, “[i]n order to increase diversity, do you support or oppose affirmative action programs that give preferences to gays and lesbians in hiring, promotion and college admissions,” an overwhelming sixty-five percent of American voters opposed the extension of affirmative action to aid gays and lesbians.<sup>289</sup> This percentage was consistent among all gender, political, racial, and religious groups, other than African Americans, who supported this proposition by fifty-four percent.<sup>290</sup>

Currently, polls show a narrow margin of Americans support abolishing affirmative action, while other polls show that a very narrow majority of Americans support some form of affirmative action.<sup>291</sup> Some commentators attribute this change to a 2011 report by Professor Michael Norton and Samuel Sommers indicating that white Americans have come to see anti-white bias as a bigger societal problem than anti-black bias.<sup>292</sup> Generally speaking, polls should have little sway on the Supreme Court. However, when support for affirmative action was at its highest, the Court decided *Bakke*.<sup>293</sup> Once again in 2003, when support for affirmative action was high, the Court decided *Grutter*.<sup>294</sup> As the support for affirmative action declined in 2009 and beyond, the Court seemed readily prepared to place definite limits on the use of racial preferences.<sup>295</sup> Chief Justice Roberts even stated, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>296</sup> This shows that some members the Supreme Court are poised to end all race-conscious preferences of any type.

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287. *Id.*

288. Peter Schmidt, *Poll Finds Most Americans Oppose Affirmative Action when Defined as “Preferences”*, THE CHRON. OF HIGHER EDUC. (June 3, 2009), available at <http://chronicle.com/article/Poll-Finds-Most-Americans/47684/>, archived at <http://perma.cc/ZW9R-XFJP>.

289. Brown, *supra* note 18.

290. *Id.*

291. Adam Liptak, *Justices Take Up Race as a Factor in College Entry*, N.Y. TIMES, Feb. 22, 2012, at A1.

292. Norton & Sommers, *supra* note 11, at 215.

293. *Regents of Univ. of Cali. v. Bakke*, 438 U.S. 265, 265 (1979).

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

295. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

296. *Id.* at 748.

## III. LGBT CIVIL RIGHTS MOVEMENT IN AMERICA

A. *The Evolution of LGBT Civil Rights*

As gay men and lesbians continue to struggle for equality in America, with so many accomplishments in recent years, it is hard to remember a time when homosexuals were not visible. It was not very long ago that homosexual behavior was criminalized and men and women who identified themselves as homosexuals were stripped of their rights, in most instances by the courts and society.<sup>297</sup> While the origins of discrimination against homosexuals may go back as far as the 1800s (and possibly beyond), for the purpose of this note I begin in the 1990s.<sup>298</sup> It is important to note that before World War I there were several gay advocates and, what some term, the “homosexual underground” subculture, but with the end of the war, many of these individuals were censored and forced into invisibility because of “hostility towards ‘difference.’”<sup>299</sup>

The beginning of the 1990s opened with a rough start for the LGBT civil rights movement. After the *Bowers v. Hardwick* decision in 1986,<sup>300</sup> the stigma associated with being labeled homosexual remained and some states still had sodomy laws that criminalized homosexual activity.<sup>301</sup> Also, in 1992, Colorado took its opposition to homosexuals one step further when it became the first state to abolish civil rights protection for homosexuals by amending its constitution.<sup>302</sup> Amendment 2 sought to prevent Colorado (and any city or town within the state) from recognizing gays and lesbians as a protected class.<sup>303</sup> However, this amendment would later be found to be unconstitutional in 1996, by the Supreme Court in *Romer v. Evans*.<sup>304</sup> But there were more struggles for the LGBT community. In 1993, President Clinton signed into law a ban on homosexual activity in the military called

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297. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1556, 1564, 1575, 1587–89, 1595–96, 1631 (1993).

298. *Id.* at 1554.

299. *Id.* at 1554–58.

300. *Bowers v. Hardwick*, 478 U.S. 186 (1996).

301. See, e.g., ALA. CODE §§ 13A–6–60(2) (1975), 13A–6–65(a)(3) (1977); FLA. STAT. ANN. § 800.02 (West 1993); IDAHO CODE ANN. § 18-6605 (West 1972) (imposing a prison term of not less than five years); LA. REV. STAT. ANN. § 14:89 (1975) (imposing a prison term of not more than five years); MISS. CODE ANN. § 97-29-59 (West 1942) (imposing a prison term of not more than ten years); N.C. GEN. STAT. ANN. § 14-177 (West 1994); S.C. CODE ANN. § 16-15-120 (1962) (imposing a five-year prison term); UTAH CODE ANN. § 76-5-403(1) (West 1953); VA. CODE ANN. § 18.2-361(A) (1993).

302. See *Romer v. Evans*, 517 U.S. 620, 637 (1996).

303. *Id.*

304. *Id.*

“Don’t Ask Don’t Tell,” which operated to dishonorably discharge openly gay and lesbian soldiers (if they were caught).<sup>305</sup> Some consider Don’t Ask Don’t Tell to be “the most detrimental federal program pertaining to homosexual rights.”<sup>306</sup> Don’t Ask Don’t Tell condoned the continued stigma associated with being homosexual by making it incompatible with “high standards of morale, good order and discipline . . . .”<sup>307</sup> This all culminated in a crushing blow called the Defense of Marriage Act (DOMA), which codified the federal definition of marriage as “a legal union between one man and one woman.”<sup>308</sup> This set the stage for many states to ban same-sex marriage.

Toward the end of the 1990s, the tide began to change in favor of LGBT civil rights. More states began to repeal their anti-sodomy laws.<sup>309</sup> In 1996 in *Romer v. Evans*, the Supreme Court ruled that Colorado’s Amendment 2, which placed a ban on recognizing gays and lesbians as a protected class, was unconstitutional.<sup>310</sup> Also, “[b]y 1999, over half of the Fortune 500 companies included sexual orientation in their workplace anti-discrimination policies, and anti-discrimination policies in universities had become virtually standard.”<sup>311</sup> One of the most significant events of 1999 was when the Supreme Court of Vermont held that the state had to offer the benefits and responsibilities of civil marriage to same sex couples in *Baker v. State*.<sup>312</sup> This provided a stepping stone for the events of the early 2000s.

The 2000s were filled with even more advances. According to a poll taken in 2003, fifty-four percent of American believed that homosexuality was an acceptable alternative lifestyle,<sup>313</sup> compared to thirty-four percent in 1982.<sup>314</sup> Sixty percent of Americans felt that homosexual relations between consenting adults should be legal,

305. 10 U.S.C. § 654 (1993).

306. Phong Duong, Comment, *A Survey of Gay Rights Culminating in Lawrence v. Texas*, 39 GONZ. L. REV. 539, 553 (2003–2004).

307. 10 U.S.C. § 654 (1989).

308. 1 U.S.C. § 7 (1996).

309. Duong, *supra* note 306, at 554–55 (“[B]y 2001 only nine states (Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina Utah, and Virginia) prohibited both same and opposite-sex sodomy.”).

310. *Romer*, 517 U.S. at 637.

311. Sharon E. Debbage Alexander, *Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON C.L. & C.R. 261, 271 (2002).

312. 744 A.2d 864, 888–89 (Vt. 1999).

313. Frank Newport, *Six out of 10 Americans Say Homosexual Relations Should be Recognized as Legal*, GALLUP (May 15, 2003), <http://www.gallup.com/poll/8413/six-americans-say-homosexual-relations-should-recognized-legal.aspx>, archived at <http://perma.cc/6Q2J-5LTN>.

314. Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 L. & SEXUALITY 119, 135–36 (2003).

compared to forty-three percent in 1977.<sup>315</sup> Furthermore, eighty-eight percent of Americans believed that homosexuals should have equal rights when it comes to job opportunities, compared to fifty-eight percent in 1977.<sup>316</sup> Most importantly, on June 26, 2003, the Supreme Court, in *Lawrence v. Texas*, overruled its previous holding in *Bowers* and held that the fundamental right to privacy did extend to consensual homosexual conduct between adults.<sup>317</sup> The *Lawrence* decision effectively put an end to sodomy laws in America.

By 2003, several states had laws that protected gays and lesbians from discrimination in employment.<sup>318</sup> Also, several states included sexual orientation as a factor in laws criminalizing hate crimes.<sup>319</sup> Additionally, some states extended health insurance and financial benefits to same-sex partners of their employees.<sup>320</sup> In 2003, the Massachusetts Supreme Court legalized same-sex marriage in Massachusetts.<sup>321</sup>

Over the remaining years from the 2000s until present day, the LGBT civil rights movement continued to make incredible steps toward equality for homosexuals in America. First, according to the Human Rights Campaign, thirty-six states and Washington, D.C. now provide some kind of recognition to the relationships of same-sex couples.<sup>322</sup> In addition, nine states and Washington, D.C. provide civil unions or domestic partnerships.<sup>323</sup> Furthermore, 21 states plus Washington, D.C. prohibit discrimination against an individual based upon his or her sexual orientation in employment decisions,<sup>324</sup> and 21 states prohibit discrimination in housing based on an individual's sexual orientation.<sup>325</sup>

More Americans began to approve of same-sex relationships and show support for same-sex marriage. In a poll conducted in May 2011,

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315. Newport, *supra* note 313.

316. *Id.*

317. 539 U.S. 558, 578 (2003).

318. *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2014–15 (2003).

319. *Id.* at 2015.

320. Yatar, *supra* note 314, at 138–39.

321. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

322. *Maps of State Laws & Policies: Marriage Equality and Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN (Jan. 22, 2015), [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps), archived at <http://perma.cc/K2BP-27AP>.

323. *Id.*

324. *Maps of State Laws & Policies: Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN (Jan. 22, 2015), [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps), archived at <http://perma.cc/K2BP-27AP>.

325. *Maps of State Laws & Policies: Statewide Housing Laws and Policies*, HUMAN RIGHTS CAMPAIGN (Jan. 22, 2015), [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps), archived at <http://perma.cc/K2BP-27AP>.

fifty-six percent of Americans approved of gay and lesbian relations.<sup>326</sup> Additionally, in an unprecedented and historical event, on May 9, 2012, President Barack Obama became the first president to publicly support legalization of same-sex marriage.<sup>327</sup> In a Gallup poll taken the day after President Obama's historic announcement, a majority of Americans reported that same-sex relations should be legal.<sup>328</sup> The poll showed that sixty-three of Americans support legalizing same-sex marriage and that "women, adults aged (sic) 18 to 34, and Democrats are more supportive of gay rights than their counterparts."<sup>329</sup> However, thirty states and the District of Columbia have amended their constitutions to prevent same-sex marriage by defining marriage as between a man and a woman, although these provisions have been struck down in all but 13 states and the District of Columbia.<sup>330</sup>

On October 28, 2009, President Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law,<sup>331</sup> and currently, thirty states and Washington, D.C. have laws that pertain to crimes involving bias against a person based on sexual orientation.<sup>332</sup> On December 22, 2010, President Obama signed the repeal of "Don't Ask, Don't Tell," putting an end to the military's ban on homosexuals serving in the military."<sup>333</sup> Furthermore, on February 23, 2011, the Obama Administration decided to stop defending the

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326. Lydia Saad, *Doctor-Assisted Suicide Is Moral Issue Dividing Americans Most: Pornography, Gay Relations Produce Biggest Generational Gaps*, GALLUP (May 31, 2011), available at <http://www.gallup.com/poll/147842/doctor-assisted-suicide-moral-issue-dividing-americans.aspx>, archived at <http://perma.cc/SVL6-Z4B7>.

327. Adam Nagourney, *A Watershed Move, Both Risky and Inevitable*, N.Y. TIMES, May 9, 2012, at A1.

328. Lydia Saad, *U.S. Acceptance of Gay/Lesbian Relations is the New Normal: For Third Year, Majority Says Gay/Lesbian Relations are Morally Acceptable*, GALLUP (May 14, 2012), available at <http://www.gallup.com/poll/154634/acceptance-gay-lesbian-relations-new-normal.aspx>, archived at <http://perma.cc/9XX4-XF4S>.

329. *Id.*

330. *Maps of State Laws & Policies, Statewide Marriage Prohibition Laws*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (last visited Feb. 28, 2015), archived at <http://perma.cc/K2BP-27AP>. But see Sarah Warbelow, *What Today's Supreme Court Denial of Cert for Marriage Equality Means for You and Your Family*, HUMAN RIGHTS CAMPAIGN (Oct. 6, 2014), <http://www.hrc.org/blog/entry/what-todays-supreme-court-denial-of-cert-for-marriage-equality-cases-means>, archived at <http://perma.cc/XD8H-4MLQ> (explaining that the Supreme Court's denial of certiorari on marriage equality cases meant that the rulings striking down bans on same-sex marriage in Utah, Oklahoma, Virginia, Wisconsin, and Indiana would stand, and that the bans on same-sex marriage in West Virginia, North Carolina, South Carolina, Kansas, Colorado, and Wyoming would also be struck down as a direct result).

331. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249.

332. *Maps of State Laws and Policies, State Hate Crimes Laws*, HUMAN RIGHTS CAMPAIGN (last visited Feb. 28, 2015), [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps), archived at <http://perma.cc/K2BP-27AP>.

333. Don't Ask Don't Tell Repeal Act of 2012, 10 U.S.C. § 37.

constitutionality of DOMA stating that classifications based on sexual orientation should be subjected to heightened scrutiny.<sup>334</sup> This set the stage for one of the biggest victories in the LGBT civil rights moment—*United States v. Windsor*.<sup>335</sup>

### B. *Windsor v. United States: The Demise of DOMA*

Edith Windsor and Thea Spyer began a long-term relationship in 1963.<sup>336</sup> Concerned about Spyer's health, in 2007 the couple made a trip to Canada for their marriage.<sup>337</sup> The state of New York deemed their marriage valid.<sup>338</sup> When Spyer died in 2009, she left her entire estate to Windsor.<sup>339</sup> Windsor was required to pay \$363,053 in estate taxes because she did not qualify for the surviving spouse exemption from federal estate tax as a result of DOMA's definition of spouse.<sup>340</sup> Section 3 of DOMA defined marriage for the purpose of any federal law as "only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."<sup>341</sup> On November 9, 2010, Ms. Edith Windsor brought suit to declare that Section 3 of DOMA violated the Equal Protection Clause of the Fifth Amendment.<sup>342</sup>

While the suit was still pending, the President directed the Department of Justice to stop defending the constitutionality of DOMA's section 3 definition.<sup>343</sup> The Attorney General informed Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny."<sup>344</sup> In response the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened in the litigation to defend section 3 of DOMA.<sup>345</sup>

#### 1. *The District Court's Ruling*

The United States District Court for the Southern District of New York ruled in favor of the plaintiff, Edith Windsor, finding that

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334. Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, February 24, 2011, at A1.

335. 133 S. Ct. 2675 (2013).

336. *Id.* at 2683.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 2683.

341. Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996).

342. *Windsor*, 133 S. Ct. at 2683.

343. *Id.*

344. *Id.*

345. *Id.* at 2684.

DOMA's section 3 violated Windsor's right to equal protection under the Fifth Amendment.<sup>346</sup> While Windsor argued that DOMA should be subjected to heightened scrutiny (either strict or intermediate scrutiny), the court indicated that courts should be reluctant to establish new suspect classes.<sup>347</sup> However, the court held that it was unnecessary to determine if sexual orientation was a suspect classification because DOMA "may be disposed of under a rational basis review."<sup>348</sup> Instead, the court held, "the rational basis analysis can vary by context," and "[law[s that] exhibit[] . . . a desire to harm a politically unpopular group' [] receive 'a more searching form of rational basis review . . . .'"<sup>349</sup>

The court went on to apply rational basis to determine if BLAG had a legitimate state interest and whether DOMA was rationally related to those legitimate state interests.<sup>350</sup> Finding that each of BLAG legitimate state interests were indeed legitimate state interests, the court held that DOMA was not rationally related to any of those legitimate state interests.<sup>351</sup> For example, BLAG asserted that DOMA was supported by the legitimate interest of "deter[ring] heterosexual couples from having children out of wedlock"<sup>352</sup>; however, the court concluded that "Congress's goal [was] so far removed from the classification." that it was not narrowly tailored.<sup>353</sup> The court held that "DOMA [had] no direct impact of heterosexual couples at all; therefore, its ability to deter those couples from having children outside of marriage, or to incentivize couples that are pregnant to get married, is remote, at best."<sup>354</sup> The court went on to grant summary judgment in favor of Ms. Windsor.<sup>355</sup>

## 2. *The Appeals Court's Ruling*

After the District Court's Ruling, BLAG appealed the court's decision.<sup>356</sup> Unlike the District Court, which seemed reluctant to find that homosexuals were a suspect class, the Appeals Court decided that no variation of rational basis was required because homosexuals

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346. See *Windsor v. United States*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012).

347. *Id.* at 401.

348. *Id.* at 402.

349. *Id.*

350. *Id.* at 403.

351. *Id.* at 402–06. BLAG asserted several legitimate state interests, including childrearing and procreation, caution and maintaining the traditional institution of marriage, and consistency and uniformity with regards to federal benefits.

352. *Windsor*, 833 F. Supp. 2d at 404.

353. *Id.* at 405.

354. *Id.* at 404.

355. *Id.* at 406.

356. *Windsor v. United States*, 699 F.3d 169, 169–70 (2d Cir. 2012).

were a quasi-suspect class.<sup>357</sup> After taking this unprecedented step, the Second Circuit went on to explain why homosexuality should be treated as a suspect classification. The court used the four factors the Supreme Court generally uses to determine if there is justification for heightened scrutiny.<sup>358</sup> The court listed those factors as:

A) whether the class has been historically “subjected to discrimination; B) whether the class has a defining characteristic that “frequently bears [a] relation to ability to perform or contribute to society; C) whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group;” and D) whether the class is “a minority or politically powerless.”<sup>359</sup>

The court concluded that the “all four factors justify heightened scrutiny” in this case.<sup>360</sup> First, the court held that homosexuals were historically subjected to discrimination as apparent in past actions that made homosexuality criminal.<sup>361</sup> Next, the court concluded that homosexual did not bear a relation to ability to perform or contribute to society.<sup>362</sup> The court also concluded that “homosexuality is a sufficiently discernible characteristic to define a discrete minority class.”<sup>363</sup> The court’s conclusion was founded on the fact that the court found that “[n]o ‘obvious badge’ is necessary” and certain classifications are still discernible characteristics “even though these characteristics do not declare themselves.”<sup>364</sup> Finally, by examining the parallels between the status of homosexuality and the status of women at the time of the decision to apply heightened scrutiny to classification based on gender, the court found that although “[homosexuals]’ position ‘has improved markedly in recent decades’ . . . they still ‘face pervasive, although at times more subtle, discrimination . . . in the political arena.’”<sup>365</sup>

After the court determined that homosexuals were a part of suspect class subject to heightened scrutiny, the court concluded that “the class is quasi-suspect . . . based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect.”<sup>366</sup> This meant that the court reached the conclusion that

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357. *Id.* at 181–82.

358. *Id.* at 181–85.

359. *Id.* at 181 (internal references omitted).

360. *Id.*

361. *Id.* at 182.

362. *Windsor*, 699 F.3d at 182–83.

363. *Id.* at 183.

364. *Id.*

365. *Id.* at 184 (citing *Frontiero v. Richardson*, 411 U.S. 677, 685–86 (1973)).

366. *Id.* at 185.

the classification in that case should be quasi-suspect by looking at the parallels between race, national origin, gender, and illegitimacy.<sup>367</sup>

The court concluded that Section 3 of DOMA did not pass the intermediate level of scrutiny, which requires that the classification must be substantially related to an important (or exceedingly persuasive) government interest, making DOMA unconstitutional.<sup>368</sup> The court held that maintain a uniform definition of marriage was not an exceedingly persuasive justification for DOMA because “DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage. . . .”<sup>369</sup> The court also held DOMA was not substantially related to the exceeding persuasive justification of “sav[ing] government resources by limiting the beneficiaries of government marital benefits,” because DOMA was so broad that it touched federal laws that were not related to fiscal matters.<sup>370</sup> The court held that preserving a traditional understanding of marriage was not an exceedingly persuasive justification for DOMA “because the decision of whether same-sex couples can marry is left to the states.”<sup>371</sup> Finally, the court held that DOMA was not substantially related to the important government interest of encouraging procreation because “DOMA does not provide any incremental reason for opposite-sex couples to engage in ‘responsible procreation.’”<sup>372</sup>

### 3. *The Supreme Court’s Decision*

On December 7, 2012, the Supreme Court of the United States granted a writ of certiorari to determine whether DOMA was constitutional under the Fifth Amendment of the Constitution.<sup>373</sup> In a 5–4 decision, the Court found that DOMA was unconstitutional “as a deprivation of the liberty of the persons protected by the Fifth Amendment.”<sup>374</sup> Writing for the majority, Justice Kennedy explained that DOMA was in contradiction with general principles under the constitution.<sup>375</sup> Throughout the opinion, Justice Kennedy continuously reiterated that New York granted dignity to same-sex marriages and that DOMA essentially takes away the dignity of these marriages.<sup>376</sup>

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367. *Id.*

368. *Windsor v. United States*, 699 F.3d at 185.

369. *Id.* at 186.

370. *Id.* at 187.

371. *Id.* at 187 (citing the District Court’s ruling at *Windsor*, 833 F. Supp. 2d at 403).

372. *Id.* at 188.

373. *Windsor v. United States*, 699 F.3d. 169, *cert. granted*, 133 S. Ct. 786 (Dec. 7, 2012).

374. *Windsor*, 133 S. Ct. at 2694–95.

375. *See id.*

376. *See id.* at 2692–94.

Justice Kennedy began by explaining that throughout history and by tradition, the authority to determine who is married within a state has generally “been treated as being within the authority and realm of the separate States.”<sup>377</sup> Justice Kennedy admitted that this tradition and history was not without its exceptions. He noted that Congress “can make determinations that bear on marital rights and privileges.”<sup>378</sup> Justice Kennedy pointed out the flaw in DOMA was its pervasiveness. He explained that when compared to the discrete examples where Congress regulated the meaning of marriage, “DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations.”<sup>379</sup>

Justice Kennedy also pointed out that DOMA created two statuses of married individuals within one state, by having one class of married individuals who are married for federal purposes and another class who are not.<sup>380</sup> He explained that “DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”<sup>381</sup> Even though DOMA defies state sovereignty, Justice Kennedy noted that it was not necessary to determine whether DOMA was unconstitutional under principles of federalism.<sup>382</sup> He stated it was “unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.”<sup>383</sup>

Stressing the idea of equality, Justice Kennedy explained that “DOMA seeks to injure the very class New York seeks to protect.”<sup>384</sup> New York sought to make same-sex marriages equal to opposite-sex marriages in the state, but DOMA sought to once again make same-sex marriage unequal. By doing this, Justice Kennedy stated that “[DOMA] violates the basic due process and equal protection principles applicable to the Federal Government.”<sup>385</sup>

Next, the Court applied an equal protection analysis, without saying that it is applying an equal protection analysis. Justice Kennedy starts with this principle: “[t]he Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm

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377. *Id.* at 2689–90.

378. *Windsor*, 133 S. Ct. at 2690.

379. *Id.* at 2690.

380. *Id.*

381. *Id.* at 2692.

382. *Id.*

383. *Id.*

384. *Id.* at 2693.

385. *Id.*

a politically unpopular group cannot' justify disparate treatment of that group."<sup>386</sup> Essentially, Justice Kenney applied the first prong of any level of review—determining if the government had a sufficient justification for the discrimination. The opinion dodged one of the most important questions in this case: the appropriate level of review for classes drawn based on homosexuality.<sup>387</sup> The idea at its most basic principle is this: determining the appropriate level of review is not necessary, according to the majority, because a bare congressional desire to harm a politically unpopular group never justifies disparate treatment under any level of scrutiny.<sup>388</sup>

Justice Kennedy went on to hold that “determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration.”<sup>389</sup> He went on to explain that because of “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage . . . [there] is strong evidence of [the] law having the purpose and effect of disapproval of that class.”<sup>390</sup> Justice Kennedy then showed how DOMA indeed had the purpose and effect of disadvantaging of homosexuals.<sup>391</sup> First, he looked at the history of the enactment of DOMA.<sup>392</sup> He explains that “[the] enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was its essence.”<sup>393</sup> He also notes that DOMA’s purpose was “to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law.”<sup>394</sup> Justice Kennedy also noted that DOMA had the effect of displaying disapproval of homosexuals by “writ[ing] inequality into the entire United States Code.”<sup>395</sup> He stated that “[a]mong the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits.”<sup>396</sup>

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386. *Windsor*, 133 S. Ct. at 2693 (quoting *Dep’t of Ag. v. Moreno*, 413 U.S. 528, 534–35(1973)).

387. *Id.* at 2706 (Scalia, J., dissenting) (“The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and woman are reviewed for more than mere rationality.”).

388. *Id.*

389. *Id.* at 2693 (majority opinion).

390. *Id.*

391. *Id.*

392. *Windsor*, 133 S. Ct. at 2693.

393. *Id.* (quoting the conclusion reached in the House: “[b]oth moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”)).

394. *Id.* at 2693–64.

395. *Windsor*, 133 S. Ct. at 2694.

396. *Id.*

In closing, Justice Kennedy stated that “[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”<sup>397</sup> Even if the state had a legitimate purpose, it would not be sufficient to overcome the state’s constitutional decision to grant protection to certain marriages within that state.<sup>398</sup>

In a dissent written by Justice Scalia (in which Justice Thomas joined), Justice Scalia seemed very perplexed by the majority’s opinion.<sup>399</sup> Justice Scalia called the opinion’s justifications “rootless and shifting.”<sup>400</sup> He seemed to take offense to the fact that the opinion began with a reiteration of the states’ power to define marriage, but noted that the majority opinion was not a federalism opinion.<sup>401</sup> Justice Scalia also noted that the opinion echoed analyses of equal protection, as the opinion makes several citations to equal protection cases, but the Court does not determine the appropriate level of review.<sup>402</sup> He signaled that rational basis review was the appropriate level of review for DOMA, and under traditional rational basis review there were “justifying rationales for [the] legislation.”<sup>403</sup> Justice Scalia went on to explain how this decision will be used in the future to find state laws denying same-sex marriage unconstitutional as motivated by “bare . . . desire to harm’ couples in same-sex marriages.”<sup>404</sup>

The *Windsor* decision was one of the most important victories in the LGBT civil rights movement.<sup>405</sup> After the decision, President Obama said that he had “directed the Attorney General to work with other members of [his] Cabinet to review all relevant federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly.”<sup>406</sup> In the upcoming months, many legally married couples will be allowed for the first time to take advantage of over 1,000 federal benefits that were previously denied to them.<sup>407</sup> However, some federal benefits will be

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397. *Id.* at 2696.

398. *Id.*

399. *Id.* at 2697, 2705.

400. *Id.* at 2705.

401. *Windsor*, 133 S. Ct. at 2705.

402. *Id.* at 2706–07.

403. *Id.* at 2707–08 (discussing justifications for DOMA such as avoiding difficult choice-of-law issues, and guarding prior legislation against unforeseen changes in circumstance).

404. *Windsor*, 133 S. Ct. at 2709–11.

405. Liz Halloran, *After DOMA: What’s Next for Gay Married Couples*, NPR (June 26, 2013, 11:52 AM), <http://www.npr.org/blogs/thetwo-way/2013/06/26/195881288/after-doma-whats-next-for-gay-married-couples>, archived at <http://perma.cc/3ECN-S372>.

406. *Id.*

407. Eyder Peralta, *Court Overturns DOMA, Sidesteps Broad Gay Marriage Ruling*, NPR (June 26, 2013, 10:04 AM), <http://www.npr.org/blogs/thetwo-way/2013/06/26/19588>

limited to only those persons living in states that recognize same-sex marriage because some federal laws use state law to determine marital status.<sup>408</sup>

*C. Hollingsworth v. Perry: The Fall of Proposition 8*

On the same day the Supreme Court issued its ruling in *Windsor*, it issued its ruling in *Hollingsworth v. Perry*,<sup>409</sup> which was another (although limited) victory for LGBT individuals living in California. The *Hollingsworth* case was created in the aftermath of the California Supreme Court's 2008 holding that limiting marriage to opposite-sex couples violated the California Constitution.<sup>410</sup> After this holding, California voters passed Proposition 8 ("Prop 8"), which amended the California Constitution to define marriage as a union between a man and a woman.<sup>411</sup> Suit was filed in federal court challenging Prop 8 as an unconstitutional violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>412</sup> The named defendants (the Governor, Attorney General, and other officials) refused to defend Prop 8, and the Court allowed proponents of it to intervene to defend it.<sup>413</sup> The District Court declared the amendment unconstitutional.<sup>414</sup> The officials elected not to appeal; however, the intervening proponents did.<sup>415</sup> Relying on the California Supreme Court's ruling that the proponents had standing to appeal, the Ninth Circuit agreed that the proponents had standing to appeal.<sup>416</sup> The Ninth Circuit concluded that Prop 8 was unconstitutional as a violation of the Equal Protection Clause because it had no legitimate purpose "but to impose on gays and lesbians . . . a majority's private disapproval of them and their relationships."<sup>417</sup> The Supreme Court granted certiorari and directed that the parties also brief and argue "[w]hether [t]he petitioners have standing under Article III . . . ." <sup>418</sup>

On June 26, 2013, the Supreme Court issued its holding that the petitioners (the proponents of Prop 8) did not have standing under

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7796/supreme-court-strikes-down-defense-of-marriage-act, archived at <http://perma.cc/ZASQ-UQF3>.

408. Halloran, *supra* note 405.

409. 133 S. Ct. 2652 (2013).

410. *See In Re Marriage Cases*, 183 P.3d 384 (2008).

411. CAL. CONST., art. I, § 7.5 (stating that "[o]nly marriage[s] between a man and a woman is (sic) valid or recognized in California").

412. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

413. *Id.*

414. *Id.*

415. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

416. *Id.*

417. *Id.* at 1095.

418. *Hollingsworth*, 133 S. Ct. at 2661.

Article III of the Constitution.<sup>419</sup> In the 5–4 opinion written by Chief Justice Roberts, the Court concentrated on the fact that the proponents of Prop 8 did not have “an injury that affect[ed] [them] in a ‘personal and individual way.’”<sup>420</sup> The Court also indicated that the proponents of Prop 8 did not have a “‘direct stake’ in the outcome of their appeal [because] their only interest . . . was to vindicate the constitutional validity of a generally applicable California law.”<sup>421</sup> The Court went on to explain why the proponents could not assert the interest of the state of California in appealing the District Court’s ruling.<sup>422</sup> The Court explained that even though there were exceptions to the prohibition against third party standing, “when [the Court has] allowed litigants to assert the interests of others, the litigants themselves still ‘must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.’”<sup>423</sup> The Court held that the judgment of the Ninth Circuit should be vacated and remanded with instructions that the appeal from the District Court should be dismissed for lack of jurisdiction.<sup>424</sup>

It seems unbelievable that the LGBT civil rights movement was able to gain steam and accomplish so much over the past three decades. Just between the 1990s and 2013, Americans’ perception of gays and lesbians changed drastically.<sup>425</sup> In fact, some have claimed that there is no longer a need for laws that protect gays or lesbians because they are now on an equal playing field, because the LGBT civil rights movement “[has] gained more political ground in less time than just about any other interest group in American political history.”<sup>426</sup> Considering this, as some colleges and universities have begun requesting information concerning an applicant’s sexual orientation, the question remains whether students who choose to come out in the admissions process should be given affirmative action treatment.

#### IV. ANALYZING AFFIRMATIVE ACTION PROGRAMS THAT BENEFIT LGBT INDIVIDUALS IN COLLEGE AND UNIVERSITY ADMISSIONS

##### *A. Origins of Support for Affirmative Action for LGBT Individuals*

The beginning point of an analysis to determine whether affirmative action treatment is appropriate for LGBT individuals during

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419. *See id.* at 2668.

420. *Id.* at 2662.

421. *Id.*

422. *Id.* at 2663–64.

423. *Id.* at 2663.

424. *Hollingsworth*, 133 S. Ct. at 2668.

425. *See Barnes*, *supra* note 15.

426. *Id.* (quoting a legal brief filed on behalf of the House of Representatives in support of the Defense of Marriage Act (DOMA)).

the college or university admissions process requires a brief discussion of the roots of the argument. Most of the justification for LGBT equal rights comes from an analogy to the civil rights movements of racial minorities, women, and disabled individuals.<sup>427</sup> This analogy is deeply rooted in past discrimination.<sup>428</sup>

The analogy between the LGBT equal rights movement and other civil rights movements (like those of African Americans and women) finds its foundation upon the differential and discriminatory treatment of LGBT individuals throughout American history.<sup>429</sup> First, as mentioned above, homosexuality has been thought to be morally wrong throughout American history and has resulted in death and, until the 1990s and 2000s, criminalization.<sup>430</sup> The harsh laws against homosexuals force them to hide their true identities in an effort to avoid discrimination and persecution.<sup>431</sup> Additionally, support for discriminatory behaviors against gays and lesbians was based on traditional morals based on language in the Bible, and these justifications were used to continue discrimination against LGBT individuals, contributed to the stigma associated with being homosexual, and created homophobia.<sup>432</sup> These biblical arguments were the same as those used to justify discrimination against African Americans and women.<sup>433</sup> Many proponents of this “sameness” argument find support in comparing homophobia to racism.<sup>434</sup> This controversial belief is founded in the fact that African Americans (as well as women and the disabled) and homosexuals have been the victims of invidious treatment at the hands of a majority, whether that majority is white, male, and/or heterosexual.<sup>435</sup>

Next, proponents of this “sameness” argument use comparisons between same-sex marriage bans and miscegenation laws (laws that prevent a black person from marrying a white person), which were struck down in *Loving v. Virginia*.<sup>436</sup> These proponents find support in the fact that the arguments used against the unconstitutionality of

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427. See Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and “The Civil Rights Agenda,”* 1 AFR.-AM. L. & POL’Y REP. 33 (1994).

428. *Id.*

429. *Id.* at 35–37.

430. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

431. Byrne, *supra* note 13, at 54.

432. Russell, *supra* note 427, at 43–44.

433. *Id.*

434. *Id.* at 37–39 (discussing the animosity that results when homophobia is considered as “comparable” to racism).

435. *Id.* at 44.

436. Herbert C. Brown, Jr., *History Doesn’t Repeat Itself, but It Does Rhyme—Same-Sex Marriage: Is the African-American Community the Oppressor this Time?*, 34 S.U. L. REV. 169, 194–96 (2007) (hereinafter *History Doesn’t Repeat Itself*) (citing *Loving v. Virginia*, 388 U.S. 1 (1967) and discussing similarities between support for miscegenation laws and oppression to same-sex marriage).

miscegenation laws are the same constitutional arguments used to support opposition to same-sex marriage.<sup>437</sup> Opponents of same-sex marriage claim that marriage should be left to the providence of the states rather than the federal government.<sup>438</sup> Opponents also claim that same-sex marriages are immoral and not within the traditional concept of marriage,<sup>439</sup> just as they once argued that marriage between a white person and a black person was not moral, natural, or within the traditional notion of marriage.<sup>440</sup>

Although there are similarities between the LGBT civil rights movement and the African-American civil rights movement, these similarities have their flaws. One point of opposition to the “sameness” argument is that sexual orientation, unlike race, is not an immutable trait.<sup>441</sup> For example, supporters of Colorado’s Amendment 2 reacted to the “sameness” argument by arguing that homosexuality is not an immutable trait (like race or gender), but instead it is a behavior that one chooses to engage in and “that declaring one’s minority sexual orientation, unlike acknowledging one’s minority race, was a conscious choice to behave in a stigmatized manner (after all, one ‘couldn’t do anything about’ being African-American or Latino).”<sup>442</sup> Others oppose the “sameness” argument by the degree of discrimination. Some have stated that gay and lesbian experiences are not comparable to the experiences of African Americans because gays and lesbians “were [not] enslaved for 300 years and were continued in the segregated society for another 150 years.”<sup>443</sup> Further, General Colin L. Powell stated, while defending the military’s ban on gays, “[h]omosexuality is not a benign . . . characteristic, such as skin color or whether you’re Hispanic or Oriental. . . . It goes to one of the most fundamental aspects of human behavior.”<sup>444</sup>

Even though the parallels between LGBT civil rights and African-American civil rights (and others) seem to still be highly debated, the LGBT community has suffered past discrimination appropriately supported by the well-documented fact that gays and lesbians have been discriminated against throughout history and, to some degree, continue to be discriminated against today.<sup>445</sup> However, the analysis of whether affirmative action programs are appropriate in college

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437. *Id.* at 193–96.

438. *Id.* at 193–94 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

439. *See Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

440. *See Loving v. Virginia*, 388 U.S. 1, 3–4 (1967).

441. Russell, *supra* note 427, at 45.

442. *Id.*

443. *History Doesn’t Repeat Itself*, *supra* note 436, at 197–98 (quoting Bishop George McKinney of St. Stephen’s Church of God in Christ).

444. Russell, *supra* note 427, at 37–38 (quoting General Colin L. Powell).

445. Byrne, *supra* note 13, at 52–53.

admission for self-identified LGBT applicants does not end with a comparison of past discrimination. Furthermore, the degree of past discrimination is not relevant; whether this discrimination came by enslavement or by forced invisibility is mere pretext and of no consequence. Affirmative action programs only seek to remedy the effects of past discrimination, no matter the degree of that discrimination.<sup>446</sup> Therefore, a comparison to other beneficiaries of affirmative action treatment, while helpful, is neither decisive nor necessary. Further analysis of the appropriateness of affirmative action treatment for LGBT applicants in college admissions depends on whether the extension would be supported by traditional justifications for affirmative action programs.

*B. Analysis in Context of Three Traditional Justifications for Affirmative Action*

To determine if the extension of affirmative action treatment to self-identified LGBT applicants in college admissions policies is appropriate, the history and current situation of LGBT individuals in America must be examined in the context of the three traditional justifications for affirmative action: remedying the effects of past discrimination, role modeling, and diversity.<sup>447</sup>

*1. Remedial Purpose Justification*

First, affirmative action programs find their strongest justification in the need to remedy the effect of past discrimination.<sup>448</sup> In *City of Richmond v. J.A. Croson Co.* the Supreme Court showed that justification for affirmative action has deep origins in the need to remedy past discrimination.<sup>449</sup> However, upon further review, we find a need to overcome the present effects of past discrimination, which requires that there be a current problem or consequences associated with that past discrimination.<sup>450</sup> Indeed, the need for a present problem that stems from past discrimination is supported by the Court's decision in *City of Richmond v. J.A. Croson Co.*<sup>451</sup> There the Court struggled to find statistical support for the effects of past discrimination in order to uphold a city set-aside program for minority businesses.<sup>452</sup> In that

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446. *Id.* at 68.

447. *Id.* at 68–70.

448. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 280–81 (1986).

449. 488 U.S. 469, 477 (1989).

450. *Id.* at 508.

451. *Id.* at 507–10.

452. *See id.*

case, the Court emphasized the need for proof that remedial measures were needed and held that statistical disparities may be enough to prove the continued effects of past discrimination.<sup>453</sup> The remedial justification for affirmative action is a backwards looking notion that seeks to erase past discrimination in hopes of creating a current environment that is free of the effects of that past discrimination.<sup>454</sup>

In the case of race, the current effects of the past discrimination are racism that is still prevalent today and the shortage of minority students enrolled in colleges and universities.<sup>455</sup> Furthermore, colleges and universities seek to remedy the discrimination that they themselves participated in against African Americans and other minorities through affirmative action policies designed to increase the percentage of minorities in colleges and universities.<sup>456</sup> Colleges and universities believe that these programs will help increase the percentage of minorities to a level that is equivalent to what it would have been (or at least what they perceived it would have been) without the past discrimination.<sup>457</sup>

In the case of LGBT individuals, it is necessary to determine what effects of past discrimination affirmative action programs would be seeking to remedy. While homophobia and systematic discrimination against homosexuals still exist, generally the need for affirmative action programs is predicated upon statistical evidence of disparate treatment in opportunities between two groups.<sup>458</sup> In this case, statistical evidence of a disparity between heterosexuals and homosexuals in colleges and university admission would justify a need for affirmative action policies in college and university admissions for self-identified LGBT individuals. However, there is no statistical evidence that this disparity exists.<sup>459</sup> Absent this statistical evidence, affirmative action policies for self-identified LGBT individuals would need to find support in one of the additional traditional justifications for affirmative action policies.

Furthermore, the lack of statistical evidence gives credence to the innocent victim rationale for opposition to the extension of affirmative action for LGBT individuals. Without statistical evidence supporting a present problem with the presence of LGBT students at colleges and universities, heterosexual students are more likely to be seen as innocent victims because the affirmative action policy

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453. *Id.* at 501–02.

454. Schuck, *supra* note 4, at 22.

455. Lawrence, *supra* note 73, at 956–57.

456. *See id.*

457. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 272 (1979).

458. *See supra* Part I.A.

459. *See A Survey of LGBT Americans*, *supra* note 3.

would likely be seen as unnecessary given the lack of evidence.<sup>460</sup> Furthermore, given the fact that a large number of college age Americans support the LGBT equal rights agenda, there is an increased appearance that these Americans would be seen as innocent victims.<sup>461</sup>

While other victims of past discrimination, like African Americans, found justification for affirmative action policies in college and university admissions based on the restitution (or remedial purpose) rationale, colleges and universities would be hard-pressed to find support for affirmative action treatment for self-identified LGBT students through the restitution rationale.<sup>462</sup> The most distinguishing feature of present consequence of the past discrimination for racial minorities and women is that “[r]ace and gender discrimination create economic disadvantage, whereas sexual orientation discrimination most often creates gay and lesbian invisibility.”<sup>463</sup> Yes, homophobia and discrimination against homosexuals still does exist; however, colleges and universities must prove that the effects of both past and continued discrimination have affected their student bodies in a way that has warranted an increase presence of LGBT students.<sup>464</sup> Generally, this proof comes by reliance on statistical evidence; without which, there is no perceived need for affirmative action treatment for these students.<sup>465</sup> However, colleges and universities may have support in one of the remaining justifications for affirmative action.

## 2. *Role Modeling Justification*

Another justification for traditional affirmative action policies in college and university admissions is the role modeling justification. This justification is built on the belief that there is a need for role models in minority groups, “especially [among] the young who need to have high aspirations and confidence that others have succeeded despite their common legacy of group disadvantage.”<sup>466</sup> However, the Supreme Court, in *Wygant*, held that the role modeling justification is not sufficiently compelling to withstand a constitutional challenge.<sup>467</sup> This justification still has importance because it can be used

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460. Byrne, *supra* note 13, at 86 (noting a common, if perhaps unsupported, view that white, heterosexuals suffer from affirmative action).

461. *Id.* at 86–87.

462. *Id.* at 74–75.

463. *Id.* at 74.

464. *Id.*

465. *See supra* Part I.A.

466. Schuck, *supra* note 4, at 30–31.

467. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–78 (1986).

as a justification for the expansion of affirmative action to included LGBT individuals.

Professor Schuck explains that this justification has additional support in the idea that “the presence of minority group members in visible roles of leadership and influence is conducive, if not essential, to the legitimacy of social and political institutions. For minorities to accept their outcomes as minimally just or at least acceptable, they must view these institutions as inclusive . . . .”<sup>468</sup> Proponents believe that without examples of success minorities minority youths “might conclude that certain social roles and professional opportunities are closed to them.”<sup>469</sup>

In applying this justification to the LGBT community, there appears to be support in the need for role models for LGBT youths.<sup>470</sup> In a 2012 study release by the Human Rights Campaign, the results revealed that the biggest problem facing LGBT youth today is acceptance.<sup>471</sup> Several participants reported being the victim of verbal harassment concerning their sexual orientation and nearly half of the participants (47%) reported not “fitting in” in their communities.<sup>472</sup> This report also quoted one of the participants as stating that he or she wishes that he or she “could meet more gay people to talk to and get to know.”<sup>473</sup> The report goes on to reveal that 92% of LGBT youth say they hear a negative message about being LGBT; however, 78% report hearing a positive message from the internet and their peers.<sup>474</sup>

These statistics show that there is a need for role models for LGBT youths. In fact, as a result the challenges faced by LGBT youths, Dan Savage and his partner Terry Miller created the “It Gets Better Project,” which served to inspire LGBT youths facing harassment.<sup>475</sup> College and university affirmative action policies can be used as a way to recruit LGBT students, who will in turn return to their communities and provide role models for LGBT youth.<sup>476</sup> These role models can stress and provide example for LGBT youth that they can succeed despite the perceived disadvantage of intolerance

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468. Schuck, *supra* note 4, at 31.

469. Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222, 1223 no. 5 (1991).

470. See, e.g. Byrne, *supra* note 13, at 70.

471. GROWING UP LGBT IN AMERICA, HUMAN RIGHTS CAMPAIGN 7 (2012), available at [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America\\_Report.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf), archived at <http://perma.cc/GUF6-94v4>.

472. *Id.* at 10 (stating that 42% of LGBT youth report that the community they live in is “not accepting of LGBT people”).

473. *Id.* at 9.

474. *Id.* at 18.

475. See IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> (last visited Feb. 28, 2015), archived at <http://perma.cc/9WP9-MNXP>.

476. Byrne, *supra* note 13, at 70 (discussing diversity in the workplace).

and discrimination.<sup>477</sup> They can also form much needed mentoring relationships for LGBT students who, based on statistics, often feel out of place and need someone to talk with.<sup>478</sup> Based on the evidence of the adversities that LGBT youths face and the need for role models that can exemplify succeeding despite adversity, the use of affirmative action policies for LGBT applicants by colleges and universities is supported under the role model justification.

### 3. Diversity Justification

The diversity justification is where colleges and universities can find the most support for granting affirmative action treatment in the application process for self-identified LGBT students.<sup>479</sup> Recall that the diversity justification finds support in Justice Powell's decision in *Bakke*.<sup>480</sup> In that case, Justice Powell stated that "genuine diversity" was a compelling interest which could justify considering race and making it a "plus" factor in college and university admissions policies.<sup>481</sup> To justify this position, Justice Powell stated, "the atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."<sup>482</sup> He went on to state that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."<sup>483</sup>

However, it is important to remember that Justice Powell added clarity as to the type of diversity that would further a compelling interest. Justice Powell went on to state that "genuine diversity" was more than "simple ethnic diversity," and that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."<sup>484</sup> Through his clarity, Justice Powell did not limit the type of diversity that would further a compelling interest to race or ethnicity, instead he defined diversity broadly.<sup>485</sup>

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477. *See id.*

478. *See id.*; *see also* HUMAN RIGHTS CAMPAIGN, *supra* note 471.

479. *See* Byrne, *supra* note 13, at 70.

480. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314–15 (1979).

481. *Id.* at 315 (opinion of Powell, J.) (stating that the goal of achieving the educational benefits of a diverse student body is sufficiently "compelling" to justify the use of race as a factor in university admission policies).

482. *Id.* at 312.

483. *Id.* at 313 (quoting Keyshian v. Board of Regents, 385 U.S. 589, 603 (1967)).

484. *Id.* at 315.

485. *Bakke*, 438 U.S. at 315.

The diversity justification is the least offensive justification. It requires no looking back to recognize past wrongs, and, as Professor Eugene Volokh stated, “it ascribes no guilt, calls for no arguments about compensation. It seems to ask simply for rational, unbigoted judgment. . . .”<sup>486</sup> Other commentators claim that it “describe[s] the importance of our institutions being representative of all citizens and truly democratic . . . . Diversity affirms the notion that different groups need not conform to the dominant culture, need not mix into it to be an accepted and important part of it.”<sup>487</sup> Furthermore, diversity seeks to obtain benefits that can be derived from varying views because it seeks to challenge harmful stereotypes and combats intolerance.<sup>488</sup>

Based on the broad definition of diversity, which requires something beyond racial and ethnic diversity, there is a logical argument that sexual orientation would fit into the definition of diversity used in the *Bakke* case.<sup>489</sup> Additionally, the many benefits (such as inclusion, tolerance, and acceptance) that can be derived from including self-identified LGBT individuals into the definition of diversity, for the purpose of affirmative action policies in college and university admissions, are a significant justifications for these policies.<sup>490</sup> Furthermore, because the diversity justification does not require looking back to past discrimination and comparing to other disadvantage minorities (such as African Americans and women), the diversity justification is the most palatable way to justify extending affirmative action to self-identified LGBT students.

### *C. Constitutionality of Affirmative Action Programs for LGBT Applicants*

In attempting to determine the constitutionality of any affirmative action program, the Court often finds itself posed with two decisions: (1) the correct standard of review to apply and (2) how much deference should be given to the university.<sup>491</sup> Indeed, the Court has struggled with these decisions several times over in their quest to

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486. Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA. L. REV. 2059, 2060 (1996).

487. Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1658–59, n. 16 (1990).

488. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 125 (stating that inclusion is one of the best “remedies for the expression of that labels people as subordinate”).

489. *See supra* Part IV.B.3.

490. *See supra* Part IV.B.2–3.

491. *Bakke*, 438 U.S. at 358–59, 365.

determine the constitutionality of affirmative action programs.<sup>492</sup> First, in *Bakke*, where the Court was splintered on whether to apply a lower standard of review because the affirmative action program in question in that case was a racial classification intended to be remedial and not invidious.<sup>493</sup> Then again in *J.A. Croson Co.*, where the Court finally decided that regardless of the purpose behind the classification, a classification based on race must be examined under the strict scrutiny standard of review.<sup>494</sup> For a racial classification to be deemed constitutional under the strict scrutiny standard of review, the classification must serve a compelling state interest and be narrowly tailored to meet that compelling state interest.<sup>495</sup> Furthermore, “[t]he test also ensures that ‘the means chosen fit th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.’”<sup>496</sup> The narrowly tailored requirement gives the government very little (if any) deference.<sup>497</sup>

However, the Court has struggled with how much deference to give to the government, in this case the college or university, when determining the appropriate means to accomplish diversity (the compelling interest).<sup>498</sup> This is particularly true in the *Grutter* case, where Justice Kennedy took strong offense to the majority’s extreme deference to the law school in determining the proper means to achieve the compelling interest of diversity.<sup>499</sup> Because the admissions program was a racial classification, the Court applied the strict scrutiny standard of review.<sup>500</sup> However, in determining whether the classification was narrowly tailored, the Court gave great deference to the school stating, “[w]e are satisfied that the Law School’s admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota.”<sup>501</sup> Justice Kennedy believed that the strong deference to the Law School circumvented the narrow tailoring prong of the strict scrutiny requirement, which would have required the Law School to show that its admission process was constitutional.<sup>502</sup>

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492. See *supra* Part I.B.1 (discussing the *Bakke* decision).

493. *Bakke*, 438 U.S. at 291.

494. 488 U.S. 469, 493, 520 (1989).

495. *Id.* at 493.

496. *Id.*; see also *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

497. *Bakke*, 438 U.S. at 358–59, 365.

498. See *Grutter*, 539 U.S. at 387.

499. *Id.* at 388 (“The Court confuses deference to a university’s definition of its educational objective with deference to the implementation of this goal.”) (Kennedy, J., dissenting).

500. See *id.* at 387–88 (majority opinion).

501. *Id.* at 355.

502. *Id.* at 389 (Kennedy, J., dissenting).

Justice Kennedy also took offense to the Courts refusal to require the Law School “to seriously explore race-neutral alternatives.”<sup>503</sup> Justice Kennedy was disappointed in the Court’s “willingness to be satisfied by the Law School’s profession of its own good faith.”<sup>504</sup>

After the *Fisher* case, the law in the area of affirmative action seems to be settled (at least for the time being).<sup>505</sup> It requires strict scrutiny for all racial classification.<sup>506</sup> Diversity is still a compelling state interest which is sufficient pass strict scrutiny.<sup>507</sup> Furthermore, no deference is to be given to universities and colleges in deciding the appropriate means to accomplish that diversity, and narrow tailoring still does not require exhausting race-neutral alternatives.<sup>508</sup>

### *1. Appropriate Level of Scrutiny*

In applying the principles mentioned above to the affirmative action treatment for self-identified LGBT applicants to colleges and universities, it is important to note one unique distinction. The strict scrutiny standard of review applies to affirmative action programs based on racial classifications because “any racial preference must face the most rigorous scrutiny by the courts.”<sup>509</sup> However, in the case of other classifications not based on race, like sexual orientation, a lower standard of review is required because these classifications are not inherently suspect.<sup>510</sup> The Court, in *Romer v. Evans*, reaffirmed the proposition that classifications based on sexual orientation “have so far been given the protection of heightened equal protection scrutiny.”<sup>511</sup> The Court went on to apply the rational basis review standard requiring that the government action bear “a rational relation to some legitimate end.”<sup>512</sup> Under rational basis review, “a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or . . . if the rationale for it seems tenuous.”<sup>513</sup> The rational basis standard of review grants great deference to the government action.<sup>514</sup> Furthermore, unlike with strict scrutiny, rational basis scrutiny does not require that the law be

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503. *Id.* at 394.

504. *Grutter*, 539 U.S. at 394.

505. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

506. *Id.*

507. *Id.* at 2419–20.

508. *Id.* at 2420.

509. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989).

510. *See Romer v. Evans*, 517 U.S. 618, 640, n. 1 (1996).

511. *Id.* at 629.

512. *Id.* at 631–32.

513. *Id.* at 632.

514. *Id.* at 621, 632.

narrowly tailored nor does it require the government to explore neutral alternatives.<sup>515</sup>

In applying the rational basis standard of review, it is clear that granting affirmative action treatment to self-identified LGBT students in college and university admissions meets the rational basis standard.<sup>516</sup> First, the government seems to be advancing a legitimate interest in diversity.<sup>517</sup> For the last three decades since *Bakke* and continuing in the *Grutter*, *Gratz*, and *Fisher* decisions, diversity has been a compelling government interest.<sup>518</sup> This is indeed the case considering the Court's reluctance to overrule its holding in the *Fisher* case.<sup>519</sup> A compelling interest, like diversity, clearly meets the lower standard of a legitimate government interest. This is particularly true when the Court has stated that under rational basis level of review "a law will be sustained . . . even if the law seems unwise."<sup>520</sup> This demonstrates that there is a lower standard required to justify action under rational basis—viewed both as a legitimate government interest, and a compelling interest, like diversity, would clearly meet this lower standard.<sup>521</sup>

Next, affirmative action treatment for self-identified LGBT applicants in college and university admissions bears a rational relationship to the legitimate government interest of diversity. The Court has held that under the rational basis review standard, government action will be upheld even if the rationale for it seems tenuous.<sup>522</sup> Justice Powell has indicated (and the Court has adopted) that the diversity that furthers a compelling interest is more than just racial and ethnic diversity.<sup>523</sup> This broad definition of diversity can include LGBT individuals. This means that policies adopted by colleges and universities to give affirmative action treatment to self-identified LGBT students would be reasonably related to accomplishing the goal of student diversity.

Furthermore, traditional rational basis review grants extreme deference to the government in determining the appropriate means to

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515. *Id.*

516. Compare *Romer*, 517 U.S. at 635–36 with *Grutter v. Bollinger*, 539 U.S. 306, 328 (2002).

517. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418–19 (2013).

518. *Id.* at 2417–18.

519. See *id.* at 2418–22, 2411.

520. *Romer*, 517 U.S. at 632.

521. *Id.*

522. *Id.* ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or work to the disadvantage of a particular group, or if the rationale for it seems tenuous").

523. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12, 315 (1979); adopted in *Grutter*, 539 U.S. at 325.

accomplish the legitimate government interest.<sup>524</sup> The Court has stated that a governmental action is not “subject to courtroom fact-finding (sic) and may be based on rational speculation unsupported by evidence or empirical data.”<sup>525</sup> By not requiring evidence or fact-finding under rational basis review, the Court grants great deference to the government in determining the appropriate means to accomplish the legitimate government interest.<sup>526</sup> This means, in the case of affirmative action treatment for self-identified LGBT students, the Court will not look for statistical evidence that these policies are the appropriate means to accomplish the goal of diversity. Nor would the Court require statistical evidence showing that LGBT individuals are underrepresented at colleges or universities.

Notwithstanding the extreme deference that the Court grants to government action under the traditional rational basis, the Court seems to have embarked on a new rational basis analysis.<sup>527</sup> Under this new so-called rational basis with “bite,” the Court looks past the suggested purpose and legitimate interest given by the government to ensure that the classification was not “born out of animosity toward the class of persons affected.”<sup>528</sup> This trend is continued in the *Windsor* opinion.<sup>529</sup> However, even under this new rational basis analysis, policies granting affirmative action treatment to self-identified LGBT individuals in college and university admissions are likely to be deemed constitutional because the classification is not born out of an animosity or desire to harm any applicants in particular. Instead, these programs are conceived out of the desire to convey the benefits of diversity to the entire student body.

Furthermore, it seems relevant in the constitutional analysis of an affirmative action program that grants a “plus” factor to a certain class of applicants that the programs not place an undue burden on the applicants who do not receive the special treatment.<sup>530</sup> Indeed, both Justice O’Connor and Justice Ginsburg have required proof that the program does not burden applications of those students not favored.<sup>531</sup> It seems likely that this is only applied in the context of strict scrutiny’s narrow tailoring requirement.<sup>532</sup> However, even if

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524. *Romer*, 517 U.S. at 632–33.

525. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

526. *Id.*

527. *Romer*, 517 U.S. at 634.

528. *Id.* at 620, 634.

529. *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2014).

530. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2002).

531. *See id.* at 341, 539 U.S. at 339–41; *see also Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting).

532. *Grutter*, 539 U.S. at 341. Justice O’Connor states that “[n]arrow tailoring . . .

this was required under the rational basis review standard, admission policies that do not make LGBT status a decisive factor will pass this test by placing every applicant on an equal playing field.

Therefore, based on the Court's current law on affirmative action and rational basis review, college and university admission policies that would seek to grant a "plus" factor to self-identified LGBT applicants would be constitutional. The rational basis standard of review would apply because attending college is not a fundamental right and LGBT individuals are not a suspect class.<sup>533</sup> In addition, under the rational basis standard of review, affirmative action treatment for self-identified LGBT applicants would serve the legitimate interest of diversity and would be rationally related to accomplishing student diversity. Furthermore, the Court is likely to give some level of deference to the colleges and universities in determining the best method to accomplish that diversity.<sup>534</sup> Finally, such policies are likely to be constitutional because using a policy that only makes LGBT status a "plus" factor without making it a decisive factor, would mean that disfavored applicants are not burdened.

## *2. The Need for Programs that Give Affirmative Action Treatment to LGBT Students*

While affirmative action programs benefitting self-identified LGBT individuals in college and university admissions would likely withstand a constitutional challenge under the rational basis standard of review, the parallel between LGBT individuals, African Americans and women provides little support for a need for affirmative action treatment for LGBT individuals. Past discrimination against women and African Americans was pervasive and closed the door to many opportunities and successes for these individuals. The results from this discrimination still exist today. In particular, women are sorely underrepresented in leadership roles.<sup>535</sup> African Americans are underrepresented on college and university campuses, and in leadership roles.<sup>536</sup> Unlike the discrimination against women and African Americans, discrimination against LGBT individuals did not completely lock the LGBT community out of opportunities.<sup>537</sup> Instead LGBT individuals were granted these opportunities, but could not speak of or disclose their homosexuality. Over time this inevitably

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requires that a race-conscious admissions program not unduly harm members of any racial group." *Id.*

533. *Id.* at 326–27; *see also Romer*, 517 U.S. at 640 n.1 (Scalia, J. dissenting).

534. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418–19 (2013).

535. *Windsor v. United States*, 699 F.3d 169, 184 (2013).

536. *See Fisher*, 133 S. Ct. at 2416; *see also Grutter*, 539 U.S. at 316.

537. *See Windsor*, 699 F.3d at 184–85.

resulted in many “closeted” successful LGBT individuals in leadership roles. As a result of increased LGBT acceptance, these individuals have begun to disclose their sexuality or “come out.” However, this is not to say that there are not incidences where LGBT individuals were excluded from positions or opportunities because of their sexual orientation.

Furthermore, the private nature of a student’s sexual orientation makes it difficult to determine whether affirmative action treatment is necessary in college and university admission programs. Unlike race and gender, which are obvious distinguishing characteristics, homosexuality has to be disclosed. While it may be true that there are some individuals whose sexual orientation may be clearly discernible, generally one can only speculate as to that individual’s sexual orientation. The Second Circuit Court of Appeals recognized this problem in the *Windsor* case stating that “[i]t is difficult to say whether homosexuals are ‘under-represented’ in positions of power and authority without knowing their number relative to the heterosexual population.”<sup>538</sup> Since sexual orientation is such a private matter and many individuals are met with hostility when they do disclose their sexual orientation, evidence demonstrating a need for more self-identified LGBT students is lacking. This evidence would provide a strong basis for the implementation of affirmative action programs in college and university admissions for LGBT students.

#### *D. Pros and Cons*

There are various benefits that can be derived from an admissions policy that encourages LGBT students to voluntarily identify themselves during the admission process. As Professor Jeffrey Byrne put it, “lesbians and gay men can change individual attitudes and prejudices by coming out and interacting with heterosexuals as openly gay and lesbian people.”<sup>539</sup> As gay men and lesbians come out in the admission process, hopefully these individuals will be comfortable being themselves on campus. These openly gay students will play an important role in changing the traditional stereotypes associated with being homosexual and encouraging both acceptance and inclusion. Additionally, giving affirmative action treatment to self-identified LGBT students in college and university admissions sends a positive message to the public and potential applicants: that the college or university is striving to ensure that every student has an

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538. *Id.* at 184.

539. Byrne, *supra* note 13, at 55.

equal opportunity to achieve a higher education degree no matter what his or her background may be.

On the other hand, there are a few drawbacks to affirmative action treatment for self-identified LGBT students. First, many commentators are concerned with the possible stigma associated with affirmative action treatment.<sup>540</sup> These critics claim that affirmative action treatment for LGBT individuals would “stamp” beneficiaries with a “badge of inferiority.”<sup>541</sup> This badge of inferiority would in turn open LGBT beneficiaries of affirmative action treatment up to questions about whether affirmative action played a role in their advancement, which even marks those persons who succeeded without affirmative action. Additionally, some believe that affirmative action for LGBT individuals would violate the privacy rights of LGBT individuals.<sup>542</sup> In particular, this critique states that affirmative action treatment for LGBT individuals would place pressure on these individuals to disclose their status and “unacceptably encroach upon the free exercise of their privacy rights.”<sup>543</sup> Finally, there are some concerns that some applicants will attempt to abuse the policy by making false statements disclosing that they are gay to help them increase their chances of getting into a good college.<sup>544</sup> In particular, it is difficult to ensure that the students that identify themselves as LGBT individuals are in fact members of the LGBT community.

Before creating an admissions policy that gives affirmative action treatment to self-identified LGBT students, colleges and universities should give careful consideration to the benefits and the disadvantages of such policies. Not only should these advantages and disadvantages be viewed from the perspective of the college or university, but also from the students’ perspective.

### *E. Cautions*

In seeking to adopt policies that give affirmative action treatment to applicants who disclose themselves as members the LGBT community, there are several cautions that colleges and universities may want to consider. First, the strongest justification for affirmative action treatment for students that self-identify as members of the

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540. Byrne, *supra* note 13, at 84; *see also Grutter*, 539 U.S. at 373 (Thomas, J., dissenting).

541. Byrne, *supra* note 13, at 84.

542. *See id.* at 80–82.

543. *Id.* at 81.

544. Jaschik, *supra* note 12 (quoting Greg McCandless, associate director of admission at Harvey Mudd College as saying “What if people just start to say, ‘Hey, I’m gay.’ Are we going to follow them around for a semester?”).

LGBT community is diversity.<sup>545</sup> With this in mind, colleges and universities should expand this definition of diversity to include, not only LGBT applicants, but also “‘straight allies’ of gay students . . . because a college benefits from having people who are ‘bridge builders.’”<sup>546</sup> Furthermore, this ensures that straight students are not burdened by the affirmative action treatment. Next, the information gathered should not only be used to grant affirmative action treatment, but it should also be used in making housing choices, directing students to organizations on campus, and in helping to serve the LGBT students that already exist on campuses.

Next, colleges and universities should preserve the privacy of students. First, as with questions about race and ethnicity, questions about sexual orientation should be optional. Furthermore, to ensure that students do not feel compelled to disclose their sexual orientation, questions about sexual orientation can be hidden in personal statements, such as the one used by University of Michigan law school requiring students to explain how they will add to the student body diversity.<sup>547</sup> This ensures that students do not feel compelled to disclose their sexual orientation.

#### CONCLUSION

Affirmative action policies in colleges and universities are controversial in general.<sup>548</sup> This is even more apparent when contemplating whether colleges and universities should grant affirmative action treatment to students who self-identify themselves as members of the LGBT community. Under current Supreme Court precedent, there seems to be support for this position if these policies take a holistic view of each student.<sup>549</sup> First, there is strong support for affirmative action treatment for LGBT students, not in remedying past discrimination, but based on student body diversity.<sup>550</sup> Second, the policies would likely pass rational basis review because under current law, diversity is a compelling interest and affirmative action programs geared towards LGBT students would increase student body diversity.<sup>551</sup>

The most difficult question when contemplating whether LGBT students should be given affirmative action treatment during both

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545. *Id.* at 2.

546. *Id.*

547. *Grutter v. Bollinger*, 539 U.S. 306, 315 (2002).

548. Jaschik, *supra* note 12, at 2.

549. *Grutter*, 539 U.S. at 315–16.

550. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418–19 (2013).

551. *Id.*

college and university admissions process is whether there is a need for such programs. Considering the fact that there is very limited evidence of disparities between heterosexual individuals and LGBT individuals in colleges and universities, affirmative action treatment may not be warranted.<sup>552</sup> This question is further complicated when considering the private and non-apparent nature of sexual orientation. Nonetheless, colleges and universities have begun asking students their sexual orientation on admission applications.<sup>553</sup> With this comes the potential that colleges and universities may begin granting affirmative action treatment for LGBT students to accomplish student diversity, which could change affirmative action policies forever.

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552. *A Survey of LGBT Americans*, *supra* note 3.

553. Mannion, *supra* note 12.

