# Examining Race-Conscious Policies in College Admissions

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## Abstract

In 1978, the Supreme Court affirmed that the benefit of diversity in education was compelling enough to allow for the use of racial classification in college admissions. Since 2000, five lawsuits challenging the constitutionality of race-conscious admissions have been heard before the Supreme Court, and a lawsuit against Harvard University appears to be on the path to the Supreme Court. In each case, the Supreme Court has upheld the notion that, within a limited scope, the practice of race-conscious admissions in order to create a diverse campus community meets strict scrutiny and does not violate the 14th Amendment. Using case law upholding the use of race in college admissions, historical understanding of college admissions practices, and student development theory which reinforces the benefits of diverse learning environments, this paper will argue that race conscious admissions policies are vulnerable but necessary in higher education.

# Examining Affirmative Action in College Admissions

Consideration of race in college admissions has been contested regularly in the recent two decades, but admissions offices were put on alert in mid- 2018 when a prestigious private institution, Harvard University, was sued for racial discrimination of Asian-American applicants, the United States Justice Department backed the plaintiffs, and the Trump administration rescinded guidelines encouraging colleges and universities to follow Supreme Court rulings allowing for the use of race in admissions (Jaschik, 2018, July 5). While these events did not signal legal changes to the use of race-conscious admissions, they did signal a shift in governmental acceptance.

Race-conscious admissions generally refers to institutions positively using race and ethnicity to admit a diverse incoming class. Several cases beginning in the 1970s challenged the idea that race could legally be considered without violating the 14th Amendment. Proponents of the use of race-conscious admissions argue of the benefits of diversity in education while opponents argue violation of equal protection under the law.

## Historical context of affirmative action in admissions

College and university admissions offices review the applications of prospective students seeking to enroll in their institutions. No one set of criteria or information exists across institutions, but the most important factors considered by colleges and universities have remained consistent. In a survey of 447 four-year colleges and universities across the country, high school grades, high school curriculum, and test scores were reported as the most important factors in a student's undergraduate application (Clinedinst, 2020). The report found that "In addition to considering the merits of each applicant, most universities also consider the composition of the entering class as a whole in order to ensure that a diverse group of

students…will enrich the campus experience" (Clinedinst, 2020, p. 14). This statement was true for approximately one-quarter of institutions surveyed (Clinedinst, 2020). The weight placed on any factor considered in the admissions process tends to vary based on institutional characteristics such as size, scope, and selectivity. Small, private institutions tend to place more weight on student characteristics in addition to their academics, while large public institutions focus more on test scores and transcripts (Clinedinst, 2020). Selective institutions were statistically significantly more likely to place emphasis on factors like race/ethnicity, gender, first-generation status, or high school attended than less-selective institutions (Clinedinst, 2020). This finding does not mean that less-selective institutions do not value or consider personal characteristics of students. The vast majority of colleges and universities accept more than 50% of their applicants with almost half of four-year institutions accepting 70% or more (Clinedinst, 2020). It follows that the more selective an institution is, meaning the lower the percentage of applicants admitted to the institution, the more factors they consider to discern between applicants.

## Diversity matters

In the *Regents of the University of California v. Bakke*, which will be discussed later in this paper, the Supreme Court ruled that a diverse learning environment was a compelling interest which allowed for the consideration of race in the college admissions process (*Regents of the University of California v. Bakke,* 1978). What makes a diverse learning environment compelling?

One of the first considerations is the mission statement of the institution. If the institution can show that providing a diverse and dynamic learning environment is what they strive to do, then the Supreme Court is willing to provide some deference (Garces &Jayakumar, 2014). While

having such a mission statement is not sufficient, noting the benefits that arise from a diverse learning environment can be a necessary crucial building block for institutions that make this argument.

Several student development theories speak to the importance of a diverse learning environment. From Crisp and Turner and Gurin et al.as found in Garces and Jayakumar (2014), "Cross-racial interactions contribute to student learning and growth only insofar as these encounters challenge students' pre-existing stereotypes, beliefs and worldviews" (p. 119-120). Students benefit the most from environments which will challenge what they think they know, and a diverse college campus provides that opportunity. The more interactions students have with individual members of various racial, ethnic, religious, or gendered groups, the more likely perceptions and bias will be challenged (Garces & Jayakumar, 2014). In an increasingly diverse society, confronting unconscious bias and possessing greater understanding is a compelling interest.

Singular interactions with diverse people are not enough to change perceptions. The campus climate in which these interactions happen is also crucial. Students need to feel they belong and are welcome in the environment in which they have these diverse interactions. This requires a critical mass of students with whom they identify. Garces and Jayakumar (2014) caution that critical mass is not a specific number that can be prescribed to every college campus but rather relies heavily on that campus climate.

Campus racial climate is a framework put forth by Hurtado et al. defined as "…the current attitudes, perceptions, and expectations within an intuitional community about issues of race, ethnicity, and diversity" (Griffin, Museus, Quaye, 2019, p. 21). An environment hostile to racial differences prevents important growth for students of color as they attempt to navigate a

campus where they feel alone. Increasing the diversity of a campus is just one step to creating a positive campus racial climate where all students can engage in primarily positive interactions; this action must be done at the same time institutions demonstrate their commitment to structural changes to influence campus culture. As Garces and Jayakumar (2014) state "Dynamic diversity is cross-racial because it is defined by productive interactions…It is participatory because it is characterized by participation that engages group members' full selves…" (p. 121). Positive interactions with others that challenge the way people think and which provide opportunities for growth are the benefits of a diverse learning environment.

Even if all parties were to agree that diversity matters, the way in which colleges choose to admit students are varied and often unclear to applicants. This often-hidden process leaves questions as to whether or not students were discriminated against during review of their applications.

## Legal standards and cases

In legal cases of higher education admissions decisions, denied applicants frequently allege that institutions used race discrimination against them and denied them equal access to the benefits of that institution's education. Before reviewing the cases, it is important to discuss the 14th Amendment and strict scrutiny as both have implications in such cases.

### 14th Amendment

The primary question asked in the cases discussed in this paper centers on the constitutionality of using race in selecting students to institutions of higher education. Lawsuits brought against higher education admissions' processes typically allege denial of the applicant's 14th Amendment right for "equal protection under the law" (Legal Information Institute, 2019).

The premise is that government is meant for all citizens of United States and rights cannot be awarded differently to individuals:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. **(Legal Information Institute, 14th Amendment, 2019)**

In order to have standing in a court of law, the individual needs to prove discrimination and harm done. Legal precedent has set racial discrimination against strict scrutiny which is "…the highest standard of review which a court will use to evaluate the constitutionality of governmental discrimination" (Legal Information Institute, 2020).

**What is strict scrutiny?**

Strict scrutiny is the most often applied standard when issues of discrimination of race, national origin, and religion (i.e. suspect classifications) are brought before the court (Strasser, 2018). The courts utilize a two-pronged test to determine if the issue passes strict scrutiny. First, does the suspect classification serve a "compelling government interest"? (Strasser, 2018). *Regents of the University of California v. Bakke* set the precedent that diversity in education and professional training did serve a compelling government interest, although the dissenting opinions strongly opposed the assumption that diversity was an educational benefit (*Regents of the Regents of the University of California v. Bakke*, 1978). The second prong of the strict scrutiny tests requires that the discrimination be "narrowly tailored to the law to achieve that

interest" (Strasser, 2018). This means that the use of race should be limited to avoid violating an individual's 14th amendment rights. Creating a system that is sufficiently narrowly tailored proves to be a major challenge in the cases presented, including in *Regents of the University of California v Bakke*.

**Regents of the University of California v. Bakke**

In 1978, the Regents of the University of California Davis (UC Davis) medical school was sued by Bakke for denying his application two years in a row. Bakke alleged his constitutional right to equal protection was violated by UC Davis admission's process, and "He sought mandatory, injunctive, and declaratory relief compelling his admission to the Medical School" (*Regents of the University of California v. Bakke*, 1978, p. 278). The university countered by asking the court to find their special admissions process lawful. After several rulings and appeals, the Supreme Court agreed to hear the case.

At the time, UC Davis believed there was value in having a diverse student body in its medical school. In order to achieve a more diverse class, the admissions process split into two committees- one for traditional applicants and another for economically or educationally disadvantaged students. Both processes followed the same general steps, except students in the special process were not held to the same 2.5 GPA minimum and were only reviewed against other minority applications (*Regents of the University of California v. Bakke*, 1978, p. 275). The admissions committee held sixteen of one hundred seats in the class for students reviewed by this committee. Although white students self-selected into this process, no white students were admitted through the special review (*Regents of the University of California v. Bakke*, 1978, p. 276).

UC Davis argued strict scrutiny was not necessary, but the Supreme Court declined to overturn the lower courts' assertion that strict scrutiny was most applicable. The Supreme Court agreed that having diversity in education was a compelling government interest, but the way the medical school approached achieving diversity was too focused on just race and the institution was not achieving "genuine diversity" (*Regents of the University of California v. Bakee,*1978, p. 316) including diversity of experience, thought, and other backgrounds. In a split decision, the Court ruled that the UC Davis did violate Bakke's 14th amendment right and required his admittance. Then the Supreme Court overturned the enjoinment of using race in admissions and allowed consideration only if it was one of many factors. Justice Powell delivered the Court's opinion and shared an example of Harvard University using race-conscious admissions properly.

Harvard's process was described as holistic in nature. Most applicants to Harvard were academically qualified, but the first-year class was made up of only 1,100 students. The dean of admissions described what happened to the students in the middle group of applicants (not extraordinary but not unqualified) as a series of decisions to build a diverse class by considering the different perspective a student could bring to Harvard. Race and ethnicity were added to the list of special interests Harvard considered during its review process. (*Regents of the University of California v. Bakke*, 1978, pp. 322-324).

The Court came to a split decision with Justice Powell as the swing vote to affirm in part and reverse in part the findings of the lower courts (*Regents of the University of California v. Bakke*, 1978, p. 272). The decision gave colleges the opportunity to use race in admissions decisions and confirmed that the use of quotas or use of race as a primary factor were and are not permissible under the law.

**Grutter v. Bollinger**

Twenty-five years after the *Bakke* (1978) decision, the Supreme Court ruled on two cases against the University of Michigan. In *Grutter* (2003), applicants to the Law School alleged that race was used as a predominant factor in the admissions process and the institution did not have a compelling reason to use race (*Grutter v. Bollinger*, 2003, p. 317). The Law School made arguments focused on the benefit of diversity in education and explained that its process was holistic and narrowly tailored to achieve a "critical mass" of underrepresented students (*Grutter v. Bollinger*, 2003, pp. 318-320). In its admissions policy, the University of Michigan Law School made specific mention of racial and ethnic groups alongside other forms of diversity and demonstrated a "focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them." (*Grutter v. Bollinger*, 2003, p. 315). The admissions policy and practice matched exactly what Justice Powell proposed as permissible in *Bakke*.

Still, the lower courts ruled that the process was unlawful and failed both parts of strict scrutiny. After the Court of Appeals totally reversed the previous court's decision, citing *Bakke*, the Supreme Court agreed to resolve "whether diversity is a compelling interest that can narrowly justify tailored use of race in selecting applicants for admission to public institutions" (*Grutter v. Bollinger*, 2003, p. 322). Universities had been tailoring their admissions policies using the opinion of Justice Powell, and the Court needed to make a firmer and clearer decision on the issue of diversity as a compelling interest.

As a result, the Supreme Court endorsed Justice Powell's 1978 opinion that diversity in the student body is compelling and provides "substantial benefits" (*Grutter v. Bollinger*, 2003, p. 330) in education. The inclusion of amici briefs from many institutions of higher education, the U.S. military and major corporations impressed five of the justices and confirmed that the

benefits of diversity extend beyond the classroom (*Grutter v. Bollinger*, 2003, p. 333). The opinion of the Court specified the expectations of narrowly tailored policies to require that the applicants be considered as individual people and to prohibit quotas, assigning a specific or quantitative benefit to race, or separating out racial groups during review. While the Court more clearly defined what was permissible, Justice O'Connor's opinion yielded the specifics of how an institution would accomplish admitting a class be left to the expertise of the institution (*Grutter v. Bollinger*, 2003, p. 329). Many forms of higher education exist, and the Court acknowledged in this ruling that they were in no position to tell all institutions exactly what they should do. Further, the majority opinion agreed that race-neutral processes like lottery systems "would require sacrifice of diversity, academic quality of all admitted students, or both." (*Grutter v. Bollinger,* 2003, p. 340). The dissenting justices took grievance with this opinion.

Justice Thomas challenged the majority's acceptance that diversity is an educational benefit, stating no one explained what the benefit entailed or when the benefit would be achieved and, in a joint opinion with Justice Scalia, that understanding diversity is a life lesson not tied specifically to education (*Grutter v. Bollinger*, 2003, p. 347). Justices Scalia and Thomas blamed the Law School's self-imposed admissions criteria for not being able to use a race neutral process (*Grutter v. Bollinger*, 2003, p. 347): since the Law School set their own academic criteria knowing that Black and Latino applicants would not score as highly, their intention in using race-based admissions was to maintain prestige rather than attain diversity. The dissenting justices also noted that California, Florida, and Washington which were all experimenting with race-neutral admissions practices after state legislature prohibited racial preference of any kind (*Grutter v. Bollinger*, 2003, p. 342). This sentiment foreshadowed the future of the race-conscious admissions debates.

Ten years after *Grutter v. Bollinger*, the Supreme Court ruled on the constitutionality of Michigan voters adopting a state law similar to California, Florida, and Washington in *Schuette v. Coalition to Defend Affirmative Action (*2014). The Coalition attempted to argue that the issue of race-conscious admissions was too big to put to the public and that in almost 100 years, not a single initiative that explicitly benefited minorities ever passed state legislation (*Schuette v. Coalition to Defend Affirmative Action*, 2014, p. 1162). The Court was not moved and affirmed the law stating that race-conscious admissions was permissible but not required; the public had every right to vote for state legislation effecting state entities.

The second bit of foreshadowing appears in Justice Scalia's opinion that the decision to uphold the Law School's process but enjoin University of Michigan's undergraduate admissions from using race (*Gratz v. Bollinger*, 2003) will only lead to further controversy and divide on the issue (*Grutter v. Bollinger*, 2003, p. 349). Justice Scalia was joined by three other justices in dissenting. For the second time, a major Supreme Court ruling on race-conscious admissions as constitutional stood with just one vote.

**Gratz v. Bollinger**

The second case heard against the University of Michigan in 2003 focused on the undergraduate admissions process. In *Gratz* (2003), the Court decided they were being asked to rule on the constitutionality of the university's system rather than the consideration of race. Gratz and Hamacher were both white undergraduate applicants denied to the University of Michigan's College of Literature, Science and the Arts suing for violation of their 14th Amendment right to equal protection under the law and discrimination based on race (*Gratz v. Bollinger,* 2003). Much of the beginning discussion in the case centered around establishing standing for these students who both enrolled and graduated from other institutions. Justice Stevens not only raised

this point several times but also returned to and submitted a separate opinion stating while he joined the Court's decision, he did so because the Court should not be hearing the case due to a lack of standing (*Gratz v. Bollinger*, 2003, p. 282). The majority of the Court agreed the students did have standing.

At issue for the justices was the way Michigan approached achieving diversity. The Court accepted that diversity in education is a compelling interest, but ruled the admissions system was flawed. The University of Michigan assigned points to each applicant for quality of the high school, curriculum, testing, leadership, geographic diversity (in-state vs. out-of-state), alumni connections, and unusual circumstances (*Gratz v. Bollinger*, 2003, pp. 254-256). Twenty points were given to students of underrepresented racial and ethnic groups (*Gratz v. Bollinger*, 2003, p. 255). The Court found this practice highly problematic as it did not evaluate a student of color as a whole person but rather systematically added advantage to preferred groups (*Gratz v. Bollinger*, 2003, p. 272). When the University attempted to argue that to perform truly holistic admissions practices would be impossible with their volume of applications, the Court was not moved – inconvenience does not change the law and the systematic awarding of points to specific racial and ethnic groups was unlawful.

Five justices joined the Court's decision to rule against the University of Michigan's undergraduate practices. Of the four dissenting justices, Justice Ginsburg delivered one of the most poignant remarks: "If honesty is the best policy, surely Michigan's accurately described, fully disclosed College race-conscious admissions plan is preferable to achieving similar number through winks, nods, and disguises" (*Gratz v. Bollinger*, 2003, p. 305).

**Fisher v. University of Texas (I & II)**

The University of Texas (UT) was no stranger to its admissions policies being challenged in court. In *Hopwood v. Texas* 1996, the University's admissions system of using an academic index plus the student's race was deemed unconstitutional and the University had to set up a new system (*Fisher v. University of Texas*, 2013, pp. 2416-2417). The Texas state legislature set up a "top 10% rule" which automatically admitted applicants who were in the top 10% of their Texas high school graduating class and the public universities stopped considering race all together. Then, in 2004 after the *Grutter* decision, UT reintroduced the use of race in a more holistic system along with the top 10%. About 75% of the incoming first year class is admitted through the top 10% program (*Fisher v. University of Texas*, 2016), leaving very few spots for all other applicants.

Abigail Fisher was a Texas high school student, with an academic profile outside of the top 10% of her graduating class, who applied to UT Austin and sued the University after she was denied. The case was heard twice by the Supreme Court. In the first hearing, the Court ordered the case back to the district court to correct their application of strict scrutiny. Justice Kennedy stated that while some deference to the university is appropriate, "The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference" (*Fisher v. University of Texas,* 2016, p. 2420) which directly reverses the lower court's decision.

Appeals brought the lawsuit back to the Supreme Court in 2016 and this time the Court affirmed that the UT Austin was within the law during their holistic admissions process. The University presented clear goals for using racial classification including "…cultivating leaders with 'legitimacy in the eyes of the citizenry'" (*Fisher v. University of Texas* 2016, p. 2204). The

University also brought statistical studies that proved race-neutrality was not enough to achieve the kind of diversity they could enroll when race was used as one of many factors.

The majority opinion did affirm the lawful use of race-conscious admissions, but Justice Kennedy added,

> The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies. (*Fisher v. University of Texas,* 2016, p. 2215)

Institutions using race and ethnicity in the admissions process should thoroughly consider and regularly reevaluate the use of suspect categories before simply repeating the previous years' processes.

**Students for Fair Admissions v Harvard University**

Harvard University receives over 40,000 applications for a class of less than 2,000 students each year and takes a holistic approach to selecting a class (Harvard University, 2019). The university is currently being sued by Students for Fair Admissions (SFFA) for the 14th Amendment violations of Asian-American students. The organization alleges that Harvard University admissions reviews disadvantage Asian-American students and benefit Black and Latino students when looking at applicants' scores on a personal qualities scale - one of four scales used in the process (Hoover, 2019, February 14). Initial arguments were heard in October 2018 in Massachusetts where SFFA's expert presented evidence that the scoring system disadvantages Asian-American students, but Harvard's expert found that there was no statistical difference between the admissions scores of Asian-American students and any other racial group. Harvard argued SFFA's expert separated out recruited athletes and legacy students and to

leave out such a wide portion of the applicant pool misrepresented the entire process. (Harvard University, 2019)

During a federal appeals case, SFFA's lawyer pointed to an increase in the number of Asian-American students in the class of 2024 as an indication that "…Harvard was correcting an error" which Harvard's lawyer rejected saying the "…racial makeup of classes changes from year to year…" (Gluckman, 2020). In November 2020, the federal appeals court ruled in Harvard's favor stating that Harvard's use of race was both compelling and narrowly tailored (Wolf, 2020). Given SFFA's lawsuits against University of North Carolina at Chapel Hill (UNC Chapel Hill) and the association of the group's leader, Edward Blum, with the Fisher cases, SFFA is likely to continue their appeals until they reach the Supreme Court.

The outcome of this case will impact institutions across the country. Up until now, rulings at the Supreme Court level have only been made in cases of public institutions of higher education. A ruling on a private institution will be a landmark case. The use of race-conscious admissions hinges on the current Supreme Court justices continued acceptance that the educational benefit of diversity is a compelling state interest. With a Supreme Court that is decidedly more conservative than when the last affirmative action case was heard, a continuation of precedent is not a given.

## Race-neutral admissions

Alongside legal challenges to the use of race as a consideration in college admissions, a number of states have enacted state legislation banning the use of affirmative action and requiring higher education to use race-neutral admissions policies. In 2019, the state of Washington upheld its 2017 ban on affirmative action through a ballot measure (Managan, 2019). Similar bans have been enacted in California, Florida, and Michigan among other states

(Jaschik, 2020). With bans on the use of race in place, institutions have adopted a few different strategies including percent plans like the one used by the state of Texas. In the 1990s, state lawmakers prescribed a percent plan for Texas colleges and universities which required its state institutions (with the exception of University of Texas at Austin whose percentage is lower at 6%) to admit Texas high school seniors who graduated in the top 10% of their class (Watkins, 2017). The percent plan removes a certain level of bias or preference as students are automatically admitted to the institution from high schools across the state. The College Board also offers percent plans as an option for institutions to consider in the changing landscape of college admissions. The College Board defines percent plans as "a program, typically mandated by a state legislature, the provide for admission of in-state students to the state's public institutions…" (Coleman et al, 2019, p 44). These researchers caution institutions to consider who might be excluded and to consider the demographics of their state's high school population before adopting a percent plan (Coleman et al, 2019). Considering Justice Kennedy's comments during *Fisher II* where he noted that Texas's percent plan was clearly adopted in order to increase the enrollment of students of color, colleges and universities may be better served by only adopting percent plans if they are mandated by their state (Coleman et al., 2019, p. 43).

In a 2019 guidebook, the College Board published additional race-neutral strategies for institutions to consider and offered this guidance:

> As a general rule, institutional goals and objectives associated with diversity (the ends) should not raise legal concerns. However, when institutions advance those goals through race conscious means, "strict scrutiny" legal standards apply… (Coleman et al, 2019, p. 5)

The College Board's recommended strategies allow institutions to potentially increase diversity by focusing their attentions on other characteristics like socioeconomic or first-generation status, educational collaboration agreements with community organizations that typically serve underrepresented students, and flexible admissions criteria and test use (Coleman et al, 2019, p. 12). Regents of the University of California schools utilized a flexible admissions and test score criteria when they were banned from using affirmative action in the admissions process.

A 2013 study on the effect of the affirmative action ban to the Regents of the University of California (UC) compared the weight assigned to different application factors before and after the ban. The study found that the initial removal of race "…dramatically lowered the admissions rate of underrepresented minorities (URMs) relative to non-URMs at selective UC campuses." (Anotonovics & Backes, 2013, p. 296). This finding aligns with a study published in 2020 by Long and Bateman which reported incremental year-to-year drops in the percentage of Black, Latinx, and Native-American students at the majority of state institutions in nine states that had banned the use of affirmative action (Jaschik, 2020). In an attempt to replace the use of race in their process, UC schools changed the weighting of admissions criteria by specifically "…lowering the weight given to SAT scores and increasing the weight given to high school GPA and family background in determining admissions" (Antonovics & Backes, 2013, p. 296). Underrepresented students applying to UC schools had lower test scores than white and Asian students, so by lowering the level of importance placed on a test score and placing more weight on personal information (like first-generation status or parental income), the UC schools hoped to increase the diversity of their admitted students (Antonovics & Backes, 2013). By making these changes, selective UC schools were able to redistribute a portion of the chances of admission for URMs with little impact to the academic averages of the class, but this adaptation

was not without consequences – URMs in the strongest academic brackets saw their chances of admittance decrease (Antonovics & Backes, 2013). The results of this study demonstrate that institutions can adopt race neutral policies in their admissions process and still maintain a diverse pool of admitted students by using factors that typically align with race, but there will still be groups of students who do not benefit from the new process.

## What is next for admissions?

As the case against Harvard University continues through the appeals process and as more challenges to the legality of race-conscious admissions continue, higher education will need to adapt policies and procedures. Putting new policies and procedures in place now may allow institutions flexibility should affirmative action bans continue.

### Growing number of test-optional institutions

Test-optional policies may be one answer to eliminating the need for race-conscious admissions. With the current COVID-19 pandemic, admissions offices saw a huge increase in the number of institutions allowing applicants to apply without test scores. According to data from the Common Application, less than half of students submitted an SAT or ACT scores and saw a noticeable difference in the percentage of underrepresented minority (URM) applicants and white and Asian-American applicants submitting test scores (Jaschik, 2021). This result would indicate that the elimination of a required standardized test score could encourage more underrepresented students to apply to institutions.

### Failed challenges to race-neutral policies

Washington state put affirmative action back on the ballot and voters elected to continue not considering race in education or hiring (Mangan, 2019). The same was true in California when Proposition 16, which would have removed the statewide ban on affirmative action, did not

pass with virtually the same percentage of California residents as in 1996 voting to keep the ban on affirmative action (Aspegren, 2020). Given this relative consistency in voting, overturning these bans is unlikely. This trend of putting affirmative action bans on state election ballots may prove to be a favored tactic for opponents of the use of race in college admissions.

**Additional lawsuits**

Students for Fair Admissions has also sued UNC- Chapel Hill for racial discrimination against a denied white applicant with impressive academic credentials (Hoover, 2019, January 18). The facts of this case match most closely to what the Supreme Court has previously heard – a public institution denies a qualified white applicant but admits underrepresented students with lower academic credentials. Unlike the other cases, this unnamed student is presented as a highly competitive applicant whereas in *Fisher* the applicant was outside of the strongest candidates. Given the precedent surrounding this case, a ruling against UNC - Chapel Hill would be surprising. The case is currently awaiting a decision from a U.S. District Court judge (Schlemmer, 2020).

Admissions offices can best prepare for what comes next by looking to opinion of the Supreme Court and the University of Texas at Austin's extensive testimony and data provided in the *Fisher* cases (2013; 2016). The Court made clear that the expectation of institutions using race-conscious admissions is to couple the process with ongoing critical review and consider implementing race-neutral policies (Taylor, 2016). Institutions should also reflect on the overall goals of enrolling a diverse class and if those goals can be defined as clear and achievable.

**National Association for College Admission Counseling commission**

The National Association for College Admission Counseling (NACAC) announced the formation of a new commission which will review the admissions process with an equity lens

and reconsider each part of the process (Jaschik, 2021). The commission intends to review each step of the admissions process and consider who is not being served by current practices (Jaschik, 2021). This development is a promising way for college admissions to rethink what has become common practice and recommend national changes to improve access for more students.

## Conclusion

The future of race-conscious admissions in college rests in the continued acceptance that diversity in education is a compelling state interest. After the 1978 *UC Regents v. Bakke* case, subsequent cases continued to uphold that the educational benefit of diversity was still a compelling interest. With continued lawsuits alleging discrimination, state lawmakers are turning to ballot measures to ban affirmative action, and the expansion of test optional policies, institutions may find maintaining race-conscious policies difficult to defend. However, admissions offices should and can continue to shape diverse classes and use the legal means available to them to reach institutional diversity and inclusion goals. Admissions procedures are not clear-cut and are very personal to the students and families going through the application process. As long as those two things are true, there will be questions about admissions practices.

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