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FISHER'S FOREWARNING: USING DATA TO NORMALIZE COLLEGE ADMISSIONS

*Shakira D. Pleasant**

ABSTRACT

This Article presents a nuanced view of Fisher v. University of Texas that has largely been ignored in mainstream discourse in the case. In Fisher, Justice Anthony Kennedy cast the deciding vote to uphold the University of Texas ("UT") race-conscious admissions policy. This was the first time that Justice Kennedy voted to uphold a race-conscious policy, and many commentators have focused on this aspect of his Fisher majority opinion. However, Justice Kennedy also gave a stern forewarning to UT and other universities: in the future, they better have strong data to show that they need to use race-conscious admissions. Kennedy did not hold UT to a strenuous evidentiary burden because the University did not have incentive to collect certain data up to 2008—the year that Plaintiff Abigail Fisher was denied admission. However, he also made it clear that UT and other universities are now on notice and will need meticulous data for future defense of their policies.

Using UT as a model, this Article shows how universities can use data to defend their race-conscious policies and to ensure that they are attaining student body diversity along racial, socioeconomic, and other lines. First, this Article reviews jurisprudence on race-conscious university admissions, all the way up to Justice Kennedy's forewarning. Second, it evaluates data that UT has gathered since 2008. It considers admission and enrollment rates for UT's race-neutral Top Ten Percent Law ("TTPL") and for its race-conscious holistic admissions policy, and it also examines which secondary schools are the top feeders for minority students at UT. This Article argues that UT needs its race-conscious holistic policy because (1) White American students admitted under TTPL enroll at greater rates than Black and Latina/o TTPL admittees; and (2) Those minority students who are admitted via TTPL come from racially homogeneous schools. Part III of the Article then concludes with proposals for UT to defend its race-conscious policies and to improve enrollment and retention rates for minority students. These proposals also provide models for other universities who may face lawsuits against their affirmative action policies.

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INTRODUCTION

One vote underscored the importance of racial diversity in higher education.¹ When Justice Anthony Kennedy wrote the United States Supreme Court (“U.S. Supreme Court” or “Court”) decision in *Fisher v. University of Texas* (“*Fisher II*”), he found that a compelling interest exists in achieving student body diversity *and* by applying race as one of several admissions factors, the University of Texas at Austin’s (“UT” or “University”) means for satisfying that interest were narrowly tailored.² Yet, despite its holding, *Fisher II* did not foreclose future challenges to UT’s race-conscious admissions; in fact, litigation and other undermining acts currently underway are likely attributed to the narrow scope in which the case was decided.³

Justice Kennedy’s words were eerily foretelling, but also instructive.⁴ Writing for the majority, he opined:

[UT’s] examination of the data it has acquired in the years since petitioner’s [Fisher’s] application . . . must proceed with full respect for the constraints imposed by the Equal Protection Clause. The type of data collected, and the manner in which it is considered, will have a significant bearing on how

¹ See *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 136 S. Ct. 2198, 2205 (2016).

² See *id.* at 2214 (“In short, none of petitioner’s suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be ‘available’ and ‘workable’ means through which the University could have met its educational goals, as it understood and defined them in 2008. . . . The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner’s application was narrowly tailored.”).

³ The decision in *Fisher II* exemplifies how evidentiary doctrine intersects with substantive constitutional law and civil procedure. It is also the first time that Justice Kennedy wrote the majority opinion affirming a race-conscious admissions policy. Substantively, the Court determined that UT complied with constitutional requirements by satisfying strict scrutiny. *Id.* But, procedurally, it disposed of the case by finding that Fisher had not satisfied the *evidentiary burden* necessary to overcome summary judgment. *Id.* at 2209–10. It is the evidentiary burden that is most important to this case and future cases. The timing of the case did not require UT to assess its holistic admissions beyond the work it had done until 2008, but moving forward, data will be a key component to determining if a race-conscious admissions policy meets strict scrutiny. *Id.* at 2210 (“[T]he Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.”); see also Vinay Harpalani, *The Fishing Expedition Is Over: Victory for Affirmative Action in Fisher v. Texas!*, AM. CONSTITUTION SOC’Y BLOG (June 24, 2016), https://www.acslaw.org/?post_type=acsblog&p=11544.

⁴ UT’s “combined percentage-plan/holistic-review approach” had existed for only three years when Fisher filed suit. *Fisher II*, 136 S. Ct. at 2209. Thus, even if *Fisher II* had been remanded again, there was insufficient evidence to answer the question of whether Fisher received equal treatment under the law when her admissions application was rejected in 2008. *Id.* at 2209–10. Further, the record was devoid of information for the Court to determine “how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review.” *Id.* at 2209.

the University must shape its admissions policy to satisfy strict scrutiny in the years to come. . . .

. . . .

The Court's affirmance of [UT'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.⁵

The Court's opinion was lauded as “built to last,”⁶ but that did not deter UT's race-conscious admissions from being attacked less than one year after the *Fisher II* decision.⁷

In March 2017, reports surfaced that a new lawsuit against UT was afoot.⁸ Focused squarely on the U.S. Supreme Court's directive that UT must “engage in constant deliberation and continued reflection regarding its admissions policies,”⁹ the litigants claimed that “UT has not met its constitutional obligations and is vulnerable to a new legal challenge.”¹⁰

⁵ *Id.* at 2210, 2215.

⁶ Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?_r=0.

⁷ See Students for Fair Admissions, *Students for Fair Admissions Launches New Website Targeting University of Texas-Austin Admissions Policies*, PR NEWSWIRE (Mar. 1, 2017, 11:05 PM), <http://www.prnewswire.com/news-releases/students-for-fair-admissions-launches-new-website-targeting-university-of-texas-austin-admissions-policies-300416459.html> (demonstrating how Edward Blum, the financier of *Fisher I* and *Fisher II*, invites people rejected from UT to reach out to Students for Fair Admissions to “end UT's discriminatory admissions practices and bring fairness and equality back to UT” through litigation); see also *Were You Rejected from the University of Texas at Austin?*, UNIV. TEX. NOT FAIR, <https://utnotfair.com/> (last visited Jan. 19, 2019) [<https://web.archive.org/web/20190119063344/https://utnotfair.com/>].

⁸ The pending state lawsuit is not the focus of this Article, but it is worth noting that the state litigation appears to be a long-term orchestrated strategy against the University. The statute at issue, Texas Education Code § 51.803(k), was amended in June 2009—approximately one year after Fisher sued UT in federal district court and about three years before the U.S. Supreme Court granted certiorari in *Fisher I*. See Plaintiff's Original Petition & Application for Permanent Injunction at 9–10, *Students for Fair Admissions, Inc. v. Univ. of Tex.*, No. D-1-GN-17-002930 (Tex. Dist. Ct. June 26, 2017); see also TEX. EDUC. CODE § 51.803(k) (“A general academic teaching institution [UT is defined as such under TEX. EDUC. CODE § 61.003] may not offer admission under Subsection (a–1) for an academic year after the 2017–2018 academic year if . . . (1) a final court order applicable to the institution prohibits the institution from considering an applicant's race or ethnicity as a factor in the . . . decisions relating to first-time undergraduate admissions”); An Act, S.B. No. 175, 81st Leg., ch. 1342, § 1, eff. June 19, 2009 (amending TEX. EDUC. CODE § 51.803); Motion for Preliminary Injunction, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS).

⁹ *Fisher II*, 136 S. Ct. at 2215 (emphasis added).

¹⁰ *Students for Fair Admissions Files Lawsuit Against Univ. of Texas at Austin*, PR NEWSWIRE (Mar. 1, 2017, 11:05 PM), <https://www.prnewswire.com/news-releases/students-for-fair-admissions-launches-new-website-targeting-university-of-texas-austin-admissions-policies-300416459.html>.

One month later, in April 2017, the Texas Legislature once again sought to restrict how many students could be automatically admitted to UT via Texas' Top Ten Percent law ("TTPL").¹¹ TTPL opponents led the charge to amend the statute again, but the effort was unsuccessful.¹² Even though their efforts ultimately failed, they alleged two bases to support another statutory amendment.¹³ First, they claimed that UT could not be as selective with its holistic admissions because TTPL admittees comprise about seventy-five percent of the incoming class.¹⁴ Second, they claimed that TTPL admittees were not more diverse despite the law's enactment; therefore, amending the law again would not be detrimental to its purpose.¹⁵

11 In 1997, when TTPL was enacted, students graduating in the top ten percent of their class were eligible for automatic admissions. In 2009, the statute was amended, thereby restricting students' class rank and access. In a progressive scheme, UT limited its acceptance of TTPL admitted students—only those required to fill seventy-five percent of UT's freshman enrollment capacity would be automatically admitted. This meant, beginning with the 2011–2012 admissions cycle, students graduating in the top nine to six percent of their class would be eligible for automatic admission. *Compare* An Act, H.B. No. 588, 75th Leg., ch. 155, § 1, eff. Sept. 1, 1997, with An Act, S.B. No. 175, 81st Leg., ch. 1342, § 1, eff. June 19, 2009, and S.B. No. 2119, 85th Leg., Reg. Sess. (Tex. 2017). Now, the amended legislation caps automatic admissions to seventy-five percent of the incoming class, and, instead of the top ten percent being automatically admitted, it is now the top six percent. *Id.*; see also Matthew Watkins, *Author of Effort to Peel Back Top 10 Percent Rule says His Bill is Dead*, TEX. TRIB. (May 19, 2017, 1:00 PM), <https://www.texastribune.org/2017/05/19/author-effort-peel-back-top-10-percent-rule-says-bill-dead/>.

12 See Watkins, *supra* note 11 (noting that a bill author did not have enough support to get the bill to the floor); see also Matthew Watkins, *Texas Senators Mull Eliminating the Top 10 Percent Rule*, TEX. TRIB. (Apr. 5, 2017, 6:00 PM), <https://www.texastribune.org/2017/04/05/texas-senators-mull-eliminating-top-10-percent-rule/> (discussing lawmakers' proposal to eliminate the TTPL).

13 See generally Watkins, *supra* note 11; Watkins, *supra* note 12.

14 See generally Watkins, *supra* note 11; Watkins, *supra* note 12.

15 Proponents claim:

CSHB 588 would establish a fair, race-neutral admissions structure providing students from all backgrounds and parts of the state an opportunity to continue their educations. . . . Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well-qualified pool of minority students was admitted to Texas universities.

HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS HB 588 4–5 (1997), available at <https://hro.house.texas.gov/pdf/ba75r/hb0588.pdf#navpanes=0>; see also Matthew Watkins, *Abbott: "I Would Like to See" Top 10 Percent Rule Change*, TEX. TRIB. (May 19, 2016, 5:00 PM), <https://www.texastribune.org/2016/05/19/abbott-top-10-percent-rule-needs-be-changed/> ("If you look back to the university that they had before the automatic admissions compared to what they have now . . . it's my understanding it was fairly much the same.").

In addition to the state lawsuit¹⁶ and failed legislative reform, the United States Department of Justice (“Justice Department”) announced in August 2017, that it would direct resources toward “investigating and suing universities over affirmative action policies deemed to discriminate against white applicants.”¹⁷ For now, the Justice Department’s focus is on Harvard University.¹⁸ However, UT, as well as other colleges and universities should take heed because they could be next.¹⁹

The holding in *Fisher II* unquestionably outlined the Court’s expectation that UT collect, scrutinize, and utilize data to evaluate and refine its race-conscious admissions process.²⁰ And, it would be myopic to view this expectation as only being applicable to UT—other colleges and universities

¹⁶ See Matthew Watkins, *Man Behind Fisher Affirmative Action Case Files New Lawsuit Against UT-Austin*, TEX. TRIB. (June 27, 2017), <https://www.texastribune.org/2017/06/27/man-behind-fisher-case-files-new-lawsuit-challenging-affirmative-action/> (last updated June 27, 2017, 2:00 PM) (discussing a challenge under the state’s constitution); see also Plaintiff’s Original Petition & Application for Permanent Injunction, *supra* note 8.

¹⁷ Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html?mcubz=0>.

¹⁸ During the 2017–2018 academic year, Harvard, for the first time in its history admitted a majority-minority (i.e., less than fifty percent white) entering class. Deirdre Fernandes, *The Majority of Harvard’s Incoming Class Is Nonwhite*, BOS. GLOBE (Aug. 3, 2017), <https://www.bostonglobe.com/metro/2017/08/02/harvard-incoming-class-majority-nonwhite/5yOoqrsQ4SePRRNfemuQ2M/story.html> (last updated Aug. 5, 2017); see also Deirdre Fernandes, *Justice Department Investigating Harvard Over its Admissions Policies*, BOS. GLOBE (Nov. 21, 2017), <https://www.bostonglobe.com/metro/2017/11/21/justice-department-investigating-harvard-over-its-admission-policies/LJL8KmnOZHY3qOOPjCU8LP/story.html> (discussing the launch of a civil rights investigation after allegations that Harvard limited admissions of Asian-American students).

¹⁹ Harvard is being targeted by both the Justice Department and Students for Fair Admissions (“SFA”). SFA is an organization led by Edward Blum—the same individual who financed the *Fisher* litigation. Watkins, *supra* note 16. SFA also sued the University of North Carolina-Chapel Hill (“UNC”), but unlike *Fisher*, the plaintiffs’ race in the Harvard and UNC lawsuits is Asian American, not White. See *Project on Fair Representation Announces Lawsuits Challenging Admissions Policies at Harvard Univ. and Univ. of North Carolina-Chapel Hill*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/project-on-fair-representation-announces-lawsuits-challenging-admissions-policies-at-harvard-univ-and-univ-of-north-carolina-chapel-hill/> (last visited Jan. 5, 2019) (detailing how the suit against Harvard claims the university unequally admits White, African-American, and Hispanic students over Asian-American students who have better SAT scores); see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39, 43, 50–51 (D. Mass. 2015) (same systematic effort to dismantle race-conscious admissions, but strategically different tactic as private party action receives backing from government).

²⁰ *Fisher II*, 136 S. Ct. 2198, 2210 (2016) (“As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values.”).

can also benefit from using data to normalize their admissions.²¹

Before *Fisher II*, the U.S. Supreme Court had not explicitly held that a data-driven race-conscious admissions process was required to meet strict scrutiny, but now it is imperative.²² Justice Kennedy's retirement in July 2018 and the procedural posture in Harvard University's lawsuit foreshadow the Court's instruction, as well as the likelihood of more legal challenges, regarding race-conscious admissions.²³

In UT's case, future data collection and assessment must keep TTPL and its feeder schools as a focal point.²⁴ Similarly, other colleges and universities should undertake collecting, analyzing, and utilizing feeder school data,²⁵

²¹ See Mikhail Zinshteyn, *University of California President Wants to Offer Guaranteed Admission to Qualified Community College Students*, EDSOURCE (Mar. 7, 2018), <https://edsource.org/2018/university-of-california-president-wants-to-offer-path-to-guaranteed-admissions-for-community-college-students/594383> (reporting that a California university system is exploring ways to guarantee admission to academically eligible students); see also Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1328 (1986) (“[A]ffirmative action should generally be retained as a tool of public policy because, on balance, it is useful in overcoming entrenched racial hierarchy.”).

²² Colleges and universities, such as UT, can also look to Justice Kennedy's concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*, for guidance:

While [the school district] acknowledges that racial classifications are used to make certain assignment decisions, it fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision.

551 U.S. 701, 785 (2007) (Kennedy, J., concurring).

²³ The three more conservative justices on the Court—Chief Justice Roberts, Justice Thomas, and Justice Alito—alleged that the affirmative action practices the Court upheld in *Fisher II* were inherently discriminatory. See Joseph Milord, *Kennedy's Retirement Affects Affirmative Action Cases in Significant Ways*, ELITE DAILY (June 28, 2018), <https://www.elitedaily.com/p/kennedys-retirement-affects-affirmative-action-cases-in-significant-ways-9621157> (“The dissenting opinion [in *Fisher II*] becomes all the more important, considering one major affirmative action case that appears headed from the Supreme Court in the near future. That case argues that Harvard University's affirmative action practices discriminate against Asian-Americans.”); see also Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (Jun. 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html> (emphasizing Justice Kennedy's role as a swing vote and how a conservative justice could “imperil” precedent Justice Kennedy sided with).

²⁴ *Fisher II*, 136 S. Ct. at 2208–09 (“The University's program is *sui generis*. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan.”).

²⁵ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J. concurring in part and concurring in the judgment) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the

whether or not they have a state sanctioned race-neutral percentage plan.²⁶

This Article adds to the existing discourse that has been written about *Fisher* and affirmative action in higher education over the years.²⁷ It applies Lean Six Sigma (i.e., a business concept focused on process improvement) to assess the data that Justice Kennedy referenced in the *Fisher II* decision.²⁸

demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” (emphasis added)). See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 1:14-cv-14176 (D. Mass. Nov. 17, 2014); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14-cv-00954 (M.D.N.C. Nov. 17, 2014).

²⁶ In addition to Texas, California and Florida have race-neutral admissions percentage plans. This is in contrast to Massachusetts and North Carolina, where no race-neutral admissions percentage plan exists, but higher education institutions in these states are being sued for their race-conscious admissions processes. Compare CALIFORNIA MASTER PLAN FOR HIGHER EDUCATION (2002), available at <https://ahed.assembly.ca.gov/sites/ahed.assembly.ca.gov/files/hearings/master%20plan.pdf> (stating that the top one-third and one-eighth of high school graduates will be offered admission to California State University and University of California campuses, respectively), and CAL. CONST. art. I, § 31 (eliminating the use of race in college admissions in California), and Fla. Exec. Order No. 99-281 (Nov. 9, 1999), available at <https://www.dms.myflorida.com/content/download/705/3389/file/ExecutiveOrder99-281.pdf> (eliminating the use of race in college admissions), and Florida Board of Governors Regulation 6.002(2)(c) (2017), available at https://www.flbog.edu/documents_regulations/regulations/6%20002%20FTIC%20Admissions%202_FINAL.pdf (stating that high school seniors graduating in the top twenty percent of their class may be eligible but not guaranteed admission to the State University System), with *50-State Comparison*, EDUC. COMMISSION STS. (Feb. 2017), <http://ecs.force.com/mbdata/MBquest3RTA?Rep=SA1704> (listing whether each state has a guaranteed college admissions policy for high school students who meet a certain criteria).

²⁷ See generally Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005) (analyzing social movements after the *Grutter* and *Gratz* decisions as they relate to affirmative action); Ward Connerly, *It Is Time to End Race-Based “Affirmative Action,”* 1 U. ST. THOMAS J.L. & PUB. POL’Y 56 (2007) (explaining dangers of affirmative action policies); Marvin Lim, *Percent Plans: A “Workable, Race-Neutral Alternative” to Affirmative Action*, 39 J.C. & U.L. 127 (2013) (providing an overview of percent plans and analyzing their constitutionality); Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241 (2000) (analyzing how the state’s prohibition on race-based admissions harmed the educational experience); Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1 (2001) (suggesting an alternative form of law school affirmative action what the student-applicant can contribute); Kermit Roosevelt III, *The Ironies of Affirmative Action*, 17 U. PA. J. CONST. L. 729 (2015) (arguing that application of strict scrutiny in affirmative action cases is inconsistent with other doctrinal areas applying strict scrutiny); Joshua P. Thompson & Daniel M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in Grutter*, 15 TEX. REV. L. & POL. 437 (2011) (explaining how *Fisher* can be distinguished from *Grutter* or used to overturn it); Linda Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. LEGAL EDUC. 229 (2003) (using statistical models to measure the impact on diversity if race is not considered); Danielle Holley & Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999) (providing historical and legal overviews of the TLLP and explaining why it had minimal success).

²⁸ This Article uses UT as a proxy because its admission process—not other public colleges and universities in Texas—was adjudicated in *Fisher I and II*. The innovations prescribed herein are

Taking into account UT's role in *Fisher*, its unique pipeline of students and the process flow of the admissions cycle, Lean Six Sigma is an interdisciplinary tool that can be used to demonstrate whether using race in higher education admissions is narrowly tailored to achieve the college or university's compelling interest of achieving student body diversity.²⁹

As background, Part I reviews the jurisprudence on race-conscious admissions. The precedent cases relied upon are *Sweatt v. Painter*, *Regents of University of California v. Bakke*, *Grutter v. Bollinger*, *Hopwood v. Texas*, and *Fisher v. University of Texas at Austin I* and *II*.³⁰

In Part II, the Article evaluates data that UT has gathered since Abigail Fisher applied for admission in 2008—data referenced by Justice Kennedy in the *Fisher II* opinion.³¹ Further, this section reviews historical data and findings by social scientists, Professors Marta Tienda and David Montejano.³² These scholars evaluated data regarding UT's admissions

guided by legal precedent and empirical data, as well as principles of Lean Six Sigma, which is a methodology traditionally used to improve businesses processes. This interdisciplinary approach is used to create solutions that UT and other colleges or universities can use to overcome challenges to their race-conscious admissions. See generally BARBARA WHEAT, CHARLES MILLS & MICHAEL CARNELL, *LEANING INTO SIX SIGMA: THE PATH TO INTEGRATION OF LEAN ENTERPRISE AND SIX SIGMA* (2001).

²⁹ See generally BARBARA WHEAT CHARLES MILLS & MICHAEL CARNELL, *LEANING INTO SIX SIGMA: A PARABLE OF THE JOURNEY OF SIX SIGMA AND A LEAN ENTERPRISE* (2003) (stating that Lean Six Sigma has been used in manufacturing).

³⁰ *Texas v. Lesage* is also a race-conscious admissions case specific to the University of Texas; however, it will not be discussed in this Article. See, e.g., *Texas v. Lesage*, 528 U.S. 18, 22 (1999).

³¹ *Fisher II*, 136 S. Ct. 2198, 2209–10 (2016) (“[UT] had no reason to keep extensive data on the Plan or the students admitted under it—particularly in the years before *Fisher I* clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review. . . . Going forward, that assessment [of the constitutionality, and efficacy, of its admissions program] must be undertaken in light of the experience the school has accumulated and the data it has gathered. . . . The University’s examination of the data it has acquired in the years since petitioner’s application . . . must proceed with full respect for the constraints imposed by the Equal Protection Clause.”).

³² The historical social science data analysis (i.e., pre-2008) is included in Part II of this Article. See Marta Tienda et al., *Affirmative Action and the Texas Top 10% Percent Admission Law: Balancing Equity and Access to Higher Education*, 79 SOCIÉTÉS CONTEMPORAINES 5 (2008), <http://people.socsci.tau.ac.il/mu/salon/files/2010/10/Affirmative-Top-10.pdf> (“HB 588 largely transformed a de facto practice of admitting highly ranked students to a de jure guarantee of acceptance”); Marta Tienda & Sunny X. Niu, *Texas’ 10-Percent Plan: The Truth Behind the Numbers*, 50 CHRON. HIGHER EDUC., Jan. 23, 2004, at B10, available at <http://www.texastop10.princeton.edu/publicity/theop/Chronicle0104.pdf> (providing an empirical study that evaluates “whether students from highly competitive high schools have been truly crowded out of the public flagships” because of the TTPL); David Montejano, *Access to the University of Texas at Austin and the Ten-Percent Plan: A Three-Year Assessment* (2000) (on file with author) (providing a pre-*Grutter* data analysis evaluating the racial composition of students admitted to UT via TTPL and the impact of (new) high school sending or “feeding” patterns).

from the inception of TTPL until approximately 2010.³³ On balance, the data gathered since Abigail Fisher applied for admission in 2008 shows that not much has changed since Professors Tienda and Montejano completed their reviews.³⁴ This post-2008 data analysis reveals:

1. White Americans are the dominate racial group of admitted and enrolled students under TTPL and UT's holistic admissions;³⁵
2. Minority students³⁶ still enroll at UT at lesser rates than White Americans, therefore, UT's need to consider race in its admissions process has not been undermined by Texas' changing demographics;³⁷ and
3. UT cannot attain a diverse student population solely through TTPL, because minority students that are automatically admitted to UT are graduating from homogenous, in-state high schools.³⁸

³³ Tienda et al., *supra* note 32; Montejano, *supra* note 32.

³⁴ Over the course of twenty years, the data results are the same. When Professors Tienda and Montejano conducted their research, White Americans were the dominate racial group being admitted to UT under TTPL and its holistic admissions. This Author's analysis corroborated Professor Tienda and Montejano's findings as the results have not changed from 2010–2017/2018. Likewise, the Texas Tribune came to the same conclusion when it analyzed results over a five-year span. See Neena Satija, *Race and UT-Austin Admissions: A Snapshot of the Past Five Years*, TEX. TRIB. (Jun. 23, 2016, 12:00 PM), <https://www.texastribune.org/2016/06/23/race-and-admissions-ut-austin-last-five-years/> (finding that thirty-four percent of TTPL admitted students were White Americans, and forty-nine percent of students admitted via the race-conscious, holistic, admissions were White Americans); see also *infra* Parts II & III.

³⁵ See *infra* Figures 1–4.

³⁶ For purposes of this Article, “minority students” are students from racial or ethnic groups comprising less than fifty percent of Texas' statewide population.

³⁷ See *Fisher II*, 136 S. Ct. at 2214–15; Tienda et al., *supra* note 32, at 5, Table 2; *infra* Figures 2 & 4.

³⁸ Although TTPL's original legislative intent was to utilize the homogenous high school demographics to increase racial diversity, this approach viewed “diversity” too narrowly. See generally Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 312 (2006) (noting that any racial diversity achieved at UT from TTPL is largely the result of high levels of racial segregation among Texas' high schools). This revelation shows minimal change in pre-2008 and post-2008 data, thereby also implicating a potential lack of diversity with racial groups. See *Fisher II*, 136 S. Ct. at 2214 (Kennedy, J.) (“[A]lthough it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests.”); see, e.g., Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 477 (2012) (claiming that when diversity within racial groups is present, “racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students” (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003))); Devon W. Carbodo, *Interracial Diversity*, 60 UCLA L. REV. 1130, 1163 (2013) (asserting the same); Elise Boddie, *Commentary on Fisher: The Importance of Diversity Within Diversity*, SCOTUSBLOG (Oct. 11, 2012, 10:50 AM), <http://www.scotusblog.com/2012/10/commentary-on-fisher-the-importance-of-diversity-within-diversity/> (“UT's pursuit of the broadest forms of diversity, including diversity within, as well as among, racial groups, shows that its commitment is genuine and not driven simply

Part III of this Article recommends data driven solutions to improve and defend UT's race-conscious admissions process.³⁹ The solutions apply the data from Part II to recommend the following:⁴⁰

1. Because the data shows that TTPL feeder school graduates are homogenous with respect to race and socio-economics, UT must improve the data collected from TTPL feeder schools to increase the enrollment rates of minority students who are automatically admitted under TTPL, and therefore validate how race impacts its holistic admissions;⁴¹
2. During the *Fisher* litigation, UT collected data about racial isolation in the classroom and its effect on achieving student body diversity.⁴² Accordingly, UT must promote safe spaces on campus because inclusion and socio-cultural interaction is anecdotally related to the lack of enrollment of minority students.

Now more than ever, UT (and other colleges and universities such as Harvard and the University of North Carolina at Chapel Hill) must use data to support and 'refine' its admissions practices to remain in compliance with *Fisher II*'s holding.⁴³ The book *Art of War* teaches that one should not rely

by "racial balancing.").

³⁹ The Lean Six Sigma process that will be used in this Article is "DMAIC." "DMAIC (pronounced "Duh-MAY-ick") is a structured problem-solving methodology" that "encourages creative thinking *within boundaries* [of the current] process, product, or service." MICHAEL L. GEORGE ET AL., *THE LEAN SIX SIGMA POCKET TOOLBOOK 1* (2005). DMAIC stands for: Define (define what is currently known about the process); Measure (collect the data, decide what to measure, and how to measure it); Analyze (analyze the data collected to determine the cause of problem (i.e., defects) in the process); Improve (identify and implement solutions to address these defects); and Control (monitor the improvements to ensure sustained success). *Id.* at 1–20; *see also* Na Li et al., 4th International Conference on Lean Six Sigma for Higher Education, *How to Use Lean Six Sigma to Improve Service Processes in Higher Education: A Case Study* (May 25–26, 2017), *available at* <https://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1014&context=iclss>.

⁴⁰ Here, the first four steps of DMAIC are applicable. The Define step begins with asking how the pipeline of students that are automatically admitted under Texas' TTPL impact UT's holistic admissions. The Measure step reviews the data in Part II. The Analyze and Improve steps will be addressed in Parts II and III.

⁴¹ *Fisher II*, 136 S. Ct. 2198, 2209 (2016) ("The Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review."); *id.* at 2216 (Alito, J. dissenting) ("When it adopted its race-based plan, UT said that the plan was needed to promote classroom diversity. It pointed to a study showing that African-American, Hispanic, and Asian-American students were underrepresented in many classes. But UT has never shown that its race-conscious plan actually ameliorates this situation." (internal citations omitted)).

⁴² *See* Supplemental Joint Appendix at 24a, 26a Table 8, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

⁴³ "Diversity" is a term used throughout affirmative action jurisprudence, but it seems appropriate to view "diversity" as a synonymous with "normalization" because of society's evolving demographics. *See* Brennan Williams, *Shonda Rhimes Says she Isn't 'Diversifying' Television, she's 'Normalizing' It—There's*

“on the likelihood of the enemy’s not coming, but on our own readiness to receive him; not on the chance of his not attacking, but rather on the facts that have made our position unassailable.”⁴⁴ Employing the prescriptive solutions in this Article, can create an unassailable position and adhere to Justice Kennedy’s forewarning.

I. HISTORY, RACE, AND ADMISSIONS IN HIGHER EDUCATION

UT’s present cannot be viewed in isolation from its past if the University wants to overcome challenges to its race-conscious, holistic, admissions.⁴⁵ In an academic setting, the U.S. Supreme Court has posited, “[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny.”⁴⁶ “Strict scrutiny requires [a] university to demonstrate with clarity that its ‘purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.’”⁴⁷ Because stare decisis dictates that present and future cases look to the past to determine the best resolution, colleges and universities facing challenges to race-conscious admissions have a guide to withstand strict scrutiny, if they use it.

This section focuses on six pivotal cases decided between 1950 and 2016 which provide contextual, historical, information pertaining to race and higher education admissions in the United States.⁴⁸ *Sweatt v. Painter*, *Hopwood v. Texas*, and *Fisher v. Texas* addressed race and admissions at UT, specifically.⁴⁹ The other two landmark cases—*Regents of University of California v. Bakke* and *Grutter v. Bollinger*—addressed the use of race in higher education

a Difference, HUFFINGTON POST (Mar. 16, 2015, 1:47 PM), https://www.huffingtonpost.com/2015/03/16/shonda-rhimes-diversity-normalize-television_n_6878842.html (last updated Mar. 20, 2015) (“[T]he word ‘diversity,’ it suggests something . . . other. As if it is something special. Or rare Women, people of color, LGBTQ people equal WAY more than 50% of the population. Which means it ain’t out of the ordinary.”).

⁴⁴ SUN TZU, THE ART OF WAR 63 (Lionel Giles trans., 2008) (5th century BC).

⁴⁵ Here, *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and *Sweatt v. Painter*, 339 U.S. 629 (1950), provide context for the state of higher education jurisprudence in this country. However, the focal point of this Article, in Parts II and III, will be derived from the opinions in *Fisher I* and *Fisher II*.

⁴⁶ *Fisher II*, 136 S. Ct. at 2208 (citing *Fisher I*, 570 U.S. 297, 309 (2013)).

⁴⁷ *Id.*

⁴⁸ *Fisher II*, 136 S. Ct. at 2198; *Fisher I*, 570 U.S. at 297; *Hopwood*, 78 F.3d at 932; *Sweatt*, 339 U.S. at 629; see also *Texas v. Lesage*, 528 U.S. 18, 22 (1999). See generally *Grutter*, 539 U.S. 306; *Bakke*, 438 U.S. 265.

⁴⁹ See *Fisher II*, 136 S. Ct. at 2198; *Fisher I*, 570 U.S. at 297; *Hopwood*, 78 F.3d at 932; *Sweatt*, 339 U.S. at 629.

admissions, generally.⁵⁰

A. History Teaches Us that Racial Diversity Promotes the Promise of Equal Protection, but Higher Education Admissions Cannot Rely on Quotas

In 1950, Heman Marion Sweatt (“Sweatt”), an African American applicant sued UT’s School of Law.⁵¹ He filed suit to compel the law school to admit him because his application had been denied solely due to his race.⁵²

Racial segregation was still legal in the United States; however, the U.S. Supreme Court found in favor of Sweatt, holding “the Equal Protection Clause of the Fourteenth Amendment requires that [he] be admitted to the University of Texas Law School.”⁵³ Writing the majority opinion for the Court, Chief Justice Fred M. Vinson stated:

The law school . . . cannot be effective in isolation from the individuals and institutions with which the law interacts. . . . The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. . . .

It may be argued that excluding petitioner from [UT] is no different from excluding white students from the new law school. [But] [t]his contention overlooks realities.⁵⁴

⁵⁰ See generally *Grutter*, 539 U.S. 306 (reviewing law school admissions); *Bakke*, 438 U.S. 265 (reviewing medical school admissions).

⁵¹ When Sweatt applied for admission to UT’s Law School in 1946, there was no law school for “Negros.” *Sweatt*, 339 U.S. at 631; see also TEX. CONST. art. 7, § 7, (repealed 1969) (stating “[s]eparate schools shall be provided for the white and colored children, and impartial provision shall be made for both.”).

⁵² See *Sweatt*, 339 U.S. at 631.

⁵³ *Id.* at 636.

⁵⁴ *Id.* at 633–34; see also *id.* (“[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the *University of Texas Law School* is superior. What is more important, the *University of Texas Law School* possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.” (emphasis added)); *id.* at 635 (stating in conclusion that “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities” (citing *Shelley v. Kramer*, 334 U.S. 1, 22 (1948))).

Four years before racial segregation was outlawed in the United States⁵⁵ and nineteen years before it was outlawed in the state of Texas,⁵⁶ the U.S. Supreme Court found that UT would be ineffective and isolating as a higher education institution if its student body was not racially diverse.⁵⁷ This decision, albeit fifty-eight years ago, is just as important in the present day.⁵⁸ The realities of preserving racial equality in education is tantamount to upholding the promise of the Equal Protection Clause, which endorses people of all races and ethnicities being educated together.⁵⁹ The U.S. Supreme Court upheld this promise when *Sweatt* was decided in 1950, and the Court has remained steadfast with its subsequent decisions.

When Allan Bakke (“Bakke”), a White applicant, sued the University of California at Davis Medical School, the U.S. Supreme Court reinforced its Equal Protection Clause higher education jurisprudence.⁶⁰ Bakke was denied admission to the medical school in 1973 and 1974 because it used a constitutionally impermissible racial quota (i.e., a set aside number of admissions seats for a specific racial or ethnic group) instead of evaluating all applicants, from all racial backgrounds, in a collective pool.⁶¹

⁵⁵ See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding unconstitutional the concept of separate but equal in education).

⁵⁶ TEX. CONST. art. 7, § 7 (repealed 1969).

⁵⁷ *Sweatt*, 339 U.S. at 850 (“With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.”); see also TEX. CONST. art. 7, § 7 (1969); *Brown*, 347 U.S. at 494 (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

⁵⁸ The Justice Department’s efforts targeting institutions alleged to “discriminate” against white applicants is creating a divisive environment. See Savage, *supra* note 17 (noting that new enforcement could be a “conservative tilt” of civil rights laws designed to help minorities). *Contra* Jane Elliott, *A Class Divided*, FRONTLINE (Mar. 26, 1985), <https://www.pbs.org/wgbh/frontline/film/class-divided/> (examining the impact of racism and its divisive effect on a class of all-white students with different colored eyes); Ruth C. White, *A Class Divided: How we Learn to Discriminate*, PSYCHOL. TODAY (May 16, 2014), <https://www.psychologytoday.com/us/blog/culture-in-mind/201405/class-divided-how-we-learn-discriminate> (“In 1968, teacher Jane Elliott divided her all-white rural Iowa 3rd graders into blue-eyed and brown-eyed groups and gave one group ‘superiority’ over the other. This famous, and still relevant, lesson in discrimination changed the lives of her students forever.”).

⁵⁹ *Sweatt*, 339 U.S. at 635 (“In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State.”).

⁶⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280–81 (1978).

⁶¹ *Id.* at 272–73, 276–77, 319–20; see also *Fisher II*, 136 S. Ct. 2198, 2208 (2016) (quoting *Fisher I*, 570 U.S. 297, 311 (2013) (“A university cannot impose a fixed quota or ‘otherwise define diversity as some specified percentage of a particular group merely because of its race or ethnic origin.’”)).

The U.S. Supreme Court's plurality opinion upheld (in part) the California Supreme Court's holding that Bakke's Equal Protection rights were violated; the admissions process undertaken by the University needed improvement but they could not provide evidence showing how that occurred.⁶² Notwithstanding the Court's decision, Justice Powell wrote in a separate opinion that "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education."⁶³ Justice Powell's declaration was unequivocal—race could be used in higher education admissions to attain a "diverse" student body, so long as the means for achieving that goal satisfied strict scrutiny.⁶⁴ However, because the U.S. Supreme Court did not issue a majority opinion in *Bakke*, federal appellate courts were not bound by it.⁶⁵

B. *Stare Decisis and Higher Education Jurisprudence*

Almost twenty years after the U.S. Supreme Court issued a plurality decision in *Bakke*, four White applicants, Cheryl Hopwood and three other litigants (collectively "Hopwood"), sued the University of Texas School of

⁶² *Bakke*, 438 U.S. at 280–81 (plurality opinion). The issue in *Bakke* was the school's decision to set aside sixteen out of one-hundred seats for the incoming medical class and to reserve those seats for members of certain minority groups. *Id.* at 279. The candidates for those sixteen seats were competing against one another (i.e., only other racial minorities), instead of being judged against the other eighty-two applicants from all racial and ethnic backgrounds. *Id.* Although, the Supreme Court of California afforded the University an opportunity to demonstrate that Bakke would not have been admitted "but for" its special admissions program, the University could not meet its evidentiary burden. *Id.* at 270.

⁶³ *Id.* at 311–312. In dicta, Justice Powell quoted Princeton University's President as he described some of the benefits derived from a diverse student body:

[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'

Id. at 312–13 n.48.

⁶⁴ *Id.* at 312–314 ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. . . . Although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.").

⁶⁵ See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (rejecting University of Texas School of Law's admissions program that gave "substantial racial preferences" to certain minority applicants).

Law.⁶⁶ The litigants alleged that *Hispanic and African American candidates* were given ‘preferential treatment’ and admitted solely based on their race.⁶⁷ In its holding, the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”) not only upheld Hopwood’s contention, the court explicitly rejected Justice Powell’s opinion in *Bakke* that diversity was a compelling interest for colleges and universities.⁶⁸ Since *Bakke* was not binding precedent, *stare decisis* did not apply. Accordingly, the Fifth Circuit’s decision in *Hopwood* ended affirmative action in Texas—its impact was swift and lasted seven years.⁶⁹ It was not until the U.S. Supreme Court abrogated *Hopwood* with its holding in *Grutter v. Bollinger* that Justice Powell’s opinion became binding precedent.⁷⁰

⁶⁶ *Id.* at 938.

⁶⁷ The Fifth Circuit found “[t]he law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body.” *Id.* at 934, *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306, 322, 325 (2003); *see also* Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 471 (2014) (citing Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 291 (Richard Delgado & Jean Stefancic eds., 1997) (noting that many white students believe that racism does not affect them)); *id.* at 475 (“[M]any Whites discount their race-based privilege. . . . This uncritical perception of whiteness and racial inequality only perpetuates ‘culturally sanctioned assumptions, myths, and beliefs that justify the social and economic advantages white people have as a result of subordinating others.’” (quoting Joyce E. King, *Dysconscious Racism: Ideology, Identity, and the Miseducation of Teachers*, 60 J. NEGRO EDUC. 133, 135 (1991))).

⁶⁸ *Hopwood*, 78 F.3d at 944 (5th Cir. 1996) (“We agree with plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell’s argument in *Bakke* garnered only his own vote and . . . [his] view in *Bakke* is not binding precedent on this issue.”).

⁶⁹ *See id.* at 962 (holding that the law school may not use race as an admissions factor for any of several reasons, including the achievement of a diverse student body); *Hopwood v. Texas*, 861 F. Supp. 551, 554–55 (W.D. Tex. 1994) (holding that the law school’s affirmative action program did not pass constitutional muster). For further interpretations of the effect of *Hopwood*, *see* Dan Morales, Tex. Atty. Gen., Letter Opinion No. 97-001 (Feb. 5, 1997) (“Effect of *Hopwood v. State of Texas* on various scholarship programs of the University of Houston”), and John Cornyn, Tex. Atty. Gen., Opinion No. JC-0107 (Sept. 3, 1999) (reconsidering Attorney General Morales’ opinion).

⁷⁰ Although *Hopwood* is an outlier in higher education jurisprudence, its historical impact should not be forgotten. *See* Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1599 (2003) (“Elite public higher education might be at one end, but it is intimately connected with how the state provides education more generally. The permission to use race that the *Grutter* decision admits should not lead us to forget the lessons *Hopwood* forced us to learn. Perhaps the most important lesson is that racial, economic, and geographic diversity cannot be achieved without a frank and determined commitment to that goal.”); *see also* *Fisher II*, 136 S. Ct. 2198, 2205 (2016) (“In upholding this nuanced use of race, *Grutter* implicitly overruled *Hopwood*’s categorical prohibition.”); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“In summary, the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in

In 2003, Barbara Grutter (“Grutter”), a White applicant, alleged that the University of Michigan Law School discriminated against her on the basis of race, thereby violating the Equal Protection Clause.⁷¹ She contended that her application was denied because race was used as a “‘predominate’ factor, giving applicants who belong to certain minority groups ‘a significantly greater chance of admission than students with similar credentials from *disfavored* racial groups.’”⁷²

In *Grutter*’s case, Justice Powell’s words became the benchmark for using race as a factor in higher education admissions.⁷³ The U.S. Supreme Court held “the Equal Protection Clause does not prohibit the . . . narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining educational benefits that flow from a diverse student body.”⁷⁴ In fact, the Court’s holding affirmed: (1) student body diversity is a compelling state interest that can justify the use of race in university admissions;⁷⁵ and (2) “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative . . . [n]or does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of *all* racial groups.”⁷⁶ By affirming the University of Michigan School of Law’s race-conscious admission in *Grutter*, the U.S. Supreme Court established a constitutionally permissible framework for UT (and other colleges and universities) to follow.⁷⁷

admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”)

⁷¹ *Grutter*, 539 U.S. at 316–17.

⁷² *Id.* at 317 (emphasis added).

⁷³ *Id.* at 322 (“We granted certiorari . . . to resolve the disagreement among the Courts of Appeal on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. Compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) . . . (holding that diversity is not a compelling interest), with *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) (holding that it is”).

⁷⁴ *Id.* at 343.

⁷⁵ *Id.* at 330; see also Stacy Hawkins, *Diversity, Democracy, & Pluralism: Confronting the Reality of our Inequality*, 66 MERCER L. REV. 577, 642 (2015) (“Racial and ethnic minorities comprise an ever-increasing share of our citizenry, and their political salience continues to be reinforced through the ongoing legitimization of race and the perpetuation of identity politics. . . . When our democratic leaders, selected ‘by the people,’ fail to be representative of the racial and ethnic diversity ‘of the people,’ it undermines the legitimacy of our claim that government is ‘for the people.’”).

⁷⁶ *Grutter*, 539 U.S. at 339 (emphasis added) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

⁷⁷ See *Grutter*, 539 U.S. at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”). The *Grutter* decision preceded *Fisher II* by thirteen years; however, the need to consider race in college admissions did not dissipate. Justice Kennedy said it best in his concurring opinion in *Parents Involved*:

C. *History is Contextual, but Innovation Is Necessary to Sustain the Use of Race as a Constitutionally Permissible Factor in Higher Education Admissions*

The U.S. Supreme Court's decisions in *Fisher I* and *Fisher II* (the “*Fisher* cases”) provide context for the remainder of this Article, as well as the innovative solutions in Part III.⁷⁸

Fisher I began in 2008 when two White applicants, Abigail Noel Fisher⁷⁹ and Rachel Multer Michalewicz⁸⁰ (collectively “*Fisher*”), sued the state of Texas, UT, and other state officials (collectively “*UT*”).⁸¹ Fisher alleged that “*UT Austin employed an admissions plan relying on race-based affirmative action in order to increase the number of African American and Hispanic students admitted to UT Austin.*”⁸²

The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that ‘[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race’ . . . is not sufficient to decide these cases.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). Surely, Justice O'Connor in *Grutter* had justification for believing that race-neutral approaches could replace the need to consider race in college admissions by 2028, but here we are ten years removed from that idealistic sunset provision faced with the impact of race, perception, and access just as much as we were in the Civil Rights Era (i.e., 1950s and 1960s).

⁷⁸ See *Fisher II*, 136 S. Ct. 2198 (2016); *Fisher I*, 570 U.S. 297 (2013); see also *supra* note 45 and accompanying text (The opinion in *Fisher II*, specifically, frames the scope of the analysis in Part II and the solutions in Part III. The other cases noted in Part I are contextual; *supra* note 39 and accompanying text (application of Lean Six Sigma to defend and improve UT's race-conscious admissions process).

⁷⁹ Abigail Fisher graduated in the top twelve percent of her class at Stephen F. Austin High School, thus she was not eligible for automatic admission to UT under TTPL. Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 6, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS); see also JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 196 (2014) (stating that Abigail Fisher's father and older sister were UT-Austin alumni and that once Abigail was denied admission, her father called his “old friend” Edward Blum, who assured the Fisher family that their legal fees would be covered if she sued).

⁸⁰ Michalewicz graduated in the top 10.1% of her graduating class from Jack C. Hayes High School. Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, *supra* note 79, at 7; Supplement to Amended Complaint for Declaratory, Injunctive, & Other Relief, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS).

⁸¹ Amended Complaint for Declaratory, Injunctive, & Other Relief at 1, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS).

⁸² Complaint for Declaratory, Injunctive, & Other Relief at 7, 13, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS) (emphasis added); see also Amended Complaint for Declaratory, Injunctive, & Other Relief, *supra* note 81, at 1 (filing suit against defendants for “employing racially discriminatory policies”). Fisher challenged the admissions of African American and Hispanic students, even though UT sought to increase diversity of several racial groups. See *Enrollment of First-time Freshman Minority Students Now Higher Than Before Hopwood Court Decision*, UT NEWS (Jan. 29, 2003), <https://news.utexas.edu/2003/01/29/enrollment-of->

After extensive discovery at the trial court level, Fisher and UT filed summary judgment motions focusing on two points: (1) the U.S. Supreme Court's interpretation of *Grutter v. Bollinger*;⁸³ and (2) whether UT's use of race in its holistic admissions process⁸⁴ was narrowly tailored to achieve its compelling interest of having a diverse student body.⁸⁵ Fisher's summary judgment motion was denied so she appealed her case—first to the Fifth Circuit and then to the U.S. Supreme Court.⁸⁶

In 2013, Justice Anthony Kennedy authored the majority opinion⁸⁷ in *Fisher I*.⁸⁸ The U.S. Supreme Court reversed and remanded the case to the Fifth Circuit because the appellate court did not properly apply strict scrutiny.⁸⁹ At the time *Fisher I* was decided:

first-time-freshman-minority-students-now-higher-than-before-hopwood-court-decision/
 (“Diversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students—African Americans, Hispanics and Asian Americans—to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university’s enrollment process.”).

⁸³ See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (holding that diversity is a compelling state interest); see also *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 593–95 (W.D. Tex. 2009) (describing UT’s interpretation of *Grutter* and subsequent changes in admissions policies).

⁸⁴ The holistic admissions process has two-steps. First, it considers an applicant’s academic profile (i.e., class rank, completion of UT required high school curriculum, and ACT/SAT score). Second, it considers an applicant’s personal achievements (i.e., two admissions essay scores, leadership, extracurricular activities, awards/honors, and work experience), as well as special circumstances. Special circumstances include familial socio-economic status, household status (i.e., single-parent), language (i.e., bilingual), family responsibilities, socio-economic status of the school(s) attended, average ACT/SAT of the school attended in relation to the student’s ACT/SAT, and race are all considered. See generally THE OFFICE OF ADMISSIONS, THE UNIV. OF TEXAS, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) (Dec. 23, 2010) (on file with Office of Admissions at Univ. of Tex.) (explaining that although the cited statistics were not applicable in 2008 when Abigail Fisher applied to UT, she and other non-TTPL applicants were evaluated using the same process).

⁸⁵ See Memorandum in Support of Defendant’s Cross-Motion for Summary Judgment & in Opposition to Plaintiff’s Motion for Partial Summary Judgment at 10, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS) (arguing that UT’s policy was narrowly tailored); see also *Fisher II*, 136 S. Ct. 2198, 2210 (2016) (describing the plaintiff’s argument regarding narrow tailoring).

⁸⁶ *Fisher I*, 570 U.S. 297 (2013); *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011).

⁸⁷ *Fisher I*, 570 U.S. at 298.

⁸⁸ *Fisher I*, 570 U.S. at 297, 305 (relying on *Bakke*, *Gratz*, and *Grutter*, as precedent cases addressing the same issue concerning racial classifications in education and whether minority status is a positive or favorable factor in university’s admissions processes).

⁸⁹ *Fisher I*, 570 U.S. at 313–14 (citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)). The Court noted that the admissions plan in *Grutter* was upheld because “it was not a quota, was sufficiently flexible, was limited in time, and followed ‘serious, good faith consideration of workable race-neutral alternatives.’” *Id.* (citing *Grutter*, 539 U.S. at 339). The Fifth Circuit’s deference to UT’s plan did not satisfy strict scrutiny as that standard of review “does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving

Opponents of affirmative action, including lawyer Rein and activist Blum, [believed] that the [*Fisher I*] ruling required for the first time that administrators provide extensive data on why options that did not involve race had fallen short. They and others predicted that the decision would eventually spell the demise of affirmative action because, as the ruling played out in the lower courts, schools would have the difficult burden of proving that before they turned to racial classifications, all other alternatives had failed.⁹⁰

On June 23, 2016, *Fisher II* was decided—three years after *Fisher I*.⁹¹ Again, Justice Anthony Kennedy authored the majority opinion for the Court.⁹² Three guiding principles, articulated in *Fisher I*, applied to the subsequent decision in *Fisher II*: (1) strict scrutiny must be satisfied if a university is going to consider race in its admissions process;⁹³ (2) some judicial deference is proper if a higher education institution decides to pursue the educational benefits that flow from diversity, but such decision cannot impose a fixed quota or specified percentage of a particular group based on race or ethnic origin;⁹⁴ and (3) no deference is owed as the Court determines whether the use of race is narrowly tailored to achieve the university’s permissible goals.⁹⁵

With its decision, the U.S. Supreme Court disposed of both the *Fisher* cases on procedural grounds.⁹⁶ Principle-by-principle, Justice Kennedy outlined (1) how UT defined its compelling interest by “articulating concrete and precise goals;”⁹⁷ (2) that UT had not achieved a diverse student body by

close analysis to the evidence of how the process works in practice.” *Id.*

⁹⁰ BISKUPIC, *supra* note 79, at 209–10.

⁹¹ *Fisher II*, 136 S. Ct. 2198 (2016).

⁹² *Id.* at 2204.

⁹³ *Id.* at 2205–06. UT conducted a year-long study post-*Grutter* to determine whether its admissions process was “allowing it to provide ‘the educational benefits of a diverse student body.’” *Id.* at 2205. The University concluded its policy was not providing these benefits. *Id.* at 2206.

⁹⁴ *Id.* at 2208 (citing *Fisher I*, 570 U.S. at 310–11).

⁹⁵ *Id.* at 2208 (“A university, *Fisher I* explained, bears the burden of proving a ‘nonracial approach’ would not promote its interest in the educational benefits of diversity ‘about as well and at tolerable administrative expense.’” (citing *Fisher I*, 570 U.S. at 311)).

⁹⁶ The procedural posture of *Fisher I* is important because the summary judgment motions in that case served as the basis for disposing of the matter in *Fisher II*. *See id.* at 2210 (“[T]he Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.”); *Fisher I*, 570 U.S. at 314 (“The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. The Court vacates that judgment, but fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis.”).

⁹⁷ *Fisher II*, 136 S. Ct. at 2210–11 (rejecting petitioner’s claim that UT did not sufficiently and clearly

2003 despite TTPL admissions and its race-neutral holistic review;⁹⁸ and (3) that considering race in the admissions process had a meaningful impact, and it was necessary to achieve the university's goal since no race-neutral alternative was workable.⁹⁹

Ultimately, the *Fisher II* decision also solidified Justice Powell's foresight that having a racially diverse student body is a constitutionally permissible goal that can satisfy strict scrutiny.¹⁰⁰ However, to sustain this permissible goal, it requires a continuous deliberation of data and thoughtful approach for protecting individual rights under the Equal Protection Clause.¹⁰¹

II. DATA DRIVEN ADMISSIONS

Data was key to creating Texas' automatic admissions process—TTPL—and its race-conscious admissions process. Moving forward, data will be equally vital to meeting the U.S. Supreme Court's mandate in *Fisher II*.¹⁰²

articulate its compelling interest, the Court found that “[o]n the first page of its 2004 ‘Proposal to Consider Race and Ethnicity in Admissions,’ the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the ‘promot[ion of] cross-racial understanding,’ ‘the preparation of a student body for an increasingly diverse workforce and society,’ and the ‘cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.’”

⁹⁸ *Id.* at 2211–12 (finding that “[b]efore changing its policy the University conducted ‘months of study and deliberation, including retreats, interviews, [and] review of data,’ and concluded that ‘[t]he use of race-neutral policies and programs ha[d] not been successful in achieving’ sufficient racial diversity at the University,” for example, “demographic data” showed “consistent stagnation with minority enrollment.”).

⁹⁹ *Id.* at 2212–13. Despite Plaintiff's claim that using race as a factor in the admissions process had “minimal” impact, the Court found that the percentages of enrolled Latino and African American students “rose by 54 and 94 percent, respectively,” in four years. *Id.* at 2212. Thus, this use of race had a meaningful, even if limited, impact on the diversity of the university's student body.

¹⁰⁰ *Id.* at 2214 (“In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be ‘available’ and ‘workable’ means through which the University could have met its educational goals, as it understood and defined them in 2008.”).

¹⁰¹ *Id.* at 2209–10; *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J. concurring in part and concurring in the judgment) (“[O]ur tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.”).

¹⁰² *Fisher II*, 136 S. Ct. at 2210 (“As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values.”).

The Court's scrutiny will focus significantly on the term "diversity"¹⁰³ and the process used to meet that goal. In higher education admissions, it has meant different things to different institutions;¹⁰⁴ nevertheless, it is a data point the Court now seeks to measure.¹⁰⁵ Since no deference¹⁰⁶ is owed to the institution when assessing whether the narrow tailoring prong¹⁰⁷ of strict scrutiny is met,¹⁰⁸ this Part will measure several sources of data because it is now required to determine the constitutionality of race-conscious admissions.

¹⁰³ *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 643 (5th Cir. 2014) ("Diversity is a composite of the backgrounds, experiences, achievements, and hardships of students to which race only contributes.").

¹⁰⁴ See e.g., *About*, HARV. C. OFFICE OF DIVERSITY EDUC. & SUPPORT, <https://diversity.college.harvard.edu/about> ("Through our programs and initiatives, we aim to enhance students' awareness and understanding of the diverse identities and experiences of their peers, and foster greater connection and engagement with each other across differences."); *Admissions Process*, HARV. ADMISSIONS LAWSUIT, <https://admissionscase.harvard.edu/admissions-process> (detailing considerations that Harvard accounts for when choosing which students to offer admission to); *Data & Demographics*, U. N.C. CHAPEL HILL, WORKFORCE STRATEGY, EQUITY & ENGAGEMENT: DIVERSITY & INCLUSION, <https://diversity.unc.edu/data/> (highlighting the varying accomplishments of the university's incoming class).

¹⁰⁵ The measure phase of DMAIC has a two-part approach. First, it is important to map the process by creating a flow chart. This provides a visual display of the "steps, events, and operations" to complete the process. See THE LAWYER'S GUIDE TO LEGAL PROCESS IMPROVEMENT 42–43 (Laura Slater ed., 2014). Second, it is important to identify data that "establishes a baseline . . . against which to measure progress" and defects within the process. There is a hierarchy upon which data is deemed useful and valid. These data sources include: (1) reliable data that can be extracted from a system in electronic format; (2) data that exists but not in a convenient format (i.e., paper files), that can be put into a useful format such as a spreadsheet; (3) data that does not yet exist but can be created using observation worksheets, surveys, or log sheets; (4) externally available data [which in UT's case is TEA data and data from other publicly accessible sources]; (5) estimations and opinions from subject matter experts and then collating the responses; and (6) anecdotes, which might be useful as a last resort, but require context to understand the frequency of an occurrence rather than one person's perception or experience. *Id.* at 43.

¹⁰⁶ *Fisher II*, 136 S. Ct. at 2208 (2016) ("[N]o deference is owed when determining whether the use of race is narrowly tailored to achieve a university's permissible goals. A university, as *Fisher I* explained, bears the burden of proving a 'nonracial approach' would not promote its interest in the educational benefits of diversity 'about as well and at tolerable administrative expense.'" (internal citation omitted) (citing *Fisher I*, 570 U.S. 297, 311 (2013))).

¹⁰⁷ *Id.* ("Though '[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative' or 'require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups, it does impose 'on the university the ultimate burden of demonstrating' that 'race-neutral alternatives' that are both 'available' and 'workable' do not suffice." (emphasis added) (internal citation omitted) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); then quoting *Fisher I*, 570 U.S. at 311)).

¹⁰⁸ *Id.* at 2221 ("[I]t is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.").

This Part likewise introduces a new conceptual framework to analyze the data in this Article. The framework itself—Lean Six Sigma—originated in the business field as a tool to improve manufacturing processes; it has also been used in the healthcare and legal service (i.e., law firms) industries.¹⁰⁹ With data becoming more relevant to the analysis of legal issues, and more specifically, the evidentiary burden needed to show the legality or illegality of such issues (e.g., whether race-conscious college admissions processes are narrowly tailored to satisfy strict scrutiny), Lean Six Sigma is a helpful tool for legal analysis too because it is data driven.

To provide context, Section II.A below will briefly discuss TTPL's enactment and the holistic process. These processes are necessary background information because as Justice Kennedy said “[t]he University's program is *sui generis*. . . . [I]t combines holistic review with a percentage plan.”¹¹⁰

Section II.B takes an in-depth look at three specific data points that UT must consider as it reviews the efficacy of its race-conscious holistic admissions process.¹¹¹ The first data point is an overview of interdisciplinary historical data regarding TTPL, UT's holistic process, and the effect on UT's admissions and enrollment. This data, which is from two social scientists, frames the context for analyzing data from UT's percentage plan and holistic processes for 2008 and beyond.¹¹² The second data point is Texas' demographics.¹¹³ This information is analyzed by looking at (a) statewide

¹⁰⁹ *The Lawyer's Guide to Legal Process Improvement* advocates for using Lean Six Sigma in law firms.

¹¹⁰ *Fisher II*, 136 S. Ct. at 2208.

¹¹¹ See *University Diversity and Inclusion Action Plan*, U. TEX. AUSTIN, <http://diversity.utexas.edu/actionplan/> (last visited Jan. 9, 2019). During the 2016–2017 academic year, UT developed its “University Diversity and Inclusion Action Plan (UDAIP),” which was adopted spring 2017. *Id.* The most recent version of the plan, dated February 2018, states that UT has undergone a “review [of its] holistic admissions process to achieve a level of [student] enrollment whereby students from underrepresented groups no longer feel isolated.” UNIV. OF TEX. AT AUSTIN, DIVERSITY AND INCLUSION ACTION PLAN (UDIAP) 4 (Feb. 2018), available at <http://diversity.utexas.edu/actionplan/>.

¹¹² *Fisher II*, 136 S. Ct. at 2209 (“When petitioner’s application was rejected . . . the University’s combined percentage-plan/holistic review approach to admission had been in effect for just three years. While studies undertaken over the eight years since then [i.e., 2008–2016] may be of significant value in determining the constitutionality of the University’s current admissions policy, that evidence has little bearing on whether petitioner received equal treatment when her application was rejected in 2008.”).

¹¹³ *Id.* at 2212 (“To start, the demographic data the University has submitted show consistent stagnation in terms of the *percentage* of minority students enrolling at the University from 1996 to 2002. . . . In addition to this broad demographic data, the University put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation.” (citation omitted)).

demographics on race and (b) statewide demographics on race and high school enrollment because both Justice Kennedy and Justice Alito noted their relevance to UT's ongoing evaluation of its race-conscious admissions process.¹¹⁴ The third data point is UT's admission and enrollment statistics under TTPL and its holistic admissions process. This data is analyzed because it is vital to refining the current admissions process.¹¹⁵

*A. DEFINE: Automatic and Race-Conscious Holistic Admissions Process at UT*¹¹⁶

The TTPL was enacted to create opportunities for under-represented groups (based on race, ethnic, or socio-economic status) to attend higher education institutions¹¹⁷ within the state of Texas.¹¹⁸ The facially neutral law requires that (1) an eligible student graduate from a public or private state high school at least one to two years prior to seeking admission to the state

¹¹⁴ *Id.*; *id.* at 2224–25 (Alito, J., dissenting) (“UT’s extensive reliance on state demographics is also revealed by its substantial focus on increasing the representation of Hispanics, but not Asian-Americans because Hispanics, but not Asian-Americans, are underrepresented at UT when compared to the demographics of the State. . . . To the extent that UT is pursuing parity with Texas demographics, that is nothing more than ‘outright racial balancing,’ which this Court has time and again held ‘patently unconstitutional.’ (internal citations omitted) (citing *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009); then quoting *Fisher I*, 570 U.S. at 311)).

¹¹⁵ See *infra* note 153.

¹¹⁶ The “define” stage of DMAIC requires an understanding on the process that requires improvement. At this stage, it would be helpful for a college or university, such as UT, to create a process flow chart for every step in the admissions process. See, e.g., Li et al., *supra* note 39, at 135.

¹¹⁷ Nicolas Webster, *Analysis of the Texas Top Ten Percent Plan*, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY—THE OHIO STATE UNIVERSITY DEMOCRATIC MERIT PROJECT 10 (2007), available at http://kirwaninstitute.osu.edu/wp-content/uploads/2012/05/Texas-Ten-Percent_style.pdf (“[N]ot all areas of the country are as racially segregated as Texas. Since the diversity achieved through the Top Ten Percent Plan relies to some degree on segregation, racial outcomes would be difficult, if not impossible, to achieve via such plans elsewhere. Moreover, with school integration receding to pre-Civil rights era levels, we risk cutting off the educational pipeline for many minorities before they even reach high school.” (emphasis added)).

¹¹⁸ Representative Irma Rangel and her colleagues in the Texas Legislature drafted House Bill 588 (H.B. 588), which is now widely known as TTPL. See TEX. EDUC. CODE § 51.803(a); An Act, H.B. 588, 75th Leg., ch. 941, §1, eff. Sept. 1, 1997. Representative Rangel sponsored H.B. 588, but Professor David Montejano is credited with proposing TTPL, which was a revisited admissions method circa 1980 that was previously abandoned to curb inflated enrollments. See *David Montejano*, U.C. BERKLEY RES., <https://vcresearch.berkeley.edu/faculty/david-montejano> (“Dr. Montejano spearheaded several initiatives in higher education, including the design of the Texas Top Ten Percent admissions plan, which became state law in 1997.”) (last visited Jan. 9, 2019); see also S.B. 177, 73rd Leg., Reg. Sess. (Tex. 1993) (sponsored by Senator Gonzalo Barrientos and related to tuition charged to in-state residents at higher education institutions). See generally JOHN F. KAIN ET AL., *HOPWOOD AND THE TOP 10 PERCENT LAW: HOW THEY HAVE AFFECTED THE COLLEGE ENROLLMENT DECISIONS OF TEXAS HIGH SCHOOL GRADUATES* 18 (2005), available at https://wwwpub.utdallas.edu/research/tsp-erc/pdf/wp_kain_2005_hopwood_top_10_percent.pdf.

college or university,¹¹⁹ and (2) *have a grade point average in the top ten percent of their class.*¹²⁰ The law also dictates how and when students receive information about TTPL, and when they will be notified about meeting the two mandated requirements to obtain automatic admission.¹²¹

Notwithstanding TTPL's facially neutral language, its drafters were aware that the "[t]en percent rank in class . . . [would] . . . be particularly efficacious in the state of Texas, ironically, as a result of the extreme racial isolation of its high schools.¹²² "Because of . . . racial isolation, many rural and urban minority schools [would likely] have a number of minority students in the top ten percent of their class who [would] have an opportunity to be considered at flagship institutions where they [were] not [as of 1997] able to do so" ¹²³ Consequently, by meeting these merit-based, race-neutral requirements, the student is granted *automatic admission* to state-funded colleges or universities, including UT, and thus given the opportunity to "show what [s/he] c[ould] do."¹²⁴

¹¹⁹ Although TTPL automatically admits students from public *and* private high schools in Texas, this Article focuses on public schools. A subsequent Article will explore automatic admissions of private school students in Texas.

¹²⁰ See *supra* note 11; see also TEX. EDUC. CODE § 51.803; HOUSE RESEARCH ORGANIZATION, *supra* note 15, at 3–4.

¹²¹ TEX. EDUC. CODE § 28.026 (a)(2–4). Every school district in Texas must "post appropriate signs" in each school counselor and principal's office, and in each administrative building about automatic college admission. *Id.* Upon registering for classes required for high school graduation, each district or school student must receive written notification explaining the substance of automatic college admission. *Id.* Each school counselor and senior class advisor at a high school must explain to eligible students the substance of automatic college admission. *Id.* During the junior year of high school (if the student GPA is in the top ten percent), but not later than the first fourteen days of the senior year of high school, an eligible student and his/her parent or guardian, must receive written notice of eligibility for automatic college admission. *Id.*; see also 19 TEX. ADMIN. CODE § 61.1201 (providing requirements for financial aid).

¹²² "Because of the persistence of . . . segregation [in Texas high schools], admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well-qualified pool of minority students was admitted to Texas universities." HOUSE RESEARCH ORGANIZATION, *supra* note 15, at 4–5; see also TEX. EDUC. CODE § 51.803; Webster, *supra* at note 117, at 10 (citing Tienda & Niu, *supra* note 38 (arguing that any racial diversity achieved at UT from TTPL is largely the result of high levels of racial segregation among Texas' high schools)).

¹²³ Steven Thomas Poston II, Comment, *The Texas Top Percent Plan: The Problem It Causes for the University of Texas and a Potential Solution*, 50 S. TEX. L. REV. 257, 266 (2008) (citing Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 326–27 (2001)) (quoting *Hearings on H.B. 588 Before the House Higher Educ. Comm.*, 75th Leg. (Mar. 18, 1997) (testimony of University of Houston Law Professor Michael Olivas)).

¹²⁴ HOUSE RESEARCH ORGANIZATION, *supra* note 15, at 4. "Studies have shown that innate intellectual ability is distributed evenly throughout the population, occurring with equal regularity among all racial, ethnic, and socioeconomic groups. The under-representation, therefore, of certain groups in Texas colleges and universities does not indicate these students are unable to succeed in a university setting. Rather, it shows these individuals have not been given an

Unlike TTPL which is based on a single metric,¹²⁵ UT's race-conscious admissions process has two-steps. First, UT reviews a student's academic information which includes class rank, completion of UT required high school curriculum, and ACT/SAT score.¹²⁶ Second, UT reviews a student's personal achievements.¹²⁷ This layer of review includes a multi-faceted approach to evaluate the student/applicant in a holistic, individualized, manner. It includes reviewing a student's admissions essays,¹²⁸ leadership, extracurricular activities, awards/honors, work experience, school or community service, and special circumstances.¹²⁹ Once this process is complete, UT uses the combined AI and PAI score to admit the remaining twenty-five percent of its annual incoming freshman class.

opportunity to show what they can do." *Id.* at 3–4; *see also* TEX. EDUC. CODE § 51.803.

¹²⁵ *Fisher II*, 136 S. Ct. 2198, 2213 (2016) (“Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others.”).

¹²⁶ *Id.* at 2205 (“[T]he University made its admissions decisions primarily based on a measure called ‘Academic Index’ (or AI), which is calculated by combining an applicant’s SAT score and academic performance in high school.”).

¹²⁷ *Id.* In 1997, one year after *Hopwood*, UT began “making admission decisions based on an applicant’s AI and his or her ‘Personal Achievement Index’ (PAI).” *Id.* The PAI is a numerical score based on a holistic review of an application. “Included in the number [are] the applicant’s essays, leadership and work experience, extracurricular activities, community service, and other ‘special characteristics’ that might give the admissions committee insight into a student’s background.” *Id.*

¹²⁸ *Id.* at 2206 (“The PAI is a number from 1 to 6 (6 being the best) . . . based on two primary components. The first component is the average score a reader gives the applicant on two required essays.”).

¹²⁹ *Id.* at 2206 (“The second component [of PAI] is a full-file review that results in another 1–to–6 score, [known as] the ‘Personal Achievement Score’ or PAS. The PAS is determined by a separate reader, who (1) rereads the applicant’s required essays, (2) reviews any supplemental information the applicant submits (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluates the applicant’s potential contributions to the University’s student body based on the applicant’s leadership experience, extracurricular activities, awards/honors, community service, and other ‘special circumstances.’ ‘Special circumstances’ include the socioeconomic status of the applicant’s family, the socioeconomic status of the applicant’s school, the applicant’s family responsibilities, whether the applicant lives in a single-parent home, the applicant’s SAT score in relation to the average score at the applicant’s school, the language spoken at the applicant’s home, and finally, the applicant’s race.”).

*B. MEASURE: Professors Tienda and Montejano's Prior Data Analysis Provides Context*¹³⁰

Shortly after enacting TTPL, Professors Marta Tienda¹³¹ and David Montejano¹³²—two social scientists—began collecting data about the students that were automatically admitted to UT. Professors Tienda and Montejano's research determined, among other things:

- Students graduating from inner city minority high schools and rural white high schools that serve as feeder schools for the Top Ten Percent Plan had the most impact on admissions at UT;¹³³
- Empirical data disproved anecdotal accounts that Texas' Top Ten Percent Plan squeezed out the “best and brightest” from being admitted to elite public institutions such as UT;¹³⁴ and
- Empirical data also showed that “top ranked students from resource poor schools” were admitted to elite out-of-state institutions, such as New York University and University of Chicago, thereby refuting allegations about the merit of Texas' Top Ten Percent Plan admitted students.¹³⁵

The studies by Professors Tienda and Montejano also revealed that Texas' population growth increased the number of Hispanic, African American, and

¹³⁰ MICHAEL L. GEORGE, LEAN SIX SIGMA FOR SERVICE: HOW TO USE LEAN SPEED & SIX SIGMA QUALITY TO IMPROVE SERVICES AND TRANSACTIONS 281 (2003) (“Combining *data* with knowledge and experience is what separates true [process] improvement from mere process tinkering.”).

¹³¹ See generally Marta Tienda & Teresa Sullivan, *THEOP*, TEX. HIGHER EDUC. OPPORTUNITY PROJECT, <http://theop.princeton.edu/>.

¹³² See Montejano, *supra* note 32; see also David Montejano, *Maintaining Diversity of the University of Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 360 (Robert Post & Michael Rogin eds., 1998) (“Affirmative action was never a question of individual qualifications or abilities; rather, it was a question of rectifying the institutional practices that continually reproduced virtually all-white work forces and all-white student bodies.”).

¹³³ *Id.*; see also *Study Assesses Effect of Top 10 Percent Law on Entering Freshman Classes at UT Austin*, UT NEWS (Mar. 28, 2001), <https://news.utexas.edu/2001/03/28/study-assesses-effect-of-%C2%91top-10-percent%C2%92-law-on-entering-freshman-classes-at-ut-austin/> (noting Montejano's work).

¹³⁴ This empirically based determination explicitly refutes the ‘merit based’ anecdotal arguments that opponents of TTPL have alleged. Montejano, *supra* note 32; Tienda & Niu, *supra* note 32 (finding that the “best and brightest” are not being squeezed out of Texas public universities); see generally Sunny Niu & Marta Tienda, *The Impact of the Texas Top 10% Law on College Enrollment: A Regression Discontinuity Approach*, 29 J. POL'Y ANALYSIS & MGMT. 84 (2010) (concluding that the TTPL has increased admissions of certain groups of students to achieve its goal).

¹³⁵ See Tienda & Niu, *supra* note 32 (noting that highly selective institutions like New York University and University of Chicago are not vastly different from UT since they too, review a “broad range of scholastic, extra-curricular, and social factors [when] deciding who to admit”); Oral Argument at 67:10-15, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) (Scalia, J.), https://www.supremecourt.gov/oral_arguments/argument_transcript/2015 (“[T]here are those

Asian American high school graduates.¹³⁶ White American high school graduates also increased, but with the overall “shifts in the composition of Texas high school graduates,” Professor Tienda projected that only one in three high school graduates would be White by 2014.¹³⁷ Although Professors Tienda and Montejano’s work is foundational to the data discussed later in this Part, this Article does not replicate their efforts but instead builds upon it.¹³⁸

C. MEASURE: Recent Demographic Data Addresses Justice Kennedy’s Inquiry

Due to the U.S. Supreme Court’s mandate in *Fisher II*,¹³⁹ this Section evaluates (1) statewide population demographics, generally, and for school-aged students,¹⁴⁰ and (2) TTPL feeder high schools that serve as the pipeline for students who are automatically admitted to and enroll at UT.¹⁴¹ This

who contend that it does not benefit African-Americans to . . . get them into the University of Texas where they do not do well, as opposed to having them go to a less—advanced school, a . . . slower-track school where they do well.”)

¹³⁶ See *supra* note 32; see also Tienda et al., *supra* note 32, at 9 (“[T]he percent plan can not guarantee increased diversity of selective colleges and universities because enrollment of rank-eligible minority graduates presumes both that they will apply for admission and have the financial means to enroll.”).

¹³⁷ Tienda et al., *supra* note 32, at 8.

¹³⁸ See *infra* notes 154–65 and accompanying text. Professors Marta Tienda and Teresa Sullivan reviewed 210,006 of UT’s application data files for the years 1991–2002, as well as college transcript data. *Administrative Data Overview*, TEX. HIGHER EDUC. OPPORTUNITY PROJECT, https://theop.princeton.edu/admin_overview.html.

Each university was asked to provide: . . . [1] the year and term an applicant desired to enroll, [2] applicant demographics (gender, race, citizenship, Texas residency), [3] applicant academic characteristics (high school class rank [4] high school grade point average, [5 standardized test scores] SAT score, ACT score, AP classes taken, TOEFL score, desired major), and [6] high school characteristics (high school name, address, city, state, senior class size)

Id.; see also TEX. HIGHER EDUC. OPPORTUNITY PROJECT, ADMINISTRATIVE COLLEGE APPLICATION DATA 1–2 (Dec. 18, 2009), available at http://theop.princeton.edu/admin_doc.html (“Additionally, for Texas high schools, the data included a variable indicating the percentage of economically disadvantaged students.”).

¹³⁹ See *Fisher II*, 136 S. Ct. 2198, 2214–15 (2016) (“The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative action measures it deems necessary.”).

¹⁴⁰ *Id.* at 2212 (“Although demographics alone are by no means dispositive, they do have some value as a gauge of the University’s ability to enroll students who can offer underrepresented perspectives.”).

¹⁴¹ *Id.* at 2208–09 (“The component of the University’s admissions policy that had the largest impact on petitioner’s chances of admission was not the school’s consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. . . . Despite the Top Ten Percent Plan’s out-sized effect

data is described in detail to determine *whether changing demographics have undermined the need for a race-conscious policy*.¹⁴²

1. *A Macro Approach to Texas' Data—Looking at General Statewide and School-aged Population Demographics and TTPL/Holistic Admissions*¹⁴³

To adequately perform an assessment of Texas' changing demographics, UT must consider statewide data from both the United States Census Bureau (“U.S. Census Bureau”) and the Texas Education Agency (“TEA”).¹⁴⁴

According to the U.S. Census Bureau, the population in the State of Texas increased more than twenty percent¹⁴⁵ over twelve to thirteen years.¹⁴⁶ White Americans were the largest racial group in the state, comprising about seventy-nine percent of the population during this time.¹⁴⁷ Similarly, the TEA determined that public school enrollment increased between 2005 and

on petitioner's chances of admission, she has not challenged it.”).

¹⁴² *Id.* at 2214–15 (inquiring about “the fairness of [UT's holistic] admissions program, and “the effects, both positive and negative, of the affirmative action measures [UT] deems necessary.”). The “effects” inquiry is beyond the scope of this Article and will not be addressed. The “fairness” inquiry will be addressed should the data allude to it.

¹⁴³ This data focuses on the years 2005 to 2018 because UT began collecting data on its revised holistic program around 2005. In addition, by using data from 2005 onward, this Article captures three years of data that UT had when the *Fisher* litigation began in 2008, as well as the eight years of data obtained while the litigation was ongoing until 2016. Year(s) of data post-2016 is provided to guide UT's ongoing process of assessing its holistic admissions.

¹⁴⁴ “[N]either UT, nor the majority is clear about the relationship between Texas demographics and UT's interest.” *See id.* at 2224 (Alito, J., dissenting) (referring to United States Census Bureau data as a reference point for demographic diversity).

¹⁴⁵ The noted percentage is an estimation for 2005 to 2018. The figure was calculated by dividing the increased population percentage between 2000 and 2010 by two, and then adding the increased population percentage between 2010 and 2018. [20 divided by 2 equals 10 plus 14.1 equals 24.1].

¹⁴⁶ The census data is collected every ten years, so there are two sources that illustrate Texas' population growth between 2005 and 2018. *See* Paul Mackun et al., *Population Distribution and Change: 2000 to 2010*, at 2, Table 1, U.S. CENSUS BUREAU (March 2011), available at <https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> (showing that between 2000 and 2010, Texas' population grew by about twenty percent.); *see also Quick Facts: Texas, Population*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/48> (last updated July 2018) (noting that between April 1, 2010 and July 1, 2018, Texas' population increased by 14.1 percent); *Race and Ethnicity*, U. S. CENSUS BUREAU (Jan. 2017), <https://www.census.gov/mso/www/training/pdf/race-ethnicity-onepager.pdf> (explaining how the Bureau collects race and ethnicity data); *About Race*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> (last revised Jan. 23, 2018) (explaining that the 2000 Census allowed individuals to self-report more than one race).

¹⁴⁷ *Quick Facts: Texas, Race and Hispanic Origin*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/48>; *see About Race*, *supra* note 146 (outlining standards on race and ethnicity determinations).

2018.¹⁴⁸ Hispanics were the largest ethnic group in Texas' public high schools, comprising about fifty-two percent of school-aged population.¹⁴⁹

Both the U.S. Census Bureau and TEA use similar racial group classifications, but there is one exception.¹⁵⁰ Under the U.S. Census Bureau, Hispanic individuals are categorized as an ethnic origin group.¹⁵¹ Conversely, the TEA uses a combined racial/ethnic category.¹⁵² Both organizations note that Hispanic/Latino includes having Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race.¹⁵³

Although statewide racial demographic data from the U.S. Census Bureau and TEA offer a broad view of how Texas' demographics have changed over time, this information alone does not illustrate whether UT "needs" its race-conscious holistic admissions process. Therefore, below, there is detailed admissions and enrollment data for both TTPL and UT's race-conscious holistic admissions because these combined data sets can address the Court's inquiry.

¹⁴⁸ See *Enrollment in Texas Public Schools 2017–18*, at 8, Table 4, OFFICE OF ACADEMICS, TEX. EDUC. AGENCY (Aug. 2018) [hereinafter ENROLLMENT 2018], available at https://tea.texas.gov/acctres/enroll_2017-18.pdf (noting change by race or ethnicity).

¹⁴⁹ *Id.* at 18, Table 12; see also Watkins, *supra* note 12 ("UT-Austin leaders, senators and higher education officials all acknowledge the rule [TTPL] has helped rural students. The number of high schools that send students to Austin has gone up dramatically. But [legislators] said they were less sure of its impact on minorities. Hispanic enrollment at UT-Austin has increased significantly since the policy was put in place, but so has the number of Hispanic people in Texas.").

¹⁵⁰ The racial group classifications are: White ("[a] person having origins . . . of the original peoples of Europe, the Middle East, or North Africa"); Black or African American ("[a] person having origins in . . . Africa"); American Indian or Alaskan Native ("[a] person having origins . . . of the original peoples of North and South America (including Central America) and who maintains tribal affiliation or community attachment); Asian ("[a] person having origins . . . of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent, including . . . Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam"); and Native Hawaiian or Other Pacific Islander ("[a] person having origins . . . of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands). *About Race*, *supra* note 146; see also ENROLLMENT 2018, *supra* note 148, at 2 (identifying similar groups and definitions).

¹⁵¹ *Race and Ethnicity*, *supra* note 146, at n.124.

¹⁵² See ENROLLMENT 2018, *supra* note 148, at 2.

¹⁵³ The data in this Article focuses on three races and one ethnicity—White American, Black or African American, Asian American, and Hispanic—because they were alleged as the basis of Fisher's lawsuit against UT or addressed by the *Fisher II* dissent. Accordingly, other races such as American Indian, Alaska Native, Native Hawaiian, or Other Pacific Islander, have been excluded from the data herein.

a. *Data from UT's TTPL and Holistic Admissions*

From 2005 to 2018, UT reported¹⁵⁴ that about 131,000 African American,¹⁵⁵ Asian American,¹⁵⁶ White,¹⁵⁷ and

¹⁵⁴ The data for TTPL Admitted and Enrolled Students and Holistic Admitted and Enrolled Students, 2005–2018, was obtained from six sources. *Source 1*: Report 11: Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the Univ. of Tex. at Austin 7–8, Tables 1a, 2a, OFFICE OF ADMISSIONS, UNIV. OF TEX. AT AUSTIN (Oct. 28, 2008) [hereinafter 2008 HB588 Implementation Report], available at <https://provost.utexas.edu/enrollment-management/admissions-research/admission-reports> (for all HB588 Implementation Reports follow “HB588 Report Archive” hyperlink; then follow hyperlink to desired year); *Source 2*: Report 12: Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the Univ. of Tex. at Austin 7–8, Tables 1a, 2a, OFFICE OF ADMISSIONS, UNIV. OF TEX. AT AUSTIN (Oct. 29, 2009) [hereinafter 2009 HB588 Implementation Report]; *Source 3*: Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, at 28, Table 4.2, UNIV. OF TEX. AT AUSTIN (Dec. 31, 2011) [hereinafter UT REPORT 2011], available at <https://provost.utexas.edu/enrollment-management/admissions-research/admission-reports> (for all SB 175 Reports follow “SB 175 Report Archive” hyperlink; then follow hyperlink to desired year); *Source 4*: Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, 81st Legislature for the Period Ending Fall 2014, at 30, Table 4.1, UNIV. OF TEX. AT AUSTIN (Dec. 31, 2014) [hereinafter UT REPORT 2014]; *Source 5*: Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, 81st Legislature for the Period Ending Fall 2017, at 30, Table 4.1, UNIV. OF TEX. AT AUSTIN, (Dec. 31, 2017) [hereinafter UT REPORT 2017]; and *Source 6*: Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, 81st Legislature for the Period Ending Fall 2018, at 33 Table 4.1 UNIV. OF TEX. AT AUSTIN, (Dec. 31, 2018) [hereinafter UT REPORT 2018]. Data from 2005–2008 is pulled from 2008 HB588 Implementation Report, *supra*. Data from 2009 is pulled from 2009 HB588 Implementation Report, *supra*. Data from 2010–2011 is pulled from UT REPORT 2011, *supra*. Data for 2012–2014 is pulled from UT REPORT 2014, *supra*. Data from 2015–2017 is pulled from UT REPORT 2017, *supra*. Data from 2018 is pulled from UT REPORT 2018, *supra*.

¹⁵⁵ Annual data for African Americans automatically admitted under TTPL and enrolled at UT (“admit/enroll”) is: 2005 (441/252); 2006 (463/268); 2007 (485/284); 2008 (582/305); 2009 (571/307); 2010 (597/304); 2011 (562/279); 2012 (614/298); 2013 (520/247); 2014 (492/192); 2015 (669/287); 2016 (692/292); 2017 (667/268); 2018 (732/310). Annually, African Americans comprised about six percent of TTPL admissions. Annually, about six percent of African Americans enrolled at UT if they were initially admitted through TTPL.

¹⁵⁶ Annual data for Asian Americans automatically admitted under TTPL and enrolled at UT (“admit/enroll”) is: 2005 (1302/782); 2006 (1572/929); 2007 (1571/1005); 2008 (1744/1025); 2009 (1891/1135); 2010 (1757/1027); 2011 (1785/972); 2012 (1914/1114); 2013 (1993/1105); 2014 (1996/1093); 2015 (2081/1129); 2016 (2414/1262); 2017 (2342/1198); 2018 (2667/1423). Annually, Asian Americans comprised about twenty percent of TTPL admissions. Annually, about twenty-two percent of Asian Americans enrolled at UT if they were initially admitted through TTPL.

¹⁵⁷ Annual data for White Americans automatically admitted under TTPL and enrolled at UT (“admit/enroll”) is: 2005 (3887/2288); 2006 (4297/2524); 2007 (4244/2359); 2008 (4440/2480); 2009 (4816/2659); 2010 (4534/2361); 2011 (3802/1944); 2012 (4117/2128); 2013 (3747/1947); 2014 (3193/1615); 2015 (3386/1699); 2016 (3845/1911); 2017 (3671/1770); 2018 (3542/1734). Annually, White Americans comprised about forty-three percent of TTPL admissions. Annually,

Hispanic¹⁵⁸ students were automatically admitted to the university from Texas' public high schools according to Figure 1.¹⁵⁹ However, the enrollment rates for these same students hovered around fifty percent according to Figure 2.¹⁶⁰

During the same timeframe (2005 to 2018) UT reported¹⁶¹ that about 47,000 African American,¹⁶² Asian American,¹⁶³ White,¹⁶⁴ and Hispanic¹⁶⁵ students were admitted through its individualized, race-conscious, holistic

about forty-five percent of White Americans enrolled at UT if they were initially admitted through TTPL.

¹⁵⁸ Annual data for Hispanics automatically admitted under TTPL and enrolled at UT (“admit/enroll”) is: 2005 (1656/966); 2006 (1790/1049); 2007 (1974/1109); 2008 (2218/1164); 2009 (2617/1373); 2010 (2857/1518); 2011 (2694/1244); 2012 (3337/1568); 2013 (3103/1391); 2014 (2722/1132); 2015 (3332/1359); 2016 (4002/1630); 2017 (3843/1529); 2018 (4140/1585). Annually, Hispanics comprised about thirty-one percent of TTPL admissions. Annually, about twenty-seven percent of Hispanics enrolled at UT if they were initially admitted through TTPL.

¹⁵⁹ This data represents the total number of students automatically admitted under TTPL who also enrolled at UT (“admit/enroll”): 2005 (7286/4391); 2006 (8122/4902); 2007 (8476/4870); 2008 (9253/5114); 2009 (10205/5634); 2010 (10364/5546); 2011 (9383/4712); 2012 (10625/5425); 2013 (9963/4957); 2014 (8979/4310); 2015 (10092/4769); 2016 (11714/5429); 2017 (11206/5056); 2018 (11739/5353).

¹⁶⁰ See *supra* note 159; see also *supra* notes 155–58.

¹⁶¹ See *supra* note 154; see also *supra* notes 162–65.

¹⁶² Annual data for African Americans admitted and enrolled at UT through its holistic admissions (“admit/enroll”) is: 2005 (592/87); 2006 (661/110); 2007 (707/138); 2008 (700/58); 2009 (630/34); 2010 (75/49); 2011 (137/77); 2012 (168/109); 2013 (132/78); 2014 (153/81); 2015 (143/83); 2016 (201/125); 2017 (247/151); 2018 (253/147). Annually, African Americans comprised about seven percent of holistic admissions. Annually, about five percent of African Americans enrolled at UT after they were admitted through the race-conscious holistic admissions process.

¹⁶³ Annual data for Asian Americans admitted and enrolled at UT through its holistic admissions (“admit/enroll”) is: 2005 (1865/350); 2006 (2060/327); 2007 (2163/378); 2008 (2079/173); 2009 (2186/181); 2010 (265/165); 2011 (468/265); 2012 (463/295); 2013 (404/250); 2014 (675/432); 2015 (843/495); 2016 (828/500); 2017 (794/473); 2018 (925/606). Annually, Asian Americans comprised about twenty-three percent of holistic admissions. Annually, about twenty percent of Asian Americans enrolled at UT after they were admitted through the race-conscious holistic admissions process.

¹⁶⁴ Annual data for White Americans admitted and enrolled at UT through its holistic admissions (“admit/enroll”) is: 2005 (5906/1230); 2006 (6268/1163); 2007 (6196/1112); 2008 (5854/790); 2009 (5797/614); 2010 (997/615); 2011 (1607/956); 2012 (1737/1081); 2013 (1447/888); 2014 (1873/1150); 2015 (1616/968); 2016 (1700/1007); 2017 (1649/1020); 2018 (1736/1045). Annually, White Americans comprised about forty-nine percent of holistic admissions. Annually, about fifty-nine percent of White Americans enrolled at UT after they were admitted through the race-conscious holistic admissions process.

¹⁶⁵ Annual data for Hispanics admitted and enrolled at UT through its holistic admissions (“admit/enroll”) is: 2005 (2119/264); 2006 (2318/314); 2007 (2550/343); 2008 (2218/158); 2009 (2787/93); 2010 (190/117); 2011 (375/221); 2012 (483/287); 2013 (325/207); 2014 (479/278); 2015 (477/272); 2016 (611/380); 2017 (727/453); 2018 (778/475). Annually, Hispanics comprised about twenty-one percent of holistic admissions. Annually, about sixteen percent of Hispanics enrolled at UT after they were admitted through the race-conscious holistic admissions process.

admissions process. Similar to the TTPL data, Figures 3 and 4 show that about fifty percent of students admitted under the holistic admissions enrolled at UT.

b. Analysis of UT's TTPL and Holistic Admissions

A few trends emerge from the data regarding UT's TTPL admissions/enrollment and holistic admissions/enrollment.

- About ninety percent of the students admitted to UT, from 2005 to 2018, through TTPL or its holistic admissions, were White American, African American, Asian American, and Hispanic.¹⁶⁶
- Over the course of thirteen years (2005–2018), about seventy-six percent of African American and Hispanics admitted to UT were through TTPL. Although these students were automatically admitted to UT, their enrollment rates averaged about forty percent.¹⁶⁷
- About seventy-one percent of Asian Americans and White Americans admitted at UT over the course of twelve years (2005–2018) were through TTPL. Their enrollment rates were about sixty-two percent.¹⁶⁸
- About twenty-four percent of African Americans and Hispanics admitted to UT from 2005 to 2018 were admitted through its holistic admissions. Their enrollment rates were about thirty-nine percent.¹⁶⁹
- Likewise, from 2005 to 2018, about twenty-nine percent of Asian Americans and White Americans were admitted to UT through its holistic admissions. Their enrollment rates were about fifty-two percent.¹⁷⁰
- From 2005 to 2018, White Americans were the most admitted and enrolled racial group under UT's holistic admissions. About 21,000 White Americans were admitted under UT's holistic admissions and about 13,000 of those students enrolled at UT, making their

¹⁶⁶ See *infra* Figures 1–4 and *supra* note 154.

¹⁶⁷ See *supra* notes 155, 158 and accompanying text; see also Tienda et al., *supra* note 32, at 9 (“Percent plans . . . may dampen the propensity of talented minority students to apply for admission if they do not realize that they qualify for the guarantee or if they perceive campus climate as unwelcoming.”).

¹⁶⁸ See *supra* notes 156, 157, 159 and accompanying text.

¹⁶⁹ See *supra* notes 154, 162, 165 and accompanying text.

¹⁷⁰ See *supra* notes 154, 163–64 and accompanying text.

admissions-enrollment ratio about sixty percent.¹⁷¹ Similarly, White Americans were the most admitted and enrolled racial group under TTPL during a ten-year period which spanned from 2005 to 2015.¹⁷² About 52,000 White Americans were automatically admitted under TTPL and about 28,000 of those students enrolled at UT, making their admissions-enrollment ratio around fifty-three percent.

- Finally, the data reveals one definite and one potential defect in the admissions process. First, there is a defect in how UT defines race; specifically, UT does not capture the complexities of race and ethnicity in its current data sets.¹⁷³ This will be discussed further in Part III.¹⁷⁴
- Second, there is a potential defect regarding the diversity of staff reviewing admissions files,¹⁷⁵ or underrepresented students being supported by UT once they enroll.¹⁷⁶

¹⁷¹ See *supra* notes 154, 162–65 and accompanying text.

¹⁷² See *supra* notes 155–59 and accompanying text. In 2013 and 2016–2018, Latino/a students were automatically admitted under TTPL at slightly higher rates than White Americans. However, Latino/a student enrollment rates during those years remained below White Americans. See UT REPORT 2014, *supra* note 154; UT REPORT 2017, *supra* note 154; UT REPORT 2018, *supra* note 154.

¹⁷³ The dissent in *Fisher II* made a valid point about how UT classifies race/ethnicity. See *Fisher II*, 136 S. Ct. 2198, 2229–30 (2016) (Alito, J., dissenting) (“UT[] use[s] . . . overly simplistic racial and ethnic categories.”). One of the solutions in Part III suggests that UT track race and ethnicity data in its feeder school reports, so UT could benefit from using broader classification since its focus on diversity includes “diversity within diversity.” See generally Carbodo, *supra* note 38; Harpalani, *supra* note 38; *supra* notes 154–58, 162–65.

¹⁷⁴ The U.S. Census acknowledges the different subsets of race; however, Hispanic persons are not defined as a “race,” but instead are considered an “ethnicity.” See *supra* notes 154–59, 162–65 and accompanying text; see also U.S. CENSUS BUREAU, 2015 NATIONAL CONTENT TEST RACE AND ETHNICITY ANALYSIS REPORT: A NEW DESIGN FOR THE 21ST CENTURY 3, Figure 1 (Feb. 28, 2017), available at <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf> (listing and defining categories).

¹⁷⁵ Interview by Martha E. Mangelsdorf with Evan Apfelbaum, *The Trouble with Homogenous Teams*, MIT SLOAN MGMT. REV. (Dec. 11, 2017), <https://sloanreview.mit.edu/article/the-trouble-with-homogeneous-teams/> (noting that the demographic makeup of people at the table affects people’s propensity to conform to others’ decisions and people are less likely to conform in diverse groups); see also Heather Doshay, *Three Reasons Why Your Diversity and Inclusion Programs Are Not Working*, FORBES (July 17, 2018, 8:00 AM), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/07/17/three-reasons-why-your-diversity-and-inclusion-programs-are-not-working/#7e50c573494b> (discussing “bad” diversity strategies companies have employed in the workplace).

¹⁷⁶ Barbara Mae Gayle et al., *Safe Spaces, Difficult Dialogues, and Critical Thinking*, 7 INT’L J. FOR SCHOLARSHIP TEACHING & LEARNING, 2013, at 2 (“The goal of an academic safe space place is to create an ‘inclusive and effective learning environment in which opportunities for complex

Based on the above, there is data to answer the *Fisher II* inquiry as to how statewide demographics impact UT's admissions process. Consistent with Texas' statewide demographics, White Americans are the dominant racial group. Likewise, White Americans are the dominant racial group who are admitted to and enroll at UT via TTPL and its holistic admissions process. When Texas' school-aged demographics are assessed, there is a dissimilar result. While Hispanics are the dominant racial group among school aged students, they are the second most admitted (ethnic) group to UT under TTPL and its holistic admissions. In terms of enrollment, as of 2010, Hispanics fell behind White Americans and Asian Americans, respectively. Due to this inconsistency, it is important to look to the data on a micro level because it may provide more insight.

2. *A Micro Approach to the Data—Looking at the TTPL Pipeline of Texas Feeder Schools*

Changing demographics of Texas' students and those eligible for TTPL are reflected in its public high school enrollment data.¹⁷⁷ Although regional TEA data (i.e., enrollment by educational service center regions) dates back to 2008, UT did not begin reporting regional data detailing TTPL admissions and enrollment until 2010.¹⁷⁸

The TEA reports public school data in three tiers. First, data is sorted by educational service center regions ("ESCs").¹⁷⁹ Second, data is sorted by

cognitive, intrapersonal, and interpersonal development exists for *all* students." (internal citation omitted)).

¹⁷⁷ There are three data sources reflecting this information. *Source 1: Supplements to SB 175 Reports*, OFFICE OF ADMISSIONS, UNIV. OF TEX., <https://provost.utexas.edu/enrollment-management/admissions-research/admission-reports> (for all Supplemental Reports follow "SB 175 Report Archive" hyperlink; then follow hyperlink to SB175-AdmEnr-TXschools for desired year) (also known as "SB175 Reports" or "Feeder School" Reports); *Source 2: Enrollment Trends*, TEX. EDUC. AGENCY, https://tea.texas.gov/acctres/enroll_index.html; and *Source 3: School Report Cards*, TEX. EDUC. AGENCY, <https://tea.texas.gov/perfreport/src/index.html> (last visited Mar. 10, 2019).

¹⁷⁸ UT REPORT 2011, *supra* note 154, at 11, Table 1.5 (noting Non Public or Not Reported figures for 2010 (fourteen percent or 1463) and 2011 (fourteen percent or 1329)).

¹⁷⁹ See TEX. EDUC. CODE § 8.002 (noting the purpose of ESCs to assist school district in improving student performance, enable school districts to operate efficiently and effectively, and implement initiatives assigned by the legislature or commissioner); see also *Education Service Centers*, TEX. EDUC. AGENCY, http://tea.texas.gov/About_TEA/Other_Services/Education_Service_Centers/Education_Service_Centers/ (listing the 20 ESCs). The ESCs are Region 1 (Edinburgh), Region 2 (Corpus Christi), Region 3 (Victoria), Region 4 (Houston), Region 5 (Beaumont), Region 6 (Huntsville), Region 7 (Kilgore), Region 8 (Mt. Pleasant), Region 9 (Wichita Falls), Region 10 (Richardson), Region 11 (Fort Worth), Region 12 (Waco), Region 13 (Austin), Region 14 (Abilene), Region 15 (San Angelo), Region 16 (Amarillo), Region 17 (Lubbock), Region 18 (Midland), Region 19 (El Paso), and Region 20 (San Antonio). *Id.*

independent school districts (“ISD”); an individual school campus exists within each ISD and thus within each ESC.¹⁸⁰ Third, data is sorted by each individual school campus as each has an individual school report card.¹⁸¹ School report cards¹⁸² provide detailed information about students, including race/ethnicity,¹⁸³ socio-economic status,¹⁸⁴ graduation rates, and distinction designations¹⁸⁵ such as college preparedness.

During an eight year span, 2010 to 2018, UT documented that approximately 94,000 students were admitted to the University via TTPL.¹⁸⁶ Of those 94,000 students, about 68,000 students graduated high school from five of the 20 ESC regions.¹⁸⁷ Of those approximate 68,000 students, about

¹⁸⁰ See generally *About Us*, REGION10ESC, <https://www.region10.org/about-us/>.

¹⁸¹ *School Report Card (SRC) Definitions*, TEX. EDUC. AGENCY, 2015–16, available at https://tea.texas.gov/perfreport/src_2015-16/ (follow “School Report Card Definitions (English)” hyperlink). TEA offers a list of school report card (“SRC”) definitions each academic year. *Id.* The SRC definitions most relevant here are: “race/ethnicity,” “economically disadvantaged,” and “distinction designations.” The definitions used in this Article were published 2015–16.

¹⁸² The school report cards became more user friendly (i.e., easy to discern different categories) beginning 2012–13. See, e.g., TEX. EDUC. AGENCY, 2009–10 SCHOOL REPORT CARD: ALDINE HS; TEX. EDUC. AGENCY, 2010–11 SCHOOL REPORT CARD: ALDINE HS; TEX. EDUC. AGENCY, 2012–13 SCHOOL REPORT CARD: ALDINE HS.

¹⁸³ TEX. EDUC. AGENCY, 2015–16 SCHOOL REPORT CARD (SRC) DEFINITIONS. TEA school report cards designate race/ethnicity as: African American, Hispanic, White, American Indian, Asian, and Two or More Races (or Multiracial).

¹⁸⁴ *Id.* The term “economically disadvantaged” may be used interchangeably in this Article with socio-economic status. Economically disadvantaged means “[t]he percentage of economically disadvantaged students is the count of students that are eligible for free or reduced-price lunch or other public assistance divided by the total number of students.” *Id.*

¹⁸⁵ *Id.* “Distinction designations are awarded in recognition of outstanding achievement in specific areas.” *Id.* The distinction relevant here is Postsecondary Readiness. The other distinctions include: Academic Achievement in English Language Arts/Reading, Academic Achievement in Mathematics, Academic Achievement in Science, Academic Achievement in Social Studies, Top 25 Percent: Student Progress, and Top 25 Percent: Closing Performance Gaps. *Id.*

¹⁸⁶ See generally UT REPORT 2014, *supra* note 154, at 16, Table 1.5 (noting Non Public/Not Reported figures for 2012 (less than one percent or forty-three), 2013 (one percent or fifty-six), 2014 (less than one percent or thirty-eight); UT REPORT 2017, *supra* note 154, at 15, Table 1.5 (noting Non Public/Not Reported figures for 2015 (less than one percent or eight); UT REPORT 2018, *supra* note 154, at 16, Table 1.5 (noting Non Public/Not Reported figures for 2016 (less than one percent or eight), 2017 (less than one percent or six), 2018 (less than one percent or eleven)).

¹⁸⁷ See generally UT REPORT 2011, *supra* note 154, at 12, Table 1.5; UT REPORT 2014, *supra* note 154, at 15, Table 1.5; UT REPORT 2017, *supra* note 154, at 15, Table 1.5; UT REPORT 2018, *supra* note 154, at 16–17, Table 1.5. About seventy percent of the students that are automatically admitted to UT graduated high school from one of five ESC regions; there are twenty ESC regions total in the state. The comparison below shows TTPL admitted students from all twenty ESCs and the top five regions from 2010 to 2018:

- In 2010, all Regions (10,364) versus Top 5 Regions (6564) [Region 4 (2485), Region 10 (1362), Region 11 (885), Region 13 (1100), Region 20 (732)];

33,000 enrolled at UT.¹⁸⁸ These ESCs — Region 4 (Houston), Region 10

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- In 2011, all Regions (9383) versus Top 5 Regions (5938) [Region 4 (2203), Region 10 (1204), Region 11 (861), Region 13 (1034), Region 20 (636)];
 - In 2012, all Regions (10,625) versus Top 5 Regions (7723) [Region 4 (2989), Region 10 (1619), Region 11 (955), Region 13 (1226), Region 20 (934)];
 - In 2013, all Regions (9963) versus Top 5 Regions (7350) [Region 4 (2777), Region 10 (1558), Region 11 (942), Region 13 (1123), Region 20 (950)];
 - In 2014, all Regions (8979) versus Top 5 Regions (6763) [Region 4 (2565), Region 10 (1438), Region 11 (827), Region 13 (1029), Region 20 (904)];
 - In 2015, all Regions (10,092) versus Top 5 Regions (7544) [Region 4 (2865), Region 10 (1674), Region 11 (945), Region 13 (1119), Region 20 (941)];
 - In 2016, all Regions (11,714) versus Top 5 Regions (8745) [Region 4 (3385), Region 10 (1812), Region 11 (1110), Region 13 (1331), Region 20 (1107)];
 - In 2017, all Regions (11,206) versus Top 5 Regions (8336) [(Region 4 (3049), Region 10 (1882), Region 11 (1090), Region 13 (1223), Region 20 (1092)]; and
 - In 2018, all Regions (11,739) versus Top 5 Regions (8747) [Region 4 (3277), Region 10 (1902), Region 11 (1218), Region 13 (1250), Region 20 (1100)].

¹⁸⁸ UT REPORT 2011, *supra* note 154, at 12, Table 1.5; UT REPORT 2014, *supra* note 154, at 16, Table 1.5; UT REPORT 2017, *supra* note 154, at 16, Table 1.5; UT REPORT 2018, *supra* note 154, at 16–17, Table 1.5. About forty-nine percent of students that are automatically admitted to UT from all 20 ESCs enroll at the University. The comparison below shows TTPL admitted students who enrolled at UT, from all twenty ESCs and the top five regions from 2010 to 2018:

- In 2010, all Regions (5546) versus Top 5 Regions (3571) [Region 4 (1373), Region 10 (710), Region 11 (466), Region 13 (647), Region 20 (375)];
- In 2011, all Regions (4712) versus Top 5 Regions (3033) [Region 4 (1089), Region 10 (603), Region 11 (419), Region 13 (638), Region 20 (284)];
- In 2012, all Regions (5425) versus Top 5 Regions (3987) [Region 4 (1520), Region 10 (805), Region 11 (455), Region 13 (744), Region 20 (463)];
- In 2013, all Regions (4957) versus Top 5 Regions (3693) [Region 4 (1395), Region 10 (697), Region 11 (476), Region 13 (678), Region 20 (447)];
- In 2014, all Regions (4310) versus Top 5 Regions (3294) [Region 4 (1175), Region 10 (691), Region 11 (402), Region 13 (567), Region 20 (459)];
- In 2015, all Regions (4769) versus Top 5 Regions (3643) [Region 4 (1262), Region 10 (788), Region 11 (470), Region 13 (670), Region 20 (453)];
- In 2016, all Regions (5,429) versus Top 5 Regions (4,122) [Region 4 (1,498), Region 10 (832), Region 11 (508), Region 13 (754), Region 20 (530)];
- In 2017, all Regions (5056) versus Top 5 Regions (3806) [Region 4 (1339), Region 10 (802), Region 11 (480), Region 13 (711), Region 20 (474)]; and
- In 2018, all Regions (5353) versus Top 5 Regions (4108) [Region 4 (1501), Region 10 (815), Region 11 (529), Region 13 (734), Region 20 (529)].

(Richardson), Region 11 (Fort Worth), Region 13 (Austin), and Region 20 (San Antonio) (collectively, “Top 5 Regions”) — will be explored below.¹⁸⁹

The data in Figures 5 and 6 are critical to UT’s assessment and compliance with *Fisher II* because they detail regional figures which show another tier of demographic information that factor into UT’s holistic admissions.¹⁹⁰ The Top 5 ESC Regions, which will be explored below, are likewise vital to UT’s assessment and compliance with *Fisher II* because they provide racial and ethnic data which may impact how race may factor into UT’s holistic admissions.¹⁹¹

a. Region 4 – Houston

The annual enrollment of high school students in Region 4,¹⁹² between 2011 and 2018, averaged 1.1 million students.¹⁹³ During this time, the data

¹⁸⁹ In 2001, Professor Montejano similarly found that UT was more “accessible” to students graduating from inner-city minority high schools in Dallas-Fort Worth, Houston, and San Antonio. See Montejano, *supra* note 32.

¹⁹⁰ There is a period of time during the admissions cycle where UT should have data about (a) students that are automatically admitted to UT via TTPL and which of those students enroll at UT; (b) the number of remaining seats post-TTPL enrollment; and (c) the number of students who have sought admission via UT’s holistic process.

¹⁹¹ The data in footnotes 187 and 188 highlights three points. First, on balance, UT enrolls about forty-nine percent of all students from all twenty ESCs via TTPL [calculated by adding ‘All Regions’ admissions figures divided by ‘All Regions’ enrollment figures]. Second, seventy percent of students that are automatically admitted to UT via TTPL graduate from the five top ESCs [calculated by dividing ‘All Regions’ admissions by ‘Top 5 Regions’ admissions]. Third, of all of the students that were admitted to UT via TTPL and enroll at the University, about seventy-one percent graduated from the top five ESCs [calculated by adding ‘All Regions’ enrollment figures divided by ‘Top 5 Regions’ enrollment].

¹⁹² Region 4 (Houston) serves a seven-county area comprised of forty-nine public school districts. See *About Region 4*, REGION 4, <http://www.esc4.net/about/about-region-4> (last visited Jan. 5, 2019); see also REGION 4, 49 SCHOOL DISTRICTS COVERING 7 COUNTIES, available at <http://www.esc4.net/Assets/school-districts-2016-17edit-i10517.pdf> (last visited Jan. 5, 2019) (providing contact information for each school); REGION 4, PROFILE OF REGION 4 DISTRICTS AND CHARTERS: ENROLL, <http://www.esc4.net/Assets/Region-4-Districts-and-Charters-Profile-2016-2017.pdf> (last visited Jan. 5, 2019) (providing enrollment data and student and staff demographics); *Region 4 School District Directory*, REGION 4, <http://www.esc4.net/about/region-4-school-directory>.

¹⁹³ Region 4 has the largest enrollment of students in public schools in Texas, and thus potentially the greatest impact on students eligible for TTPL. See ENROLLMENT 2018, *supra* note 148, at 37, Table 19; see also *Enrollment in Texas Public Schools 2016–17*, OFFICE OF ACADEMICS, TEX. EDUC. AGENCY (June 2017) [hereinafter ENROLLMENT 2017], http://tea.texas.gov/acctres/enroll_index.html (for all enrollment reports follow “Enrollment in Texas Public Schools” hyperlink for the year desired); *Enrollment in Texas Public Schools 2015–16*, OFFICE OF ACADEMICS, TEX. EDUC. AGENCY (Dec. 2016) [hereinafter ENROLLMENT 2016]; *Enrollment in Texas Public Schools 2014–15*, OFFICE OF ACADEMICS, TEX. EDUC. AGENCY (Apr. 2016) [hereinafter ENROLLMENT 2015]; *Enrollment in Texas Public Schools 2013–14*, OFFICE OF ACADEMICS, TEX. EDUC. AGENCY (Nov. 2014)

also shows that approximately 684,000 of those 1.1 million students were considered economically disadvantaged.¹⁹⁴

In 2011, racial and ethnic enrollment data for grades nine through twelve provide that almost 292,000 African American, Asian American, Hispanic, and White American students were enrolled in Region 4 high schools.¹⁹⁵ By

[hereinafter ENROLLMENT 2014]; *Enrollment in Texas Public Schools 2012–13*, OFFICE OF ACADEMICS, TEX. EDUC. AGENCY (Mar. 2014) [hereinafter ENROLLMENT 2013]; *Enrollment in Texas Public Schools 2011–12*, OFFICE OF ACADEMICS, TEX. EDUC. AGENCY (Dec. 2012) [hereinafter ENROLLMENT 2012]; *Enrollment in Texas Public Schools 2010–11*, OFFICE OF ACADEMICS, TEX. EDUC. AGENCY (Oct. 2011) [hereinafter ENROLLMENT 2011] (including many informative tables and figures, including Table 11 (Enrollment by Grade and Race/Ethnicity) and Table 18 (Enrollment by Education Service Center, Texas Public Schools)) [collectively hereinafter ENROLLMENTS 2011–18].

¹⁹⁴ The average percentage of economically disadvantaged students in Region 4 Individual School Districts (“ISDs”) exceeds the statewide average. *Compare* REGION 4, PROFILE OF REGION 4 DISTRICTS AND CHARTERS: ENROLL, *supra* note 192 (noting that 58.2% of the student body is economically disadvantaged), *with* ENROLLMENT 2018, *supra* note 193, at 45, Table 21 (illustrating enrollment of economically disadvantaged students within ESCs). For more information, see also ENROLLMENT 2018, Table 8 (Enrollment of Economically Disadvantaged Students Within Racial/Ethnic Groups, Texas Public Schools), Table 13 (Enrollment of Economically Disadvantaged Students within Grades, Texas Public Schools), and Table 21 (Enrollment of Economically Disadvantaged Students Within Education Service Center, Texas Public Schools).

¹⁹⁵ There are 177 high schools in Region 4 that are feeder schools for UT. *See AskTED*, TEX. EDUC. AGENCY, <http://tea4avholly.tea.state.tx.us/tea.askted.web/Forms/Home.aspx> (select “Search By” and “Region,” then select the region type, check “Include School(s),” then check “Advanced Search,” for “District Type(s)” only select “Independent/Common,” for “School Type(s)” only select “Public (Does Not Include Charters),” for “Instruction Type(s)” only select “Regular,” for “Grade Levels” only select “High School”) (last visited Mar. 23, 2019). Two sources provide the high school enrollment data by race or ethnicity. They are: *Source 1*: ENROLLMENTS 2011–18, *supra* note 193; *Source 2*: *PEIMS Standard Reports*, TEX. EDUC. AGENCY, https://tea.texas.gov/Reports_and_Data/Student_Data/Standard_Reports/PEIMS_Standard_Reports/ (last visited Jan. 5, 2019). Once you are on the *PEIM Standards Reports* page locate the “Student Enrollment Reports” hyperlink, then follow this three-step process: (1) Click on the “School Year” and select the year sought (e.g., 2011–2012); (2) Click on “Report,” and use the drop down menu to select “Statewide Region Totals;” (3) Click on “Grade, Ethnicity or Gender” and use the drop down menu to select “Grade and Ethnicity.”

- 2011–2012: African Americans (60,681); Asian American (19,893); Hispanic (131,730); and White Americans (80,555).
- 2012–2013: African Americans (61,026); Asian American (20,566); Hispanic (137,294); and White Americans (79,622).
- 2013–2014: African Americans (61,700); Asian American (21,173); Hispanic (142,468); and White Americans (79,529).
- 2014–2015: African Americans (62,879); Asian American (22,263); Hispanic (150,586); and White Americans (80,145).
- 2015–2016: African Americans (63,817); Asian American (23,374); Hispanic (158,126); and White Americans (80,034).

2018, this number increased to over 333,000 students.¹⁹⁶

In Region 4, African American and Hispanic students' graduate from racially homogenous high schools at higher rates than their White American or Asian American counterparts.¹⁹⁷ African American and Hispanic students also attend schools with higher rates of poverty or low socio-economic status than their White American (or Asian American) counterparts.¹⁹⁸ Below, the chart highlights some of the homogenous high schools that are TTPL feeder schools in Region 4.¹⁹⁹

The data in Figure 7 shows racial or ethnic segregation within Region 4 schools, specifically, but it is indicative of other schools located in other Top 5 ESC Regions.²⁰⁰ As UT assesses this data, the existence of segregated schools within the state must be considered.²⁰¹ The pipeline of students in Region 4 that are currently eligible for TTPL are graduating from homogenous, in-state schools, thereby undermining diversity.²⁰²

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- 2016–2017: African Americans (64,106); Asian American (24,641); Hispanic (165,358); and White Americans (79,621).
 - 2017–2018: African Americans (64,754); Asian American (25,772); Hispanic (169,684); and White Americans (73,347).

¹⁹⁶ See *supra* note 195 and accompanying text.

¹⁹⁷ For purposes of this Article, a “racially homogenous school” exists when one racial or ethnic group is eighty percent or more of the school population. See Dylan Conger, *New Directions in Measuring Racial Isolation in School 1* (N.Y.U. Inst. Educ. & Soc. Pol’y Working Paper Series, Working Paper No. 08-02, 2008), <https://steinhardt.nyu.edu/scmsAdmin/uploads/001/113/wp08-02webversion.pdf>. The term “racial isolation” measured the exposure of each race to one another.

¹⁹⁸ The combined population of African American and Latino students exceeded eighty percent of their respective districts in at least five ISDs located within Harris County. See *School Report Cards*, *supra* note 177 (follow hyperlink; select “2017–2018 School Report Card;” select “All School Report Cards by District;” select “District Name (full or partial name);” then type the applicable ISD; click “Search,” then “Choose a District” will identify the applicable ISD; finally, select “View Report”). The five ISDs are Aldine ISD, Galena Park ISD, Houston ISD, Pasadena ISD, and Sheldon ISD. See REGION 4, 49 SCHOOL DISTRICTS COVERING 7 COUNTIES, *supra* note 192 and accompanying text.

¹⁹⁹ The data used for the chart are the School Report Cards for 2010–2011, 2012–2013, 2013–2014, 2014–2015, 2015–2016, 2016–2017, and 2017–2018. See *School Report Cards*, *supra* note 177. No school report cards exist for 2011–2012. The schools listed in this sampling are all TTPL feeder schools. See *Supplements to SB175 Reports*, *supra* note 177.

²⁰⁰ Here, eleven of the twelve schools listed in Figure 7 are located in the same county (Harris County). See *School Report Cards*, *supra* note 177.

²⁰¹ See generally *Fisher II*, 136 S. Ct. 2198, 2231 (2016) (Alito, J., dissenting) (“UT complained that the Top Ten Percent Law hinders its efforts to assemble a broadly diverse class because the minorities admitted under that law are drawn largely from certain areas of Texas where there are majority-minority schools.”).

²⁰² See Shakira D. Pleasant, *More than Just the Numbers: Fisher v. Texas and the Practical Impact of Texas’ Top Ten Percent Law*, 24 U. MIAMI BUS. L. REV. 111, 121–27 (2016) (detailing Region 4 school-specific data and arguing that UT needs TTPL and its holistic process to achieve diversity).

b. Region 10 – Richardson

Consistent with the upward enrollment trends due to population growth, Region 10 high schools²⁰³ also saw increased enrollment of African American, Asian American, Hispanic, or White American students.²⁰⁴ An average of 805,000 students annually enrolled in Region 10 public high schools between 2011 and 2018.²⁰⁵ During this same time, approximately 456,000 of the 805,000 students in this region were considered economically disadvantaged.²⁰⁶ Similar to Region 4, Region 10 schools are also segregated, as noted by Figure 8.

²⁰³ Region 10 has 80 public school districts spanning approximately nine counties. *See Region 10 School Districts/Charter Schools/Private Schools, REGION 10 ESC*, https://www.region10.org/r10_districtslist.cfm# (last visited Jan. 5, 2019); *see also* REGION 10 ESC REGION 10 SERVICE AREA, <https://www.region10.org/about-us/r10-regional-map/> (last visited Jan. 5, 2019).

²⁰⁴ *See* ENROLLMENTS 2011–2018, *supra* note 193 and accompanying text (stating and describing the two sources that provide the high school enrollment data by race or ethnicity); *PEIMS Standard Reports*, *supra* note 195.

²⁰⁵ According to Region 10 demographics, Region 10 boasts the second largest enrollment of students in Texas public schools and admits the second largest number of students to UT through TTPL. *See, e.g.*, UT REPORT 2018, *supra* note 154, at 15. There are 170 high schools in Region 10 that are feeder schools for UT. *See AskTED*, *supra* note 195; *see also* ENROLLMENTS 2011–2018, *supra* note 193; *PEIMS Standard Reports*, *supra* note 195.

- 2011–2012: African Americans (40,974); Asian American (11,354); Hispanic (78,296); and White Americans (71,959).
- 2012–2013: African Americans (41,217); Asian American (11,891); Hispanic (81,794); and White Americans (71,362).
- 2013–2014: African Americans (41,825); Asian American (12,566); Hispanic (86,428); and White Americans (71,378).
- 2014–2015: African Americans (42,760); Asian American (13,575); Hispanic (90,593); and White Americans (73,588).
- 2015–2016: African Americans (43,953); Asian American (14,562); Hispanic (95,243); and White Americans (71,956).
- 2016–2017: African Americans (44,884); Asian American (15,887); Hispanic (100,177); and White Americans (72,560).
- 2017–2018: African Americans (45,784); Asian American (17,345); Hispanic (103,714); and White Americans (73,573).

²⁰⁶ These figures equate to approximately fifty-seven percent of the students in Region 10. *See generally* ENROLLMENT 2018, *supra* note 193, at 45, Table 21 (illustrating Enrollment of Economically Disadvantaged Students Within Education Service Centers, Texas Public Schools, 2005–06 and 2017–18). For other annual statistics, *see also* ENROLLMENT 2017, *supra* note 193, at 42, Table 20; ENROLLMENT 2016, *supra* note 193, at 42, Table 20; ENROLLMENT 2015, *supra* note 209, at 42, Table 20; ENROLLMENT 2014, *supra* note 193, at 42, Table 20; ENROLLMENT 2013, *supra* note 193, at 42, Table 20; ENROLLMENT 2012, *supra* note 193, at 42, Table 20.

Based on Figure 8, there is one difference between Region 10 and Region 4 TTPL feeder schools. Unlike Region 4 where African Americans and Hispanics are the predominately segregated racial and ethnic groups, the segregated schools in Region 10 are representative of two races and one ethnicity—White Americans, African American, and Hispanic.²⁰⁷

c. Region 13 – Austin

Like Regions 4 and 10, student enrollment at Region 13 high schools²⁰⁸ increased between 2011 and 2018.²⁰⁹ During these years, a little over 390,000 students enrolled in Region 13 public schools annually.²¹⁰ Also

²⁰⁷ Between 2011 and 2018, over 350 students from several high schools among fourteen ISDs were automatically admitted to UT from Region 10; White Americans dominated the student populations of these fourteen schools, as they accounted for eighty percent or more of the total student body at each high school. *School Report Cards*, *supra* note 177. During the same time, more than 900 students from thirty plus high schools were automatically admitted to UT, but these students graduated from schools that were predominately African American or Latino. *Id.* At least twenty of the thirty plus schools are located in the same county, Dallas County, and the same ISD—Dallas ISD. *Id.*

²⁰⁸ Region 13 (Austin) has sixty public school districts spanning approximately sixteen counties. *See About Region 13*, REGION 13 EDUC. SERV. CTR., <http://www4.esc13.net/about> (last visited Jan. 5, 2019); *see also Region 13 School Districts*, REGION 13 EDUC. SERV. CTR., <http://www4.esc13.net/districts/school-districts-a-c> (last visited Jan. 5, 2019).

²⁰⁹ *See supra* note 195 and accompanying text (stating and describing the two sources from the TEA that provide the high school enrollment data by race or ethnicity).

²¹⁰ *See supra* note 193 and accompanying text. According to Region 13 demographics, Region 13 enrollment rates at UT are last among the Top 5 ESC regions. *See, e.g.*, UT REPORT 2018, *supra* note 154, at 15. There are 77 high schools in Region 13 that are feeder schools for UT. *See AskTED*, *supra* note 195; *see also ENROLLMENTS 2011–2018*, *supra* note 193; *PEIMS Standard Reports*, *supra* note 195.

- 2011–2012: African Americans (8455); Asian American (3752); Hispanic (41,199); and White Americans (44,276).
- 2012–2013: African Americans (8514); Asian American (3962); Hispanic (43,256); and White Americans (44,670).
- 2013–2014: African Americans (8518); Asian American (4199); Hispanic (44,819); and White Americans (45,207).
- 2014–2015: African Americans (8629); Asian American (4405); Hispanic (47,710); and White Americans (45,731).
- 2015–2016: African Americans (8598); Asian American (4754); Hispanic (50,244); and White Americans (46,637).
- 2016–2017: African Americans (8326); Asian American (5070); Hispanic (49,731); and White Americans (43,262).
- 2017–2018: African Americans (8239); Asian American (5584); Hispanic (51,327); and White Americans (43,906).

during this time, approximately 185,000 of the 390,000 students in this region were considered economically disadvantaged.²¹¹ Figure 9 shows that Region 13, similar to other Top 5 Regions, also has segregated high schools.

A difference between Region 13 high schools and others in the Top 5 Regions is the rate at which African Americans and Hispanics are “economically disadvantaged” in comparison to their White American (or Asian American) peers. African Americans and Hispanics are economically disadvantaged twenty percent more at schools where they comprise the majority student population.²¹² Conversely, where White Americans are the majority student population, they are “economically disadvantaged” at percentages less than the state average.²¹³

d. Region 11 – Fort Worth

Region 11 has the third largest public-school enrollment in the state of Texas,²¹⁴ behind Regions 4 and 10, respectively.²¹⁵ However, it is the fourth largest pipeline for TTPL students admitted to UT.²¹⁶ It also has the third

²¹¹ These figures equate to fifty-five percent of the students in Region 13. See ENROLLMENTS 2011–2018, *supra* note 193; PEIMS Standard Reports, *supra* note 195.

²¹² See ENROLLMENTS 2011–2018, *supra* note 193; PEIMS Standard Reports, *supra* note 195.

²¹³ See ENROLLMENTS 2011–2018, *supra* note 193; PEIMS Standard Reports, *supra* note 195. While socioeconomic disparities also exist in Regions 4 and 10, the contrast in Region 13 is more glaring. From 2011 and 2018, more than 3300 students from approximately fourteen high schools among fourteen ISDs were automatically admitted to UT from Region 13. *School Report Cards*, *supra* note 177. White American students exceeded eighty percent of the student population at various individual school campuses within a couple of ISDs. *Id.* Conversely, African American and Latino students, combined, exceed eighty percent of the student body population in approximately thirteen ISDs and a multitude of individual school campuses. *Id.*

²¹⁴ Region 11 has seventy-seven public school districts spanning approximately ten counties. See *About Us*, REGION 11 EDUC. SERV. CTR., <http://www.esc11.net/Domain/3> (last visited Jan. 5, 2019); see also *Schools Information*, REGION 11 EDUC. SERV. CTR., <http://www.esc11.net/Page/5390> (last visited Feb. 18, 2017).

²¹⁵ From 2011 to 2018, about 567,000 students (on average) were enrolled in Region 11 public schools versus the 1.1 million and 794,000 students in Regions 4 and 10. See ENROLLMENTS 2011–2018, *supra* note 193; PEIMS Standard Reports, *supra* note 195.

²¹⁶ There are 170 high schools in Region 11 that are feeder schools for UT. See *AskTED*, *supra* note 195; see also UT REPORT 2018, *supra* note 154, at 15; ENROLLMENTS 2011–2018, *supra* note 193; PEIMS Standard Reports, *supra* note 195.

- 2011–2012: African Americans (21,279); Asian American (7007); Hispanic (46,879); and White Americans (73,951).
- 2012–2013: African Americans (22,021); Asian American (7379); Hispanic (49,390); and White Americans (73,766).
- 2013–2014: African Americans (22,594); Asian American (7398); Hispanic (51,528); and White Americans (73,523).

largest amount of economically disadvantaged students, behind Regions 4 and 10, respectively.²¹⁷ Region 11 high schools and Region 10 high schools are similar because White Americans are the dominate racial group in the region; both regions also encompass cities within the Dallas-Fort Worth-Arlington metropolitan area.

Even though Region 11 has fewer segregated schools than the other regions, the data in Figure 10 shows that African American and Hispanic students are still segregated in schools within one ISD—Fort Worth ISD.²¹⁸

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- 2014–2015: African Americans (23,128); Asian American (7791); Hispanic (53,727); and White Americans (73,747).
 - 2015–2016: African Americans (24,248); Asian American (8270); Hispanic (57,026); and White Americans (75,595).
 - 2016–2017: African Americans (25,246); Asian American (8697); Hispanic (59,863); and White Americans (75,147).
 - 2017–2018: African Americans (26,058); Asian American (9191); Hispanic (61,466); and White Americans (74,884).

²¹⁷ From 2011 to 2018, about 281,000 of the approximate 570,000 students annually enrolled in Region 11 schools were economically disadvantaged. *See* ENROLLMENT 2018, *supra* note 193, at 45, Table 21; ENROLLMENT 2017, *supra* note 193, at 42, Table 20; ENROLLMENT 2016, *supra* note 193, at 42, Table 20; ENROLLMENT 2015, *supra* note 193, at 42, Table 20; ENROLLMENT 2014, *supra* note 193, at 42, Table 20; ENROLLMENT 2013, *supra* note 193, at 42, Table 20; ENROLLMENT 2012, *supra* note 193, at 42, Table 20; ENROLLMENT 2011, *supra* note 193, at 42, Table 20.

²¹⁸ According to UTs feeder school report, about twelve of the schools are predominately White or predominately African American and Latino. From 2011 and 2018, approximately 3400 students from high schools among fourteen ISDs were automatically admitted to UT from Region 11. Here, the term “predominately” means the identified racial group is eighty percent or more of the student population. Some of the predominately White schools are: Callisburg High School (Callisburg ISD), Muenster High School (Muenster ISD), Paradise High School (Paradise ISD), Peaster High School (Peaster ISD), Poolville High School (Poolville ISD), and Rio Vista High School (Rio Vista ISD). Some of the predominately African American and Hispanic schools are South Hills High School (Fort Worth ISD) and Amon-Carter Riverside High School (Fort Worth ISD). *See School Report Cards*, *supra* note 177.

e. Region 20 – San Antonio

Region 20 automatically admits the least number of students to UT,²¹⁹ but has the fourth highest public school student enrollment of the Top 5 ESCs. Between 2011 and 2018, approximately 446,000 students enrolled annually in Region 20 public schools.²²⁰ These same years, about 280,000 of the 446,000 students enrolled in schools within this region were considered economically disadvantaged.²²¹

As Figure 11 shows, Region 20 is not unlike its counterparts (i.e., Regions 4, 10, 13, and 11). This region also saw an increase in the number of African American, Asian American, Hispanic, and White Americans that were enrolled in high school between 2011 and 2018.²²² Likewise, in this region, White Americans exceeded seventy percent of the student population in two

²¹⁹ See, e.g., UT REPORT 2018, *supra* note 154, at 15, Table 1.5. Region 20 (San Antonio) has about fifty-two public school districts spanning approximately eighteen counties. See *ESC-20 School Districts*, ESC 20, <https://www.esc20.net/page/esc.R20.public.isds> (last visited Jan. 5, 2019) (mapping Region 20 coverage). There are 89 high schools in Region 20 that are feeder schools for UT. See *AskTED*, *supra* note 195.

²²⁰ See ENROLLMENT 2018, *supra* note 193, at 38, Table 19; ENROLLMENT 2017, *supra* note 193, at 38, Table 19; see also ENROLLMENT 2016, *supra* note 193, at 35, Table 18; ENROLLMENT 2015, *supra* note 193, at 35, Table 18; ENROLLMENT 2014, *supra* note 193, at 35, Table 18; ENROLLMENT 2013, *supra* note 193, at 35, Table 18; ENROLLMENT 2012, *supra* note 193, at 35, Table 18; ENROLLMENT 2011, *supra* note 193, at 35, Table 18.

²²¹ This is about sixty-three percent of the students. See ENROLLMENT 2018, *supra* note 193, at 45, Table 21; ENROLLMENT 2017, *supra* note 193, at 42, Table 20; see also ENROLLMENT 2012, *supra* note 193, at 42, Table 20; ENROLLMENT 2013, *supra* note 193, at 42, Table 20; ENROLLMENT 2014, *supra* note 193, at 42, Table 20; ENROLLMENT 2015, *supra* note 193, at 42, Table 20.

²²² See ENROLLMENT 2018, *supra* note 193, at 43, Table 20; ENROLLMENTS 2011–2018, *supra* note 193; *PEIMS Standard Reports*, *supra* note 195.

- 2011–2012: African Americans (7891); Asian American (2038); Hispanic (77,553); and White American (25,840).
- 2012–2013: African Americans (7834); Asian Americans (2143); Hispanic (79,607); and White Americans (25,740).
- 2013–2014: African Americans (7853); Asian Americans (2205); Hispanics (81,376); and White Americans (25,417).
- 2014–2015: African Americans (8058); Asian Americans (2245); Hispanic (83,906); and White Americans (26,383).
- 2015–2016: African Americans (8624); Asian Americans (2373); Hispanic (88,876); and White Americans (26,383).
- 2016–2017: African Americans (8998); Asian Americans (2541); Hispanic (93,251); and White Americans (30,135).
- 2017–2018: African Americans (8941); Asian Americans (2703); Hispanic (92,962); and White Americans (30,017).

ISDs and two individual school campuses²²³ while African American or Hispanic students, combined, exceeded eighty percent of the student body population in thirteen ISDs and a multitude of individual school campuses.²²⁴

What is evident from the data for the Top 5 ESC Regions is that Texas' demographics have not changed in a significant way to undermine UT's need to consider race in its holistic admissions process. Because the majority of TTPL admitted students' graduate high school from one of these regions, there is now proof that TTPL is insufficient to produce a diverse student body at UT. This is particularly true if UT seeks to admit diverse students within racial groups.²²⁵

C. ANALYZE: Recent Demographic Data Contradicts the Dissent

In *Fisher II*, Justice Samuel Alito made several allegations in his dissenting opinion. Two of those allegations—that affirmative action opponents may argue support ending UT's race-conscious admissions—will be discussed below.

First, Justice Alito alleged that UT seeks to engage in “racial balancing.”²²⁶ However, the data in Section II.B provides insight as to why UT needs to continue using race as a factor in its holistic admissions—racial balancing is not the reason.²²⁷ As the data shows, UT admitted White Americans under its race-conscious holistic admissions policy at greater rates than Hispanic and Asian Americans and more than nine times the rate of

²²³ The two high schools are Falls City and Utopia. See *2017–18 School Report Card: Falls City HS (128904001)*, TEX. EDUC. AGENCY (2018), <https://rptsvr1.tea.texas.gov/perfreport/src/2018/static/district/c128904.pdf>; *2017–18 School Report Card: Utopia School (232904001)*, TEX. EDUC. AGENCY (2018), <https://rptsvr1.tea.texas.gov/perfreport/src/2018/static/district/c232904.pdf>.

²²⁴ See *infra* Figure 11.

²²⁵ See Harpalani, *supra* note 38 (identifying how the legislative approach of TTPL viewed “diversity” too narrowly); Boddie, *supra* note 38 (same).

²²⁶ See *Fisher II*, 136 S. Ct. 2198, 2225 (2016) (Alito, J., dissenting) (“To the extent that UT is pursuing parity with Texas demographics, that is nothing more than ‘outright racial balancing,’ which this Court has time and again held ‘patently unconstitutional’” (citing *Fisher I*, 570 U.S. 297, 311 (2013) and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid.”))).

²²⁷ See *id.* at 2213 (majority opinion) (arguing that TTPL may increase minority enrollment but does so at risk of losing social and skill diversity). While TTPL is one tool to increase diversity at UT, the data shows it is insufficient by itself. In fact, the Court noted that class rank—as a single metric—does not lead to student body diversity because it will capture certain types of people and miss others. See *id.*; see also William C. Kidder, *How Workable Are Class-Based and Race-Neutral Alternatives at Leading American Universities?*, 64 UCLA L. REV. DISC. 100 (2016) (arguing that percentage plans admission based on socio-economic status are not effective alternatives).

African Americans.²²⁸ If the “laws of mathematics” apply as Justice Alito contends, then *clearly* UT’s holistic policy has boosted the admissions of White Americans, in comparison to Asian Americans, African Americans, and Hispanics.²²⁹ Since no arguments have been made about racial balancing among White Americans, the same should hold true for other races or ethnicities.²³⁰

Second, Justice Alito alleged that UT’s holistic admissions do not comply with the Equal Protection Clause because as a state-sanctioned institution, UT does not treat applicants under its holistic review as *individuals*.²³¹ This allegation is wrong even though Justice Alito appropriately stated that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class.”²³² Race or ethnicity is not a mutually exclusive characteristic that can be divorced from the *individual*; therefore, it also cannot be divorced from the Constitution’s guarantee.²³³ Furthermore, the avoidance of racial isolation²³⁴ and the achievement of a diverse student body are likewise at the heart of the Constitution’s guarantee of equal protection, and that is reason enough to consider race as a factor in an individualized, holistic admissions process.²³⁵

²²⁸ See *infra* Figures 3 & 4; see also *supra* notes 153, 162–65.

²²⁹ See *Fisher II*, 136 S. Ct. at 2227 n.4 (Alito, J., dissenting) (“UT’s program is clearly designed to increase the number of African-American and Hispanic students by giving them an admissions boost vis-à-vis other applicants.”); see also *id.* (making the same argument that Students for Fair Admissions alleged in their lawsuit against Harvard that considering race to the benefit of African Americans and Hispanics is injurious to Asians); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-cv-14176-ADB, 2018 WL 4688308, at *17 (D. Mass. Sept. 28, 2018) (outlining Students for Fair Admissions’ argument).

²³⁰ KROLL, UNIVERSITY OF TEXAS AT AUSTIN—INVESTIGATION OF ADMISSION PRACTICES AND ALLEGATIONS OF UNDUE INFLUENCE 29, 37–38 (Feb. 6, 2015), available at <https://www.utsystem.edu/sites/default/files/news/assets/kroll-investigation-admissions-practices.pdf> (conveying that a relationship with university officials has on occasion provided some applicants a “competitive boost” because “the admissions process has become much more political,” and “money and influence are always significant factors”).

²³¹ *Fisher II*, 136 S. Ct. at 2221 (Alito, J., dissenting).

²³² *Id.* (internal quotation marks omitted) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

²³³ See, e.g., Maya Sen & Omar Wasow, *Race as a Bundle of Sticks: Designs that Estimate Effects of Seemingly Immutable Characteristics*, 19 ANN. REV. POL. SCI. 499, 500 (2016) (conceptualizing race and ethnicity in constructivist terms in order to disaggregate unique elements).

²³⁴ See Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 278 (2009) (“[T]he nation [has a] “moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.” (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment))).

²³⁵ See Eboni Nelson, *Reading Between the Blurred Lines of Fisher v. University of Texas*, 48 VAL. U. L.

While the Equal Protection Clause requires that people be treated “equally,”²³⁶ the narrative that race must be excluded from consideration in college admissions mirrors a tale of classism.²³⁷ Classism and race, historically, appear intertwined, so to remain compliant with the *Fisher II* decision and the “Constitution’s guarantee of equal protection,” UT cannot be complicit in a classism battle.²³⁸

Accordingly, to ensure that UT meets the mandate of the Court, it will need to implement new strategies.

III. STRATEGIES TO CREATE AN UNASSAILABLE POSITION USING FOCUS, FORETHOUGHT, AND ORGANIZATIONAL PROCESS IMPROVEMENT

With proper focus and forethought, UT can create an unassailable position and remain in compliance with the *Fisher II* holding.²³⁹ As the

REV. 519, 525 n.27 (2014) (“Justice Kennedy reasoned that ‘[d]iversity, depending on its meaning and definition, is a compelling educational goal . . . He further stated, ‘[t]o the extent the plurality opinion suggests the Constitution mandates that state . . . authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.’” (internal citations omitted) (quoting *Parents Involved*, 551 U.S. at 783, 788 (Kennedy, J., concurring in part and concurring in the judgment))).

²³⁶ The term “equality” is defined by *Cambridge Dictionary* as “the right of different groups of people to receive the same treatment,” or “a situation in which men and women, people of different races, religions, etc. are all treated fairly and have the same opportunities.” See *Equality*, CAMBRIDGE DICTIONARY ONLINE, <https://dictionary.cambridge.org/us/dictionary/english/equality> (last visited Jan. 10, 2019); see also *Equal*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/equal> (last visited Jan. 10, 2019) (defining “equal” as “like for each member of a group, class, or society.”).

²³⁷ Historically, Ivy League colleges and universities interests were “to admit the . . . sons of major donors and to exclude the brilliant but unpolished children of immigrants, whose very presence prompted privileged young Anglo-Saxon men—the probable leaders and donors of the future—to seek their education elsewhere.” Jonathan R. Zell, *It’s Not About Race: The True Purpose of the University of Texas’ Holistic-Admissions System Is to Give Preferences to Well-Connected White Applicants, Not to Disadvantaged Minorities*, 24 U. MIAMI BUS. L. REV. 35, 43 (2016) (quoting JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 2* (2005)); see also Oral Argument at 67:10–15, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981), <https://www.oyez.org/cases/2015/14-981> (“[T]here are those who contend that it does not benefit African-Americans to . . . get them into the University of Texas where they do not do well, as opposed to having them go to a *less-advanced* school, a . . . *slower-track school* where they do well.” (emphasis added)).

²³⁸ “[R]ace and class in the United States inextricably interdigitate such that neither can be engaged without sustained attention to the other.” Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 DENV. L. REV. 751, 753 (2011) (quoting Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1051 (2010)).

²³⁹ See TZU, *supra* note 44, at 40 (“He who exercises no forethought but makes light of his opponents is

introduction to this Article highlighted, there are two strategies that UT can use.²⁴⁰ First, UT must improve the data collected from TTPL feeder schools. Second, UT should support safe spaces on campus to promote retention.

A. IMPROVE: Data Collection for TTPL Feeder Schools

UT's commitment to individual opportunity and selectivity does not have to be impacted by the number of annually admitted TTPL students. However, such commitment cannot ignore the fact that data in Part II shows a lack of diversity created by the TTPL pipeline.²⁴¹ UT cannot control which students are automatically admitted under TTPL, but the university can affect whether those students matriculate.²⁴²

The Part II analysis of TTPL data helps clarify the U.S. Supreme Court's inquiry about how "students . . . differ in their contribution to diversity."²⁴³ But there are still immediate changes that UT can undertake to improve its data collection and evaluation so it can assess the fairness of its holistic admissions.²⁴⁴ The solutions detailed below are: (1) organize the feeder school report by ESC and then alphabetically by ISD, and individual campus; (2) include the race(s) and socioeconomic percentage of the students at each feeder school as well as the race or ethnicity of students that are automatically admitted to UT *and* enroll at UT from TTPL feeder schools; and (3) include which feeder schools have a high percentage of economically disadvantaged students, college prepared students, or both.²⁴⁵

sure to be captured by them.").

²⁴⁰ See Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools,"* 7 AFR.-AM. L. & POL'Y REP. 1, 8 (2005) ("While affirmative action is one tool for increasing the number of underrepresented minorities in colleges and universities, including professional schools, across the United States, it most clearly is not a silver bullet that ensures that American college campuses actually reflect America.").

²⁴¹ According to Part II approximately seventy-five percent of Texas students admitted to UT under TTPL graduated high school from one of five ESC regions in the state. They are Region 4 (Houston), Region 10 (Richardson), Region 11 (Austin), Region 13 (Fort Worth), and Region 20 (San Antonio). Thus, geographically, the student applicant pool admitted to UT lacks diversity because three-fourths live in the same area(s) and attend the same school(s). This same student applicant pool lacks racial and social class diversity because high schools within the five above-mentioned ESC regions lack racial and socio-economic diversity among the student population.

²⁴² TTPL is statutorily mandated. TEX. EDUC. CODE § 51.803.

²⁴³ *Fisher II*, 136 S. Ct. 2198, 2209 (2016) (emphasis added).

²⁴⁴ The TTPL data relies in large part on TEA's individual school report cards which provide the percentage of students attending TTPL feeder schools by race/ethnicity and socio-economic status. See *School Report Cards*, *supra* note 177 (listing "Economically Disadvantaged" and "Race/Ethnicity" as defined terms for the 2016–17 School Report Cards).

²⁴⁵ *Id.*; see *infra* Figure 12; see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("School boards

The data in Part II, coupled with Professors Tienda and Montejano's prior analysis, show why race is still a necessary factor in UT's holistic admissions. The discussion below continues its focus on the numbers—TTPL admissions and enrollment data and UT's holistic admissions and enrollment data—but recommends changes to address defects.²⁴⁶ By implementing these changes, UT can attain more diversity under TTPL and optimize its race-conscious holistic admissions such that it remains constitutionally permissible.²⁴⁷

1. *Organize and Report Feeder School Data By ESC, ISD, and Individual School Campus.*

The solution recommended here would improve UT's reporting for the SB175 Report, which is also known as the Feeder School Report. Presently, UT reports data to the Texas Legislature that identifies several statistical data points.²⁴⁸ These data points include: (1) the school code; (2) the individual school campus; (3) the city where the individual school campus is located; and (4) the raw numbers of TTPL admitted/enrolled students by year.²⁴⁹ These data points, by themselves, are ineffective to meet the mandate of

may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.” (emphasis added).

²⁴⁶ This section incorporates data from Section II.B.2 as well as data spanning the same timeline (i.e., 2005 to 2018) as the statewide demographic data in Section II.B.1. This approach was taken to be inclusive of the majority and dissenting opinions in *Fisher II*.

²⁴⁷ *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring in part and concurring in the judgment) (“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality’s postulate that ‘[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,’ is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education*, 347 U.S. 483 (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*’s objective of equal educational opportunity.” (internal citation omitted)).

²⁴⁸ To view SB175-AdmER-TXschools (also known as “SB175 Reports” or “Feeder School” Reports), see *Automatic Admission Reports*, UNIV. TEX. AUSTIN OFFICE EXEC. VICE PRESIDENT & PROVOST, <https://provost.utexas.edu/enrollment-management/admissions-research/admission-reports> (follow the “SB 175 Report Archive” hyperlink for past years). See generally UT REPORT 2011, *supra* note 154.

²⁴⁹ Although Table 1.2 in UT REPORT 2011 captures TTPL admissions and enrollments by ESC, that data set is limited because it doesn’t go a step further by also capturing the race/ethnicity or economic status. The solution proposed here incorporates aspects of Table 1.2 from the SB 175 report and incorporates it into the SB175-AdmEr-TXSchools report.

Fisher II.

If UT isolates certain data points in its pipeline and that pipeline consists of graduates of Texas high schools (i.e., feeder schools), then UT can exercise “more control” over its holistic admissions.²⁵⁰ For example, UT does not currently collect data about which ESCs and ISDs serve as feeder schools for TTPL students.²⁵¹ However, by collecting ESC and ISD data as part of the SB175 Report, UT can ascertain (1) whether students from certain ESCs or ISDs are fulfilling the automatic admission process by completing the admission application; and (2) if students are or are not completing the admission application, what are the trends among racial or ethnic groups, and ESC or ISD.²⁵² Therefore, this solution recommends that UT improve its SB175 Report to include these additional data points: (1) the ESC region and ISD where a feeder school is located;²⁵³ (2) the race or ethnicity of students that are automatically admitted or enroll at UT from TTPL feeder schools;²⁵⁴ and (3) feeder schools that have a high percentage of economically disadvantaged students, college prepared students, or both.²⁵⁵

²⁵⁰ The effects of this could include proactively identifying scholars for UT’s TIP Scholars Program or potential participants in its University Leadership Network (“ULN”). *See About TIP Scholars*, UNIV. TEX. AUSTIN COLL. NAT. SCIS., <https://cns.utexas.edu/tip-scholars/future-scholars/about-tip-scholars#what-is-tip-scholars> (last visited Jan. 5, 2019) (“The TIP Scholars program is an academic community for students admitted to the College of Natural Sciences at the University of Texas at Austin.”); *see also University Leadership Network*, UNIV. TEX. AUSTIN STUDENT SUCCESS INITIATIVES, <http://studentsuccess.utexas.edu/uln> (last visited Jan. 5, 2019) (“The University Leadership Network (ULN) is a nationally recognized incentive-based scholarship program for students with demonstrated financial need.”).

²⁵¹ *See infra* Figure 12; *see also Parents Involved*, 551 U.S. at 785 (Kennedy, J., concurring in part and concurring in the judgment) (“When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.”).

²⁵² For colleges or universities that are not located in Texas, the same concept can apply. Most states have a state education agency, and most states have geographically designated school districts. *See State Education Agencies*, STATE COUNCIL HIGHER EDUC. FOR VA., <http://www.schev.edu/index/state-education-agencies-nationwide> (last visited Mar. 13, 2019). By tracking the admissions and enrollment data of students from individual school districts, there will be a true sense of the numbers versus an anecdotal assertion of who is or is not gaining access to higher education institutions. *See also Parents Involved*, 551 U.S. at 782 (Kennedy, J. concurring in part and concurring in the judgment) (“The Nation’s schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.”).

²⁵³ This solution would eliminate duplication or misidentification of feeder school results because some Texas high schools have the same name but are located in different regions or ISDs.

²⁵⁴ This solution would enhance UT’s assessment of students who may apply via its holistic admissions because no race or ethnic data is provided about TTPL students who are automatically admitted or enroll from particular feeder schools. *See generally Automatic Admission Reports*, *supra* note 248.

²⁵⁵ This solution would enhance UT’s assessment of students who may apply via its holistic admissions, as well as TTPL students who matriculate. By including socio-economic and college preparedness data in the SB175 Report, UT can determine what (if any) additional resources TTPL admittees may need upon enrollment.

The narrative of three students—Ms. Grayson Rutherford, Ms. Genesis Morales, and Ms. Stephanie Quintero²⁵⁶—from the Texas Tribune’s three-part series titled “The Price of Admission,” further illustrates why it is imperative that UT begin tracking ESC and ISD data on the SB175 Report.²⁵⁷ A brief summary of their experiences seeking admission to UT are noted below.

Ms. Grayson Rutherford did not graduate in the top 10 percent of her class at Highland Park High School located in the Highland Park ISD of ESC Region 10 (Richardson).²⁵⁸ Although her class rank did not grant her automatic admission to UT, she still believes it is fair “that minorities . . . have programs set up and ways of including them into schools that typically just take white, privileged kids.”²⁵⁹ She learned about TTPL in her government class, and students at her school have been groomed to attend Ivy League Universities since middle school.²⁶⁰ *Ms. Rutherford and her peers receive summer SAT and ACT prep courses, they are legacy applicants because a parent or grandparent graduated from UT, and UT routinely admits and enrolls students from her specific high school.*²⁶¹ Ultimately, she was admitted to UT via its holistic admissions but she chose not to enroll at the University because she received a full scholarship to Vanderbilt, which was one of many prestigious universities where she applied.²⁶²

²⁵⁶ Ms. Rutherford is a White American and graduated from a Region 10 high school. Ms. Morales and Ms. Quintero are Latina and graduated from high schools in Regions 11 and 4, respectively. See Satija & Watkins, *infra* note 257; Satija & Watkins, *infra* note 285.

²⁵⁷ See Neena Satija & Matthew Watkins, *The Price of Admissions: Part II: At High Schools Just Miles Apart, a World of Difference in College Paths*, TEX. TRIB. (Mar. 29, 2016), <https://apps.texastribune.org/price-of-admission/tale-of-two-high-schools/>.

²⁵⁸ *Id.* As of 2018, over eighty-six percent of Highland Park High School’s student body is White, zero percent of its student body is economically disadvantaged, and the high school is located in one of the top-five ESC regions addressed in Part II of this Article. See *2017-18 School Report Card: Highland Park H S (057911001)*, TEX. EDUC. AGENCY 2018, <https://rptsvr1.tea.texas.gov/perfreport/src/2018/campus.srch.html> (select “Campus Name” and search “Highland Park H S” then selected “Highland Park H S in Highland Park ISD, Dallas County” under “Choose a campus”); ENROLLMENT 2018, *supra* note 193.

²⁵⁹ She applied to UT via its holistic program, touting a “4.15 [grade point average], and . . . [an] ACT [score] . . . in the 98th percentile.” Satija & Watkins, *supra* note 257.

²⁶⁰ *Id.*

²⁶¹ *Id.* More than 150 Highland Park High School graduates apply to UT annually, and approximately seventy-three percent of those students are admitted to and enroll at UT. *Id.*

²⁶² She applied to: University of California, Berkeley; the University of California, Los Angeles; the University of Southern California; UT-Austin; Tulane University; Purdue University; the University of Michigan; Emory University; Boston College; the University of Arizona; Northeastern University; Vanderbilt; the University of Pennsylvania; and her dad’s alma mater, Harvard College. *Id.*

Ms. Morales graduated number eight in her class at Bryan Adams High School located in the Dallas ISD of ESC Region 11 (Fort Worth).²⁶³ “[E]ven though Morales would be automatically admitted to UT-Austin, she didn’t apply.”²⁶⁴ Her parents didn’t even graduate from high school and her impression of the types of students who attended UT-Austin were “people who have money, people who are, like, prodigies and stuff, . . . [she] . . . was never surrounded by those people—people who went to college.”²⁶⁵ Ultimately Ms. Morales chose to attend a smaller, less prestigious university.²⁶⁶

Ms. Quintero graduated from Carver High School located in the Aldine ISD of ESC Region 4 (Houston).²⁶⁷ *She was automatically admitted to UT via TTPL and she enrolled at the university.*²⁶⁸ However, when she failed two quizzes in her freshman chemistry course, she began to “wonder whether she was ready for college” and believed that her classmates were “better-prepared.”²⁶⁹ Luckily for Ms. Quintero, UT professor David Laude had the

²⁶³ *Id.* As of 2018, over ninety-percent of Bryan Adams High School’s student body is African American and Hispanic, almost eighty-nine percent of its student body is economically disadvantaged, and the high school is located in one of the top-five ESC regions addressed in Part II of this Article. See *2017–18 School Report Card: Bryan Adams H S (057905001)*, TEX. EDUC. AGENCY (2018), <https://rptsrv1.tea.texas.gov/perfreport/src/2018/campus.srch.html> (select “Campus Name” and search “Bryan Adams H S” then selected view report); ENROLLMENT 2018, *supra* note 193.

²⁶⁴ Satija & Watkins, *supra* note 257 (emphasis added). According to Krystal Morrow, “[m]any seniors [at Bryan Adams High School] . . . had no idea the rule existed until they received a slip a paper, toward the end of their junior year, stating that they were in the top 10 percent. *Some of them didn’t even know what a grade-point average was until that moment.*” *Id.* (emphasis added).

²⁶⁵ *Id.* (emphasis added). Although Morales acknowledged that prestige matters, her rationale for not applying to a prestigious school (like UT) was because she didn’t “feel [she was] . . . going to be as smart. . . . [because she didn’t] have the same teachers, and all of [the] extra books that you get” at high schools with lower percentages of economically disadvantaged students or that weren’t racially segregated amongst African American and Hispanic students. *Id.*

²⁶⁶ *Id.* Although some familial issues were a factor in her decision, in the end, Ms. Morales still believed she “wasn’t smart enough” to enroll at UT-Austin or Texas A&M. Had Ms. Morales received similar support, access, or even targeted recruitment efforts like Ms. Grayson Rutherford, how much could that have increased the odds that Ms. Morales would have applied and enrolled at UT-Austin?

²⁶⁷ *Id.* As of 2018, African-American and Hispanic students, combined, comprise over ninety-six percent of Carver High School’s student body. Further, about seventy-seven percent of its student body is economically disadvantaged, and the campus is located in ESC Region 4 (Houston), Aldine ISD. See *2017–18 School Report Card: Carver H S For Applied Tech/Engine (101902002)*, TEX. EDUC. AGENCY (2018), <https://rptsrv1.tea.texas.gov/perfreport/src/2018/campus.srch.html> (select “Campus Name” and search “Carver H S” then selected view report); ENROLLMENT 2018, *supra* note 193.

²⁶⁸ Satija & Watkins, *supra* note 257. Ms. Quintero graduated in the top seven percent of her class. *Id.*

²⁶⁹ *Id.* The article does not indicate whether Ms. Quintero’s parents graduated high school or college and this author makes no presumptions either. The article did note, however, that Ms. Quintero’s father was a maintenance worker and her mother cleaned houses. *Id.*

foresight to spearhead the Texas Interdisciplinary Plan (or TIP program) and University Leadership Network (“ULN”), and she was a beneficiary of both programs.²⁷⁰ The support and mentorship offered through TIP and ULN enabled Quintero’s success at UT.²⁷¹

Should UT adopt this recommendation and capture data related to ESCs and ISDs, there are other intangible data points that the university can glean about the diversity of students from TTPL feeder schools. This intangible information could be helpful to UT’s continuing obligation to meet strict scrutiny, particularly because it could prove or disprove how weighted the factor of race is in the holistic admissions process.

2. *Capture Racial and Economic Data from Feeder Schools.*

It makes sense to improve reporting by tracking and analyzing racial and socio-economic data from UT’s feeder school because the University uses its holistic admissions to round out its entering class once TTPL students have been admitted and enrolled.²⁷² Texas’ schools are still segregated and students from those schools are part of the TTPL pipeline.²⁷³

The current report does not track this information;²⁷⁴ thus, UT could use the improved data set to determine how race and socio-economic status impact TTPL admissions/enrollment. Again, the narratives of Ms. Grayson Rutherford, Ms. Genesis Morales, and Ms. Stephanie Quintero are insightful with respect to this improvement.

²⁷⁰ *Id.* With guidance from her TIP mentor, Ms. Quintero talked frequently with her professor and ultimately earned a B in chemistry. *Id.*

²⁷¹ *Id.*

²⁷² See Sunny X. Niu & Marta Tienda, *High School Economic Composition and College Persistence*, 54 RES. HIGH. EDUC. 30, 51 (2013) (“Empirical results . . . show that high school curriculum, and in particular the availability of AP courses, accounts for the lower persistence and completion rates of graduates from poor high schools, but this estimate is likely conservative.”); see also Jason M. Fletcher & Marta Tienda, *Race and Ethnic Differences in College Achievement: Does High School Attended Matter?*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 144, 161 (2010) (“Our main hypothesis—that differences in the quality of high schools attended by minority versus majority students contribute to the collegiate achievement gaps—finds considerable support.”).

²⁷³ By following this recommendation, UT will have direct evidence. See *Fisher II*, 136 S. Ct. 2198, 2216–17 (2018) (citing *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 669–70 (5th Cir. 2014) (Garza, J., dissenting)) (noting that the Fifth Circuit opinion reached the conclusion that Top Ten Percent admittees are “more homogeneous” with little direct evidence regarding the characteristics of Top Ten Percent and holistic admittees).

²⁷⁴ See Bowen, *supra* note 238, at 766 (“[W]ith the property tax funding of schools based on housing values, parental advantage, ability tracking, classroom climate, and college campus environment, we must acknowledge that poverty and racism play a role in a student of color’s college education.” (footnote omitted)).

Ms. Grayson Rutherford graduated from Highland Park High School. Its student body is over eighty-six percent White, and none (i.e., zero percent) of its student body is economically disadvantaged.²⁷⁵

Ms. Morales graduated from Bryan Adams High School. Its student body is over ninety percent African American and Hispanic and almost eighty-nine percent of its student body is economically disadvantaged.²⁷⁶

Ms. Quintero graduated from Carver High School. Over ninety-six percent of its student body is African American and Hispanic, and about seventy-seven percent of its student body is economically disadvantaged.²⁷⁷

An obvious benefit of using racial and socio-economic data for TTPL feeder schools is that UT can identify this demographic information for seventy-five percent of its incoming freshman class.²⁷⁸ That can then translate into a better assessment of how much race is or is not used as a factor when determining which students to admit under the holistic admissions process.²⁷⁹

Similar to tracking ESC and ISD data, this innovation could help UT determine intangible information.²⁸⁰ This could include, but not be limited to, whether there are effective recruitment strategies at schools where African

²⁷⁵ See 2017-18 School Report Card: Highland Park H S (057911001), *supra* note 258.

²⁷⁶ See 2017-18 School Report Card: Bryan Adams H S (057905001), *supra* note 263.

²⁷⁷ See 2017-18 School Report Card: Carver H S For Applied Tech/Engine (101902002), *supra* note 267.

²⁷⁸ Matthew Watkins, *UT System Chancellor McRaven Blasts Top Ten Percent Rule*, TEX. TRIB. (Jan. 21, 2016, 1:00 PM), <https://www.texastribune.org/2016/01/21/ut-system-chancellor-mcraven-blasts-top-ten-percent/> (noting that Former Chancellor McRaven's primary concern is that TTPL is not working to increase racial (and socioeconomic and geographic) diversity at UT and it is keeping UT down in the national rankings).

²⁷⁹ See Fletcher & Tienda, *supra* note 272, at 148 (“[M]inority students attending poor or highly segregated Texas public high schools are less likely than similarly situated whites to enroll at a selective postsecondary institution, even if they are guaranteed admission under the top 10% law.”); see also *id.* (“[H]igh school attended dictates whether selective postsecondary institutions are even envisioned as possible options.” (citing PATRICIA M. McDONOUGH, *CHOOSING COLLEGES: HOW SOCIAL CLASS AND SCHOOLS STRUCTURE OPPORTUNITY* (1997))).

²⁸⁰ See Bowen, *supra* note 238, at 767-68 (“[C]laims that race barriers can be resolved far more effectively and fairly through universal [socioeconomic status] affirmative action programs rather than race-based admissions, he ignores some significant social scientific findings. . . . ‘There is no good proxy, no more narrowly tailored criterion, no statistical treatment that can replace race.’ The story of being poor and the story of being Hispanic and/or black may have a cumulative effect, but they also have independent effects.” (footnotes omitted) (quoting Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1096, 1117 (1997))). See generally WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE ADMISSIONS* (1998) (pointing out that low income White Americans are still the majority among low income college students); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1850 (1996) (arguing that economic measures are ineffective replacements for racial-based admissions programs).

American or Hispanic students comprise eighty percent or more of the student population and where the student body is fifty percent or more economically disadvantaged. The data in Part II shows there is a disparity regarding the matriculation rates of African American and Hispanic students, so the collection of this data could identify trends contributing to UT's admission/enrollment ratios.²⁸¹

3. *Capture Which Schools Have the Postsecondary Readiness Distinction Designation from the Texas Education Agency ("TEA")*

By knowing which students are sanctioned by the TEA as "postsecondary ready," UT can apply a consistent dataset that will enable the University to overcome criticism regarding TTPL admittees. Former Chancellor Bill McRaven has noted that students who are automatically admitted to UT are devaluing the university's ranking due to their entering credentials.²⁸² As he put it, UT wants to "make sure the *right students* are coming to the university," and to "put us in the position to be a more competitive university."²⁸³

Ms. Moreno's story, particularly, provides another basis for why UT should track which TTPL feeder schools are deemed "postsecondary ready." For three consecutive school years, Bryan Adams received several TEA designations, including one for postsecondary readiness.²⁸⁴ Likewise, Ms.

²⁸¹ While there may be a variety of reasons why students of certain racial or ethnic backgrounds do not matriculate to UT, even though they would be automatically admitted under TTPL, these reasons might include student exposure to UT, resource allocation, etc. See Satija & Watkins, *supra* note 257 ("Many seniors . . . [at Bryan Adams High School] had no idea the rule existed until they received a slip a paper, toward the end of their junior year, stating that they were in the top 10 percent. . . . At Highland Park, school counselors don't spend much time persuading students to attend a four-year university. Instead, they try to find each student's perfect higher education match. That conversation starts before the student even gets into high school. In the last semester of eighth grade, students meet with counselors to start mapping out goals. The school also offers an SAT and ACT prep course during the summer, while some parents also pay thousands of dollars to hire private college admissions consultants.").

²⁸² See Watkins, *supra* note 278.

²⁸³ See Editorial Board, *UT Head Wants to Admit Only the 'Right' Students*, STAR-TELEGRAM (Jan. 26, 2016, 9:39 AM), <https://www.star-telegram.com/opinion/editorials/article56530413.html> (emphasis added); see also Scott Jaschik, *McRaven Will Step Down as Texas Chancellor*, INSIDE HIGHER EDUC. (Dec. 18, 2017), <https://www.insidehighered.com/quicktakes/2017/12/18/mcraven-will-step-down-texas-chancellor>.

²⁸⁴ See *2017–18 School Report Card: Bryan Adams H S (057905001)* (2018), TEX. EDUC. AGENCY, <https://rptsvr1.tea.texas.gov/perfreport/src/2018/campus.srch.html>; *2016–17 School Report Card: Bryan Adams H S (057905001)* (2017), TEX. EDUC. AGENCY, <https://rptsvr1.tea.texas.gov/perfreport/src/2017/campus.srch.html>; *2015–16 School Report Card: Bryan Adams H S (057905001)* (2016), TEX. EDUC. AGENCY, <https://rptsvr1.tea.texas.gov/perfreport/src/2016/campus.srch.html> (select "Campus Name" and search "Bryan Adams H S" then selected view report).

Quintero's story is instructive because although her high school did not have a postsecondary readiness designation, she was successful at UT (like many others) with additional assistance.²⁸⁵

This strategy provides UT with an efficient innovation that accomplishes three objectives. First, adding this data point to the feeder school report provides UT another tool to identify which TTPL students attended high schools with resources to prepare them for post-secondary education and those high schools that did not have resources or meet that standard. If the data shows students graduated from a resource poor school, it is a proactive way to identify which students may need additional support upon enrolling at the University.²⁸⁶ Second, it could help UT target specific feeder schools that the University can potentially partner with to ensure students are taking college preparedness courses.²⁸⁷ Third, it can enable UT to identify to the

²⁸⁵ As a result of programming such as Texas' Interdisciplinary Program ("TIP"), seventy-one percent of students who were admitted via TTPL and participate in TIP obtained a 3.0 grade point average or higher. Matthew Watkins & Neena Satija, *The Price of Admission: Part III: As UT Officials Fight the Top 10 Percent Rule, UT Also Fights to Make it a Success*, TEX. TRIB. (Mar. 29, 2016), <https://apps.texastribune.org/price-of-admission/getting-to-graduation/>. Further, in TIP's second year of programing, fifty-eight percent of students admitted via TTPL graduated in four-years even though their entrance predictors showed they could not achieve that goal. *Id.* While the recommendation in this Part proposes a proactive versus reactive remedy, the efforts that UT has undertaken (even if from a reactive state) have been successful and should be maintained. *See About TIP Scholars*, *supra* note 250 (introducing program); *see also University Leadership Network*, *supra* note 250 (introducing program).

²⁸⁶ *See supra* Section III.B; *supra* note 182 and accompanying text (explaining that data presentation has improved); *see also University Leadership Network (ULN) FAQs*, UNIV. TEX. AUSTIN STUDENT SUCCESS INITIATIVES, <http://studentsuccess.utexas.edu/uln/faq> (last visited Mar. 11, 2018) (explaining program requirements and benefits). The University Leadership Network ("ULN") works collaboratively with the Office of Admissions, Office of Financial Aid, and the Enrollment Management team to select students for the program. *University Leadership Network (ULN) FAQs*, *supra*. ULN includes a four-year plan to keep students on track to graduate timely. *Id.* Touted as an incentive-based scholarship program that provides resources for students who may not otherwise have them, ULN also supports students by giving them leadership training, experiential opportunities, etc. *Id.*

²⁸⁷ By tracking which feeder schools have the postsecondary readiness distinction designation, UT can strengthen its applicant pool. *See, e.g., UT Austin Launches the TEXAS MicroMajor for High School Students*, UT NEWS (Oct. 26, 2016), [<https://web.archive.org/web/20170407071914/https://news.utexas.edu/2016/10/26/ut-austin-and-aisd-partner-to-boost-college-readiness-0>] ("The University of Texas at Austin is launching the TEXAS MicroMajor, a new initiative to help high school students become better prepared for success at leading universities."); *see also Texas MicroMajor*, UNIV. TEX. AUSTIN: ONRAMPS, <http://onramps.utexas.edu/initiatives/txmm/> ("Completing a Texas MicroMajor will help students become more competitive for success at UT Austin or other colleges and universities. In addition to standing out in college applications, students may be able to earn up to 12 hours of transferable credit, save in college tuition costs, and develop the skills necessary to excel in the workplace.") (last visited Mar. 13, 2019). UT could also explore the possibility of ISDs teaming up with the community colleges currently partnered with UT to extend dual credit coursework to high school juniors and seniors.

Texas Legislature which feeder schools may need additional resources.²⁸⁸ Thus, if UT implements this strategy, the University fulfills its core values²⁸⁹ while undermining the correlation between high rates of economic disadvantage and under-preparedness.

C. IMPROVE: Safe Spaces at UT to Promote Retention

The data in Part II shows that UT admits and enrolls White Americans at a higher rate than any other racial or ethnic group, yet it is unclear whether the University has evaluated the data so as to reveal the reasons why.²⁹⁰ One reason that UT should assess data while considering the fairness of its race-conscious admissions is to determine whether a lack of “safe spaces” exist on campus, and if so, identify whether it is impacting diversity goals in a positive or negative way.²⁹¹ A “primary purpose of safe spaces is to serve as support

²⁸⁸ See *supra* note 287 and accompanying text (noting that UT could also explore the possibility of ISDs teaming up with the community colleges currently partnered with UT to extend dual credit coursework to high school juniors and seniors); see also *Texas MicroMajor*, *supra* note 287; Watkins & Satija, *supra* note 285 (“But because UT-Austin has no power to change the rule, it has been forced to grapple with how to make those students more successful. And that has created another unintended consequence: In recent years, the university has spent tens of millions of dollars trying to help students like Quintero catch up and stay on track to graduate in four years.”).

²⁸⁹ They are “[1] Learning— A caring community, all of us students, helping one another grow[;] [2] Discovery—Expanding knowledge and human understanding[;] [3] Freedom—To seek the truth and express it[;] [4] Leadership—The will to excel with integrity and the spirit that nothing is impossible[;] [5] Individual Opportunity— Many options, diverse people and ideas, one university[;] [6] Responsibility—To serve as a catalyst for positive change in Texas and beyond.” See *Mission and Values*, U. TEX. AUSTIN, <https://www.utexas.edu/about/mission-and-values> (last visited Jan. 5, 2019).

²⁹⁰ The debate as to how and to what degree race or ethnicity is used in UT’s holistic admissions has focused on minority races or ethnic groups (i.e., Asian Americans, African Americans, or Hispanics), but that focus disregards the question of how being of a majority racial group (i.e., White) factors into UT’s holistic admissions decisions. See *Fisher II*, 136 S. Ct. 2198, 2227 (2016) (Alito, J., dissenting) (“[UT has] not demonstrated that its race-conscious policy would promote classroom diversity any better than race-neutral options, such as expanding the Top Ten Percent Plan or using race-neutral holistic admissions.”); see also David Kow, *The (Un)compelling Interest for Underrepresented Minority Students: Enhancing the Education of White Students Underexposed to Racial Diversity*, 20 BERKELEY LA RAZA L.J. 157, 168 n.55 (2010) (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”)).

²⁹¹ See Vinay Harpalani, “Safe Spaces” and the Educational Benefits of Diversity, 13 DUKE J. CONST. L. & PUB. POL’Y, 117, 127 (2017) (“[S]afe spaces function to ‘address difficult or tension-filled learning encounters[.]’ by creating ‘learning environment[s] that allow students to engage each other with honesty, sensitivity, and respect.’” (footnote omitted)); see also *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment) (“Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.”)

mechanisms for minority [and other underrepresented] students, by mitigating feelings of isolation . . . and [to] help[] them adjust to life on predominantly White campuses.”²⁹² This purpose applies to racial or ethnic minority students attending UT, as well as students from low socioeconomic backgrounds because safe spaces promote students feeling included in the broader student body, at ease to express themselves and share their experiences, and engage in difficult discourse without fear of reprisal or disregard.²⁹³

Presently, UT has two cohesive programs that embody the primary purpose of a “safe space;” these programs are the Texas Interdisciplinary Program (“TIP”) and the University Leadership Network (“ULN”).²⁹⁴ Professor David Laude²⁹⁵ created TIP and ULN based on his own college experience and the perspective he obtained from getting to know his students.²⁹⁶ Professor Laude’s history is relatable to some UT students²⁹⁷ because he struggled academically during college, earning a C in his introductory chemistry course; the same course he has taught at UT.²⁹⁸ After struggling in most of his introductory freshman courses, Professor Laude was ready to drop out of the university and attend a junior college, but fortunately he was urged by his father to stay the course.²⁹⁹ He created TIP and ULN after researching common attributes among students who appeared less prepared to handle the rigors of the courses at UT.³⁰⁰ He found that many of the students were the first in their families to attend college, most had poor parents, and most had not been exposed to college-level courses during high

²⁹² Harpalani, *supra* note 291, at 127; *see also id.* at 129 (noting that of over 4800 students queried in a 2015 survey published by the University of Illinois, fifty-one percent of respondents reported that they had been stereotyped in class and thirty-nine percent felt uncomfortable on campus because of their race).

²⁹³ *Id.*; *see also* Harpalani, *supra* note 38, at 475 (“It is very important for universities to acknowledge and address feelings of isolation and tokenism among minority students.”).

²⁹⁴ *See Texas Advance Commitment*, U. TEX. AUSTIN, <https://admissions.utexas.edu/afford/scholarships/texas-advance> (last visited Jan. 5, 2019) (illustrating that ULN is part of UT’s “Texas Advance” program which provides scholarship assistance to economically disadvantaged Texas high school students who were “historically limited in their access to higher education.”)

²⁹⁵ *David A. Laude*, U. TEX. AUSTIN, <https://cm.utexas.edu/component/cobalt/item/129-laude-david-a?Itemid=1251> (last visited Jan. 5, 2019).

²⁹⁶ *See* Watkins & Satija, *supra* note 285 (noting that David Laude created TIP to help minority and underprivileged students succeed in college).

²⁹⁷ *See id.* (explaining that Professor Laude went to college “without a clue of how to succeed”).

²⁹⁸ *See id.* (quoting Professor Laude as saying “[m]ost people who’ve become faculty at public research universities don’t start off by doing really badly on the SAT and then getting a C in the course they now teach”).

²⁹⁹ *See id.* (noting that, while the article does not reveal the education level of Professor Laude’s father, it makes it clear that he had his father’s support pushing him to reach his potential)

³⁰⁰ *Id.*

school.³⁰¹

Similar to Professor Laude, Ms. Quintero also questioned her readiness for college.³⁰² Ms. Quintero, like Professor Laude had support— from family, peers, or the university—to enable their success.³⁰³ Imagine what could be possible if a student knew that his or her college or university would support him or her by providing scholarships, peer support via a student mentor, and other resources to enable him or her to become “as smart” as the students he or she believed “belonged.”³⁰⁴ Ms. Quintero discovered that sense of “belonging” upon utilizing the support of TIP, her peer mentor, and realizing that her professor(s) were confident in her ability to be successful.³⁰⁵

The “safe space” provided by TIP and ULN appear to promote a social (and possibly) cultural immersion to life at UT.³⁰⁶ However, these programs cannot bear the burden alone. UT should use the data improvements outlined in this Article to determine if safe spaces (or the lack thereof) are indicative of the root cause that will impact diversity among UT students.

CONCLUSION

As the U.S. Supreme Court has noted time and again in its precedent cases such as *Sweatt*, *Bakke*, *Grutter*, and *Fisher*, the value of student body diversity at institutions of higher education extends beyond test scores and grade point averages. Yet, when race or ethnicity are interjected into the conversation about higher education admissions and the value of diversity—

³⁰¹ *Id.*

³⁰² *See id.* (explaining that Ms. Quintero noted that she believed her colleagues were “better-prepared” for college).

³⁰³ For Ms. Quintero, the “small-group components of both [TIP and ULN] . . . helped her make friends and adjust to college life.” *Id.* Initially, TIP was less helpful academically, but once Ms. Quintero was assigned an upper-class mentor, she received and acted upon advice that helped her improve her grades, especially in Chemistry. *Id.*

³⁰⁴ According to *Merriam-Webster’s Dictionary*, the term “belong” means “be[ing] a member of a club, organization, or set.” *Belong*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/belong> (last visited Jan 5, 2019); *see also* CLARENCE THOMAS, *MY GRANDFATHER’S SON, A MEMOIR* 43 (2007) (“I applied to the University of Missouri (and got accepted) but the more I thought about going there, the clearer it became that I wasn’t prepared to put myself through the emotional strain of attending yet another predominately white school.”); BISKUPIC, *supra* note 79, at 9 (“Opposition to Sotomayor at the time of her nomination came not in the form of outright racism . . . but in the subtle bias of commentators . . . Such criticism portrayed her as an intellectually inferior jurist and offered a narrative that competed with her personal story of success.”)

³⁰⁵ Ms. Quintero improved her Chemistry grade from a D to a B. That achievement affirmed that she could achieve anything she set her mind to and that she “belonged” at UT with her peers.

³⁰⁶ *See* Harpalani, *supra* note 291, at 153–54 (discussing the important role that safe spaces play in “promot[ing] cross-racial understanding and . . . break[ing] down racial stereotypes”).

the narrative becomes a dichotomy that envelops student merit and belonging. African Americans, Asian Americans, and Hispanics (and other non-majority, minority individuals) belong at elite universities, such as UT, just like their White American (majority) colleagues.

Justice Kennedy's forewarning was unequivocal—data must be evaluated to justify the use of race-conscious admissions in the future. Therefore, by using the data and strategies noted above, UT can illustrate why population growth and changing racial and ethnic demographics in Texas have not undermined the need for its race-conscious admissions post-*Fisher II*. Moreover, the data and anecdotal accounts of students admitted to UT via TTPL and its holistic admissions show there is no disadvantage (or perceived power given to) one racial group over another. Finally, minority students admitted to UT via TTPL or its holistic admissions can succeed at the University, but they may need additional support or safe spaces.

Armed with this data, UT can deal—head on—with achieving diversity among its student body in a manner that is consistent with the Constitution. Similarly, other colleges and universities can use data and the strategies herein to successfully defend their race-conscious admissions policies, thereby creating an unassailable position to normalize college admissions.

APPENDIX

Figure 1: TTPL Admissions from 2005–2018

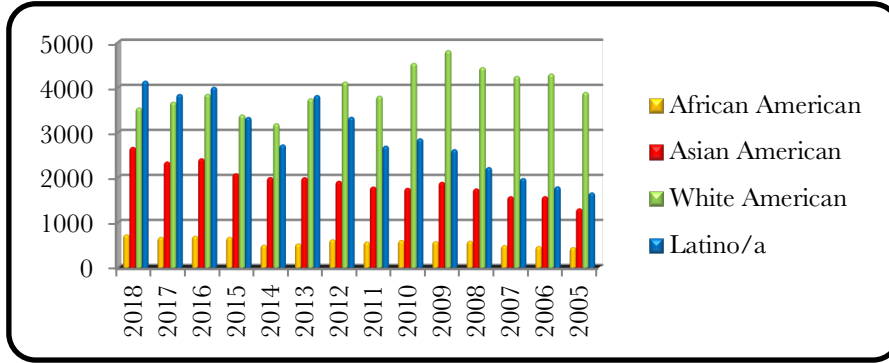


Figure 2: TTPL Enrollment from 2005–2018

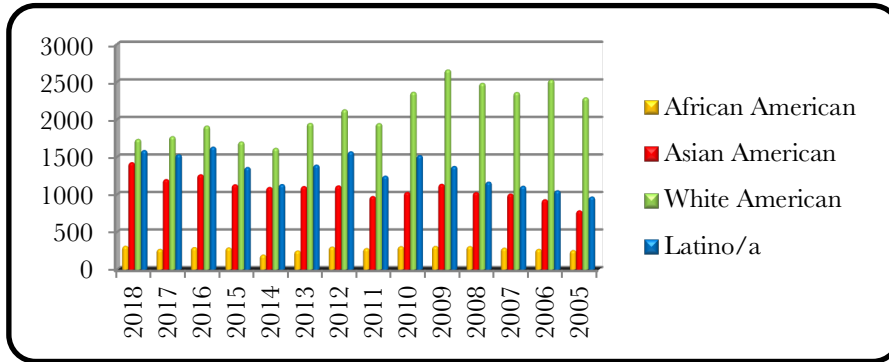


Figure 3: Holistic Admissions from 2005–2018

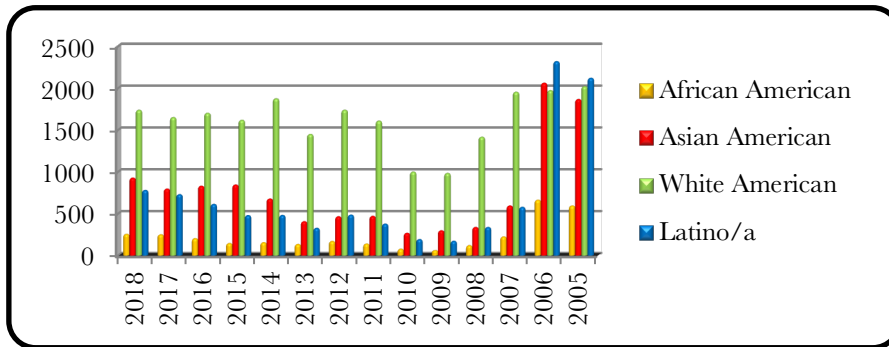


Figure 4: Holistic Enrollment from 2005–2018

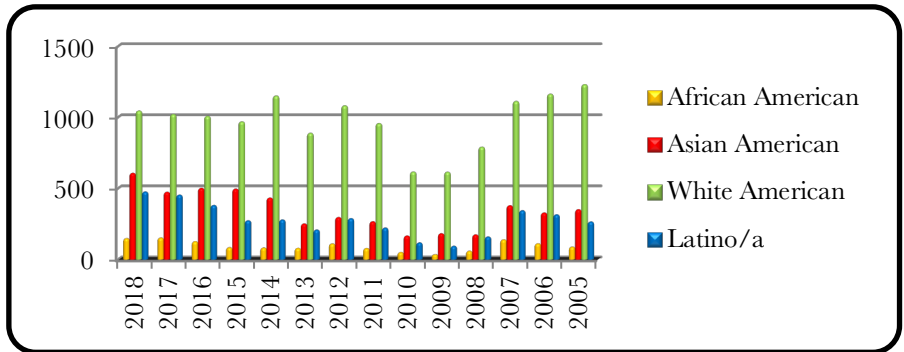


Figure 5: TTPL Admissions from All 20 ESC Regions v. Top 5 ESC Regions

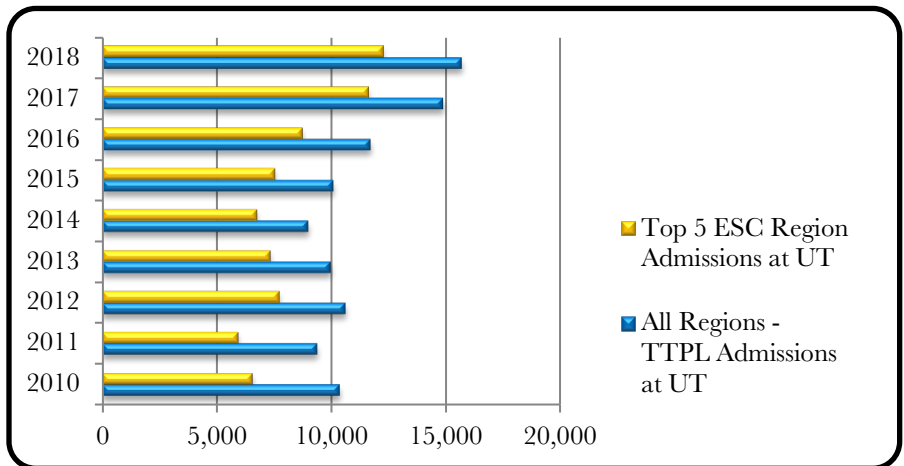


Figure 6: TTPL Enrollment from All 20 ESC Regions v. Top 5 ESC Regions

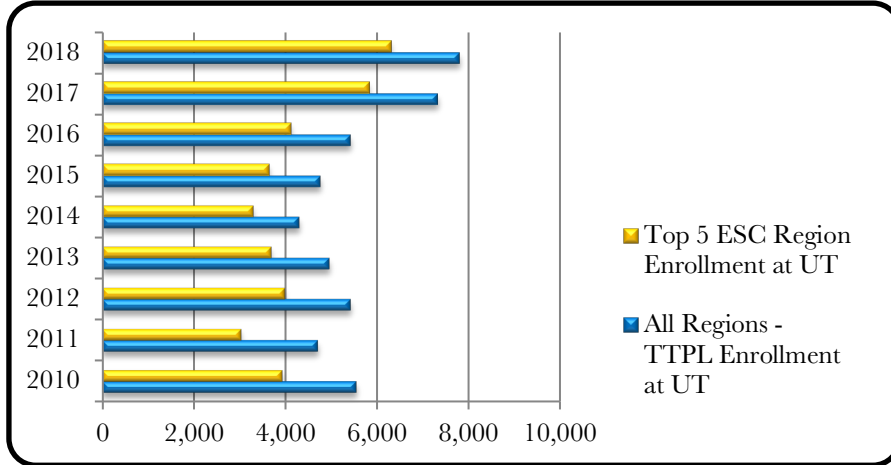


Figure 7: Sample Region 4 High Schools where One Race/Ethnic Group is 80% or more of Individual Campuses

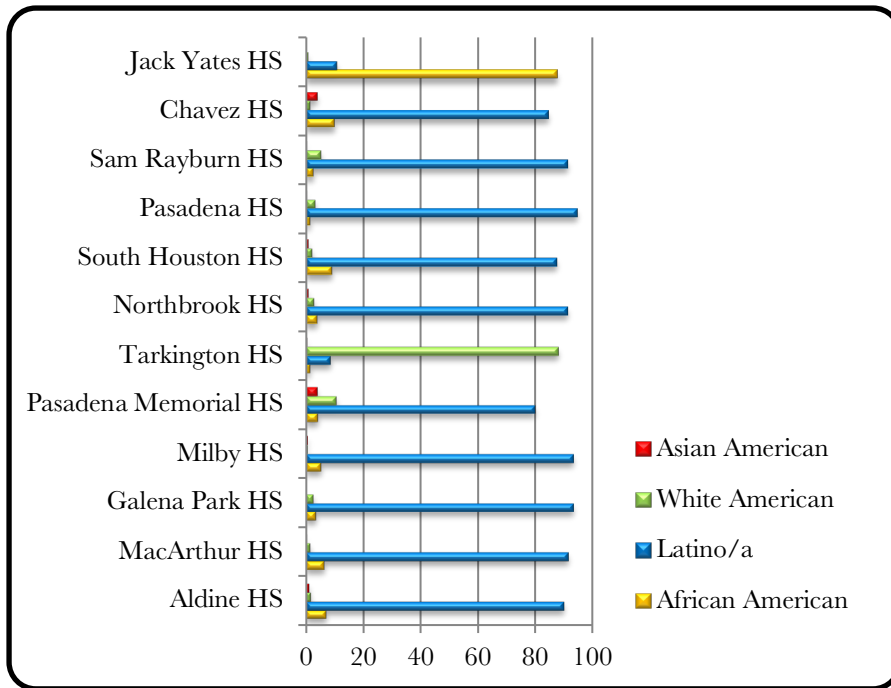


Figure 8: Sample of Region 10 High Schools where One Race/Ethnic Group is 80% or more of Individual Campuses

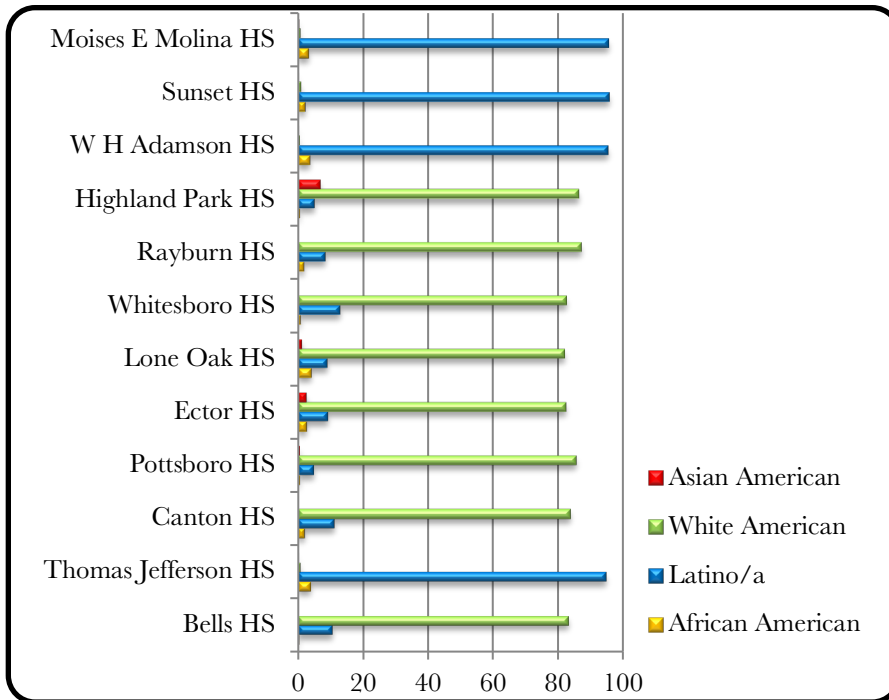


Figure 9: Sample of Region 13 High Schools where One Race/Ethnic Group is 80% or more of Individual Campuses

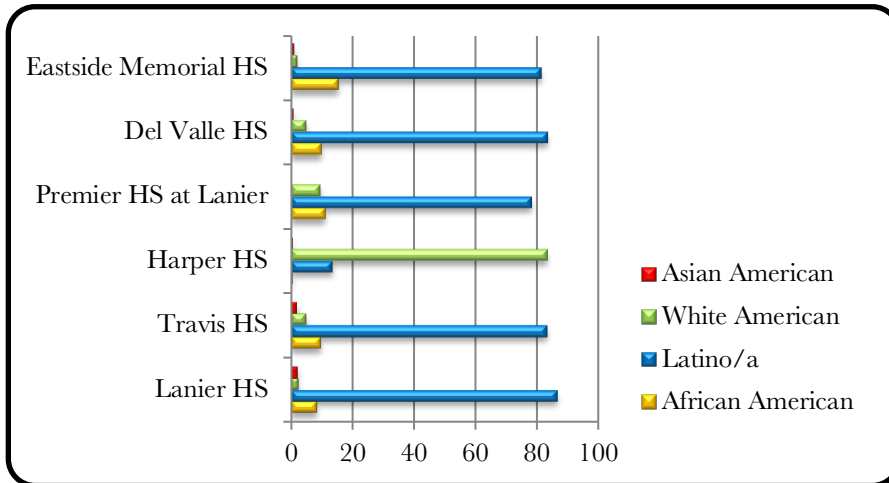


Figure 10: Sample of Region 11 High Schools where One Race/Ethnic Group is 80% or more of Individual Campuses

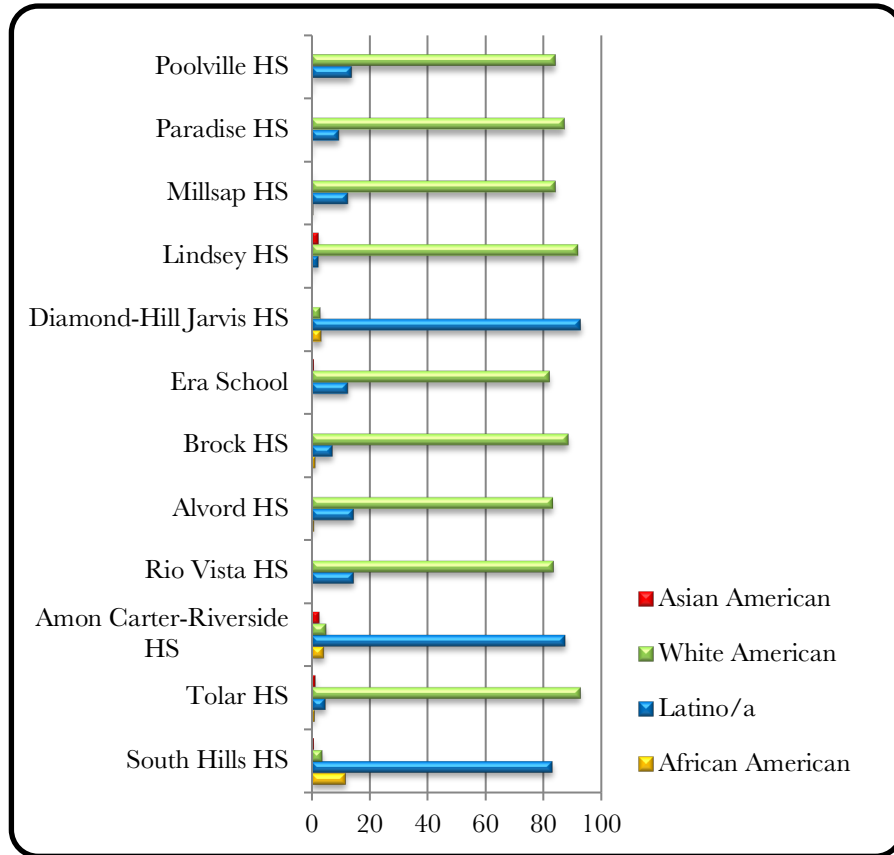


Figure 11: Sample of Region 20 High Schools where One Race/Ethnic Group is 80% or more of Individual Campuses

