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The Jurisprudence and Impact of Affirmative Action

I. Introduction

For decades the debate over affirmative action has been hard fought across the United States. From courtrooms and chatrooms to legislative halls to college halls people have fought over whether race, class, or other individual factors should be considered in higher education admissions. However, underlying the entire discussion of affirmative action is the Supreme Court's instructions on what is, and what is not, constitutional. All state policies must adhere to the Court's guidance, and thus this paper seeks to interpret the various Supreme Court rulings on this issue. However it is also critical to consider the impact these decisions have had on minority and non-minority student enrollment and attendance. Nowhere is this issue more prevalent than in Texas, whose tumultuous relationship with affirmative action provides an interesting case study of the impact of race and class-based affirmative action programs.

II. Methodology

For this paper, I will begin with a bifurcated analysis of the current state of affirmative action in the United States. The first half of my analysis will center on the history of jurisprudence on affirmative action and where the Supreme Court

currently stands on what is, and what is not, constitutional in higher education admissions policies.¹ From *Regents of the University of California v. Bakke*² in 1978 to the first and second iterations of *Fisher v. University of Texas at Austin*³ in 2013 and 2016, the Court has attempted to provide clarity over the constitutionality of affirmative action. In the second half of my analysis I focus on affirmative action as it has been addressed by Texas, which provides a unique model of race and class-based affirmative action through the Top Ten Percent Plan.⁴ I assess the impact of the program on minority enrollment at Texas universities, and ways in which minority enrollment, retention, and graduation has been improved by programs such as the Longhorn Opportunities Scholars at the University of Texas at Austin and the Century Scholars Program at Texas A&M University. Finally, I consider the ethical implications surrounding affirmative action, particularly with reference to Ronald Dworkin’s resource approach to distributive justice and Martha Nussbaum’s capability approach.⁵

III. Analysis

¹ *Infra* Part III.A.

² 438 U.S. 265 (1978).

³ 570 U.S. 297 (2013); 136 S. Ct. 2198 (2016).

⁴ *Infra* Part III.B.

⁵ *Infra* Part IV.

A. Jurisprudence

Throughout the past few decades the Supreme Court has ruled on several key affirmative action cases which shape the current dialogue and practices surrounding race and class-based admissions programs. The Court's affirmative action jurisprudence began in 1978 with the case *Regents of University of California v. Bakke*.⁶ This case set the stage for future cases and established a framework of how future cases would be discussed. In 1996 the Fifth Circuit Court of Appeals interpreted *Bakke* in the case *Hopwood v. Texas*.⁷ This case led to a significant overhaul of Texas' approach to race-based higher education admissions. In 2003 the Supreme Court decided two cases on the same day, *Grutter v. Bollinger*⁸ and *Gratz v. Bollinger*,⁹ which abrogated *Hopwood* and cemented the Court's analysis for the constitutionality of race-based affirmative action programs. Most recently, the Supreme Court decided two iterations of the case *Fisher v. University of Texas at Austin* in 2013¹⁰ and 2016,¹¹ which garnered national attention to the issue of affirmative action.

⁶ 438 U.S. 265 (1978).

⁷ 78 F.3d 932 (5th Cir. 1996).

⁸ 539 U.S. 306 (2003).

⁹ 539 U.S. 244 (2003).

¹⁰ 570 U.S. 297 (2013).

¹¹ 136 S. Ct. 2198 (2016).

Regents of University of California v. Bakke was the first major affirmative action case that the Supreme Court considered.¹² The case was argued on October 12, 1977, and decided on June 28, 1978.¹³ In *Bakke*, a white male sued the University of California School of Medicine, alleging that he had been denied admission due to the school's consideration of race in admissions.¹⁴ Under the University's admissions system, minority applicants were considered in a separate pool than other applicants.¹⁵ The two pools had different acceptance criteria, and the school had specific racial quotas.¹⁶ The Court upheld the use of race as a consideration in higher education admissions,¹⁷ however found that rules that specified quotas were unconstitutional under the Equal Protection Clause of the

¹² Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U. L. REV. 1037, 1038 (2013).

¹³ *Bakke*, 438 U.S. at 265.

¹⁴ *Id.* at 276–79.

¹⁵ *See id.* at 274 (identifying “minority groups” as “Blacks, Chicanos, Asians, and American Indians” (internal quotations omitted)).

¹⁶ *Id.* at 274–76.

¹⁷ *See id.* at 320 (“[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”).

Fourteenth Amendment.¹⁸ The Court asserted that the use of race in admissions decisions requires a strict scrutiny standard of review, meaning that the government must have a compelling interest and the means chosen to achieve that interest must be narrowly tailored.¹⁹ The Court further held that a university's interest in diversity in higher education was compelling enough to satisfy strict scrutiny.²⁰ The Court cited the benefits of the "robust exchange of ideas" in the

¹⁸ *Id.* at 319–20. Affirmative action cases are challenged under the Equal Protection Clause of the Fourteenth Amendment, which reads:

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

U.S. CONST. amend XIV (emphasis added).

¹⁹ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 290–91 (1978). This language is derived from the famed footnote in the 1938 case *United States v. Carolene Products Co.* 304 U.S. 144 (1938). This footnote calls for "more searching judicial inquiry" into laws concerning "discrete and insular minorities" (including racial minorities) or "which tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.* at 153 n.4.

²⁰ *See Bakke*, 438 U.S. at 314 ("[T]he interest of diversity is compelling in the context of a university's admissions program.").

classroom,²¹ however warned that racial and ethnic diversity cannot be the only factor universities consider.²²

In 1996 the case *Hopwood v. Texas* became the first successful challenge to a race-based affirmative action program.²³ In *Hopwood* the Fifth Circuit considered the challenge of four white residents of Texas who were rejected by the University of Texas Law School.²⁴ The plaintiff argued that they had been unfairly rejected because of the Law School's unconstitutional use of race as a consideration in the admissions process.²⁵ The court held that the Law School could not use race as a consideration in the admissions process as a means to "achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate

²¹ *Id.* at 313.

²² *See id.* at 314–15 (clarifying that a university may not ignore individual constitutional rights in the pursuit of diversity).

²³ Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 476 (2005).

²⁴ *Hopwood v. Texas*, 78 F.3d 932, 938 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁵ *Id.*

any present effects of past discrimination by actors other than the law school.”²⁶ By effectively ending race-based affirmative action in Texas, this decision put a spotlight on affirmative action in the national discussion,²⁷ and in part led to the development of the Texas Top Ten Percent program.²⁸ However, the *Hopwood* decision was abrogated by the Supreme Court in 2003.²⁹

On June 23, 2003 the Supreme Court decided two cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*, both concerning the issue of race-based affirmative action.³⁰

²⁶ *Id.* at 962.

²⁷ See generally Courtney A. Hueser-Stubbs, *Hopwood v. Texas: Ramifications and Options for University Affirmative Action Programs*, 65 UMKC L. REV. 143 (1996).

²⁸ Brooks H. Spears, “*If the Plaintiffs Are Right, Grutter Is Wrong*”: *Why Fisher v. University of Texas Presents an Opportunity for the Supreme Court to Overturn A Flawed Decision*, 46 U. RICH. L. REV. 1113, 1124–25 (2012).

²⁹ Angela M. Hough, *All Deliberate Ambiguity: The Question of Diversity, College Admissions, and the Future of the Texas Top-Ten-Percent Plan*, 39 TEX. TECH L. REV. 197, 206 (2006).

³⁰ John E. Higgins, *Grutter and Gratz Decisions Underscore Pro-Diversity Trends in Schools and Businesses*, N.Y. ST. B.J., January 2004, at 32, 33.

Twenty-five years after the *Bakke* decision,³¹ *Grutter v. Bollinger* reaffirmed the Supreme Court’s holding in *Bakke* that race can be considered in higher education admissions.³² In *Grutter*, the Court upheld the University of Michigan Law School’s admissions policy which considered race as a “soft variable” along with factors such as the applicant’s personal statement, recommendations, and other personal factors.³³ In finding the practice constitutional the Court focused on the individual consideration of each application rather than the strict quota system like in *Bakke*.³⁴ The Court said that the University’s “plus” system was a permissible method of achieving a “critical mass” of underrepresented minorities in order to achieve the benefits of diversity in higher education.³⁵ Notably, Justice Sandra Day

³¹ See Emanuel Margolis, *Latching on to Affirmative Action*, 77 CONN. B.J. 1, 19 (2003) (“The *Bakke* decision left the principle of affirmative action in a no-man’s-land for 25 years.”); *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (“We last addressed the use of race in public higher education over 25 years ago.”).

³² See *Grutter*, 539 U.S. at 325 (“[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).

³³ *Id.* at 315.

³⁴ See *id.* at 337 (emphasizing the “highly individualized, holistic review” of each application).

³⁵ *Id.* at 333.

O'Connor, writing the opinion for the majority, noted that it had been twenty-five years since the Supreme Court had last addressed the issue of affirmative action in *Bakke*, and she predicted that in twenty-five years there would be no need for race-based admissions considerations.³⁶

Decided on the same day as *Grutter*, the Supreme Court in *Gratz v. Bollinger* found that the University of Michigan's undergraduate admissions policies did not satisfy strict scrutiny and were thus unconstitutional.³⁷ The University's admissions system was point based, and the Court found that the twenty points awarded to racial minorities could be outcome determinative, which the Court found to be unconstitutional.³⁸ Those twenty points determine whether a minority applicant would be admitted more often than not, instead of a careful consideration of the application and what the student could bring to the classroom to enhance the

³⁶ *See id.* at 343 (“It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

³⁷ *Gratz v. Bollinger*, 539 U.S. 244, 249–51 (2003).

³⁸ *Id.* at 270.

conversation.³⁹ Because the applications were not being considered on an individual basis, the Court found that there was an improper use of race.⁴⁰ The contrast of *Grutter* and *Gratz* created a balance of affirming the Court’s ruling that diversity in higher education can be a compelling interest for the invocation of race, however it must be an individualized consideration, rather than a systematic one.⁴¹

The case *Fisher v. University of Texas at Austin* gave rise to two Supreme Court decisions, *Fisher I*⁴² in 2013 and *Fisher II*⁴³ in 2016. *Fisher* is the most recent Supreme Court decision on the topic of affirmative action.⁴⁴ In that case, Abigail

³⁹ *Id.* at 271–72.

⁴⁰ *See id.* (noting that the “only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups”).

⁴¹ *See generally* Lauren S. Foley, *From Comparing Plus Factors to Contexts Review: The Future of Affirmative Action in Higher Education*, 39 J.L. & EDUC. 183 (2010); Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517 (2007); Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459 (2004).

⁴² *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013).

⁴³ *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016).

⁴⁴ Eboni S. Nelson et al., *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187, 2190 (2017).

Fisher, who was white, was denied admission to the University of Texas.⁴⁵ The University of Texas filled about 75% of its freshman class with students who were guaranteed admission through Texas’s Top Ten Percent Program.⁴⁶ The remaining 25% were admitted based on the applicants’ “Academic Index,” which combined factors such as the student’s SAT score and other academic performance metrics, and their “Personal Achievement Index,” which considered the student’s holistic profile, including race.⁴⁷ The plaintiff was not in the top ten percent of her high school class, and believed that she was unfairly rejected because of her race.⁴⁸ The case gathered significant media attention and sparked a national debate on affirmative action.⁴⁹

Fisher I reaffirmed the Court’s commitment to diversity as a compelling interest in higher education admissions policies and the use of race.⁵⁰ In *Fisher I*, the Court set forth three overarching principles necessary to considering the

⁴⁵ *Fisher*, 136 S. Ct. at 2207.

⁴⁶ *Id.* at 2204.

⁴⁷ *Id.* at 2206.

⁴⁸ *Id.* at 2207.

⁴⁹ For one discussion of the public outrage surrounding this case, see Jayne S. Ressler, *#worstplaintiffever: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779, 793 (2017).

⁵⁰ *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310–11 (2013).

constitutionality of a university's affirmative action program.⁵¹ First, the Court reiterated the need for a strict scrutiny standard of review for race-based affirmative action programs.⁵² Second, the Court stated that a university's interest in diversity in higher education must flow from a good faith interest of the benefits of diversity, which merits some but not entire judicial deference.⁵³ And third, the Court said that courts must consider whether or not the means chosen to achieve this goal are narrowly tailored, and in doing so universities must show that other race-neutral alternatives do not suffice.⁵⁴

In *Fisher II*, the Court was faced with the unique issue that Texas presents concerning affirmative action.⁵⁵ Because the largest part of the freshman class is not admitted based on the consideration of race, the University only had to meet strict scrutiny on the invocation of race for the remaining portion of the freshman

⁵¹ *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2207–08 (2016).

⁵² *Fisher*, 570 U.S. at 309.

⁵³ *Id.* at 310–11.

⁵⁴ *See id.* at 311–12 (“The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.”).

⁵⁵ *See Fisher*, 136 S. Ct. at 2204–07 (detailing the history of Texas' affirmative action programs and the specific admissions practices at issue in the case).

class.⁵⁶ The Court found that the University met this burden by showing that that the race-neutral alternatives proposed by the plaintiff were not workable or did not achieve the University's proper interest in diversity.⁵⁷

B. Overview of Texas Affirmative Action and Outcome Research

⁵⁶ *Id.* at 2206.

⁵⁷ *See id.* at 2210–15 (rejecting the plaintiff's argument that there were satisfactory race-neutral admissions policies available to the University of Texas). Also, of note, the *Fisher* case was engineered by a man named Edward Blum, who sought out Abigail Fisher as a plaintiff to challenge the University of Texas' admissions policies. He is currently working to bring lawsuits against Harvard University, the University of North Carolina at Chapel Hill, and the University of Wisconsin claiming that their admissions policies do not satisfy the standards set forth in *Fisher*, particularly with regard to their admission of Asian-American students. *See* Anemona Hartocollis, *He Took On the Voting Rights Act and Won. Now He's Taking on Harvard*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html> (last visited Mar. 11, 2018); Sam Sanders, *New Affirmative Action Cases Say Policies Hurt Asian-Americans*, NPR (Nov. 20, 2014, 6:28 PM), <https://www.npr.org/sections/codeswitch/2014/11/20/365547463/new-affirmative-action-cases-say-policies-hurt-asian-americans> (last visited Mar. 11, 2018).

While a number of states have enacted laws concerning race- and class-based affirmative action,⁵⁸ Texas provides a unique case study because of its recent history, data availability, and the size and diversity of its population. Between 1996 and 2004 Texas went through four distinct periods of affirmative action policy: pre-1996 when affirmative action was permitted; 1997 when *Hopwood v. Texas* banned affirmative action; 1998–2003 when the Top Ten Percent Law and the judicial ban were in place; and 2004–present when, following *Grutter v. Bollinger*, affirmative action is permitted⁵⁹ and the Top Ten Percent Law is in place.⁶⁰ Additionally, the Texas Higher Education Coordinating Board, a state agency, releases large amounts of data each year on a wide range of aspects of education,

⁵⁸ See, e.g., Kylie Rahl, *Racing to Neutrality: How Race-Neutral Admissions Programs Threaten the Future Use of Race-Based Affirmative Action in Higher Education*, 49 TEX. TECH L. REV. ONLINE EDITION 109, 126–37 (2017).

⁵⁹ This race-based affirmative action applies to students not admitted through the Top Ten Percent Plan and was upheld by the Supreme Court in *Fisher II*.

⁶⁰ Angel Harris & Marta Tienda, *Minority Higher Education Pipeline: Consequences of Changes in College Admissions Policy in Texas*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 61 (2010).

which is useful in assessing the success of different policies.⁶¹ Finally, Texas’s large and diverse population allows for more robust data surrounding higher education.⁶²

Following the Fifth Circuit’s decision in *Hopwood v. Texas*,⁶³ the Texas State Legislature enacted Texas House Bill No. 588, commonly known as the “Top Ten Percent Program.”⁶⁴ This program guaranteed admission to any Texas state university for Texas students graduating in the top ten percent of their high school class.⁶⁵ This program does not consider any other factors such as standardized test scores or, more notably, race, ethnicity, or socioeconomic status.⁶⁶ Because the program draws from every high school in the state, the Top Ten Percent Program has been hailed as a useful means to increase student body diversity in higher

⁶¹ See, e.g., TEXAS HIGHER EDUCATION DATA, <http://www.txhighereddata.org> (last visited Apr. 5, 2018).

⁶² *QuickFacts Texas*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/TX> (last visited Apr. 5, 2018).

⁶³ See *supra* notes 23–29 and accompanying text (outlining the significance of the *Hopwood* decision).

⁶⁴ Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999).

⁶⁵ *Id.*

⁶⁶ *Id.*

education without reliance on race.⁶⁷ In 2015, the portion of the entering freshman class comprised of students admitted through the Top Ten Percent Program was 36% white, 6% black, and 28% Hispanic.⁶⁸ Additionally, 19% of the students admitted through the Top Ten Percent Program came from families with an annual income of less than \$40,000, compared to 7% of the students admitted through the affirmative action program.⁶⁹ However, given the overwhelming success of the program the Legislature amended the policy in 2009 to cap the number of automatically admitted students to 75% of an incoming class at the University of Texas at Austin, meaning that students generally need to graduate in the top seven or eight percent of their high school class to get in automatically.⁷⁰ Although the Top Ten Percent Plan applies to all state universities, the benefits are usually discussed with reference to Texas' two flagship universities, the University of Texas

⁶⁷ David Orentlicher, *Economic Inequality and College Admissions Policies*, 26 CORNELL J.L. & PUB. POL'Y 101, 107 (2016).

⁶⁸ *See id.* at 107–08 (comparing the students admitted through the Top Ten Percent Program with those admitted through the affirmative action program, which were 49% white, 4% black, and 14% Hispanic).

⁶⁹ *Id.*

⁷⁰ Matthew Watkins, *Texas Senators Mull Eliminating Top 10 Percent Rule*, TEXAS TRIBUNE (Apr. 5, 2017), <https://www.texastribune.org/2017/04/05/texas-senators-mull-eliminating-top-10-percent-rule/> (last visited Mar. 11, 2018).

at Austin (UT-Austin) and Texas A&M University (Texas A&M).⁷¹ Additionally, a number of public universities in Texas automatically admit students graduating in the top 25% of their high school class, though most of those schools have ACT or SAT score requirements to qualify.⁷²

While the race-neutral intent behind the Top Ten Percent Plan garnered wide support,⁷³ there is evidence concerning minority admission and enrollment

⁷¹ See *National University Rankings*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/rankings/national-universities> (last visited Mar. 22, 2018) (noting that in the 2018 National University Rankings, UT-Austin ranked #56, and Texas A&M ranked #69).

⁷² *Automatic Admissions*, COLLEGE FOR ALL TEXANS, <http://www.collegeforalltexans.com/index.cfm?objectid=24937C2A-D8B0-34EB-1FC5AF875A28C616> (last visited Apr. 5, 2018).

⁷³ David G. Hinojosa, *Of Course the Texas Top Ten Percent Is Constitutional . . . And It's Pretty Good Policy Too*, 22 TEX. HISP. J. L. & POL'Y 1, 14 (2016); Marta Tienda, Sigal Alon, & Sunny Niu, *Affirmative Action and the Texas Top 10% Percent Admission Law: Balancing Equity and Access to Higher Education*, 2, 3 (2008).

that the benefits may not be as far reaching as originally thought.⁷⁴ For example, one study found that even though the Top Ten Percent Plan increased minority enrollment, in the years after its implementation African-American and Hispanic freshmen enrollment did not reach pre-*Hopwood* levels.⁷⁵ In 1996, the year of the *Hopwood v. Texas* decision, first-time freshman African American enrollment at UT-Austin, Texas A&M, and the University of Texas at Dallas was collectively 528, and dropped to 439 in 1997 and 334 in 1998.⁷⁶ Similarly, Hispanic first-time freshman enrollment at those three universities fell from 1,681 in 1996 to 1,333 in 1998.⁷⁷ After the Top Ten Percent Plan was implemented, African-American enrollment rose to 505 in 2001 before dropping to 486 in 2002, which was still lower than pre-*Hopwood* enrollment.⁷⁸ However, Hispanic enrollment increased to 1,709

⁷⁴ See generally Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan*, 29 ECONOMICS OF EDUC. REV. 1110 (2010).

⁷⁵ John F. Kain, Daniel M. O'Brien, & Paul A. Jargowsky, *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates*, TEX. SCHOOLS PROJECT (2005).

⁷⁶ *Id.* at 11.

⁷⁷ *Id.*

⁷⁸ *Id.*

in 2002, which was higher than the enrollment pre-*Hopwood*.⁷⁹ Further, there is some belief that the increases in minority enrollment is due to special recruiting efforts by programs such as the Longhorn Opportunity Scholarship.⁸⁰ These enrollment statistics must also be viewed contextually, especially in light of the increased student body at these schools.⁸¹ In 1996 African-Americans were 4.9% of the freshman class, and were only 2.9% in 1998.⁸² After the implementation of the Top Ten Percent Plan African-Americans were only 3.6%, significantly less than pre-*Hopwood*.⁸³ Similarly, before *Hopwood* Hispanic students made up 15.6% of the freshman class, but only 12.8% after the Top Ten Percent Plan in 2002.⁸⁴

Another study found that under the pre-*Hopwood* affirmative action regime (1990–96), Hispanic applicants at Texas A&M were admitted at a rate of 86.2%,

⁷⁹ *Id.*

⁸⁰ *See infra* notes 93–100 and accompanying text (discussing the impacts of the Century Scholars and Longhorn Opportunity Scholars programs).

⁸¹ Marta Tienda, Kevin T. Leicht, Teresa Sullivan, Michael Maltese, & Kim Lloyd, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action*, PRINCETON 13 (2003).

⁸² Kain, et al., *supra* note 75, at 12.

⁸³ *Id.*

⁸⁴ *Id.*

making up 14.4% of the composition of admittees.⁸⁵ However in the period immediately following the implementation of the Top Ten Percent Plan (1998–2002) the same students were admitted at a rate of 70.8%, making up just 10.9% of the admitted student body.⁸⁶ Hispanic applicants saw a similar shift at UT-Austin, with a decrease from 74.9% to 67.7% in admittance and 15.9% to 14.5% in composition of the admitted students.⁸⁷ However, it can be difficult to measure the impact of the Top Ten Percent Plan on minority acceptance and enrollment because of changing state population and demographics.

Further, the Top Ten Percent Plan only guarantees admission, it does not ensure that students from lower socioeconomic backgrounds will have the financial

⁸⁵ See Angel L. Harris & Marta Tienda, *Hispanics in Higher Education and the Texas Top Ten Percent Law*, NCBI 57, Table 3 (2012) (noting that white applicants were admitted at a rate of 73.9% and comprised 73.0% of the admitted students during the same period).

⁸⁶ See *id.* (finding that white applicants were admitted at a rate of 74.0% and comprised 76.6% of the admitted class in the period following the Top Ten Percent Program implementation).

⁸⁷ See *id.* (noting that white applicants also saw a decrease in admittance during these time periods from 71.7% to 71.4% and a decrease in composition of admittees from 65.1% to 61.3%).

means to actually attend these schools.⁸⁸ While students admitted through the Top Ten Percent Plan may be eligible for financial aid,⁸⁹ the amount awarded does not come close to the cost of tuition and other expenses for state universities.⁹⁰ It is immaterial if the Top Ten Percent Plan grants access to higher education for

⁸⁸ Stella M. Flores & Catherine L. Horn, *Texas Top Ten Percent Plan: How It Works, What Are Its Limits, and Recommendations to Consider*, EDUCATIONAL TESTING SERVICE 1, 6 (2015).

⁸⁹ See *Top 10 Percent Scholarship Program (Top 10%)*, COLLEGE FOR ALL TEXANS, <http://www.collegeforalltexans.com/apps/financialaid/tofa2.cfm?ID=385> (last visited Apr. 9, 2018) (discussing the eligibility requirements for financial aid).

⁹⁰ See 19 Tex. Admin. Code § 22.200 (limiting financial aid awards to \$2,000); see also *Cost of Attendance*, TEXAS ADMISSIONS, THE UNIVERSITY OF TEXAS AT AUSTIN, <https://admissions.utexas.edu/tuition/cost-of-attendance> (last visited Apr. 9, 2018) (estimating the cost for undergraduate tuition and fees at the University of Texas at Austin for a Texas resident to be \$5,056–5,810 per semester); *Cost of Attendance*, SCHOLARSHIPS & FINANCIAL AID, TEXAS A&M UNIVERSITY, <http://financialaid.tamu.edu/Undergraduate/Cost-of-Attendance#0-CollegeStationUndergraduate> (last visited Apr. 9, 2018) (estimating the cost for undergraduate tuition and fees at Texas A&M University for a Texas resident to be \$10,764 annually, and \$28,400 including other expenses such as housing and books).

minority students if they will not have the financial ability to enroll at these schools. Financial aid has proven to be a powerful deciding-factor for students considering where, or if, to attend for higher education, particularly among minority students.⁹¹ For affirmative action to actually achieve a diverse student body it is important for schools to provide scholarships and financial aid to attract minority students, and then to provide support while they are enrolled to ensure long term success.⁹²

As a means to combat the drop in minority enrollment following the *Hopwood* affirmative action ban, the Longhorn Opportunity Scholars (LOS) and Century Scholars (CS) Programs were implemented at UT-Austin and Texas A&M, respectively.⁹³ These targeted-recruitment programs provide scholarships and support to low-income and minority students in order to increase enrollment and retention rates for low-income and minority students at these two universities.⁹⁴

⁹¹ Ellison S. Ward, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U. L. REV. 609, 617 (2009).

⁹² Maurice Dyson, *In Search of the Talented Tenth: Diversity, Affirmative Access, and University-Driven Reform*, 6 HARV. LATINO L. REV. 41, 76 (2003).

⁹³ Rodney J. Andrews, Scott A. Imberman, & Michael F. Lovenheim, *Recruiting and Supporting Low-Income, High-Achieving Students at Flagship Universities*, NATIONAL BUREAU OF ECONOMIC RESEARCH 1, 5 (2016).

⁹⁴ *Id.* at 5–6.

While these programs differ slightly in their scopes⁹⁵ and the types of academic support services provided,⁹⁶ both share the same goal of increasing enrollment, retention, graduation, and success of these key students.

While these programs share common goals, Rodney Andrews found that the UT-Austin LOS program has been significantly more successful in enrolling and graduating minority students, as well as long term financial success for students.⁹⁷ Andrews posits that it is the key differences between these two programs that lead to the dramatic outcomes.⁹⁸ By providing more academically focused services than CS, the LOS program ensured that students did not stumble academically and felt

⁹⁵ *See id.* at 6 (noting that both programs recruited at certain high schools, with the key difference being that the LOS Program provides program services to all students who enroll from the targeted schools, while CS only provides support services to those students receiving scholarship money).

⁹⁶ *See id.* (noting that the LOS Program offers extensive support including “guaranteed spaces in residence halls, free tutoring, and peer mentoring,” as well as small sections for students in introductory courses, while the CS Program focused more on social skills such as faculty mentoring, public speaking training, and instruction on interviewing and presenting skills).

⁹⁷ *Id.* at 31. *See also id.* at 21–28 (discussing the statistical data comparing the outcomes of the two programs).

⁹⁸ *Id.* at 31.

supported throughout their time at the University.⁹⁹ By providing more comprehensive services the LOS program was better able to intervene and ensure long-term success for low-income and minority students.¹⁰⁰

These changes in access for minority students are critical because of the impact that access to quality higher education has long-term on students. Attendance at a state's flagship university can have strong, long-term effects on graduate earnings.¹⁰¹ One study found that the mean effects of college quality on earnings is about 11.5 percent for UT-Austin, and 21.2 percent for Texas A&M.¹⁰² While the economic returns of higher education are influenced by a number of

⁹⁹ *Id.* at 31–32.

¹⁰⁰ *Id.* at 34.

¹⁰¹ *See, e.g.,* Mark Hoekstra, *The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach*, THE REVIEW OF ECONOMICS AND STATISTICS 717, 724 (2009) (finding that “attending the flagship state university increases the earnings of 28- to 33-year-old white men by approximately 20%”).

¹⁰² Rodney J. Andrews, Jing Li, & Michael F. Lovenheim, *Quantile Treatment Effects of College Quality on Earnings*, THE JOURNAL OF HUMAN RESOURCES 200, 220 (2016).

variables, including college major,¹⁰³ it may also be influenced by academic achievement while in college, which supports the need for student support by programs such as LOS and CS.

IV. Normative Considerations

Underpinning the discussion surrounding affirmative action are the ethical considerations. One particularly salient example is the debate over what should be allocated in order to ensure justice. There are two key approaches to this issue, the resourcist approach advanced by John Rawls and Ronald Dworkin and the capability approach of Martha Nussbaum.¹⁰⁴ The resource approach to distributive justice focuses on means in making interpersonal comparisons, and seeks “to answer the question ‘Equality of what?’ in terms of means rather than what people can obtain from the means.”¹⁰⁵ In the context of affirmative action, Dworkin said that:

The distribution of position and power that affirmative action helps achieve . . . flows and changes naturally in accordance with millions of choices that people make for themselves. If the policy works to improve the overall position of any minority . . . it does so only because other people have chosen to exploit the results of that policy: the greater range

¹⁰³ See *id.* at 224–227 (discussing the impact college major choice has on future earnings).

¹⁰⁴ Ensar Yilmaz, *Resources Versus Capabilities in Social Justice*, J. OF INTERDISCIPLINARY ECONOMICS 230 (230).

¹⁰⁵ *Id.* at 234.

and variety of graduates with the motives, self-respect, and training to contribute effectively to their lives. Affirmative action in universities, in that way, makes the eventual economic and social structure of the community not more artificial but less so; it produces no balkanization, but helps to dissolve the balkanization now sadly in place.¹⁰⁶

In this way, Dworkin's resourcist approach favors a forward-looking policy, rather than one focused on remediation.¹⁰⁷ Because distributive justice is concerned with inequalities that are not born out of discrimination or prejudice,¹⁰⁸ Dworkin would view class-based affirmative action programs such as the Top Ten Percent Plan as productive ways to allocate resources to those who have been systemically harmed.

Conversely, Nussbaum's capability approach to distributive justice focuses on what achievements people are able to accomplish.¹⁰⁹ By looking to people's capabilities, this approach to justice aims at assisting people to the point where

¹⁰⁶ Robert Westmoreland, *A New and Improved Affirmative Action?*, 72 U. CIN. L. REV. 909 (2004) (quoting RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 425 (2000)).

¹⁰⁷ *Id.* at 924.

¹⁰⁸ *See id.* at 927 ("It aims to raise the prospects of those who are at the bottom of the socioeconomic ladder, not because they have been wronged by anyone, but simply because they are relatively deprived as the unintended consequence of innumerable actions taken by millions of individuals and institutions.").

¹⁰⁹ Yilmaz, *supra* note 104, at 236.

they have “a realistic option of exercising the most valuable functions.”¹¹⁰ The capability approach has a focus on the ends of justice, rather than the means.¹¹¹ In that respect the capability approach would put more attention on programs such as LOS which are concerned with ensuring that each student not only has the opportunities to succeed, but that they are supported in a way that they do. The capabilities approach may also support the economic rationales for elite higher education, such as increased long-term earnings.¹¹²

V. Conclusion

Affirmative action has a long and varied history in the United States judicial system, and it continues to be discussed and debated.¹¹³ While the Supreme Court has permitted diversity in higher education as a compelling interest for the use of

¹¹⁰ *Id.* (quoting MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 46 (Oxford: Oxford University Press, 1999)).

¹¹¹ *Id.* at 239.

¹¹² *See supra* notes 102–103 and accompanying text (discussing the long-term financial impact of attending flagship universities in Texas).

¹¹³ *See supra* note 57 (discussing the current suits being brought against the University of North Carolina and Harvard concerning affirmative action).

race-based affirmative action programs,¹¹⁴ it is also critical to understand the impact race and class-based affirmative action programs can have on student body diversity. Access through affirmative action may be beneficial in theory, but if students are not applying or enrolling because the financial aid barrier makes it cost prohibitive then these admissions policies may be using race unconstitutionally in the admissions process because the methods chosen are not narrowly tailored to achieve the goal of diversity.¹¹⁵ Furthermore, if minority students are not receiving the academic and social supports necessary for success while enrolled,¹¹⁶ then they face higher chances of failure or lower long-term chances of success.¹¹⁷

¹¹⁴ See *supra* notes 12–22 and accompanying text (discussing *Bakke* and the Supreme Court’s initial consideration of affirmative action).

¹¹⁵ See *supra* notes 88–92 and accompanying text (discussing financial barriers to minority enrollment).

¹¹⁶ See *supra* notes 93–100 and accompanying text (discussing the Longhorn Opportunity Scholars and Century Scholars programs and the impact they have had on student success).

¹¹⁷ See *supra* notes 101–103 and accompanying text (discussing the long-term financial benefits of elite higher education).

Nowhere is this more evident than in Texas, which provides an interesting case study of the effects of differing affirmative action policies.¹¹⁸ The drop in minority enrollment following the *Hopwood* affirmative action ban and the change in student body composition in the years immediately following the implementation of the Top Ten Percent Plan provide a unique picture of the role class and race-based affirmative action programs can have on minority enrollment.¹¹⁹ But more importantly these numbers demonstrate the critical role student support plays in achieving the benefits of a diverse student body. Furthermore, there are critical ethical arguments that play into the allocation of justice, which deepen the conversations surrounding how we should approach access to higher education.¹²⁰ The diversity the Supreme Court has endorsed does not end at the admissions process, but it must be a continuing effort on the part of the school to ensure that the benefits of higher education are available broadly to all students.

¹¹⁸ See *supra* notes 58–62 and accompanying text (describing the unique example Texas provides in affirmative action policy).

¹¹⁹ See *supra* notes 75–87 and accompanying text (denoting the changes in minority acceptance and enrollment in the differing phases of Texas affirmative action policy).

¹²⁰ See *supra* notes 104–112 and accompanying text (evaluating the distributive justice approaches of John Rawls and Martha Nussbaum).