Is the Future of Affirmative Action Race Neutral?

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The outlook does not appear particularly bright for affirmative action programs in the United States that grant preferences based on race to blacks, Hispanics, and others in hiring, university admissions, and bidding on government contracts. These programs continue to be unpopular with the public and face increasing hostility in courts of law. In their place, courts and commentators have been promoting an alternative form of affirmative action that I will call "race-neutral affirmative action." Race-neutral affirmative action seeks to change the racial composition of those who benefit from employment, education, or government spending not by granting preferences based on race (what I will call "racially explicit affirmative action") but by granting preferences based on characteristics that are correlated with race. That is, as I will define it, the purpose of race-neutral affirmative action is the same as the purpose of racially explicit affirmative action—to increase the numbers of certain racial groups who benefit from these opportunities. But the means are different: race-neutral affirmative action uses correlates of race rather than race itself.

Perhaps the best-known race-neutral affirmative action program in the United States is the Texas Ten Percent Plan at the University of Texas, which grants automatic admission to any in-state applicant who gradu-
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ated in the top 10 percent of his or her high school class. For applicants admitted under this plan, the Texas legislature eschewed all other criteria in favor of high school class rank because the racial segregation that still exists in Texas high schools leads class rank to correlate with applicants who are black and Hispanic better than other traditional admissions criteria such as SAT scores. For the same reason, other universities have adopted preferences for poor, bilingual, and first-generation applicants, as well as for students who have “overcome diversity” or “demonstrated cultural awareness.” Although many of these preferences have merits of their own, when they are motivated in whole or in part by their ability to generate racial diversity, I call them race-neutral affirmative action.

As I noted, courts have become increasingly hostile to racially explicit affirmative action, and many commentators have turned to promoting this sort of race-neutral affirmative action instead. Indeed the United States Supreme Court recently vacated a lower court’s approval of a new, racially explicit affirmative action program at the University of Texas in part because the Texas Ten Percent Plan alone had been so successful there. The Court will consider the question again this coming year.

In this chapter, I examine the rise of race-neutral affirmative action in the United States and assess the costs and benefits of trying to diversify through race-neutral means. I conclude, first, that, although courts have been promoting race-neutral affirmative action, they have yet to confront serious questions about whether it is any more constitutional than racially explicit affirmative action. In my view, it is hard to square race-neutral affirmative action with the Supreme Court’s cases that prohibit programs that have both the purpose and effect of racial discrimination. Second, even if the courts decide not to adhere to these past cases, it is unclear whether race-neutral affirmative action is any less problematic than racially explicit affirmative action. Although race-neutral affirmative action may be less divisive and less stigmatizing to its beneficiaries, I suspect it will be so much less efficient at bringing about racial diversity that it will require institutions to make much greater sacrifices to other aspects of their missions. Indeed, the race-neutral programs that are likely to be the least divisive and least stigmatizing are probably also those that are the least efficient at diversifying. For both of these reasons, I am not sure race-neutral affirmative action is the panacea that many seem to think it is.
I. The Rise of Race-Neutral Affirmative Action

As is well known, in the late 1960s, employers, governments, and universities began efforts to increase opportunities for racial minorities by granting preferences to blacks and Hispanics who applied for jobs, university admissions, and government contracts. These efforts were highly controversial from their inception—both politically and legally—but they received qualified legal blessings from the United States Supreme Court in 1978 in education, in 1979 in employment, and in 1980 in government contracting. As the federal judiciary became more conservative in the 1980s, the legal foundation of racially explicit affirmative action began to weaken, but it has thus far survived, if only by the narrowest of margins. Nonetheless, many observers believe it is only a matter of time before the legal foundation crumbles altogether. Indeed, even jurists supportive of racially explicit affirmative action have said it should come to an end in the next several years. Courts hostile to racially explicit affirmative action have cited the availability of race-neutral affirmative action as one reason for their hostility.

In some ways, the political fortunes of racially explicit affirmative action have improved over time even as its legal fortunes have declined. Although the Republican Party made these programs a prominent target in the 1980s and 1990s, the party has now largely abandoned its opposition. In light of the increasing racial diversity of the population of the United States, I believe the prospects for the opposition to resume are dim. Nonetheless, the programs remain unpopular with the public. Consequently, antipreference activists have gone around the political parties in a number of states and directly to a plebiscite for votes to ban their governments (but not private parties) from using racial preferences. These efforts have almost always succeeded and are likely to continue. To date, there are now six states where state governments and state universities have been prohibited from using racially explicit affirmative action by direct democracy: California (1996), Washington (1998), Michigan (2006), Nebraska (2008), Arizona (2010), and Oklahoma (2012). Two other states have enacted these prohibitions through other means: Florida (1999) and New Hampshire (2011).

Where racially explicit affirmative action has been banned, the states faced a choice: forgo efforts to increase opportunities for racial minorities or practice race-neutral affirmative action—that is, to find correlates with race and to replace preferences for race with preferences for those correlates. In many instances, state universities chose the latter course. As I explained above, one of the best-known examples is the University of Texas (which lost the ability to use race by court decision), which
elevated high school class rank in its admissions decisions over any other criteria because it was better correlated with black and Hispanic applicants.\textsuperscript{31} Other states—such as California and Florida—also rely heavily on this correlate with race.\textsuperscript{32} Class rank is better correlated with race than other traditional admissions criteria in these states because the high schools are still so racially segregated.\textsuperscript{33} Other universities have used or considered using preferences for other correlates with race, including family income, residence in urban areas, and bilingualism.\textsuperscript{34} There is no reason similar correlates cannot be used to replace racial preferences in employment and even government contracting (a popular example in the latter context is preferences for smaller business).\textsuperscript{35} Although there have been periods of transition, these correlates have proven largely successful in achieving levels of racial diversity in universities similar to those achieved with racial preferences.\textsuperscript{36} It is harder to find data on employment and government contracts, but there is some evidence that race-neutral affirmative action has been less successful at diversifying in these contexts.\textsuperscript{37}

Many commentators believe that the trend in favor of race-neutral affirmative action will continue, compelled by the public, by the courts, or by both.\textsuperscript{38} Indeed, many commentators believe that racially explicit affirmative action will eventually meet its demise and that the only future for affirmative action in the United States is the race-neutral variety.\textsuperscript{39} On this point, it is interesting to note that race-neutral affirmative action apparently is now being used in other countries, even those that never had the appetite for the racially explicit variety.\textsuperscript{40}

Some commentators have celebrated this future while others have decried it.\textsuperscript{41} As I explain below, I am not persuaded that race-neutral affirmative action should fill the void that may be left by the demise of racially explicit affirmative action in the United States. As I explain, not only are race-neutral programs with racial purposes as legally dubious as racially explicit programs, but it also may very well be the case that race-neutral affirmative action is no less problematic than racially explicit affirmative action.

\section*{II. Is Race-Neutral Affirmative Action Constitutional?}

Many commentators believe that race-neutral affirmative action can overcome the legal infirmities that still dog racially explicit affirmative action.\textsuperscript{42} As I have written in the past and as I explain in this section, I think the legal advantages of race-neutral affirmative action have been seriously overstated.\textsuperscript{43}
Racially explicit affirmative action is legally infirm because using racial classifications to burden or benefit individuals must pass the Supreme Court's "strict scrutiny" test in order to satisfy the Equal Protection Clause of the U.S. Constitution. Under this test, affirmative action must be supported by a "compelling government interest" and be "narrowly tailored" to support that interest. Although the Supreme Court has recognized a few compelling interests in this context—for example, correcting for an institution's own past discrimination and reaping the educational benefits of racial diversity—the Court continues to make it hard on racially explicit affirmative action. For example, in Fisher v. University of Texas, the Court sent a racially explicit affirmative action program back for further litigation over whether the university had proven that marginal educational benefits continued to accrue at the levels of diversity it was seeking. The Court will consider the question anew this coming year.

Some commentators believe that strict scrutiny can be avoided altogether with race-neutral affirmative action because it does not rely on racial classifications, but I think this view is mistaken. In a number of cases, the Supreme Court has held that race-neutral classifications must satisfy the strict-scrutiny test when they have the same purpose and effect as racially explicit classifications. As the Court put it in one case, "[a] racial classification...is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is a...pretext for racial discrimination." Almost by definition, these holdings would encompass race-neutral affirmative action.

Other commentators believe that the legal parity between race-neutral-but-racially-motivated classifications and racially explicit classifications should not include race-neutral classifications that are motivated to help blacks and Hispanics as opposed to hurt them. But, as it has with so-called benign racially explicit classifications, the Supreme Court has already applied strict scrutiny to race-neutral classifications that seek to aid blacks and Hispanics in its voting-district gerrymandering cases.

In my view, there is only one way in which race-neutral affirmative action is on firmer legal footing than racially explicit affirmative action: the narrow-tailoring inquiry in the strict scrutiny test for race proxies is easier to satisfy than it is for racially explicit programs. Other than that, however, race-neutral affirmative action would seem to have to overcome all the same legal barriers that racially explicit affirmative action does, including the barrier for which the Supreme Court remanded in
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Fisher: to show that marginal increases in racial diversity continue to further a compelling interest.

With all this said, it should be emphasized that the Supreme Court is much like the stock market in at least one respect: past performance is no guarantee of future success. The Court's personnel changes over time, and precedents are not always followed. Moreover, Justices are free to change their minds. Constitutional law is, to a large extent, political law,58 and, if race-neutral affirmative action maintains its popularity with the public, the Supreme Court may look for ways to facilitate it.59 There is some reason to believe this transition is already underway.60

III. The Social Desirability of Race-Neutral Affirmative Action

Perhaps courts will give a green light to race-neutral affirmative action despite the precedents I marshaled in the previous part. Does that mean that race-neutral affirmative action should fill the void that many commentators believe will be left by racially explicit affirmative action's demise? I am not so sure. As I explain in this part, it may very well be that race-neutral affirmative action is just as problematic as the racially explicit variety.

A. The Advantages of Race-Neutral Affirmative Action

There are some reasons to believe that race-neutral affirmative action will be less problematic than racial preferences. Many commentators, for example, favor race-neutral affirmative action because they believe it can achieve the same amount of racial diversity as racial preferences but without as much racial divisiveness.61 The assertion here is that the same people who find racially explicit affirmative action immoral or otherwise objectionable do not get as exercised about preferences of other sorts—even if those preferences are correlated with race and were selected for that very reason. Indeed, there does seem to be empirical support for the notion that the public favors at least some race-neutral programs more than racially explicit ones, such as the Texas Ten Percent Plan and preferences based on family income.62 In many of these surveys, however, it may have been hard for the public to know whether the race-neutral program was or was not motivated by its racial effects as opposed to some end independent of racial diversity. Some commentators are skeptical that the public will support these programs if it is aware of the racial motivations.63 On the other hand, the motivation behind the Texas Ten Percent Plan should have been apparent to any observer,64 and that does not seem to have detracted from its popular-
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ity. Thus, I tend to agree that race-neutral affirmative action is probably less divisive than the racially explicit variety.

Other commentators believe that race-neutral affirmative action will not burden individuals aided by it with the same stigma that is associated with preferences based on race. The notion here is that the same people who might think less of blacks or Hispanics because they may have been admitted to a university or received a government contract or job in part because of their race will not think the same way if they received the same benefits because of other criteria—even if, again, those other criteria are correlated with race and selected for that very reason. This claim is harder to prove, and I am not aware of any empirical evidence either for or against it. Nonetheless, for the same reason that race-neutral programs tend to be less divisive and more popular with the public, it may very well be that the beneficiaries of these programs are not held in lower regard.

Some people also believe that race-neutral affirmative action is a less problematic way to generate racial diversity because it avoids the messy business of figuring out who belongs in one racial group or another in order to determine who should benefit from a racial preference and who should not. Although this business may have been messy at one time, in recent years, racial preferences have largely operated on the “honor system,” where individuals self-declare their race. Thus, it strikes me that any advantage here may be insignificant.

B. The Disadvantages of Race-Neutral Affirmative Action

Although race-neutral affirmative action may offer some advantages over racially explicit affirmative action, I believe it also comes with disadvantages. The biggest problem with race-neutral affirmative action is that it is much less efficient at generating racial diversity than racial preferences are. By definition, proxies or correlates for race will sweep in individuals of all races, including those for whom greater representation is not sought, usually whites and Asians. How much less efficient race-neutral affirmative action is depends on how good the correlates for race are. Some correlates—such as residence in urban areas—may be highly correlated with race. For example, Wayne State University Law School in Michigan has adopted an admissions policy that gives preferences to applicants from Detroit, which is almost 90 percent black and Hispanic, in order to maintain diversity in the face of the ban on racial preferences in Michigan. But other correlates such as family income and high school class rank are very inefficient—blacks and Hispanics make up much smaller percentages of individuals from impoverished fami-
lies or who graduated at the top of their high school class; these correlates are not very good, but they are used because they are better than SAT scores. This loss in efficiency has a serious and negative implication: in order to achieve desired levels of diversity with race-neutral affirmative action, universities, employers, and governments may have to forgo other criteria that are important to their missions. For example, under the Texas Ten Percent Plan, in order to achieve the same racial diversity it had when it used racial preferences, huge portions of the University of Texas had to be admitted on class rank alone; the state finally permitted the University to cap Ten Percent admissions at 75 percent of each freshman class. All of the other characteristics that a university might think are important to assemble in a successful student body—good test scores, extracurricular activities, leadership skills, perseverance, and so on—must be relegated to the remaining 25 percent of the student body. That strikes me as an incredible sacrifice to institutional mission.

Some commentators believe another disadvantage to race-neutral affirmative action is that it undermines transparency in government because race-neutral affirmative action obscures the racial motivations behind legislation. This may be one reason race-neutral affirmative action is less divisive than racially explicit affirmative action: the public simply may not realize that race-neutral affirmative action is motivated by racial diversity at all; perhaps if the public knew that, it would not support race-neutral affirmative action either. On the other hand, as I noted above, when I think it has been clear to the public that race-neutral programs were racially motivated, as it was with the Texas Ten Percent Plan, the public still supports the programs more than it does racial preferences. Of course, the Texas Ten Percent Plan is only one example, and it may be true as a general matter that it is difficult for the public to see the "affirmative action" side to race-neutral affirmative action. Certain schools of political science might see this as a cost to race-neutral affirmative action.

Some commentators also oppose race-neutral affirmative action because they think its success is a product of—rather than an antidote to—discrimination against blacks and Hispanics. For example, university preferences based on class rank achieve diversity only to the extent that school segregation persists. Preferences for urban residents do so only to the extent that neighborhoods are segregated by race. Preferences for family income do so only to the extent that blacks and Hispanics are stuck in greater poverty than whites and Asians. For these commentators, race-neutral programs "lock in" racial segregation and disadvantages based on race rather than break them. This argument has some rhetorical appeal, but I am unsure if race-neutral affirma-
ative action does any less to free blacks and Hispanics from, for example, poverty and segregation than racially explicit affirmative action. If racially explicit affirmative action in education, employment, and government contracting mitigates poverty and segregation by increasing the wealth and improving the aspirations among blacks and Hispanics as many commentators suggest, then why would race-neutral affirmative action not do the same so long as it places the same numbers of blacks and Hispanics into these opportunities? In other words, I am not sure this should count as a "cost" of using race-neutral affirmative action to bring about racial diversity.

C. Assessment

Although the empirical evidence is somewhat undeveloped, race-neutral affirmative action may well be able to generate the same racial diversity as racially explicit affirmative action without two serious downsides: racial divisiveness and stigmatization. At the same time, however, it may impose a cost of its own: because it is a less efficient means to achieving racial diversity, it may force institutions to sacrifice other ends important to their missions. A rigorous assessment of these costs and benefits is a difficult endeavor that certainly goes beyond the scope of this book chapter, if it is possible at all. That is, it may be impossible to discern (at least in any coherent way) which is worse: fostering racial animosity and social stigma or undermining the institutional missions of our universities and governments.

Nonetheless, there is one feature of the above discussion that leads me to suspect that it is unlikely that race-neutral affirmative action will be any less socially problematic than racially explicit affirmative action. This feature is that the advantages offered by a race-neutral affirmative action program are likely to be directly correlated with its disadvantages. In other words, the race-neutral programs that will be the least divisive and least stigmatizing are probably the same ones that rely on the weakest correlates for race and will pose the greatest costs to institutional missions. I think this might be the case for two reasons. First, weaker correlates benefit whites and Asians more frequently; thus, from simple self-interest, individuals from these groups (the groups mostly likely to find such programs divisive and to impose social stigma on others) may well prefer weaker correlates. Second, because they are so inefficient, it may be less apparent from weaker correlates that they were adopted for racial reasons. This could lead to more support from whites and Asians if racial motivations behind legislative programs are what triggers opposition to them.
Indeed, as I noted, preferences based on family income and, in the university setting, high school class rank (such as the Texas Ten Percent Plan) tend to be popular with the public, but these criteria are at the same time poorly correlated with race. In regions with segregated schools like Texas, the racial composition of individuals with top high school rankings will be little different than the racial composition of high school-aged students in the region overall; although this may make class rank a better correlate with race than other traditional university admissions criteria, it is still a weak one. Family income is a somewhat better proxy for race—the racial composition of families in poverty is more skewed toward blacks and Hispanics than is the overall population—but even this correlation is not particularly strong.

If I am correct about this, and only those race-neutral programs that require institutions to make the greatest sacrifices to their missions will offer corresponding advantages over racially explicit affirmative action, then it is easy to see how race-neutral affirmative action may be no less costly to society than is racially explicit affirmative action.

**IV. Conclusion**

Many advocates of racial diversity have pinned their hopes on race-neutral affirmative action to take the place of racially explicit affirmative should it meet its political or legal demise. But I do not see race-neutral affirmative action as the panacea that some do. Although race-neutral programs appear to have the support of increasingly conservative courts and of many commentators, these judges and commentators have not yet wrestled with what I believe are serious constitutional questions posed by these programs. Moreover, even if these questions are pushed to the side, it is not clear to me that race-neutral programs are any less problematic: the very programs that are likely to offer the greatest advantages over racial preferences may very well pose the greatest costs. As a result, if the future of affirmative action is indeed to be race-neutral, it may not be a particularly happy one for proponents of increased opportunities for blacks and Hispanics.

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Notes

1. See infra notes 18 & 38.


3. See id. at 325–27 ("[T]he Ten Percent Plan was selected to boost the percentage of racial minorities admitted to top universities because it could circumvent the problem of poor performance by racial minorities on standardized tests...").

4. See infra note 34 and accompanying text.

5. Perhaps the most prominent and ubiquitous proponent of race-neutral affirmative action has been Richard Kahlenberg, a senior fellow at the Century Foundation. See, e.g., RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 83–182 (1996) [hereinafter Kahlenberg, The Remedy] ("Class-based affirmative action...is color-blind and yet responds to the moral desire to do something about the legacy of our nation's history."); Richard D. Kahlenberg, Class-Based Affirmative Action, 84 CALIF. L. REV. 1037, 1060–64 (1996) [hereinafter Kahlenberg, Class-Based Affirmative Action] (arguing that class-based affirmative action is morally, politically, and legally preferable to race-based affirmative action).

6. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2420–21 (2013) (holding the Court of Appeals failed to determine that adding a race-conscious component was "necessary...to achieve the educational benefits of diversity" (internal quotation marks omitted)). The plan has been successful in enrolling total black and Hispanic numbers; the university has argued, however, that it has not been successful in enrolling the mix of black and Hispanic students that the university desires. For example, the university has argued the plan enrolls too many poor students and not enough rich ones. See Tr. of Oral Arg. at 43–44 (Alito, J.) ("Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds...[b]ut you say, well, [the Ten Percent Plan] is faulty because it doesn't admit enough African Americans and Hispanics who come from privileged backgrounds.").

7. For an excellent recent history of affirmative action, see RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 39–77 (2013) (describing the development of affirmative action from the Johnson administration through the Obama administration, as well as the emergence of state ballot initiatives to ban affirmative action); see also TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 107–09 (2004) (noting that by the end of the 1960s, "most citizens now felt that all minorities deserved political equality and equal opportunities on the job"); KAHLENBERG, THE REMEDY, supra note 5, at 3–15 (recounting the early history of affirmative action); RONALD TURNER, THE PAST AND FUTURE OF AFFIRMATIVE ACTION 6 (1990) (describing the efforts of the Kennedy and Johnson administrations to strengthen employment nondiscrimination policy). The term "affirmative action" first emerged as a matter of federal policy in an executive order issued by President Kennedy in 1961. Exec. Order No. 10,925, 3 C.F.R. 448 (Mar. 6, 1961). Four years later, President Johnson directed federal contractors to "take affirmative action" to end discrimination in hiring. Exec. Order No. 11,246, 3 C.F.R. 340 (Sept. 24, 1965). At the time, "affirmative action" referred to "organized efforts by government and other institutions to make sure that opportunities...were truly open to all..." RICHARD

8. See KENNEDY, supra note 7, at 53–54. While there is not “systemic, national polling data” from the 1960s on racial preferences, “[i]solated instances in which poll questions on affirmative action were asked in the 1960s suggest that, even in this early period, the general public was highly opposed to preferential treatment.” ELAINE B. SHARP, THE SOMETIME CONNECTION: PUBLIC OPINION AND SOCIAL ORDER 74–75 (1999); see also, e.g., ANDERSON, supra note 7, at 75–83 (describing competing notions of fairness “mired in debate” and the Goldwater-led opposition to preferences, quotas, and proportional hiring); cf. Richard D. Kahlenberg, The Class-Based Future of Affirmative Action, THE AMERICAN PROSPECT, June 25, 2013, http://prospect.org/article/class-based-future-affirmative-action [hereinafter Kahlenberg, Class-Based Future] (“[A]ffirmative action based on race has been politically problematic for the left from the earliest days…”).

9. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (“[T]he State has a substantial interest that legitimately may be served by...the competitive consideration of race and ethnic origin.”).

10. See United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (holding that Title VII “does not condemn all private, voluntary, race-conscious affirmative action plans”).


12. See KENNEDY, supra note 7, at 54–69 (discussing the “affirmative action stalemate” that has developed since the late 1970s); ANDERSON, supra note 7, at 189–205 (describing the halting narrowing of affirmative action in the 1980s and general solidarity of Reagan appointees in opposing racial preferences). In a survey of federal district judges in the early 1990s, approximately 78 percent agreed with the statement, “Overall, the federal judiciary is becoming more ‘conservative’ than it was in the 1960s, 1970s, and early 1980s.” See KEVIN K. LYLES, THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 28–30 (1997). This is no doubt a residual effect of President Reagan’s unprecedented opportunity to remake the federal judiciary: Reagan made more appointments to the circuit courts of appeals than any other President and is second only to President Clinton for number of district court appointments. U.S. COURTS, JUDGESHIP APPOINTMENTS BY PRESIDENT, http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/Judges/Judgeships/docs/appointments-by-president.pdf (last visited Jan. 28, 2014); see David M. O’Brien, Federal Judgeships in Retrospect, in THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM & ITS LEGACIES 327, 327 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003) (“Reagan appointed close to half of all lower court judges, more than any other previous president.”). Most of these appointees were “opposed to [racial] preferences” and laid the foundation for later Supreme Court decisions “diminish[ing] affirmative action.” ANDERSON, supra, at 215–16. See generally THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE
ROAD TO MODERN JUDICIAL CONSERVATISM (2010) (recounting the emergence of conservative judicial activism in the late 1970s and 1980s).


15. Justice O’Connor, who joined with her more liberal colleagues to provide the critical fifth vote in Grutter, famously predicted: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” 539 U.S. at 343.

16. See Fisher v. Univ. of Tex., 570 U.S., 133 S. Ct. 2411, 2420–21 (2013) (holding the court of appeals failed to determine that adding a race-conscious component to a race-neutral affirmative action program was “necessary...to achieve the educational benefits of diversity” (internal quotation marks omitted)).


18. The public gives conflicting answers when it is asked whether it supports “racial preferences” (no) or “affirmative action” (yes). SeePew RESEARCH CTR., PUBLIC BACKS AFFIRMATIVE ACTION, BUT NOT MINORITY PREFERENCES (June 2, 2009), http://www.pewresearch.org/2009/06/02/public-backs-affirmative-action-but-not-minority-preferences/. The more meaningful surveys move beyond these vague terms and ask the public directly whether it supports using race as a factor
in decision making. Americans have consistently opposed this practice; a recent poll found opposition by a two-to-one margin (67 percent to 28 percent) even if it “result[ed] in few minority students being admitted” to colleges. Jeffrey M. Jones, In U.S., Most Reject Considering Race in College Admissions, GALLUP POLL NEWS SERV. (July 24, 2013), http://www.gallup.com/poll/163655/reject-considering-race-college-admissions.aspx.

19. See KENNEDY, supra note 7, at 69–76 (discussing California’s Proposition 209 and subsequent ballot initiatives to ban affirmative action); DANIEL C. LEWIS, DIRECT DEMOCRACY AND MINORITY RIGHTS 42–44 (2013) (evaluating role of direct democracy in state affirmative action bans).


22. WASH. REV. CODE ANN. § 49.60.400 (West 2013) (Initiative 200).


25. ARIZ. CONST. art. II, § 36 (Proposition 107).

26. OKLA. CONST. art. II, § 36A (Question 759).


31. *See* supra notes 2–3 and accompanying text.

32. *See* Fitzpatrick, Texas Ten Percent Plan, *supra* note 2, at 290 (noting that California and Florida have implemented plans that guarantee admission to the top 4 and 20 percent of students, respectively).

33. *See* id. at 347 (“Members of the Texas Legislature shrewdly identified class rank as the race-neutral university admissions criterion on which blacks and Hispanics performed better than any other...").

34. *See* Brian T. Fitzpatrick, Can Michigan Universities Use Proxies for Race after the Ban on Racial Preferences?, 13 MICH. J. RACE & L. 277, 278–79, 292 (2007) [hereinafter Fitzpatrick, Can Michigan Universities Use Proxies?] ("[Michigan] universities have identified a number of criteria which would appear to correlate fairly well with African American, Hispanic, and Native American applicants: bilingualism, residency on an Indian reservation or in Detroit, and experience overcoming discrimination."); *see also* KAHLENBERG, A BETTER AFFIRMATIVE ACTION, *supra* note 14, at 52 (noting Michigan’s preference for background factors such as “cultural awareness/experiences, status as first generation college student, low economic family background, and residence in an economically disadvantaged region”); UNIV. OF WASH., OFFICE OF ADMISSIONS, FRESHMAN REVIEW, http://admit.washington.edu/Admission/Freshmen/Review (last visited Jan. 31, 2014) (considering personal characteristics such as “[a]ttaining a college-preparatory education in the face of significant personal adversity, or disability...[or] economic disadvantage” and “[d]emonstrating cultural awareness”).

35. The Small Business Administration, for example, has a program of technical and financial support for small, disadvantaged businesses (SDBs). 13 C.F.R. § 124.101 et seq. (2013) (establishing eligibility requirements for SDBs); see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) ("[A] race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation."); *id.* at 526 (Scalia, J., concurring) (noting that small-business preferences “may well have racially disproportionate impact," but are nonetheless permissible); see also Gilbert J. Ginsburg & Janine S. Benton, One Year Later: Affirmative Action in Federal Government Contracting after Adarand, 45 AM. U. L. REV. 1903, 1917–45 (describing federal programs designed to benefit SDBs).

36. *See* KAHLENBERG, A BETTER AFFIRMATIVE ACTION, *supra* note 14, at 26–63 (profiling states that have banned affirmative action in college admissions).

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38. See, e.g., Kahlenberg, A Better Affirmative Action, supra note 14, at 4–10 (explaining why racial preferences are legally and politically vulnerable); Gregory Rodriguez, The White Anxiety Crisis, TIME, Mar. 11, 2010, http://content.time.com/time/specials/packages/article/0,28804,1971133_1971110_1971119,00.html (predicting that demographic changes may cause whites to "develop a stronger consciousness of their political interests as a group"); Nina Totenberg, Supreme Court Wades into Affirmative Action, Nat'l Pub. Radio (Feb. 21, 2012, 4:14 PM), http://www.npr.org/2012/02/21/147212858/supreme-court-wades-into-affirmative-action-issue (noting that the decisive vote in Grutter, Justice O'Connor, was replaced by Justice Alito, who "has quite consistently been hostile to the idea of racial preferences").

39. See supra note 14 and accompanying text.

40. E.g., Kennedy, supra note 7, at 248–49 ("French authorities have quietly sought to influence the racial demography of college admissions...by using as criteria of eligibility for benefits the residential location and socio-economic class position of candidates—in other words, 'race neutral' affirmative action.").

41. Compare Kahlenberg, Class-Based Affirmative Action, supra note 5, at 1060, 1099 ("If genuine equal opportunity is the agreed-upon end, class-based preference is the obvious remedy."); with Richard H. Fallon Jr., Affirmative Action Based on Economic Disadvantage, 43 UCLA L. Rev. 1913, 1951 (1996) ("[W]e should not allow proposals for economically based affirmative action to divert attention from the need for other, more effective public policies to combat both poverty and race-based disadvantage.").

42. See, e.g., Kahlenberg, A Better Affirmative Action, supra note 14, at 21 ("Even opponents of using race in student assignment concede that using socioeconomic status is perfectly legal."); John Martinez, Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs, 12 Harv. Blackletter L.J. 49, 54 (1995) ("If we reconstruct affirmative action programs according to neutral criteria, then minimum rationality judicial review would apply instead of strict scrutiny... ").

43. See Fitzpatrick, Can Michigan Universities Use Proxies?, supra note 34, at 281 ("[U]nder the Equal Protection Clause, not only are explicit racial classifications subjected to strict scrutiny, but so are race-neutral classifications that have the same purpose and effect as the explicit ones."); see also Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) ("[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious."); Ian Ayres, Narrow Tailoring, 43 UCLA L. Rev. 1781, 1791 (1996) ("The central problem is that the race-neutral means still have a race-conscious motivation."); Chapin Cimino, Comment, Class-Based Preferences in Affirmative Action Programs after Miller v. Johnson: A Race-Neutral Option, or Subterfuge?, 64 U. Chi. L. Rev. 1289, 1297 (1997)("[W]henever
the Court suspects a racial motivation behind an ostensibly neutral statute, the principle against subterfuge will prohibit the government from doing covertly what it may not do overtly.

34. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 485-86 (1989) (invalidating Richmond’s minority subcontracting quota because it was not “narrowly tailored to accomplish a remedial purpose”).


36. E.g., Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (“[T]he Equal Protection Clause does not prohibit...narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).

37. Some have argued that the Court did not faithfully apply strict scrutiny in Grutter. See, e.g., Ian Ayres & Sydney Foster, Don’t Tell, Don’t Ask: Narrow Tailoring after Grutter & Gratz, 85 TEX. L. REV. 517, 581 n.223 (2007) (“The extreme deference that Justice O’Connor showed to state officials is deeply inconsistent with the whole idea of strict scrutiny as an attempt to smoke out unjustified governmental racial preferences.”).


39. After observing that the Ten Percent Plan alone had “resulted in a more racially diverse environment,” the Court remanded the case because the Fifth Circuit failed to perform the “searching examination” of whether adding a race-conscious component was “necessary...to achieve the educational benefits of diversity.” Id. at 2414, 2416 (internal quotation marks omitted); see also id. at 2424 (Thomas, J., concurring) (“Diversity...cannot be an end pursued for its own sake.”); cf. SANDER & TAYLOR, supra note 7, at 288 (noting that the racial-preferences component is “vulnerable even under Grutter” because the University of Texas is “one of the few elite universities that already has a facially race-neutral system”).

40. See, e.g., Martinez, supra note 42, at 54 (arguing that race-neutral criteria will bypass strict scrutiny); KENNEDY, supra note 7, at 176–77 (noting that many “color-blind immediatists” are willing to countenance race-neutral plans provided they “are silent as to race”).

41. See, e.g., Hunter v. Underwood, 471 U.S. 222, 227–28, 233 (1985) (holding that a provision in the Alabama Constitution disenfranchising citizens convicted of “crimes involving moral turpitude” violated the Equal Protection Clause because the legislature chose crimes that affected ten times as many African Americans as whites); see also, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 461–62 (1979) (invalidating several race-neutral actions by the school board, including the “use of optional attendance zones, contiguous attendance areas, boundary changes[,] and the selection of sites for new school construction” because they “had the foreseeable and anticipated effect of maintaining the racial separation of the schools” (footnotes omitted)); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 201 (1973) (holding that “concentrating Negroes in certain schools by structuring attendance zones or designating ‘feeder’ schools” can violate the Equal Protection Clause).

In voting-district gerrymandering cases specifically, the Court has held that race-

52. Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979) (citations omitted); accord Hunt, 526 U.S. at 546 ("A facially neutral law...warrants strict scrutiny...if it can be proved that the law was 'motivated by a racial purpose...'").

53. See Fitzpatrick, Texas Ten Percent Plan, supra note 2, at 314-20, 334-35; Fitzpatrick, Can Michigan Universities Use Proxies?, supra note 34, at 284. I say "almost" by definition because it is not altogether clear what constitutes a "racial effect" in this line of Supreme Court jurisprudence; it all depends on what the baseline of comparison is, and the Court has used a number of different baselines over the years. See Fitzpatrick, Texas Ten Percent Plan, supra, at 298-306 (discussing different forms of "racial effects").


55. E.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."); accord Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742 (2007) ("The argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, and has been repeatedly rejected." (internal citations omitted)); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) ("We thus reaffirm the view...that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."). But see Parents Involved, 551 U.S. at 830-38 (Breyer, J., dissenting) (disputing that the Court has ever "repudiated this constitutional asymmetry between that which seeks to exclude and that which seeks to include members of minority races" (citation omitted)).

56. See, e.g., Hunt, 526 U.S. at 546 (applying strict scrutiny to facially neutral law that is "motivated by a racial purpose or object," or if it is "unexplainable on grounds other than race" (internal citations omitted)); Miller, 515 U.S. at 911-13 (holding that Georgia's redistrict plan fails strict scrutiny notwithstanding the fact that the plan was "race neutral on [its] face"); Shaw, 509 U.S. at 653 (instructing the district court to apply strict scrutiny if petitioners' allegation of racial gerrymandering is not contradicted).


59. See supra notes 18, 50, & 54 and infra note 62.

60. In Parents Involved, Justice Kennedy leaves doubt whether he would continue to subject race-neutral affirmative action to strict scrutiny: 
"[Facially neutral] 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." 551
I have explained elsewhere why I do not think Justice Kennedy's opinion should be understood to cast doubt on his adherence to precedents in this area, but it is admittedly far from clear what he meant here. See Fitzpatrick, Can Michigan Universities Use Proxies?, supra note 34, at 289–91 ("Although I think one could read Justice Kennedy's further dicta here to suggest that he no longer thinks that the Constitution is as concerned with racial gerrymandering as it is with explicit racial discrimination... in my view, the meaning Justice Kennedy most likely intended was one suggesting that, if the Court adopts the 'predominant' motivation standard... then it will be harder for plaintiffs to make the necessary showing to invoke strict scrutiny.").

61. See, e.g., Ayres, supra note 43, at 1790 ("[R]ace-neutral classifications seem less likely to provoke the kind of racial enmity that would itself undermine the remedial purpose of the legislative action."); Forde-Mazrui, supra note 14, at 2371–75 ("Race-neutral classifications are significantly less likely than racial classifications to perpetuate racial stereotypes or racial hostility..."); Don Munro, Note, The Continuing Evolution of Affirmative Action under Title VII: New Directions after the Civil Rights Act of 1991, 81 VA. L. REV. 565, 606–07 (1995) ("[C]lass-based preferences would provide a less controversial means of achieving minority gains in employment.").

62. Kahlenberg surveys the public's preference for economic affirmative action vis-à-vis racial preferences:

In 2003, for example, a Los Angeles Times survey found that Americans opposed (56 percent to 26 percent) the University of Michigan's racial preference policy, but those same Americans supported preferences for low-income students (59 percent to 31 percent). A Newsweek poll around that same time likewise found that Americans opposed preferences for blacks in university admissions (68 percent to 26 percent) but supported preferences for economically disadvantaged students (63 percent to 28 percent). A third poll, by EPIC/MRA, also found that voters opposed the University of Michigan's affirmative action plan (68 percent to 27 percent) but supported preferences for economically disadvantaged students (57 percent to 36 percent). A subsequent 2005 New York Times poll put support for socioeconomic preferences at nearly 85 percent.


63. See KENNEDY, supra note 7, at 92–94 ("Eligibility rules that say nothing explicitly about race but are wealth sensitive will still draw fire from detractors who will claim that the rules camouflage a racial Trojan horse...").

64. See Fitzpatrick, Texas Ten Percent Plan, supra note 2, at 323–34 (reviewing the legislative history of the Ten Percent Plan and motivation of its proponents).

65. See, e.g., Forde-Mazrui, supra note 14, at 2376 ("[R]ace-neutral classifications... are less likely than racial classifications to reinforce stigmatic racial stereotypes..."); Munro, supra note 61, at 608 ("[T]he traditional arguments about 'stigma' lose much of their force when applied to class-based affirmative action."); THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 253 (1995) ("Stereotyping of the poor helps to explain why cross-national research on social expenditures has found that universal
programs are more sustainable in democracies, even if they are more expensive than policies targeted solely on the poor or other 'marginal' groups.

66. See, e.g., Forde-Mazrui, supra note 14, at 2374 ("[R]ace-neutral classifications avoid the necessity of choosing which racial groups to include in a preferential program..."). But see Deborah C. Malamud, Class-Based Affirmative Action: Lessons and Caveats, 74 TEX. L. REV. 1847, 1894–98 (1996) (describing the potentially prohibitive challenge of developing a reliable and robust index of socioeconomic inequality).


69. See, e.g., Ayres, supra note 43, at 1784 (“Extending affirmative action subsidies to non-victim whites produces less-tailored, overinclusive programs.”).


72. See Fitzpatrick, Texas Ten Percent Plan, supra note 2, at 336 (“The Ten Percent Plan subordinated [traditional admissions criteria] to high school class rank by admitting roughly half of each freshman class to the University of Texas at Austin solely on the basis of class rank.”).

73. See TEX. EDUC. CODE ANN. § 51.803(a-1).
74. See Ayres, supra note 43, at 1793–96 (“Preferring race-neutral subsidies because the racial motivation is less visible violates Kant’s publicity principle that ‘[a]ll actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity.’”); Ilya Somin, Why Fisher v. Texas Might Turn Out to Be a Pyrrhic Victory for Opponents of Racial Preferences, VOLOKH CONSPIRACY, Feb. 29, 2012, 3:16 PM, http://www.volokh.com/2012/02/29/why-fisher-v-texas-might-turn-out-to-be-a-pyrrhic-victory-for-opponents-of-racial-preferences/ (“If the Supreme Court strikes down explicit race-based affirmative action but endorses the ten percent plan[r]acial preferences [would] become less transparent and more costly to society…”).


76. See Daria Roithmayr, Barriers to Entry: A Market Lock-in Model of Discrimination, 86 Va. L. Rev. 727, 734 (2000) (arguing that the current distribution in educational achievement is “the product of earlier anticompetitive behavior by whites” and that race-neutral measures are insufficient to overcome this locked-in racial preference).


78. In 2012, more than half of all Americans living below the poverty line were black (27.2 percent) or Hispanic (25.6 percent), whereas these groups comprised less than a third of the general population (12.9 percent and 17.1 percent, respectively). Carmen DeNavas-Walt et al., U.S. CENSUS BUREAU, DEPARTMENT OF COMMERCE, Income, Poverty, and Health Insurance in the United States: 2012, at 14 (Sept. 2013), available at http://www.census.gov/prod/2013pubs/p60-245.pdf.