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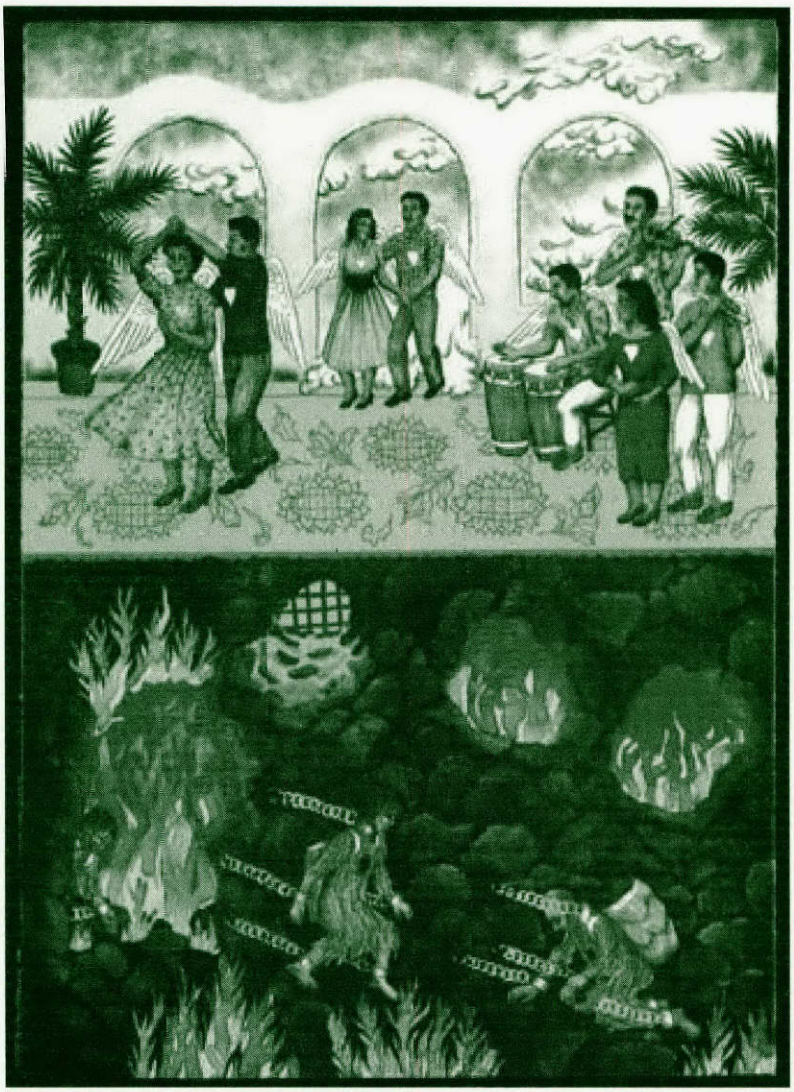

Heaven and Hell **Carmen Lomas Garza**

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THE UNIVERSITY OF TEXAS SCHOOL OF LAW

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— Benito Juarez, President of Mexico

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The purpose of the *Journal* is to serve as an academic forum for legal issues that affect Latinos. Through academic discussion, the *Journal* seeks to inform scholars, judges, practitioners, and organizations of these issues and, as a result, improve Latinos' legal representation. As an academic publication with an informational purpose, the *Journal* aspires to be a neutral forum open to all views. Accordingly, the *Journal* does not advocate particular political views or agendas.

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By: Carmen Lomas Garza

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About the author: Carmen Lomas Garza is a Mexican American artist who has devoted her life to instilling appreciation for Mexican-American culture through her art. At the age of thirteen, Ms. Garza decided to become a visual artist and pursue every opportunity to advance her knowledge of art in institutions of higher education. The Chicano Movement of the late 1960s inspired the dedication of her creativity to the depiction of special and everyday events in the lives of Mexican Americans based on her memories and experiences in South Texas. She saw the need to create images that would elicit recognition and appreciation among Mexican Americans, both adults and children, while at the same time serve as a source of education for others not familiar with this culture. It has been her objective since 1969 to make paintings, prints, installations for Day of the Dead, paper and metal cutouts to instill pride in Mexican American history and culture in American society.

Ms Garza has had numerous major exhibitions in the United States, which includes: the Hirshhorn Museum and Sculpture Garden/Smithsonian Institution in Washington D.C. the Whitney Museum of American Art at Phillip Morris in New York City, the Smith College Museum in Northampton, Massachusetts, Nettie Lee Benson Latin American Collection at the University of Texas in Austin, Texas, among many others.

If you are further interested in Ms. Garza's artwork, more of her exhibits can be located in her webpage: http://carmenlomasgarza.com/, her email being lasecretaria@carmenlomasgarza.com.

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1. Legal Articles and Notes

   Legal articles and notes include traditional pieces dealing with statutes, court decisions, and administrative policies affecting Latinos. Pieces will be published as articles if submitted by non-student authors. Any piece submitted by a student and accepted will appear as a note.

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   B. Biographical or Cultural Capsules

      The Editorial Board may consider publishing biographical sketches or cultural capsules focusing on Latinos and their role within the legal community.

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      The *Journal* welcomes suggestions on topics or pieces to be considered for publication in future issues.

ARTICLE

OF COURSE THE TEXAS TOP TEN PERCENT IS CONSTITUTIONAL AND IT'S PRETTY GOOD POLICY TOO

DAVID G. HINOJOSA[1,2]

While education is often referred to as the great equalizer to achieve the "American Dream" for people from all different walks of life, the continuing inequities in opportunity and access to a quality education make that "equalizing" concept far more idealistic than realistic for many students of color (especially African American, Latino and Native American) and low income students.[3] This especially rings true for these student groups when trying to access higher education.

In 1995, Texas policymakers were faced with a real quandary of higher education access and opportunity for all students following the Fifth Circuit Court of Appeals' decision in *Hopwood v. Texas*.[4] In *Hopwood*, White students challenged the University of Texas School of Law's affirmative action admissions plan for Black and Latino students under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution.[5] The Fifth

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1. National Director of Policy for the Intercultural Development Research Association ("IDRA"). The author previously litigated systemic education civil rights cases with the Mexican American Legal Defense and Educational Fund ("MALDEF"). At MALDEF, he represented amici high school and university students of color, and civil rights, education and community organizations in the *Fisher v. Texas* case since its filing in 2009. More recently, he authored a Supreme Court amicus brief for IDRA in 2015. The opinions expressed here are solely of the author in his individual capacity and do not reflect the opinions of IDRA or MALDEF.

2. This paper was written with the collaboration of Barbara Depeña and Lena Silva, both first year law students at the University of Texas School of Law and members of the Texas Hispanic Journal of Law and Policy.

3. The author recognizes that student groups are not monolithic performing students and that even among the various groups disaggregated by race, ethnicity, income, language, disability and other characteristics, students perform at varying levels. For example, although the Asian group is often perceived as a high academic performing group, disaggregated groups within the broader defined Asian group perform at various levels. Nevertheless, the data aggregated by these various classes can tell researchers and advocates much about treatment, access and opportunity.

4. *Hopwood v. State of Tex.*, 78 F.3d 932 (5th Cir. 1996) *abrogated by Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)

5. *See generally, id.* (Challenge to University of Texas School of Law's affirmative action admissions plan).

Circuit struck down the law school's use of a separate committee to review applications from minority students as unconstitutional, holding that the use of race could not be used as a plus factor in considering student diversity. nor could it be used to remedy societal discrimination, discrimination in K-12 schooling, or to achieve racial diversity.[6] The Attorney General of Texas holding office at the time, Dan Morales, then issued an opinion stating that none of the schools in Texas could engage in any affirmative action admissions policies, scholarships or outreach.[7]

With declining minority[8] student enrollment at UT Austin and Texas A&M, the Texas Legislature went to work on a race-neutral college admissions plan and passed House Bill 588 in 1997 (also known as the Top Ten Percent law. "TTP" herein).[9] This bill required Texas's four-year public universities to admit high school students graduating in the top ten percent of their class, including the flagships of the University of Texas at Austin and Texas A&M University.[10]

Several years later, the law is seemingly under attack from several angles as more minority students are graduating in the top ten percent of their class and choosing to attend the flagship universities. Some legislators, parents, and attendants at the University of Texas at Austin have been outspoken about their dissatisfaction with the law due to the crowding out of largely. white suburban alumni's students being denied entry into UT.[11] Some legal

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6. David Orentlicher, Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality, 74 Notre Dame L. Rev. 181, 183-85 (1998).

7. William Forbath & Gerald Torres, Symposium: Merit and Diversity After Hopwood, Stan. L. & Pol'y Rev 185, *186 (Spring 1999).

8. For purposes of this article, 'minority' students refers to those two student groups who are identified as being significantly under-enrolled in postsecondary education in Texas, namely Latino and Black students.

9. Tex. Educ. Code § 51.803 (2015). Automatic Admission: All Institutions.(a) Subject to Subsection (a-1), each general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated with a grade point average in the top 10 percent of the student's high school graduating class in one of the two school years preceding the academic year for which the applicant is applying for admission and:

(1) the applicant graduated from a public or private high school in this state accredited by a generally recognized accrediting organization or from a high school operated by the United States Department of Defense;

(2) the applicant:

(A) successfully completed:

(i) at a public high school, the curriculum requirements established under Section 28.025 for the distinguished level of achievement under the foundation high school program; or

(ii) at a high school to which Section 28.025 does not apply, a curriculum that is equivalent in content and rigor to the distinguished level of achievement under the foundation high school program; or

(B) satisfied ACT's College Readiness Benchmarks on the ACT assessment applicable to the applicant or earned on the SAT assessment a score of at least 1,500 out of 2,400 or the equivalent.

10. Danielle Holley and Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 Harv. C.R.-C.L. L. Rev. 245, 245 (1999).

11. *The University of Texas at Austin Student Profile Admitted Class of 2010*, (Sept. 20, 2010) https://www.utexas.edu/vp/irla/Documents/AdmittedFreshmenProfile-2010.pdf. *See also infra* note 37, Fall 2015 Report (for 2013 and 2015 admissions data).

scholars have also taken aim at the law, arguing that despite the obvious racial neutrality of the law and its impact on geographic diversity, it likely violates the Fourteenth Amendment's equal protection clause.

This article seeks to address both of these arguments. From a legal perspective, the argument that the TTP law is unconstitutional because it amounts to unlawful, intentional discrimination against White students is creative, but severely flawed based on well-established Supreme Court precedent. First, unquestionably, the law on its face is race-neutral. Second, a court would have to stretch the facts and the law very far to find that the actions of the legislature in adopting the TTP were intended to harm White students because of their race. In fact, White students continue to benefit from the TTP law at rates greater than other student groups (except for Asians), which raises the question of whether White students challenging the law would even be able to satisfy the requisite standing principles and to establish a disparate effect. Further, an examination of the application the *Feeney* standard and the *Arlington Heights* factors shows that the TTP is not the type of intentional discriminatory law considered to violate the equal protection rights of students under the Fourteenth Amendment.

From a policy perspective, the TTP has opened the doors of the flagship universities to low income and rural communities, as well as concentrated communities of color—all groups who were typically denied access to the flagships for generations under admissions criteria skewed in favor of White students. This is especially true when comparing the demographics of TTP students to students admitted under UT Austin's admission practices for non-TTP students. While the success of the TTP is limited because the state has failed to ensure adequate support of other pipeline initiatives, it has resulted in a far more equitable approach in light of the uneven playing field for resilient minority students achieving in spite of Texas's highly inequitable public school system. The TTP has stripped away UT Austin's discretionary authority to admit students solely because of their privileged education and status, though several thousand privileged students are still admitted because they graduate in the top ten percent of their class.

Lastly, given the sound policy and the legal sanction of the law, the author outlines certain policies for the Texas Legislature to consider that would ensure access and opportunity for all student groups. These include, among other proposed policies: the need to create an equitable PK-12 public education system that better prepares students for college in underserved communities and provides stronger academic counseling; expanding the number of flagship universities in Texas; creating pathways for all student groups in the admission processes for certain colleges within the universities that routinely deny underserved students admission; making college affordable by reigning in tuition costs and providing students and universities access to greater financial aid packages.

CAN THE TOP TEN PERCENT LAW SURVIVE A CLAIM OF DISCRIMINATION BY WHITE STUDENTS?[12]

The University of Texas at Austin's holistic admissions plan with its limited consideration of race has been under fire in the courts since the filing of *Fisher v. Texas* in the Western District of Texas in 2009. In that case, plaintiff Abigail Fisher claims that the University of Texas at Austin ("UT Austin") unfairly denied her admission by implementing an affirmative action admissions plan that favored less qualified Black and Latino students in violation of her rights to equal protection under the Fourteenth Amendment of the U.S. Constitution and Title VI of the Civil Rights Act of 1964.[13] In the trial court and on appeal, the parties do not dispute that UT Austin's holistic admissions plan purposefully considers race and, therefore, the court must apply strict scrutiny to the admissions plan.[14] The only question remaining is whether UT Austin's holistic plan satisfies strict scrutiny: that is, whether the plan is narrowly tailored to satisfy a compelling interest in the educational benefits that flow a diverse student body. including racial diversity.[15]

The constitutionality of the TTP is not at issue in that case,[16] although it was the subject of considerable briefing and debate. The TTP's constitutionality. however. has been questioned by some attorneys and scholars claiming that it was passed with the intention to discriminate against White students.[17] However, many of these pieces are conclusory in na-

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12. The focus of the legal arguments below center on admission to the University of Texas at Austin because it has been ground zero for the debate on both the value of the top ten percent and the legality of a holistic admissions plan that considers race as one factor of many. 'White' students (non-Latino) are used here as the prospective plaintiffs because they have been the primary challengers of affirmative action admission plans in past years. Recently, Asian students were part of two cases challenging the affirmative action plans of Harvard College, *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College (Harvard Corp.)*, No. 14-14176 (D. Mass.), and the University of North Carolina, *Students for Fair Admissions, Inc. v. Univ. of N.C.* No. 1:14-cv-00954 (M.D. N.C.). Nevertheless, a challenge by Asian students would also likely fail for many of the same reasons stated here, including the lack of a disparate impact against Asians resulting from the law.

13. Amended Complaint for Declaratory, Injunctive, and Other Relief, Fisher v. Texas, No. 1:08-cv-00263-SS (W.D. Tex. April 17, 2008).

14. *See, e.g.*. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415, 2419-20 (2013) (Fisher I) (both parties recognize race as a protected class, warranting a strict scrutiny standard of review).

15. Adam Liptak, *Supreme Court to Weigh Race in College Admissions*, NY Times (June 29, 2015), http://www.nytimes.com/2015/06/30/us/supreme-court-will-reconsider-affirmative-action-case.html?_r=0 (last visited April 9, 2016).

16. *See* Amended Complaint, *supra* note 13, at 24 (Plaintiff Fisher alleging that the race-neutral TTP had achieved great diversity for UT Austin and there was no reason for UT Austin to return to the use of race for admissions).

17. *See, e.g.*. Brian Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 Baylor L. Rev. 289 (2001) (concluding that TTP was drafted with a discriminatory purpose and would be subject to strict scrutiny); Michael C. Dorf, *Is the Texas Ten Percent Plan 'Race Neutral"?*. Verdict Justia (Dec. 16, 2015) *https://verdict.justia.com/2015/12/16/is-the-texas-ten-percent-plan-race-neutral*; (suggesting Top TTP is not race-neutral). *http://news.vanderbilt.edu/2015/12/vanderbilt-professor-sees-another-constitutional-problem-with-texas-admissions-plan/; but see* Fitzpatrick at 293, note 8, noting the following authors upholding the constitutionality of the TTP: 'William E. Forbath & Gerald Torres, Merit and Diversity after Hopwood, 10 Stan. L. & Pol'y Rev. 185, 188 (1999) (concluding after a cursory analysis that the response in Texas will be constitutional because it is race-neutral); Kim Forde-Mazrui, The

ture and have not applied an appropriate, rigorous analysis as contemplated by the courts. Even Justice Ruth Ginsburg's comment in *Fisher I* that "only an ostrich could regard the supposedly neutral alternatives [like the TTP] as race unconscious"[18] is off-track under current Supreme Court precedent analyzing intentional discrimination.

Claims of discrimination filed in courts under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution and pursuant to a private right of action under Title VI of the Civil Rights Act of 1964 have been interpreted to require both a discriminatory impact and a discriminatory intent.[19] [20]And while both the Fourteenth Amendment and Title VI were principally created to protect Black and other minority groups from racial discrimination, the courts have interpreted both to protect all races and ethnicities.[21]

Constitutional Implications of Race-Neutral Affirmative Action, 88 Geo. L.J. 2331, 2346-48, 64-82 (2000) (assuming that these responses will incur strict scrutiny, but arguing that they will survive such scrutiny); Danielle Holley & Delia Spencer, The Texas Ten Percent Plan, 34 Harv. C.R.-C.L. L. Rev. 245, 259-60 (1999) (concluding, after a cursory analysis, that the response in Texas will be constitutional because it is race-neutral); Mark R. Killenbeck, Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action, 87 Cal. L. Rev. 1299, 1368 (1999) (concluding, after cursory analysis, that the Ten Percent Plan 'should survive quite easily if challenged, for while undoubtedly directed toward an increase in the enrollment of minority students, at no point does the Policy expressly mention that objective"); David Orentlicher, Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality, 74 Notre Dame L. Rev. 181, 193-97 (1998) (arguing that the response in Texas does not violate the constitutional test for discriminatory effect); Kathleen M. Sullivan, After Affirmative Action, 59 Ohio St. L.J. 1039, 1047-54 (1998) (arguing that the response in Texas does not violate the constitutional tests for either racially discriminatory purpose or effect).

18. *Fisher I*, 133 S.Ct. at 2333 (J. Ginsburg dissenting).

19. *See e.g.* Washington v. Davis, 426 U.S. 229, (1976) (holding that absent of an intent to discriminate, the discriminatory impact against African American applicants resulting from a police department's race-neutral test was not enough to amount to illegal discrimination under the Fourteenth Amendment's equal protection clause); *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (holding that there is no private right of action to enforce the disparate impact regulations created by the Department of Justice under § 602 of Title VI, 42 U.S.C. 2000d-1, and that a private right of action under Title VI must be based on intentional discrimination). The Fourteenth Amendment to the United States Constitution provides in pertinent part: 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. § 1. Title VI of the Civil Rights Act of 1964 provides in relevant part: No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. Because a private right of action claiming discrimination under Title VI of the Civil Rights Act of 1964 is interpreted with the same intent standard as claims filed under the equal protection clause of the Fourteenth Amendment, this article focuses primarily on the equal protection clause.

20. *See generally* Derek Black, The Mysteriously Reappearing cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs, 67 Maryland L. Rev. 358 (2008) Available at: http://ssrn.com/abstract=1943585 (discussing intentional discrimination standards under the Fourteenth Amendment and Title VI's private right of action claim).

21. *See, e.g. Regents of the Univ. of California*, 438 U.S. 265, 287-305 (1976) (J. Powell) (discussing history and application of equal protection clause against several racial and ethnic groups and concluding that White students also deserve equal protection as a suspect class warranting strict scrutiny) based on their race and ethnicity)

A. The Top Ten Percent Law is Race-Neutral on its Face

Some laws and policies are unconstitutional and illegal due, in part, to the express racial classification they employ. This facial test centers on the language of the challenged policy or practice to determine whether it classifies people by their race or other protected class.[22] Policies that set aside quotas for minority students for admission purposes in education, for example, are subjected to strict scrutiny based on their express racial classification of applicants. In *Regents of the University of California v. Bakke*, a white plaintiff denied admission to the medical school at the University of California at Davis challenged the Regents' policy setting aside sixteen seats out of one-hundred for African American, Latino, American Indian, and Asian students.[23] The Supreme Court subjected the quota system to strict scrutiny analysis due to the quota's reliance on race as a determinative factor for admissions. "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial, but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[24] Although the court acknowledged that policymakers may consider race among other factors in affirmative action programs created in response to findings of past and present discrimination and, in higher education, to promote the educational benefits flowing from a diverse student body.[25] the Supreme Court found that the quota system was not narrowly tailored to address either and stuck down the Regents' plan.

Likewise, in *City of Richmond v. Croson*, the Supreme Court ruled that a quota system that expressly classified construction businesses based on race was subject to strict scrutiny despite its benign purpose of increasing state-sponsored minority business involvement.[26] It failed strict scrutiny because the means (30% racial quota system) were not narrowly tailored to the ends of mollifying past state-sponsored discrimination in the Richmond construction industry.[27]

Unlike the quota systems in *City of Richmond* and *Bakke*, the TTP is race-neutral on its face because it does not classify students based on race or operate on the basis of race.[28] The law grants all Texas high school students attending accredited public and private high

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22. *Washington v. Davis*, 426 U.S. at 242.
23. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
24. *Id.* at 307 (J. Powell).
25. *Id.*at 307 (discrimination); *id.* at 311-12 (educational benefits of diversity viewed as a compelling state interest and derived from a university's interest in academic freedom under the First Amendment).
26. Kim Forde-Mazrui, *The Constitutional Implication of Race-Neutral Affirmative Action*, 88 Geo. L.J. 2331, 2334 (2000).
27. *Id.* at 2339.
28. *Id.* at 2351.

schools with grade point averages in the top ten percent of their graduating class and completing the Recommended High School Program, or distinguished level of achievement under the new foundation school program, automatic admission to Texas public universities.[29] Because the TTP on its face does not expressly invoke a student's race or other suspect class, it is not facially invalid.

That answers the easier question. A discussion of whether the TTP is intentionally discriminatory for other reasons follows next.

B. The Test for As-Applied Intentional and Purposeful Discrimination

Even if a statute or policy is facially neutral, it may still run afoul of the equal protection clause. To violate the equal protection clause and be subject to strict scrutiny, it must have a disparate impact on a suspect class of people and "must ultimately be traced to a racially discriminatory purpose."[30] In terms of affirmative action in higher education, these "race-neutral" actions (also referred to as "alternative action" by some commentators[31]) may seek to create racial diversity without relying on express racial classifications.[32] However, this "alternative' may still be subject to strict scrutiny if the underlying purpose is discriminatory.[33]

1. Does the TTP Cause a Discriminatory Effect on White Students?

Failure to present evidence of a discriminatory effect on White students, even if a discriminatory purpose is found, may be enough to defeat an equal protection challenge.[34] Prospective white plaintiffs would find great difficulty in alleging, much less proving, a discriminatory effect on White student admissions at UT Austin resulting from the TTP. The

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29. Tex. Educ. Code § 51.803 (2015). In 2009, the Texas Legislature enacted SB 175, which capped students admitted automatically through the TTP at 75% of total projected admissions at UT Austin. *See Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 655 (5th Cir. 2014); *see also* Tex. Educ. Code § 51.803(a-1). This cap on admissions will be lifted if the Supreme Court overrules UT Austin's limited use of race under its holistic admissions plan for non-TTP students or UT Austin decides to no longer consider a student's race or ethnicity as part of its holistic admissions plan. Tex. Educ. Code § 51.803(k).

30. *Washington v. Davis*, 426 U.S. at 240.

31. *See* Forde-Mazrui, *supra* note 17, at 2332.

32. *Id.*

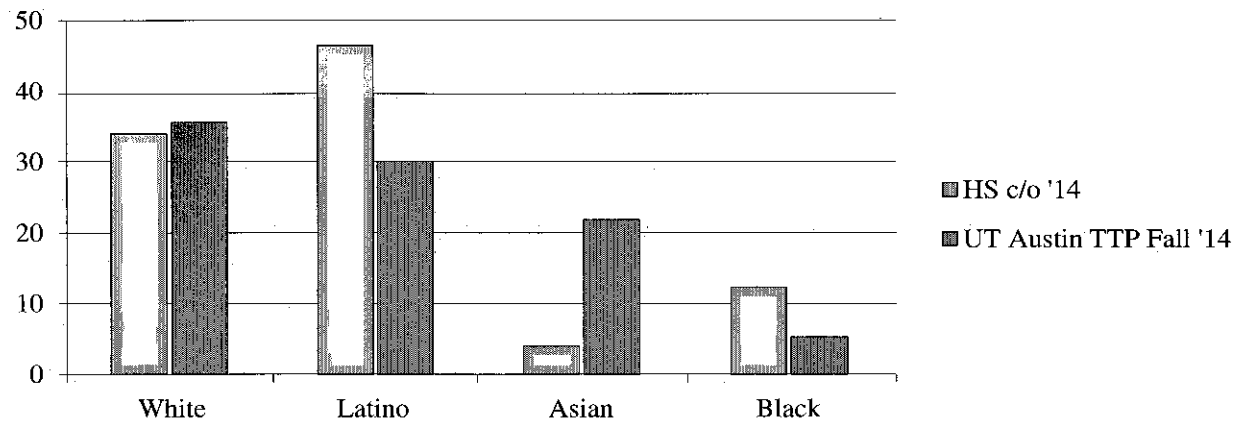
33. *Id.* at 2333–2334.

34. *See, e.g., Palmer v. Thompson*, 403 U.S. 217, 225 (1971)(denying an equal protection claim due to the lack of a discriminatory effect on Black plaintiff's challenge to city's closure of all swimming pools rather than desegregating them); *but see Church of Scientology v. City of Flag Water,* 2 F.3d 1514, 1528-29 (11th Cir. 1993)(questioning *Palmer*'s holding over time, citing e.g. *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979)(sex discrimination); *see also City of Mobile v. Bolden*, 446 U.S. 55 (1980)(race discrimination under Fourteenth and Fifteenth Amendments)).

results of the TTP's effect on UT Austin admission rates by race show that White students still benefit disproportionately from TTP admissions at UT Austin.

White students make up the highest percentage of freshman students admitted to UT Austin under the TTP despite graduating far fewer high school students than Latinos, as shown in Figure 1. For the freshman class admitted in the fall of 2014, UT admitted 401 more white students (36%) than Latino students (30%). Yet, Latinos made up 47% of the high school Class of 2014 compared to 35% White. Black students comprised roughly 13% of the high school graduates in 2014 but only 5% of all students admitted to UT. The chart below shows that UT Austin admits Asian and White students at rates much higher than their comparative high school graduation rates.

FIGURE 1. COMPARISON OF TEXAS HIGH SCHOOL CLASS OF 2014 GRADUATES BY RACE AND FALL 2014 UT AUSTIN TOP TEN PERCENT FRESHMAN ADMITS BY RACE[35]

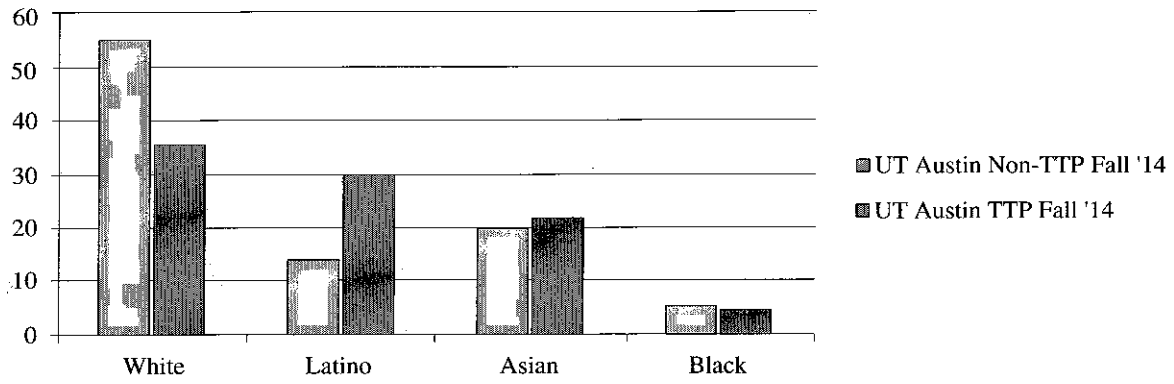


White students also maintain a significant advantage over other racial groups for admissions outside of the TTP. As Figure 2 below shows, White freshman students entering UT Austin in the fall of 2014 made up more than one out of every two students admitted outside of the TTP (55%)—a rate far exceeding the White TTP admission rate of 36%. All

35. *See Tex. Edu. Agency, Texas Academic Performance Report, 2014-15 State Performance Report (2015), https://rptsvr1.tea.texas.gov/perfreport/tapr/2015/state.pdf.* The State TAPR's (hereinafter, (Year) State TAPR Report), https://rptsvr1.tea.texas.gov/perfreport/tapr/. *The University of Texas at Austin Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representative on the Implementation of SB 175, 81st Legislature, For the period ending Fall 2014* (Dec. 2014), at 30. https://www.utexas.edu/student/admissions/research/SB_175_Report_for_2014.pdf

other student groups' non-TTP admission rates dropped, with the exception of the Black students who stayed even at 5%.[36]

FIGURE 2. FALL 2014 UT AUSTIN FRESHMAN ADMITS BY RACE, TTP V. NON-TTP



In 2009, the Intercultural Development Research Association ("IDRA") conducted an analysis of the probability of admission into UT Austin between 1998 and 2008 for Black, Latino, White, and Native American students.[37] The analysis showed that due to the increasing number of applications to UT Austin, the probability for all groups fell over the ten-year period.[38] Nevertheless, White students continued to have a greater chance for admission into UT over the other student groups followed by Latino students.[39] Black students had the lowest chance of being admitted for each year studied.[40]

Thus, neither the TTP nor the holistic admissions plan for non-TTP students appear to disparately impact White students as a group but instead, provide them with advantages in comparison to the minority groups.[41] Accordingly, a court could summarily rule against a

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36. For the fall of 2015, Black students accounted for 7% of TTP students admitted compared to 5% of non-TTP students; Asians 21% of TTP and 25% of Non-TTP: Latinos 33% of TTP and 14% of non-TTP: and Whites 34% of TTP and 49% of non-TTP. *The University of Texas at Austin Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, 81st Legislature, For the period ending Fall 2015* (Dec. 2015), at 33. The authors did not perform a similar analysis of the 2015 entering freshman class with high school graduation rates because the state will not publish those rates until the fall of 2016.

37. *See* IDRA, *Analysis of Minority Student Access to the University of Texas at Austin, 1998-2008* 2 (May 2009), http://www.idra.org/images/stories/Access%20Index%20Key%20Findings%20May%202009.pdf.

38. *Id.* at 2.

39. *Id.*

40. *Id.*

41. This analysis does not suggest that that the holistic admissions plan is not working for minority applicants to UT Austin and, therefore, should be rendered unconstitutional in *Fisher*. While that topic is not relevant for purposes here, readers may want to review IDRA's Supreme Court amicus brief filed in *Fisher*, which presents strong arguments

White plaintiff challenging the TTP under the Fourteenth Amendment's equal protection clause because there is no disparate effect on White students resulting from the law.[42]

2. Is the TTP intended to discriminate against White students?

As noted in the prior section, a court would likely dismiss a case filed by White students challenging the TTP as racially discriminatory under the Fourteenth Amendment's equal protection clause because the law neither classifies students on the basis of race nor does it have a disparate impact on White students. Nevertheless, as a matter of exercise and to refute other articles written on the matter, the author will examine whether the TTP was intended to discriminate against White students on the basis of their race.[43] As the courts have held, "[t]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[44] "Discriminatory purpose" implies that the decisionmaker selected or reaffirmed a particular course of action, at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[45]

a. Analysis of the TTP under Feeney

The Feeney case presents a good example of how a reviewing court may examine the TTP law. There, females challenged the State of Massachusetts' employment preference system for awarding veterans additional points in their job applications based on their service. Despite evidence showing that 98% of the veterans were male at the time of the litigation, the court noted that "nothing in the record demonstrates that this preference for veterans was originally devised or subsequently reenacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service. To the contrary, the statutory history showed that the benefit of the preference was consistently offered to 'any person' who was a veteran. That benefit has been extended to women under a very broad statutory definition of the term veteran."[46]

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supporting the constitutionality of UT Austin's holistic admissions plan. *See* Amicus Brief of IDRA in Support of Respondents, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (2015) available at http://createsend.com/t/r-97E8BD355A25D8682540EF23F30FEDED.

42. *See* Orentlicher *supra* note 6, at 196 (noting that in *Palmer v. Thompson*, 403 U.S. 217 (1971), the Supreme Court permitted a discriminatory motivated policy to shut down all city swimming pools because the policy neither included a racial classification nor did it have a discriminatory impact on any racial group).

43. *See, e.g.*, *Washington v. Davis*, 426 U.S. at 239 (discriminatory intent needed in addition to disparate impact).

44. *Id.* at 240.

45. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (citation and footnote omitted) (rejecting a claim of intentional gender-based discrimination under the Equal Protection Clause against a statutory hiring preference for veterans, over 98% of whom were male and only 1.8% of whom were female at the time of the complaint).

46. *Id.*

Here, a court would be similarly hard-pressed to find the TTP in violation of the equal protection clause. Nothing in the legislative record shows that the TTP was enacted because it would keep any racial student group out of higher education, or out of UT Austin.[47] Indeed, as in *Feeney*, the statutory history of the TTP shows that the benefit of ranking in the top ten percent would be offered to any student who completed a required curriculum[48] and ranked in the top ten percent in his or her graduating class, whether that class was 90% White or 90% Latino. Because the TTP does not single out Black and Latino students for preferential treatment, nor does it single out White students for unfavorable treatment, and there does not appear to be any evidence of discriminatory effect on White students, a court would likely negate a claim by White students challenging the TTP.

b. The TTP scrutinized under the Arlington Heights *factors*

The courts may also employ the *Arlington Heights* test to determine intent.[49] "Because direct evidence of discriminatory purpose is rarely available, courts must make 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"[50] Courts "must look at the totality of the relevant evidence to determine whether invidious discriminatory purpose was a motivating factor for the decision."[51] Challengers of the TTP must prove that the Texas Legislature enacted the TTP *because of race*, not because of another permissible factor."[52]

Trying to determine the intent of legislative body is no easy task. As the Fifth Circuit held recently in *Veasey v. Abbott*, "Discerning the intent of a decision-making body is diffi-

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47. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1112 (1989)(noting that the *Feeney* Court 'refused to import into equal protection the familiar doctrine that a person intends the natural and foreseeable consequences of her voluntary actions").

48. Under House Bill 5 (83rd RS) signed into law in 2013, the Texas Legislature revised the high school curriculum program. Students must complete the Foundation School Program and choose an endorsement offered by their school district. Tex. Educ. Code § 28.025(b) (2015). However, completion of the default program will no longer automatically qualify a student ranking in the top ten percent of her graduating class for automatic admission under the TTP. As noted earlier, to qualify for the TTP, students must complete the distinguished level of achievement. *See* Tex. Educ. Code § 51.803 (2015). The HB 5 graduation requirements become mandatory for all students beginning with the Class of 2017.

49. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 255 (1977)(Court examining the corporation's intent to discriminate against Black plaintiffs who challenged the denial of the rezoning petition and creating different factors that may be considered in discovering intent in a facially neutral policy).

50. *Santamaria v. Dallas Indep. Sch. Dist.* 2006 U.S. Dist. LEXIS 83417,*107-08 (N.D. Tex. 2006) (citing *Jim Sowell Constr. Co. v. City of Coppell, Tex.. 61 F.Supp.2d 542, 546 (N.D.Tex.1999)* (Fitzwater, J.) (quoting *Arlington Heights, 429 U.S. at 266*))(other citations omitted).

51. *Id.* (citing *Washington, 426 U.S. at 242*).

52. *See* Ortiz, *supra note* 48, at 1113 (holding *Arlington Heights* requires 'real evidence of motivation to disadvantage a protected group, and prohibit governments 'from pursuing discriminatory goals but not from reaching disparate results").

cult and problematic."[53] It is even more difficult when attempting to determine "the intent of an entire state legislature. '[54] Nevertheless, the Supreme Court has laid out a nonexclusive list of factors that the courts may consider in trying to flush out the motivation and discriminatory intent of state actors charged with violating the equal protection rights of persons on the basis of race. The *Arlington* factors are:

1) The impact of the decision on race;
2) The historical background of the decision;
3) The specific sequence of events leading up to the decision;
4) Departures from normal procedure, including substantive departures if the factors usually considered would have led to a different result; and
5) The legislative or administrative history.[55]

1. Impact of the Top Ten Percent on Race

Whether the challenged action or policy "bears more heavily on one race than another" may indicate, along with other supporting factors, that the state acted with discriminatory intent. "*Sometimes a clear pattern, unexplainable on grounds other than race,* emerges from the effect of the state action even when the governing legislation appears neutral on its face."[56] Absent a "stark" pattern, however, impact on race alone is not determinative.[57]

There appears to be nary any evidence that the TTP is negatively impacting White students' access to UT Austin, much less a "stark" or 'clear' pattern. As noted earlier, UT Austin continues to admit a higher percentage of White students into UT Austin through the TTP compared to the minority student groups and the enrollment records likewise demonstrate that UT Austin enrolls more White students than the other races.[58] High school graduation rates for White students in Texas likely explain any decrease in the number and percentage of declining admission rates for White students. Over the last ten years, the total number of high school graduates rose from 244,165 for the Class of 2004 to 303,109 graduates for the Class of 2014. All student racial and ethnic groups increased the number of graduates, except White students who graduated nearly 13,000 fewer students in 2014.[59]

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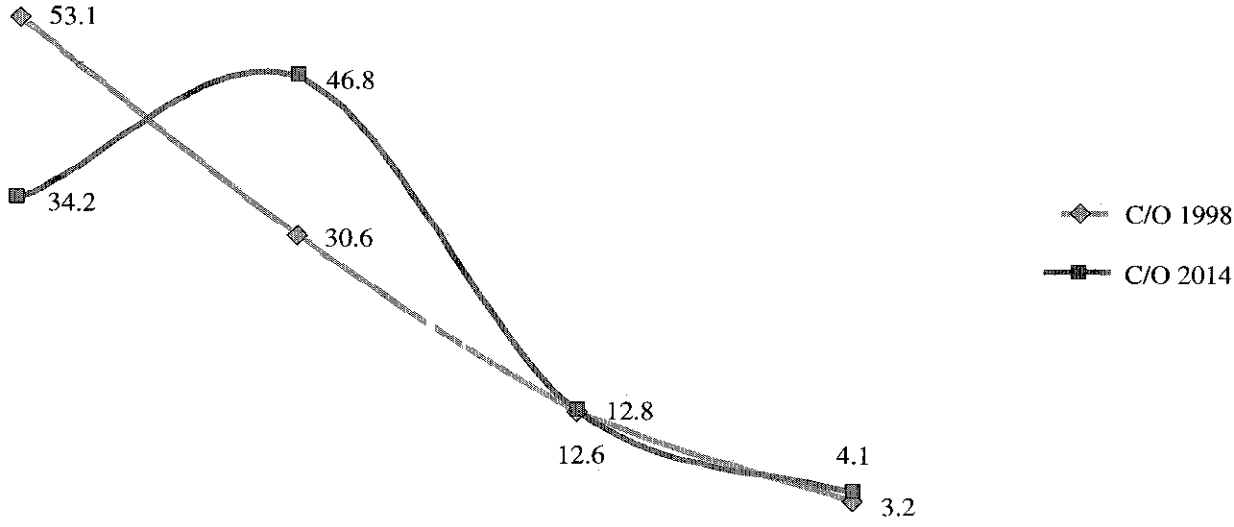
53. 796 F.3d 487, 499 (5th Cir. 2015)(citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)).
54. *Id.*
55. Arlington Heights, 429 U.S. at 266-69.
56. Arlington Heights, 429 U.S. at 266-67.
57. *Id.*
58. *See supra* note 36-37 (discussing enrollment figures from 2012-15 at UT Austin).
59. 2014-15 State TAPR Report; TEX. EDUC. AGENCY, TEXAS ACADEMIC EXCELLENCE INDICATOR SYSTEM REPORT, 2004-05 STATE PERFORMANCE REPORT (2005).

Figure 3 below shows that between the years 1998 and 2014, White high school graduates declined by nearly twenty percentage points.

FIGURE 3. PERCENT OF HIGH SCHOOL GRADUATES IN TEXAS PUBLIC SCHOOLS.



It is difficult to discern any appreciable impact on White student admissions resulting from the TTP. The publicly available data indicates that the courts would likely find no evidence of disparate impact against White students.

2. Historical Background of the Texas Top Ten Percent and Legislative History[60]

The historical background of the Texas Top Ten Percent Plan is another source for courts to weigh relevant evidence of intentional and purposeful discrimination, "particularly if it reveals a series of official actions taken for invidious purposes."[61] Texas has historically struggled with integration of its public school system at all levels as evidenced by the mandated segregation in the Texas Constitution that lasted until 1969.[62] Scholarships "for whites only" were maintained at the University of Texas at Austin until the 1960s.[63]

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60. *Arlington Heights*, 429 U.S. at 267-68 (determining that legislative history and historical background are factors to consider.)
61. *Id.* at 267.
62. Danielle Holley and Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 Harv. C.R.-C.L. L. Rev. 245, 245 (1999).
63. *Id.*

A series of actions both at the state and university levels attempted to address the past historical discrimination against minority students by including targets for Black and Latino students in higher education. Much of this activity resulted from the U.S. Department of Education Office of Civil Rights' investigation into the state's higher education system in the 1970s that resulted in a finding that Texas had failed "to eliminate the vestiges of its former de jure racially dual system of public higher education, a system that segregated blacks and whites."[64]

Following the Hopwood ruling, some Texas legislators went to work to devise a plan to ensure that the state's universities remained accessible by qualified students of all races. House Bill 588 was filed by South Texas Representative Irma Rangel on January 21, 1997.[65] Because the bill targeted the top ten percent rankings in all schools across Texas, HB 588 had the promise of reaching students in underrepresented schools, including rural, urban, low income and high minority schools.[66] As envisioned by its drafters, HB 588 would help recruit "the very best students **of each school** in the state" to the flagship universities.[67]

The Texas Legislature enacted the TTP in 1997, one year following the Fifth Circuit's *Hopwood* decision.[68] Although there is some evidence that some minority members of the Texas Legislature supported the TTP because of its potential to mitigate the effects of *Hopwood* on Latino and Black student admissions, Anglo conservative representatives from rural districts also supported the law.[69] Rural, Anglo representatives saw HB 588 as an opportunity to diversify state universities not only in terms of race, but also in terms of geographic and socioeconomic diversity.[70] When speaking of the potential reach of the bill, Representative Rangel stated that it would create a "fair, race-neutral admissions structure providing students from all backgrounds and [all] parts of the state an opportunity to continue their educations."[71]

Some commentators on the constitutionality of the TTP have argued that statements by individual legislators and individuals supporting the legislation because of its potential to

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64. *Id.* at 247.
65. *Id.* at 252.
66. *Id.* at 253.
67. *See* Tienda *infra* note 71, at 4 (quoting David Montejano, 'Access to the University of Texas at Austin and the Ten Percent Plan: A Three Year Assessment.' (2001); (emphasis in original) available at http://www.utexas.edu/student/admissions/research/montejanopaper.html.)
68. Symposium, *On Grutter and Gratz: Examining 'Diversity' in Education: Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 Colum. L. Rev. 1596, 1600 (2003).
69. *Id.* at 1600–02.
70. *See also* 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) ("Political support for HB 588 derived from its adherence to race-neutral admission criteria that were applied uniformly to all high schools, irrespective of size, wealth, or location.').
71. *Id.* at 4.

increase minority enrollment substantiate a discriminatory motive.[72] While the courts do weigh the consideration of "contemporary statements by members of the decision–making body. minutes of its meetings, or reports"[73] related to the legislation, the courts are also wary of assigning liability to the legislature as a whole for the statements of a few.

The Fifth Circuit's decision in *Veasey*. the challenge to Texas' voter identification law. is instructive. There, the appellate court criticized the lower court for giving undue weight to isolated statements made by legislators.[74] Quoting the Supreme Court's decision in *United States v. O'Brien*, *Veasey* Court explained:[75]

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Accordingly. while the legislative record and the history of TTP have some isolated statements indicating a motivation to impact minority college enrollment at UT Austin, a court should not be expected to find sufficient evidence to extrapolate the motivation on to the legislature as a whole. Moreover, the mere consideration of the possibility of impacting race will not, and should not, implicate strict scrutiny. For example, in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, Justice Kennedy stated in his concurring opinion that schools using race-neutral criteria for the purpose of achieving diversity or avoiding racial isolation can "consider[ ] the impact a given approach might have on students of different races."[76] Certainly, if race-neutral actions such as the drawing of school boundaries with an

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72. *See, e.g. supra* Fitzpatrick, note 17 at 323-25 (noting testimony of Rangel, Senate sponsor Senator Gonzalo Barrientos, MALDEF attorney Al Kauffman, and Professors David Montejano and Michael Olivas).

73. *Arlington Heights*, 429 U.S. at 268.

74. Veasey, 796 F.3d at 499.

75. *Id.* At 501.

76. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J. concurring). The U.S. Department of Justice and the U.S. Department of Education's Office for Civil Rights identified the following examples of authorized race-neutral approaches in its 2011 Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools: the use of criteria such as: students' socioeconomic status; parental education (e.g. highest degree attained or years of education); students' household status (e.g. dual or single-parent household); neighborhood socioeconomic status; geography (e.g. existing neighborhood lines);

awareness of the potential impact on race is permissible under the Fourteenth Amendment, the race-neutral TTP can likewise expect to pass constitutional muster.

3. Specific Sequence of Events Leading up to the Adoption of the Top Ten Percent Plan

The specific sequence of events leading up to the enactment of the TTP "also may shed some light on the decisionmaker's purposes."[77] Nothing in the TTP record leading up to the adoption of the TTP is particularly striking concerning the sequence of events. The loss of affirmative action in Texas did help propel the filing of race-neutral bills intended to ensure that qualified African American and Latino students remained competitive for admission at the state's colleges and universities. However, as noted earlier, the mere consideration of a bill's potential impact on race does not give rise to the invidious nature of intentional discrimination outlawed by the Supreme Court. The TTP intended to admit all White, Latino, Asian, Black and other students who graduated in the top ten percent of their respective schools; it was never intended to lead to the classification of students by their race and exclude them on that basis. Had the Texas Legislature singled out minority students ranking in the top ten percent of their class, or only offered the TTP automatic admissions to certain high schools with high concentrations of Black and Latino students, then certainly this may have sparked suspicion about the intent to discriminate against White students and necessitated further inquiry into the sequence of events.[78] However, the legislature did not do such and instead offered admission to any student—irrespective of race—graduating in the top ten percent of her class. Hence, while the Hopwood decision was the first event in the sequence leading up to the adoption of the TTP nothing appears in the legislative record showing that any events occurred that targeted White students because of their race.[79]

4. Departures from the Normal Legislative Procedure

"Departures from the normal procedural sequence also might evidence improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."[80] However, "objection[s] to typical aspects of the legislative process in

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and composition of area housing (e.g. subsidized housing, single-family home, high-density public housing, or rental housing). Available at http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf.

77. *Arlington Heights*, 429 U.S. at 267.

78. *Id.* at 269.

79. *Id* at 267 (citing *Reitman v. Mulkey*, 387 U. S. 369, 373-76 (1967); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)) (noting that "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes").

80. *Id.*

developing legislation," such as increasing the number of votes a law requires for passage, may not be sufficient to demonstrate intent.[81]

The legislative record of the TTP also does not appear to reveal any abnormalities in the legislative process. Representative Irma Rangel proposed the TTP bill, HB 588, during the 1997 Regular Session. It was read on the floor of the House of Representatives on February 4, 1997.[82] The bill was then referred to the Higher Education Committee for discussion, public hearings, and a committee vote.[83] On March 18, 1997 the Higher Education Committee held the first public hearing.[84] Only after serious and contentious deliberations did the TTP pass with support from minority and Anglo legislators.[85] There appears to be no evidence in the legislative record of any departures from the normal procedures and consequently, the courts would likely be satisfied under this factor.[86]

Under the totality of the circumstances, it appears that a court would likely conclude that the TTP does not intentionally discriminate against White students when applying the Arlington Heights factors. Even if a court was to somehow find that the legislature passed the TTP "because of" its intent to discriminate against White students and its disparate effect on White students, a court would still likely uphold the law. In *Arlington Heights* and *Mt. Healthy*, if a plaintiff can prove that racial discrimination was "a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor."[87] Because of the significant record showing broad support for the TTP due to its attention to underserved communities including poor and rural Anglo communities, its intention to increase the number of schools targeted, and strong support from rural Anglo legislators, a court could easily conclude that the legislature would have enacted the TTP without factoring in race.

In addition, if a court did find that the TTP intentionally discriminated against White students and applied strict scrutiny to the TTP it would likely survive. In *Grutter v. Bollinger*, the Supreme Court affirmed Justice Powell's prior ruling in *Bakke* that recognized as a compelling interest the educational benefits flowing from a diverse student body and the same was affirmed in *Fisher I*.[88] The TTP achieves that compelling interest (in part, as the

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81. *Veasey, at 503.*

82. *See* Holley *supra* note 10, at 252-53.

83. *Id.*

84. *Id.*

85. *Id.* at 255-58.

86. *See* Allstate Ins. Co. v. Abbott, 495 F.3d 151,161 (5th Cir. 2007) (finding that the Texas Legislature did not deviate from procedural norms sufficient to demonstrate discriminatory intent where the Legislature held well-attended committee hearings, those opposed to the legislation were allowed to testify, and legislators met with private parties harboring concerns about the proposed law).

87. *Hunter v. Underwood*, 471 U.S. at 228 (1985).

88. *See Fisher I*, 133 S.Ct. at 2418; *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

holistic admissions plan also attempts to achieve the interest) through means that would satisfy the narrow tailoring prong. The TTP does not classify students by race and, therefore, should be found to be among the least restrictive means to achieve the university's compelling interest. In addition, it comes on the heels of UT Austin exhausting other race-neutral methods, which did not have a discernible impact on diversity.[89] Therefore, it should pass constitutional muster.

c. Standing issues present a major obstacle for prospective White plaintiffs challenging the TTP.

Article III of the U.S. Constitution prohibits courts from ruling on nonjusticiable controversies, including cases in which a party lacks standing to maintain the action, the controversy has become moot, or the parties seek an advisory opinion.[90] Article III standing requires that a plaintiff allege and prove: 1) an injury in fact that is both actual and imminent and concrete and particularized; 2) the injury is fairly traceable to defendant's conduct; and 3) the injury is likely to be redressed by a favorable ruling.[91] If a plaintiff lacks standing, the courts lack jurisdiction to hear the case.[92]

Courts have held that plaintiffs challenging race-conscious admissions plans have standing because of the inability to compete for positions reserved for applicants of other races.[93] Because the defendants in those cases prevented the White applicants from competing for those admission slots solely because of their race, the plaintiffs did not need to present evidence that they would have been accepted but for their race—the traceable connection. The courts, however, have not applied such relaxed standing requirements in other cases, including cases challenging holistic admissions plans where no specific seats are set aside for minority applicants and where race is not the deciding factor in admissions decisions.[94] In a case challenging the TTP so too should there be no 'sliding scale of standing."

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89. *See* Fisher I, 133 S.Ct. at 2420-21.

90. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

91. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992).

92. *Id.* at 560.

93. See, e.g. Parents Involved, 551 U.S. at 719 (holding that plaintiff organization had standing where it 'asserted an interest in not being 'forced to compete for seats at certain high schools in a system that uses race as a deciding factor .); *see also* Bakke, 438 U.S. at 280 n. 14 (finding that plaintiff had standing to challenge the quota-based admissions program where the university's creation of a special admissions program for the consideration of minority-only applicants caused his injury).

94. *Compare Doe v. Beaumont Indep. Sch. Dist.* 240 F.3d 462, 474 (5th Cir. 2001) (Weiner, J. dissenting) (citing *Valley Forge Christian Coll. v. Ams. United for Separation for Church and State*, 454 U.S. 464, 484 (1982)) (noting that 'the Supreme Court has emphasized that there is no 'sliding scale of standing' that would apply a different standard to an Establishment Clause case").

The TTP is a very different admissions plan compared to those in *Parents Involved* and *Bakke*. First, the TTP does not have a quota, or even a target setting aside a certain number of seats for Latino and Black applicants. Second, there is no evidence of Latino or African American applicants receiving fixed bonus points for their race.[95] As stated earlier, the TTP is race-neutral and applies evenly to all qualified students graduating in the top ten percent.

Applying the traditional standing requirements, prospective White applicants would likely fail. They would not be able to show 'a causal connection between the injury and the conduct complained of"—the TTP—nor would the injury be shown to be 'fairly .trace[able] to the challenged action of the defendant. ".[96] It is implausible to think that White applicants denied admission under the TTP could show how their denial was caused by the TTP's propensity to admit Latino and Black students graduating in the top ten percent of their class but not White or Asian students who similarly ranked in the top ten percent.

THE TOP TEN PERCENT LAW IS GOOD, THOUGH IMPERFECT, POLICY

The TTP is probably among the most scrutinized systemic reform education policies in Texas' history, and certainly over the last twenty-five years. Proponents of the TTP often hone in on the fairness of the bill to students attending schools across the vast Texas landscape and its potential to be much more inclusive than any other constitutionally permissible admissions program out there. They further aver that efforts must be made to ensure the TTP is supported with other supporting initiatives. Opponents suggest that the TTP has not increased diversity over the years, and that universities need more discretion to choose students beyond their high school grade point averages. The data cited in the previous section and further below suggests that students admitted to UT Austin under the TTP tend to be poorer, less White, and more socioeconomically diverse when compared to their peers admitted outside of the TTP and pursuant to UT Austin's discretionary authority. Nevertheless, the debate continues.

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95. *See Gratz v. Bollinger*, 539 U.S. 244, 271-72 (2003).

96. *See, e.g., Lujan*, 504 U.S. at 560.

A. *Are the Concerns over the Top Ten Percent Warranted or are they mere Pretense for Admitting More Suburban White Students?*

During the legislative hearings on HB 588, some testified over their concern of lowering the bar for admissions.[97] Then-University of Texas Chancellor, Dr. William Cunningham, testified about his concern over admitted students who were underprepared for college coursework and suggested that the TTP should be open to only those students who were enrolled in college preparatory programs.[98] Supporters of the TTP countered that the universities' focus on using standardized test scores as the primary trigger for admissions disparately and unfairly impacted low socioeconomic and minority communities.[99] Proponents of the TTP pushed for admissions criteria that would ensure that high achieving students in the classroom would be rewarded for their hard work. Eventually, the TTP incorporated minimum college preparatory requirements but maintained the top ten percent ranking based on grade point averages as determined by the high school.

The use of the top ten percent ranking does not appear to result in a drop in academic performance at UT Austin. Former UT Austin President Larry Faulkner remarked on how the TTP admitted students were performing at higher levels than students admitted outside the TTP with SAT scores "200 to 300 points higher."[100] Researchers have similarly concluded that TTP students with lower standardized college entrance scores outperform non-TTP students with higher standardized scores.[101] This should not surprise anyone because high grade point averages earned in high school are often achieved through hard work, which transfers to success in higher education. One of the more recent and more extensive studies published in 2014 showed that high school grade point averages (GPAs) were better predictors of college success compared to SAT scores.[102] In fact, an increasing number of higher education institutions continues to question the utility of college entrance exams

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97. *See* Holley *supra* note 10, at 255-56 (noting concerns of higher education officials about the admissions criteria needing to be strengthened).

98. *Id.*

99. *Id.* at 256-57 (citing testimony from MALDEF's Regional Counsel Al Kauffman and UT Austin Law Professor Gerald Torres that the use of standardized test scores accounted for the low matriculation rates into college).

100. *See* Montejano, *supra* note 67, at 1.

101. *See* Nicholas Webster, *Analysis of the Texas Ten Percent Plan*, Kirwan Institute for the Study of Race and Ethnicity 12 (2007).

102. *See, e.g.* William Hiss & Valerie W. Franks, *Defining Promise: Optional Standardized Testing Policies in American College and University Admissions*, at 3 (2014), http://www.nacacnet.org/research/research-data/nacac-research/Documents/DefiningPromise.pdf ("College and university Cumulative GPAs closely track high school GPAs, despite wide variations in testing. Students with strong [high school] GPAs generally perform well in college, despite modest or low testing. In contrast, students with weak [high school] GPAs earn lower college cumulative GPAs and graduate at lower rates, even with markedly stronger testing.').

scores, like the SAT in predicting college success and choose to either no longer require the SAT/ACT for admission purposes or de-emphasize its weight.[103]

Another concern voiced about the TTP is the relationship between segregated schools and communities and the success of the TTP. University of Houston Law Center Professor Michael Olivas testified in 1997 during the legislative hearings on HB 588 and acknowledged the link between the success of the TTP and the de facto segregated schools in Texas.[104] Some social scientists have weighed in on the matter and questioned the integrity of the TTP because of its reliance segregated communities and schools.[105] One study suggests that the TTP has 'capitalized" on segregation, finding that Latino and Black students at integrated schools are *less* likely to enroll in the flagship universities compared to their White and Asian peers and that Latino and Black students largely come from majority-minority schools.[106]

These points may have some limited validity. but the fact is that Texas schools and communities are de facto segregated and neither local nor state policies have proliferated to offset the resegregation of Texas' schools. Indeed, the state and federal courts have made it easier for majority white communities to annex themselves from other communities as they increase in the number of minority students.[107] Reforms should still be sought to integrate schools and communities, as well as educational access and opportunities for minority students in the integrated schools, but until those actions are successful, policymakers must deal with the cards they are dealt.

Texas law included race-neutral admissions criteria for universities to consider for non-TTP students that would help increase the socioeconomic and racial diversity.[108] When comparing admissions and enrollment data in the two programs at UT Austin in 2010 (the last year that UT Austin admitted the Top 10% of high school graduates) and the most recent years under the 75% cap under SB 175, the TTP plan clearly shows a more racially

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103. *See, e.g. New Survey Shows Record Number Of Colleges And Universities Dropped ACT/SAT Exam Score Requirements In Past Year*, FAIRTEST (Apr. 29, 2015), http://www.fairtest.org/new-survey-shows-record-number-colleges-and-univer.

104. *See* Holley *supra* note 10, at 257.

105. *See, e.g.* Brief of 823 Social Scientists as Amici Curiae in Support of Respondents, at 13, Fisher v. Univ. of Texas at Austin, No. 14-981 (2015) (arguing, in part, that 'the feature of the plan is problematic in light of the documented harmful effects of segregation on test scores, which are most profoundly evident on African American student performance. ') (citation omitted).

106. *See* Marta Tienda and Sunny Niu, *Capitalizing on Segregation, Pretending Neutrality: College admissions and the Texas top 10% law*, 8 American Law and Economics review, 8:312-346 (2006a).

107. *See, e.g.*. United States v. Texas (Goodrich), 158 F.3d 299 (5th Cir. 1998)(allowing a majority white subdivision to detach from a majority minority school district to a majority white school district despite a statewide school desegregation order).

108. *See* Holley *supra* note 10, at 255 (citing, e.g. academic background, socioeconomic background, bilingual proficiency, extracurricular obligations, such as employment and child-raising).

diverse student population. With the exception of the four percentage point gain in admissions for Non-TTP Asian students in 2015, White students are the only student group with a larger percentage of students admitted outside the TTP.

TABLE 1. PERCENT OF TTP AND NON-TTP ADMITS FOR UT AUSTIN, 2010, 2013, 2015[109]

	2010			2013			2015		
Race	**2010 TTP**	**Non-TTP**	**+/- % Non-TTP**	**2013 Top 8%**	**Non-Top 8%**	**+/- % Non-Top 8%**	**2015 Top 7%**	**Non-Top 7%**	**+/- % Non-Top 7%**
White	44%	62%	**+18**	38%	59%	**+21**	34%	49%	**+15**
Latino	28%	8%	-20	30%	13%	-17	33%	14%	-19
Black	5%	3%	-2	5%	5%		7%	4%	-3
Asian	17%	15%	-2	21%	16%	-5	21%	25%	**+4**

The enrollment rates by race over the last three years do not seem to note any stark patterns versus admission rates.[110] However, for the years 2013, 2014, and 2015, Latino students enrolled 3, 4 and 5 percentage points lower for those three successive years among Latino TTP admits. Conversely, Asian students admitted under the TTP had an increase in enrollment rates compared to their admission rates at 2, 3 and 3 percentage points for 2013-15.

The TTP also admits and enrolls a more socioeconomically diverse group of students. For the most recently reported year, 2015, the figures show stark differences between the families with students admitted through the TTP and those admitted outside the TTP.

TABLE 2. 2015 UT AUSTIN FAMILY CHARACTERISTICS[111]

Admitted Students			Enrolled Students	
Parent Income	Top 7%	Non-Top 7%	Top 7%	Non-Top 7%
Less than $60,000	32%	11%	30%	12%
More than $100,000	35%	53%	36%	54%
Parent Education				
HS or less	20%	4%	16%	4%
Bach Deg or more	64%	92%	68%	88%

109. *The University of Texas at Austin Student Profile Admitted Class of 2010*, Office of Admissions (Sept. 20, 2010), at 1; *see* Fall 2015 Report *supra* note 36 (for 2013 and 2015 admissions data).

110. *See* Fall 2015 Report, *supra* note 36 (comparing racial enrollment data to racial admissions data).

111. *Id.* (19% of students did not report their income levels).

Thus, for all the shortcomings that may be noted about the TTP it continues to be the major, though not the only, driving force behind the increasing racial and socioeconomic diversity at UT Austin. The success of the TTP may be due, in part, to the increasing diversity in our public schools. Some have suggested that the diversity still lags behind the pre-Hopwood diversity levels, and that UT Austin should instead pursue admissions through more rigorous affirmative action programs. Even putting aside the debate about whether that is true, especially when considering the more recent TTP admission rates of Latino students, those advocating for such fail to understand that those more rigorous measures are no longer available to institutions. Universities likely cannot have separate application piles for students based on race nor can they have quotas under currently existing precedent. Therefore, it is nonsensical to assert that UT Austin should revert back to previous practices which are currently deemed unlawful by current Supreme Court precedent.

Given the option between discretionary authority for admissions for non-TTP and the more rigid TTP the TTP appears to be doing much better on the student diversity scale.

TABLE 3. NUMBER AND PERCENT OF TEXAS PUBLIC HIGH SCHOOL GRADUATES AND UT AUSTIN FRESHMAN ADMITS BY RACE/ETHNICITY, 1998, 2004, AND 2008[112]

	c/o 1998	1998 Fall Admits	c/o 2004	2004 Fall Admits	c/o 2008	2008 Fall Admits
African American (% of overall student pop.)	25,165 12.8%	401 3%	33,213 13.6%	569 5%	33,873 13.4%	728 6%
White, Non-Latino	104,792 53.1%	7659 64%	116,497 47.7%	6,814 58%	112,983 44.8%	6,582 52%
Latino	60,362 30.6%	1620 14%	85,412 35.0%	1,911 16%	94,571 37.5%	2,621 20%
Asian American	6,263 3.2%	1942 16%	8,304 3.4%	2013 17%	9,750 3.9%	2,309 18%
Total Graduates/ Admits	197,186	11,975	244,165	11,788	252,121	12,843

Certainly, reflecting upon the state's PK-12 and high school demographics, UT Austin is still far behind of where it should be, especially for Black, low income and Latino students. However, the non-TTP diversity numbers show that the limited consideration of race coupled with other race-neutral factors pale in comparison to TTP admits.

112. 1998-99 Tex. Educ. Agency AEIS Rep. 2004-05 Tex. Educ. Agency AEIS Rep. 2008-09 Tex. Educ. Agency AEIS Rep. Fisher I, Supplemental Joint Appendix, SJA 156a (for UT Austin data) (on file with author).

Furthermore, the TTP was never envisioned to be the sole vehicle for ensuring access to the flagships for all qualified Texas students, much less for all qualified minority students. The TTP was seen as the state's attempt to attract the top students at every high school in Texas.[113] The TTP succeeded early on in its impact on the number of high schools sending graduates to the flagships, with the number of feeder high schools increasing from 622 in 1996 to 792 in 2000.[114] In 2015, the number of feeder high schools rose to 943.[115] Much work remains to ensure that students from all areas of Texas enroll and graduate from the flagships.

The recently appointed UT System Chancellor Bill McRaven was the latest top UT official to criticize the TTP for its purported impact on the university's reputation. In response to UT Austin's "low" ranking in the latest U.S. News & World Report's College Rankings, he was quoted as saying publicly. "Candidly. right now what is holding us back is the 10 percent rule. To make sure THE RIGHT STUDENTS are coming to the university. that alone will put us in the position to be a more competitive university."[116] However. Professor Julian Vasquez-Heilig debunked McRaven's assertion by analyzing UT Austin's relevant facts against the methodology used in the ranking and found that the TTP would likely have little effect on UT Austin's ranking.[117] Furthermore, the U.S. News and World Report methodology's emphasis on college admission test scores and its failure to factor in the positive effects of diversity result from a limited methodology should not be given much weight by a system chancellor. much less the greater public. In fact, UT Austin was the top-ranked public university in another national college ranking list, one which considered student diversity among other factors such as academics, professor quality. and value.[118] This begs the question of just how and why a chancellor would question a fair admissions policy that allows diverse students from high schools across Texas to attend UT Austin, and assert that UT needs to admit the "right" students.

Still others have criticized the TTP because of its effect of excluding students from "high-performing" schools who missed the top ten percent in their class in favor of admitting

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113. Angela Harris and Marta Tienda, *Hispanics in Higher Education and the Texas Top Ten Percent Law*, Race Soc Probl. 4(1): 57-67. (April 2012).

114. *See* Montejano *supra* note 67 (also finding that the 'new senders' included a cluster of 'inner-city minority high schools in Dallas-Ft. Worth, Houston and San Antonio, and rural white high schools in East and Northeast Texas; there is also a suggestion of a third cluster of minority ad 'mixed' rural schools in West and South Texas").

115. *Texas Feeder Schools Supplement to SB 175 Report for 2015*, University of Texas at Austin (2015), at 36.

116. *See* Matthew Watkins, *UT System Chancellor McRaven Blasts Top Ten Percent Rule*, Texas Tribune (Jan. 21, 2016).

117. Julian Vasquez-Heilig, *Should Our Universities be Cadillacs or Chevrolets?*. Higher Education Access (Apr. 25, 2016). Available at: https://cloakinginequity.com/2016/04/25/should-our-public-universities-be-cadillacs-or-chevrolets/.

118. NICHE, *2016 Best Colleges, Top Public Universities* (2016) Available at https://colleges.niche.com/rankings/top-public-universities/.

"less qualified" students from lower income schools.[119] As the TTP's influence continues to grow with the state's public education population, critics contend that the state is squeezing out its best and brightest, creating a brain drain.[120] However, the state's top feeder schools continue to send the vast majority of students to UT Austin in comparison to other schools. A study by researchers Marta Tienda and Sunny Niu found "little evidence that masses of students, including those who graduated from feeder schools, are being crowded out" of UT Austin and Texas A&M.[121] The researchers also found that nearly three out of every four students ranking in the second decile of a top feeder school and whose top college preference was a flagship went on to enroll in one.[122]

B. Policy Recommendations to Ensure Access and Opportunity for All Students

So where do we go from here? Some argue that we should scrap the TTP altogether, given the ongoing debate. Others argue that the TTP should be curtailed down to 40%, thus providing the universities more discretion in admitting students, but the results would likely be devastating, particularly for minority and rural communities.[123] The first option should be to maintain the current blended admissions plan while seeking other supports to ensure all students are able to compete fairly for the limited number of admission slots available at the flagships.[124]

The Texas Legislature should also focus its efforts on providing pipeline support to the flagships and consider seriously expanding the number of top flagships in the state. When HB 588 was being debated nearly twenty years ago, Texas A&M Deputy Chancellor Leo Salavedra testified before the committee "that the most detrimental effect of *Hopwood* had been on financial aid, and that universities would not be able to achieve diversity without adequate financial aid packages."[125] Yet, years later, the State has failed to invest appropriately in higher education opportunities, especially for its most underserved students. In past sessions, the state has cut already-reduced levels of financial aid based on need, ended the "Be On Time Loan" and the TTP scholarship (which it never funded) and reformed the

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119. *See, e.g,* Tienda *supra* note 69, at 5 (noting that critics of affirmative action shifted their attention to high school quality following the implementation of the TTP).

120. *See* Webster, *supra note* 100, at 10 (discussing the 'Brain Drain' of non-TTP students).

121. Marta Tienda and Sunny Niu, *Texas' 10-Percent Plan: the Truth Behind the Numbers*, The Chronicle Review, Vol. 50, Issue 20, Page B10.

122. *Id.*

123. *See* The Intercultural Development Research Association, *Research Relating to Measures that Would Limit the Texas Top Ten Percent Plan* (March 11, 2009), http://www.idra.org/Press_Room/Recent_Speeches_and_Testimony/Research_Relating_to_Measures.

124. *See, e.g.*, MALDEF, Americans for a Fair Chance, Equal Justice Society, Society of American Law Teachers, *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz*, (June 24, 2004). Available at http://www.civilrights.org/publications/blend-it/post-grutter-report.pdf.

125. *See* Holley *supra* note 10, at 255.

Texas Grants in ways that exclude underserved students. Texas already lags behind its competitor states of Michigan, Florida, California and North Carolina when comparing the percentage of the state's gross domestic product on public education, including post-secondary education.[126] If the state can invest more appropriately. it can begin to reign in tuition rates that have skyrocketed since being deregulated.

Along those lines, Texas must take major steps toward investing in at least five additional major flagships. Although some Texas universities recently achieved 'Tier 1" status under the Carnegie Classification of Institutions of Higher Education for research and should celebrate that distinction,[127] the difference between those universities and the two state flagships remains stark. With Texas gaining nearly 80,000 students each year in its public schools, the state must come to terms with investing in its public higher education institutions.

But a comprehensive, meaningful solution does not stop with financial aid, tuition re-regulation, and the expansion of flagship universities. Texas must also adequately and equitably support its PK-12 public education system to help prepare students for college and a career. The findings by the state district court judge in the most recent school finance case are riddled with facts detailing the crisis in public schools caused by the state's failure to meet the needs of its growing underserved student population.[128] Regardless of the Supreme Court of Texas's decision on the legal merits of the claims, the facts will not change and the needs will not be met until the state appropriately invests in its public schools. This is especially important as the state has lessened the rigor of its default high school curriculum through House Bill 5 passed in 2013. The previous default curriculum, the Recommended High School Program, previously aligned well with college entrance requirements but the new Foundation plus endorsement program does not meet many of those requirements and worse, could lead to the tracking of students by race and poverty into less rigorous tracks. Academic counselors are sorely needed to ensure that parents and students are made aware of the options available in the schools so they do not close the door to higher education opportunities. And the schools must do a much better job in building a culture of college-going expectations and providing students meaningful information on the career paths to college.

Finally. while some investment has been made by UT Austin and other universities in creating pathways for all student groups in the admission process, the numbers speak for themselves. Universities like UT Austin pride themselves in being the training ground for future leaders. As such, they must collaborate more closely and more meaningfully with

126. *See* Harris, *supra* note 112 n. 13, (citing former UT President's communication to alumni in June 2008).
127. *See* Matthew Watkins, *Four Texas Colleges Reach Carnegie 'Tier One' Status*, Texas Tribune (Feb. 2, 2016).
128. *See* Tex. Taxpayer & Student Fairness Coalition v. Williams, No. D-1-GN-11-003130, 2014 WL 4254969 (Tex. App.—Travis Aug. 2014) ("*Texas Taxpayer*").

underserved high schools and underserved students to ensure those students are not only admitted but are enrolled and supported. The legislature can help make this happen by appropriating funds to connect universities and schools, similar to what it has done with job training, community colleges and public schools.

These are a sampling of the major reforms that the state should consider. As IDRA stated in its testimony before the Texas Legislature in 2009 when the state was considering cutting back or eliminating the TTP, "it is ironic that at a time when expanding global competition requires better educated citizens, Texas is discussing ways to *limit* access of its top students to its top institutions of higher learning."[129] Texas instead should choose to be a leader as an investor in public education, including higher education, which is not only an investment in that child and the schooling, but an investment in the state's social and economic future.

129. Intercultural Development Research Association, Testimony on HB 52 Relating to the Texas Top Ten Percent Plan (Mar. 11, 2009), http://www.idra.org/Press_Room/Recent_Speeches_and_Testimony/Testimony_on_HB_52_/

SYMPOSIUM

CHALLENGES OF THE LATINO COMMUNITY IN 2016 AND THE YEARS TO COME

On February 26th, 2016, the Texas Hispanic Journal of Law and Policy (THJ) put on a symposium titled "Challenges of the Latino Community in 2016 and the Years to Come" at the University of Texas School of Law Eidman Courtroom. This symposium, lasting over seven hours, explored different issues that were looming over the Latino population: What will the Latino community political power look like these following years? What is the impact of denying birth certificates to children of undocumented parents? What types of ethical challenges do attorneys who advocate for affirmative action face? These are all questions that members of our community all had and were in desperate need to be addressed.

Once THJ determined the topics to be addressed in the symposium, finding great quality speakers was not difficult, as Texas has an incredible amount of extraordinary attorneys. The lineup of speakers that the symposium had was full of greatly experienced attorneys who are also deeply committed to the cause of ending inequality in the United States. Here are the bios of the speakers in the symposium:

Jose Garza: Jose Garza has more than thirty four (34) years of experience practicing law, dealing almost exclusively with complex federal litigation. **Mr. Garza is currently the Litigation Director for Texas RioGrande Legal Aid, Inc.** (part time) as well with the Law Office of Jose Garza. Mr. Garza has represented Latino voters in voting rights litigation including state-wide redistricting cases. Finally, Mr. Garza was arguing counsel for the Plaintiffs before the U.S Supreme Court in Perez v. Perry in 2012 and for Defendant-Intervenors in Lockhart v. United States in 1983.

James Harrington: In 1990, Harrington founded the **Texas Civil Rights Project**, a statewide non-profit foundation that promotes social, racial, and economic justice and civil liberty.The Project has a staff of 40 with offices in Austin, El Paso, San Juan, Houston, and Odessa. Harrington has handled cases involving grand jury discrimination, voting rights, free speech and assembly. and the rights of persons with disabilities. Harrington was an adjunct professor at The University of Texas Law School for 27 years.

Rolando Rios: Mr. Rios is the **former General Counsel for the Southwest Voter Registration and Education Project**. Mr. Rios has been involved in redistricting for more than twenty years, resulting in over two hundred cases being litigated. Due to Mr. Rios' vast experience, he was called to testify before the United States Congress on the extension of the Federal Voting Rights Act in both 1978 and 1981.

David Hinojosa: Mr. Hinojosa is the **Intercultural Development Research Association (IDRA) National Director of Policy**. In this position, he supports integration and coordination of national policy reform efforts impacting the education of all students, with special emphasis on minority, low-income, and English Language Learning students. Previously, Mr. Hinojosa served as a staff attorney, senior litigator, and for three years, Southwest Regional Counsel of the Mexican American Legal Defense and Education Fund (MALDEF).

Celina Moreno: Ms. Moreno is a staff attorney with the **Mexican American Legal Defense and Education Fund (MALDEF)**. Ms. Moreno is the attorney in charge of Policy and Legislation in the Southwest Regional Office of MALDEF. She is a graduate of the University of Houston Law Center, and of the Harvard University Kennedy School of Government.

Gary Bledsoe: Mr. Bledsoe is **President of the Texas NAACP** and has held that position since being elected in 1991. He also is a member of the National Board of the NAACP since 2003. As NAACP President, Gary was involved in handling the racial discrimination complaints against the Department of Public Safety that broke the racial barriers preventing minorities and women from being Texas Rangers. He was also the lead lawyer for the NAACP in the recent Congressional Litigation. Since 2007 he has been a member of the Texas Southern University Board of Regents.

Norma Cantu: Norma Cantú brings exceptional practical and policy-making experience to her new joint appointment in the Education and Law Schools at UT. For eight years, she served as the **Assistant Secretary of Education for Civil Rights in the Clinton Administration**, where she oversaw a staff of approximately 850 in implementing governmental policy for civil rights in American education.

Ranjana Natarajan: Ranjana Natarajan directs the **Civil Rights Clinic at the University of Texas School of Law**. From 2009 to 2013, she directed the National Security Clinic, in which law students worked on cases and projects relating to national security, terrorism, and constitutional and human rights. From 2003 to 2008, she worked as an attorney with the ACLU of Southern California, where she litigated and advocated on a variety of civil rights and civil liberties issues, including immigration detention, civil rights post 9/11, gender equity, and prisoners' rights.

With this, we invite you to read a transcription of the symposium that THJ put together.

THE EVENWEL LITIGATION AND ITS POTENTIAL EFFECTS ON VOTING RIGHTS WITHIN THE LATINO POPULATION

SPEAKER: JOSE GARZA, LITIGATION DIRECTOR OF THE TEXAS RIO GRANDE LEGAL AID
PRESENTER: HECTOR GUTIERREZ, DEVELOPMENT EDITOR OF THE TEXAS HISPANIC JOURNAL OF LAW AND POLICY

PRESENTER: HECTOR GUTIERREZ, THJ DEVELOPMENT EDITOR

Presenter:

Good morning everybody. I'm really happy to see the attendance and I'm glad that y'all turned out today. So I'm going to go ahead and introduce our first speaker for our first topic. Our first topic is going to be "The Evenwel Litigation and its Potential Effects in Voting Rights Within the Latino Population. So our speaker today has thirty-four years of experience litigating and practicing law. He is currently the litigation director for the Texas Rio Grande Legal Aid Incorporated, and runs his own law office. Please put your hands together for Mr. Jose Garza.

Jose Garza:

Well, thank you very much for inviting me and giving me the opportunity to talk a little bit about Evenwel, a case that is currently pending before the United States Supreme Court. You have a very impressive list of guests for the rest of the day, and I commend you for putting the symposium on. During the discussion that I'm going to have on Evenwel please feel free at any time to interrupt me, to ask me questions about the case, about the impact of the case on Latino voting rights, or about anything that I say that you either disagree with, or that you have questions on.

Evenwel is a challenge to the redistricting plan for the Texas Senate. Sue Evenwel is a voter that lives in District 1 of the Senate plan, up in North East Texas. Edward Pfenninger is a resident of District 4. Both District 1 and District 4 have some of the highest numbers of registered voters in the State within the Senate District, and some of the highest numbers of eligible voters within the Senate District. Their theory of the case is that the principle of 'one person, one vote' applies to voters and not people, and that districts, in order to comply with

the 14th amendment, must equalize voters between districts. The way that the case was initiated is sort of interesting; the way it has progressed is sort of interesting. The Evenwel Plaintiffs filed a lawsuit here in Austin, Texas. If you are familiar with redistricting litigation, the rules for federal court require that if you challenge a statewide redistricting plan you must have a panel of three judges to hear the case. There is a circuit judge on the 5th Circuit on the panel, and two district judges on the panel. And they filed it in Austin and the case was heard not on the basis of a trial on the merits, but on pre-trial dispositive motions. The State of Texas was the Defendant in the lawsuit, Greg Abbott was specifically named as the Defendant, and the State of Texas filed a motion to dismiss. On the other side, the Plaintiffs filed a motion for summary judgment, asserting that there were facts that were not in dispute that clearly demonstrated their entitlement to rehearing the case. So that is the posture of the case. No trial on the merits; no evidentiary record beyond that which is contained in the summary judgment motion. The record in this case, the evidence that was submitted by the Plaintiffs, was, if you are familiar with redistricting, redistricting generally occurs after the census, and the Census Bureau puts out data for drawing districts at all levels of government. In Texas, the data was released in February 2011, and in that session the legislature adopted plans for the Texas House, the Texas Senate, Congressional Districts, and the State Board of Education. So the evidence that was presented by the Evenwel—yes?

AUDIENCE QUESTION:

So, actually. you know what, I actually studied the case a little bit, and it took me a really long time to get, wrap my head around the equalizing votes, the 'one person, one vote.' Can you go over exactly what the premise is so we can all, like, understand it?

JOSE GARZA:

Yeah. Sure. So when the State drew the plan, the basis for equalizing population between districts was total population. That's what they used. The Supreme Court has historically approved of plans in which the districts are drawn and the variance, the difference in population between the largest district and the smallest district, is no more than 10%. So if your plan has population between districts where the differential does not exceed 10%, that's generally thought to be in compliance with 'one person, one vote.' Evenwel—the Plaintiffs in Evenwel—alleged that the population, the base data for measuring compliance, was wrong. That what you needed to do was look at the number of voters in each of the districts, and if the balance of voters in each of the districts was substantially skewed, then you were in violation of 'one person, one vote.' So then the question becomes: what data would they use to measure voters? And what the Plaintiffs said is "look, there is a number of metrics that you can use to measure the number of voters in each of the districts, and each one of them

shows that the balance of voters between districts is excessive in Texas." So some of the measures you can use are voter registration. The number of people that are registered in a senate district, you can count that. That is something that is pretty easy to determine, and the fact is that District 1 and District 4, compared to other districts in Texas, had substantially larger numbers of registered voters. Or, you can use citizen voting age population. The Census Bureau doesn't count citizen voting age population generally as part of its census count; there is only total population that it counts as a 100% of its count. They use mathematical formulas to estimate citizen voting age population in large population groups. They refine their techniques so that you can have citizen voting age population at what's called a block group level. It is fairly accurate, at least the Census Bureau argues that it is fairly accurate at a census block level. And the Plaintiffs in Evenwel measured the citizens' voting age population in Districts 1 and 4 and compared it to other districts in Texas and found that the variance was substantial. And I don't dispute that, it is a substantial variance; close to a 40 or 50% differential in citizen voting age population if you use that as the base data for redistricting. So that's the evidence that they submitted to the court. They submitted an affidavit, they submitted tables for each of the districts, and nobody disputes the data that they submitted to the court. As the case was proceeding—remember that this is a lawsuit challenging the senate's districts in Texas—the Mexican-American Senate Caucus moved to intervene. This was something that was going to impact their precise districts. After having oral argument on the motion to dismiss, the motion for summary judgment, and the motion to intervene—the district court, the 3-judge panel, issued its opinion and it said: 'You don't have a cause of action. The country has always redistricted using total population; it doesn't matter that there's a differential in voters. The Supreme Court has put its stamp of approval on redistricting plans historically based on population, and the State of Texas didn't have to draw districts based on population, but it is their prerogative. They could use another matrix to comply with 'one person, one vote. The Supreme Court has said this is a database that is reliable, available, and accurate, and the State of Texas chose to do that. It could have chosen to do one of the other matrixes that the Plaintiffs suggest, but they didn't have to, and nothing requires them to do that. Therefore, the motion to dismiss is granted, the motion for summary judgement is denied; and since we are not going to file, the motion to intervene is denied as well. " So, it's a 3-judge court, if you are familiar with federal procedures, it doesn't invoke the 5th Circuit because it's a 3-judge court. Appeals are directed to the United States Supreme Court, and that's why Evenwel is currently pending at the United States Supreme Court.

Now the topic here is the impact, or what will be the impact, of Evenwel on Latino voting rights; and I'll get to that. Eventually, we'll get to that. But I did want to start by talking a little bit about how the argument went at the Supreme Court, and a little bit about what the current status of the Supreme Court means for this case. There is a Supreme Court blogger, very well-respected, who suggests that there's much ado about nothing in the Evenwel case; it's not a really important case, the Supreme Court was reluctant to take it in the first instance, he says. And so it's going to get affirmed, don't worry about it. His name is

Rick Hasen; if you want to go read his blog, it's very informative. But let me also tell you the notion that there is something serious brewing here, was something that wasn't considered when Evenwel was first filed.

I was approached to make a presentation to the Hispanic caucus early on in the filing of this lawsuit, and so I did. I said this is a very important case you guys ought to be in, and you need to be prepared. You need to develop a factual record on what impact there's going to be on the Latino community. etcetera, etcetera. They caucused. They talked to lawyers that have represented senate democrats and they were told this is a frivolous lawsuit. "Don't worry about it. Don't sweat it. Don't spend any money on this." And they came back and they told me that. They said: "We respect your opinion, but everybody else that we talked to said 'don't worry about it.'"

So they waited, and that's part of the reason their intervention, in my opinion, was denied. They waited too long; the process was too far along before they intervened. So that's what folks are saying, and now that Justice Scalia has passed away and the balance of power essentially in the Supreme Court has shifted, I think there is even more reason for people to think "don't worry about this case, it's over for the Plaintiffs." And I'll get to that in a minute; I have a different view of what might happen.

Just to make it succinct about what happened at the Supreme Court, I want to start by quoting the opening statements of each of the three lawyers that argued before the Supreme Court. And by the way. you could hear the oral argument. There is an audio, if you go on the Supreme Court webpage you can click on the audio of every case that is argued there. And Evenwel is a particularly interesting oral argument to listen to. But Mr. Consovoy. who argued for the Plaintiffs, said:

> 'This appeal presents a fundamental question. That question is whether the one-person, one-vote rule affords eligible voters any reasonable protection. We submit that the answer must be yes under this Court's decisions, and as a consequence, Appellants have stated a claim under the Equal Protection Clause. The districts at issue here, District 1 and District 4, have deviations as measured by eligible voters approaching 50 percent under any metric available to voters. No decision of this Court has ever sustained vote dilution of that magnitude under a one –person, one –vote case. Beginning with Gray, continuing to Wesberry, through Reynolds, and the Court's many decisions since then, the issue has always been vote dilution.

Vote dilution is an interesting term. It's used to describe the standards of 'one person, one vote.' And it's also used to describe the impact of voting schemes on minority voters, as opposed to vote denial, that is the diminishing of the vote.

Now Mr. Keller, who argued for the State of Texas, his opening line was:

> The only question the Court has to resolve here is whether the Equal Protection Clause requires every State to change its current practice and use voter population to reapportion. The answer is no.

Pretty straightforward. Pretty simple. And that was his opening line.

Now Mr. Gershengorn, he was an assistant solicitor for the United States, he argued for the United States, they were asked to participate by the Supreme Court. His opening statement was:

> Redistricting on the basis of total population, as Texas did here, vindicates the principle of equal representation for equal numbers of people that is at the heart of Reynolds and Wesberry. We thus agree that Texas was not required to redistrict on the basis of some as-yet-undefined measure of voter population. However, we disagree that the Court should go on to decide that Texas is free in the future to redistrict on the basis of some measure of population — voter population if it so chooses.

So, do you see the distinction between what the United States is arguing and what the State of Texas is arguing? Now think about it, there are only two parties here: Plaintiffs and the State of Texas. And the Plaintiffs say. "They should've used some other method to measure voting." The State of Texas says, "We did it the right way. so leaves us alone. And the federal government is saying, "They did it the right way, but they don't have any option. They have to use that."

So, do you get the sort of distinction between the three positions? The State of Texas is saying, "If next time we want to redistrict based on citizen voting age population, we can do that. Don't worry about that, it's our option. So maybe the Plaintiff's lose is here, but we might want to do that next time." And the federal government is saying, 'No, you gotta use population." So that's the way the case was presented to the United States Supreme Court.

It's interesting that the Plaintiffs in their portion of the argument. there are a couple of things from the argument that I think are extremely important. One is that in the course of the argument Justice Scalia didn't ask any questions, not a single one; and that is very unusual for Justice Scalia. So some writers, Mr. Hasen for example, suggest that he understands that this is a dead issue, that it's not going anywhere, that the Supreme Court is only hearing this because they have a heightened interest in cases that are coming out of a 3-judge court. Or it could be that it's already been decided which way it's going to go and he doesn't need to frame the argument for anybody. So that's the first interesting thing that you get from the oral argument.

The second is the manner in which a particular issue is framed. Now, so, as you know, the voting rights act has been on the news a lot because the Supreme Court did away with the coverage formula for section 5 of the voting rights act. And part of the reason they

justified doing that is they said you still have section 2, and section 2 is sufficient protection for the minority community on voting rights issues. Well, I've been litigating under section 2 for a long, long time, and that law has evolved in the way it is enforced. When we first started doing section 2 cases, in order to prove a violation, part of our evidence was that we had to show that there was a potential remedy. And the way that you did that, for instance, if you challenged an at large election system you submitted a redistricting plan that showed that minorities did do better in a redistricting plan than they did under at large elections, and the metric that we used for showing that was population. We can develop a district that was over 50%, over 60% minority in population, and the 5th Circuit, and then the 9th circuit, and then circuits all over the country said that's not enough. As a pre-condition of your claim of vote dilution, in addition to all the other factors that you have to prove—including proof of a history of discrimination, a history of exclusion, and racially polarized voting—a critical issue that you have to prove, or your case is dismissed, is that you can draw a single member district that is majority of citizen voting age population. So submitting a district that is a citizen voting age majority district in some instances is not an easy task because data is unreliable, because data is unavailable, because the census puts out total population all the time—everybody recognizes that—but citizenship data is very difficult to secure, and it's not as reliable. And when you are doing redistrict data, or you are doing a section 2 case to a city or a school board, the districts that you draw are now down to a block level. Well, there is no citizenship level data at the block level. So, by placing that as a requirement of a section 2 case, the case becomes more onerous for the plaintiff. In the discussion of the Evenwel case, that issue, the use of plaintiffs in a section 2 case of citizenship voting age data, was described as something of a benefit for minorities. And if it's good enough for minorities, why isn't it good enough for all the rest of us to use in redistricting? See how that gets turned around? And look at who is arguing the case: the United States, the Department of Justice, and the Plaintiffs. There are advocacy groups for the minority community. the Mexican American Legal Defense and Education Fund, for example, represented in the caucus, the Senate Caucus in their attempts to intervene. They're not there. The NAACP. They're not there. There are no representatives of the minority community at the oral argument of Evenwel. There are no representatives of the minority community in any of the parties that are allowed to litigate this issue. So that's, I think, an important sort of discussion. If you get a chance to listen to the oral argument, pay close attention because nobody on the court challenged the notion, not Kagan, not Sotomayor, not Ginsburg, not Breyer; nobody challenged the notion that use of citizenship voting age population data by minority plaintiffs in a section 2 case wasn't some sort of protection for the minority community.

So, as we all know. the balance on the Supreme Court has changed. Scalia has passed away. I think it's generally understood that there are four moderate judges on the Supreme Court, and four conservative judges on the Supreme Court. From a review of the oral argument the one judge that is always talked about as being sort of a swing judge is Justice Kennedy. So, the third issue that you should pay attention to on the oral argument is the questions that Justice Kennedy was asking and the theme that he was submitting. And that's

another reason why this discussion of CVAP, citizen voting age population, is so important and why it was so important that it was missing from this argument. Justice Kennedy says, "Well, we know we can use total population—everybody knows that you can balance total population—what about balancing both? Has anybody looked at balancing both population and voter data?" And so the response by the Plaintiff was, 'Well, that is what we suggest can be done, and it can be done in Texas." And the United States tried to push back a little bit by saying that there is never going to be a balance like that. And the State of Texas said that it might be possible to balance population and also voter data, which would be done with citizen voting age population. And again, nobody would push back on the reliability of citizen voting age population for redistricting, which goes back to the block level. So, there is a 4-4 split on the Supreme Court. In my estimation, if you look at Justice Kennedy, he is very concerned about equalizing voter population in the redistricting process. That's why he was suggesting, "Let's try to do both. So, as you know, if there is a 4-4 tie on the Supreme Court, that is essentially an affirmance without precedential value of the lower court decision. In this case the lower court decision dismissed Evenwel, so you might assume this is, as Hasen says, no sweat. This is over, this issue is gone. Two possibilities, one is that they don't have to make a decision in Evenwel. With Justice Scalia off the court, they would be justified to push the decision to the next turn and maybe even reargue the case, which means that a decision wouldn't have to be issued until say May of next year, plenty of time for a replacement Justice on the Court. The election in November is not a foregone conclusion. It's going to be a tight race. It might very well be a strategy that the conservative Justices on the Supreme Court decide to employ—let's wait for the general election to be over, let's wait for the people to decide, and there might be another conservative Justice appointed to the Supreme Court on the next term. So that's one. But even if that doesn't happen, and I'm wrong, and there is 4-4 tie and the case is therefore affirmed, then this case is over. We are not that far away from the next redistricting. The State of Texas has indicated in its arguments and its briefs that it is free to choose the population based data, and it is their position that citizen voting age population data is just as accurate, and is just as reliable for purposes of redistricting as is total population, so that might happen. There's also a court case out of Dallas in which school board districts are being challenged on similar grounds as Evenwel; and as I said, a 4-4 tie is an affirmance, but has no precedential value, so it may be going up on another case as well. So, I don't think it's over. I think it's a very important issue, it's an issue that if it's not decided now will be eventually decided, and there are some very real dangers for the Latino community.

So, in their brief, the Plaintiffs point to a particular district in Texas, and it's interesting in the way it's formatted and the way it's presented. I've heard Mr. Blum talk. Mr. Blum, by the way, is the person who recruited the Plaintiffs. He is the one who funds these types of lawsuits. He is the person behind the Fisher affirmative action case versus the University of Texas. He's been involved in these cases for decades. He may even be a fellow at the American Enterprise Institute; I know he was affiliated with them for a while. But this is really, in my opinion, about white privilege. This is about redistricting eliminating districts in which

minorities have an opportunity to elect the candidates of their choice. This is a challenge that has gone on every decade. The way it's framed in their petition and in their complaint and in their briefs for the Supreme Court, they don't talk outwardly about the impact of race and ethnicity on their theory. But it's interesting because the district that they highlight when they compare District 1 and District 4, which they identify—along with the population numbers and voter numbers for those districts—they compare it to another district, but they don't identify the district. They don't say this is District 12 or District 6 that we are comparing it to. They just say this is the district that the senate planned that has the fewest voters. That district is District 6. If you look at the numbers and compare the numbers that they put in their charts to all of the districts on the Texas senate plan, you can see it's District 6. District 6 is in Houston, it's represented by Senator Garcia. District 6 is 74% Mexican-American, it's 12% African American, it's an 85% minority district. That's the district that is under populated vis-à-vis voters. The only way to cure that it is to bring in white voters. That district goes from being a minority opportunity district to being a white district because you balance out the number of voters. And the number of voter differential is substantial.

District 1 has 497,000 registered voters. District 6 has 295,000 registered voters. In order to get those equalized you need to bring in a lot of population, if you are going to stay in the Houston area. That district would be eliminated. There are other districts that have lower levels of registered voters. District 29, in El Paso, is an 85% Latino district; it is under populated vis-à-vis voters. District 27 in Brownsville is 89% Latino, it is under populated vis-à-vis voters. District 21 in Laredo, it is 75% Latino, it is under populated in terms of eligible voters. If the Plaintiffs secure a victory in this case, all these districts will have to have an influx of voters, an influx of white population. Each one of these districts will be placed in jeopardy. Mexican Americans and African-Americans in Texas are underrepresented in Congress, in the House, and in the Senate. This case is about eliminating minority opportunity districts in the State, and that would be the result of the Plaintiffs' victory in this case. And it's outrageous, from my perspective, that this very important case, argued at the United States Supreme Court, had no representation from the population that this is going to affect the most.

So, what is the theory then? The principle that they are litigating under is 'one person, one vote.' So what's the legal theory that justifies having unequal voters in districts? This is a republic that is based on representation; it is what our democracy is based on. It cannot be based, in my opinion, on whether people exercise their right to vote. It cannot be based on the number of people who choose to register and then turn out to vote. That's not the democracy that we've established in this republic. People have a right to representation, whether they choose to participate in the electoral process or not; otherwise we would have a very elite system.

So think about this as well. In Texas we have a well-documented history of racial and ethnic discrimination. In Texas, and I suspect that very quietly many Texans are very proud

of this, at least the ones in power, we have the worst turn out in the country. We are 50th in voter turn out. We have more obstacles to participation probably than any state in the Union. To base our representation, our republic, our democracy, based on who votes, on who participates, when you have the juxtaposition with the history of voting discrimination in Texas—it's just not right. So, you might say, this is 2016, you are talking about things that happened many, many years ago. They don't happen anymore. Wrong. And I know that a lot of the democrats, a lot of the minority representation advocacy groups point to the voter ID case. Voter ID cases are a good example of how this is continuing. The gerrymandered redistricting plan that was adopted in the last session—which is by the way still being litigated—is another example. But neither one of those, in my opinion, is the best example of how discrimination continues today. If you go into rural Texas and you interview elections administrators, the notions that we had in the 50s about voting being a privilege and not a right are still manifest. Election officials see themselves as the gatekeeper for who should participate in the electoral process. We had a situation where we found out, simply by coincidence—because we were taking the deposition of the elections administrator in Atascosa County—and we were talking about how do you determine who's going to be allowed to vote and who's not. And there was a woman in Atascosa County that in the 2014 elections had requested a mail-in ballot, her name was Guadalupe Garcia, she signed the mail-in application "Guadalupe Garcia." She received the ballot in the mail, she filled it out, put it in the envelope, sealed it, signed the envelope 'Lupe Garcia. When that ballot arrived at the Atascosa County Elections Office it was discarded. Her vote did not count. The reason? Her signature didn't match. Her application said Guadalupe Garcia, her ballot said Lupe Garcia. Can you imagine if somebody had signed Joseph Jones and then Joe Jones that their ballot would've been thrown out? And this wasn't the only one; there were a number that were eliminated. The campaigns that Texas has every election year about warning people about election fraud, the number of people that have been prosecuted and then the case is dismissed for carrying ballots to the elections, no evidence of real fraud. And then we have voter ID, which addresses no fraud at all. So in that environment, to require compliance with 'one person, one vote' to be measured by voters, is ridiculous. And so, it's an important case, you should keep an eye on it, you should go and listen to the oral argument. And that's really all I've got to say.

Refusal of Birth Certificates to Children of Undocumented Parents in Texas

Speaker: James Harrington, Founder of the Texas Civil Rights Project
Presenter: Hector Gutierrez, THJ Development Editor

Presenter:

Our second topic is going to be on the refusal of birth certificates to children of undocumented parents in Texas. Now our speaker, he is the founder of the Texas Civil Rights Project, he is an adjunct professor with UT law, he has been for twenty-seven years, and some of his cases involve grand jury discrimination, voting rights, and free speech and assembly rights. Ladies and Gentlemen please put your hands together for Mr. James Harrington.

James Harrington:

Well I appreciate the opportunity to come and talk with you all this morning. And also to follow Jose, with whom I've had the honor of working for many years, and to talk a little bit about the birth certificate case, but also to put it into contest as Jose was doing. So if you look at what is happening in the totality of events in Texas, you pretty clearly have war, if you want to call it that, on the Hispanic community. And also on the African American community. And that war is there if you want to call it that, it's a strong word, but I think its probably accurate, because what's happening in Texas of course is the demographic shift, and that means that economic power is going to change, and anytime economic power changes of course there is huge resistance, and that's just the way we are. As human beings, we don't like that insecurity. I worked 10 years in south Texas in the valley and I was down there when the transition happened from the Anglo majority to the Hispanic majority. even though at that time I was there the population at that point was still 80% Hispanic, but it took that long to bring about that transition. But the resistance was there. You see the same thing going on in other parts of Texas. In Williamson County, right north of us, that transition is going on, and you see the same kind of resistance, so I think its important to put this in the context of every one of these cases that we are talking about today. Every one of these events that we are talking about today is part of that resistance to change. And that is why it's really important for you to be here because you need to be part of this. You have to help bring about the next level if you meant to call it that, or the next few steps on this journey to

justice. So I hope that its not just sort of an academic thing today for you all, but to think about how it is in your own lives, you're going to help make this transition because you're here today because of the people who fought before you. Right, you're here because of that. I remember when UT was all white. You know. it wasn't that long ago. In fact, when I was here in graduate school in 1968, and what we used to do was collect our used textbooks to give to Huston-Tillotson University. That was the way the State funded Huston-Tillotson. So I think it's really important to see yourselves on this path of the people that have gone in front of you, and to be true to their hope. Their hope was for you to be here and their hope was that you would bring about the next step in the journey. So keep that in mind, and part of that of course is deciding what you're going to do when you get out of law school; what kind of work are you going to do. How are you going to roll whatever occupation as an attorney you're going to go into, how are you going to roll that into service to the community. You can do it by working with a non-profit, or you could do it as pro bono. However, you can be in the criminal defense system, which I'm going to talk about the 2nd part a little bit. I think also that you need to think about what you do during the summers. We have 6 offices in Texas. El Paso, South Texas down in Alamo, here, Houston, Dallas, and Odessa and we always are open to volunteers. You have to get your own funding, we are poor, but it's a good way to be part of this struggle and to learn what its like to go through the struggle, like Jose working for legal aid. You'll know what it is to be on the outside trying to come in and open that door a little bit wider for people. So I just want to put that out there because you folks are the future. So accept that mantle and figure out how you're going to help open those doors for your kids or the people in your community. your family. and all those that will come after you because they depend on you. So everything you're going to hear today is part of this struggle, this war against Texas minority communities. Of course, we are focusing today on the Hispanic community. the obstacles that have been thrown up by the legislature, and the kind of racism that still continues in rural Texas. By rural Texas I don't mean like 20,000 farm communities, right? I mean we are talking about basically where you get outside of the big cities, because it's a huge State, but those attitudes still continue. One of the things that I think is important to keep in mind as we look at historical context here is that this isn't just kind and gentle racism that we are talking about. This is deep in Texas. If you go back and look at the history of Texas—how we were formed as a republic by illegal immigrants from Tennessee and then as a state—in the beginning, in order to become independent, there was an alliance between the Blacks, Hispanics, and the Whites. And we actually devised a fairly populist constitution. A lot of the stuff that we now see in the law was not in the original constitution. There was a very clear single member district, no poll tax. People could vote if they weren't citizens. You only had to live here for 6 months. All those kinds of things facilitated that transition. After the transition happened we start to see racism raise its head. Under the new constitution, that we are still operating under, but when it came into effect in 1873, the black community voted astronomically high and elected people to the legislature. The white community's response to that was the war of terror by the KKK. Lynching people, killing people, and depressing the black vote. So when we talk about the depressed vote there is a historical reason for that. It was not just kind and

gentle; this was, as I say. brutal. There is a book out, *1919* that talks about what happens when minority soldiers came back from WW1, having fought to make the world safe for democracy. The veterans that came back, tried to stop the lynching and a lot of the lynching of course happened here in Texas and even here in Austin, a progressive community. Of course, you can take the same thing and apply it to the Texas Rangers. So what the KKK was doing in East Texas, the Texas Rangers were doing in South Texas. There are two or three documentaries in the last couple of years that show just the awful random killing by Texas rangers of Hispanic people in Texas. And it's all about suppression and suppressing the change that people resist and we are talking about years and years, right? This was a hundred years ago that all of this suppression started and it's still going on. We see it in a different way today. but there is a historical context. That woman that Jose was talking about in the rural area that thought voting was a privilege, comes from that era. We will let a few people vote or we will buy the poll tax—the poll tax of course was not in the constitution but it comes in later on—of those voters that we can trust to vote; that's how LBJ wins. So I think it's really critical to keep that in mind; that we are working in that historical context. This isn't just something that happened all of the sudden. It's part of this pattern and part of this culture. This racism and discrimination is ingrained in our culture. No matter how many times people say, "I'm not a racist" we all are. We are born in and part of the culture. So we just have to kind of accept that and actually you know I did a lot of lobbying with Jose back in redistricting stuff, back in the old legislature before it became tea party, and you could actually get a lot of conservatives to admit that they had a lot of baggage. It was the good olè boy time when you could joke. You can't now. This tea party stuff is much more visceral and much more brutal, if you want to call it that in terms of trying to change stuff. So it's to put all of that into context where the birth certificate case comes from, and how it arises. And you know part of the game here with our government as it has become more and more right wing or anti immigrant is a reaction against the administration, Obama trying to make immigration in a sense more humane. So as that is happening then the counter punch that comes from Texas government are all these other attacks that come up in terms of voter ID that Jose was talking about or the just dreadful Gerrymandering that they know they can do because it'll go on for years and years and years while in the meantime they elect their people. And of course the gutting of the Voting Rights Act by the Supreme Court has been devastating. The Statesmen is doing an article about this, about what has been the result of not having this tool to be able to use the Department of Justice to pre-clear redistricting. You know this is really important if you're from a smaller community. or even if you're from El Paso for example, its very important to be part of the county government of the school boards, because these are the biggest employers. If you want to talk about economic opportunity. you on these boards open that opportunity up. Sharing the pie is what we are talking about. So for example, the city of Bryan is trying to do away with single member districts. This is really out there, as you will see in the article. The idea of pooling the districts so they are no longer representative of the community means that there are less financial resources available. So if you're in a county and you have five members, four commissioners and a county judge, if you have a minority person representing the more minority part of the

community, then that person is going to make sure that the streets get paved, and that there are public services comparable to the rest of the country. Then when you get around to hiring people you're going to make sure that it is spread out also in the minority community: so this isn't just an academic exercise about "its nice to have representative government," but it is very concrete. So before I talk about the birth certificate case, I'd like to give you an example about how this is concrete.

When I was in South Texas, we began to look at the way the grand juries were picked in Texas. It's called the "key man" system. In the "key man" system, the judge appoints five commissioners; the commissioners select twenty people, and the judge picks twelve of the twenty to be on the grand jury to indict people. So what do you think the grand jury looks like? It looks like the judge. In Hidalgo County at that time, even though the population was 80% Hispanic, 52% women, 26% under age 26, and more than half of the people poor, the grand juries were basically white businessmen—in Hidalgo County. And what crimes did they indict for? What do you think a businessman indicts for? Property crime. So we sued, we won, and they had to change. And the minute it changed, the focus of the grand jury went to personal violence. No longer were rape cases laughed out of the grand jury. with comments like, "She asked for it," "Look at how she was dressed." In addition, other kinds of personal violence were indicted too. It was a huge change, because that grand jury was now reflecting the community and the community's priorities at that point. So all of this stuff has enormous consequence in the day-to-day life of a democracy. So this isn't just an academic thing. If you look at it on the ground level, it is really important that these changes happen. They're inevitable, but you all play a role in how inevitable it is going to be. Is it going to be in ten years or twenty years? Or are you going to let it go on for fifty? So what you're doing, hopefully while you're here, is showing an interest in these really important issues. It is really important to think about how you can help make this change happen in the future. Because you're here because people fought for you to be here.

So part of this, moving to the birth certificate case, is part of the war on minority communities. This birth certificate case focuses on the Hispanic community. Under the constitution, of course, if you're born in the U.S. you're automatically a citizen. That has been our belief, that has been the wording of the constitution, and that has been the interpretation of the courts since the beginning of the republic. And of course now we see the debate beginning to change, coming from the side that resists the change. You know there is some argument—"Well, maybe you're not really a citizen,"—and all that is probably not going to fly. But what the State has done in response to the administration, in response to Obama's trying to make immigration more humane and not deport families, is to come back and make it almost impossible, in many situations, for parents who are undocumented to get the birth certificates of their kids. And if you don't have a birth certificate for your kid, you will probably have a very hard time getting your child into school and getting your child baptized. If you have a disabled kid, you will have a very hard time getting Medicaid. And above all, if you're picked up and deported with your kid, your child will probably never ever

be able to prove that he or she was born in the U.S.—and your child will essentially become stateless.

If you look at the reality of this, the inhumanity of this is that these parents are in the country because of the violence and the economic depravation in their countries and communities. It is just awful. If you haven't read *The Beast*, you should read it. I think she wrote this in 2002, but it's a trip across Mexico on the train named "The Beast" and it is still very true today. I went down with a group two summers ago when the big influx started, and we worked at Sacred Heart, helping to process through the women and the children that were coming in. And to listen to their stories about what it was like in their communities and what they endured to get here were just awful. In fact, I got to the point that I never even asked a woman what the trip was like, because I didn't want her to talk about it. Because I didn't want it to be embarrassing, because I can imagine what it was like, particularly for the women. So if you haven't read *The Beast*, you should read it because it puts it into context. And you also have to see that the reason that people are immigrating, the reason the violence is happening, is because we have deported these violent gang members from California back to their country of origin, even though they haven't actually lived there, and they have taken over the countries—El Salvador, Honduras, Guatemala. They basically rule the country. They basically rule the small communities where these people are migrating from. This brutality that they experience is the effect of our foreign policy.

But that is not in the equation when you hear the drumbeat of hostility toward immigrants. Why are they coming here? People don't just get up and leave their homes because they feel like it. I'm here because of the potato famine in Ireland. Why are you here? Any self-respecting parent is going to move somewhere where they can support their kids and give them the opportunity that they did not have. But what we do in our rhetoric is we trash all of these people, and we have this thing about, "Well, people come over just to have the baby. so that the baby will be a citizen." The only place that really happens is with rich people who fly in from Asia. They are the ones who actually come here to give birth to a child in the U.S. for citizenship. Folks coming across the border, they are coming here for their lives. You know, a number of the people I talked to had kids in the family that had been killed, or had absolutely no food, or their husbands had been disappeared. You know you either have to do what the gangs want or you're going to get killed. That is what it comes down to. You wouldn't walk across Mexico or get on that train if it wasn't for that fear of violence that you're coming from.

So they get here and then people are penalized for that. You can't get a birth certificate for your child—penalizing the child. I mean, the child is born here—it's a kid. He or she is a little baby. so why do we penalize the child? But that is what this State does. They set up these criteria, and these are new, but you have to prove that you're the parent. So proving that you're a parent means that you have to have certain kinds of ID that the health

department prescribes, and the ID that they prescribe is what most people won't have, like a passport.

By definition, people are not going to have a passport. I mean, they're coming to the country unlawfully, so I mean, to ask them for a passport. or maybe you have a passport from your own country. Poor people don't go out and get passports, but the other thing is that when you're coming across Mexico with the Coyotes, you're going to lose your ID anyway. They're going to steal it or you're not going to bring it. You're not going to have the ID. Or the health department says you can have a national ID or voter card, but this is stuff that poor people don't have. And even when they do have it, by the time they get here they're not going to have it. And this is only to show ID. In Texas, or anywhere in the U.S. it has to be current—that is the other catch. So, for example, I'm representing a woman from El Salvador who made that awful trip. She has a passport and she has an El Salvador ID. but they're not current, and therefore they're invalid. I mean, this is the other part of the unreality of this.

What are the chances you're going to have a current passport and ID once you walk across Mexico, spend some time here, and have a kid here? If you're going to fly somewhere and you go through security. you can go through security on an expired drivers license for up to a year. That is sufficient for NSA identity purposes; it is not sufficient for the health department for identity purposes. It's crazy. And what is wrong with an expired passport? It's going to show the face of the person. It may have expired but it's still going to show identity. So that's the game they're playing to make it virtually impossible in many situations, particularly for folks that are coming from Central America, to be able to establish identity. And you know the birth certificate is made from what the hospital reports. So when you have a kid, the hospital gives you a little certificate and has the feet stamped on it, the picture, and all that kind of stuff. It is sent to the health department from which the department makes the official birth certificate. But by the time it gets there, you can't get it back if you are undocumented and you don't have the kind of identity proof that the State requires. It's crazy. We have filed a case with Texas Rural Legal Aid and you can't imagine the amount of publicity from around the world. Nobody can believe this is happening; that you could be in a situation where folks could not get a birth certificate for their kids. So I'm going to talk a little bit about the legal part of this and if you have any questions as we go along I'd be happy to answer.

Audience Question:

I have a question. Speaking about the birth certificates from the health department, is there a mechanism or process available for ad litems to represent the infant—the American citizen—to get the birth certificate on their behalf? If the parents can't prove they are the parents, surely that child is still entitled to that birth certificate.

James Harrington:

That is a really good point. It sounds logical. It can work sometimes. What we are finding is that there is some passive resistance going on in some of the local offices. People really understand this is not fair. But even if you can do it, it shouldn't be a requirement on the parents that they have to go find a lawyer to do this. And we are talking about thousands of people and Legal Aid cannot represent undocumented people. Which is why we are in the case. We are representing the parents and legal aid represents the kids.

Audience Comment:

But a child who the birth certificate is for is not an undocumented person.

James Harrington:

Right. Right. Yeah. This is logic. And that is part of our argument. You look at this from two perspectives: (1) what are the rights of the parents and (2) what are the rights of the kid.

Audience Comment:

Because if the child has health problems as an infant he needs that birth certificate in order to get the proper health care, to get in school, and it would make the child eligible for Medicaid.

James Harrington:

Right. That's right and you can push and shove and make it happen in certain situations, but the point is that it doesn't happen to anybody else. I have a kid I can go over and get the birth certificate. I don't have to get a lawyer or go through some fancy legal process to do it. And what you reminded me of when you talked about Medicaid is, of course, Texas refused to be part of the federal Medicaid program under the Affordable Care Act. And who benefits from that? So put that in the context of this war on minority communities, if you want to call it that. So I mean what you're focusing on is part of the suit. Even if the State says that this ID is not sufficient, then there should be an alternative mechanism there for that kid to get the birth certificate. And it shouldn't be a burden on the parent; they often have to go find a lawyer to go figure this out or finesse it. It should be part of that system. You could have a State ad litem or local ad litem, however you want to do it, and the school could call up and say they need a copy of the birth certificate and they could get it.

Audience Comment:

But the birth certificate doesn't benefit the parent; it benefits the child.

James Harrington:

Yeah, but you keep looking at this logically. and this isn't logical. It is like Jose was saying. There is not one instance, not one instance, where somebody got an illegitimate birth certificate. I mean, the State says we have to do this for national security. We are going to have terrorists getting fake birth certificates. Really. you think terrorists are going to plan twenty years ahead of time to get this cadre of Hispanic terrorists to do whatever? I mean there is no logic to this. It's like voter ID. There is no problem. There is no problem with voter fraud. There was a lot more problems back, as we were talking about earlier, with LBJ. That was a different story. But there is no voter fraud. Even the few instances they have found in Texas—I don't know. it's a handful like four, five, six or whatever—are all mistakes. And you know you can't swing an election with four or five votes anyway.

Audience Question:

And this is regulatory. not legislative, right? And it goes through comments, a memo, or regulations?

James Harrington:

Yeah, with the regular process and actually what they did is they introduced it a while ago but didn't really start enforcing it. You know the sort of creeping issue here, but the enforcement really ratcheted up when Obama said he was going to relax the deportation of folks that were here working. Those who had no criminal record or minor criminal record that had families and that kind of stuff. That's when it really tightened up. And it tightened up because the Health Department tightened it up. I mean they really started enforcing it. So anyway. on the kids' part, a child should have the absolute right to a birth certificate one way or the other. The State should not be in the position where it can keep that kid from having a birth certificate. You're entitled to it. Absolutely entitled to it. But there is no alternative mechanism that the State has put in place, so if you go back to the parents' rights on this, so we made the arguments that we made in this a particular case and we tried for a preliminary injunction. We didn't get it because the State muddled it with facts, and I can come back and talk about that don't let me forget to come back and explain what the State did to defeat the preliminary injunction. So we have in Texas or under our constitution (Federal and State) that parental rights are fundamental. They're fundamental rights and when it's a fundamental right that means that the State cannot infringe upon that right except for a compelling state interest. Which means generally the State loses. In very few cases has the State ever been able to win when you're talking about fundamental rights.

Sometimes they can chip away at it a little, but the burden is really against the State on fundamental rights. So that is part of our argument: they can't show a compelling reason. And even if you could show a compelling reason, the regulation or statute has to be as narrowly tailored as possible to address the evil that the compelling state interests wants to speak to. So that is our argument. One of our parental rights arguments.

You know that part of this substantive due process concept that the Supreme Court has come up with—and it's been around for about 100 years in Supreme Court cases. In fact, we pointed to fourteen Supreme Court cases in which the court says, "Yes, parental rights are fundamental rights, and that means you get to govern the life of your child." And if you want to have your child get medical care, get baptized, or go to school, then you are free to exercise that right. But you can't exercise that right if the State creates this birth certificate facade that keeps you from exercising your fundamental rights. So that is one of our arguments. It sort of comes back to what you're saying in the sense that even if there is some compelling state interest here, the regulation still has to be the least restrictive mechanism, to make sure that the right people get the birth certificate. So is it least restrictive simply because this women is from El Salvador and her passport is a year out of date? Is this really least restrictive in terms of determining if that is her identity? That kind of stuff— it comes up.

You can also bring in some other fundamental rights arguments; you can tie them together. The more you can tie fundamental rights together the stronger you are. So you have the right to exercise your religion. If you want to baptize the child and the priest or the minister says, "I can't do it unless you have the birth certificate because the State is breathing down my neck." You know that used to be, when I lived down in the Valley it was not uncommon to go to the church and get a birth certificate and use that birth certificate to prove citizenship, to prove that the child was born here. Those days are gone and it's not even an issue with the State but it is the other way around. If you want to exercise your religious beliefs, you can't do it without the birth certificate. So I'm sure you'll find some priest that will do it but by and large, that's a huge impediment. The same thing, you can tie the fundamental right to travel into this.

It may sound a little far fetched but think about this —if your family for example wants to go, and you're living here in Austin, and you want you to go to San Antonio for a quinceñera, baptism, wedding, or funeral, you can't go because you're afraid. Even if you said, "Here is Jose 3 years old, he was born here but I can't get his birth certificate. He has a great relationship with his grandmother and they were very close." He can't go to the funeral even if you put him in a car with folks that have passports or citizenship because if that car gets stopped for whatever reason that kid may be deported. I mean that's all possible. So it infringes on your right to travel, so you try to tie all that together or we try to tie all that together. It also means that if you actually get the kid in school, which you sometimes can do, this still means that that kid probably can't travel on any school events because you're always

risking what happens if somebody asks the question, or the border patrol somehow, or I guess its called ICE now, somehow intervenes.

So I think that Mexico has done something very clever and of course it was a brilliant move —they say it wasn't directly to address the litigation—but one of the IDs that you can use is the voter ID card from your country, and so Mexico is now issuing those. There is a big debate about the Matricula, which is what the Mexican government issues to serve as your ID. The State says it's unsecure and that you can't rely on the Matricula for identification purposes. It's based on the 2003 Matricula, which was probably unsecure. But since then, Mexico has twice updated the Matricula, and the current version, the 2014 version, is really quite safe. It's a really good identity document but the State, again it is not about logic, they're not going to go examine the 2014 Matricula, they're just basing it upon the 2003 one. It's not about logic. Since the State has said that you can't use the Matricula, what Mexico is doing now is issuing the Voter ID. However, it takes time because you go to the consulate, apply, then they do the background check and all that. Then it goes to Mexico City to be issued and you get it back in two to three months. It's not perfect but it is an end run around the State in this regard.

Mexico is very interested in filling an amicus curiae brief in the case, which is very unusual, and what was the State's response? They responded, "Well we want to take the deposition of the counsel." That's the sort of disrespect that the State agency has, and it's an amicus brief for heavens sake—they're not coming in as a party. And that is the sort of racist arrogance that you see at play here. El Salvador and Honduras and Guatemala, and all of the countries have also filed amicus briefs in this case trying to protect their citizens. The other thing is that, and this is probably something we couldn't say in court, but the police chiefs, including the police chief here in Austin, filed an affidavit saying in their viewpoint the Matricula was an excellent piece of identification. They use it. This is law enforcement. This is fine with them. I talked to a police chief and he actually said the Matricula is more secure than Texas driver's licenses. You go to the flea market on the weekend and you can buy a driver's licenses. This whole thing about safety, identity, and protecting the document and all that is false; he said the driver's license in Texas is one of the most fabricated pieces of ID. And so the State relies on it, and we rely on that for crime, you know for ID when we are stopped by the cops or just about anything. It's pretty much become our national ID card along with our Social Security number, which is not supposed to be a national ID number, but de-facto it is. And if these are good enough for identity purposes, then why is the Matricula not? So again, it comes back, it's not about logic; it's a part of this war on immigrants. To try to get people uneasy about being here, which is not going to work, but it also means it keeps those kids from enjoying full citizenship and maybe even growing up to become citizens. That's part of the agenda to slow down the demographic change in Texas.

So the other argument here, which is always a little bit weaker argument, is equal protection. In the general run-of-the-mill equal protection argument, you have to show that

what the State is doing is totally irrational. If you just say that there is discrimination against people who are citizens and who are not citizens, you got to show that that is irrational. It's a very steep test. And in the 5th circuit— this is another reason why you have to be involved in the elections— we have a lot of judge appointments coming up with the next president. You should know by now how important the appointment of judges is. And that it generally is not an election issue with us. Hopefully this year with the Supreme Court vacancy it'll become an election issue, but generally people don't focus on that. But judges are involved in our day to day lives in a very intimate way and the Fifth Circuit—which at one time was the harbinger of progressive change, the liberal circuit—is now one of the most regressive circuits and maybe the most regressive. It's a tight run between the Fifth and the Eleventh, but we are in a bad circuit. And so the Fifth Circuit takes that and convolutes it, so we don't really say. 'is there a rational basis?" Instead, the Fifth Circuit basically says, "is there not an irrational basis?" They turn it upside-down, which actually is harder if you think about that. It's actually harder to prove than to actually disprove a rational basis. So you're basically saying, "is there any way on earth that this is unreasonable? Irrational?" Which is a lot harder than saying, "is there any way on earth to show that this is rational?" You see what I'm saying? That's what the circuit does. It does it all the time. The horrible police decision the other day was about a cop that was in somebody's house secretly. He freaked out the owner, the owner got in a fight, and the cop killed the owner. He thought he was in danger. It's not about the rationality of that context. Look at all the bad decisions that Jose had talked about already that have come out of the Fifth Circuit. That is a very steep burden for us. Hopefully we will be able to rely on impeding the rights that are at stake. On the preliminary injunction, the judge was clearly sympathetic. A couple of things were at play here: of course the judge was brand new, and he's looking at the Fifth Circuit. Judges don't like to be reversed. And even if he's on our side, he doesn't want to get reversed in a way that hurts the case. The Fifth Circuit—depending who the panel is—can really go out of the way to sabotage the case. Anyway, what the State did is raise factual issues. There are some other secondary documents they have that they probably could have applied, and they didn't. You can't get a preliminary injunction if there are fact disputes, and that's what they did. They totally freaked out the judge with all these fact arguments. So that's what they did. He wrote a basically good opinion, denied the preliminary injunction, and sort of gave us what he wants to see developed in the record. The trial is in December. So if you want to volunteer for some work on that, you can contact Robert Doggett over at Texas Rio Grande Legal Aid or contact our office to work on it. We would be happy to exploit your legal skills.

Audience Question:

So when the litigation resolves and we win, will the remedy apply retroactively?

James Harrington:

That's a very good question. The thing in my mind that bothers me is that there were mass deportations on Christmas. What's happening to the kids that were born here that are deported without proof of citizenship? That's actually a really good question to raise when looking at the remedy at the end. We are not looking for damages, either. Usually you don't have a lot of retroactive relief, but it seems like in this case it'd be perfect for it. Because you're talking about a present right: the present right of the kid.

Audience Question:

From the Health Department data, are birth certificates that are at least in the system counted in the U.S. Census?

James Harrington:

Does the Census count those documents? I don't think so; I'm not totally familiar. We used the Census for grand jury discrimination, but that's really done by sampling. So I don't think they actually use that. I don't know. frankly. And you know. there is that debate in Congress that you can't actually use sampling; you have to go out and talk to everybody one by one, but everyone knows that is quite impossible to do.

Audience Comment:

Because the Census is affecting federal and state funds that are coming out, but it's based on data of new births where these people not allowed their citizenship, there should be some correlation there, I think.

James Harrington:

Well, it's a good argument. It's sort of an ethical argument. You could make the argument that whoever is in the country: the State has to take care of in some fashion, you know. emergency services. That is an interesting moral argument. You must not be from Texas. It's just too logical, too ethical.

Audience Question:

How long do they keep new birth data? If I was a child that didn't get my birth certificate, how long would I be able to recover that, years later?

James Harrington:

Anytime. It is there. The certificate is there. It's just having access to it. That's the problem. And that's essentially what the State is doing, denying access to them. So if you have a family, let's say one of the parents is undocumented, and they want to travel, and they want to make sure their kid is protected if they're stopped. They want to have the birth certificate or they want to get an American passport. Some people want to get passports because they're easier to carry around and it gives you greater flexibility with the kid. You can send the kid to Mexico with grandparents or whatever. But that is the question: the access to getting it. So, they exist. You can get it anytime you want. After you're eighteen, you get your own. But that is really the question cutting off the access.

Audience Comment:

There's the question of life or death, too. The hospitals in San Antonio have such a large percentage of low-income populations, where the child comes in for emergency pediatric care, and it's an infant or small child whose life is in danger. The hospital will, in fact, step in and make sure that child gets on the Medicaid rolls so that they can immediately give them the healthcare that they need. But that hospital needs a birth certificate to start that process.

James Harrington:

That's right, and sometimes they will do the first year and say. "we are just going to do it." But when it comes up for renewal the second year is where the problem really lies. In emergencies, that is helpful. But if you have a kid that's disabled, then you have a real problem when you get to the renewal. In fact, a clinical worker actually referred the woman I was talking about from El Salvador to us. A local clinic identified her and called up about her because she was going in for Medicaid. Some of these workers are just fantastic and will do anything they can to get past this hurdle. But they ran up against the second year, and that was the problem.

Audience Question:

You've mentioned a lot of these obstacles to getting these certificates. They're all portrayed objectively, but they're really meant with other intentions. Has there been any evidence where the practitioners have actually revealed these intentions?

James Harrington:

Well, we're in discovery right now, so we are poring over hundreds of thousands of documents looking for a smoking gun. There will be one. They always show up. But this is the problem; this is the cynicism of this. So the State must know ultimately they're going to

lose, but they're going to make this process go on for three-to-five years to have the effect of discouraging people or however you want to look at it, keeping kids out of schools or whatever their ultimate agenda is. Well, we know what the ultimate agenda is. The one thing I've learned in civil rights litigation is when you sue the government, they don't care about spending the money: it's not their money. If you sue a business, the business is going to look at this: am I going to win? Am I going to lose? What's this going to cost me? How am I going to do this? How am I going to make it right? The government couldn't care less. You have people making decisions who are personally offended by some of the cases. For example, we sued Williamson County. They have a religious test to become the constable. The constable. First of all, you can't have religious tests, but secondly. why would you even worry about the constable? All the constable does is serve papers. So we sued the commissioners, two or three of them, including the county judge, are personally offended they got sued. And they're not worried about whether they violated the Constitution or not. And so they dump money to hire Rudy Giuliani who I think is charging like $750 an hour or something like that for Williamson County because their egos are involved. They're not going to win that case in the end. You cannot do a religious test. It's even clearer under the Texas Constitution that you can't do it; it says there: no religious test. But it's not their money. and that's what's going on with the health department and with our officials. Think of all the money that Abbot has spent as Attorney General, bringing all these cases against Obama. What did he say every morning? "I get up, I'm going to try to figure out how I'm going to sue Obama today?' Our taxpayers' money. That's our money that he is using. They have no sense of shepherding the money in the right way to the benefit of the State. It's just for furthering their political agenda. So, you know. this may be where the ethics part of this course comes in. Anything else?

Audience Question:

Unintelligible.

James Harrington:

I think once you change the composition of congress you can do this stuff. Whether that can happen is another question because what Jose was talking about earlier is all this gerrymandering, these people are gerrymandered in for life. Unless you have some huge, you know tsunami by the voters; we are going to be stuck with a pretty bad congress for a long time. This is the prospect; this is the hope of Donald Trump. If he becomes the nominee he will just bring everybody down. I don't know I've learned not to be that optimistic. I never thought Ronald Reagan would get elected president or Richard Nixon.

Audience Question:

Unintelligible.

James Harrington:

Sure, change the voting rights act. No just you know fine tune the voting rights act to meet the Supreme Courts requirements. I'm sure you know voter ID, I'm sure the government and the justice department is on our side on that.

Audience Question:

But nothing happened, as far as these issues?

James Harrington:

It can't, not with the control of the Congress. They wont even modify the voting rights act in the very limited way that they are trying to do the compromise just to limit it to a few southern states. I mean you got to have a new congress. And judges, we talked about this earlier that the president appoints the judges. But don't get pessimistic; you have to keep fighting.

Audience Question:

The denial of birth certificates is so important legally and ethically. Has anyone written an article on this issue? Because it seems like it would be a good article for the Texas Hispanic Journal of Law and Policy to publish.

James Harrington:

Yeah go for it. Yeah, sure it'd be good. I mean a lot of it is already written in terms of looking at the pleadings and arguments of both sides, it's just a question of pulling together. It's a great idea having a coherent presentation and then that way we can also tell some of the stories of the plaintiff, which is very important, you know. I think just listening to people talk about what they went through to get here, what they left, what they had to leave and the journey they made is very powerful, you know. but that's not what they want to look at. 'They're taking our jobs,' is the argument, which we know is not true unless you work for a trump hotel. And they're finding out now he has all these immigrants working for him. He does not hire Americans. Again, it's not about logic.

Political Power of Latinos in the Years to Come

Speakers:
Rolando Rios, Former General Counsel, Southwest Voting Rights Project
James Harrington, Founder of the Texas Civil Rights Project

Presenter: Hector Gutierrez, THJ Development Editor

Presenter:

Okay. everyone. Welcome back. Our third panel for the day is going to be on the political power of Latinos in the years to come. This panel is going to have two speakers: for the first half, we're going to have Mr. Rolando Rios. He is the former general counsel for the Southwest Voting Rights Project, and he has more than twenty years of experience in redistricting issues. So, he's going to go ahead and start with a speech right now. Put your hands together for Mr. Rios.

Rolando Rios:

Thank you very much; I really appreciate the opportunity to speak with you today. I will say that you are here at a point in time when it's probably the most significant election in my generation and your generation coming up. This presidential election will impact your lives tremendously. Insofar as who gets elected. For one thing, we have Supreme Court Justice Scalia, who is no longer on the Supreme Court. And I'm never going to celebrate someone's death, but I'm glad he's off the court. We had at least five cases up there and won four of them. And in all five cases he was always against the positions we took. Now, especially we Latinos, you need to realize how important the democratic process and the election process is in the United States is.

When I was seven years old, my father was killed. He was shot in the head by a crazy person. So I was left, as a seven year-old with three sisters and my mother, who had a second-grade education. And my father, who was the only source of income, was a cab driver. He was removed from our house; it was in 1952. And it was very significant because my family was the first family to qualify for Supplemental Social Security in San Antonio, Texas. We came out on the front page of the paper. Because Supplemental Social Security was a law that was passed, in 1952, by the Democrats, that allowed for any family who had a

catastrophic event in their family. like losing your main breadwinner, to get subsidies. Because of that Supplemental Social Security my mother would get a check for $400 a month, until I was 18. Which meant that I didn't have to drop out of school and so on. The significant point here, is that, not one Republican voted for the SSI that was passed in 1952. Not one, okay. So, who gets elected will affect your life. You jump back, getting out of high school, and getting out of college, there is a lot of talk about Vietnam. And I'm thinking, "who cares about Vietnam? It doesn't bother me. It's halfway around the world." Well I find myself on a plane to Vietnam, in 1970, and I almost lost my life. Why? Because someone in Washington, this was Johnson, decided that we were going to go to war halfway around the world. So, to make my point, it's really important that you get involved with the democratic process, because the decisions that are made, way up there in Washington, affect your life in a very direct and personal way. So I came back and I got involved in the civil rights movement. And I worked with Southwest Voter Registration Project, and then with MALDEF. And then I went off to law school up in Washington, and stayed in touch with Southwest Voters and MALDEF. When I came back, I graduated from Georgetown, Southwest Voters was having some real problems, because what they were doing is they would go to a town, do voter registration, and Willie was a very dynamic leader, and he would do very effective voter registration drives, and he would get people out to vote. And they would come out to vote in, say. Seguin, or Levelland, TX, or Amarillo. And they would come out to vote and they would lose. Even if everyone came out to vote, they would lose. And Willie kept saying, "Why is that?' The reason is that they had devices at the local level that basically annihilated the right to vote for Latinos. These devices consisted of at-large elections, numbered posts, and racial gerrymandering at single-member districts. An example of the at-large election problem occurred in San Antonio in the mid-seventies. I had just come back from law school and San Antonio only had ten "at-large" city council members. That means that city council elections were city-wide. In San Antonio, the Latinos live on the South and West side while all the Anglos live on the North side. At that time, there had only been one Latino out of 40 or 50 elected officials in the past ten years. The reality was that even if people registered to vote and showed up at the polls, they could not elect the candidate of their choice because the voting devices were being used to stifle their vote. We sued the city of San Antonio in the mid-seventies and created ten single-member districts. We immediately ended up with three minority elected officials just because we changed the election device. That started a wave in the mid-seventies. At-large elections were being used for other cities such as Amarillo, Fort Worth, Lubbock, Midland, San Antonio, Corpus Christi, Houston, and Dallas until we knocked them out. All those cities had at-large election systems where minorities could not elect candidates of their choice. Now. here we are today with this reality from the mid-seventies. At that time, the Voting Rights Act was extended to cover Texas. There were two parts of the Voting Rights Act that were very significant. One was Section Two of the VRA, and the other was Section Five of the VRA. Today. it is important to keep in mind that for a hundred years, people would go and vote, and their vote would mean nothing. At that time, there was a requirement that you had to be able to read before you could vote. People would sue and eventually it made it to

the Supreme Court. After taking two years, the Supreme Court would mandate the elimination of the literacy test. As soon as it came back to Texas, however, Texas passed another Grandfather Clause. The Grandfather Clause had a requirement that an individual's grandfather had to be registered to vote before the individual could vote. This was also litigated for another two years. By the time it came back, Texas would pass another law to prevent minorities from voting. The point being that the government doesn't care. For example, here in Texas they want to maintain power. There are laws being passed right now that cause gerrymandering of the congressional districts, and those kinds of negative devices. You file a lawsuit, and they will fight it all the way to the Supreme Court, and spend millions of dollars, and it doesn't matter because once it gets back they'll pass another law. What happened was that these devices were successively challenged throughout the seventies, eighties, and nineties. I remember going up to the Panhandle with Willie Velazquez once. In that whole Panhandle area, there were no minority elected officials. Yet, minorities were 30-40% of the population. For example, in Seminole, Texas, the minorities were probably 40% of the population but no representation on the school board, city hall, or county commissioner. For the county commissioner, there are four commissioners; for the school board, there are seven; and for city council, there are five or six. None of them were Latinos, even though they were 30-40% of the population. In the early 80s, we did about sixty lawsuits, just in the Panhandle area. When we filed the lawsuits and we created single-member districts from the at-large system, we did away with the gerrymandering. We went from zero elected officials to three on the school board, three on the city council, and one county commissioner. We went from zero representation to seven. From 1980 to the mid-nineties we did probably 68 lawsuits just in the Panhandle area, and the last count we had 165 Latino elected officials at the local level. We went from zero to that kind of representation all because of the federal Voting Rights Act (VRA) and the litigation. The reason I'm saying that this is a very significant case is because Section Five of the VRA is essentially an injunction. In other words, there was already a court order in place. If the City of Dallas wanted to make any kind of voting change, no matter how insignificant, there was already an injunction in place in federal court where they could not do that without approval by the DOJ in Washington. That is what created the voting section of the DOJ. It is all due to a hundred years of abuse of the State passing the election devices that kept minorities from getting elected. In the past two years, Section Five has been eliminated. Immediately upon the elimination of Section Five, a college district in Harris County reduced the number of polling places from 48 to about 20. They completely eliminated those polling places in the West, in the Latino and the Black areas and there's no remedy now. Before, with Section Five, they would have to get that approved by the DOJ and that would never be approved. Now they can do it and get away with it. I'll file a lawsuit, but that will take two years, and we'll win. We'll probably win under Section Two of the VRA. By the time we win and come back, however, they will make another voting change. So we are back to where we were in the mid-seventies before we had Section Five of the VRA. That is why this election year is more significant: because of this turning back the clock of the civil rights movement of the sixties and seventies. We have made a lot of progress. There is now another effort, and this

started with Ronald Reagan in the eighties. He appointed a lot of conservatives and they would be given litmus tests to undo the VRA and the Civil Rights laws. We are at a point now where they are undoing more and more of the Civil Rights laws. Whoever the next president is going to be will be able to set the tenure of the court for the next generation. That is why this election is probably the most important election ever. Let me give you another example of what's happening in Texas. In Texas, there's 150 state legislators. And right now. Latinos, we probably have about 45-50 Latino state representatives. And maybe 20, around there, African-Americans, and they're all Democrats. So we're at a point, 75-76 is the magic number. At 76, you control the legislature. Okay. And the battle here is: who controls the legislature? Who controls billions and billions of dollars? So, this is the fight. So what happens now?

One of the biggest problems we have is when we draw districts. We draw districts on the basis of population. In other words, everybody gets counted and you apportion the districts based on population. Right now. like I said, we've got about 48 state reps that are Latino districts that we've drawn. Right now. there's an issue before the Supreme Court where the conservatives, and the State of Texas, are arguing that apportionment should not be based on population; it should be based on citizen voting age population. That's a huge difference because what happens now is, instead of us having like 45-48 state reps, we are now going to use citizen voting age population as the basis. It will pack Hispanics and non-citizens into districts, and reduce the number of districts. In other words, we would go from about 45 state rep districts, down to maybe 32, if we use citizen voting age population. The issue is: does the Constitution require that you apportion based on population, or citizen voting age population? And I will tell you right now. there are three Supreme Court justices, well one's gone now. Thomas and Alito, that think that apportionment should be done based on citizen voting age population, which is again turning back the clock. All the progress we've made is being turned back. What's going to happen now? If we can get Hillary elected, she will appoint progressives, which will help hold the line on the retrogression of civil rights and minority rights. I believe that she would be able to appoint some. Because we have, Scalia's gone. Well there's a good chance there's going to one or two more, in the next four years, that are going to be gone. So, we could set. .and the Supreme Court sets the pace. They set the pace on progress and progressive issues, like us. Now. I would say this, that between the mid-seventies and two years ago, we did over 300 federal lawsuits asserting section two and section five of the VRA, and we won 98% of them. Now the main difference is that section five is already an injunction. A voting change would be made, we would go to federal court, an injunction would issue, and then you can't make that voting change. The only thing left is section two, which is the lawsuit that we're using to challenge the present redistricting and also the voter ID law. But those cases are really expensive. You've got a whole series of factors to prove, but you can win, and we will win. And we won the voter ID case in Corpus Christi. And it went to the 5th Circuit, got affirmed, and that's going to end up going to the Supreme Court. And, like Jim said, they have spent millions and millions of dollars keeping the minority vote from happening. Okay. And they will continue, because,

again, we're talking about power. Who is going to run the Texas Legislature? Now Latinos are very key here just like they've been in California. In California, Latinos control the legislature. We have Democratic senators; we have a Democratic governor. That, in my opinion, is where we're going to be in the next few years in Texas, if we continue to be engaged, and continue being involved in the Democratic process. One more point I want to make, too, is about this whole thing with immigration, you know, because I do a lot of immigration work as well. If you are from Cuba, and you walk into the United States, you get a green card. This friend of mine I met in Vietnam, he's here now. When they left Vietnam, they came here. They gave them $50 and a green card because of the social turmoil going on in Vietnam and going on in Cuba. Yet, if a mother, in El Salvador, has a 12-year-old child who is being threatened by a local gang, and he has to become a member of a gang or else he's going to be killed, says, "well, I've got to get you out of here, because of the social situation here," gives $1,000 to a coyote to bring him over, to come into this country, and bring him over, they have no status. What's the difference between the social unrest that's happening in Cuba or Vietnam and what's happening in Latin America today? Yet, our immigration law favors one group, and not the other. Okay, so that is another issue that's before us in this election. And I'll be more than happy to answer any questions.

James Harrington:

First of all, I want to say, it's an honor to be sharing a panel with Rolando. This guy is a legend, and you can just hear from some of the cases he's done the impact that he's had on politics in Texas. So, thank you for all your work. It's just amazing.

Rolando Rios:

Well, thank you, Jim. We've been working in this area for many, many decades. More than we.

James Harrington:

We won't go there. But, 1952, man. But the 1952 thing about SSI is important, because, like what I was talking about earlier, we make progress, but we have to keep working on it because we don't see, necessarily, the result. But those folks that worked on SSI, those Democrats in Congress, gave us, in reality, Rolando Rios, that desegregated much of Texas, so, every step. I always like to tell the story of Cesar Chavez. You know, I got to work with him a lot in Texas, so I picked up this story. And, you know, he was a migrant, and dropped out of school because he had to support the family, and went into the Navy. And when he came back from the Navy, every Saturday he used to hang out with his friends and they'd be drinking beer and playing with the cars, tinkering with cars, big pastime, in LA. But every Saturday, this guy named Fred Ross, who was a Saul Alinsky organizer, came by, and said, "Cesar, you can do something better." And finally, one day, Cesar said "Like what?" And, of course, the rest is history, right? And that's why I think it's really important,

like I was saying earlier, to think about everything you're doing, because you guys are going to be the ones who will open the door further. Rolando's done a great job in many respects. You're probably here because of his leadership. But, what's the next step? This is where the mantle falls on your shoulders. We're expecting things of you, right, as we drink beer, when we're 90 years old, and tell war stories. So I want to change the focus a bit, to some other issues, that aren't clearly identifiable as Hispanic issues, but have an enormous impact in the Hispanic community. And that is what we're calling the debtors' prison. This is the whole criminal justice system. So, when you're looking at what you might want to do in the future, if you're interested in criminal law, this is something to look at. But here's what's going on. In reality, you have people who are arrested and given bonds that they can't afford. And I'm talking about misdemeanors. I'm not talking about felonies, like murder. I'm just talking about DWI, or hot check, or that kind of stuff. They're put on bond, that they can't afford, end up in jail, held for trial, two, three, six, eight months, and what happens in that time: they lose their job, maybe as a result of losing their job, can't afford the rent, get evicted, get foreclosed on, perhaps, their house, maybe lose their car.

They're put on bond, that they can't afford, end up in jail, held for trial, two, three, six, eight months, and what happens in that time: they lose their job, maybe as a result of losing their job, they can't afford the rent, and they get evicted. Foreclosed on, perhaps, their house and maybe lose their car. All sorts of collateral consequences for their family. And so, on the face of that, what happens? People say, "well, I got to get out, I'll just plead guilty." So you get out and get probation. And then, one misstep on probation and you're back in jail. You're totally at the whim and power of the probation officer whom may not understand or may have another cultural thing going on, and you're back in. And, at this point, you're not entitled to a lawyer, in that situation. No, I should say, you are entitled to a lawyer, but the State won't do it. The judges have this process of ramming this stuff through so the State doesn't have the consequence of paying for it. But think about it, the collateral consequence that that had. I was on a panel, a Legal Aid panel. If we remedied that part of the system, that would knock out half of the business that Legal Aid has to deal with. In other words, Legal Aid is dealing with the symptoms of the disease. Because Legal Aid is going to deal with the foreclosure, it's going to deal with the rent issue, and it's going to deal with the consumer issue. That's all because of the criminal justice system, the way that it functions. It's a really, really serious problem. And, of course, who does that impact? It's going to impact people who are poor, and that, of course, means, generally, Hispanic and Black communities in Texas. There's already a suit filed against the court here, against the municipal court here in Austin. Our office will probably file one in El Paso for sure, and maybe Galveston. But, this is a political issue because of the way our government is set up. It's like going district by district or school board by school board. You have to go court by court. You have to go county by county or city by city. And, of course, its enormously difficult to sue judges. They protect themselves. They've created this great doctrine of judicial immunity where you can't sue them. It's very difficult, so, ultimately, it's going to have to be a political issue. So, here's the thing, too. You plead guilty, and even if you're

clean afterwards, and you don't make some technical violation of probation (a technical violation could be, "I had to go work, so I couldn't see the probation officer. or "I don't have enough money to pay my monthly assessment."), the probation officer can revoke you. And they do, all the time. So what happens then is that you have a record. And if you're hiring somebody. and somebody comes to you, and you have two choices, and somebody has a couple of misdemeanors, and somebody's clean, who are you going to hire? If you haven't read, *The New Jim Crow*, you need to read it. Michelle Alexander does a really remarkable job of talking about the criminal justice system. She calls it "the new Jim Crow" because it effectively disenfranchises minority communities. Jim Crow. as Rolando was talking about, was when we had all these artificial barriers, right, literacy test, poll taxes, all that kind of stuff. But here's how the system, she explains, manipulates the criminal justice system. What you end up doing, is people are kept in poverty because they're disenfranchised in the larger context. They can't get jobs because of their records, this is that whole school-to-prison pipeline you may have heard about, where Texas, can you imagine, they criminalize bad behavior in school. If they did that when I was in school, I would still be in prison. I mean, kids act out. Kids do bad things, but why criminalize it? Because all you're doing is setting the future that that person can't get a good job and can't vote right away. Texas has loosened that up, but at one time there was an absolute bar of anyone ever convicted of a felony from voting. They still have some time after you get out when you can't vote, but you're disenfranchised. So, all you're doing is, the criminal justice system is perpetuating poverty. And it has the collateral consequence of. .I say collateral, but maybe this is intentional, she argues that it is, but that it's the new way of suppressing the dynamism of minority communities. So, lots of times we focus on something that we can readily identify as a Hispanic, or African-American issue, as in redistricting. But in our system, in how it actually functions, you see these seemingly neutral rules and laws that actually have the effect of preventing the minority community from moving forward. Drug use, in the white community. is four times more prevalent than in the black community. That's not the myth, right, when we hear it? Cocaine, is not, it's a West Side drug, we'll use Austin, is not criminalized to the extent that crack is, on the East Side, the poor person's drug. How did that happen? You know? Is that by accident that that happens? And now that we know that's not true, why don't we undo it? Why don't we undo it? So, I think that what we need to do here, in terms of looking at the future, is really look at all our systems, and how to redirect them, so that they actually do justice because everything is in place to perpetuate power. Everything is in place to perpetuate power. And, we have to chip away at it wherever we can chip away at it so there will be change. I hope you don't walk out of here in despair. looking for hemlock. There has been an enormous amount of change, even in our lives. We're not anywhere near where we thought we'd be. When I got out of law school, I thought two or three class-actions would solve all the problems in the United States. I was pretty naïve. But, if you look where we were 100 years ago, where we were 50 years ago; I'm old enough now that I can actually see this. And I used to hear people talk about this all the time, "yeah, we made some change, it's not as bad as you think." We have made change, but its because people have made that sacrifice to work on the change even though they know

they're not going to see the results. But they have this hope in this struggle for human rights that what they do is going to have consequence. And it does. So keep that in mind, move you life in that direction. But I want to come back and talk about how important it is to look at the criminal justice system and think about how to reform it, because it really perpetuates this system of segregation in our society. And the system is very, very sophisticated.

Rolando Rios:

Let me add something there, Jim. A friend of mine runs Avance. Avance is an organization that focuses on three year olds, mostly Latinos, and the development of the brain of a three year old. Avance, because of the research of the doctors and so on, they can predict—because by the time a child is three years old 60% of the child's brain is developed— given the social structure that they come from, who is the most likely candidate to end up in prison. And he handles $50,000,000 a year, and he's over here in Austin every year lobbying for more money. Well, guess who lobbies against us: the prison system. It is big business, folks. And, I mean, they don't come out there and say it, but they have a vested interest in keeping those prisons full. Am I right?

James Harrington:

Definitely.

Rolando Rios:

So, when he says it's a sophisticated system, it is. Because it's power. When he came over, I heard that. When he testified, the lobbyists were against it. If he is effective, the lobbyists know that the prisons will be. What you are talking about, the reforms, are also directed at minimizing the number of prisoners, which hurts their bottom line.

James Harrington:

That's a really good point. This is exactly what you see with the private prison system. Look at what's going on with the immigrants and children that are coming in. They are being placed into these private prisons that are run by private companies, like CCA. This is awful because their whole purpose is to make money. They are profit-making, so they are not going to protect your rights. They need to have a full prison. So what do they do? There is a decision from California federal judge that says, "you cannot detain kids at these detention centers because they are not licensed as children's facilities." So, what do they do in Texas? They go to the government and get licensed as a children's facility. A detention center becomes licensed as a children's facility. But it's about money. It's all about money. So, it sounds good. We'll do some privatization, and we'll save some money. Yet the net result is an economic interest is being created that will resist social change. That's why the example of Avance is really great. That's exactly what's going on with immigrant children. It's absurd.

George Orwell would be laughing, that you could call a detention center a children's facility. That's how bizarre this is. But it's about money. and nobody fights. When private prisons came about, everybody took the party line — "oh yeah, it'll be better. State prisons are awful, but private prisons are just as bad. Anyway. I'm finished if there are any further comments.

Audience Question:

Has there been, to date, any kind of policy. or backlash against the private prison system?

Roland Rios:

Not really. The problem is that most of the public isn't as engaged as the private prison system is. When the legislature is in session, they are there. They are going. They know who to give money to, in order to make sure that whoever's in charge of the committees and so on, are well-funded. So, when the legislature meets for six months every two years, they are there to make sure that they take care of. .themselves.

James Harrington:

Yeah, they invest a lot of money. Also, employers, in the communities, employ a lot of people. So, they get folks all revved up, and they come and lobby their reps and their senators. You know. it's sort of perverse, to use your. .but that's what they do. We've doubled the prison population in Texas. It's basically creating political jobs, in a sense, in these outlying areas. Look at where the detention centers are placed.

Rolando Rios:

You know. you are in a wonderful position, like I said. California, at one time, was run by Republicans. It sounds so partisan, but that's just my experience. At one time, the governor was Republican, the two senators were Republican, and the legislature was Republican. Latinos really got involved and turned out the vote. Here in Texas, if we were to increase three to five percent on our turn out, we would run the governor's office, the two democratic senators, and the legislature. You will get to see that in your lifetime. Look at this election, if Rubio becomes the nominee or the vice presidential candidate for the Republicans, Hillary will be strongly pressured into having a Latino be hers. .and it'll probably be Castro. Why? No one person can be elected President of the United States, unless they receive, I guess, between 35-40% of the Latino vote. Okay. so, that's you guys. The laws that are going to be impacted when Hillary's in, are the laws that you're going to have to enforce whether you get into, whether it's criminal law. or whatever. You have to have a social conscience because that's only way that you will prepare your kids for what they have coming up. Okay. it's real important. I mean, I was in your shoes 35 years ago and

decided to make sure that, as a lawyer, I had an impact on the community. Because, like I tell my clients in immigration, in this country. if you don't fight for your rights, you will lose them. Like, the place where I eat, a lot of the waitresses there, they're citizens, whom are not registered to vote, or are registered and don't vote. Or they don't register because they don't want to serve on jury duty. They still believe that, which was eliminated a long time ago. But in this country. if you don't participate in the democratic process, you will lose your rights. So, I tell them, they ask me, "my father is not here legally what do I do?" I tell them that the first thing they need to do is register to vote.

James Harrington:

You know, I love this story. because, I was talking about the 5th Circuit earlier today. how, basically. its function has been to gut law. gut law. and gut law. It's done this in the employment context. It's been awful over the years. I can't tell you how many times I get a call, from someone who's been fired, or whatever, and they say "this is what happened, do I have a lawsuit?" I reply, "no, you don't, but you would have three years ago before the court changed the law." They say. "well, that's not fair." And I say. "did you vote?" I have yet to have somebody say yes. People don't realize the effect that voting has on their lives. It's not only who is president, but who all the judges are going to be.

Rolando Rios:

He's right, and that's an excellent point. Because when we started in the mid-seventies, the 5th Circuit, which has fifteen judges, was very progressive. They were part of the civil rights movement and so on. But, it all started when Reagan came in. He started appointing. right now we have the worst, the most conservative, and bigoted court of appeals in the country. Am I right?

James Harrington:

Yeah.

Rolando Rios:

A lot of them are people who were appointed during the Reagan years, to turn back the revolution. Well there, like Edith Jones, they can't last much longer, right? So, again, because it's the 5th Circuit, it has an impact on people's lives. That's why. this election, and the next eight years, we will be able to fill in, not only the Supreme Court, but the Court of Appeals. You guys are going to be living under those laws. yes ma'am?

Audience Comment:

I just have a comment, and I hope everyone here is with me, because I know it's going to sound like the end of the world, but unfortunately. I have a lot of law students ask me every year, "what can I do this summer that will impact me the most?' In other words, 'what will help me in the rest of my career as a lawyer?' This is the first time in my legal career where my advice to any law student is: "The most important thing you can do this summer that will help you for the rest of your legal career is to register voters, wherever you are. If you have the time go out and register voters all over the state. I agree with Mr. Harrington that this particular election is going to be close; it is not going to be a slam dunk. John McCain and Mitt Romney did not really motivate or excite the Republicans. If you are keeping track of the states, the Republicans are breaking records, all time voting records. More Republicans are coming out now more than in the last three or four presidential elections. It's going to be a tight race; it's going to be very critical for minority voters. If you register just ten people and those ten people vote, it could impact this election tremendously. The next President of the United States will appoint a minimum of two Supreme Court judges. We might not be arguing Hopwood four or five years from now because there will be no affirmative action anywhere in the country. We won't need Hopwood plaintiffs. There won't be affirmative action. Enrollment for minorities in law schools, medical schools, and undergraduate schools will just plummet. The reason that the University of Texas has to keep increasing tuition is because the legislature won't give enough funds to the University. They know that the higher tuition goes, the lower minority enrollment will be. They're smart people; they know that. You raise tuition. You eliminate more minorities that are getting college degrees. This is going to continue to happen depending on who gets elected. This election is probably one of the most important in my lifetime as a voter. You're all going to graduate. What's the likelihood, if a Republican gets elected, of any minority getting appointed to any bench, anywhere in the country? There won't be minority judges. There won't be minority legislators. Very. very few. if any. There will be, as Mr. Harrington puts it, a representation issue. We won't have representation. It will impact your entire legal career. It will impact all of the issues you care about, all of the people you would like to be judges, whether you become a judge. This is a critical, critical question. This is very important. I know we can sound all gloom and doom, but you can see the numbers already with minority enrollment in the law school and in the undergraduate school they are going down. That will get much worse. This is a very, very important legal issue.

Rolando Rios:

I wanted to modify your summer schedule a little bit. So, I suggest that from noon to five, you volunteer with us, and then from five to eight, you register voters. After eight, you go to Sixth Street. The next morning, you sleep in until eleven, and then go back over to our office. That way you learn about civil rights litigation, but you also do good political work. Even if you end up clerking at a law firm, the best time to register people is going to be at

night, you know. during early evenings. I mean, that's a really good point. I just wanted to see if we could get some volunteers, so yeah, but you're pretty pessimistic. I'm not quite that pessimistic.

Audience Comment:

Well, I'm very worried.

James Harrington:

Well, that's good. It's good to sound the alarm, because that's a good way—

Rolando Rios:

The future looks good. The future looks good, but you've got to stay engaged.

James Harrington:

I mean, if Trump is to get the nomination that would be just a tremendous organizing tool for our side. He's bad on everything.

Rolando Rios:

I think Hillary could beat him in every state—even Texas. He's toxic.

James Harrington:

I want to get your ideas on this. I think that if Trump got the nomination, the Republican Party would kill it. They would vote Democratic, so they could get the party back.

Rolando Rios:

Well, I think a lot of this started with Reagan, appealing to the base's racial instincts, right? And developing that and developing that so that this base, that they've developed since the Reagan years, is now coming back to bite them. Because they're rejecting, they're saying, "look, we've had 30 years of you making promises that you're going to do away with minorities and close the border and all that. Well, this base, who has elected you, well, now they are going to reject you. That's hopefully to our advantage because the Republican mainstream. .I've got friends who are Republicans who I play racquetball with who say, "Well, if Trump gets the nomination, I'm either not going to vote because I can't vote for Hillary. or I'm going to vote for Hillary because I can't vote for Trump." You know, there's a lot of that.

James Harrington:

You know it's the same as the Democrats did with McGovern in 1972 when the left-wing took over.

Rolando Rios:

Exactly, in the seventies. Yes, sir?

Audience Question:

Even if we can get Hillary elected, isn't that going to drive Republicans to go out and make Congress more Republican?

Rolando Rios:

Yeah, that's absolutely right. You have to have, like Jim said, a wave election. We had a wave election in '94 when I ran for congress with Ann Richards. In '94, not a single Republican lost, country-wide, and for the first time in thirty years, Congress was controlled by Republicans. The first time. And guess what, once they got in, they realized that 80% of Latinos vote Democrat, and they're coming in by the bucketful. We have an immigration problem! We never had an immigration problem. How do you think 15 million people got here without being deported? Well, number one, there were jobs here, and the employers needed their cheap labor, so they didn't care. There's such a thing as, like a squatter law, where a person stays on the land over a period of time, and they develop equity in the land. Well, here's people who have been here, never had an immigration problem until the Republicans took over the House. Been here for ten, fifteen, twenty years. Now, all of the sudden, "oh, you violated the law." Well, the reason they did is you let them live here, they developed a family, and by the way, it's a civil law, it's not a criminal law, it's a civil law. And now, all of the sudden, we have a problem folks, immigration, they're coming in illegally. Because, 70-80% of Latinos vote Democrat. Like I said, before '94, before Republicans took over the House, you never heard about immigration being a problem, am I right?

James Harrington:

Yeah.

Rolando Rios:

Never.

James Harrington:

I like the "squatter rights" thing, because that's how the illegal immigrants from Tennessee took over the land grants from the crown which people had. They squatted. That's why adverse possession law in Texas is so good.

Rolando Rios:

So, don't you think people have some equities? I've got clients with 10, 15, 20 year-old kids that were born and raised here, or parents who brought them here at the age of two, and now you say: "oh, now we're going to enforce the law" after you basically told them they could stay here.

Audience Question:

So, we've heard a lot about Reagan. How did Reagan get away with the fact that he was the only president to give amnesty?

Rolando Rios:

Well, like I said, Reagan was elected on the premise that he was going to appoint conservative judges and take care of all this civil rights stuff. He was kind of like Trump, he would work. He was a reasonable Republican. He could never get elected now. He was reasonable because he fed into that narrative. This country's changing, we're missing the old times, and there are too many minorities, you know. look at the blacks, look at the gays. So, he fed into that in a very subtle way. and he got elected. And they kept on developing that. But he did pass a law. I mean, I think I ended up immigrating over four or five hundred people because of amnesty. And he was a reasonable Republican, that would never be elected today. But, it was a transition. And he did appoint some very conservative Supreme Court justices who have turned back the clock to the point that now we don't have a VRA. But if we can get a good Democrat elected, like Hillary. we've got to turn the clock back, and wait for the next wave election to take over congress, because it's not going to happen until there's another wave, right? Because we, the Democrats, after WWII, took over congress and controlled it for 30-40 years. We've got to wait for that to happen again. But in the meantime, we need the presidency. and we need the Supreme Court to hold the line, and maybe advance the line. What's wrong with, next year, having five judges who reverse the decision on section five. Jose was telling me about that today. I said, "well, you're a dreamer," but it could happen. Section five of the VRA was passed by the Senate, 97-to-nothing, and the Supreme Court struck it on a five-to-four vote. Five-to-four.

James Harrington:

By interpreting facts, which the Supreme Court is not supposed to do. Right, appellate courts are not supposed to interpret the facts.

Audience Question:

Something I don't understand is, after Obama got elected, there was a Democratic Supreme Court, we had congress and the president, I don't remember any of them doing very much. So when Republicans get elected to office they're very good at being ready to pass things, which they have done because they have bills written years before. They're ready to go. So, help me understand, next time there's a super-majority. whatever word you use, in congress. What's different? What happens next time?

James Harrington:

Well, you know. for me, both Clinton and Obama, for being lawyers and understanding constitutional law. did an awful job of not capitalizing on judicial appointments in their first month in office. And the thing is, I don't understand why Obama didn't learn from Clinton. Because, you know, after two years you lost the Democratic majority. and it seems like, if you know how important judges are, you're going to have your list, and ten minutes after your inaugural address, that's going to go to the senate. For every judicial position in the country. And why they didn't do that, I don't get. You know. the Republicans, as you point out, would do that. It's just, incomprehensible to me that this opportunity went down the tubes.

Rolando Rios:

I think you're right, and I think that, Obama was kind of green. He could have done something on immigration when we had control. He spent all of his political capital on healthcare. Which is important. And I think that they just should have, I think Jim's right. They should have known better. But in my opinion, they didn't handle it right. Because they could have done more. But it was a short period, what, two years? When they had the majority in both, it was a very short period of time.

Audience Question:

So, between Hillary and Bernie, which ones do you see as the better advocates for Latino rights?

Rolando Rios:

Well, I personally think that both of them would be good, and I like Bernie's position on social issues, especially money for education. The most important resource we have is young people. Human beings. The more money the government invests in human beings the better. Like they invested in me when I was young, the greater this country will become. I like both of them, I just think Bernie will be labeled as a communist, I mean, I have Republicans who say. "I would never vote for him," because they don't like to pay taxes and so on. But I like his ideas, I just don't think he's electable, and Hillary and him have similar ideas. She's been working for progressive issues her whole life. I met her in '72. She was down here. But I think, I'm glad the young people are excited about Bernie, because they're idealists and they want a good future, like you guys. It's admirable, I just don't think the practical politics would work in your favor, if we nominated Bernie. Do you agree with that Jim?

James Harrington:

Yeah, I don't think America is every going to vote for an agnostic right now. right? Especially an agnostic socialist.

Rolando Rios:

Already. Trump's called him a communist.

James Harrington:

Yeah, that's what he'll get labeled.

Rolando Rios:

The sickle, and the thing above his head, you know.

James Harrington:

I mean, he's really got good ideas. We even had him speak at one of our dinners. But, I think pragmatism has set in on this. But, I think Hillary also has the potential to appeal to a lot of Republican women, particularly if Trump is in, she'll pull a lot of Republican women. Probably with any of the three Republican contenders, she'll pull a lot of Republican women.

Rolando Rios:

Interesting, interesting year.

James Harrington:

Who would have guessed? Who would have guessed a year ago that we'd be where we are today? It's absolutely astonishing.

Rolando Rios:

But Jim's right. I never thought, I never thought that Ronald Reagan would get elected, he was a class 'b' actor.

James Harrington:

Yeah.

Rolando Rios:

You never know what can happen. I think it looks good for Hillary if Trump gets the nomination, because even the Republicans don't like him.

James Harrington:

And Cruz, I think Cruz is out, too.

Rolando Rios:

Well, today or yesterday. what's the name of that senator from South Carolina who's running for president?

James Harrington:

Graham?

Rolando Rios:

Lindsey Graham said that, did you hear this? He said that if Ted Cruz was shot on the floor of the Senate, he would have a hard time finding a jury who would convict anybody.

James Harrington:

Wow. what's with all the shooting things that the Republicans are doing?

Rolando Rios:

That's how split the Republican Party is, and that's to our advantage. I mean, I don't know. I'm assuming these are all Democrats, but I could be wrong. I mean, some of my best friends are Republicans, okay? The best man at my wedding was a Republican, so.

Moderator:

Okay. let's give them a hand.

Possible Repercussions of the Fisher Litigation

Speakers:
David Hinojosa, National Policy Director of the Intercultural Development Research Association
Celina Moreno, Staff Attorney at MALDEF (Mexican American Legal Defense and Education Fund)
Gary Bledsoe, President of the Texas NAACP

Presenter: Leonel Ruiz, THJ Editor in Chief

Presenter:

At this time, it's my honor and pleasure to present the next panel. We have three really great speakers. The first person is David Hinojosa, a personal mentor of mine. He is the National Director of Policy for the Intercultural Development Research Association. He supports the integration and coordination of national policy reform efforts impacting the education of all students. Previously. Mr. Hinojosa served as staff attorney. senior litigator, and, for three years, Southwest Regional Counsel for the Mexican American Legal Defense and Education Fund (MALDEF). As a lot of you might know. MALDEF is very well known, very renowned in this area of law— civil rights.

We have Celina Moreno, who is a great friend of mine, too. She is a staff attorney with MALDEF. She is the point person when it comes to policy and legislation within MALDEF.

Lastly. we have Gary Bledsoe. Mr. Bledsoe is the President of the Texas NAACP and has held this position since being elected in 1991. He has also been a member of the National Board of the NAACP since 2003. As NAACP President, Mr. Bledsoe was involved in handling the racial discrimination complaints against the Department of Public Safety that broke racial barriers in DPS. Without much ado, I'm really excited. Take it over, David.

David Hinojosa

Thank you, Leonel, and thanks everybody for being here this afternoon. We'll try to keep it exciting; we know it's right after lunch, but what's more exciting than talking about race-based affirmative action in higher education, right?

I am going to open up and give you a little background on the Fisher case, then I am going to turn it over to Celina, who is going to talk about some of the briefing that was done by MALDEF during this last round, and maybe some of their other involvement. Mr. Bledsoe is going to talk about the amicus brief also, and some of the issues that they raised in the NAACP brief that he helped author. Then, they'll go back to me and we'll talk about the IDRA brief that I drafted on Pre-K-to-12th issues.

So, we start with the Fisher litigation: whenever you talk about this you have to go back to 1978. People always say. "Oh, well, you know, since 2003, the Court has recognized diversity as a compelling interest." But in the Bakke v. UC Regents case in 1978 in the Supreme Court, there were a bunch of different opinions, but Justice Powell's has been seen as the controlling opinion, and, in that opinion, although they struck down the UC Regents' policy of providing quotas for African-American and Latino students to attend the med school at that time, he also said that there is a First Amendment issue for universities in being able to select the student body that they believe will carry forward the universities' missions. He [Powell] also recognized the educational benefits that flow from diversity. and that not just the institutions themselves can enjoy. but also the students themselves can enjoy. so he recognized that as a compelling interest.

In 1996, the 5th Circuit issued its Hopwood decision, essentially striking down UT's consideration of race; the 5th Circuit didn't recognize diversity as a compelling interest. That case was denied cert[iorari], so there wasn't any other word on that issue. Meanwhile, in response to the Hopwood decision, the University of Texas had adopted the Top Ten Percent Plan. The Top Ten Percent Plan allowed students who graduated in the top ten percent of their class, whether is was a public or private school, to attend the University of Texas as long you completed at a minimum the recommended high school program. Of course, you still had to apply to the university. but you would be automatically admitted.

The University of Texas also started engaging in some other race-neutral efforts. In 2003, the Grutter decision recognized diversity as a compelling interest and rejected the University of Michigan's undergraduate program because the Court felt it was too quota-based; however. Grutter affirmed the constitutionality of the University of Michigan's law school which looked at students' race not in isolation from all their other attributes but in a more holistic sense when weighing a student's race. That opinion stood in 2003. In response to that, UT said, "well, let's let our Top Ten Percent Plan measure our diversity" and starting in 2005 UT adopted race as one of many factors to be considered in the application process. Its intentions were to increase the enrollment of Latino and African-American students, but UT would also apply a student's race and experiences of race to other student groups. So, if you were a White student body president in a majority minority school, they would probably look kind of favorably on that, which they very well should be in trying to look at a broad range of diversity.

And so, when you look at how race plays a part in the admission process, you have the academic index. This is for non-Top Ten Percent students, so on the left side, and you have Top Ten Percent students, which I now say is top seven percent because of the 75% cap on admissions. For non-Top Ten Percent students, you have both an academic index and you have a personal achievement index. From that, you have a special circumstances category and within special circumstances is race. So now all of a sudden, you don't have to necessarily leave your race behind, as many of us know it is so easy to do, but UT would consider it.

So, when we go back to the timeline, we see that plaintiff Fisher had applied for the fall of 2008, was denied admission, so she sued. She was denied a preliminary injunction and then UT was awarded a summary judgment in 2009. Just want to flow forward, that was affirmed by the 5th Circuit. In 2013, we had the Fisher I decision. Fisher argued that perhaps racial diversity should no longer be seen as a compelling interest— it should be rejected wholly. Certainly some of the amicus briefs that were filed in support of her position said stated as much. The 5th Circuit sent it back down. We called it, basically, a "check engine" light. OK, well, wait a second. We don't know whether that "check engine" light is a faulty light or if the whole engine is broken and you've got to throw everything away.

The 5th Circuit reanalyzed it. Mind you, this is the 5th Circuit Court of Appeals, the conservative 5th Circuit Court of Appeals who all they needed to do was weigh the decision *en banc* because they are a conservative court seen as a whole. But they didn't do that. They never ruled to weigh the decision *en banc* and that meant that all of the 5th Circuit judges would rehear the decision of the three- judge panel.

And so, it walked back up to the Supreme Court and, of course, we have the oral arguments in 2015 in the Fisher II part of this case. So, the main issues in the case are: because race is being considered as one of many factors by UT, the court appropriately must apply the strict scrutiny standard; race is one of the protected issues under the Equal Protection Clause which requires strict scrutiny. Within that strict scrutiny analysis is, of course, that UT must satisfy the compelling interest test. So, is there a compelling interest in diversity? Of course, we know that this is true already from the Supreme Court recognizing it, and whether or not the means to achieve that compelling interest in diversity are narrowly tailored. Fisher, now on the second appeal, has attacked UT's compelling interest in diversity, not necessarily saying that diversity isn't a compelling interest, but kind of trying to say "Well, we don't know exactly where the line falls with UT because on one hand, they're saying is the diversity they want. On the other hand, they're saying this is the kind of diversity they want. UT responds and says, 'Hey, we have a broad interest in diversity. That's what we're supposed to have. We're not supposed to pigeonhole diversity just to race, for example.'" Whether or not the means are narrowly tailored, are there race-neutral alternatives that should have been considered? Maybe we'll hear more about that from the panel, so I'll finish there and I'll pass it over to Celina Moreno now from MALDEF.

Celina Moreno

Hi, good afternoon, everybody. My name is Celina Moreno and I'm a staff attorney at MALDEF. MALDEF has been involved in the Fisher case since when it was first filed in 2008. We've been involved in the briefing at every level and I was actually an intern when David was an attorney there, and so we have a line of interns who are staying connected.

One of the things when this case first started, we represented high school and college students trying to intervene into the case. The court rejected our intervention, and since then we've been involved representing amici filing amicus briefs. This last time around for the US Supreme Court, we filed on behalf of 25 state and national organizations as well as UT students, this includes organizations from the National Council of La Raza and LULAC to educators to business groups to media professionals. So just kind of a wide range of people that we represented and we made some arguments very similar to that of UT: namely. that diversity is a compelling interest, and then saying that because they are allowed to use diversity and race conscious admissions, is it narrowly tailored enough? So we made our arguments to discuss why it is.

But I want to focus today not on those general overarching arguments, but on some specific arguments we made in our briefing. But before we do, I just want to talk about some of the demographics that we mentioned. Latinos will be the majority of the population in the state of Texas within a few decades. We are already the majority of Texas public school students and yet only 1 in 5 White students goes to a typically Latino school. So, what does that tell you? Schools are very segregated, not just Latinos in highly segregated Latino schools, but also White students are not having a lot of interaction with Latino and Black students in their schools. That is one of the reasons why it is so important when students, like yourselves, are going to graduate from this university. that they have this cross-cultural understanding, that they know how to work and learn and have conversations with people of all different backgrounds.

So, one of our main arguments in our briefing was an argument called "diversity within diversity." What that means is having diversity of viewpoints within a particular race or ethnicity. or what we also called 'inter-racial diversity." And it is kind of intuitive, right? As Latinos, some of us are Mexican, some of us are Panamanian, some of us are Cuban, Puerto Rican. We come from rural areas, cities, and suburban areas. Some of us speak Spanish, some of us speak Spanglish, and some of us don't speak either. Some of us are vegetarians, although David was surprised; he tried to revoke my Mexican card after he hired me, when I told him I was vegetarian.

David Hinojosa

That was her attorney card, not her Mexican card, by the way. I would not discriminate against her 'Mexican-ness'

Celina Moreno

So we're different, right? When you talk about diversity within diversity, intuitively, we know. I was a UT student. I graduated from UT in 2003 and my experience was. one of my first experiences I remember at UT was going to one of my first social events and this White student was dressed in a tuxedo and had a Confederate flag cummerbund. I didn't say "Wow. I'm going to have some thoughts about that," but I also didn't say 'because this particular student is dressed this way that all White students want to wave the Confederate flag," and there's a reason why. There is already diversity across the country. here at UT, there is diversity within diversity among White students and so that's a good thing. Latino and Black students are less likely to stereotype White students when you're exposed to a diverse group of students and the reverse is true. The more diversity within diversity among Latino and Black students and other students, there's going to be less racial stereotyping, less racial isolation, and so, those are all very important aspects and some of the arguments that we made in our briefing.

Another thing that we focused on was leadership. In the briefing, we talked about how and we cited, as many of you probably know if you followed the case, there was a wide range of briefings, not just from your civil rights organizations but from the military— military leaders, and national security experts— talking about how important it was for officers, who we know are mostly educated in the college or four-year university settings, why it's so important for officers to be able to work with and understand people from all different backgrounds; because we know that the enlisted group of people and the soldiers come from diverse backgrounds. So, for officers to have legitimacy. and also to be able to effectively lead people into harm's way and effectively lead our military forces, officers have to be diverse.

There was also a lot of briefing from the STEM field and that is an area particularly important to the Latino community because Latinos are the most likely to major in STEM once they are admitted into college. So they are not the most likely to go into the field, but most likely to major in STEM and that's important because they are not necessarily the most likely to graduate with STEM degrees and there are some reasons for that. They don't necessarily have the support network or enough faculty diversity. and these are all things that stem from this cycle of diversity, right? You have a student, you become a graduate student, you become a professor or, if you major in STEM, you become a STEM professional and then can mentor other Latino students.

It's really important because there is such a shortage in the STEM field and the US economy is going to more and more be so connected to the STEM field that as you have Latinos in the majority of the public school population, that population is going to be central to filling those gaps, to filling that shortage in the STEM field. There was a lot of mention of that, both by STEM professionals and also in our own briefing.

A lot of people don't know this. People are frustrated by early voting results in San Antonio. In San Antonio, only 5% so far have turned out for early voting. When you talk about a robust democracy, you have to look at it in context. When you control for levels of education, there is actually very similar levels of voter turnout. It also has implications for our democracy moving forward, making sure all of our students are educated. And then of course, we're in Texas, and Mexico, our biggest trading partner, some people want to build a wall, and act that that is not true, but Mexico is our largest trading partner. You need people not just who are Mexican but who have been in class with Latino students and understand, and can go to our various trade partners and know how to communicate effectively. So diversity within diversity, leadership and then one of third things we focus on was racial isolation and when you have those stereotypes, and you have that feeling of tokenism, people are more likely to cluster in racial groups and kind of goes against the purpose of the Equal Protection Clause in the context of affirmative action is about. Trying to promote individuality amongst different races and ethnicities. At the University of Texas, in classes under 25 students, almost half have 0 to 1 Latino student, and these numbers are even dire for the black student population, which creates a sense of racial isolation. In a post-university of Missouri, post-Ferguson world, we know race still matters, on the UT campus you are seeing border patrol themed parties, catch illegal immigrants games, affirmative action bake sales, all of these things you have seen as students. Those things just worsen the situation. Rather than break down stereotypes, they create more racial isolation. Let's talk about the outcomes and implications for policy for the top ten percent plan.

Gary Bledsoe

Thank you. I am honored to be on the panel with such distinguished lawyers. You may not have read this part but they were instrumental in the recent Texas funding case addressing the inequities in K-12 education, one of the most important cases we have seen in our state for some time so I think that they are surely committed to the cause of trying to ensure that we have a fair system in Texas. Before I get into the primary remarks in reference to the Fisher case, I want to give you a little backdrop in terms of what I see that is probably driving these matters so that it might be better understood. In Texas, the adult population of African Americans and Latinos are 49.4% of the population and the citizenship population African American and Latinos are 39.3%. When you add East Indians, Indians, Asians, and others it is 55% minorities in this state. There in looms a problem in this state, that is really indeed viewed as a problem nationwide. There is very much a concerted effort to limit the gains and opportunities for minorities that is occurring at all levels. There are organizations that have been crated that are comprised of some of the most powerful people in this country that have this as one of their primary goals on their agenda.

Understanding that, we have to look at, whether we are talking about voting rights or educational opportunity, these are well funded efforts that we have to truly reckon with. If

we look at the Supreme Court now, sadly Justice Kagan took herself out of the mix in deciding affirmative action cases for a reason I don't think she needed to take herself out, so we were looking at three Justices who probably favor our position, and potentially five Justices who were favoring theirs if you say Justice Kennedy's Grutter opinion was an indication on how he would decide this case, I don't think it necessarily is. With the death of Scalia, you are looking at a 3-3-1 court. The first opinion was divided differently because of court politics that allowed it to go to 5th circuit. Justice Ruth Bader Ginsburg was not one that really agreed with that decision. What we wanted to do in writing our brief was we wanted to do some things that maybe wouldn't be part of the record except for groups like ours in a brief which David will talk about. So, let me give you an idea, when the Hopwood case occurred back in the 1990's, the University, because of political or other reasons, could not bear to put forth important information relating to the current effects of previous de jure segregation in our education. Because of that, I don't think that the best case was put forward, so sometimes it is important for advocacy groups like those we represent it's going to be up to us. Because it is hard for an institution to stand up and say yes we are a discriminatory institution, we discriminated for many years, there are current effect on the campus we have all these issues that occur. It is important for us to try to put that information in the record that will allow for a more definitive and sounder decision to be made.

One of the things we wanted to emphasize, even though rejected the first time around when the case was actually heard, was the issue of standing. There seems to be, in my honest and sincere opinion, a different standard for standing in race cases than other cases. It is almost so tenuous that a barber in Great Britain could say they are offended by an admissions policy in the United States and the Supreme Court would have heard the case. I know that sounds crazy, but let's look at Abigail Fisher in this case.

In Fisher, when you look at the issue it is about making the first cut in the holistic program of the Ten Percent Plan, and the cut has to have a certain index [GPA], which was 3.5. Then you got into all other issues of one's background, and if you didn't have a 3.5 you weren't in the debate or the discussion. Every single person admitted over Ms. Fisher had a 3.5 or higher, so she has no basis or standing to challenge the University's admission policies. So this is where we come in and take another look at what I think is a national initiative to reign in the power of minorities and keep minorities in a certain place. Let me mention another thing in that regard that looms large at least to me. The Grutter case was handed down in 2003. Justice O'Connor, who was a crucial fifth vote in that case, retired in 2006, so we have this case being accepted by the court after it had been decided by the court in 2003. So there really was no basis or need for it. I think that has further implications for the lack of true standing that I think exists in the case. When I get back to the things that we pointed out in our brief was the history of discrimination in Texas and its current effects. We talked about how there were 40 school districts as of 1984, when Ms. Fischer would have been in elementary. 40 school districts were still under desegregation orders for their de jure

discrimination. We also noted in the brief that, in 1969, the old Health Education Welfare (HEW) Department, which was divided into several different agencies, one of them being the Department of Education, they determined there were ten states guilty of historical discrimination against African Americans and Latinos, and that they had not come into compliance with the 1964 Civil Rights Act and its obligations on institutions and states to eliminate those past vestiges [of discrimination]. The State of Texas was not included as one of these ten. But when HEW decided not to enforce it, a lawsuit was filed in Washington, D.C. and a district court ordered the HEW to come up with criteria that states could use in trying to achieve the requirements of the Civil rights Act that did ultimately take place. In 1973, there was a supplemental order including the State of Texas. So we looked for further evidence to put in the record. In 1980, 70% of African Americans lived in Metropolitan areas that were in court ordered desegregation plans— that's a huge number! In 1983, the District Court [decided] the plan that Texas put together to comply with the district court order that we talked about was held to be inadequate. And Texas put together another plan, and in 1988, our own higher education coordinating board decided we were not meeting our own to try to come into compliance with the 1964 Civil Rights Act.

And then the whole world changed after the *Hopwood* decision came down, and then Attorney General's opinion after that that doubled down the Hopwood decision. So all those efforts to try to remedy the past discrimination and the effects of past discrimination were brought to a halt. After the Hopwood decision, some of the statistics were truly alarming. But a couple of things I wan to note in terms of how we talk about diversity— after Hopwood, only 3% of Texas higher education students were African American. One third of those were in historically black colleges. So meaning that diversity we were seeking to achieve in terms of African American students really did not exist. Governor Bush, before he left the Governor's mansion signed a Texas commitment that was signed in light of the *Hopwood* decision to try to remedy the issues that had been forestalled by *Hopwood.* Let me fast forward to where we are today. to talk about the issue of how African American and Latino students deserve to have greater participation in the institution of higher education. The overall population in Texas is 38.5% Latino. In 2014, 19% of those admitted to the University were Latino, so that is less than the 50% of the number expected if there were no discrimination indicators. African Americans were 12.4% of the population, and only 3.9% of those admitted are African American, so that's about 30% [of the numbers expected]. So you can see some serious under representation in that regard. Another thing we tried to do was to present narrow–tailoring information to the court. We thought that was particularly crucial because that was the issue that Justice Kennedy had honed in on in his dissent in Grutter. We felt our only salvation in this case would be to turn Justice Kennedy around, because there would be no way to turn the other conservatives around. I think that was shown again by the arguments that took place. What we wanted to do was to make it clear to the Court what we saw. We emphasized narrow tailoring, and we thought this was extremely important. We did a lot of things there, looked at elements in Grutter, and showed how this was a narrowly tailored program.

Let me just mention one other thing— the mismatch theory. If you go and you find a copy of the oral argument, you will find that on page 67 of the oral argument, Justice Scalia hones in on this mismatched theory in the oral argument, which says that you are bringing people into institutions that are too difficult for them, and this causes them not to perform the way that they could, and they would be better off and their communities would be better off if you would let mainly the higher institutions be populated by primarily White students and minorities went to lesser institutions. This was even supported by research that was clearly outlandish, and if you look at things said by the K.K.K. and other groups; Professor Scalia has said this too. The Brookings Institute looked at the data of the theory and they looked at the same data that was the basis of the mismatch theory and said "you guys are not reading the data correctly" If you are talking about science, there is a one percent differential between those who are in the lower quadrants that are admitted to the higher schools in the higher institutions and those in the lower quadrants who go to other institutions. So there is no material difference. But if you look at those who matriculate, not just degrees in science, overall, those who were lower socio-economic realms and went to higher ranked institutions compared to those from lower who went to a lower-ranked institution had a marked increase of matriculation rates. So that completely debunked the mismatched theory. which was intended to be offensive and provocative.

Celina Moreno

And also, the separate but equal theory of education has long been discredited, so there is that.

David Hinojosa

There was no evidence for the mismatched theory in the summary judgment record for Latino and African American students. Scalia found it in amicus briefs, but there was no evidence that African American students at UT were somehow mismatched and disserved by being admitted.

I want to quickly go through some of the systemic issues talked about by Gary. The Supreme Court said that just because there is past discrimination you can't engage in affirmative action. One thing you should know is no one is admitted to UT because of their race. There are a lot of other factors that UT considers, and nobody is admitted solely because of their race. Secondly, we have to realize some of the systemic issues that confront students of color over the years that have not necessarily confronted White students. Not to say that all White students have been treated wonderfully. We know that in poor, rural communities, poverty does not discriminate, and in fact there are more poor White people in America than poor people of color. But, what I am getting to is our funding issues. In our IDRA brief we focused on Pre K-12 issues, access to high quality Pre-K, access to high quality teachers, discipline rates— how students were disciplined at disproportionate rate, mobility rates— how those impacted dropout rates. One of the core issues we looked at was

the funding inequities of the system, so if you look at a poor district and wealthy districts you see about an average gap of a thousand dollars to eleven hundred dollars [per pupil].

UT does not fund according to race, but according to property values, along with other formulas. This is supposed to make up for the differences in property value, but we still have a gap. But when you look at the wealthiest one hundred districts versus the bottom one hundred districts, there's a thousand-dollar difference [per pupil], and when you look at the demographics of those students there's about 57% of the students in the wealthiest students who are White. 10% of the students in the poorest districts are White. A huge gap there, and when you look at demographics in Texas, I think we are somewhere around 35% White students today in our public schools.

So, we have these gaps, and money is not going to be the only answer, but you don't pay teachers without money. or you don't smaller class sizes, or have materials and technology. It's not going to be this kind of free services that come through. Then when you look at our statewide rates, we are not doing too great as a whole. We only have one quarter, one our of every four students, according to the College Board, are deemed college ready. according to the ACT or SAT. But those tests only tell one aspect; there is not a direct correlation between your scores and success. I disproved that theory on whether you could become a successful or semi-successful lawyer with the LSAT. Even White students, you see only 2 out of 5 hitting the SAT or ACT mark in Texas. When you look at Abigail Fisher and how she had complained about her SAT score. Who exactly took her seat? If you look at the Latinos enrolled in Fall, 2008, they scored, on average, 31 points higher than Abigail Fischer's 1180, yes, 1180 and she's complaining about not being admitted. There were over 100 White students who were enrolled at UT in the Fall 2008 who had a lower score than Fischer, yet it was black and brown students who somehow took her seat, not those White students. She did not make the top 10% of her high school, which would have been automatic acceptance. Even with the personal achievement index, if she had scored the highest, which she could do, which was a 6.0, evidence shows she still would not have gotten in. And yet, she blames the black and brown kids who were admitted into UT. She's allowed to continue this lawsuit because of that White student standing precedent that the Supreme Court has established and not having to prove that she, on the front end of a case, like other minority students would have to prove if they were alleging discrimination on the basis of race, they would have to prove an injury in fact that was proximately caused by the action complained of, and that she was harmed by that, as a matter in fact, she's graduated from LSU. It wasn't a class action yet she is still allowed to continue.

I do want to say. because we argued this in our IDRA [Intercultural Development Research Association] brief in the last section, that if there was a quota at UT setting a hundred seats aside for African Americans there might not be so much of a complaint, there is a complaint because standing still changes, but that seat was taken from her, she was not allowed to compete for that seat solely because she was White. That's what happened in

Bakke, and that's where this standing precedent started. Today. nobody gets considered solely because of their race, it is a holistic admissions process, so traditional standing requirements should apply. Had those traditional standing requirements applied, when I first started getting involved in this case in 2008, it would have been over in 2008. Instead we had tremendous amounts of resources and attention being pulled form more important things, all because AbigailFischer was allowed standing. So, we hope that Fischer stays mad, some of you might have seen some of the hashtags about it. I just wanted to add that piece there, and I want to now open it up to questions because we don't have much time.

Question

Who is paying her legal fees?

Celina Moreno

I was going to say— the stay mad Abby was fun, we saw students of color take pictures of themselves in graduation caps. She has really attempted to misuse the court and harm national interests based on this false sense of entitlement, but let's be real, it's not just her— she was handpicked by people like Edward Blum, people that are not just trying to get affirmative action overturned, but also voting rights, like in Shelby County v. Holder, the case that gutted the Voting Rights Act. Cases like *Evenwell vs. Texas*, a case that will be decided in a few months by the Supreme Court. It is about the one person one vote principle which turns on its head the 14th Amendment which was originally intended to take out the horrible provision of the US Constitution that slaves were considered 3/5 a person, now that case would make anyone who is a child or a non-citizen, for constituency purposes, 0/5 of a person. So, voting rights cases, constituencies, Fischer, this is an orchestrated effort. So while we want to Abby to stay mad, wealso want to pay attention to the larger context.

David Hinojosa

The project on fair representation is headed by Edward Bloom. His money is banking this, and there are other groups like the Eagle Forum that have come in because this is an issue that they care about. He is also leading efforts, against the University of North Carolina and Harvard, on behalf of Asian American students, because apparently he saw how he did not get a whole lot of traction with Abigail Fisher, as a White student complaining about this and now he's using Asian American students as a vehicle to complain of not being allowed in. Which is actually kind of interesting, because if you are just looking at test scores, White students are going to lose out to Asian American students as a whole. Certainly not across the board, there's a lot of Asian American groups who have supported UT's efforts in this case because they recognized the diversity within the Asian American community. It is quite remarkable that they are not settling on one issue or one case, but really trying to drive this as an institutional way of challenging somebody's fairer and progressive reforms.

David Hinojosa

Next question?

Question

With Scalia passing made a seven-person panel that cannot be a tie. Are you able to hypothesize what will happen next in the Fisher case?

Gary Bledsoe

It will be a 4/3 decision unless Scalia still has a vote on it. What normally happens after a case is argued, they take a preliminary vote, and after briefs are circulated there is a vote. Kennedy seemed to be torn, and looking at what he did in this case because, we have precedent. Let me give you a quote from him where there is inadequate showing of individualized consideration of student applications. This is a big reason why he was going on the other side and he dissented in the *Gruter* case. So, I look at what the University has put forth here, and see that there is sufficient evidence of individualized consideration of each applicant, and that there isn't some hidden quota, which is what the other side tried to argue. I think we have a 50/50 chance of getting Kennedy's vote. He was disappointed in UT's lawyer's answer, he seemed to chime in on UT's effort to have the case remanded for more fact finding, so he wanted to hear UT say that based on the Supreme Court's decision there was need for more fact finding, but the lawyers said they have enough to win, and that disappointed Kennedy. so I don't know if he got the answer he wanted.

Celina Moreno

I listened to the oral argument again, and listened to the conversation about remand. I am more interested in what would happen if Fischer does win. What does that mean in Texas? In the legislature there is a Hook Em amendment, where if Fischer prevails and UT can no longer consider race, that 75% cap on top 10% admission will be lifted to 100%. UT will try to limit the top 10%, because they have made it clear they will not survive past a couple of years, in terms of rankings, if that cap is lifted to 100%. Yes, we support race conscious admissions, but MALDEF has supported a blended approach supporting both top 10%, as a necessary but insufficient tool, and the race conscious admissions. For Latinos specifically. a far higher percentage of Latinos admitted to UT has come from top 10% as opposed to race conscious admissions. It [Top Ten Percent Plan] remains a really important tool, and as a community we will continue to fight to protect.There are limitations, under the bill, passed in 2013, HB 5, the current default high school curriculum now no longer makes you automatically eligible for the top 10% program, you have to opt in to certain classes, like Algebra 2 for example. Yes, it does create diversity. but it does not have that diversity within diversity component as strongly as if you were to consider race in admissions.

David Hinojosa

It has made for great theater in the media, but affirmative action won't be shot down completely. Fisher isn't asking for that. What has been concerning is un-ruling *Gruter* and making it so complicated that universities would not want to touch it with a ten foot pole, and that would be a huge defeat almost as if affirmative action was overruled. Whether there is a remand, there is an indication from Justice Kennedy, who is the swing vote, we don't know. I will add that when the case was filed in 2008, MALDEF and the NCAAP attempted to intervene separately because we felt that UT would not do a strong enough job in pointing fingers at itself saying we are not doing a great job with black and brown kids. And sure enough, a lot of that evidence is missing from the summary judgment. I am not saying that that evidence is critical and necessary. but I do think it would have helped to have a lot more evidence in the summary judgment record.

Leonel Ruiz

Thank you very much, we have another panel after this.

Ethical Considerations in Advocating for Affirmative Action

Speakers:
David Hinojosa, National Policy Director of the Intercultural Development Research Association
Ranjana Natarajan, Director of the Civil Rights Clinic at the University of Texas School of Law
Norma Cantu, Law Professor at the University of Texas School of Law

Presenter: Hector Gutierrez, THJ Development Editor

Presenter

Our next panel is going to discuss the ethical issues of advocating for affirmative action. For this panel we have three speakers. Mr. David Hinojosa is returning with us. We have Ms. Ranjana Natarajan – she is a UT Law professor here, and she is the director of the civil rights clinic. And we have Norma Cantu. She is also a UT Law professor, and she was a former assistant secretary for civil rights for the Clinton administration.

Ranjana Natarajan

Good afternoon, thanks so much for sticking with us. We know it has been a day full of rich topics and discussion, so we're excited to continue and talk about ethics for the next hour or so. So we thought what we might do is I would open with a little bit of discussion, very generally, about what we mean by ethics in the context of the legal profession, some of the specific rules that we try to abide by and what those mean, and then move right away into talking about potentially unethical conduct in affirmative action litigation. And then, let David talk about Fisher specifically and other affirmative action litigation in which ethics issues have come up. And hopefully we're going to leave a little bit of time at the end for questions.

So, what do we mean when we talk about ethics in the legal context? At the risk of repeating your professional responsibility class, I will try to do this very quickly. So I think you guys all know that we refer to the ABA model rules of professional conduct, and in Texas we have a parallel Texas rules of disciplinary conduct. And we think of those

specifically as referring to the rules that govern the relationships between attorney and their clients, attorneys and courts, and attorneys and adverse parties. And so we are often thinking about this in the context of a lawyer acting as a lawyer, meaning acting as an advocate for a particular client. In addition to that, the ABA Model Rules also have some information (which I pulled up on my phone, because I was like "why open a laptop when you can have a phone?"), which I think is really important, which is the preamble to the ABA rules really say something about a lawyer's duties in the context of things like affirmative action litigation or other public-interest or cause lawyering that I think is really important.

They say 'a lawyer as a member of the legal profession is a representative of clients, an officer of the legal system (that is why we have all this regulation about how you interact with the legal system with your clients), and a public citizen having special responsibility for the quality of justice. And I think that we're really talking about that last piece here this afternoon when we're talking about what does it mean that when you're taking on affirmative action litigation or litigation where there is some goal beyond your particular client's individual goal, that maybe there is some larger collective goal, as in the Fisher case. What does it mean to be acting as a public citizen with a special responsibility toward justice? And undergirding that larger question are the sort of two prongs I think of the most important kind of ethical rules when we regard ourselves as lawyers who represent particular people – the duty of competent representation, and that means above all else to know what you're doing when you're doing it and to know the reasons why you're doing something. And so, as I often tell my students, you don't do anything in litigation without having thought about it three, four, or seven times, and you have discussed it with several of your colleagues. And the reason is because when it's high stakes litigation in something like Fisher, for example, you want to be doubly and triply sure that what you're doing is the right thing to do. And as David will tell us when we get to this portion, that's not always an easy answer. There are often strategic decisions you're making where you could really go one way or another and it's a close call. So that's very important. And the other duty that I think is really important is the duty of zealous representation. And this is where we really have to ask ourselves, "zealous for whom?" We know you have to be zealous with respect to the particular client you represent. And whether that's an organization or an individual, that means that you have to know what the client's goals are and respect the client's goals and really work to carry out the client's goals as opposed to the attorney's goals.

On the other hand, zealousness in the context of affirmative action litigation also means something else, which is, if there are stated goals that are collective goals, that are something beyond the individual's remedy. then it's important to state what those are and to be overt about them and to respect those, and then to balance them, because sometimes there is a tension between what are collective goal might be and what an individual remedy is or could be for someone. So these are just some background concepts that undergird our discussion of ethics in the context of affirmative action litigation. And I'll come back and have some more comments, but why don't we have you start.

Norma Cantu

Okay. so this is something I put together just last minute, and I apologize. I start with a quick disclaimer. I organized so I could talk really fast, get through it really quickly. and then allow Q&A. Because what usually happens is we lecture at you and you don't tell us what you are really interested in. Secondly. for me the topic is really personal. My law school application went in while the Bakke case was pending. I know. I'm as old as dirt. But when I got accepted, I didn't know if it was a regional consideration, that one of the factors that they liked about my application was that I didn't come from the East Coast. Or it was gender, because there less than twenty percent of women were law students and no tenured women faculty. Or, because I was Hispanic. Or because I was eighteen when I took the LSAT. Or because I came from PanAm – because they had never heard of the campus, they thought I had applied from an airline. So it's very personal to me. I feel like Forrest Gump because I was co-counsel in a lawsuit called Adams v. Bell, which was a suit against the U.S. Department of Education for not finishing its statewide reviews of higher education desegration in the South. Texas didn't think it was in the South, and I was working at MALDEF at that time and got Texas in as one of the fourteen states that was being reviewed. And the other Forrest-y thing I did, I was assistant secretary for the civil rights, so I have a White House picture. Because I had worked on the Adams case where I sued the Department of Ed. on issues dealing with higher education desegregation, I couldn't participate in the Hopwood case. So I had to use my ethics and voluntarily recuse, and not wait for someone to recuse me.

Affirmative action in the twenty-first century— Molly Ivins said that if Bob Bullock were alive, he would've said, "the problem with Texas school finance is we have a twenty-first century economy and a nineteenth-century tax structure" That's real similar for what's happening with universities and affirmative action. Affirmative action is a 21st century concept. Bakke is '73, right. But universities are still wearing caps and gowns from the 1500s. Look at our courtroom. We don't look like the 21st century. And we're having a dissonance and a mismatch with that. Affirmative action. When you get in a dialogue, please talk about how you define affirmative action. Chris Edley spoke really clearly on it. Think of it as a continuum, where you don't even consider race, you just advertise that there is a university slot open, or advertise that you can be a firefighter or a police officer. Because before affirmative action, those slots were passed from father to son, never mind daughters and nieces. Father to son became a firefighter. Father to son got legacy to get into a prestigious graduate program. If you move on the continuum, then you've got targeted recruitment. Let the NAACP know that there are certain available opportunities. Then you use race as one of many factors because those others did not work. If you keep going on the continuum, Chris will say, then you're going to get thrown out by the Supreme Court. We do not go to the far part of the continuum, where you use race as a tie-breaker (not allowed), or you use race as the sole factor. Also, think of that continuum for how admissions committees work. Admissions committees can be a very small pool. There are only three applications to review.

They pick one and two people to sit down and look at it. It could be something like the entire undergraduate for the University of Texas, which would be really complicated because within that, as you heard earlier, there are sub-programs and colleges that are looking for things. They're looking for athletes; they're looking for musicians; they're looking for people who are already entrepreneurs and have started their own businesses. So think of arraying all your information in some kind of way – that's thinking 21st century, not the 1500s that the universities are.

Ethics and legal counsel— Depends upon which hat you're wearing. I believe that the more hats I wear, the more purses and shoes I can buy. So I have a closet just for my hats, guys. I'm a Gorruda, right? You know the Gorrudas in San Antonio. They're civil rights activists who always wear a hat because being an activist means you have to walk on the sidewalks and get to meet the people in your community. Are you investigating the case, researching cases, or evaluating? Are you giving advice? Are you preserving the documents? Are you creating a digital archive? Are you communicating? Are you the spokesperson? Are you drafting legislation to solve the problem out of court? Are you drafting policy so that everybody can act in a uniform way? Which hat are you wearing? And then you have to think about, ethically, what are your obligations with the hat you're wearing? Now, in the Fisher case, for example, we have government lawyers. The standards for government lawyers are different than the standards for private lawyers. We had university counsel, who may have had different ideas about how to handle the case from the system counsel. We had private counsel that was brought in to advise both of those groups. Then we had interveners. We had organizations. We had private individuals, like Professor Richard Sander in California, who's the one who came up with the mismatch theory and he found himself a lawyer so he could get represented in an amicus brief; so different types of counsel. The rules are complicated, and we're not going to spend all this time because I want you to ask what you want. Some of the questions you might want to talk about is "who is the client, because that's covered in a Texas disciplinary rule. You need to know that, just like thinking seven times about your case. Who are you going to represent? Is it a monolithic group and they all want the same thing? Or are you going to have some divisions or some conflict within your own group that you're representing? Who speaks on behalf of the client? Who's that intermediary that speaks for UT and says, "this is what UT wants. If conflicts arise, how are you going to handle them? And what ethical issues do you have in terms of sharing with the rest of the world what the position is of each party in that affirmative action case? The disability rules are that the responsibilities of government lawyers under various legal provisions, including constitutional statutory common law, may include authority concerning legal matters that ordinarily reposes in the client. In other words, the government lawyer, the attorney general, can settle the case. The attorney general can decide not to appeal the case. The government lawyer is in a different disciplinary rule zone— shocking to me when I first found out about it. Then I became a government lawyer and I liked it.

Representing an organization— working for MALDEF for thirteen and a half years, I had to write retainer agreements to make it really clear to the clients, what it is we were going to do for you and we would paste those out. If something happens after the district court ruling, we are going to come back and write a new retainer agreement about what to do about the appeal. So I have had appeals that I did not pursue, even though my clients wanted to. Because I told them, "Nope, I wrote you. You're my client phase by phase, not all the way to the Supreme Court. I'm not going to create bad law for the rest of the United States because you want to run to the Supreme Court, okay?" So making those kinds of ethical decisions and communicating that clearly to the client. And trying to foresee if there is something happening in the client group, and that you do not want to contribute to problems in the client group by being disruptive. You've got an ethical obligation to serve your client. You cannot be playing one group of clients against another group. That's not ethical for attorneys to do under the disciplinary rules. There is an exception. If your clients are up to something, they're up to no good. They're going to commit fraud. They're going to commit a crime. Then you're allowed to disclose and you're allowed to reach out outside that attorney-client privilege to talk to someone about a crime or fraud.

Examples – information that needs to be kept confidential. Texas had a case come up where the NAACP brought a lawsuit back in the 70's. The state wanted to chill out that kind of litigation. So, they subpoenaed information about every member of the NAACP. They wanted to know their addresses, their phone numbers, how much they got paid, who were their employers. They were really trying to intimidate so that they would not participate in the lawsuit. The U.S. Supreme Court ruled that membership information was confidential and did not need to be disclosed in class action cases. In university cases, we have a similar kind of confidential issues. Students say everything when they apply. I mean they write a heart-breaking hardship application. They write a statement, you know. 'I came out when I was seventeen. I changed my mind and now I'm transgender." I mean those are the kind of things people write in applying to college. So there is a lot of confidential information. The sad thing is the federal privacy law doesn't protect student applications, except for the university where you actually matriculate, where you actually enrolled. So say you applied to five law schools. You got into UT and you enrolled at UT. UT's got to keep your information private. The other four you applied to, according to the U.S. Department of Ed. and how they interpret FERPA, can take that folder and give it to a lawyer who wants to know about you. So, sorry there are some problems here, okay.

Duty to keep information— things you cannot do as a lawyer under the Texas rules. If your client flat out tells you, "Don't disclose," then UT can't share that information. The attorney general, if they've been told by UT, "Don't forward this and don't present this as part of your case," the attorney general, to follow the ethics rules, can't do it. If you use information and it is going to disadvantage the client, you can't do that. You can't use the information of a former client. So here's, like people like me with all my different hats. I was a schoolteacher, then I was a staff attorney at MALDEF. then I worked at the U.S.

Department of Education. Now I teach at UT. I have sued myself so many different ways it's not even funny. When I applied for the Department of Ed. job, the secretary of education said, "Well you've already sued the Department of Education, I think you've got it out of your system." When I got to UT. they said, "we want you because you see what UT needs to improve." So that actually became an asset in my job application to be at UT. They recruited me hard. By the way. I told UT "I haven't had a vacation for fourteen years at MALDEF and eight years at the Department of Ed. I've never had a summer off, I've saved money. I don't want to work. They thought I was doing hardball job negotiation, and they kept raising my salary. They thought I was the best negotiator they've ever run into. They just didn't know I was damn tired. So if you see me making more than a whole lot of other faculty. well.

You cannot use your own information for your own advantage. Which is an issue with this because I can take affirmative action personally. so can other people. But it is not ethical for the attorneys who represent those people to use that information for their own advantages or for the advantages of a third person. Now things you can do, they're there on the board. I'm not going to read them to you. Do I need to read them out loud to you? You're all law students here. You okay? Cool.

Examples of complications— because 21st century meets technology. People now search on the web for clients, people now search on the web for class members and witnesses and experts. Positive things about social media – it helps us who work on affirmative action cases to keep in touch with our clients so we can share information and be transparent and let them know what's going on. It helps UT be able to describe, there is a website from the legal counsel office, you can click on a whole bunch of boxes and see everything UT's ever filed. Isn't that nice? Social media is great that way. The negative is you can't be contacting folks who are already represented. That's unethical. So you've got to know who you're talking to. As a lawyer, and you reach out and somebody's your friend, you know. They liked you, they liked your webpage and you're talking to them. They may already have a lawyer. They may already be in another case somewhere else, and now your license is in jeopardy. And you can't be jumping in and looking for a client. You can educate new school districts that you want to represent or new students that you want to represent. But you can't be going to a person and saying, "Use this information for something that will help my firm." So you've got to be really careful about the information you do collect. If you post something about your case, it better be accurate. Because the state bar is going to read everything you post. So if you made a claim that you are the smartest lawyer that's ever walked into a courtroom, there better be something – I can say I am nice. Do you know why I can say that? Because when I was secretary of education, two members of congress got mad at my investigators, and they got a GAO audit conducted to find out if I was a bully. and intimidating, and mean and scary. And I have a written federal investigation report that says I'm nice. So I can be as mean as I want because I've got it in writing. And of course judges

now are using social media because they're running for office. Be really careful about what you're writing back and forth to judges.

Closing. Hey. It was that fast? Was that good? I'm closing! Do not forget the Texas Creed. 'I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas (and California). I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of rules and laws. I am committed to this Creed for no other reason than it is the right thing to do'

David Hinojosa

Alright, thanks Norma. A few years ago, I had to follow both Norma and Al at the Saint Mary's University [conference]. Actually. more than a few years ago, it was like 10. Back in 2005 or 2006. And I was like, "Great, I have to follow these two giants." Being in their shoes at MALDEF was enough, and now. you know. in a public presentation. Always engaging to hear Norma. I actually would love to sit on more panels just so I could listen to her. And of course, Rajana opened this up beautifully.

Norma Cantu

[Pointing at Ranjana] Did you notice I didn't answer any of her tough questions? I'm leaving that for you guys to answer.

David Hinojosa

I'm going to talk a little bit about some of the ethical issues— potentially ethical issues that arose with some of the organizations that were represented. So you heard Rajana talk about some of the zealous representation that you have to proceed, and you heard Norma talk about the client's interests being at stake, and the duties owed to organizations when you represent those organizations. But sometimes within the organizations themselves, you can have some disagreement, there could be dissention, there could be potentially apparent differences among the goals and what the result of the legislation might be. So in the Fisher case, there were dozens and dozens of amicus briefs filed on both sides. More so on the side of Texas, and more in the Fisher 1 case. But what was kind of interesting was the Asian-American group. So of course there are several Asian-American national organizations, and there are probably about four primary ones. And sometimes people seem to think, "Oh well Asian Americans aren't for affirmative actions, why would they be for affirmative action? That wouldn't benefit their clients." But a couple of these organizations, including AALDEF. the Asian American Legal Defense Fund, saw it a little differently because they represent diverse communities within the Asian American population, they represent very affluent Chinese-American families, for example, and Japanese-American families, Korean families, and they also represent many communities from Southeast Asia

that have been routinely impoverished; there has been a lot of discrimination against them even within the Southeast region. And that's not to say there is not diversity within the Chinese community, for example, or the Nai. But using the generalizations there. So there were some groups that sided with Fisher, and they filed the amicus briefs saying about all the harm that would be suffered by the Asian-American community.

And then there was the briefs filed by AALDEF and APALC, which is the Asian Pacific American Legal Center, and they filed briefs on the other side of Fisher, you know, kind of talking about these challenges within the communities. You know, both on the educational system, and in the economic system, and in the employment sector. And it was kind of interesting because some of the other groups which I forgot what their names were, the pro-Fisher Asian American groups, had kind of pointed out the other two groups that sided with UT, AALDEF and APALC, essentially accusing them of underserving their clients' interests of basically supporting UT when it wasn't in their clients' best interest, which wasn't in their membership's best interest. And it was just kind of interesting seeing that develop because they would use these national figures, especially standardized testing figures and grade point averages. They being the pro-Fisher groups, would say, "How can you sit here and state that upholding affirmative action would benefit Asian Americans." But it's important to know the client's interests and the historical context of this; that APALC and AALDef recognized, and that was the history of discrimination against some of the Asian American groups, and it was looking at things more holistically.

Seeing the end result was that, if affirmative action was taken out, then possibly many of these Asian American students from the more challenging communities would never benefit from that. If the goal is to get the students looked-at holistically, being able to look at their experiences, look at the challenges they have overcome just to make themselves very competitive in the educational process, then the end result would be to have the Fisher decision affirmed on appeal. In another context, looking at the top ten percent plan, this also raised some potential issues for organizations. Because within organizations, whether they were LULAC for example or the NAACP, you had students who had been admitted to UT both from the top ten percent and outside the top ten percent. What was kind of interesting in this case was that the students from the top ten percent – if you look at the demographics of the students in the top ten percent, about forty-nine percent of those students are White. So a race-neutral policy, you have essentially fifty-percent White at UT. You look at the non-top-ten percent, so when UT can consider race, two thirds of those kids, approximately. I think it's about sixty-five percent now, two thirds of those kids are White.

So when you use a race-neutral policy, you have fewer Whites being admitted. But yet when you use race as part of a holistic admissions policy, even more students are White. And these are the numbers straight from the university. We didn't make these up; I have the data if anyone is interested. So within that dynamic for an organization like MALDEF—MALDEF supports a blended admissions approach like what Celina said in an earlier panel,

both the top-ten percent also being complimented with the holistic admissions process that considers race as one of many factors. And so within that dynamic— knowing full well that the top ten percent lets in seventy-five percent of the kids into UT and lets in a lot more Latinos compared to the non-top-ten-percent students. I think that the percentages drop from like twenty-five percent to about fourteen percent for Latinos. For Asian Americans, it also drops, curiously. From about twenty percent of the top-ten-percent students to about sixteen percent. African Americans are essentially around five percent at each level. So the only group that their numbers increase under the non-top-ten-percent student plan, oddly enough, are White students. But yet UT has no legacy admits, yet UT is going to consider all these different factors. So within that context, MALDEF. we were always, kind of seemed to battle UT a little bit on this issue. Because UT wanted to push back against top ten percent and say. "wait a second, that's not necessarily getting us the kind of diversity that we need." And then you have Fisher saying, "hey. wait a second, if you're going to use race, it has to mean something and your numbers have to be jumping up." Now the numbers do show that before the race was added for the non-top-ten-percent students, it was down here, then once race was added, it did jump up some [showing a visual aid]. So it was making a difference, but exactly how much difference we weren't able to tell. But we had that issue at MALDEF because we represented at the Supreme Court, we represented twenty-three national Latino/ Latina organizations, and also some state organizations as well. And within that membership, you had the top-ten students and the non-top-ten-percent students, so there was always that issue about "okay. well we definitely want affirmative action upheld on appeal, and that's a national precedent because we have national issues at MALDEF."

But at the same time, we didn't want it to intrude so far into the top ten percent plan because we knew that had really opened the doors for a lot of students. Not just Latino students, either. But, students of rural communities, students of poverty. It had really opened up the doors to this flagship. And that's why it's so important in this case. Because the State of Texas unfortunately has decided that it's only going to really fully fund two flagships for our incredibly large state. So there were other organizations that had this kind of dilemma too about how much more they were going to push the top ten percent, how they would push back, and how they would balance that issue because of their client interest. And so during the Fifth Circuit oral argument, the NAACP LDF. an attorney for them had presented some of the oral argument as amici in the case on the side of Texas. And the judges themselves with their questions started attacking the top ten percent, and basically saying, "Well this top ten percent's letting in these under qualified kids; it's just looking at GPAs; it's letting in these kids from these lower-performing schools as opposed to some of these high-performing schools." And the attorney for the LDF had confided to me afterward that he had a lot of trouble with it because he knew he had clients there in the courtroom who had been admitted by top ten percent, who had been admitted from these "less challenging" high schools, these lower-performing high schools. And so it presented a difficult issue. And I think he handled it fine. He acknowledged the qualifications of top-ten-percent students, but also stated that you need to consider something beyond GPAs and a basic curriculum, and

it's okay for UT to go beyond that and to consider diversity within diversity. Those were a couple of the dilemmas that were facing some of the organizations there and how ethics was implicating strategy.

Ranjana Natarajan

I wanted to say a couple more things on the Asian American example. It was very interesting that those briefs were filed, as they have been every single time from Hopwood forward. That there is always some briefing on both sides; that's been filed by different Asian American groups. And on the part of the groups that file on behalf of preserving affirmative action, there is a very specific agenda. And the agenda is not only saying publicly that yes, of course there are Asian Americans who see the benefit of affirmative action, who see the benefit of racial solidarity among people of color, and who understand the legacy of discrimination. But also, to say that we need to educate our own community about how pervasive and how wrong the model minority myth is and how we have come to think of ourselves in a really tainted fashion because we believe this myth. And so there is a lot of education within the community that's going on that's operating through these briefs. So I'm glad you brought up the amicus briefs, there are a couple of other briefs that I thought were so interesting, and I'd love to hear your perspectives on all of this too. You mentioned in the last panel that the University of North Carolina has been feeling some heat and thinking about the repercussions of the Fisher litigation. And UNC and a variety of other state academic institutions of higher learning have filed amicus briefs in support of the University of Texas. And there are some things that Texas cannot and will not say on the public record because it needs to be able to defend both its top ten percent program and its holistic review program.

Although behind the scenes, it may well be true that they would prefer a little bit more flexibility here or a little bit more flexibility there. And so I think David's comments are so interesting in terms of thinking about what the public position is that you put forth in a brief versus what the complexities are behind closed doors that you have to sort of negotiate. Whenever you have a set of clients or a set of interests that are more complicated in an issue like this. And so the other higher education institutions come in over and over to say 'diversity is a compelling interest for all of us." And that has never changed over the course of time, and it will continue to be that way. And then to also kind of explain how diversity creates pathways to leadership, specifically for state institutions and for state flagship institutions.

I think those are really important because I think one of the arguable benefits of all this horrendous affirmative action litigation has been that state universities have really had to understand better through social science research and through analysis of their own data what role does diversity play in higher education, and what is the role of the institution of higher education in this state. And so how those things tie together are some things that the

universities have had to put together in defending against this kind of litigation. And that's really important because I wanted to get back to this ethics question, which is – in affirmative action cases and in other public interest litigation, a lawyer is not just a lawyer, a lawyer is a change agent. You are at all times thinking very much about social engineering. What you are doing is thinking about the tomorrow you'd like to see and creating that today. So while we may think that we know what's right, some of these policy questions are very difficult and they involve things like data analysis and statistical analysis. And so, if we are are thinking, "Oh I'm a lawyer, I know what the law is," then I think we sort of rob ourselves of all the social science research and data. And I think the universities have come far in terms of understanding why the social science helps them.

And you as lawyers, if you're going to be change agents, are going to be using social science data. And you are going to be relying on research. You're going to be reading reports about things that you never thought you would think about in law school. And it's important for you to have those kind of quantitative analysis skills and qualitative analysis skills. And the: .what do you call the opposite of hubris? The humility, and the humility to know that you cannot socially engineer without having other subject area experts in the room. So those are all ethical considerations when you're doing this kind of litigation. It's not just about 'what's my relationship to my client?' It's also "what is my relationship to the social change I am trying to see happen? And how do I know I can make this decision? Who else do I need to get into the room to make this decision?"

Norma Cantu

And a lot of our law graduates from this campus end up in the Legislature. And they look to us to model humility as folks who train lawyers. But we look to the Legislature to model that in terms of representing all constituents, not just a narrow group. So we have to reinforce that ethical concern of not thinking we are the only smart person in the room or the smartest person in the room. We need to be multi-disciplinary. I completely, completely agree with you. You're right on that.

David Hinojosa

And the area of impact litigation, it's always something really important that you communicate to the clients that you are speaking to. If we take the school finance picture, for example, some parents that you might talk to might have an issue with a teacher or a principal at a school. Or lack of pre-K programs or something. And of course, you can't bring a claim about a bad teacher or about a bad principal or maybe not having access to Pre-K – that's debatable depending on what state you are in. So when you're thinking about this as a systemic change - what can we use, and what vehicles are available, what claims can we file – you look at what potential remedies there might be. In the area of school finance, this is something that requires a lot of education of the community because your everyday parent isn't going to know what are the ramifications from having underfunded schools. Why

is it that when I visit my child, he has twenty-seven other kids in his first-grade classroom and the teacher's ignoring him? Why is it that the kids are huddled by the heater in the classroom because we have cracks in the windows, or just an inadequate central heating system? And having to educate the community on these really big systemic changes if they want to be a part of it becomes a very challenging piece. And plus, you have to tell them that this is going to take quite a while.

The current school finance case here in Texas was filed in 2011. It's now 2016. One of the clients that are represented at MALDEF – two of her children have since graduated. Now she still has another small child, but they [the children who graduated] never saw the benefits. They continued to have to purchase paper in order to go to this school. They still didn't get to do the science lab equipment. Looking down the line, it's very difficult for these parents to hang on to the lawsuit. It takes a lot of work to make sure they understand how long some of these cases can take. Even at the end of the day. they might not get everything they want. Your job as a litigator and as a representative is to try to get them as much as you can.

Ranjana Natarajan

One other piece I'd like to say along those lines. Because of institutional reform litigation — whether you're talking about affirmative action litigation, school finance, prison reform, criminal justice reform — all of these types of litigation take so long and, as David mentioned, the individuals may not get the remedies that you're seeking in a short time or ever. So not only do you have to make them understand that, but also then you have to ask yourself, "So what's in it for them? What are they getting out of this?" And that's actually an ethical concern for the lawyer. You have to ask yourself, "If I'm asking community members or inmates to participate in a lawsuit with me, what is it that I am prepared to give back to them?"

And one of the things that can happen in the course of litigation is that you are respecting people's stories that they never get to tell and telling those stories in a court that can hear them sometimes for the first time. There is some real sort of benefit to human dignity from having your story heard and from having your story publicized in a court of law. That is important consideration to remember, which is that you may not be able to give this particular client the things that she needs for her kids. However, you can at least give her the feeling that someone is hearing the stories that you are telling. Someone is hearing what your commitments are, what your beliefs are, and what your needs are. That is often a goal of these litigations. Litigation is not always brought just to win. Of course we want to win, of course we want to win! But there are many other things that you can accomplish through litigation that are equally important for advocacy purposes, regardless of the subject area.

So why don't we take some questions. Leonel and then Zach.

Audience Member

So there is a really strong argument against affirmative that appeals to people from both sides of the aisle. Affirmative action focuses on the minority candidates who have already made it up and who don't need the help anymore. You're focusing more on people who don't need the help than actually helping the people at the bottom. So how does a group like MALDEF zealously argue for affirmative action even when you think that there is another solution that maybe goes against a case for affirmative action?

David Hinojosa

So I think this was particularly evident in this round of the Fisher case because Texas had argued the diversity within diversity argument. I think that you can't just pigeonhole all people on race and say, "Ok well what they bring to the table is going to be the same thing that all children bring." So what a poor Mexican American family might experience in the West Side of San Antonio, and what those experiences will bring that student, would not probably be the same thing that is experienced by a much more affluent Hispanic student who was educated in the northeast side schools, for example. But what that Hispanic brings, having been educated in that other community. that more affluent community. still should not be dismissed in the broader sense of diversity. right? When we are talking about diversity. we are not just talking about poor people, for example. That being said, I still think it is a more complicated piece to the puzzle. For example, I look at myself and at look at my kids. Granted I'm a nonprofit lawyer. right? I'm not "rolling in the dough' But I know the opportunities that I've been allowed to bring to my kids, and they're a lot better than what I what I had by receiving education on the west side of San Antonio. So I think that in one respect it seems perhaps unfair, but then when you look at the other constructs, and you can see that race still plays a role. When I went to interviews here at U.T. and all White lawyers who were looking for an intern over the summer were interviewing me, they were looking for someone they could really pal around with and teach and who would someday join their firm as an associate. They probably didn't have me in mind. It's just that race still plays a role, which makes it all the more reason why we still need affirmative action, why diversity within diversity still matters.

Norma Cantu

It looks messy because we are still in the middle of trying to figure it out. What does critical mass mean? We didn't have many Asians when the Texas School Reform occurred and when H. Ross Perot was going around the country visiting universities and excellent schools. He came back saying, "There sure are a lot of Asians at MIT. What is that about?" Because there weren't any Asians at UT Austin, and that was in 1984, not that long ago. So it is still messy. It isn't as if we are not been doing it well with a lot of energy and a lot of leadership for a century. It's only been recently that we've gotten a sense of how big the problem is. And it is only recently that we've had the vocabulary to communicate that we

have a big problem. And the big problem is that we don't understand where we're going yet. It is one of these things where if you don't have a roadmap, you don't have a destination. Well the Supreme Court keeps asking us, "What's your destination?' And we say. "We're working on it. We got the car started. And we are out of the garage. And we're down the driveway." But we are nowhere near being able to give the answer. It's a trick question because the answer that Fisher wants us to give is that we are there when one third is African American, one third is Latino, and one third is White, and zero Asian. If we give that, that is the wrong answer. If we give that answer, then we're all about quotas.

David Hinojosa

But here's another twist to the issue. Who is to say that more affluent Latinos or African Americans are getting in because of race? You won't question an affluent White person. Frankly. when you look at history. which includes the lack of discrimination against White people largely especially not low-poverty White people, they've had access to a lot more privileges without any competition for generations. And yet we always want to say. "Oh well, they got in because they pulled themselves up by their bootstraps.' No, someone gave them those boots and pulled those bootstraps up for them. Not everybody has bootstraps.

Norma Cantu

I keep waiting for someone else who says, "Yes, I'm a law professor too and I'm a beneficiary of affirmative action." I say it every time I speak; I'm a beneficiary of affirmative action. And I keep waiting for other folks to say "Me too."

Ranjana Natarajan

Me too!

Norma Cantu

Yay! [claps]

David Hinojosa

I was post-Hopwood, sorry!

Norma Cantu

[Laughs] But, it is still in motion.

Ranjana Natarajan

I am a professional in America. I am a beneficiary of affirmative action. I mean it is sort of like the U.T. Law class is not roughly fifty-percent men and fifty-percent women out of magic. It's not magic. Somebody's calibrating all of these things very carefully. and thinking about you as an individual, as well as some larger goals at all times.

Norma Cantu

Well I can give one explanation. When I started here in '01, we had about seven tenured faculty women who were not teaching here. They had some. .something had happened in their intercommunication with the men faculty that they were all visiting faculty somewhere else. And our Dean Powers had to go visit them. He went, traveled, and found them, and said "We want you back at UT. Whatever has happened, we need to hear about it, fix it, and bring you back." So, why are we fifty-fifty? Somebody like Bill Powers put the effort into it. And why aren't we higher than fifty-fifty female? There is still some work to be done.

David Hinojosa

Zach.

Audience Member

So you all talked about zealous advocacy and educating people about affirmative action, or rather what they are getting and what you're going to get out of this legislation. One thing that always jumps out at me with a lot of this impact litigation is the, I don't want to say lack of education or lack of providing education to the general public about what we would call the liberal stance, the stance opposite of Abigail Fisher. But on the other side there, with almost every hot-button issue there seems to be this really coherent message. It is easier on the other side, "well the Fourteenth Amendment says 'equal' and you give preferential treatment to a certain race, that is unequal.'" And that's obviously not what the argument boils down to. But my question is, how do you all see us educating people, White people and minority communities, about why this case is so important, about why affirmative action is important? Do you know of any sort of education campaigns in other areas of litigation that might be imported into this? Because I really feel like a lot of the. .I talk to some of my in-laws and they are social justice-minded people, but as soon as affirmative action comes up, they say "that is racist." And they are not dumb; they are not racist people. I think there is just a lack of understanding about why this is so important. What can we as future lawyers do to educate the populace about this?

Norma Cantu

It is a communication challenge. I mean, when the top ten percent plan was approved, people understood at that time, they understood very clearly that it meant no longer would ten or fifteen percent of the high schools monopolize the incoming freshman class for UT Austin. So we grew a much larger feeder pattern where a lot more high schools from a lot of different parts of the state were going to be sending their best students to UT. Somewhere the communication has broken down, and people don't see it as an elastic pool where more and more folks are coming in than before. They see it as a zero-sum game. If the person that I knew that is in my school that I used to attend didn't get in, then the pie must have shrunk really tiny. And that is a terrible thing.

So somewhere folks have not realized that educational slots are not fixed slots; they are elastic. Some years we have a lot more students than others, and some years we want to, you know. improve the faculty-student ratio, and so we don't admit as many folks. But it is not a steady. fixed number of slots every single year. And it is a gain when we are serving all of the State of Texas because we are written in the constitution to do that. We're supposed to be the flagship not just for Central Texas but for the whole state. So we need to work on that more. We need work on the communication, and we should start thinking about what STEM means for us. When I go to South Texas, and I see the infrastructure there, and I see that bridges are not as safe looking as they should be, I'm thinking STEM. I'm thinking, "where are all the UT engineers that are going to go back to South Texas and patch that big thing back up to make it safer for us?" I am thinking medical schools are a potential save for the whole state. We've got a challenge. One is to be more transparent about what we do. The part about the top ten percent that I love the best, not just that it serves a lot more high schools across the whole state, is that any parent regardless of their educational attainment gets it; they understand it. They say. "This is like a coupon. I can redeem this. I know that if my child gets this GPA, no one can take that away from him or her." And so the understanding of how clear it is – it may not be the best admissions process, but sure enough there is no hidden lies behind it, there is no secret backdoors behind it. It works.

David Hinojosa

I think when we had a conversation a couple of years ago when Fisher 1 was going up. We had a national call with amici, and we were co-coordinating the efforts with the NAACP LDF and we asked the communication experts to join the call. And it was kind of interesting because, back then, we were always talking about it in other forms. And then they came on, they said, "Oh we think it is okay to use the word affirmative action." And I was like "What?! I can't believe he said that!" What was funny. because I was like "maybe it is just because I am in Texas or something. Something's going on here because we haven't used the words affirmative action in quite some time." Now the other side always uses that, but we're talking about 'expanded opportunity.' 'diversity for all talented students,' etc. And then they came on and they said that. And I was waiting and waiting to chime in, and then

someone from California came on, and they said, 'You know what? I gotta say. even out here in California, we don't want to use 'affirmative action.' We don't want to use that word because it has certain negative connotations." And I was like, "Oh! Okay I wasn't the only one." Thankfully someone from California had said that. But at the end of the conversation, it was "how do we tell this story in terms of expanding opportunity for all talented students?"

All talented students don't face the same barriers, unfortunately. in our largely segregated community. So how can we ensure that the doors are open for all talented students from all regions? And because of what Norma said, it is especially important. If you get someone from, you know. Ames. Are they going to want to be a doctor in Brownsville, Texas? Probably not. I wouldn't say definitely not. And when you talk about the national interest at stake, and you talk about companies coming in and seeing the benefits of having a diverse learning environment that leads to a diverse workforce, when you talk about fostering diverse learning, and etcetera. I think it tries and gets us there. But like what Norma said, it's not an easy task, and trying to tell the story in this greater context with all these systemic constructs that are betting against certain people largely based on color. Not solely, but still largely as we know from all the events going around. It is something that is absolutely necessary. and how we get there I don't think that there is any definitive answer right now.

Norma Cantu

And as long as we have underserved counties in Texas that don't have access and can't get their students into UT. then the job isn't done.

Ranjana Natarajan

I think we have probably run out of time because it's 3:10 and the organizer is telling me yes. But I am just going to take my moderator's prerogative to answer it in this way also, which is, you know. we live in a society that is based on structural White supremacy that was built four-hundred-something years in the making. You can't dismantle it overnight. It takes a really. really long time. And we are going to be chipping away at it for another four hundred years, probably. And it is undoubtedly associated with all the sort of colonialism, slavery that built and shaped our entire world. So that is my macro answer that's not meant to be a downer. but it is a little bit. And here is my more helpful answer. I mean it when I say that we are all change agents, and one of the things we can do is tell our own stories, and make sure that the stories of others are heard. A lot of you in this room, and a lot of us, have stories about privilege as well as stories about deprivation. And those stories are important to share because we live in such a segregated society that people don't have access to those stories. And I think what we have found, what civil rights lawyers have found, is that people respond to stories. They respond to human experience in a way that they don't even respond to data. So both of those things are important in terms of educating others and making them more aware of what the realities are. Thank you very much, and thank you to the panelists.