"DIVISIVE CONCEPT" BILLS: WHERE DOES TENNESSEE EDUCATION GO FROM HERE?

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Diversity, equity, and inclusion ("DEI") in higher education institutions stemmed largely from affirmative action. Further, DEI has expanded to most universities and colleges across the country. But, in 2020, this began to shift. Former President Trump signed Executive Order 13950, which identified several "divisive concepts" prohibited from government workplace training. Following this, almost one hundred bills using similar language were proposed. However, these bills were directed toward higher education institutions. Tennessee has signed into law a bill that mirrors Executive Order 1350. While unclear how these laws will be enforced, it has sent a clear message to

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historically underrepresented communities. Executive Order 1350 and the following bills altered this nation's political, social, and legal landscape. Following on the heels of these bills, the Supreme Court overturned affirmative action, and this caused the previous landscape to shift even more.

These "divisive concept" laws and the overturning of affirmative action, represent an existential threat to a generation's worth of values that have been propping up admissions decisions, employment decisions, financial aid decisions, and employment positions in the United States. Tennessee educators are already fearful of how these shifts will affect their teaching ability. In fact, many teachers fear these bills will chill their academic freedom. In response, higher education institutions are already adjusting how they approach DEI. This paper will proceed in four parts. Part I will provide a brief history of affirmative action and the growth of DEI in higher education. Specifically, it will discuss the interrelation of the two. Part II will then analyze the rise of "divisive concept bills" in Tennessee and nationwide. Part III will discuss how Tennessee universities and colleges are responding to these changes and where they go from here. Lastly, Part IV will conclude with the message these shifts send to historically underrepresented students.

INTRODUCTION

"'[T]he nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."[1] For nearly forty years, the Court has upheld affirmative action principles and recognized legitimate interest in promoting diversity.[2] In turn, these principles propped up a generation's worth of admissions decisions, employment decisions, financial aid decisions, employment positions, and diversity initiatives in the United States. Specifically, affirmative action largely cultivated diversity, equity, and inclusion in higher education.[3]

However, in 2020, the political, social, and legal landscape began to shift. Former President Trump signed Executive Order 13950,

1. Regents of Univ. of California v. Bakke, 438 U.S. 265, 313 (1978) (internal citations omitted).

2. *See generally* Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 315 (2013) ("[in 1978,] this Court [held] the benefits of a student body diversity that "encompasses a ... broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

3. *Pivotal Moments in Higher Education DEI*, INSIGHT TO DIVERSITY (Sept. 27, 2023), https://www.insightintodiversity.com/pivotal-moments-in-higher-education-dei/.

which outlined "divisive concepts" and prohibited federal government contractor's workplace training.[4] Even though it was revoked in 2021, several states passed "divisive concept" laws that flowed directly from Executive Order 13950.[5] This Order broadly defined "divisive concepts" to include: "one race or sex is inherently superior to another race or sex; the United States is fundamentally racist or sexist[; and] . . . any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex[.]"[6] Many states followed this definition closely. Tennessee is one of these states. T.C.A § 49-7-1901 prohibits mandatory training on any "divisive concept," prohibits personal diversity statements, and creates a framework for an individual to report any alleged violation.[7]

Many professors and administrators fear these laws will chill academic freedom and disincentivize diversity initiatives.[8] In addition, shortly after these bills were passed, the Supreme Court overturned race-based affirmative action programs in college admissions. Justice Jackson's dissenting words, "ignoring race just makes it matter more,"[9] are also poignant in the context of "divisive concept" laws, which purport to do just that. While these laws are in their infancy, how or if they will be enforced is unclear. Although these laws create more questions than answers, a clear message has been sent to historically underrepresented individuals in Tennessee.

This paper will proceed in four parts. Part I will outline a brief history of affirmative action and DEI in higher education. Namely, it will discuss the interconnectedness between the two and affirmative action's roots deep within DEI initiatives. Part II will analyze the rise of "divisive concept" bills in Tennessee and other states nationwide. In addition, it will look at Tennessee educators' responses to this legislation and their concerns for the future. This part will also discuss the overturning of affirmative action and its far-reaching effects on education and DEI. Part III will discuss where Tennessee universities go from here. These laws create many questions that have yet to be answered, and it will fall upon university administrations to

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4. Leah C. Rachow, *Scapegoating and Stereotyping: The Executive's Power over Federal Contractors*, 47 J. CORP. L. 529, 530, 547 (2022).

5. IDAHO CODE ANN. § 33-138 (West 2021); FLA. STAT. ANN. § 1000.05 (West 2022); MISS. CODE. ANN. § 37-13-2 (West 2022); S.D. CODIFIED LAWS § 13-1-67 (2022); OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021).

6. Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (2020).

7. TENN. CODE ANN. § 49-7-1901 (2022).

8. Ryan Quinn, *Tennessee Again Targets 'Divisive Concepts'*, INSIDE HIGHER ED (Apr. 18, 2023), https://www.insidehighered.com/news/faculty-issues/diversity-equity/2023/04/18/tennessee-again-targets-divisive-concepts.

9. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S.Ct. 2141, 2277 (2023).

navigate this uncertain territory. In addition, this part will discuss the *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*'s dissent to identify similar fears stemming from "divisive concept" laws. Lastly, Part IV will conclude that these laws send a clear message to administrations across the state and historically underrepresented individuals.

I. HISTORY

A. *Affirmative Action*

The Civil Rights Act of 1964 states that "all persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin[.]"[10] This act ignited change across the nation, as courts upheld affirmative action policies, and schools leaned on it to create affirmative preferential policies.[11] In 1978, the Supreme Court noted, "this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring all persons the protection of equal laws, in a Nation confronting a legacy of slavery and racial discrimination."[12] These strides were perhaps most visibly seen in the area of education and admission policies.

In *Bakke,* a white applicant challenged the University of California at Davis Medical School for their admission policy that reserved 16 out of 100 seats for minority applicants.[13] The medical school argued that their admission process serves several purposes, including (i) reducing the historic deficit of traditionally disfavored minorities in medical schools, (ii) countering the effects of societal discrimination, (iii) increasing the number of practicing physicians in underserved communities, and (iv) the educational benefits of a diverse student body.[14] Though *Bakke* ruled racial quotas in admissions violated equal protection, the Court noted that "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic

10. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 et seq. (2006)).

11. RALPH PREMDAS, THE STRUGGLE FOR EQUALITY AND JUSTICE: AFFIRMATIVE ACTION IN THE UNITED STATES OF AMERICA 43 (2016).

12. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 293–94 (1978) (internal citations omitted).

13. *Id.* at 277–79.

14. *Id.* at 305–06.

origin is but a single though important element."[15] This key landscape grew into admission policies considering various qualifications and characteristics, including race and ethnic origin.[16] Although undeniable in importance, *Bakke* was problematic in its application. The case consisted of six different opinions, leading many courts to split in interpretation and enforcement.[17] By 2002, circuit courts of appeal inconsistently applied *Bakke,* which led to the Court resolving the split in *Grutter v. Bollinger*.[18]

In *Grutter v. Bollinger*, an applicant to the University of Michigan Law School (hereinafter "Law School") challenged the school's policy that aspired to achieve "diversity which has the potential to enrich everyone's education and thus make [the] law school class stronger than the sum of its parts."[19] Specifically, the policy required the admissions board to consider an applicant's essay describing how the applicant would contribute to the diversity of the Law School.[20] In addition, the policy provided that the admissions board should "look beyond grades and test scores to other criteria that are important to the Law School's educational objectives," which included race.[21]

The Supreme Court determined that the Law School's use of race without a quota, invalidated in *Bakke*, constituted a compelling state interest.[22] Further, the Court has consistently acknowledged the importance of preparing students to enter the workforce:

> Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide for the training and education necessary to succeed in America.[23]

The Law School's admission policy considered race only a single factor in creating a diverse student body.[24] Therefore, the Supreme Court held that the Law School's policy was sufficiently tailored to

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15. *Id.* at 315. *See also* Roy Carleton Howell, *Affirmative Action in Higher Education: Bakke Has Been Affirmed*, 26 N.C. CENT. L.J. 38, 43 (2003).

16. Howell, *supra* note 15, at 43.

17. PREMDAS, *supra* note 11, at 60.

18. *Id.*

19. Grutter v. Bollinger, 539 U.S. 306, 315 (2003) (internal citations omitted).

20. *Id.*

21. *Id.*

22. *Id.* at 328.

23. *Id.* at 332–33.

24. *Id.* at 340.

promote the state interest and educational benefits of a diverse student body.[25]

In 2013, affirmative action principles were again addressed with the Court's opinion in *Fisher*. The University of Texas at Austin (hereinafter "Texas") had a race-conscious admissions policy that considered race among multiple factors in the undergraduate admissions process.[26] The Court provided an extensive history of the *Bakke* and *Grutter* decisions, reiterating the holding that student body diversity is a compelling state interest.[27] Justice Kennedy also stated that the policy goal to achieve diversity, a compelling state interest, must be narrowly tailored.[28] Specifically, race-conscious admissions policies are tested under strict scrutiny, which means "that the Court will insist that the university, or other government entity, demonstrate that its affirmative action measures are no more extensive than necessary to advance a compelling interest."[29]

By the time *Fisher* reached the Supreme Court, it was clear that affirmative action policies had significantly integrated into American society, including higher education institutions, corporations, and government entities.[30] The Court concluded that Texas's race-conscious admission program satisfied strict scrutiny because it "articulated concrete and precise goals; it provided 'both statistical and anecdotal evidence' that its affirmative action was needed."[31] The Court also concluded that universities "could serve as 'laboratories for experimentation'" to determine the appropriateness of affirmative action programs.[32] In addition to shaping admission policies for over a generation, the Court's affirmative action decisions reflected an increased priority of promoting diversity in education and beyond.

B. *Diversity, Equity, and Inclusion in Higher Education.*

In addition to endorsing affirmative action principles, the Court's decisions had a far-reaching effect on DEI initiatives in higher education.[33] This is mainly because "by reaffirming the principle that promoting diversity in college and university admissions is a

25. *Id.* at 343.
26. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 300 (2013).
27. *Id.* at 307–310.
28. *Id.* at 312.
29. David A. Strauss, Fisher v. University of Texas *and the Conservative Case for Affirmative Action*, 1 SUP. CT. REV. 1, 2 (2016).
30. *Id.*
31. *Id.* at 14.
32. *Id.* at 14–15.
33. *Pivotal Moments in Higher Education DEI*, *supra* note 3.

compelling state interest, [*Grutter*] acknowledged that a diverse student body benefits not only the educational experience but also society at large."[34] Further, this decision reaffirmed the constitutionality of race-conscious admissions programs and encouraged other programs to continue promoting diversity on campuses. Higher education institutions saw this opinion as an endorsement to continue creating policies for a diverse community, which included additional DEI efforts.[35]

In addition to the push for affirmative action in admission, higher education institutions shifted focus to retention.[36] Retention rates,[37] as well as the educational experience as a whole, became a critical problem as the enrollment of nonwhite students increased.[38] This demonstrated to universities that the longevity of diversity and inclusion efforts was closely linked to a continuous commitment to removing economic, cultural, and political barriers.[39]

Based on the increased enrollment yet low retention of underrepresented students, many higher education institutions created new positions to help further support these students.[40] Namely, these positions were often called "offices of minority affairs, multicultural affairs, and cultural centers."[41] As the number of support staff grew, and with advancements in technology and social media, more attention was directed towards racism and

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34. *Id.*

35. *Id.*

36. *The History of Diversity in Higher Education*, AM. LEADERSHIP INST. (June 25, 2021), https://sites.lsa.umich.edu/leadership-institute/2021/06/25/the-history-of-diversity-in-higher-education-ali-series-part-i/ ("In 1976, white students made up over 80% of all U.S. college students, but that percentage dropped to 57% by 2016. As the nation continues to diversify, higher education has begun to acknowledge the way in which language and education barriers can misrepresent a student's learning and intelligence.").

37. "Even in colleges where more diverse students were admitted, retention remained low. Although twice as many Black students were admitted to Columbia in 1969, for instance, only half ended up receiving their degrees." *Id.* (emphasis added). *See also*, ALAN SIEDMAN, MINORITY STUDENT RETENTION 2 (2018) (noting in 2003 "six-year graduation rates for students who began college in the fall 1994 semester, we find that for whites 56.9% graduated within six years, compared with 41.7% of black students, 41.7% of Hispanics, and 35.8% of American Indians.")

38. B.E. Vaughn, *The History of Diversity Training and Its Pioneers*, DIVERSITY OFFICER MAGAZINE (2007), https://diversityofficermagazine.com/diversity-inclusion/the-history-of-diversity-training-its-pioneers/.

39. *Pivotal Moments in Higher Education DEI, supra* note 3.

40. Eugene T. Parker III, *Do Colleges Need a Chief Diversity Officer?*, INSIDE HIGHER ED (Aug. 19, 2020), https://www.insidehighered.com/views/2020/08/20/chief-diversity-officers-play-vital-role-if-appropriately-positioned-and-supported.

41. *Id.*

discrimination on college campuses.[42] Thus, universities continued to expand offices for diverse professionals.[43] This eventually morphed into what is now commonly referred to as "chief diversity officers" tasked with aiding higher education institutions in achieving the goals of DEI.[44]

In addition to affirmative action in education, this period saw multiple other civil rights advances, including:

> [A]n increase in women entering the workforce and a heightened focus on gender parity, anti-harassment policies, and pay equity. The Equal Employment Opportunity Commission (EEOC) received more than 50,000 complaints of sex-based discrimination in its first five years of operation. Title IX of the Education Amendments of 1972 ensured equal access for women to higher education and professional schools, which increased the number of women enrolling in historically male-dominated professions like medicine, law, and engineering. The number of girls and women participating in athletics increased exponentially due to Title IX as well . . . . The Rehabilitation Act of 1973 mandated equal opportunities for employment in the federal government for people with mental and physical disabilities . . . . The 1975 Education for All Handicapped Children Act guaranteed equal access to education for children with disabilities. In 1990, after decades of advocacy, disability rights activists were successful in getting Congress to pass the Americans with Disabilities Act (ADA), which guaranteed equal treatment and access to employment opportunities and public accommodations.[45]

Thus, affirmative action policy had far-reaching impacts on almost all societal aspects.

In 2020, a push for increased DEI in higher education was renewed.[46] Following the murder of George Floyd, any higher education institution that did not employ diversity professionals

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42. *Id.*

43. *Id.*

44. *Id.*

45. MARIA MORUKIAN, DIVERSITY, EQUITY, AND INCLUSION FOR TRAINERS: FOSTERING DEI IN THE WORKPLACE 9–10 (ATD PRESS 2022).

46. J. Brian Charles, *The Evolution of DEI*, CHRON.OF HIGHER ED. (June 23, 2023), https://www.chronicle.com/article/the-evolution-of-dei?sra=true.

promptly did so.[47] This pushed many schools to renew their pledge to achieve a more diverse college community.[48] In addition, following this event, groups totaling between 15 to 26 million gathered to support Black Lives Matter.[49] Also, the New York Times created the 1619 Project on "the 400th anniversary of the beginning of American slavery. It aims to reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative."[50]

Following, articles published by Christopher Rufo, former Center on Wealth and Poverty[51] director, made national headlines targeting these protests, critical race theory, and antiracism workplace training.[52] Critical race theory is widely discussed in the political realm.[53] Yet, its teachings are diverse and not easily summarized.[54] However, critical race theory casts a wide net in addressing "the various ways in which assumptions about race affect the players within the legal system . . . and have a determining effect on substantive legal doctrines."[55] In an interview on Fox News, Rufo

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47. *Id.*

48. *Id*. *See also* Michelle Williams, *Regarding the Death of George Floyd*, HARVARD T.H. CHAN: SCHOOL OF PUBLIC HEALTH (June 01, 2020), https://www.hsph.harvard.edu/deans-office/2020/06/01/regarding-the-death-of-george-floyd/ ("That reality is apparent . . . in the legacy of slavery and discrimination that persists in countless social determinants of health . . . . Our community stands united in doing everything we can to live these values—in both our personal and professional capacities—to be agents of anti-racist social transformation and advance the well-being of all people around the globe.").

49. Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign against Critical Race Theory, through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE GENDER & SOC. JUST. 61, 67 (2021).

50. *The 1619 Project,* N.Y. TIMES, https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html (last visited Dec. 4, 2023).

51. *Center on Wealth & Poverty*, DISCOVERY INST., https://wealthandpoverty.center (last visited Mar. 19, 2024) ("The Mission of Discovery Institute's Center on Wealth & Poverty is to apply the perennial truths of economics and ethics to the urgent challenges of today. We are building a sustained argument against the progressive ideological regime that increasingly dominates America's institutions . . . .").

52. Hamilton, *supra* note 49, at 72–75.

53. *See generally* Vanessa Miller, Frank Fernandez & Neal H. Hutchens, *The Race to Ban Race: Legal and Critical Arguments against State Legislation to Ban Critical Race Theory in Higher Education*, 88 MO. L. REV. 61, 81 (2023) ("Conservative lawmakers and news outlets suddenly became interested in CRT after Derek Chauvin knelt on George Floyd's neck for more than nine minutes. . . [.] [I]nstead, they propped up CRT as a straw man and sought to target and censor faculty as divisive instigators of racial tension.").

54. Douglas E. Litowitz*, Some Critical Thoughts on Critical Race Theory,* 72 NOTRE DAME L. REV. 503, 503 (1997*).*

55. *Id.* at 503–04.

stated, "[C]ritical race theory . . . has pervaded every aspect of the federal government . . . . I'd like to make it explicit: The President and the White House—it's within their authority to immediately issue an executive order to abolish critical-race-theory training from the federal government."[56] The following day, Rufo received a call from the White House Chief of Staff, and within the month, former President Trump signed Executive Order 13950.[57] This marked the tipping point, shifting the political, social, and legal landscape for generations to come.

II. THE TIPPING POINT: THE CREATION OF "DIVISIVE CONCEPT" BILLS AND THE OVERTURNING OF AFFIRMATIVE ACTION.

A. *"Divisive Concept" Laws*

1. Executive Order 13950

"Divisive concept" laws were proposed across the country following an executive order from former President Trump. This Executive Order came about in the aftermath of the 1619 Project and the surge in the "Black Lives Matter" movement following the murder of George Floyd.[58] In addition, former President Trump repeatedly tweeted about critical race theory "as 'sickness that cannot be allowed to continue.'"[59] Shortly after, former President Trump commented again on both critical race theory and Project 1619 at the White House Conference on American History.[60] Specifically, he noted that "[c]ritical race theory, the 1619 Project, and the crusade against American history is toxic propaganda, ideological poison that, if not removed, will dissolve the civic bonds that tie us together. It will destroy our country."[61] Five days later, former President Trump signed Executive Order 13950.[62]

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56. Hamilton, *supra* note 49, at 75.

57. *Id.*

58. Aina N. Watkins, *Executive Order 13950, On Combating Race and Sex Stereotyping: Its Effect on Government Contractors' Use of Diversity Training*, 56 PROCUREMENT LAW 10, 10 (2021).

59. Rachow, *supra* note 4, at 531 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2020, 6:52 AM), https://twitter.com/realDonaldTrump/status/1302212909808971776 [https://perm a.cc/6CENB2ZZ]).

60. *Id.*

61. *Remarks by President Trump at the White House Conference on American History,* NAT'L ARCHIVES MUSEUM (Sept. 17, 2020), https://perma.cc/GS2W-LQ2W.

62. Rachow, *supra* note 4, at 531–32.

Executive Order 13950 barred government contractors, military, and federal agencies from "promoting 'divisive concepts' in workplace trainings."[63] Some of these "divisive concepts" include:

> [O]ne race or sex is inherently superior to another race or sex; the United States is fundamentally racist or sexist; an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; . . . any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.[64]

In fact, Russell Vought, former Director of the Office of Management and Budget, noted the former President directed these agencies to "cease and desist from using taxpayer dollars to fund these divisive, un-American propaganda training sessions" and all agencies should "identify all contracts or other agency spending related to any training on 'critical race theory,' 'white privilege,' or any other training or propaganda effort that teaches . . . that the United States is an inherently racist or evil country."[65] On January 20, 2021, President Biden revoked Executive Order 13950, but for many, the damage was already done.[66] Many states, all Republican-led, have introduced bills that "'have banned or limited the teaching of critical race theory or similar concepts . . . .' The new state laws ban K–12 education, institutions of higher education, and 'companies that do business with government entities from conducting diversity, equity, and inclusion programs.'"[67] Many of these states have since passed these bills into law.[68]

2. "Divisive Concept" Bills Across the Nation.

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63. Juliet Dee, *Do Bans on Teaching "Divisive Concepts" Interfere with Students' Right to Know?*, 13 AAUP J. ACAD. FREEDOM 1, 5 (2022).

64. Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (2020).

65. Memorandum from Russell Vought, Dir., Off. of Mgmt. and Budget, on Training in the Federal Government to the Heads of Exec. Dep'ts and Agencies (Sept. 4, 2020); *see also* Dee, *supra* note 63, at 5.

66. Watkins, *supra* note 58, at 11.

67. *Id*. at 11–12 (citing Bryan Anderson, *EXPLAINER: So Much Buzz, but What Is Critical Race Theory?*, AP NEWS (June 24, 2021), https://apnews.com/article/what-is-critical-race-theory-08f5d0a0489c7d6eab-7d9a238365d2c1).

68. *See infra* Section II(A)(2).

Since January 2021, over ninety-nine bills have been proposed mirroring Executive Order 13950, and at least twenty-two bills targeted higher education.[69] Nine states have signed these bills into law.[70] Specifically, Idaho,[71] Florida,[72] Mississippi,[73] South Dakota,[74] and Oklahoma[75] are a few of the states that have passed laws echoing Executive Order 13950.

Effective 2021, Idaho passed a law titled "Dignity and Nondiscrimination in Public Education."[76] This law notes, "Idaho legislature finds that tenets . . . often found in 'critical race theory,' exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho."[77] In addition, no state funding may be used for a purpose prohibited in § 33-138.[78] Meanwhile, South Dakota legislation states, "the Board of Technical Education, or any institution under their control may not require their students or employees to attend or participate in any training or orientation that teaches, advocates, acts upon, or promotes divisive concepts."[79]

In Oklahoma, the legislature adopted a statute prohibiting "[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex."[80] Mississippi's statute adds that "[n]o public institution of higher learning . . . shall make a distinction or classification of students based on account of race."[81] While many of these states slightly differ in the text of these statutes, they aim to achieve the same goal: prohibit or tightly constrain DEI initiatives in the state's higher education institutions.

In 2023, Florida Governor Ron DeSantis signed a bill prohibiting the use of federal funds to support or maintain any program advocating for DEI or engaging in political or social activism.[82]

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69. Jennifer Ruth, *Subnational Authoritarianism and the Campaign to Control Higher Education: Understanding State-Level Attacks on Colleges and Universities*, https://www.aaup.org/article/subnational-authoritarianism-and-campaign-control-higher-education (last visited Mar. 19, 2024).

70. *Id.*

71. IDAHO CODE ANN. § 33-138 (West 2021).

72. FLA. STAT. ANN. § 1000.05 (West 2022).

73. MISS. CODE. ANN. § 37-13-2 (West 2022).

74. S.D. CODIFIED LAWS § 13-1-67 (2022).

75. OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021).

76. IDAHO CODE ANN. § 33-138 (West 2021).

77. *Id.*

78. IDAHO CODE ANN. § 33-139 (West 2021).

79. S.D. CODIFIED LAWS § 13-1-68 (2022).

80. OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021).

81. MISS. CODE. ANN. § 37-13-2 (West 2022).

82. FLA. STAT. ANN. § 1004.06 (West 2023).

Following, Governor Desantis stated that "DEI is better viewed as standing for discrimination, exclusion, and indoctrination . . . [and] that has no place in our public institutions."[83] Governor Desantis continued that Florida would be the first state to remove DEI initiatives from public universities altogether.[84]

In contrast, those opposing "divisive concept" bills emphasize that these legislatures "completely mischaracterize [DEI programs] to create a straw-man demon that they now have to do away with."[85] They note that Florida's actions will have broader impacts.[86] These "divisive concept" laws generally consist of:

> [V]ague pronouncements, riddled with exceptions, that focus on banning the teaching of race stereotyping and the notion that individuals of different races should be treated differently or should bear responsibility (emotional or otherwise) for past racial discrimination. As a result, the bills tend to chill conversation about race in the classroom by imposing vague and politically-charged prohibitions on speech and, more broadly, by explicitly characterizing discussion of racism, race relations, and structural racism as divisive, inflammatory, and unamerican.[87]

Tennessee's law is no exception.

3. Tennessee's Divisive Concept Law

On February 01, 2022, Senator Mike Bell introduced Senate Bill 2290 to the General Assembly, initiating a "divisive concept" law in Tennessee.[88] Shortly after, Governor Lee signed it into law on April 13, 2022, as Public Chapter 818.[89] This law identified several "divisive concepts" that "exacerbate[d] and inflame[d] divisions on the basis of sex, race, religion, color, national origin, and other criteria in ways

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83. Jaclyn Diaz, *Florida Gov. Ron Desantis Signs a Bill Banning DEI Initiatives in Public Colleges*, NPR (May 15, 2023), https://www.npr.org/2023/05/15/1176210007/florida-ron-desantis-dei-ban-diversity.

84. Virginia Gerwin, *Academics Fight Moves to Defund Diversity Programmes at US Universities*, NATURE (Mar. 9, 2023), https://www.nature.com/articles/d41586-023-00711-z.

85. Diaz, *supra* note 83.

86. *See* Gerwin, *supra* note 84.

87. Francesca Procaccini, *(E)racing Speech in School*, 58 HARV. C.R.-C.L. L. REV. 457, 461 (2023).

88. S.B. 2290, 112th Gen. Assemb. (Tenn. 2022).

89. *Id.*

contrary to . . . the well-being of this state and its citizens."[90] Some of these "divisive concepts" include that:

> An individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously . . .; [a]n individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex; [a] meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress another race or sex; [t]his state or the United States is fundamentally or irredeemably racist or sexist; . . . [a]ll Americans are not created equal and are not endowed by their Creator with certain unalienable rights, including, life, liberty, and the pursuit of happiness; . . . [i]ncludes race or sex scapegoating.[91]

Public institutions are prohibited from punishing students or employees who fail to endorse or support one of these "divisive concepts."[92] In addition, public institutions cannot require personal diversity statements from an applicant for admission or employment.[93] If a student or employee feels this law has been violated, they "may pursue all equitable or legal remedies that may be available to them in a court of competent jurisdiction."[94]

In addition, the Tennessee legislature prohibited mandatory training for students or employees on any "divisive concept."[95] A public institution of higher education is prohibited from using any training program for students or employees that contains any identified "divisive concept."[96] Further, DEI employees must ensure their role includes strengthening intellectual diversity, supporting workplace readiness, and aiding academic achievement,[97] thus limiting the time and resources used for diversity efforts.

Lastly, this Act is qualified that it should not be interpreted to "[i]nfringe on the rights of freedom of speech protected by the First Amendment to the United States Constitution. . . [or] the rights of

90. TENN. CODE ANN. § 49-7-1901 (2022).
91. *Id.* § 49-7-1902 (2022).
92. *Id.* § 49-7-1903(1) (2023).
93. *Id.* § 49-7-1903(3).
94. *Id.* § 49-7-1903(4).
95. *Id.* § 49-7-1904(a)(1) (2023).
96. *Id.* § 49-7-1904(a)(2).
97. *Id.* § 49-7-1904(b)(1)(A)–(B).

academic freedom of faculty in public institutions of higher education."[98]

On January 20, 2023, Senator Joey Hensley introduced Senate Bill 817 to the General Assembly.[99] This Bill was signed into law on April 28, 2023, to become effective on July 01, 2023. This law is titled the "Tennessee Higher Education Freedom of Expression and Transparency Act" and continues the 2022 law.[100] Tennessee General Assembly reaffirmed these constraints, stating that:

> Positively or negatively incentivizing, informally pressuring, indoctrinating, or otherwise compelling students or employees of a public institution of higher education to embrace divisive concepts is contrary to the mutual respect and collegial processes essential to the free exchange of ideas [and] [m]easures taken to ensure non-discrimination cannot be allowed to undermine the principles of merit and excellence in the core activities of public institutions of higher education.[101]

Lastly, this new statute adds language that if students or employees feel a violation of T.C.A. § 49-7-103 has occurred, they may report such alleged violation.[102] The institution must investigate the alleged violation and take any necessary corrective action for any reported violation.[103] As the University of Memphis notes, "If [employees] are sued, the State of Tennessee generally provides legal representation through the Attorney General's Office. However, employees may have personal liability if it is determined that they have acted willfully, maliciously, or criminally or if they acted for personal gain."[104]

B. *The Supreme Court overturns affirmative action in Students for Students for Fair Admissions, Inc. v. President & Fellows of Harvard College.*

98. *Id*. § 49-7-1906(2)–(3) (2022).
99. S.B. 0817, 113th Gen. Assemb. (Tenn. 2023).
100. TENN. CODE ANN. § 49-7-1907 (2023).
101. *Id*.
102. *Id*. § 49-7-1907(b).
103. *Id.*
104. *Divisive Concepts Act Information and Resources*, UNIV. OF MEMPHIS: OFF. OF PROVOST AND ACAD. AFFS., https://www.memphis.edu/aa/resources/divisiveconcepts.php (last visited Dec. 11, 2023).

Given this social and largely political landscape, it was perhaps no surprise and no small irony that decades of precedent came tumbling down with the conservative majority Court's decision in *Students for Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*.[105] In this case, the court overturned the precedent, stating that race-based admission programs failed strict scrutiny.[106] Students for Fair Admissions ("SFFA"), a nonprofit organization, filed lawsuits against Harvard College and the University of North Carolina.[107] SFFA claimed that the two universities' race-based admissions programs were unconstitutional.[108] In this decision, Chief Justice Roberts stated, "[F]or too long, universities have 'concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin.'"[109] Further, the majority adds the dissenters would like to tell states "when they have picked the right races to benefit. Separate but equal is *'inherently* unequal.'"[110]

In addition, the Court noted the benefits from diversity were so amorphous that no court could ever measure its effectiveness.[111] Specifically, the Court added:

> How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they

105. In a similar vein, in 2013, the conservative Court held provisions of the Voting Rights Act aimed to eliminate discrimination were no longer necessary because "[o]ur country has changed." Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 557 (2013). However following this decision, Alabama made several swift changes including "requiring photo identification to vote while simultaneously closing dozens of driver's license offices, several of which were located in counties representing the highest percentages of Black voters." Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625, 1628 (2023) (citing Maggie Astor, *Seven Ways Alabama Has Made It Harder to Vote*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/2018/06/23/us/politics/voting-rights-alabama.html).

106. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S.Ct. 2141, 2166 (2023).

107. *Id*. at 2156.

108. *Id*.

109. Mark Sherman, *Divided Supreme Court Outlaws Affirmative Action in College Admissions, Says Race Can't Be Used*, AP NEWS (June 29, 2023), https://apnews.com/article/supreme-court-affirmative-action-college-race-f83d6318017ec9b9029b12ee2256e744.

110. *Students for Fair Admissions,* 143 S.Ct. at 2175.

111. Kevin R. Eberle, *A Review of Significant Supreme Court Decisions of the 2022–23 Term*, 35 S.C. L. 48, 50 (2023).

> have been reached, and when the perilous remedy of racial preferences may cease? [112]

Also, the Court added college admissions are a zero-sum game where an applicant's "plus" for having a specific characteristic will necessarily be a negative for another without that characteristic.[113]

However, the Court clarifies this opinion must not be interpreted as prohibiting a university from considering how race has impacted an applicant's life.[114] For example, an applicant can use racial discrimination to exemplify courage or determination.[115] Students must tie their race, heritage, or culture to a unique ability they will contribute to the university.[116] "In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race."[117]

Despite leaving this door partly open, given the current social and political backdrop, the effects of this decision will reach far beyond university admissions.[118] It will be "felt in every aspect of the nation's economic, educational, and social life—from the Rooney rule that requires a minority applicant be considered in all NFL coach hiring decisions to employment and promotion decisions, programs in schools and workplaces, and much more."[119]

III. WHERE DOES HIGHER EDUCATION GO FROM HERE?

One thing is clear: there has been a seismic shift in the Tennessee legislature's priorities and legislatures nationwide. The passing of these "divisive concept" laws in Tennessee has exhibited the legislature's intent that diversity is no longer a critical issue. In addition, because the Supreme Court has signaled its change in direction, the task of achieving diverse education communities and experiences will fall upon teachers and administrations.

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112. *Students for Fair Admissions*, 143 S.Ct. at 2166.
113. Eberle, *supra* note 111, at 50.
114. *Students for Fair Admissions*, 143 S.Ct. at 2176.
115. *Id*.
116. *Id*.
117. *Id*.
118. Nina Totenberg, *Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admission*, NPR (June 29, 2023), https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision.
119. *Id*.

A. *The Students For Fair Admissions' Dissent Directly Applies to Concerns Caused by "Divisive Concept" Laws.*

In 1978, the Supreme Court stated, "'[T]he nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."[120] More than ever, this rings true today. However, this exposure becomes jeopardized when diversity is no longer a legislative priority or an interest that can survive strict scrutiny. From the widespread passing of "divisive concept" bills to the overturning of affirmative action, a clear message has been sent to historically underrepresented groups.

As Justice Brown Jackson noted in her dissenting opinion in *Students for Fair Admissions*, "[n]o one benefits from ignorance."[121] She continues that:

> With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat. But deeming race irrelevant in law does not make it so in life . . .. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And ultimately, ignoring race just makes it matter more.[122]

In addition, Justice Sotomayor "characterized the Supreme Court's opinion as 'grounded in the illusion that racial inequality was a problem of a different generation,' emphasizing that 'entrenched racial inequality remains a reality today' and that ignoring race will not lead to equality."[123] These "divisive concept" laws exemplify the dissent's concerns in practice.

B. *How are Tennessee Higher Education Institutions Responding?*

While this statute is new, professors are already fearful of its potential consequences. Lucy Jewel, a tenured professor at the University of Tennessee College of Law, noted this statute will "chill academic freedom."[124] She emphasized that this law is alarming because it promotes "'the colorblind 'We don't want DEI to be solely about race and gender,' because women and minorities have been so

120. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978).
121. *Students for Fair Admissions*, 143 S.Ct. at 2277.
122. *Id*.
123. Joshi, *supra* note 104, at 1669.
124. Quinn, *supra* note 8.

historically excluded from the halls of higher education."[125] A chilling effect occurs "where one is deterred from undertaking a certain action X as a result of some possible consequence Y."[126] In this case, the broad language of T.C.A § 49-7-1901 *et seq*. may discourage university administrations and professors from engaging in behavior that could potentially violate this law. Vaguely written laws often have the most "chilling effect," which can lead to censorship.[127] In Tennessee, the current statute leaves many questions to be answered. Further, the Tennessee Code casts a net so broad to include any concept that "'promotes division between . . . a class of people,' so specifically as to include the claim that 'All Americans . . . are not endowed by their Creator with certain unalienable rights,' and so vaguely as to include the claim that 'the rule of law does not exist.'"[128] Thus, this law is riddled with complexities laying the groundwork to place a "gag order"[129] on universities across Tennessee. These restrictions leave professors and administrators with very little space to approach most topics regarding race. In an educational environment that is highly scrutinized, administrations may fall on the side of self-censorship to avoid becoming a victim of enforcement or investigation by state governments.[130] While these statutes are new and have yet to be enforced, it is unclear how the Tennessee legislature will proceed.

At the University of Tennessee at Martin, professors gathered in a private meeting to formally condemn these laws as racist.[131] No professors would go on the record at this meeting, and they refused to allow recordings.[132] Another Tennessee professor notes, "Professors and faculty at universities and colleges are specially qualified to teach the classes that they teach. . . and when the legislature comes in and

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125. *Id*.

126. Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1481 (2013).

127. Ruth, *supra* note 69.

128. Ian Hensley, *Tennessee Shouldn't Hinder an Educator's Ability to Teach 'Divisive' Concepts*, TENNESSEEAN (Mar. 21, 2022), https://www.tennessean.com/story/opinion/2022/03/21/why-exposing-college-students-divisive-topics-necessary/9458216002/; *see* TENN. CODE ANN. § 49-7-1902(1)(J) (2023); § 49-7-1902(1)(L) (2023); § 49-7-1902(1)(M) (2023).

129. Jeremy C. Young & Jonathan Friedman, *Educational Gag Orders: How Colleges and Universities Can Respond*, AM. ASS'N OF COLLS. AND UNIVS. (Spring 2023), https://www.aacu.org/liberaleducation/articles/educational-gag-orders.

130. Hensley, *supra* note 128.

131. Jane Kim & Randall Barnes, *UT Martin's Faculty Leadership Formally Condemns Two Tennessee Laws as Racist, But Behind Closed Doors*, WPSD LOCAL 6 (Apr. 25, 2023), https://www.wpsdlocal6.com/news/ut-martins-faculty-leadership-formally-condemns-two-tennessee-laws-as-racist-but-behind-closed-doors/article_efd94a4e-e3de-11ed-a033-07fccfd39aaf.html.

132. *Id*.

starts dictating what can and cannot be discussed, that disrupts the entire purpose of higher education."[133] A sociology professor adds, "Sociology is based on understanding inequalities[,] and this law suggests that talking about inequalities is divisive and it's not."[134] These "divisive concept" laws, in addition to the overturning of affirmative action, represent an existential threat to a generation's worth of values that have been propping up admissions decisions, employment decisions, financial aid decisions, and employment positions in the United States. It will now fall on university admissions, faculty, students, and high school administrations to continue to pursue their commitment to a diverse college community.

Again, as Justice Brown Jackson notes, "deeming race irrelevant in law does not make it so in life."[135] In the wake of this new legislation, Tennessee universities and colleges must reexamine their policies to ensure they align with these new laws. In addition, they must be thoughtful in approaching diversity initiatives in hiring and admissions policies. Under the Tennessee Code, training includes employee or student seminars, workshops, and orientations.[136] This means universities must be conscious of the many areas that could violate this new law. Education, namely higher education, plays a pivotal role in breaking racial inequality in minority communities.[137] Thus, it will continue to fall on college administrations to pursue diversity initiatives while evading the landmines placed by the Court and the Tennessee legislature.

While it is still unclear how these new laws will be enforced, many universities across Tennessee have reaffirmed their commitment to diversity. The University of Tennessee at Knoxville has noted:

> A true university education is one in which students hear, study, and discuss ideas that challenge their thinking . . . . Students should expect to hear ideas that make them uncomfortable . . . . We support our diversity and engagement work to make sure everyone

133. Mary Klingler, *UTK Faculty Reject 'Divisive Concepts' Law and Embrace Teaching About Inequalities*, WBIR (Oct. 3, 2022), https://www.wbir.com/article/news/education/utk-faculty-reject-divisive-concepts-law-tennessee/51-f850afcb-b67d-45c9-be73-022dc96b13d1.

134. *Id*.

135. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S.Ct. 2141, 2277 (2023).

136. TENN. CODE ANN. § 49-7-1902(4) (2022).

137. *Students for Fair Admissions*, 143 S.Ct. at 2236 (citing E. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2416 (2021) ("[E]ducational opportunities . . . allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy[.]")).

> in our campus community knows they matter and belong.[138]

In addition, the University of Tennessee at Knoxville has stated, "The university continues diversity and inclusion training. Trainings that are mandatory, as noted, undergo review to comply with the legislation."[139] Thus, the university aims to continue its diversity goal while eliminating potential violations of these new laws. Specifically, the University of Tennessee at Knoxville has provided guidelines on mandatory training, proposing if it is mandatory and does not fall within a listed exemption,[140] "convert the training to an optional/recommended training; or . . . remove any reference(s) to divisive concepts in the training programs."[141] Lastly, the university directs administrators and employees to the Office of the General Counsel to aid in "reviewing training materials, determining whether an exception would apply, and advising on how to bring any mandatory trainings into compliance with the law."[142] Thus, the University of Tennessee at Knoxville aims to continue pursuing diversity in the wake of these laws, but pushback on these promises remains to be seen.

Tennessee State University, a historically black university, has stated the university "remains committed to the education of a non-racially identifiable student body and promotes diversity and access," and they will continue to offer "a variety of programs that will provide opportunities for students and faculty to respectfully appreciate cultural diversity."[143] Lastly, the University of Memphis has released a similar statement that they promote "a welcoming, creative and supportive learning environment for all our students, faculty, and staff. . . . Diversity within our community makes us stronger as an institution and provides a more meaningful environment for diverse

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138. *DIVISIVE CONCEPTS LEGISLATION: INFORMATION AND SUPPORT*, UNIV. OF TENN. KNOXVILLE: OFF. OF PROVOST, HTTPS://PROVOST.UTK.EDU/DIVISIVE-CONCEPTS-LEGISLATION (LAST VISITED DEC. 11, 2023).

139. *Id*.

140. TENN. CODE ANN. § 49-7-1906 (2022) ("This part shall not be interpreted to: [p]rohibit public institutions of higher education from training students or employees on the non-discrimination requirements of federal or state law . . . [or] [p]rohibit public institutions of higher education from promoting diversity, equity, and inclusion[.]").

141. *Guidance on Mandatory Training*, UNIV. OF TENN. KNOXVILLE: OFF. OF PROVOST, https://provost.utk.edu/divisive-concepts-legislation/guidance-on-mandatory-training/ (last visited Dec. 11, 2023).

142. *Id*.

143. *Divisive Concepts Act: TSU's Commitment*, TENN. STATE UNIV., https://www.tnstate.edu/legal/resources/divisiveconcepts.aspx. (last visited Dec. 11, 2023).

thoughts and experiences."[144] While other Tennessee public universities have released similar statements,[145] at the end of the day, words mean little if they do not continue to uphold these initiatives. Moreover, time will tell if efforts are used to pursue and litigate these laws and how enforcement will occur.

Any efforts are fraught and not without risk. Following the overturning of affirmative action, several groups began sending letters and looking for opportunities to litigate these issues.[146] Specifically, Edward J. Blum, on behalf of Students for Fair Admissions, emailed 150 public and private universities demanding compliance with the opinion and added, "essays, personal statements, and other aspects of an application 'cannot be used to ascertain or provide a benefit based on the applicant's race.'"[147]

While the initial pushback was directed towards race-based admissions policies, that quickly broadened. Thus, it is only a matter of time before their focus shifts to enforcing "divisive concept" bills. American First Legal, led by former President Trump advisor Stephen Miller, sent a letter to 200 law schools stating that they "'must immediately announce the termination of all forms of race, national origin, and sex preferences in student admissions, faculty hiring, and law review membership.' . . . [T]he letter also claims that racial and gender preferences in law journal participation . . . violates the

144. *Divisive Concepts Act Information and Resources*, UNIV. OF MEMPHIS: OFF. OF PROVOST & ACAD. AFFS., https://www.memphis.edu/aa/resources/divisiveconcepts.php (last visited Dec. 11, 2023).

145. *See, e.g., Tennessee Divisive Concepts Act*, MIDDLE TENN. STATE UNIV., https://www.mtsu.edu/about/divisive-concepts.php (last visited Dec. 11, 2023); *Divisive Concepts Legislation: Resources and Information*, EAST TENN. STATE UNIV., https://www.etsu.edu/provost/divconcepts.php (last visited Dec. 11, 2023); *Divisive Concepts Legislation: APSU Response and Support for Faculty*, AUSTIN PEAY STATE UNIV. https://www.apsu.edu/academic-affairs/faculty/divisive_concepts.php (last visited Dec. 11, 2023); *Divisive Concepts*, TENN. TECH UNIV., https://www.tntech.edu/divisiveconcepts/index.php (last visited Dec. 11, 2023).

146. *See* James Bickerton, *Former Trump Advisor Sends Law Schools 'Warning Letter' Over SCOTUS Ruling*, NEWSWEEK (July 1, 2023), https://www.newsweek.com/former-trump-advisor-sends-law-schools-warning-letter-over-scotus-ruling-1810316; Scott Jaschik, *The Demands of Students for Fair Admissions*, INSIDE HIGHER ED (July 13, 2023), https://www.insidehighered.com/news/admissions/2023/07/13/demands-students-fair-admissions#.

147. Michelle N. Amponsah, *Legal Experts Divided Over Whether Ed Blum's Letter to Schools Adheres to SCOTUS Affirmative Action Ruling*, HARV. CRIMSON (July 28, 2023), https://www.thecrimson.com/article/2023/7/28/blum-letter-affirmative-action-compliance/.

law."[148] Tennessee higher education institutions must continue to pursue diversity and support historically underrepresented students regardless of threats and lawsuits from these organizations.

C. *Other Avenues for Supporting Diversity in The Wake of "Divisive Concept" Laws.*

It is important to note that nothing in these laws prohibits endorsing diversity and diversity initiatives in higher education. Thus, schools must continue to promote these efforts, support robust academic freedom, and advocate for change. First, higher education institutions can continue to endorse diversity efforts in a non-mandatory manner. While they must make continued efforts so as not to violate "divisive concept" laws, universities can increasingly champion diversity efforts across school communities. In addition, they can increase non-mandatory efforts and widely advertise such events. Second, higher education institutions must continue to support robust academic freedom of professors and employees. As the new law states, it is not to be interpreted as to "[i]nfringe on the rights of freedom of speech protected by the First Amendment to the United States Constitution. . . [or] the rights of academic freedom of faculty in public institutions of higher education."[149] Thus, universities can continue to reiterate this to the academic community. In addition, these schools must vocalize their willingness to defend and protect the rights of employees and students. Lastly, higher education institutions must advocate for change and the repeal of these laws. By showing support to historically underrepresented students and professors, universities can continue to foster a welcoming and diverse school community.

Also, T.C.A. § 49-7-1903(3) prohibits universities from requiring a personal diversity statement for employment or admission.[150] One potential solution is for additional responsibilities to fall upon high school guidance and college counselors to inform students of the importance of discussing the role of race, culture, and ethnicity in their lives. As the majority in *Students for Fair Admissions* notes, this opinion must not be interpreted as prohibiting a university from

148. Karen Sloan, *Conservative Legal Group Threatens to Sue Law Schools Over Racial Preferences*, REUTERS (July 05, 2023), https://www.reuters.com/legal/government/conservative-legal-group-threatens-sue-law-schools-over-racial-preferences-2023-07-05/.

149. TENN. CODE ANN. § 49-7-1906(2)–(3) (2022).

150. Tenn. Code Ann. § 49-7-1903(3).

considering how race has impacted an applicant's life.[151] Similarly, nothing in T.C.A. § 49-7-1901 *et seq.* prohibits prospective students from using their race, heritage, and culture to identify unique characteristics in the admissions. In addition, this law cannot be interpreted to run afoul of the First Amendment, and students must continue to exercise their freedom of speech and expression. Continuing, it will fall upon students and high school administrations to advise students on the need to use their background to discuss unique features to be considered when applying to a higher education institution.[152]

But that, too, is a flawed, incomplete solution. Further, it is critical to note the privilege of a college counselor. For example, in 2019, only 29% of public schools employed at least one part-time or full-time staff member whose duty was to provide college counseling.[153] To better equip high school administrations, public schools will require more funding. It is hard to imagine Tennessee or federal legislation allocating additional funding to atone for an obstacle they created. Further, employee and admission applicants must continue to discuss their diverse perspectives to set themselves apart from other applicants, even when no longer prompted. Once historically underrepresented individuals are admitted into Tennessee universities, it will fall on the administration to continue to create an inclusive community. It remains to be seen whether these objectives will remain achievable in our new environment.

CONCLUSION

While it is uncertain how these laws will be enforced, the drastic shift in this nation's priorities sends a clear message to historically underrepresented groups. By enacting these "divisive concept" laws, Tennessee legislation has aimed to constrain higher education professors and administrations in teaching about topics like implicit bias and privilege. Tennessee professors and administrations have already voiced their concerns that these laws will chill their ability to adequately educate and prepare students to enter the workforce. This dramatic shift in legislative priority has dismantled over forty years of precedent supporting administrative initiatives and admission policies across Tennessee. It is unclear how these laws will be enforced, but it will fall upon university administrations to continue

151. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S.Ct. 2141, 2176 (2023).

152. *Id*.

153. MELISSA CLINEDINST, NAT'L ASS'N FOR COLL. ADMISSION COUNSELING, STATE OF COLLEGE ADMISSIONS 4 (2019).

pursuing DEI while navigating a new educational landscape. As Justice Jackson stated, by "[t]urning back the clock . . . the Court indulges those who either do not know our Nation's history or long to repeat it."[154] Tennessee has turned the clock back to a time that no longer prioritizes preparing a diverse workforce or inclusive community. Only time will tell the consequences.

154. *Students for Fair Admissions*, 143 S.Ct. at 2278.