

Forward!

On-Campus Housing Capacity Expansion as an Anticipatory Model for a
post-*Students for Fair Admissions* Equity Commitment at
The University of Texas

Ethan Smith

The University of Texas at Austin

Human Dimensions of Organizations – Senior Honors Thesis

Spring 2021

Advisor: Dr. Art Markman

To Holly,
To my grandfather, Byron Smith,
and
To Club 1808

"Equity aids the vigilant and not those who slumber on their rights."

-Doctrine of Laches

"With interest rates at historic lows, the smartest thing we can do is act big. In the long run, I believe the benefits will far outweigh the costs, especially if we care about helping people who have been struggling for a very long time."

-Janet Yellen, Remarks before the Senate Finance Committee, 1/19/2021

"...life is full of surprises. You know I have decided to consult a great business leader. And I have taken my information from *Der Mann ohne Eigenschaften*, The Man Without Qualities, Robert Musil's famous novel. What we have is a very interesting discussion between Mr. Arnheim, a greatly successful Prussian businessmen, one of the wealthiest businessmen of his times. He's talking to an Austrian general of the army and he delivers this parable.

He says "you know General, I do not play billiards, but let me explain to you my concept about great business decisions." He says, "If I want to hit the ball right, I have, if I want to make my decision on the basis of the data that I need, I must know the laws of mathematics. And the mechanics of rigid bodies. And the law of elasticity. The temperature. All possible monitoring pulses - my muscles. I have got to consider variables such as the situation of my condition of my body. But that's not - if I want to do that it would take a lifetime, before I decide how to hit the ball.

No no no, he says. Things in life proceed differently. Well, I go up to the billiard table with a cigarette in my lips and a tune in my head, so to speak, with my hat on, and I hit the ball. And I make the decision. Why I do this? Because politics, honor, war, business, all the decisive processes in life, are completed outside the scope of conscious intelligence. All man's greatness has an irrational component - the intuition. You make the decision how to act, yes based on what you know, must try to know as much as you can, but you will never be able to know all you need in order to make a decision. Something must be left to your intuition - to your imagination."

-Maurizio Viroli, Ph.D.

Professor, Dept. of Government, College of Liberal Arts

Lecture at McCombs School of Business, 2/22/2017

"Lessons from Machiavelli-Leadership in Changing Times"

TITLE

DEDICATION

EPIGRAPH

TABLE OF CONTENTS

LIST OF FIGURES AND GRAPHS

THESIS

NARRATIVE

RESEARCH QUESTIONS

ACKNOWLEDGEMENTS

PART I: HOUSING

EXECUTIVE SUMMARY (*p. 7*)

TOPIC #1: HOUSING IN THE CAPITAL IMPROVEMENT PROGRAM, 1985-2020 (*p. 8*)

TOPIC #2: THE HOUSING AND DINING BUDGET, 1995-2020 (*p. 28*)

TOPIC #3: HISTORY OF THE ON-CAMPUS HOUSING BENCHMARK AT UT, 1996-2020 (*p. 37*)

TOPIC #4: LOCATION AND COST ANALYSIS (*p. 42*)

TOPIC #5: FINANCE (*p. 64*)

PART II: EQUITY

EXECUTIVE SUMMARY (*p. 71*)

TOPIC #6: EQUITY POLICY AT UT-AUSTIN, 1996-2009 (*p. 72*)

TOPIC #7: EQUITY POLICY AT UT-AUSTIN, 2010-2020 (*p. 94*)

PART III: SYNTHESIS

TOPIC #8: DEFINING RELATIONSHIPS BETWEEN EQUITY AND HOUSING AT UT-AUSTIN (*p.119*)

TOPIC #9: RECOMMENDATIONS FOR COMPREHENSIVE HOUSING POLICY (*p. 141*)

AFTERWORD

BIBLIOGRAPHY

LIST OF OPEN RECORDS REQUESTS

APPENDIX A: THE PROCESS TO UPDATE THE CAPITAL IMPROVEMENT PROGRAM

APPENDIX B: MEETINGS AND INTERVIEWS, 2020-2021

APPENDIX C: STUDENTS FOR FAIR ADMISSIONS V. UT-AUSTIN ET AL.

LIST OF FIGURES AND GRAPHS

TOPIC # 1: HOUSING IN THE CAPITAL IMPROVEMENT PROGRAM, 1985-2020

figure 1.1 – The cover of the 2016 Capital Improvement Program

figure 1.2 – Capital Improvement Program Summary by Funding Source

figure 1.3 – Capital Improvement Program Funding by Institution

figure 1.4 – CIP splits dedicated to health and academic institutions have remained stable since 2001.

figure 1.5 – Moderate correlations between UT-Austin and Academic Institutions, 1991-2020

figure 1.6 – Weak correlation between UT-Austin and total CIP, 2000-2020

figure 1.7 – UT-Austin funding vs. System Health Institutions, 1991-2020

figure 1.8 – UT-Austin funding vs. other System Academic Funding, expressed as a percentage, 1991-2020

figure 1.9 – Summary of UT-Austin Capital Projects, with project costs and funding sources

figure 1.10 – Project summary for Rowling Hall

figure 1.11 – Capital Improvement Program total size, 1991-2020 (inflation adjusted)

figure 1.12 – Institutional Funding has dropped since 2009

figure 1.13 – Gifts and Hospital Revenues, as percentage of CIP, 2001-2020

figure 1.14 – Gifts and Hospital Revenues, in constant dollars, 2001-2020

figure 1.15 – Hospital Revenues, 2002-2020

figure 1.16 – Unique Housing Projects across UT-System, 1991-2020

figure 1.17 – UT-System Cost Per Bed Benchmark summary for Guadalupe Hall

figure 1.18 – West Campus Design Guidelines, February 2004

figure 1.19 – UT internal market data showing 14% rate increase in private market, 2018

figure 1.20 – UT internal market data comparing graduate apartments with the wider rental market

TOPIC # 2: THE HOUSING AND DINING BUDGET, 1995-2020

figure 2.1 – Example “green sheet” budget summary.

figure 2.2 – Historic Profit Margin of Housing and Dining at UT-Austin, 1995-2019

figure 2.3 – Salaries, Wages, and Fringe Benefits as share of total revenues, 1995-2019

figure 2.4 – Linear real growth in the Housing and Dining budget.

figure 2.5 – Profit as illustrated by widening overage from debt service obligations.

figure 2.6 – Use of profit from the Housing and Dining budget.

TOPIC # 4: LOCATION AND COST ANALYSIS

figure 4.1 – 1996 Cesar Pelli and Associates Master Plan, Student Housing Rendering I

figure 4.2 – 1996 Cesar Pelli and Associates Master Plan, Student Housing Rendering II

figure 4.3 – 1996 Cesar Pelli and Associates Master Plan, Student Housing Rendering III

figure 4.4 – 2012 Residence Hall Master Plan Potential Residence Hall Sites

figure 4.5 – 2013 Sasaki and Associates Master Plan, proposed student housing map

figure 4.6 – 2013 Sasaki and Associates Master Plan, Floor Area Ratio of campus map, by zone

figure 4.7 – priority identified sites of the 2015 Student Life Master Plan

figure 4.8 – Determining site viability I

figure 4.9 – Determining site viability II

figure 4.10 – 2609 University Avenue housing mockup, 2015 Student Life Master Plan

figure 4.11 – Whitis Court housing mockup, 2015 Student Life Master Plan

figure 4.12 – Creekside housing mockup, 2015 Student Life Master Plan

figure 4.13 – Clark Fiend housing mockup, 2015 Student Life Master Plan

figure 4.14 – Existing and Potential Campus Neighborhoods, 2015 Student Life Master Plan

figure 4.15 – Proposed capacity expansion in existing neighborhoods

figure 4.16 – Two models for a new neighborhood at the Thompson Conference Center

figure 4.17 – Site proposed for land acquisition, Model A

figure 4.18 – Site proposed for land acquisition, Model B

figure 4.19 – Project summary for UT Music Academy, 2011 CIP

figure 4.20 – Brackenridge Report analysis of alternate sites for graduate housing

figure 4.21 – Location of Gateway relative to Brackenridge Tract. Matthews Elementary District is highlighted.

figure 4.22 – East side housing density compromise

figure 4.23 – Location of future graduate housing in East Campus, as proposed

figure 4.24 – 2015 Student Life Master Plan cost per bed projections

TOPIC # 5: FINANCE

figure 5.1 – Odessa American, November 8, 1984 “PUF to put cash in local projects”

figure 5.2 – Guidelines Governing Administration of the University of Texas System Revenue Financing System, Board of Regents Meeting 847, April 1990

figure 5.3 – Financing evaluation requirements of the OAM for capital projects

figure 5.4 – Debt related metrics from Housing and Dining Budget, 1995-2019

figure 5.5 – Establishment clause of the Brackenridge Tract Fund, Board of Regents Meeting, April 1990

TOPIC # 6: THE EQUITY COMMITMENT AT UT-AUSTIN, 1996-2009

figure 6.1 – Board of Regents Meeting Minutes, August 6, 2003 (“related to decision in University of Michigan affirmative action cases”)

figure 6.2 – McNair Fellowship recipients, by race, 1999-2003

figure 6.3 – South Texas Graduate Fellowship recipients, by race, 2002-2003

figure 6.4 – PhDs and EdDs Awarded to African Americans at UT-Austin, 1997-2002

figure 6.5 – Freshmen enrollment, 1996-2002

figure 6.6 – Effect of Top 10% Rule, 1998-2003

figure 6.7 – A decrease in racial representation post-Hopwood and its effect on the classroom environment, 1996-2002

TOPIC # 7: THE EQUITY COMMITMENT AT UT-AUSTIN, 2010-2020

figure 7.1 – Four-year graduation rates and SAT scores for FTIC students, 1975-2010

figure 7.2 – Four-Year Graduation Rates and Tuition Cost in 2010 Dollars, 1976-2010

figure 7.3 – Graduation and Attrition Rates by Demo, p. 55

figure 7.4 – Estimated Net Effects of Background Characteristics on Four-Year Graduation Rates

figure 7.5 – Computer Science Enrollment Goals target race and gender

figure 7.6 – Fall 2020 UT Computer science demographic information

figure 7.7 – 4-year graduation rate increases, 2012-2017

figure 7.8 – Statistical Handbook Enrollment by Level and Race/Ethnicity data, 2011-2020

figure 7.9 – Enrollment of First-Time Freshman by Gender and Race/Ethnicity data, 2011-2020

TOPIC # 8: DEFINING RELATIONSHIPS BETWEEN HOUSING AND EQUITY AT UT-AUSTIN

figure 8.1 – Statistics from Housing and Dining Memo, January 9, 2018

figure 8.2 – GPA comparison, by semester

figure 8.3 – GPA advantage for on-campus student, by semester

figure 8.4 – Grade inflation, 1997-2020

figure 8.5 – 2400 Nueces provides additional revenue

figure 8.6 – 2400 Nueces

figure 8.7 – Passage from “The Influence of Frank Erwin on Texas Higher Education”

figure 8.8 – UT-Austin admissions by race, 2008-2018

TOPIC # 9: RECOMMENDATIONS FOR COMPREHENSIVE HOUSING POLICY

figure 9.1 – Janet Yellen, US Secretary of the Treasury

figure 9.2 – Detail of proposed land acquisition site, Dean Keeton Neighborhood

figure 9.3 – U.T. Academy of Music project summary sheet, 2011 CIP

figure 9.4 – Consideration of P3 for East Campus Graduate Student Housing Complex

figure 9.5 – Gateway mockups from 2009 Brackenridge Report

figure 9.6 – Profit margin in Housing and Dining budget, 1995-2020

figure 9.7 – A proposed future auxiliary campus may address state population growth

figure 9.8 – Muny Conservancy Co-Chair and two-time Masters champion Ben Crenshaw

Forward!

*

On-Campus Housing Capacity Expansion as an Anticipatory Model for a post-*Students for Fair Admissions* Equity Commitment at The University of Texas

THESIS

This thesis is about equity and housing policy at UT-Austin. It describes the relationships, organizational processes and incentive structures guiding decisionmakers responsible for the strategic implementation of these policies. This thesis was conducted in the modality of a relatively young liberal arts discipline called Human Dimensions of Organizations (HDO). As applied here, HDO is best described as a methodology which leverages other disciplines of the liberal arts to create a holistic understanding of organizational dynamics.

Here I have created institutional histories and generated data sets to define the total set of known knowledge for the interrelated topics which in an ideal world would serve as a basis for housing and equity policymaking at UT. The focus is on how UT-Austin as an institution has approached these topics over long periods of time.

My hope for this thesis is twofold: 1) that it will provide all necessary background to allow UT-Austin to expedite an aggressive on-campus housing expansion policy without the need for any additional information or delay, and 2) that it will serve as a catalyst for UT-Austin to comprehensively address efficiency and legal questions regarding its equity portfolio before being embarrassingly forced to do so by the Supreme Court.

I make the case that a strategy of aggressively building additional on-campus housing is the most cost-effective big money bet towards remedying nagging equity issues that UT can make. I will also argue the meaning of *the state's compelling interest in diversity in higher education* and present a theoretical contingency model for an equity commitment in the event that current race-based programming is found to be unconstitutional.

The worst case scenario is that UT does not preemptively address these issues and the rug is pulled out from underneath, similar to the period following the *Hopwood* decision ending affirmative action. Pre-*Hopwood* in 1996, 97 of 1,513 (6.4%) law school students were Black, however by 1999 Black enrollment had dropped to 17 of 1,380 (1.2%)¹. It was not until 2005 that Black law enrollment again exceeded 5%, and to date it has never exceeded 7%. It must be unacceptable to move backwards in this way, and this is why I have titled my thesis "Forward!"

Although the current equity commitment is examined with a degree of scrutiny generally applied by those who disparage equity's role in higher education as unnecessary or dogmatic, this is not the case here. Rather I have done this out of the desire to maximize efficiency and to ensure an orderly transition to a future equity commitment which will be both impactful and on firm constitutional footing.

*

¹ Source: UT Statistical Handbook

I also deeply hope my work is of some interest to the average Austinite. As a native Austinite, my interest in housing comes in part from a general and universal observation that the city has rapidly changed. For many, the loss of affordability is associated with the loss of “a sleepy college town” identity where musicians, students, and the working class could flourish.

Since many laypeople I have spoken with about my thesis have wondered about my personal interest in the topic, I will take the liberty of including a narrative which describes my personal journey to involvement with this thesis topic.

NARRATIVE

I graduated from UT Music School in 2008. I returned in 2018 after a decade in the service industry to retrain for the professional workforce.

Around the time of my initial graduation, the school was renamed in honor of Sarah and Ernst Butler who had given the school around \$55 million - the largest gift to a music school in North American history. So why upon returning a decade later did I lay eyes on a facility so remarkably unchanged, down to the ancient green couches which hosted many a nap of my youth? Why did my jazz ensemble have no group practice room, when that is standard at most universities? These questions initiated the line of inquiry which eventually led to this thesis. As I looked for answers to these questions I would encounter roadblocks seemingly tied to bigger problems. Unsatisfied, this in turn led me to press forward looking for bigger solutions.

I did not find answers to my questions at first, but fortunately I was undeterred through this essential time period. Objections to my proposed solutions would lead me down deeper rabbit holes, and I would allow this process to revise my working models even as I sensed I was approaching the tip of an iceberg. Though I may not have consciously known it yet, I fit the mold of a student in search of a thesis topic to a tee. While it was interesting bouncing from idea to idea, I knew that eventually my varied interests would need to coalesce or else it would all be a waste of time.

During this period I was something of a pitchman. I would meet with administrators describing my sincere desire and passion for additional practice space, a Fine Arts dorm, or even an auxiliary campus on the Morris Willaims Golf Course. Despite my straight on til morning attitude, my lack of research and qualification meant any hope of implimentation was unrealistic. It wasn't that the ideas themselves were bad – but the institution only responded to certain acceptable inputs. One of those inputs was research, and I had none.

My desire to challenge myself by pursuing such a quixotic course of action was also a reflection of a point in life I had arrived at. I had been turning on the TV, taking exception to the decision-making of our political class, particularly figures like Stephen Miller who were no older than myself, and thinking I had no right to complain if I was not meaningfully participating

in the marketplace of free ideas to the best of my ability. In a sense, this was the capacity I had hoped to develop by returning to college.

*

In order to better advocate for a Fine Arts dorm, I was challenged to look into the topic of student housing at UT more generally by my supervisor in the Student Consultants program, Carol Longoria. She framed the idea as a good idea in competition with many other good ideas which compete for funding, space, and bandwidth at a university. I had identified Creekside as the likely dorm where my envisioned Fine Arts dorm would go, but there had already been planning processes determining the best use for Creekside revolved around maximizing the number of beds and controlling costs by eliminating the bells and whistles from the project. If I wished to compete with this vision of a large generic concept, I would first need to understand the pressures on UT to maximize its number of units per project. I took the bet and began digging deeper into the overall housing question at UT.

I first looked at what was happening in the private market. This past decade, Austin has consistently led as a residential and commercial real estate market. No Austin neighborhood has seen a more precipitous rise in prices than West Campus. Whereas in 2010 I subleased a private room at 21st and Rio Grande in a beautiful two-story wooden multiplex from the late 1800s for \$500 a month, as of 2020 UT was marketing an unfurnished one bed one bath at 2400 Nueces for \$1,757 per month². So was UT an active participant in creating upward pressure on market rates, thus making college less affordable?

There is an issue with prices in West Campus, but I ask readers to hold off on judgement concerning UT's role. This thesis will show that UT *is* a viable partner for affordability and that in fact this is increasingly the case the more UT builds. Further, I believe a good model for equity policy may incorporate as a subset of that model a strategy of capturing market share of above-market apartments; it increases throughput and generates revenue. Liquidity generated by above-market projects would be committed towards equity via various cost-effective avenues.

Recent moves concerning graduate housing pricing as well as the 2400 Nueces acquisition indicate that UT administration is well aware that incorporating such a strata of housing into UT's portfolio has the potential to support an equity commitment. These moves in isolation however do little in the face of Austin's rapidly changing market. If the housing issue is not addressed to scale, it leaves the unfortunate impression that UT is focusing its energies on providing additional housing to those who need it least.

*

² 12 installments of \$1684 for an 11 ½ month lease, or \$20,208 annually. Food plan not included.

This is the story of how I got involved writing a thesis in this modality. Academic work, particularly the work of Liberal Arts and the Humanities, has been under attack as of late. It is lampooned, perhaps fairly, as a bastion of far left ideas with no critical accountability. With this thesis I hope to show the value of the contemporary Liberal Arts, which are not a static conception. This work at times makes its arguments with applications of rhetoric, psychology, philosophy of law, sociology, and above all history.

RESEARCH QUESTIONS

1. How does UT-Austin, at all organizational levels, generate housing policy, particularly the decision to expand on-campus housing capacity?
2. How would one create a theoretical model whereby housing and equity policy at UT-Austin may be better aligned?

Additionally, it became necessary to incorporate a discussion of the implications of *Students for Fair Admissions, Inc. v. University of Texas et al.*, a case currently in district court which may well eventually be decided by the Supreme Court. UT-Austin's equity policy has been highly reactive to Supreme Court decisions dating to *Hopwood v. Texas* in 1996.

ACKNOWLEDGEMENTS

I would like to acknowledge several people without whom this work would not have been possible. I would like to acknowledge my parents and grandparents for getting me back in school, loving me, and being so supportive in so many ways. I would like to acknowledge all those who served in mentoring roles for this project: my advisor Dr. Art Markman, my HDO mentor who also assisted me weekly in his role at the University Writing Center Lynn Wills, my supervisor in the Student Consultants program Carol Longoria, and my leadership coach Dr. Pamela Maxson. I am also indebted to Paul Finkelman, a famed legal historian who provided feedback on topics six through eight which greatly improved those sections.

Additionally, I wish to acknowledge Bob Davis at UT-Austin and Cynthia Tynan at UT-System who responded to my many Open Records Requests with warmth and professionalism. Finally, I would like to thank all those who have carried this research forth while in its preliminary stage so that it may possibly have impact in the public sphere, particularly Francie Frederick, General Counsel for the UT Board of Regents, and Brianna McBride and Muhammad Muhdhar, key people in the Black President's Leadership Council collective at UT-Austin.

I. HOUSING

1. HOUSING IN THE CAPITAL IMPROVEMENT PROGRAM, 1985-2020
2. THE HOUSING AND DINING BUDGET, 1995-2020
3. HISTORY OF THE ON-CAMPUS HOUSING BENCHMARK AT UT, 1996-2020
4. LOCATION AND COST ANALYSIS
5. FINANCE

EXECUTIVE SUMMARY

When considered as a suite, these topics provide the necessary background to allow UT-System and UT-Austin to consider, in strictly financial terms, an aggressive, expedited on-campus housing expansion policy at UT-Austin. This level of detail is necessary to refute the assertion which has governed UT housing policy over the past several years: that the students and the University are best served by leaving the niche student housing market in the hands of private development. Additionally, this background is designed to allow for the development of a knowledge base capable of overcoming risk-aversion promoted within the organizational structure itself.

When considered individually, these topics also have practical implications. The overview of the Capital Improvement Program may help the Board of Regents and certain UT-System offices improve budgetary policy by providing new perspective on the value of supporting housing as a capital improvement systemwide. Analysis in this chapter may also spur additional conversation regarding the ideal level of capital improvement funding.

The longitudinal study of the Housing and Dining budget may help UT-Austin leadership set policy, including determining the best paradigm for rate setting. A key discovery is that the Housing and Dining budget is fundamentally scalable, suggesting greater economic efficiency as on-campus housing capacity grows. The best model for aligning housing with equity policy was found to center on maximum expansion, including generating liquidity through above-market segment capture; proceeds then would be applied to an endowment addressing affordability.

Discussion of the on-campus housing benchmark overviews the many different processes UT has undergone to determine the ideal benchmark. This is to allow today's policymakers to accurately determine a benchmark with a historical perspective prior to embarking on a campaign of housing expansion.

The full consideration of the University's historical approach to determining locations for potential housing expansion is prerequisite to expediting a comprehensive expansion plan. The completed review of all relevant documents allows the University to avoid the common delays and pitfalls which have plagued previous processes.

Finally, the section on finance describes with longitudinal perspective how UT-System has financed student housing. This includes discussion of a potentially key funding mechanism which is not well known, the Brackenridge Tract Fund. The Fund explicitly grants the Board of Regents an eminent domain power for land adjoining campus, provided the funding for the acquisition is secured from revenues of the Brackenridge Tract. It is highly relevant to generate a knowledge base around the Fund since it suggests alternate models and leverage points relevant to on-going closed-door negotiations between the City and the University for the future of the Brackenridge Tract.



The University of Texas System

FY 2017-2022 Capital Improvement Program

August 25, 2016

Fig 1.1, the cover of the 2016 Capital Improvement Program

TOPIC #1: HOUSING IN THE CAPITAL IMPROVEMENT PROGRAM, 1985-2020 **PART I: THE CAPITAL IMPROVEMENT PROGRAM**

What is the Capital Improvement Program?

The Capital Improvement Program (CIP) “details the U.T. System’s long-range plan to preserve and enhance facility assets. The CIP is a six-year projection of major repair and rehabilitation and new construction projects to be implemented and funded from component and System-wide revenue sources.” (August 2007 Capital Improvement Program, p. A.1)

Currently, all buildings with a projected cost above \$10 million must be approved by the Board of Regents for inclusion on the CIP¹. Between 1985-2007, CIPs were issued every two years; since 2008, they have been issued yearly. To determine how housing policy is affected by processes at the system level, I analyzed historical CIPs obtained via Open Record Request with UT-System.

This chapter uses the 2016 CIP (projecting FY 2017-2022) for the purpose of illustration.

¹ The project approval process is detailed in Topic #5: Finance.

Funding in the CIP

Funding for Capital Improvements comes from either bond proceeds or institutional sources. There are three types of bonds: Permanent University Fund (PUF) Bonds, Revenue Financing System (RFS) Bonds, and Tuition Revenue Bonds (TRB). Student housing is almost entirely funded with RFS bonds. The largest sources of institutional funding are gifts and hospital revenues.

<i>The University of Texas System</i> <i>FY 2017-2022 Capital Improvement Program</i> <i>Summary by Funding Source</i>		
Funding Source	CIP Project Cost Total	% of Total
<u>Bond Proceeds*</u>		
Permanent University Fund Bonds	483,875,000.00	7.65%
Revenue Financing System Bonds	2,172,947,500.00	34.37%
Tuition Revenue Bonds	1,072,632,000.00	16.97%
Subtotal Bond Proceeds*	3,729,454,500.00	58.99%
<u>Institutional Funds</u>		
Auxiliary Enterprises Balances	92,300,000.00	1.46%
Available University Fund	36,860,000.00	0.58%
Designated Funds	126,192,500.00	2.00%
FEMA	547,320,000.00	8.66%
General Revenue	101,980,000.00	1.61%
Gifts	584,133,300.00	9.24%
Grants	16,993,936.00	0.27%
Hospital Revenues	876,589,064.00	13.87%
Insurance Claims	27,880,000.00	0.44%
Interest on Local Funds	21,686,000.00	0.34%
MSRDP	52,258,185.00	0.83%
Unexpended Plant Fund	108,568,700.00	1.72%
Subtotal Institutional Funds	2,592,761,685.00	41.01%
Capital Improvement Program Total Funding Sources	6,322,216,185.00	100%

Fig. 1.2, Capital Improvement Program Summary by Funding Source

Funding by Institution

CIPs include funding summaries by component institutions of UT-System. Historical percentages have averaged 63% for Health Institutions and 37% for Academic Institutions. UT-Austin's share of the CIP moderately correlates with the subtotal for Academic Institutions. Given generally stable apportionment percentages between Health and Academic Institutions since 2000, UT-Austin's apportionment also correlates with the overall size of the CIP, although this relationship is weaker.

The University of Texas System FY 2017-2022 Capital Improvement Program Summary By Institution		
Academic Institutions	Number of Projects	Total
UT Arlington	1	\$125,000,000.00
UT Austin	18	\$1,625,061,000.00
UT Dallas	8	\$314,200,000.00
UT El Paso	1	\$85,000,000.00
UT Permian Basin	2	\$91,325,000.00
UT Rio Grande Valley	4	\$196,032,000.00
UT San Antonio	1	\$100,000,000.00
UT Tyler	1	\$76,000,000.00
Subtotal Academic Institutions	36	\$2,612,618,000.00
Health Institutions	Number of Projects	Total
UT HSC-Houston	2	\$134,360,000.00
UT HSC-San Antonio	5	\$166,235,000.00
UT HSC-Tyler	1	\$18,500,000.00
UT MB-Galveston	7	\$1,655,150,000.00
UT MDACC	11	\$1,047,930,000.00
UT SWMC	6	\$554,323,185.00
Subtotal Health Institutions	32	\$3,576,498,185.00
UT System Administration	Number of Projects	Total
UT System	1	\$133,100,000.00
Subtotal UT System Administration	1	\$133,100,000.00
Total	69	\$6,322,216,185.00

Fig. 1.3, Capital Improvement Program Funding by Institution

Exploring Budgetary Relationships: Findings of longitudinal analysis

The percentages of the CIP which split between Health and Academic institutions has operated in a tight range since 2001.

UT-Austin's funding is not in competition with the other Academic Institutions. The data does not suggest a meaningful inverse relationship between UT-Austin funding with funding of other Academic Institutions. UT-Austin's funding does however experience a rising tide correlation when all Academic Institutions receive a greater funding level.

UT-Austin also has a rising tide relationship, albeit a weaker correlation, with total CIP funding. Since 2006 UT-Austin funding levels have correlated with UT-Health funding levels. Prior to 2006 these measures were not coupled.

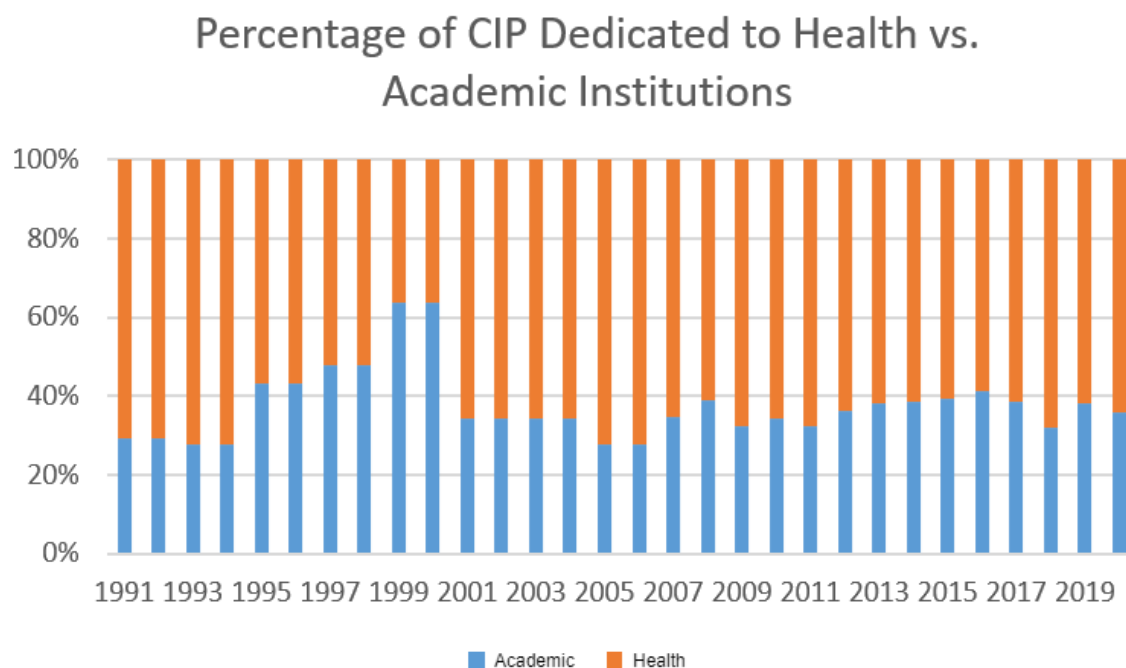
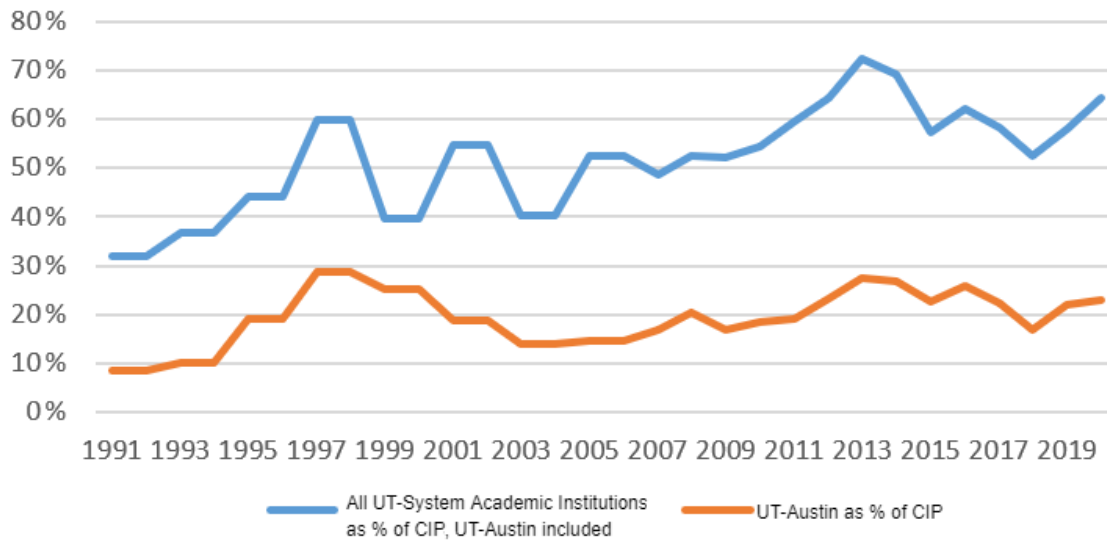
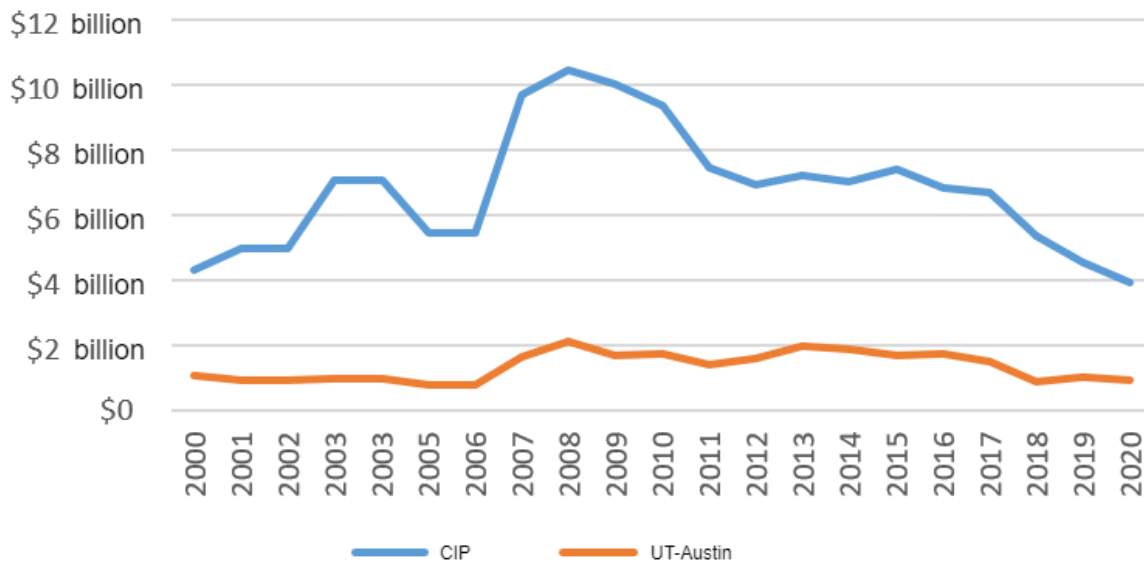


Fig. 1.4, CIP splits dedicated to health and academic institutions have remained stable since 2001.

UT-Austin CIP Funding Moderately Correlations with Academic Institution CIP Funding (%)



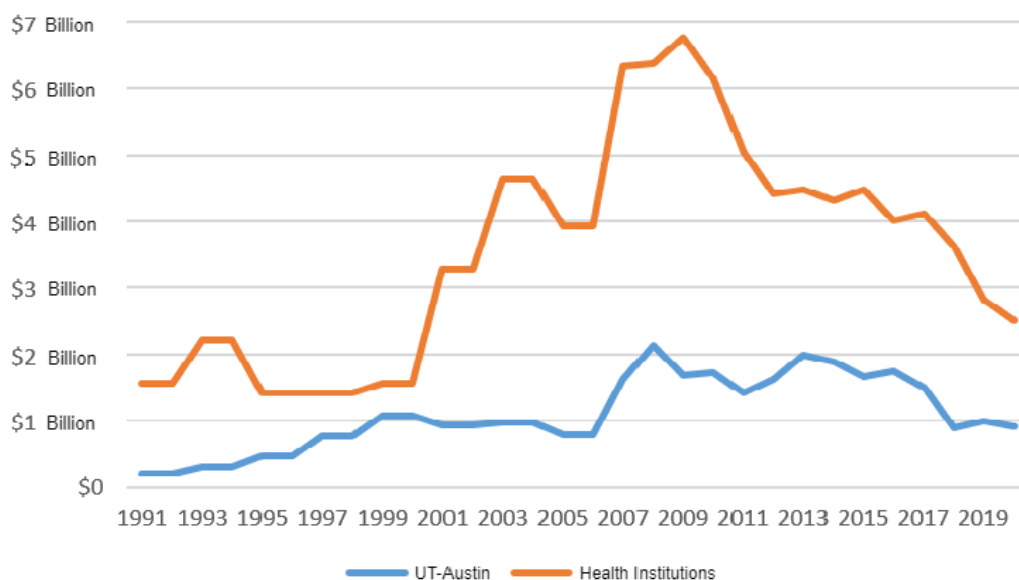
UT-Austin CIP Funding Weakly Correlates with Total CIP Funding (\$)



Figs. 1.5, Moderate correlations between UT-Austin and Academic Institutions, 1991-2020

Fig. 1.6 Weak correlation between UT-Austin and total CIP, 2000-2020

UT-Austin CIP Funding Moderately Correlates With Health Institution CIP Funding Since 2006, But Not Prior



Lack of Correlation Between UT-Austin and Other Academic Institutions Suggests a Non-Competitive Funding Relationship

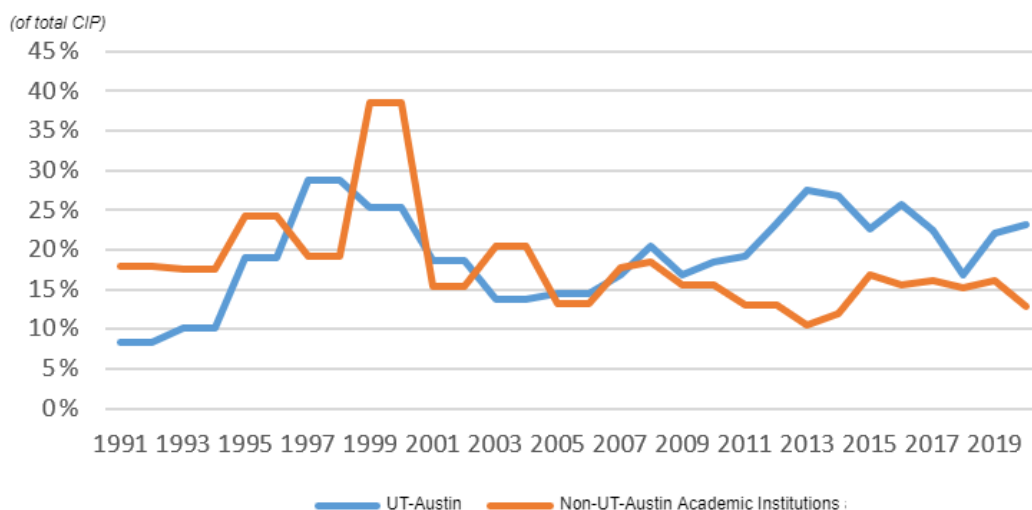


Fig 1.7, UT-Austin funding vs. System Health Institutions, 1991-2020

Fig 1.8, UT-Austin funding vs. other System Academic Funding, expressed as a percentage, 1991-2020

The University of Texas System
FY 2017-2022 Capital Improvement Program
Summary of Project Submission
(dollars in millions-rounded)

	Project Cost	PUF	RFS	TRB	Aux Ent Bal	AUF	Design Funds	FEMA	Genl Rev	Gifts	Grants	HEAF	Hosp Rev	Ins Clm	INT on Local	MS RDP	UPF
UT Austin																	
Existing - Carried Forward																	
102-358 Littlefield Home and Carriage Hous	15.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	15.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Subtotal for Existing - Carried Forward	15.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	15.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Underway																	
102-041 Belo Center for New Media	77.88	0.00	30.09	0.00	0.00	0.00	8.66	0.00	0.00	25.00	0.00	0.00	0.00	0.00	0.00	0.00	14.12
102-219 Speedway Mall and East Mall	76.75	0.82	0.00	0.00	0.00	30.00	0.00	0.00	0.00	36.95	0.00	0.00	0.00	0.00	8.05	0.00	0.93
102-282 Welch Hall Renovation	148.00	25.00	0.00	75.00	0.00	2.40	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	45.60
102-357 Battle Hall Complex-West Mall Offi	2.00	0.00	1.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1.00
102-488 Berry M. Whitaker Sports Complex	23.00	0.00	16.00	0.00	5.80	0.00	0.00	0.00	0.00	1.20	0.00	0.00	0.00	0.00	0.00	0.00	0.00
102-556 Engineering Education and Research	313.70	105.00	143.59	0.00	0.00	4.21	4.80	0.00	0.00	50.00	0.00	0.00	0.00	0.00	0.00	0.00	6.10
102-692 Jester West Maintenance and Interi	36.00	0.00	0.00	0.00	36.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
102-719 Robert B. Rowling Hall	186.50	0.00	113.75	0.00	6.80	0.00	1.50	0.00	0.00	58.25	0.00	0.00	0.00	0.00	0.00	0.00	6.20
102-772 Dell Medical School - Phase I	436.40	0.00	435.90	0.00	0.00	0.25	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.25
102-778 Austin by Ellsworth Kelly	14.85	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	12.85	0.00	0.00	0.00	0.00	0.00	0.00	2.00
102-783 Medical District Utility System In	87.59	0.00	87.59	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
102-788 Tennis Center Replacement Facility	15.00	0.00	0.00	0.00	14.60	0.00	0.00	0.00	0.00	0.40	0.00	0.00	0.00	0.00	0.00	0.00	0.00
102-821 Townes Hall HVAC Renovation	10.00	0.00	0.00	0.00	0.00	0.00	10.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
102-831 Advanced Computing Building	20.00	10.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	10.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
102-926 Graduate Student Housing Complex	89.00	0.00	89.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
102-928 East Campus Parking Garage	62.40	0.00	62.40	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
102-936 Montopolis Research Center Office	11.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	11.00
Subtotal for Underway	1610.06	140.82	979.32	75.00	63.20	36.86	24.95	0.00	0.00	194.65	0.00	0.00	0.00	0.00	8.05	0.00	87.20
Total for UT Austin	1625.06	140.82	979.32	75.00	63.20	36.86	24.95	0.00	0.00	209.65	0.00	0.00	0.00	0.00	8.05	0.00	87.20

Fig. 1.9, Summary of UT-Austin Capital Projects, with project costs and funding sources

Inner-Institutional Breakdown

CIPs include funding sources for individual projects by institution. In FY 2017-2022, UT-Austin projects with large notes include the Dell Medical School (\$436m), the Engineering Education and Research Project (\$313m) and the business school expansion, Rowling Hall (\$186m). The importance of RFS funding is evidenced by their centrality to financing these prestige projects at the core of UT's educational mission. Of these projects, Dell Medical was financed entirely with RFS bonds, the Engineering Project used RFS bonds augmented by PUF funding and gifts, and Rowling Hall used RFS bonds augmented with gifts, but without PUF funding.

It is important to determine if less prestigious RFS financed projects, such as the still yet unbuilt Graduate Student Housing Complex, are in direct competition for funding with these projects. The correlation between UT-Austin and academic institution funding suggests a rising tide relationship for all RFS projects, however there may also be direct competition embedded in other institutional processes, such as the process for determining a viable project location². The base financial proposition for all RFS financed projects is the same: generate revenue at a ratio in excess to bond exposure resulting in profit.³ These calculations are typically handled by an Associate VP assigned as a "project advocate".

In the 2017-2022 CIP, 60.3% of total funding was sourced from RFS bonds, 12.9% from gifts, 8.6% from PUF bonds, 4.6% from TRB bonds, and 13.5% from other sources.

² Discussed in Topic #4: Location and Cost Analysis.

³ Finance requirements for CIP inclusion are discussed in Topic #5: Finance.

Individual Project Summaries

A modern CIP includes detailed one-sheet summaries of each project. These summaries have become increasingly sophisticated over time and now include relevant project description, project information, funding information, and the project schedule.


FY 2017-2022 Capital Improvement Program	
THE UNIVERSITY of TEXAS SYSTEM OFFICE	
<i>Nine Universities, Six Health Institutions, Unlimited Possibilities.</i>	
102-719 Robert B. Rowling Hall	Individual Project Summary
The University of Texas at Austin	
Project Description	
The University of Texas at Austin plans to build a new 198,383 GSF/118,188 NASF academic building, Robert B. Rowling Hall, for the McCombs School of Business to house the Graduate School of Business. In addition, the project scope will include an approximately 88,854 GSF/52,935 NASF expansion of the AT&T Executive Education and Conference Center in order to further strengthen the ability of the conference center to support the McCombs Executive Education programs. A parking garage (217,939 GSF/192,377 NASF) with 400 spaces is also included in the program. The parking spaces will support the new Robert B. Rowling Hall, the conference center expansion and campus. The project is scheduled to begin construction in December 2014.	
Project Information	
Project Status:	Active
Project Delivery Method:	Construction Manager at Risk
CIP Project Type:	New
Gross and Assignable Square Feet:	GSF: 505,176 ASF: 363,500
Historically Significant	No
*44 Initiative: Project:	Yes
Phase:	Construction
Management Type:	OFPC Managed
Architecture Firm:	Jacobs Engineering Group
Construction Firm:	DPR Construction
Project Funding	
Total Project Cost:	\$ 186,500,000
Designated Funds	\$ 1,500,000
Auxiliary Enterprises Balances	\$ 6,800,000
Revenue Financing System Bonds	\$ 113,750,000
Gifts	\$ 58,250,000
Unexpended Plant Fund	\$ 6,200,000
Project Schedule	
BOR CIP Approval	08/23/2012
BOR/Chancellor DD Approval	05/02/2014
Issue NTP - Construction	12/01/2014
Achieve Substantial Completion	05/18/2017
Achieve Operational Occupancy	05/18/2017

Fig. 1.10, Project summary for Rowling Hall

The Capital Improvement Program Over Time, 1985-2020

All figures and graphs in August 2020 constant dollars.

The first CIP in 1985 was limited to PUF financed projects; it then reached a fuller level of maturity with the creation of the Revenue Financing System (RFS) in 1990.⁴ The 1991 CIP was the first to include RFS funded projects and totaled \$2.5b. The CIP trended upwards until hitting a highwater mark of \$10.5b in 2008. Since that time, the CIP has decreased to \$3.9b.

No doubt the 2008 Financial Crisis played a part in this reversal. Academic literature has found capital expenditures experience with high elasticity and variability in periods of economic downturn (White and Musser, 1978). These budgets may rapidly expand in flush times (Delaney and Doyle, 2011). The continued diminishment of UT-System's institutional contribution to the CIP even as the economy has reversed course warrants further examination; is recency bias or state-level policy at issue here? When I requested comment from UT-System, Assistant General Counsel Cynthia Tynan related the following: "The general consensus seems to be that funding is rarely predictable and therefore it is difficult to answer questions regarding patterns." Determining the effects of state-level decision making on CIP funding levels is outside the scope of this thesis. It may be helpful for further research to develop a theoretical model which may inform state-level policymakers, particularly regarding the fiscal conservancy of a model which funds CIPs to a greater degree as a means of economic development.

Since the CIP is funded in large part by RFS bonds, and the proposition of RFS projects is that they self-finance and additionally generate revenue, a fiscally conservative model might call for additional RFS debt issuance, shifting the burden of financing higher education away from the taxpayer. There is also the question of the relative advantages and disadvantages of engaging in public-private partnerships compared to the state financing projects with bond debt or institutional sources.

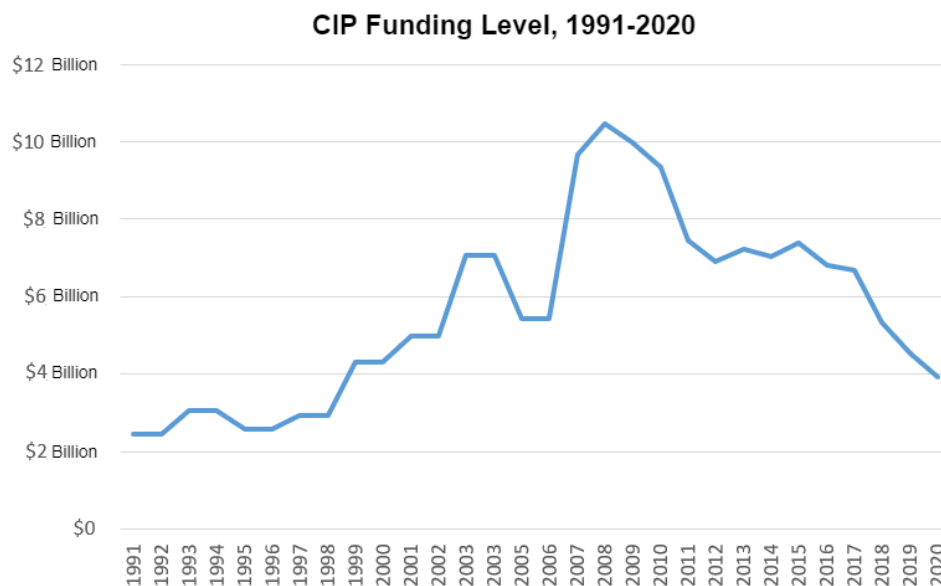


Fig. 1.11, Capital Improvement Program, 1991-2020 (inflation adjusted)

⁴ See Topic #5: Finance.

The CIP by Bond and Institutional Funding Sources

Prior to 2009, Institutional and Bond funding levels had a high degree of correlation. Perhaps in response to the Financial Crisis, these metrics decoupled around this time. Institutional financing for capital improvements have steadily decreased to its lowest level since the early 1990s. In the past decade, bond funding levels have bounced up and down roughly between \$3-4b. Other than the few years before the financial crisis, this is the same range this budget was operated in the previous decade, from 2000-2006. Further analysis is outside the scope of this thesis, however I will present a soft hypothesis that separate consideration of these sources may determine that recency bias is one driver of setting these benchmarks. It may also be helpful for UT-System to analyze these budgets in the context of higher education more generally, as well as in the context of the state budget.

Not only housing, but other revenue generating capital improvements such as health networks have the potential to revolutionize the economic development of the state's varied economies, including rural economies. The UTHHealth network in East Texas provides a prime example from which data may be collected. Research into the cost-effectiveness of such infrastructure improvements may potentially yield data in support of higher budgeting levels for capital improvements.

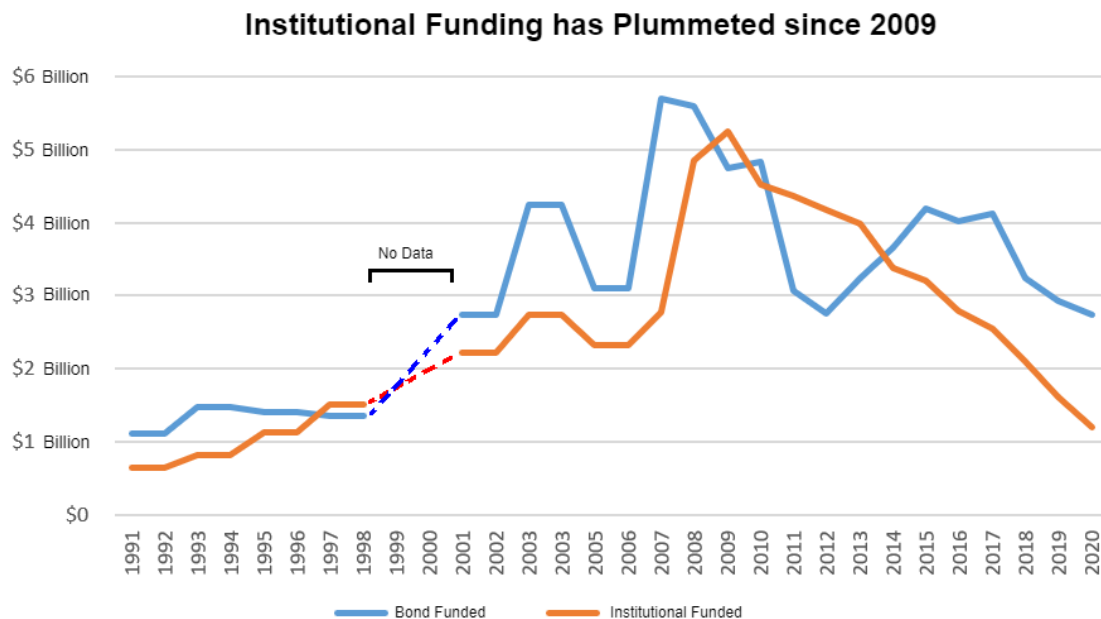


Fig 1.12, Institutional Funding has dropped since 2009

Gifts and Hospital Revenues

Gifts and hospital revenues account for the largest shares of institutionally sourced funding on the CIP. Record keeping of these budget segments begins in 2001. Gifts and hospital revenues as they appear in the CIP are part of a larger functioning model in the higher education budget, analysis of which was largely outside the scope of this thesis.

Hospital revenues are a significant revenue driver in the state budget. While the current CIP budget is roughly one third of the funding level of its 2008 peak, hospital revenues have risen quite substantially during that same period. In non-inflation adjusted dollars, hospital revenues from only five institutions have risen from \$1.5b in 2002 to \$7b in 2019. This provides guideposts highlighting the expected financial impact of the Dell Medical School as it continues to build towards maturity.

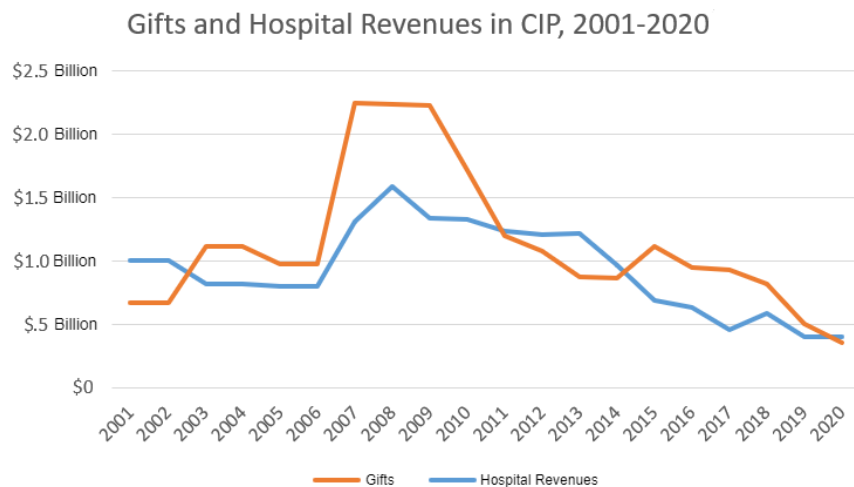
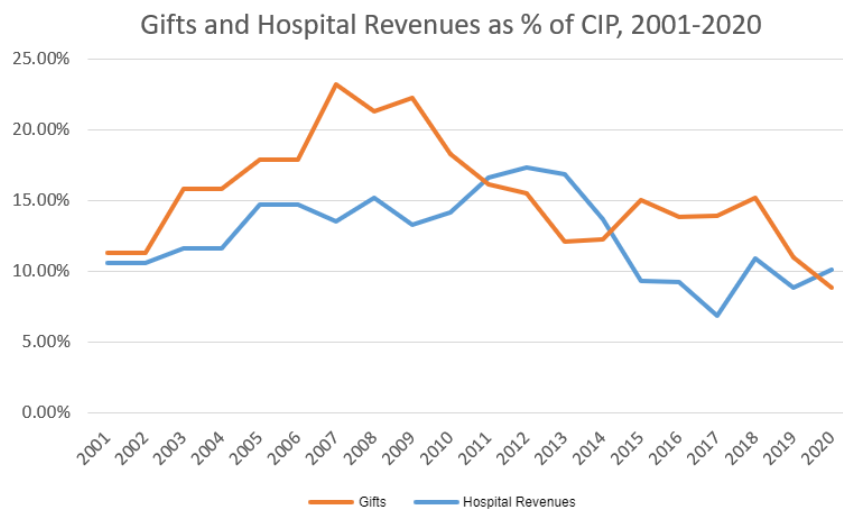


Fig. 1.13 Gifts and Hospital Revenues, as percentage of CIP 2001-2020

Fig. 1.14 Gifts and Hospital Revenues (inflation adjusted) 2001-2020

The University of Texas System
Office of Health Affairs
Compiled March 23, 2021

Annual Hospital Revenues (Sales & Services of Hospitals, Net of
Discounts & Allowances) Source: Annual Financial Reports
Fiscal Years Ending August 31, 2XXX

UT System Total is the sum of Hospital Revenues from UT Southwestern,
UT Medical Branch, UT Health Science Center Houston, UT MD Anderson
Cancer Center, and UT Health Science Center Tyler. UT Health Science
Center San Antonio neither owned nor operated a hospital 2002 to 2020.

FY	Total
2002	1,545,234,935
2003	1,679,516,031
2004	1,900,998,155
2005	2,302,552,035
2006	2,574,849,870
2007	2,763,559,452
2008	3,016,628,032
2009	3,133,437,815
2010	3,407,062,136
2011	3,812,092,231
2012	4,138,248,795
2013	4,472,285,487
2014	4,748,987,649
2015	5,260,354,994
2016	5,368,140,809
2017	5,786,262,919
2018	6,317,449,623
2019	7,007,967,315
2020	6,989,202,194

Fig. 1.15, Hospital Revenues, 2002-2020

PART II: HOUSING IN THE CAPITAL IMPROVEMENT PROGRAM, 1991-2020

All figures listed adjusted to August 2020 constant dollars.

I created a data set of housing projects by examining the project summaries of CIPs between 1991-2020. When possible, I tracked the institution, the cost, the type of financing, and the bed count. I adjusted all figures for inflation. Record keeping did not always include bed count, so I refined my dataset by contacting UT-System open records. This dataset reflects the cost as it appeared on the CIP, not the actual cost. It is possible not every project in this data set was seen to completion, however the sample size is robust enough to be useful for tracking key metrics.

From 1991-2020 there were 63 unique student housing projects appearing on Capital Improvement Programs⁵. The average bed count per project was 325. There have been no projects completed systemwide since 2016. The FY 2004-2009 included nineteen projects, fifteen of which were completed within two years. This suggests UT-System has the capability to administer a throughput consistent with a rapid expansion policy should such a strategy be adopted.

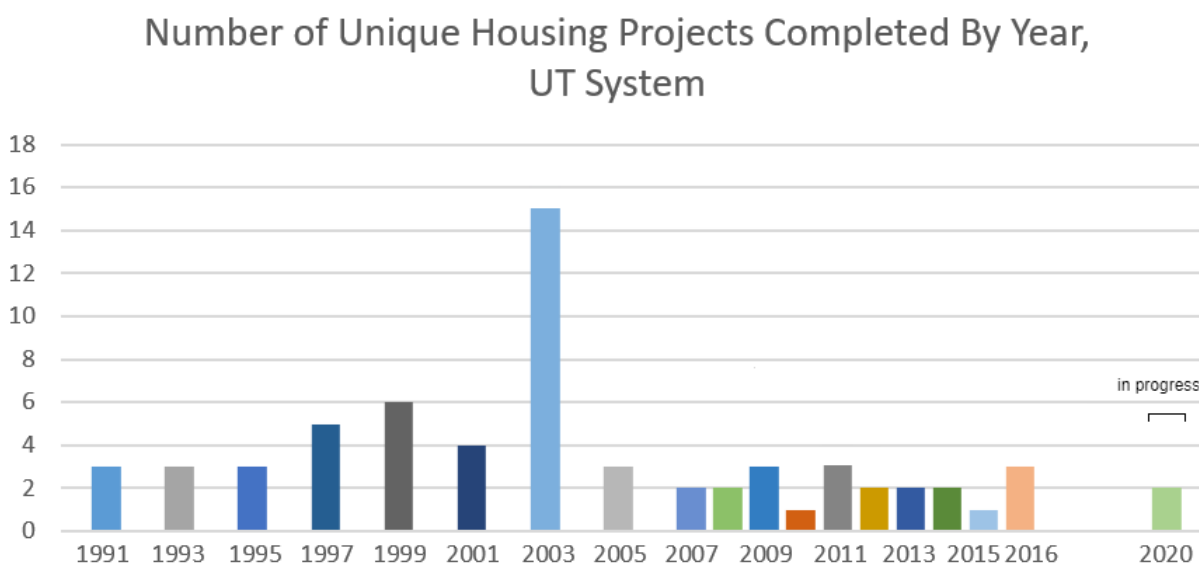


Fig. 1.16, Unique Housing Projects across UT-System, 1991-2020

Although student housing is not funded as a priority, it has clearly played a consistent role in the CIP since the creation of the Revenue Financing System in 1990. Between 1991-1997 a public-private partnership model was repeatedly utilized; however, this practice was discontinued. Since 1999, 96.5% of student housing project funding has come from RFS bonds. The following analysis covers the post public-private partnership era, from 1999-present.

⁵ This figure does not include three projects determined in the open records request process not to have been completed. No data was available for the bed-count of two projects from 1991 and one project from 1995, so bed counts were ultimately available for 60 projects.

Analysis, 1999-2020

During this period, the CIP averaged a budget for student housing of \$157.3m⁶. This represents an 8.7% share of RFS bonds and a 2.8% share of the total CIP. The 2003 CIP is an outlying data point. In that year, \$441.2m (6.2% of total CIP) was earmarked for student housing.

The average budgeted cost-per-project (adjusted) has been \$34.3m. Bed counts were available for 54 of 66 projects. Of the set of 54 projects with available data, the average per-project bed-count was 327. UT-System has the information of the bed-counts of the remaining twelve projects as well as the actual rather than budgeted costs associated with these projects. Future research by UT-System could determine what the actual weighted, inflation adjusted cost-per-bed has been for all student housing construction since the CIP was first instituted.

Total Set of Projects by Market, 1991-2020

To understand the state's role in generating student housing I created a dataset of all projects and their budgeted cost since 1991. I included bed count for all projects where this information was available. More modern CIPs also include data about square footage of projects. In the future, UT-System may wish to refine this data set based on actual cost, bed-count, and square footage rather than the numbers projected in the CIP. This would also allow UT-System to determine the confidence interval of cost projections for these types of projects.

ACADEMIC: (54 projects)

UT Dallas (11 projects, 1991, 1997, 1999, 2001, 2003, 2007, 2011, 2012, 2014, 2016 (x2))
UT Arlington (10 projects, 1991, 1999, 2001, 2003 (x5), 2009, 2011)
UT Permian Basin (8 projects, 1999, 2003 (x2), 2007, 2012, 2013, 2015)
UT San Antonio (7 projects, 1991, 1993, 2003 (x2), 2005, 2010, 2020)
UT Tyler (7 project, 1991, 1993, 2003 (x4) 2008)
UT El Paso (5 projects, 1999, 2001, 2003, 2009, 2014)
UT Austin (3 projects, 1997, 2005, 2020)
UT Pan American (2 projects 1999, 2005)
UT Brownsville (1 project, 2007)

HEALTH: (9 projects)

UT Health Science Center Houston (5 projects, 1995, 1999, 2001, 2003, 2013)
SW Medical Center Dallas (2 projects, 1995, 1999)
Tyler Health Center (1 project, 1991)
McDonald Observatory (1 project, 1997)

⁶ This represents the budgeted amount for a given year. Because some projects are listed across multiple CIPs, this figure is in excess to the average amount the state commits to housing projects.

Total Investment by Market, 1991-2020

In addition to number of projects, total investment into a given markets is a useful metric. UT-System student housing investment on a market-by-market basis, adjusted for inflation, is as follows:

DFW - \$739.9m
San Antonio - \$263.7m
Austin - \$219.8m
Odessa - \$114.9m
Houston - \$89.0m
Tyler - \$80.6m
Rio Grande Valley - \$45.6m
McDonald Observatory - \$1.3m

This dataset reveals the lion's share of UT-System student housing has been built in the Dallas-Fort Worth Metroplex, primarily at UT-Dallas and UT-Arlington. While UT-Austin has lagged in number of projects, it is represented to a greater degree in weighted dollars invested. There may be factors unique to UT-Austin which encourage larger housing projects and require projects with a higher cost-per-bed. It should be determined if the delays with the Graduate Housing Complex and Creekside redevelopment are in part due to UT-Austin's reliance on housing projects which are larger in scale than the average project systemwide⁷.

Cost-Per-Bed by Markets, 1991-2020

Austin - \$103,012 per bed
Houston - \$102,127 per bed
Odessa - \$100,015 per bed
DFW Metroplex - \$95,062 per bed
San Antonio - \$66,429 per bed
Tyler - \$65,688 per bed
El Paso - \$54,218 per bed
Rio Grande Valley - \$55,575 per bed

Across this period, UT-System has built at stratified price points by market. Austin is the most expensive market, followed by closely by Houston, Odessa, and the Metroplex. I hypothesize successful lobbying efforts may be tied to the high cost-per-bed associated with construction in the Odessa market.

⁷ This question will be revisited in Topics #4 and #5.

Historical Cost by Institution Type, 1991-2020

Health Institutions - \$78,255 per-bed average⁸

Academic Institutions - \$82,201 per-bed average⁹

Of the eight health institutions analyzed, five were built in the 1990s. The remaining three were commissioned for the UT Health Science Center in Houston in 2001, 2003 and 2013, generating a total of 604 beds. The weighted adjusted average of those projects was \$114,666 per bed. The 2013 project generated 168 beds at the cost of \$162,666 per bed.

There were 52 out of 54 Academic institutions with available bed count data. These projects account for 18,094 beds and a total inflation adjusted construction cost of \$1.49b. There were no projects exceeding \$100,000 in constant dollars per-bed until 2003.

Change in the Cost-Per-Bed over Time (inflation adjusted)

Academic institutions weighted cost-per-bed, 1991-2004 (9,457 beds) - \$57,051 per-bed

Academic institutions weighted cost-per-bed, 2005-2020 (8,637 beds) - \$109,738 per-bed

UT-System has paid on average 1.92x per bed in the past 15 years than it did in the previous 15-year period. Texas remains a national economic leader currently, with several leading real estate markets. UT-System should consider how this longitudinal dataset may upwardly revise long-term projections. If UT-System adopts a policy of providing housing at market rate, this would further suggest the ability to upwardly revise the acceptable cost-per bed for new construction, particularly those high-end markets such as Austin.

U. T. San Antonio Guadalupe Hall (cont.)

Cost Per Bed Benchmarks

Guadalupe Hall	\$83,044		
College Planning and Management National Average, Residence	\$101,110		
	Low Quartile	Median	High Quartile
Other U. T. System Projects	\$77,742	\$96,135	\$122,945
Other National Projects	\$72,229	\$91,645	\$121,597

- All benchmark costs are escalated to midpoint of construction



Fig. 1.17, UT-System Cost Per Bed Benchmark summary for Guadalupe Hall

⁸ (8 of 9 health institutions with available data)

⁹ (52 of 54 academic institutions with available data)

The Role of the Private Market – UT-System

The longitudinal analysis by type reveals the markets where UT-System has built student housing. The DFW area leads the pack, with 23 projects between UT-Dallas, UT-Arlington, and the SW Medical Center in Dallas. The mid-tier of project allocation includes UT Permian Basin (8 projects), UT Tyler (7 projects), UT San Antonio (7 projects), UT El Paso (6 projects) and the UT Health Science Center in Houston (5 projects). One hypothesis to explore is that the strength of alumni networks as well as the private market has guided these projects to their home markets.

The Role of the Private Market – UT-Austin

Despite being the flagship state university, and despite a longstanding consensus concerning the need for additional on-campus housing¹⁰, UT-Austin is distinctively in the rear when it comes to generating projects for residential expansion. UT-Austin has forged a different path, relying on development in the University Neighborhood Overlay (UNO) area, which roughly corresponds with West Campus. The UNO neighborhood, as regulated by the Central Austin Combined Neighborhood Plan is described in current city literature as “public-private working partnership”¹¹ which may harken back to the creation of its original guidelines in 2004.

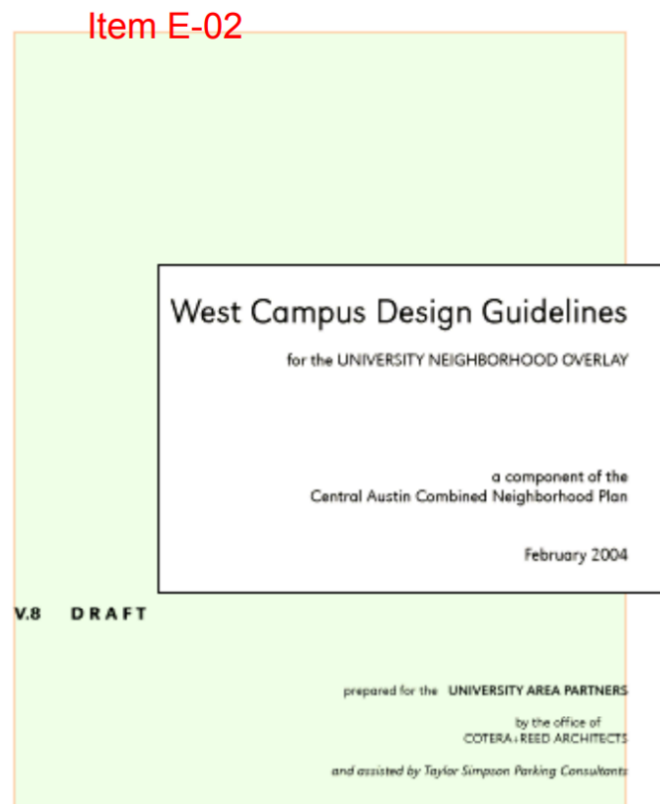


Fig. 1.18, West Campus Design Guidelines, February 2004

¹⁰ Detailed in Topic #5: History of the On-Campus Housing Benchmark at UT, 1999-2020.

¹¹ 2018 City of Austin Planning Commission Briefing, prepared by Mark Walters, Planning and Zoning Department

Purpose built student housing is a lucrative niche market nationally which attracts billions in capital from Real Estate Investment Trusts (REITs) (Revington and August, 2020). Student housing REITs are perceived as a haven for investment due to their ability to weather economic downturns and act as an income generating hedge for investment portfolios. Finance for REITs fundamentally ties to the demand for a liquid investment vehicle into real property, rather than the demand for housing (Revington and August, 2020). Leading scholarship efforts on active managerial strategies of REITs and their methodologies of profit maximalization have been conducted by none other than current UT President Jay Hartzell (Hartzell, Sun, and Titman, 2009).

The model presented in Topic #9: Recommendations for Comprehensive Housing Policy acknowledges the role private, or public-private partnership (P3) development may play. Although academic literature on the topic is scant, in a rapid expansion model that benchmarks to the maximum allowable debt ratio, one way to increase capacity and throughput even further is the utilization of P3s. A P3 is also recommended as a negotiated solution with the City of Austin to expedite the moving of the housing stock on the Brackenridge Tract, with the HealthSouth tract as the proposed location. As discussed later, P3s are well suited for graduate housing but not undergraduate; there is most likely demand for 4,000 additional graduate beds, which is where this mechanism would be most useful. This demand could be determined with precision by updating the 2013 Residence Hall Needs Assessment.

P3s must augment rather than be prioritized over bond financed on-campus housing. University and national literature, as well as a study of comparative GPAs, contradict survey data suggesting P3s contribute to student life at levels comparable to on-campus housing¹². In constitutional terms, this consideration parallels discussions regarding *the state's compelling interest to diversity in education* which will be at issue in the *Students for Fair Admissions* case¹³.

Another drawback to consider is the incentive of the private market to support rate hikes. Meeting the demand for above-market student housing can be a valid segment for the University to target, given the potential for revenue generation; however, if throughput is low, focusing on this segment will not efficiently address the housing needs of any student but those from top-income brackets. Student Affairs has estimated that 80% of 2400 Nueces residents are Greek sorority students¹⁴.

Whereas on-campus housing have risen at rates less than 4.8% a year¹⁵, internal UT market research has found that rates in West Campus are increasing at a year-over-year rate of 14%. In the broader Austin rental market, there seems to be a greater degree of rate pressure on multi-bedroom units (17% in 2018) when compared with single-bedroom units (2%). Although the internal research conducted by UT is not uniform for the past six years, I believe this data, along with the 2013 Residence Hall Needs Assessment, could be recompiled to present a more complete picture of the Austin student housing market which would be of value to decisionmakers.

¹² See Topic #8: Defining Relationships Between Housing and Equity at UT-Austin

¹³ See Topic #3: History of the On-Campus Housing Benchmark at UT, 1996-2020

¹⁴ "New and Increased Non-Mandatory Fee Request Form, Proposed Effective Date 08/2020"

¹⁵ Non inflation-adjusted. This figure includes revenue increases tied to capacity expansion. The actual figure is lower and could be precisely determined with a longitudinal data set of rates, which were unavailable.

University Housing and Dining
Table 1: Local Market Rates of Residence Halls
Jan-19

Property	Shared Space - Shared Bath	Single Space - Private Bath	Dining Plan
The Callaway House	\$18,140	\$14,020	Included
Hardin House	\$16,340	\$16,340	Included
The Castilian	\$13,820	\$19,600	Included
Dobie Center	\$12,600	\$22,200	Included
Scottish Rite	\$12,000	\$8,650	Included
University of Texas	\$11,692	\$14,095	Included
University Towers	\$8,460	\$17,520	Included
Average	\$13,293	\$16,061	
Median	\$12,600	\$16,340	
Average Delta	14%		
Dollar Delta	\$1,601		

Fig. 1.19, UT internal market data showing 14% annual rate increase in West Campus market

Table 2: Core Peer Group, 1 Bedroom Monthly Rates

Property	Zip Code	Built	Rate	Notes
Lorrain	78703	1980	\$1,275	Approx 200 sqft more than UHD
Park Place	78703	1972	\$1,062	
Enfield Apartments	78703	1968	\$1,000	Approx 200 sqft more than UHD
24 Flats	78703	1972	\$950	Studio rate, 150 sqft less than UHD
Spanish Village	78703	1960	\$900	
Eden Roc	78703	1958	\$850	
UHD: Colorado	78703	1960's	\$668	Proposed new tenant rate: \$955
UHD: Gateway	78703	1970's	\$646	Proposed new tenant rate: \$924
UHD: Brackenridge	78703	1980's	\$646	Proposed new tenant rate: \$1016

Median Rate (Peer Group)	\$975
Average Rate (Peer Group)	\$1,006
Average Delta	2%
Dollar Delta	\$20

Table 3: Core Peer Group, 2 Bedroom Monthly Rates

Property	Zip Code	Built	Rate	Notes
24 Flats	78703	1972	\$1,575	
Park Place	78703	1972	\$1,450	
Lorrain	78703	1980	\$1,424	
Antilles	78703	1981	\$1,274	
Spanish Village	78703	1960	\$1,135	
Enfield Apartments	78703	1968	\$1,000	
Eden Roc	78703	1958	\$975	
UHD: Colorado	78703	1960's	\$761	Proposed new tenant rate: \$1088
UHD: Gateway	78703	1970's	\$739	Proposed new tenant rate: \$1057
UHD: Brackenridge	78703	1980's	\$739	Proposed new tenant rate: \$1162

Median Rate (Peer Group)	\$1,274
Average Rate (Peer Group)	\$1,262
Average Delta	17%
Dollar Delta	\$186

Fig. 1.20, UT internal market data comparing graduate apartments with the wider rental market

KEY FINDINGS:

PART I

1. There has been a wide variance of CIP funding levels in different eras.
2. UT-Austin's CIP funding most closely correlates with the funding of all Academic Institutions. Since 2006, UT-Austin's funding correlates with the funding for UT-System Health Institutions. UT-Austin's funding does not seem to compete with other Academic Institutions.
3. A plurality of funding is generated through RFS bonds. Historically 96.5% of housing has been funded with RFS bonds.
4. Institutional funding for capital expenditures have plummeted since the financial crisis of 2008.
5. Growth in Hospital Revenues systemwide indicates is a significant driver of policy. This growth does not seem to be tied to growth in Hospital Revenues dedicated to capital expenditures.

PART II

1. There have been 63 projects since 1991, with an average project size of 325 beds.
2. Housing has been constant feature in capital improvement programs, historically averaging 2.64% of total capital allocation.
3. There is significant stratification in what UT-System pays per bed by market.
4. A triangulation technique for determining the appropriate cost per bed for UT-Austin should incorporate the significant rate of change in cost per bed by era that UT-System has paid. UT has commissioned market research annually for the past six years.¹⁶
5. It should not be assumed that the significant upward pressure on rental market rates will eventually reach a "saturation point" causing prices to stabilize. As Austin continues its rapid metamorphosis into a burgeoning tech hub, it would be wise to consider models which are responsive to the possibility of a future Bay Area like housing market.
6. Public-private partnerships can be a good revenue generation model for graduate housing and capturing high end market-share, and in specific situations. It can also increase total throughput in a rapid expansion model. P3s should not be prioritized at the expense of on-campus bond funded projects.

¹⁶ This is in addition to the 2013 Residence Hall Needs Assessment which will be discussed in Topics #3 and #4.

TOPIC #2: THE HOUSING AND DINING BUDGET, 1995-2020

Format of the Budget

The approach of Human Dimensions of Organization is to seek understanding by examining how an organization has approached a topic over time. For this reason, I created a longitudinal data set of the Housing and Dining (H&D) budget to determine what clues within might provide insight into past policy decisions or organizational behavior. H&D budget summaries were acquired via open records request beginning with the FY 1995-96 budget and continuing through the 2019-20 budget. Data was collected using the previous year's budget numbers, i.e., the figures used for FY 1995-96 come from the FY 1996-97 Housing and Food Service Summary Budget. Inflation was accounted for using the inflation calculator on the US Bureau of Labor Statistics website¹. For clarity, fiscal years are referred to hereafter by their initial year (i.e., FY 1995-96 is labeled as 1995).

The H&D budget is divided between "Estimated Incomes" and "Budgeted Expenses". "Estimated Income" is subdivided into "Room and Meals", which historically accounts for 96% of revenues and "Other Income" which covers retail operations and conferences. Together, these revenues are known as "Total Estimated Income".

"Budgeted Expenses" subdivides into "Salaries", "Wages", "Fringe Benefits", "Other Operating Expenses", and smaller accounts "Travel" and "Allocation for Budget Adjustments". Together, these are known as "Total Budgeted Expenses". The "Total Estimated Income" less the "Total Budgeted Expenses" is known as the "Excess Income Over Budgeted Expenses." Next, "Debt Service" is tracked, as well as "Excess Income after Debt Service." This number, "Excess Income after Debt Service" is referred to interchangeably as total profit. When "Excess Income after Debt Service" is expressed as a percentage of "Total Estimated Income" this is referred to as the profit margin.

Finally, the budget tracks "Transfers to" other accounts from this account, "Estimated Income after Transfers" (EIAT), and then the "Estimated Beginning Balance" and the "Estimated Ending Balance". There have been slight accounting methodology changes over the 25 years concerning these last three line-items, but anything after "Transfers to" is insignificant for our purposes². EIAT has never exceeded \$1m, either in the red or black, meaning the account is essentially zeroed out, with profits transferred elsewhere. Beginning in 1998, under expenses there is a budget line called "Other-IDT Credits from Dorms" which is mostly significant for accounting of certain overhead units³.

¹ https://www.bls.gov/data/inflation_calculator.htm. Constant dollars set to August 2020.

² There are minor accounting changes related to the calculation of the estimated beginning balance and a one-time \$10m accounting change in 2017. After receiving clarification via Open Records Request, I altered my dataset to better reflect long-term trends by treating the \$10m as it would have been in other years, namely as an "Other Operating Expense". That year the money was instead transferred to the Repair and Replacement Reserve.

³ Open Records Request #R001334-030321

DIVISION OF HOUSING AND FOOD SERVICE SUMMARY BUDGET 2002-03 (12 Months)			
	ACCOUNT NUMBER	2001-02 BUDGET	2002-03 BUDGET
ESTIMATED INCOME			
Room and Meals		\$ 44,268,753	\$ 45,381,343
Other Income		2,246,695	2,423,357
Total Estimated Income	29-02+-0095	\$ 46,515,448	\$ 47,804,700
BUDGETED EXPENSES			
1. Salaries			
Administrative and Professional	29-02+-0009	\$ 844,489	\$ 866,850
Longevity Pay	29-02+-0009	8,120	9,060
Classified Personnel	29-02+-0010	10,145,714	10,673,993
Longevity Pay	29-02+-0010	256,260	278,600
Subtotal		\$ 11,254,583	\$ 11,828,503
2. Wages	29-02+-0020	\$ 3,171,425	\$ 3,285,094
3. Fringe Benefits	29-02+-0014	4,553,809	5,038,433
4. Other Operating Expenses	29-02+-0050	22,557,694	22,729,594
5. Other-IDT Credits from Dorms	29-02+-0050	(3,411,088)	(3,630,055)
6. Travel	29-02+-0075	88,300	84,300
7. Allocation for Budget Adjustments	29-02+-0090	811,209	887,686
Total Budgeted Expenses		\$ 39,025,932	\$ 40,223,555
EXCESS INCOME OVER BUDGETED EXPENSES		\$ 7,489,516	\$ 7,581,145
8. Less - Debt Service		5,581,093	5,832,983
EXCESS INCOME AFTER DEBT SERVICE		\$ 1,908,423	\$ 1,748,162
9. Transfers to:			
2% Administrative Charge	29-7120-0095	\$ 729,132	\$ 727,249
UTPD H&F Security	29-3050-3095	50,000	50,000
Parking and Traffic Enforcement	29-3050-0095	0	0
General Repair & Replacement	36-0800-1007	300,000	0
General Repair & Replacement	36-0800-1407	1,500,000	1,500,000
General Repair & Replacement	36-0800-1707	150,000	150,000
EXCESS INCOME AFTER TRANSFERS		\$ (820,709)	\$ (679,087)
ESTIMATED BEGINNING BALANCE		910,000	740,000
ESTIMATED ENDING BALANCE		\$ 89,291	\$ 60,913

Fig. 2.1, Example "green sheet" budget summary

Framing the Discussion

The dataset runs 25 years from 1995-2019. During that period, there were three years the University expanded on-campus housing: constructing San Jacinto in 2000, Duren Hall in 2007, and acquiring 2400 Nueces in 2019. This thesis is concerned with the impacts of expanding on-campus housing, so I paid special attention to these years.

When Duren Hall was built, despite assuming additional debt, there was a dramatic increase in H&D's total profit, from \$1.8m to \$6.1m. The annual profit has grown steadily ever since, reaching nearly \$25m in 2019 (*fig. 4.2*). As debt has retired and room rates gradually increased, the profit margin has steadily risen as well, from 9.4% in 2007 to 21.6% in 2018. Additional income in this portfolio is closely correlated with a widening profit margin. I believe this correlation indicates scalability in the H&D budget, which is also expressed in the downward trend in salaries, wages, and fringe benefits as % of revenues (*fig. 4.3*). Between 1995 and 2006 average profit was 2.1%, representing a policy of running the H&D budget for minimal profit. It is important to understand the implications of pivoting the H&D portfolio to a for-profit venture as was done in 2007. We will examine the functions supported by these funds once they are transferred out of the H&D budget. These functions will inform us on the incentive structure and ultimately on policy.

From an affordability standpoint, it is natural to question why the University now runs a 21% profit from this budget, rather than operating a break-even model which passes savings to students, thus directly addressing the student debt issue. The reader is asked to reserve judgement on this point. Although counterintuitive, I believe the best model for aligning housing and student debt reduction policy maintains a large profit in this budget. I note however that rising student housing margins in both the public and private present a countervailing force to the Board of Regent's historic equity investment the Texas Advanced Commitment, which contends to remove structural cost-barriers and address debt issues.

In later chapters, this thesis will propose that greater alignment between housing and equity policy is best achieved through rapid expansion of on-campus housing at all viable sites, price setting at market rate, and earmarking newly generated revenue for an endowment germane to equity, affordability, and student debt-reduction goals. I believe an endowment of this type is the most fiscally conservative and secure model for financing such a commitment. To proactively create a finance mechanism for a non-race-based equity commitment is all the more important given that Equal Protection issues are once again headed for high profile judicial review. Beyond the revenue stream, decades of academic research support the idea that additional student life on campus in of itself would directly address UT's nagging campus culture issues, particularly for Black students.

Despite a widening profit margin post-Duren, this was not the effect of a policy of increasing room and board rates. In fact, year-over-year revenue growth was 5.0% for the pre-Duren period (1995-2006) and fell to 3.8% post-Duren (2007-2019). This supports a hypothesis

that as the university increases on-campus housing capacity, upward pressure on rates is lessened. In the Pre-Duren period, Housing and Dining realized only 2.1% profit, however post-Duren it has averaged 14.0% - a figure which has steadily increased to over 21% for 2018 and 2019. This means room and board rates are not directly tied to profit margin. Stated another way, profit can be garnered from this budget without a policy which burdens the student.

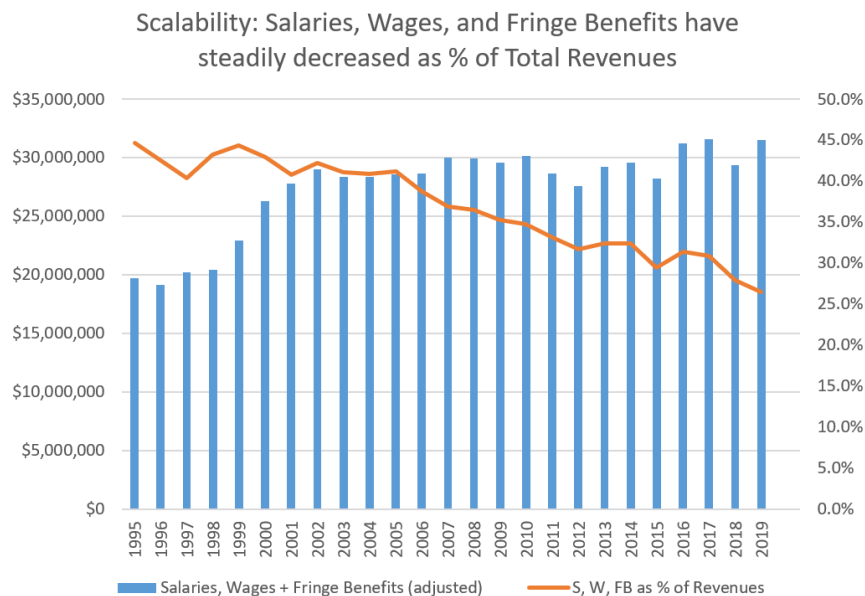
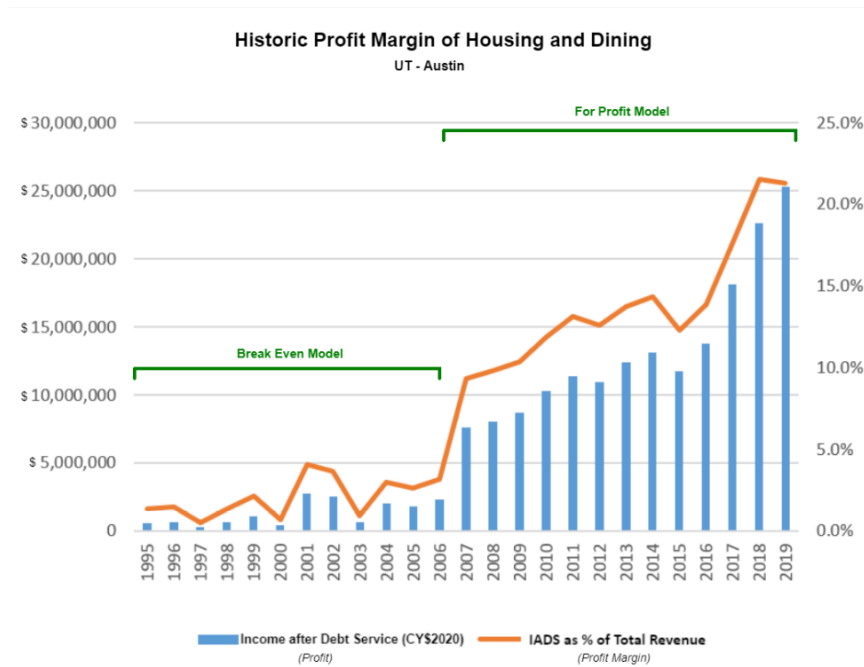


Fig. 2.2, Nominal profit and profit margin closely correlate in this budget

Fig. 2.3, Scalability in H&D budget as represented by a lessening impact of fixed costs

Revenues and Real Growth

In constant dollars, revenue increased from \$44.1m in 1995 to \$118.7m in 2019. This represents an after-inflation revenue growth rate of 4.34% per year over the last 25 years. In years UT expanded capacity, average revenue growth was 13.7%. In years it did not, average revenue growth was 3.0%. Since 96% of total income is room and board rates, years with no capacity expansion approximate increases in room and board rates⁴. Despite spikes associated with new construction, the rate of revenue increase is remarkably linear across the sample (*fig 4.4*). One may question why UT has raised rates above inflation; however, its increases seem modest when compared against the private market's which UT internal market research has recently measured at 14% year-over-year. City policymakers may wish to consider that in this sense, UT is a far superior partner to the private market on affordability, despite affordability bonuses tied to median family income (MFI) which are baked into the student housing niche market under the University Neighborhood Overlay (UNO) ordinance.

I was interested to see if policy towards generating revenue growth had intensified in recent years, particularly in the years since this budget began to run a profit. Was this profit the result of a policy to extract additional revenue from students? I found this *not* to be the case. Average revenue growth between 1995 and 2006 was 5.0% and 3.8% from 2007 to 2019.

Between 2002 and 2012, there were 7 years where Real Growth of Estimated Incomes did not exceed 1%. It can therefore be said that in these years policy was to keep room and board rates flat. Indeed, rates begin to increase more rapidly on the recommendation of the 2013 Residence Hall Needs Assessment Final Report, a key document.

The September 2013 Residence Hall Needs Assessment stands alone as the most extensive document ever to look at this issue. The Assessment recommended a rate increase of 10% to 16%, to be achieved by 5% annual increases for 3 years (p.11). Subsequent increases of 2-3% were recommended to track inflation. Once a policy of 5% increases was begun, it took root. The 6-year period starting with 2013 averaged a 4.8% increase in revenues, with 2019, the year 2400 Nueces comes on-line, seeing an increase of 15.0%. In inflation adjusted dollars, this translates to an average increase of 3.2% per year, which is very near the 3.0% rate which is the historical average in years of no construction.

⁴ Room and board rates were sought via Open Records Request, however due to the way this information is stored there would have been a significant charge to obtain this information. Further analysis could be conducted to determine growth in room and board rates more accurately.

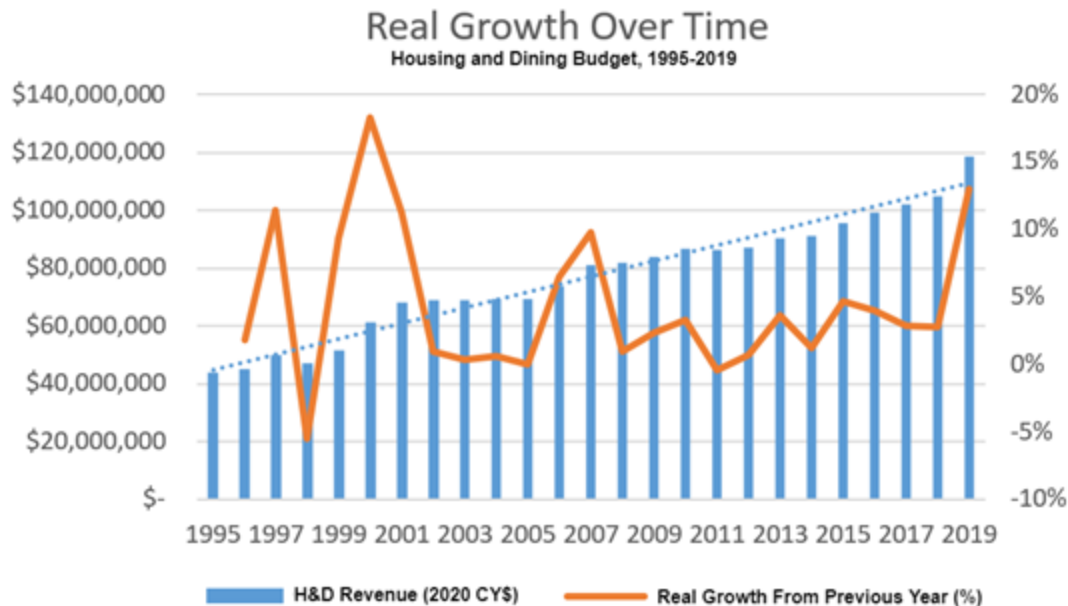


fig. 2.4, linear real growth in the H&D budget

So, if this new profit stream is not attributable to an increase in room and board rates compared with Pre-2006, where does it come from? The answer lies on the expenses side of the ledger. As we have noted, part of the reason is the scalability factor with salaries, wages, and fringe benefits operating somewhat as a fixed cost. We will also examine the effect of retiring debt on increasing the profit margin.

Expenses

The largest expense in the H&D budget is known as “Other Operating Expenses”. Like Total Revenues, its budget growth has been linear. It has operated in a tight range as a percentage of income, centered around 51.9%. This average has not changed in the for-profit, or for not for-profit era – Pre-Duren it was 51.8% of income, and post-Duren it was 52.0%. Future research may wish to determine why Other Operating Expenses operates as a linear function, and if that is related to the linear function of Total Revenues.

As previously noted, Salaries, Wages and Fringe Benefits have trended downward from 44.7% to 26.5% (fig. 4.3). In constant dollars, this budget has been essentially flat since 2002. This suggests that the scalability benefit can be accomplished either by expanding capacity or by increasing rates, so long as revenues continue to increase at their historic average. This also suggests rates and increased capacity have an inverse relationship. Added capacity lessens the upward pressure on rates for on-campus housing.

Debt Service

All figures in this section are in constant 2020 dollars.

From 1995-1999 debt service was held at a level between \$2.1m and \$2.51m. The average profit during this period was \$656,035. When San Jacinto was built in 2000, debt service rose to \$8.8m, partly due to a balloon payment. That year, excess income over budgeted expenses pre-debt-service was 15.2% and debt service was 14.5%, meaning there was only .7% overage. The next year this margin widened to 4.1%. In dollar amounts, income after debt service for the post-San Jacinto, pre-Duren period (2001-06) averaged \$2.0m. Despite taking on additional debt, UT had generated an additional \$1.4m in reoccurring funds.

The debt service level was again brought up to \$8.6m for the construction of Duren Hall. Although a similar amount as after the construction of San Jacinto, the effect on the budget was not as severe. Due to increases in revenues, this only represented 10.6% of revenues, rather than 14.5%. The excess income jumped from 11.9% the previous year to 20.0%. The \$6.1m profit was 9.4% of revenues, over twice as much as the previous high-water mark.

Debt Service levels have operated between \$6.4m and \$8.8m since San Jacinto was built in 2000. As revenues have grown and debt service retired, a downward trend emerges on a percentage basis. Besides considering growing profits in nominal amounts, understanding this margin on a percentage basis tells us something about the University's ability to issue additional debt for this portfolio. It is notable that in 2019 5.6% of revenues were committed to Debt Service representing the lowest level in 20 years.

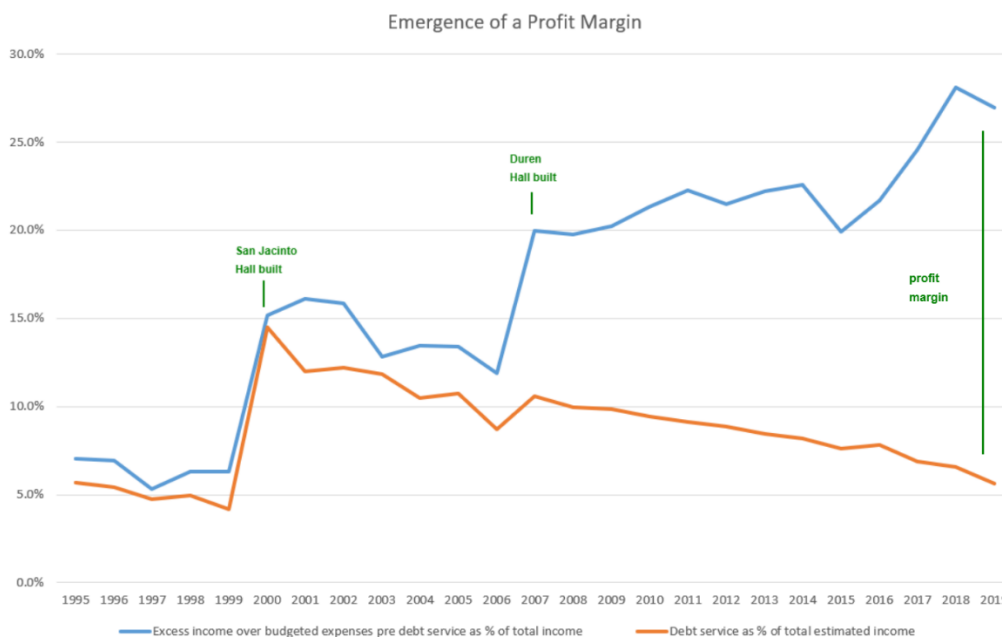


Fig. 2.5, Profit as illustrated by widening overage from debt service obligations.

Income after Debt Service and Transfers

Fig. 2.2 expresses profit both in nominal terms and in terms of percentage. Of the two metrics, the end consideration for most purposes certainly is the nominal profit. As this budget is mostly zeroed out (within a couple million each year) these transfers out become very valuable non-budgeted sources of money which may be used with some degree of latitude.

In 2007, the first year of the Duren profits were realized. This year saw the first significant withdrawal into the Repair and Replacement Reserve (RRR). Previous years had seen transfers labeled “for repairs and replacement”, however this year was the first significant withdrawal, and seem to address a longer-term strategy. In 2009 this transfer increased to \$5.35m then to \$6.35m the following year. In 2017 \$21.2m went into this fund.

I asked Dr. Gage Paine, Vice President of Student Affairs from 2012-2016 about the purpose of this fund. She said the fund was being created to generate a down payment on a future construction project to “buy down” the cost-per-bed, therefore keeping room and board prices low. In this way the current students would subsidize the future students, which is common practice in various ways. Since no new dorms have been built since 2007, the size of the RRR is hypothesized to have no effect on the decision whether to build additional on-campus housing.

This thesis recommends RFS bonds as a superior funding mechanism to hard cash in the current low-interest environment. In this model, there is no pressure to save for a down payment. Revenues deposited in the Repair and Replacement Reserve (RRR) point to the potential of creating an even greater profit stream from this budget. I recommend operating the RRR as a quasi-endowment, so that it may generate interest. Additional profits could finance an endowment, with the interest earmarked for affordability and equity issues.

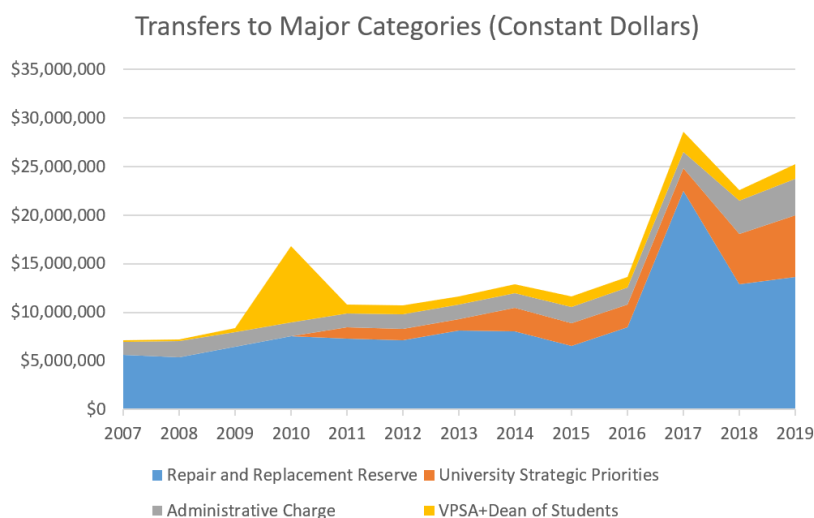


Fig. 2.6, Use of profit from the H&D budget

CONCLUSIONS:

1. The Housing and Dining budget is scalable. As bed-count grows, so does profit and profit margin.
2. Profit and profit margin in the H&D budget are correlated.
3. Revenue growth in constant dollars follows a linear function, despite being punctuated with years of more rapid growth corresponding with new buildings opening.
4. In constant dollars, revenue growth in years without construction averages about 3%. Above inflation increases are passed to students in the form of room and board rate increases.
5. These rate increases are much slower than increases in the private market, however they do still produce a cumulative effect to the detriment of affordability and equity.
6. The percentage of revenues dedicated to retiring bond debt is at a 20-year low.
7. The profit margin is currently at a record high.
8. As the budget's revenues grow, large nominal expenses become less impactful on the debt ratio. Thus, this budget has over 2.25x as much "buying power" as prior to San Jacinto's bond issuance in 2000, even before the difference in interest rates is factored. This is also before factoring in the superior excess income pre-debt-service to total estimated income ratio.
9. High fungibility and non-interest generating savings are existent facets within Housing and Dining budgets, particularly the Repair and Replacement Reserve.
10. An endowment model targeting equity is proposed to be sourced from this budget. Funds currently in the Repair and Replacement Reserve could serve as a down payment on such an endowment, given the attractiveness of bond financing in the current interest environment.
11. From an equity perspective, it makes more sense for funds to flow from large projects towards equity, rather than raising room and board rates to accrue money which will be used as a down payment on some very large project, whether that be at the Brackenridge Tract, the Erwin Center site, or somewhere else. Amassing funds in the RRR has not led to new housing construction.
12. The Repair and Replacement Reserve should be operated as either an interest producing quasi-endowment, or its use should be pivoted to an endowment providing greater affordability.

TOPIC #3: DETERMINING THE APPROPRIATE ON-CAMPUS HOUSING CAPACITY BENCHMARK

The on-campus housing benchmark has been addressed in the following documents all of which recommend UT significantly increase housing capacity:¹

1. 1996 UT-Austin Campus Master Plan (Cesar Pelli and Associates) *
2. 2004 Commission of 125
3. 2004 Board of Regents Meeting Minutes
4. 2012 Final Report of the Taskforce on Undergraduate Graduation Rates
5. 2013 UT-Austin Campus Master Plan (Sasaki and Associates) *
6. 2013 Residence Hall Needs Assessment
7. 2015 Student Life Master Plan *
8. 2019 Graduate Education Task Force

Tracking the rationale behind these documents is important not only for understanding how UT sets the benchmark but also for legal reasons. If it is determined that the University has long concluded, via a wide variety of institutional processes, that increasing student housing capacity is a means of attaining the state's compelling interest of diversity in higher education, this may preclude the direct use of race in admissions under the strict scrutiny standard of *Fisher II*². It also potentially compels the University to build student housing to attain the benefits of diversity. This possibility will be explored more fully in Topic #7: Equity Policy at UT-Austin, 2010-2020.

1996 UT-Austin Master Plan, Pelli and Associates

The Pelli Plan was crafted around seven objectives and organizing principals. Principle #4 was "To add substantially to on-campus housing, thus creating a more complete academic community." Principle #5 was "To establish new centers of student activity, reinforcing housing and academic uses to enhance a full on-campus life." (p.33) The rationale for the addition of on-campus housing was described as this: "To support the academic, social and recreational needs of an academic community, it is essential that substantial numbers of students live on campus. It is in the undergraduate experience of working and living together that the spirit and collegiality of the institution are maintained...The addition of new housing on campus will make a positive contribution to increasing academic and social interaction and extend a sense of security throughout the day" (p.37). The Pelli Plan set a capacity benchmark of 10,400, which

¹ Asterisks denote documents which also proposed locations, which are all master plans. Documents discussing capacity with no discussion of location are varied: an independent commission report, a residence hall needs assessment, and two task force reports.

² For this reason, I have included several direct quotations for comparison where applicable.

was an increase of 5,200 over capacity at the time. This was during the tenure of President Larry Faulkner.

[Early Faulkner-era benchmark: 10,400 beds]

2004 Report of the Commission of 125

The Report of the Commission of 125 was a set of recommendations “meant to provide guidance for development of The University for the next 25 years” (p.5) by a commission of citizens, most but not all of whom were Alumni and/or Texas residents. In President Faulkner’s introductory message, he notes the commission was assisted by “a sizable number of our current faculty and staff, including all vice presidents and deans; however, pains have been taken throughout the process to avoid having any part of this report become the voice of insiders” (p.5).

The commission deliberated for nearly two years before delivering sixteen operational recommendations, one of which was to “Increase the Campus residence-hall capacity to 9,000 beds.” At the time of this report, San Jacinto Hall had just been opened, increasing housing capacity to 6,700 beds, so this recommendation was in effect for an additional 2,300 beds.

Justification for additional capacity again centered on the community and academic benefits of living on campus. “Students who live on campus tend to perform better academically and adjust more successfully to college life. And their very presence, day and night, improve the sense of community that encourages strong bonding with the institution” (p.26-27).

Additional rationale focused on the benefit for freshmen. “All freshmen should be able to live on campus...By expanding capacity to 9,000 beds, The University can provide housing to all freshmen who want to live on campus, while maintaining an appropriate mix of freshmen and non-freshmen in its dormitories” (p.27).

[Late Faulkner-era benchmark: 9,000 beds]

2004 Board of Regents Meeting Minutes

The August 2004 meeting minutes for the Board of Regents included a Capital Expenditure sheet for Duren Hall, which lists a housing benchmark of 10,000. At the time there were approximately 6,700 students living on campus. The report lists 4,700 freshmen students and 1,900 upper-division students.

[Late Faulkner-era benchmark: 10,000 beds]

2012 Final Report of the Taskforce on Undergraduate Graduation Rates

This document carried forward the recommendation to “increase residence hall capacity with a goal of requiring freshmen to live in a campus residence hall or a private dormitory in close proximity to campus” (p.102). The rationale was that “Reports indicate that living on campus enhances not only classroom success, but also a student’s overall university experience. The freshman year sets the tone for a student’s college career, making it imperative for students to connect with the academic community. Living on campus clearly boosts the odds for integration” (p.102). The academic and social integration subcommittee of the taskforce found that “decades of research on student success have shown quite clearly that an important predictor of student success is the connectedness students feel toward the campus, their coursework, other students on campus, and the values of the university community. The subcommittee agreed that for graduation rates to improve, the university must place a renewed emphasis on increasing the integration felt by students.” (cite needed)

The taskforce also recommended offering low-cost university housing as a part of a financial aid package. No numerical capacity benchmark was generated by this report.

2012 Residence Hall Needs Assessment

The Residence Hall Needs Assessment was prepared by a project team consisting of architects and planning specialists. It includes the most complete public market analysis and demand analysis for student housing available. The needs assessment used sophisticated triangulation techniques to determine an existing demand of 4,620-4,882 additional beds, depending on price point. The needs assessment believed the University could prudently address this demand by adding 3,900 beds: 2,000 dorm beds and 1,900 apartment beds. The Needs Assessment did not recommend a first year live-on requirement, rather it suggested a naturally occurring Freshmen capture rate of 76%.

Student success was again tied to an on-campus housing increase. “Stakeholders found student housing pertinent to the furtherance of UT’s focus on student success, four-year graduation rates, and the financial accessibility of the institutions” (p.5). (check cite)

[late Powers-era benchmark: 11,105 beds]

2013 UT-Austin Campus Master Plan, Sasaki and Associates

The Sasaki Plan recommended an additional 2,500 beds, with the primary goal of accommodating a requirement that all freshmen live on campus. The Residence Hall Needs Assessment was conducted concurrently, so the Sasaki Plan offered a preliminary housing proposal.

The plan noted that “Student success rates are heavily influenced by student and residential life programs on campus. While assessment and planning for student life and residential programs are not included in this phase of planning, the heavy concentration of students living in the West University Neighborhood and north of campus will require university engagement if that residential area is to contribute to the university’s success” (p.6). However, Sasaki concluded “Since this neighborhood and the residential stock it provides are not controlled by the university, the area does not provide the kind of managed and supportive environment that leads to increased student success” (p. 171).

The goal to house all freshmen on-campus was described thusly: “Recognizing the positive impact on-campus student housing can have on student engagement, academic success, retention, and graduation rates, the Task Force recommends that all first-year students live in university housing” (p. 174).

[late Powers-era benchmark: 9,705]

2015 Student Life Master Plan

The Student Life Master Plan carried forth the recommendation for 2,000 additional dorm beds, but not for the 1,900 apartment beds. This plan identified six potential sites, and bestowed priority on four sites. Then Vice President of Student Affairs Dr. Gage Paine helmed the leadership team for this plan. Dr. Paine characterized the downward revision as a practical matter of presenting leadership with something that may be signed off on. Indeed, there was no additional housing generated during the Fenves era, and the rationale of letting West Campus provide housing became *de facto* policy. Each site identified in the 2015 Plan has pros and cons which will be discussed later.

[early Fenves-era benchmark: 9,205 beds]

2019 Graduate Education Task Force Report

The Graduate Education Task Force noted an 850-person waitlist for housing in University Apartments. Child-care was a concern and the report asked for a housing reduction benefit. This is relevant to the modern-day conversation regarding the Brackenridge Tract. A deal which uses the east campus Graduate Housing Complex site for offsetting the loss of housing on the Brackenridge Tract does not address the need for additional graduate housing as identified in this Report.

[late Fenves-era discussion: additional capacity needed for graduate students]

CONCLUSIONS:

1. The University has consistently identified the need for significant additional on-campus housing.
2. The University has consistently affirmed the connection between on-campus housing and student success. It has repeatedly determined that off-campus housing, even if close to campus, does not realize the student success benefits of on-campus housing.
3. On-campus housing benchmarks have ranged from 9,000-11,105. UT would need to generate approximately 1,700-3,800 beds to fall within this range.
4. Due to market pressures and the loss of housing on Riverside, a targeted update to the 2013 Needs Assessment could potentially find greater demand now exists. Such an update would also provide valuable data points for understanding the impact of development on affordability in general and would be valuable for both university and city policymakers. Should an updated assessment be commissioned, future on-campus housing construction should *not* be delayed pending the results. A high degree of certainty exists from the totality of documents analyzed to support a policy of maximum expansion on the existing suite of viable on-campus sites.
5. According to Dr. Paine, there is a political element to housing decisions, including site competition and prioritization. Student housing cannot be built without the backing of the University President.

TOPIC #4: LOCATION AND COST ANALYSIS

UT-Austin cannot be compelled to build housing absent suitable locations. The approach of Human Dimensions of Organizations is to explore this topic in the context of how it has previously been addressed by the University. The University identifies suitable locations primarily as a part of Master Planning processes; thus, these documents track changes to the University's recommendations. The power of hindsight is also helpful in determining why locations slated for student housing in master plans routinely do not manifest as such. This chapter utilizes a completist approach for defining the total universe of locations officially considered by UT-Austin since the Cesar Pelli Master Plan in 1996.

I. LOCATION

The Pelli Plan was the first master plan since the Paul Philippe Cret Master Plan period (1931-1945). University documents which have systematically addressed housing beginning with this document are as follows:

1. 1996 UT-Austin Campus Master Plan (Cesar Pelli and Associates)
2. 2009 Brackenridge Report
3. 2012 Residence Hall Master Plan
4. 2013 UT-Austin Campus Master Plan (Sasaki and Associates)
5. 2013 Residence Hall Needs Assessment
6. 2015 East Campus Master Plan
7. 2015 Student Life Master Plan

The 2013 Residence Hall Needs Assessment does not include location recommendations but is contextually essential. The 2015 Student Life Master Plan is the most recent plan to comprehensively propose locations for on-campus housing. The location needs of undergraduate and graduate housing are very different, so this discussion is separated.

UNDERGRADUATE

1996 UT-Austin Master Plan (Cesar Pelli and Associates)

The 1996 plan called for 5,200 additional beds at three primary locations, bringing capacity to 10,400. These locations share an interesting similarity: none became student housing, rather they were all developed as prestigious, revenue-generating projects. These locations currently house the Blanton Art Museum, the Dell Medical School, and soon the Moody Center. It is with a mindful eye that we will later analyze prospective housing sites to determine if they are likely to face competition from projects with priority value propositions.

The Pelli Plan also foresaw student housing overlooking Clark Field and an East Quad at what is soon to become the Graduate Student Housing Complex east of I-35.



Fig. 4.1, Blanton Site



Fig. 4.2, "Sabine Street" aka Moody Center Site



Fig. 4.3, East Quad, in simpler times

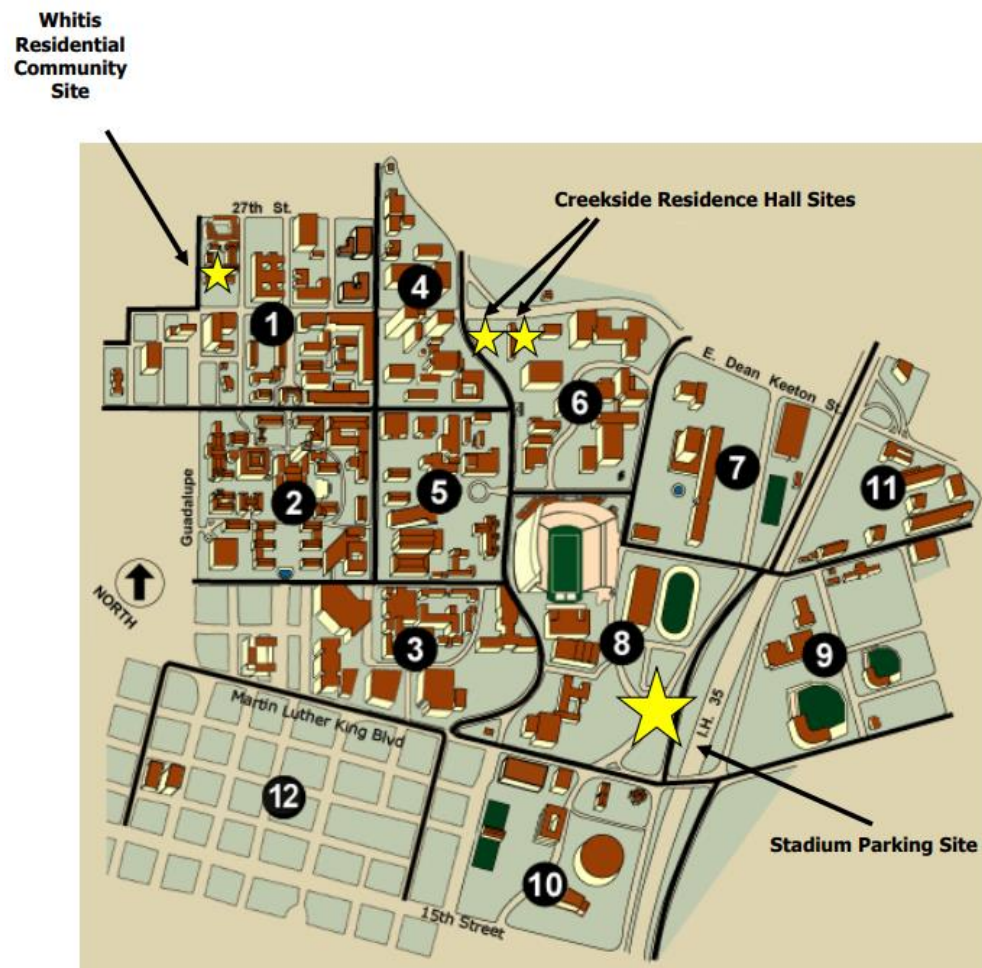
2012 Residence Hall Master Plan (UT Housing and Dining)

The 2012 Residence Hall Master Plan identified three locations for housing expansion. The bulk of new units (1,500-2,500 beds) were to be built at the current Moody Center site, with additional units at Creekside (500-1,000 beds) and Whitis Court (500 beds). Creekside and Whitis Court both require demolishing existing buildings, with capacities of approximately 200 students each. This plan sought to increase capacity by 2,100-3,600 beds, bringing to total capacity to 9,250-10,750.

This plan estimated new hall construction cost at \$100,000-\$150,000 per bed (\$112,000-\$169,000 in 2020 constant dollars).

Potential Residence Hall Sites

Residence Hall Master Plan August 2012



The University of Texas at Austin

Fig. 4.4, Potential Residence Hall Sites, internal document (2012)

2013 UT-Austin Master Plan (Sasaki and Associates)

The 2013 Sasaki Master Plan proposed a capacity target of 20% of the undergraduate population. The Sasaki sites account for a net gain of 2,457 beds. The Dedman and Medical District sites have been infilled with other projects, so this leaves 1,203 beds possible to capture from this plan.

Locations proposed in Housing and Dining's plan are preserved and augmented by three additional sites in Central Campus. This is in accordance with an overall plan to increase FAR ratios in Central Campus rather than Core Campus, which is already among the densest campus feels in America. Creekside and Dedman (the Moody Center site) both hold a significantly smaller number of students than in the 2012 Residence Hall Master Plan.



Fig. 4.5, Sasaki Plan proposed student housing map

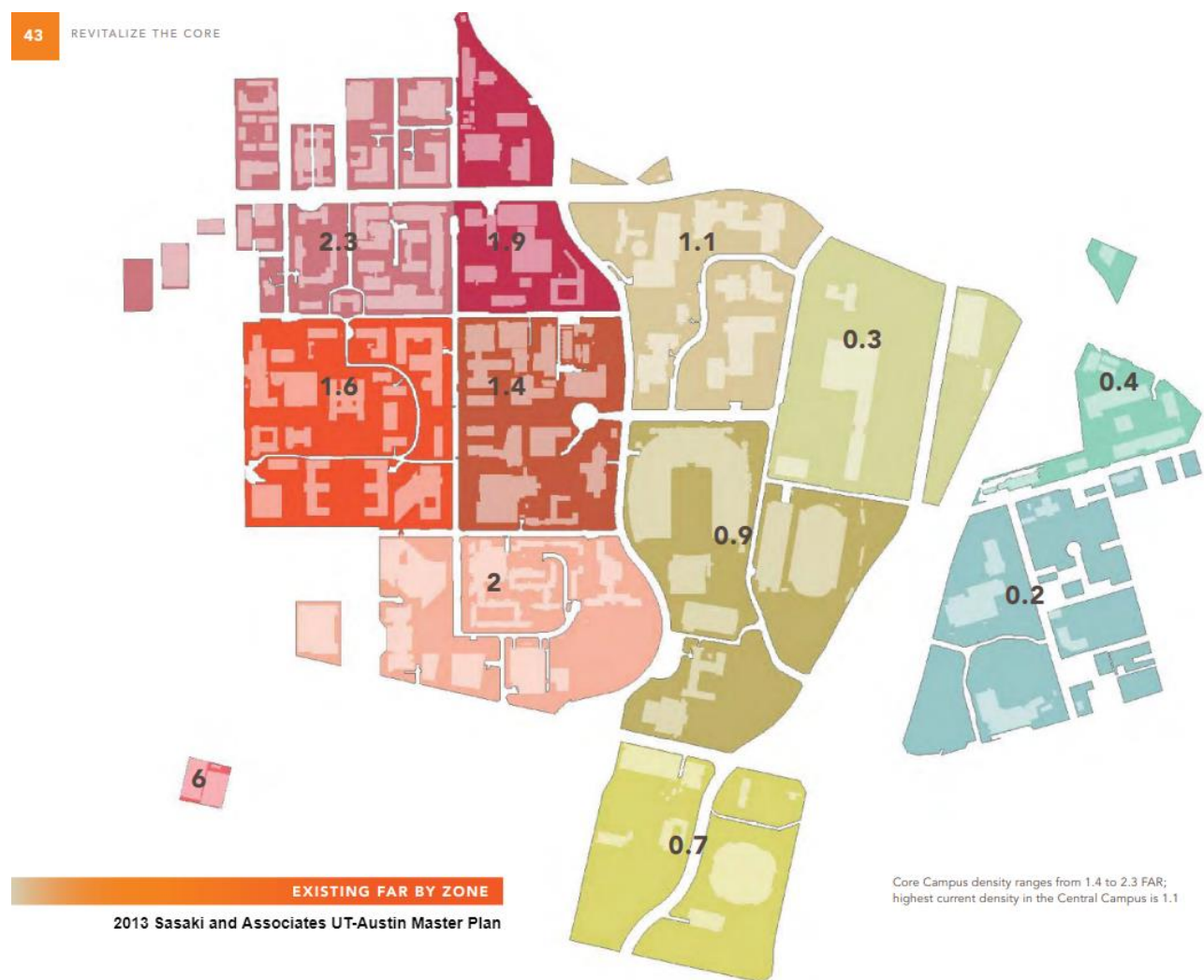


Fig. 4.6, Sasaki Plan Floor Area Ratio of campus map, by zone

2013 Residence Hall Needs Assessment (Barnes Gromatzky Kosarek Architects with Brailsford & Dunlavey)

This report was presented to the Division of Housing and Food Service in September 2013. Its charge was to “characterize on- and off-campus student housing, in alignment with campus initiatives, to enhance student development and improve four-year graduation rates.” (Preface) This is the most sophisticated document ever produced on the topic of student housing demand at UT. Dozens of high-level UT administrators including a steering committee provided input. It includes extensive market analysis and a demand analysis, both of which remain highly relevant today.

The Needs Assessment found an overall net demand for 4,620 on-campus beds at a high price point (total demand of 11,839), and for 4,882 (total demand of 12,101) at a low price point, suggesting a low degree of price-sensitivity. The Assessment recommended the University construct 3,900 beds: 2,000 dorm beds, and 1,900 apartment beds. This was presented as a prudent downward revision of the net demand. This was done because apartments were thought at the time to be the “riskiest asset class to develop” (p.66) since it would be in competition with amenity-rich units in West Campus. Changes in the market warrant an update of the assessment concerning the relative risk of UT developing apartments. The 3,900 figure is for undergraduates only.

This plan also delineates demand by class level. There was found to be a need for 1,200 Freshmen beds, attaining a capture rate to 76%. This was, at the time, the capture benchmark for total saturation without a first year live-on requirement. The other 800 non-apartment beds address upper-division demand. The 1,900 apartment beds also address upper-division demand. Therefore, defining a strategic end goal to house all freshmen meets only 30% of the Assessment’s already downwardly revised need.

As a primary measure of strategic utility in housing I believe these goalposts warrant a reset. Nowhere in UT’s longitudinal approach towards this issue is a 1,200 additional bed housing benchmark supported which is limited to the final objective of addressing the need for Freshman beds. Furthermore, the greatest academic benefits are attained from increasing the number of Sophomores living on campus¹.

This document provides no recommendations for potential location.

2015 Student Life Master Plan (Barnes Gromatzky Kosarek Architects with Sasaki Associates, Inc., and Project Cost Resources, Inc.)

Capacity and Location

This plan is UT’s most recent document which addresses student housing holistically. The leadership team for this plan consisted of top Student Affairs administrators. Eleven potential sites for student housing were considered, of which seven were deemed viable, and four were identified as the highest priority. The high priority sites were ordered as follows: 1) 2609 University Avenue (UA9), 2) Creekside, 3) Whitis Court, and 4) Clark Field. Architectural plans were generated. Living-learning conducive “pod” arrangements account for 85% of all units. Unlike the Sasaki Plan, these locations focus back towards Core Campus.

¹ See Topic #8: Defining Relationships Between Housing and Equity at UT-Austin

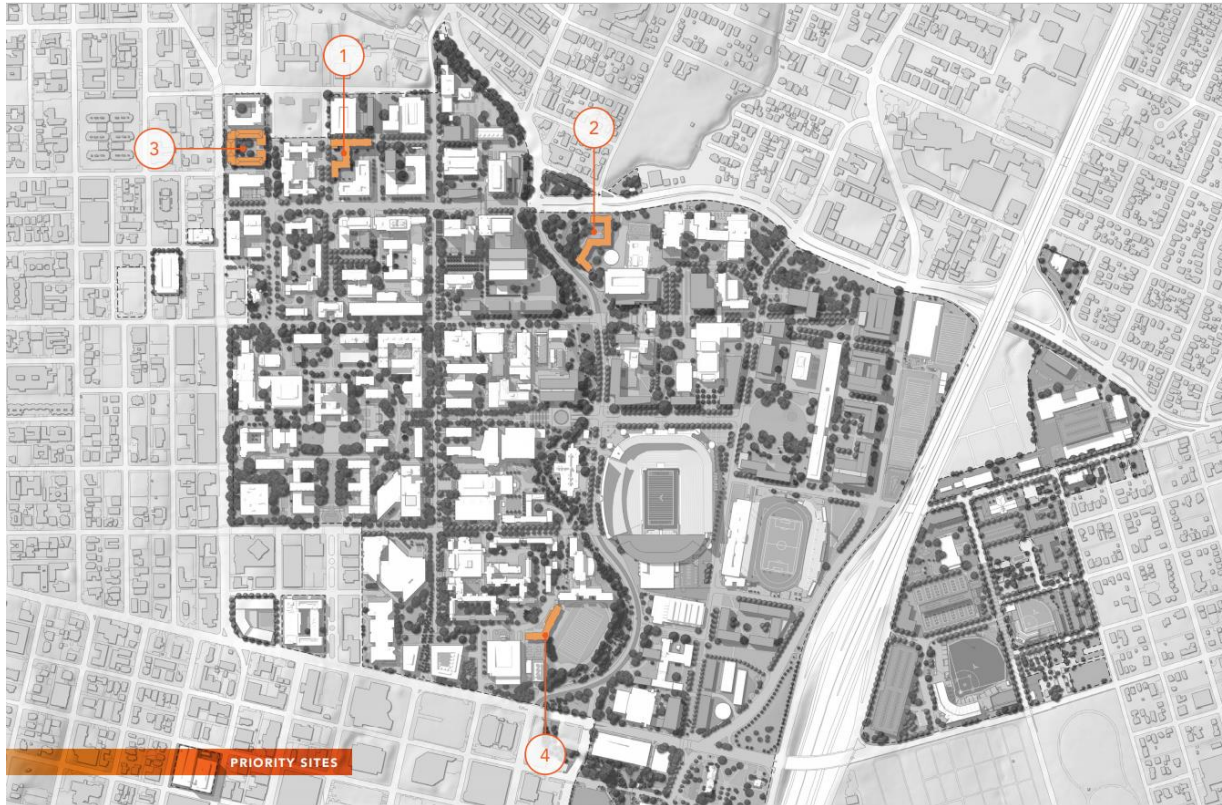


Fig. 4.7, Priority identified sites of the 2015 Student Life Master Plan

The plan identified UA9 as the first target of what was to be a phased operation. Developing UA9 takes no beds offline. The plan asserts the site is unsuitable for development as an academic building due to an underground utility tunnel. UA9 increases bed-count by 483.

Creekside in this plan was a 695-bed building, for a net increase of 493 beds. Plans for an optional 2nd building (“Creekside West”) on the other side of Waller Creek would increase capacity a further 243 beds.

Whitis Court was foreseen as a 525-bed project which would replace the current Living Learning Centers between Duren Hall and the Belo Center for New Media. This would generate a net gain of 316 beds.

The fourth prioritized location was overlooking Clark Field which would add 334 beds and is a repeat recommendation from the 1999 Master Plan. To build on this site would require coordination with an existing underground utility tunnel; however, this was not viewed as prohibitive.

The final capacity recommendation, which did not include Creekside West, totals an additional 1,626 beds, and due to phasing considerations represents a long-term strategy. This is a significant downward revision from the recommendations of the Residence Hall Needs Assessment, which itself includes its own downward revision from estimated demand.

KINSOLVING NEIGHBORHOOD POTENTIAL HOUSING SITES:

- 1 **WHITIS COURT:**
G+5 LEVELS, 400-500 BEDS
NET GAIN 191-291 BEDS
- 2 **KINSOLVING:**
3 LEVELS, 1,011 TOTAL BEDS
NET GAIN 240 BEDS
- 3 **UA9 (2609 UNIVERSITY AVE.):**
G+5 LEVELS, 400-500 TOTAL BEDS



FINAL DRAFT 09/01/2015

KINSOLVING NEIGHBORHOOD POTENTIAL HOUSING SITES:

- 1 **WHITIS COURT:**
G+5 LEVELS, 400-500 BEDS; NET GAIN 191-291 BEDS

BENEFITS:

- PROXIMITY TO EXISTING DINING FACILITIES
- PROXIMITY TO CORE CAMPUS

CONCLUSION:

- SITE VIABLE FOR HOUSING ✓

- 2 **KINSOLVING:**
3 LEVELS, 1,011 TOTAL BEDS; NET GAIN 291 BEDS

CHALLENGES:

- LOSS OF BEDS AND DINING HALL DURING CONSTRUCTION
- SUBSTANTIAL COST PER BED
- STRUCTURAL LIMITATIONS OF EXISTING RESIDENCE HALL

CONCLUSION:

- SITE NOT RECOMMENDED ✗

- 3 **UA9 (2609 UNIVERSITY AVE.):**
G+5 LEVELS, 400-500 TOTAL BEDS
STUDENT LIFE FUSION FACILITY

BENEFITS:

- PROXIMITY TO EXISTING DINING FACILITIES
- PROXIMITY TO CORE CAMPUS

CHALLENGES:

- DISPLACEMENT OF 2616 WICHITA ST. AND 2609 UNIVERSITY AVE.
- UNDERGROUND UTILITY TUNNELS ON SITE

CONCLUSION:

- SITE VIABLE FOR HOUSING ✓

Figs. 4.8 and 4.9, Determining Site Viability



Fig 4.10, 2609 University Avenue



Fig. 4.11, Whitis Court



Fig. 4.12, Creekside



Fig. 4.13, Clark Field

Neighborhood Structure

The Student Life Master Plan defines Student Life in terms of neighborhoods. There are currently only two neighborhoods: Jester, and Kinsolving. Creekside is well situated, but full buildout does not generate a bed-count sufficient to create a neighborhood. Dean Keeton was found to be a viable location for a future neighborhood, however no student life facilities currently exist in this part of campus.

The 2015 Plan recommendation for an additional 1,626 beds is a modest expansion which maintains the current two-neighborhood structure. After the proposed expansions of this plan, there is no additional expansion possible in those neighborhoods.



Fig. 4.14, Existing and Potential Campus Neighborhoods, 2015 Student Life Master Plan

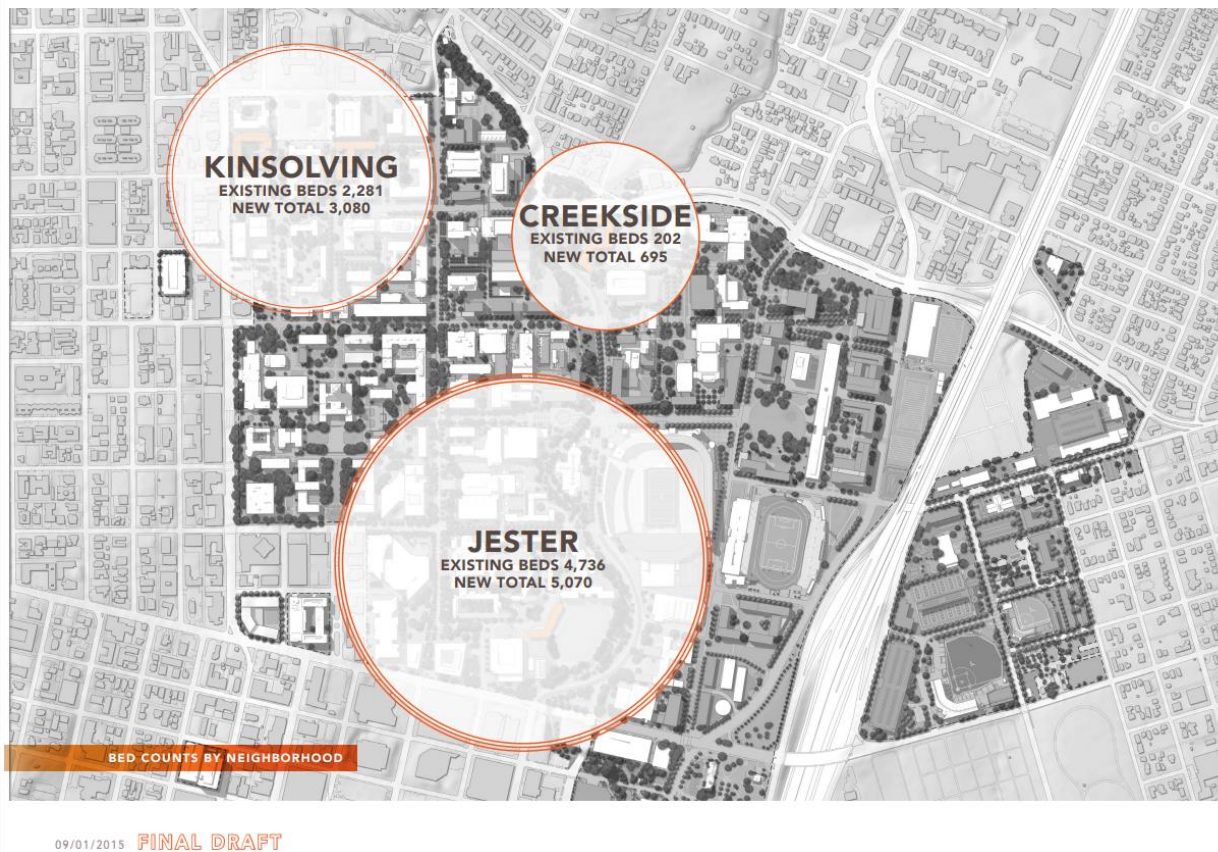


Fig. 4.15, Proposed capacity expansion in existing neighborhoods

The Dean Keeton Neighborhood has been identified by the University as the most suitable location to increase capacity beyond this threshold. The site has the potential to increase capacity in an integrated manner with student life facilities. The proposal for a Dean Keeton Neighborhood centers on the current site of the Thompson Conference Center. This neighborhood was not included among the main recommendations but was included in a test-fitting exercise for living-learning pods. A 1,280-bed model which renovates the existing Conference Center and a 1,400-bed model which demos the Conference Center were both found to be viable. Both models include a Fusion Facility which would include Rec Sports and supportive Student Life functions. The Littlefield Drive location found in the Sasaki Plan was not considered in this Master Plan.

DEAN KEETON
NEIGHBORHOOD
POTENTIAL HOUSING SITE:

DESIGN CONCEPT 1:
G+5 LEVELS, 1,280 TOTAL BEDS
CONF. CENTER (INCL. ACADEMICS &
DINING)
STUDENT LIFE FUSION FACILITY

DESIGN CONCEPT 2:
G+5 LEVELS, 1,400 TOTAL BEDS
STUDENT LIFE FUSION FACILITY



FINAL DRAFT 09/01/2015

Fig. 4.16, Two models for a new neighborhood at the Thompson Conference Center

My thesis operates outside the constraints of the multi-year planning processes which have consistently led to downward benchmark revision and delay. I seek to generate a model with an ability to meet the *actual* demand and to argue that UT already has all the needed background to green light a major expansion in real time. Elsewhere I will argue this expansion to be the most fiscally conservative route for the State long-term and a shrewd investment into addressing structural issues of affordability and access. Thus, committing to a Dean Keeton neighborhood is of special concern to break past the 1,626 ceiling in a meaningful way.

Topic #9: Recommendations for Comprehensive Housing Policy addresses this topic more fully. A stand-alone model and models including land acquisition to the north of Thompson are considered. The recommended finance mechanism for land acquisition is the Brackenridge Tract Fund, a “quasi-endowment” created by the Board of Regents in April 1990.² This is discussed in Topic #5: Finance and may also be applicable for land acquisitions related to future Medical School expansion. It is also suitable to tap the Permanent University Fund for the purpose of land acquisition.

² The Master Resolution Establishing the University of Texas System Revenue Financing System was adopted at this same meeting. I believe this is significant because it was determined in court in 1964 that the Brackenridge Tract is not a part of the PUF. This mechanism represents a culmination of decades of conversation about how the Board of Regents can best fulfill its fiduciary charge with the tract. Acquiring land adjacent to campus was found to be consistent with Colonel Brackenridge’s original desire for the Tract to provide a new main campus for UT. 226 pages of discussion concerning the Brackenridge tract are omitted from the September 1964 Board of Regents meeting minutes. An open records request yielded the response that Counsel was determining what could be provided and what would need to remain redacted.

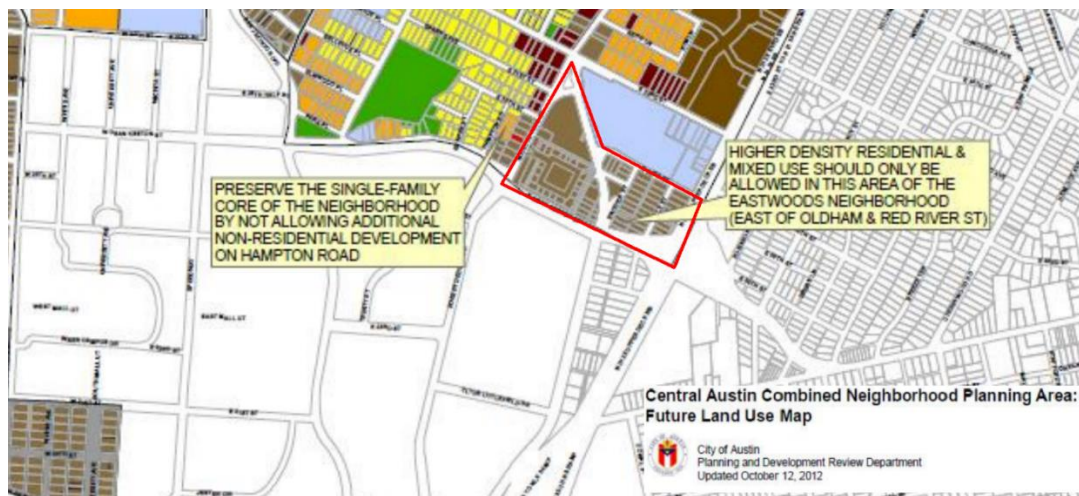
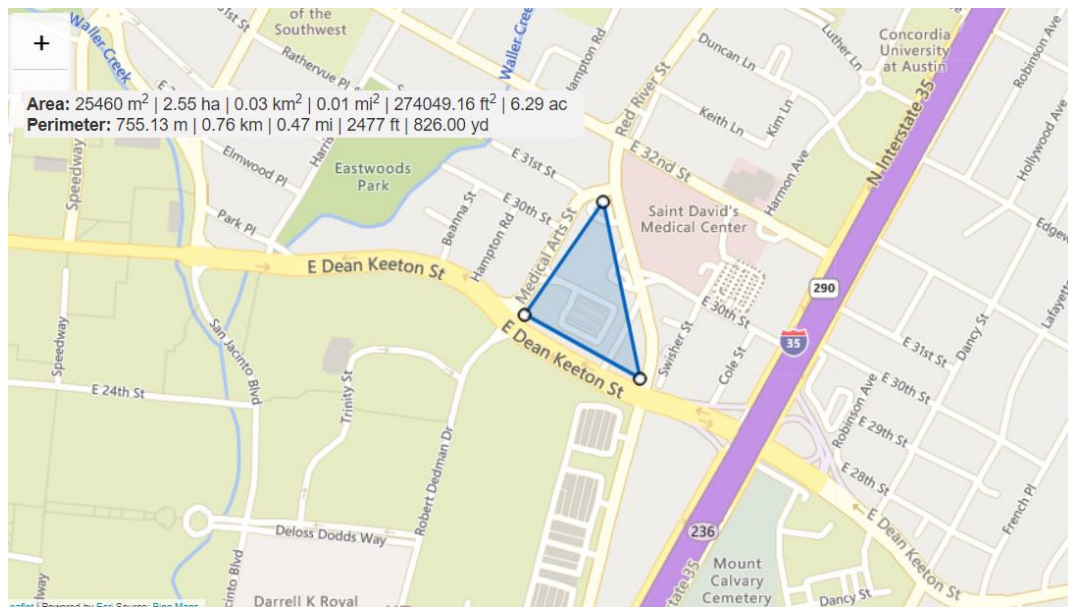


Fig. 4.17, Site proposed for land acquisition, Model A

Fig. 4.18, Site proposed for land acquisition, Model B

The creation of a new neighborhood at this location would need to include a parking garage to support students as well as offset the loss of parking adjacent to the Thompson Conference Center. Beyond that, I believe a major redevelopment should include not only housing and a student life center, but also a prestige project which may court private dollars and support a new student life neighborhood with a concentration of Fine Arts students. As an idea, I encourage UT to reach out to Sarah and Ernst Butler to see if they still have any interest in financing the UT Music Academy which appeared on the 2011 Capital Improvement Program but was never built. Topography at this site offers a unique opportunity architecturally and is much more adjacent to the music school than the site proposed in 2011.

The University of Texas System
FY 2012-2017 Capital Improvement Program
Individual Project Summary - Major Construction Projects

Name of Institution	The University of Texas at Austin		
Project Name	U. T. Academy of Music		
Management Type	OFPC Managed	Gross Square Feet	60,000
OFPC Project Number	102-624	Assignable Square Feet	0
Designer		BOR CIP Approval	02/18/2011
Constructor		Design Development Approval	05/17/2012
Category	BOR Approved - Not Started	THECB Approval	07/26/2012
Type of Project	New	Issue NTP - Construction	10/01/2012
Project Delivery Method	Design/Build	Achieve Substantial Completion	07/01/2013
Historically Significant	No	Achieve Final Completion	08/01/2013
		Achieve Operational Occupancy	08/15/2013

Source of Funds	Amount
Gifts	\$20,000,000
Total Project Cost	\$20,000,000

Project Description

The U. T. Academy of Music (Academy) will provide approximately 60,000 gross square feet of classroom, rehearsal, and performance facilities along with administrative and support space. The building will include a 300-seat concert hall that, when not in use by the Academy, would be available as a performance space for the Sarah and Ernest Butler School of Music. This facility will be located on property east of Interstate Highway 35 and will house all noncredit instruction as well as provide pedagogical training for graduate music students. The Academy will generate significant job opportunities for instructors for graduate students and provide quality noncredit musical instruction to children and adults in Greater Austin, a service to the community U. T. Austin is uniquely qualified to fill.

Project Justification

With its current enrollment of 250 students, the UT String Project provides approximately \$100,000 in financial aid to graduate students who teach in it, while the other programs provide another \$20,000 each year. With the availability of an adequate facility and the establishment of a comprehensive Academy of Music, it is projected that within five years more than 2,500 children and adults will be enrolled. The revenue from the proposed Academy is expected to increase financial aid for graduate students to more than \$1,000,000 per year. It is anticipated that approximately 90% of instructional funds and approximately 25% of administrative funds will go to graduate students in the Butler School of Music in the form of financial aid. Such an increase would be a major step in achieving the goal of fully funding all graduate students in the Butler School of Music.

The UT String Project, a pre-college program in the Butler School of Music, has for more than 60 years provided quality instruction on violin, viola, cello and double bass to children of Greater Austin. The String Project has provided invaluable pedagogical training and financial aid for UT music students for many years. In the past decade the Butler School has developed other small projects and programs patterned after the String Project, including a Guitar Project, a Piano Project and the Austin Live Music Academy (ALMA). The String Project currently has an enrollment of approximately 250 children and a waiting list of 700 due to the lack of available space in the music building. There are sufficient graduate students to double or triple the enrollment in the current non-credit programs. A number of new programs could be organized for very young children and for adults to address the expanding musical needs of the Greater Austin community.

Music Academy (ALMA). The String Project currently has an enrollment of approximately 250 children and a waiting list of 700 due to the lack of available space in the music building. There are sufficient graduate students to double or triple the enrollment in the current non-credit programs. A number of new programs could be organized for very young children and for adults to address the expanding musical needs of the Greater Austin community.

Fig. 4.19, Project summary for UT Music Academy, 2011 CIP

GRADUATE

2009 Brackenridge Report (Cooper, Robertson & Partners)

The Brackenridge Report exhaustively examined potential graduate housing locations to facilitate the sunseting of the Colorado and Brackenridge Apartments. Land acquisition was determined to be cost-prohibitive, so only locations on UT owned land were considered.

The report recommended redeveloping Gateway with 825 units, thereby replacing the total lost capacity (current capacity for the University Apartments is 715 units and a 1,119 bed-count). Other sites considered included Pickle, Mueller, the Intermural Fields and the Blacklands neighborhood, also referred to as East Campus.

The estimated cost of redeveloping Gateway was \$89.5 million (\$107.7m CY\$), however this assumes a 5.625% interest rate. The multi-generational symbiotic relationship between the graduate housing and Matthews Elementary was noted as a consideration to be preserved by this Report.

8.3. ALTERNATIVES ANALYSIS

The Collaborative Team identified and analyzed a variety of future scenarios, including a number of additional sites for consideration in those scenarios that relocate the graduate student housing off the Brackenridge Tract. The analysis for each of the sites was based on program assumptions and a set of planning criteria and goals described in the next page.

RELOCATION SCENARIOS

- 1 Maintain existing conditions of facilities.
- 2 Construct 200 apartments in the Brackenridge Complex to replace the Colorado Apartments.
- 3 Construct additional apartments on the Gateway Apartments site to replace the 200 units of Colorado Apartments and 315 units of Brackenridge Apartments.
- 4 Construct apartments on the Lions Golf Course portion of the Brackenridge Tract to replace the 200 units of Colorado Apartments and 315 units of Brackenridge Apartments.
- 5 Construct apartments in the Pickle Research Center to replace the 200 units of Colorado Apartments and 315 units of Brackenridge Apartments.
- 6 Construct replacement apartments in the Mueller Redevelopment Project site.
- 7 Construct replacement apartments on property adjacent to the Intermural Fields.
- 8 Construct replacement apartments on The University of Texas at Austin property of the Blacklands Neighborhood.
- 9 Renovate Simkins Hall Dormitory.
- 10 Construct replacement apartments within the West Campus Neighborhood.

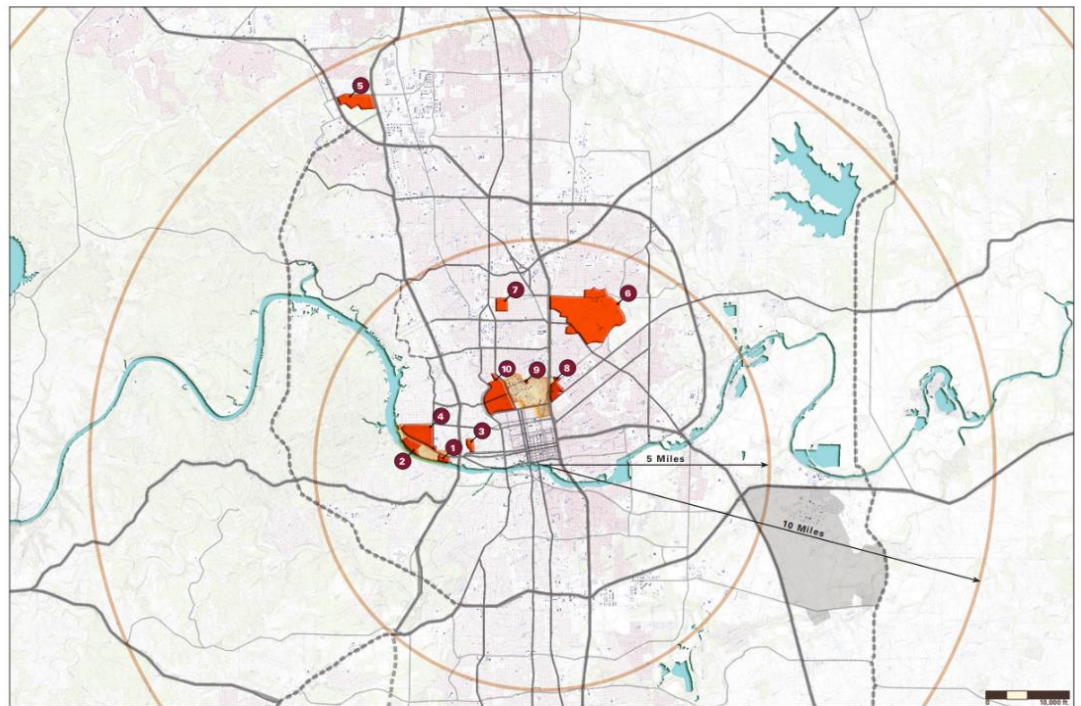


Fig. 4.20, Brackenridge Report analysis of alternate sites for graduate housing



Fig. 4.21, Location of Gateway relative to Brackenridge Tract. Highlighted area is Matthews Elementary District.

2015 East Campus Master Plan

This plan is meant to increase graduate capacity by 734 students. In the CIP, of 716 units only 18 were listed as two-bedroom units, with 160 one-bedroom units and 538 “micro units” (p. 28).

This plan was not designed to replace the capacity lost on the Lake Austin tract, which is primarily multi-bedroom units. Rather, micro studios were chosen to augment this capacity. The Graduate Student Housing Complex has been on the Capital Improvement Program with a \$89 million note for 6 years and has not yet broken ground. There have been protracted conversations with the neighborhood over this site, leading to an arrangement which calls for two-story units at street level, with four-story units farther from the neighborhood line. UT has included a promise to replace some student housing as a part of Lake Austin tract redevelopment, so I theorize that this site which is already on the docket to developed as student housing is being used as a bargaining chip.

Specifications of the Graduate Student Housing Complex business plan, which was signed off on in April 2017 and called for 95 micro-studios, 162 two bedrooms, and 81 four bed units to house 747+ students (Executive Summary).

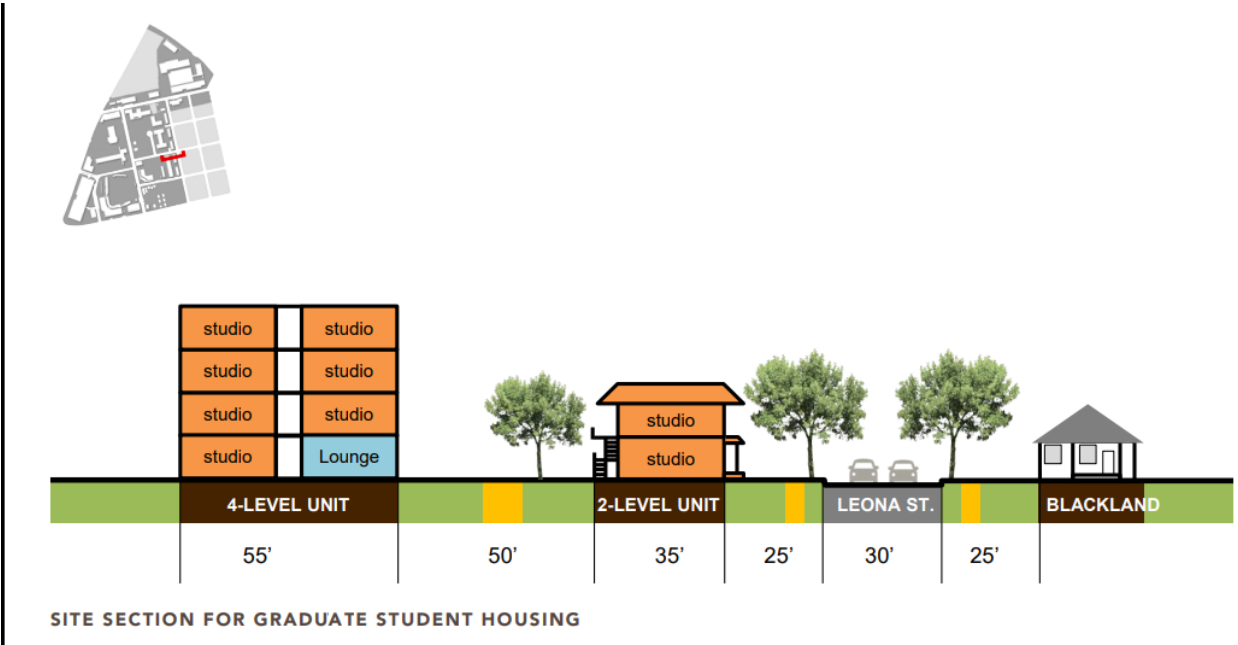


Figure 4.22, East side housing density compromise

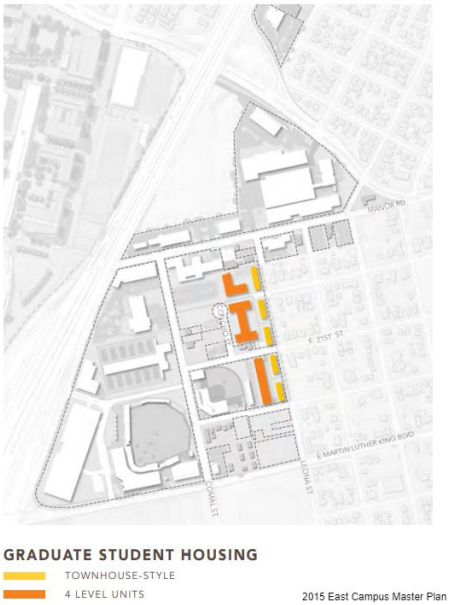


Fig. 4.23, Location of future graduate housing in East Campus, as proposed

KEY FINDINGS

- The institution consistently revises capacity benchmarks downward through the process of targeting location. These revisions are not a reflection of actual demand.
- The strategic goal of housing all freshmen as an endpoint for housing capacity can be said to represent the most significant downward revision of the organization's internal conversation. No master planning document examined reflects this view.
- Locations marked for housing expansion tend to instead be developed as prestige, revenue generation projects, or else to be delayed.

JESTER AND KINSOLVING

- Clark Field (334 beds) should be developed immediately.
- Whitis Court is cost prohibitive due to a net bed-count gain of only 316 for a 525 bed project. This site should only be considered as a phased solution much later down the line after debt ratios have renormalized. The Repair and Replacement Reserve should not be used to "buy down" the cost per bed of Whitis Court.
- Competition for the UA9 site (483 beds) should be determined. The unique value proposition of UA9 should be viewed in the context of its ability to generate bed count at 1/3rd the price of Whitis Court. UT-Austin has no viable path to achieving the full housing benchmark proposed in this thesis without at least one of UA9 or Whitis Court.
- There is no potential to increase the housing capacity of the Jester and Kinsolving neighborhoods beyond these sites. These sites, if all developed, add 1133 beds.
- This thesis' recommendation is Clark Field and UA9 only, which is +817 beds.

CREEKSIDE

- The Capacity for Creekside has been extremely variable across these plans. The current 1,200 capacity model (net +1,000) carries a note of \$155 million and has not been approved by the Board of Regents due to cost-overruns.
- Creekside could support a profitable dining operation, however there is no capability to generate a full student life neighborhood at this site.
- There is no viable path to meet full demand without redeveloping Creekside. Although there is an added expense associated with demolishing an existing facility, Creekside allows for a much higher capacity redevelopment than Whitis Court, meaning its net additional bed are generated at roughly 2/3rds of the cost.
- The 2015 Student Life Master Plan recommended a Creekside East (695 beds, net +493 beds) and Creekside West (+243 beds).
- Although discussed among administrators as a potential "Engineering Dorm", Creekside was not mentioned in either the 2009 or the 2016 Cockrell Engineering Master Plan.
- This thesis' recommendation for Creekside is that it be built to specs of the 2015 Student Life Master Plan, which is +736 beds.

DEAN KEETON

- No model meets 50% of demand without developing a Dean Keeton student life neighborhood.
- FAR ratios suggest future UT expansion will occur primarily in Central Campus.
- Developing at this site will not interfere with Medical District development.
- The 2015 Student Life Master Plan developed models for a Dean Keeton neighborhood with a plan for +1,280 beds at the site of the Thompson Conference Center.
- The existence of student life provides an obvious cornerstone for future densification.
- The LBJ Lawn should be the major greenspace of UT's densification of Central Campus.
- The East Mall should be designed to serve as a thoroughfare for bike traffic to connect a future densified Central Campus to Core Campus.
- The prospects of developing this site as a full neighborhood are greatly enhanced by acquiring land north and northeast of the Thompson Center.
- This neighborhood could support additional capacity as well as a prestige project if the University acquired this land. It would make sense to earmark apartments for the law school to ameliorate cost barriers for prospective students.
- The proposed housing and prestige project to be developed concurrently would be a Fine Arts dorm and the UT Academy of Music as proposed in the FY 2012-2017 Capital Improvement Program, or a similar idea.
- Brackenridge Trust Fund quasi-endowment should be explored as a mechanism to finance this land acquisition.

GRADUATE HOUSING

- Gateway is a suitable location to replace lost capacity from the Colorado and Brackenridge Apartments.
- Absent a larger model, redeveloping Gateway creates a phasing issue – either the demolition of the Lake Austin tract must be delayed or else there would be two years with no graduate capacity.
- The East Campus Graduate Housing Complex is needed to increase rather than replace capacity and is not a workable replacement or bridge solution for the Lake Austin apartments. Additionally, the micro studio units proposed for this site would displace the family graduate students and break the connection with Matthews Elementary.
- The recommended approach is for the University to acquire the HealthSouth location either as a Public-Private Partnership or through a direct deal with the City of Austin.
- HealthSouth would supply the needed multi-bedroom units, create a bridge solution allowing for the redevelopment of Gateway with no phasing issues, and preserve the link with Matthews Elementary. After Gateway's redevelopment, this location would be transitioned into medical student and first-year faculty housing.
- HealthSouth should include a child-care center to serve as a recruitment tool.

II. COST PROJECTIONS

UA9				
BUILDING AREA (GSF)	CONSTRUCTION COST /SF	ESTIMATED TOTAL CONSTRUCTION COST	BEDS	CONSTRUCTION COST/ BED
161,000	\$281.83	\$45,373,929	483	\$93,942
TOTAL COST MULTIPLIER 1.54		ESTIMATED PROJECT COST TOTAL	\$69,875,850	
CREEKSIDE (EAST)				
BUILDING AREA (GSF)	CONSTRUCTION COST /SF	ESTIMATED TOTAL CONSTRUCTION COST	BEDS	CONSTRUCTION COST/ BED
183,000	\$278.47	\$50,959,376	695	\$73,323
TOTAL COST MULTIPLIER 1.54		ESTIMATED PROJECT COST TOTAL	\$78,477,439	
CREEKSIDE (WEST)				
BUILDING AREA (GSF)	CONSTRUCTION COST /SF	ESTIMATED TOTAL CONSTRUCTION COST	BEDS	CONSTRUCTION COST/ BED
65,000	\$294.28	\$19,128,505	243	\$78,718
TOTAL COST MULTIPLIER 1.54		ESTIMATED PROJECT COST TOTAL	\$29,457,897	
WHITIS COURT				
BUILDING AREA (GSF)	CONSTRUCTION COST /SF	ESTIMATED TOTAL CONSTRUCTION COST	BEDS	CONSTRUCTION COST/ BED
184,000	\$286.40	\$52,698,073	525	\$100,377
TOTAL COST MULTIPLIER 1.54		ESTIMATED PROJECT COST TOTAL	\$81,155,032	
CLARK FIELD				
BUILDING AREA (GSF)	CONSTRUCTION COST /SF	ESTIMATED TOTAL CONSTRUCTION COST	BEDS	CONSTRUCTION COST/ BED
102,150	\$274.68	\$28,058,853	334	\$84,009
TOTAL COST MULTIPLIER 1.54		ESTIMATED PROJECT COST TOTAL	\$43,210,633	

Fig. 4.24, 2015 Student Life Master Plan cost per bed projections

Once viable locations are identified, the price has got to be right. But what is the right price?³ The 2015 Student Life Master Plan provides professional cost analysis of potential sites. After adjusting for inflation, I analyzed these sites both in terms of number of beds, and in terms of the net gain in beds. Due to the loss of existing inventory, Whitis Court was an outlier, requiring \$279,985 per bed. A model which reaches full capacity is possible without Whitis Court, so it is considered primarily as a contingency.

When Whitis Court is excluded, UT pays \$159,093 per net additional bed. This generates 1,543 beds from Creekside, Clark Field and UA9. If UT also develops Whitis Court, the cost jumps to \$179,643 per bed, however the bed-count is increased by 1,859 rather than 1,543. The 1,543 plus 1,280 at Thompson yields +2,823 new beds. I advocate for a buildout north of Dean Keeton in support of Thompson to best create a fully realized student life neighborhood. This is important for UT strategically long term and would be an appropriate use of eminent domain. This is also a prime spot for housing for law students; perhaps there is room for another 500-1,000 beds. Densification with an eye towards equitable affordability at this location should be agreeable to City Council, who can work with the University elsewhere in the broader negotiations over the Brackenridge Tract.

³ As discussed in Topic #3, due to scalability in the Housing and Dining budget I hypothesize that determining an appropriate price is less a question of whether these projects break even and more about protecting a newly generated revenue stream.

TOPIC #5: FINANCE

Pre-Revenue Financing System era (Pre-1986)

The history of higher education finance in Texas is in many ways the history of the Permanent University Fund (PUF). For uninitiated readers, the PUF is the endowment funded by oil money. Colonel Brackenridge gifted UT land in West Texas near the turn of the century which became worth a fortune when oil was discovered in 1923.

The UT-System was officially conceived in 1967 and expanded through the 1970s as a way of protecting the PUF for UT-Austin from State Legislators who might otherwise covet this money for colleges in their locales (Bay, p. 182). A powerful Regent, Frank Erwin, was the major player in this task until his death in 1980 (p. 183).

With Proposition 2 in November 1984, Texas voters amended the state constitution to finally allow interest from the PUF to be shared between component institutions of the UT-System. These funds could be used for land acquisition, building construction, major repair, capital equipment acquisition, library support, or for refunding previous bonds. They could not be used for student housing, athletics, or auxiliary enterprises. These types of projects were expected to finance their own bond obligations with the revenues they generated. Prior to 1986, Revenue Bond issuances were managed at the institutional level, however the state was transitioning to management at the system level. In 1986, one year after the inaugural Capital Improvement Program (CIP), the Board established the General Revenue Financing program, standardizing non-PUF finance systemwide.¹



Fig. 5.1, Odessa American, November 8, 1984 "PUF to put cash in local projects"

¹ Board of Regents Meeting 841, p.36 (June 1989)

Prior to the General Revenue Financing program, bond terms for student housing were highly variable. In the case of UT-Austin, married graduate student housing was funded across three separate bond issuances, in 1965, 1971, and 1981. The Colorado Apartments (1965) were funded on a 40-year term at a 3.5% interest rate guaranteed as part of a federal program.² Gateway (1971) was bonded for on a 30-year term at 6.6% but took advantage of a federal HUD program to have an effective interest rate of 3%.² The Brackenridge bonds (1981) were issued on a 30-year term at 11.1%.² In 1986, The Board of Regents consolidated all outstanding bonds by issuing \$222 million in “General Revenue Refunding Bonds” and henceforth disallowed the practice of bond issuance at the institutional level.² This wide variance in terms is emblematic of the student housing finance scheme for all UT-System component institutions prior to 1990.

The RFS bond era (1990 – present)

The original 1985 Capital Improvement Program was limited to PUF funded projects. By 1989, Revenue Bond funded projects began to be accounted for on the same document. Then, in April 1990, The Board of Regents adopted a Master Resolution establishing The University of Texas System Revenue Financing System and providing guidelines.

**BOARD OF REGENTS GUIDELINES GOVERNING ADMINISTRATION OF THE
UNIVERSITY OF TEXAS SYSTEM REVENUE FINANCING SYSTEM**

The purpose of the Revenue Financing System is to provide a System-wide financing program with which to finance capital improvement projects using debt secured by resources other than the Permanent University Fund. The guiding principle underlying administration of the Revenue Financing System is that allocations of debt proceeds shall be contingent upon a Board determination that a component institution can prudently meet its proportionate share of debt service with its own financial resources. All decisions including Board actions shall be premised upon the observation of this principle.

Fig. 5.2, Guidelines Governing Administration of the University of Texas System Revenue Financing System, Board of Regents Meeting 847, April 1990

As a part of the guidelines, the Board defined the protocol for the inclusion of individual projects. Institutions are required to submit a financing evaluation to the Office of Asset

² The bond issuances and debt consolidation can be found in Board of Regents Meeting Minutes, Meeting 635, p.3 (July 1965), Meeting 692, p. 3 (July 1971), Meeting 777, p.5 (May 1981), and Meeting 820, p.20 and p. 37 (August 1986).

Management (OAM) at UT-System. The OAM then concludes whether the “individual component institution proposing the project may prudently service its proportionate share of debt with its own financial resources,” and provides a recommendation (p.40).

The financing evaluation is handled on a shared basis between the institution, the OAM, and the Office of Business Affairs. The institution is required to include the following:

- a. Three levels of debt capacity & repayment analysis:
 - project level
 - component level
 - System level; with emphasis on maintaining or improving the current debt rating.
 - b. Financial Statement analysis:
 - 5 year history
 - trend analysis
 - evaluation of basis for projections.
 - 5 year projections
 - verification of assumptions
 - risk adjustment of revenues
 - c. Sensitivity Analysis:
 - worst, probable and best cases
 - d. Application of tests:
 - debt service coverage
 - leverage
- The Board shall determine the sequence of funding and the terms of Revenue Financing System debt issues.

Fig 5.3, Financing evaluation requirements of the OAM for capital projects

Typically, this means individual projects must surpass the given threshold of debt service coverage at all three levels to be greenlit (project, component, and System). As a practical matter, proposals which do not meet the OAM’s thresholds do not advance.

We again consider the guiding principle of RFS bonds: “Debt proceeds shall be contingent upon a Board determination that a component institution can prudently meet its proportionate share of debt service with its own financial resources.”

This thesis has defined student housing as a profit generator for UT-Austin. Although revenues increase linearly, the new construction of on-campus housing is the combustion engine which generates profit margin. Therefore, managing the debt ratio is best relegated as a secondary concern, rather than impede an overall expansion strategy which yields the greatest equity, capacity, and profit.

The Revenue Financing System was created in the first place to give the Board additional flexibility, not constraints.

A review of the historical debt-service ratio within the Housing and Dining budget illuminates what this means for the current situation at UT-Austin:

FY	EXCESS INCOME PRE DEBT SERVICE	DEBT SERVICE		DS as % of Est. Income	INCOME POST DEBT SERVICE	REALIZED SCALABILITY
	EIOBE P-D-S as % of est income	Debt Service	Debt Service (CYS)		Income after debt service	Income after debt service as % of revenue
95-96	7.0%	1,474,846	\$2,507,120	5.7%	\$348,332	1.3%
96-97	6.9%	1,474,846	\$2,436,991	5.4%	\$404,657	1.5%
97-98	5.3%	1,475,278	\$2,384,654	4.8%	\$168,518	0.5%
98-99	6.3%	1,471,095	\$2,340,056	4.9%	\$405,723	1.4%
99-00	6.3%	1,382,937	\$2,151,103	4.2%	\$708,230	2.1%
00-01	15.2%	5,903,924	\$8,880,446	14.5%	\$281,234	0.7%
01-02	16.1%	5,581,093	\$8,172,562	12.0%	\$1,908,423	4.1%
02-03	15.9%	5,832,983	\$8,390,163	12.2%	\$1,748,162	3.7%
03-04	12.8%	5,806,995	\$8,176,307	11.8%	\$475,152	1.0%
04-05	13.5%	5,320,565	\$7,297,687	10.5%	\$1,505,602	3.0%
05-06	13.4%	5,650,363	\$7,477,747	10.8%	\$1,375,087	2.6%
06-07	11.9%	5,040,385	\$6,425,130	8.7%	\$1,844,742	3.2%
07-08	20.0%	6,886,843	\$8,609,242	10.6%	\$6,084,572	9.4%
08-09	19.8%	6,883,055	\$8,165,850	10.0%	\$6,773,093	9.8%
09-10	20.3%	6,881,138	\$8,286,610	9.9%	\$7,240,655	10.4%
10-11	21.3%	6,883,363	\$8,195,194	9.4%	\$8,672,177	11.9%
11-12	22.3%	6,857,043	\$7,867,154	9.1%	\$9,902,099	13.1%
12-13	21.5%	6,854,754	\$7,733,671	8.9%	\$9,717,212	12.6%
13-14	22.2%	6,857,843	\$7,621,395	8.4%	\$11,157,595	13.7%
14-15	22.6%	6,855,519	\$7,491,505	8.2%	\$12,007,367	14.4%
15-16	19.9%	6,686,306	\$7,292,353	7.6%	\$10,787,967	12.3%
16-17	21.7%	7,213,607	\$7,784,708	7.8%	\$12,781,667	13.9%
17-18	24.6%	6,640,906	\$7,030,395	6.9%	\$17,097,459	17.7%
18-19	28.1%	6,681,180	\$6,887,094	6.6%	\$21,978,282	21.6%
19-20	26.9%	6,602,412	\$6,688,904	5.6%	\$24,982,556	21.3%

Fig. 5.4, Debt related metrics from Housing and Dining Budget, 1995-2019

In this chart, the highlighted years are those in which the University expanded its on-campus housing.³ San Jacinto was built in 2000, Duren Hall in 2007, and 2400 Nueces was purchased in 2019. Debt payments associated with 2400 Nueces began in FY 2019-2020.

As of FY 2019-20, the debt service as a percentage of the estimated incomes was 5.6%. This is the lowest ratio in 20 years. The Excess Income pre debt service stands at 26.9%: The differential between the income and the debt service has been over 21% the past two fiscal years. This represents the highest margin in at least 25 years. The revenue stream produced from this budget has steadily increased and in FY 19-20 generated nearly \$25 million. UT-Austin is well positioned to take on additional bond debt. Institutional fundamentals, as well as the national interest rate and inflation environment, suggest if ever there was a time to act, that time is now.

Part of this increase in profit is due to fundamental scalability in the Housing and Dining budget.⁴ As overall capacity goes up, Salaries, Wages, and Fringe Benefits becomes a significantly smaller portion of the revenues. Long-term, scaling Housing and Dining is a moneymaker, irrespective of periodic jumps in the debt service. Housing and Dining is now a \$117m budget, whereas before San Jacinto was built it was a \$51m budget (in constant dollars). This means on a strictly nominal basis, the budget has over twice the ability to absorb debt into its debt ratio, simply due to the growth of the budget. Scalability bonuses as evidenced by

³ The orange highlighted square is modified to better reflect long-term trends. See footnote 2, Topic #2.

⁴ See: Topic #2: The Housing and Dining Budget, 1995-2020

superior returns pre-debt service suggest an even greater capacity to take on debt, particularly when market rate units are generated.

The Board of Regents may determine it is acceptable to increase the debt load, but still wish to remain within certain debt capacity boundaries. If this is the case, there is still one other potential major funding mechanism (besides fundraising): The Brackenridge Tract Fund.

THE BRACKENRIDGE TRACT FUND

U. T. Austin - Brackenridge Tract: Establishment of the Brackenridge Tract Fund; Authorization to Purchase Real Property Located at 2504 Lake Austin Boulevard, Austin, Travis County, Texas; and Approval to Transfer Brackenridge Tract Funds to Purchase Additional Real Estate (Exec. Com. Letter 90-13).--Upon recommendation of the Executive Committee, the Board:

- a. Established the Brackenridge Tract Fund as a quasi-endowment at The University of Texas at Austin by transferring an initial amount of \$110,000 from the current Brackenridge Tract income account.

This quasi-endowment fund will be used to acquire parcels of land within the bounds or adjacent to University-owned land which will increase the overall value of the Brackenridge Tract while generating a prudent investment return for U. T. Austin.

- b. Authorized the purchase of real property located at 2504 Lake Austin Boulevard, Austin, Travis County, Texas, for \$104,750, plus closing costs.

The acquisition of this property will be the initial investment for the Brackenridge Tract Fund.

- c. Authorized the transfer of other Brackenridge Tract funds as necessary to purchase additional real estate within the Brackenridge Tract upon the recommendation of President Cunningham and approval by the Executive Vice Chancellor for Academic Affairs, the Executive Vice Chancellor for Asset Management, and the Executive Director for Lands and Endowment Real Estate.

BoR Meeting 847, April 1990

Establishment of the Brackenridge Tract Fund, Board of Regents Meeting, April 1990

In April 1964, just as UT-System was coming together, the final legal determination was made that the Brackenridge Tract is not a part of the PUF⁵. The Board of Regent's fiduciary duty regarding the tract and the use of its proceeds exists wholly outside the paradigm of acceptable uses for PUF and RFS bonds. Brackenridge Tract proceeds in a sense can do it all; it is wholly up to the Board of Regents. The Board discussed the Brackenridge Tract for a half day in September 1964, but those meeting minutes were omitted from the record.

I believe it is no accident that in 1990 the Board codified a new funding mechanism for the tract at the same meeting that the Revenue Financing System was created. This also follows a multi-year negotiation process with the City of Austin resulting in the 1988 Brackenridge Development Agreement.

In the past, the Board of Regents has considered that Colonel Brackenridge originally meant the tract to serve as a new main campus for UT-Austin. Once this possibility was no longer feasible, it was then reasoned that land acquisition near main campus would be an appropriate interpretation of the Board's fiduciary duty. Policymakers may wish to determine if this would be an appropriate Fund to tap for the purchase of the HealthSouth site, where Lake Austin tract graduate housing might be relocated. It may also be the right tool for purchase of land north of the Thompson Conference Center, or to support further expansion of the Medical School.

It is unclear if a knowledge base currently exists on using the Brackenridge Tract Fund as a mechanism to funnel proceeds from developing the Lake Austin tract for land acquisition. The possibility of using this revenue stream for land acquisition provides the Board with additional flexibility in UT's master planning. It also frames conversations of eminent domain in a different light given that the fiduciary duty of the state has already been established for this purpose, provided the land at issue is adjacent to main campus.

My top recommendation for the Lake Austin tract is an oft repeated sentiment that the tract never be sold; rather it should be held in perpetuity and leased for as large a revenue stream as possible. To parlay revenues from the tract towards housing would create a second large revenue which also addresses the core issues of access, affordability, and student debt.

⁵ April 30, 1964 in 126th District Court of Travis County.

II. EQUITY

6. EQUITY POLICY AT UT-AUSTIN, 1996-2009

7. EQUITY POLICY AT UT-AUSTIN, 2010-2020

EXECUTIVE SUMMARY

This thesis originally germinated on the topic of housing without any consideration to a potential relationship with equity policy at UT-Austin. As my research progressed, I began to search for potentially catalytic rationales, people, and conversations across UT to increase the likelihood of the university's serious consideration of my housing recommendations. This in turn led me to a deeper examination of equity, a theme which has been at the forefront of ongoing quasi-negotiatory organizational conversations since summer 2020. In this section, I examine equity in formal, legalistic terms, relying on both 1st and 14th Amendment rationales as expressed in landmark Supreme Court affirmative action cases.

I argue that the expansion of on-campus housing as presented by this thesis qualifies as a race neutral method which obtains *the educational benefits that flow from a diverse student body*. This is a triggering event for the consideration of this plan as a workable alternative to the more direct uses of race currently employed by the University.

This past year's conversation on race at UT has required a tremendous amount of stakeholder bandwidth yet has yielded a still murky path forward. In the public sphere, *equity* and *diversity* are currently politically charged buzzwords more likely to conjure the image of an argument between opposing factions than to express the academic ideals of *speculation, experimentation, and creation*.

*

Equity policy at UT-Austin has been highly responsive to affirmative action litigation. This includes the familiar litigation where UT-Austin has been party as a defendant – *Hopwood*, *Fisher I*, *Fisher II*, and now *Students for Fair Admissions* – as well as national landmark cases such *Grutter v. Bollinger* and *Gratz v. Bollinger*.

This section of the thesis tracks UT-Austin's responses to new legal regulatory environments by reviewing documents which were responsive to contemporary Supreme Court guidance on affirmative action.

Finally, this section provides background to help UT determine if it is out of compliance with current legal standards or engaging in discriminatory practices. Such an exacting exploration is appropriate in preparation for *Students for Fair Admissions*, which alleges that UT discriminates against Black students in admissions by operating a quota system. Should it be ruled by a court that discrimination is a current practice, this thesis offers a potential strategy to allow the University to save face and simultaneously remedy the situation.

TOPIC #6: EQUITY POLICY AT UT-AUSTIN, 1996-2009

Note: I am not a lawyer. This section was greatly improved by feedback from Paul Finkelman¹. I have made extensive use of pull-quotes because of potential relevance to a legal defense for *Students for Fair Admissions, Inc. v. UT et al.*, no. 1:20-cv-763 (w.d. tex.)

Key Dates:

June 28, 1978 – In *Regents of the University of California v. Bakke*, the U.S Supreme Court for the first time affirms the use of race-based affirmative action in university admissions.

March 18, 1996 – U.S. 5th Circuit Court of Appeals ends the affirmative action program at the University of Texas at Austin with the *Hopwood v. Texas* decision. *Hopwood* litigation continues through 2001.²

May 20, 1997 – Texas House Bill 588, a.k.a. the “Top 10% Rule” is signed into law by Governor George Bush.

December 4, 2000 – In *Smith v. University of Washington Law School*, U.S. 9th Circuit Court of Appeals splits from the 5th Circuit’s ruling on *Hopwood* in applying the *Bakke* standard.

October 2002 – President Larry Faulkner commissions the Report of the Task Force on Enrollment Strategy.

June 23, 2003 – *Grutter v. Bollinger* overturns *Hopwood v. Texas*; *Gratz v. Bollinger* rules on “narrow tailoring” for undergraduate admissions.

August 7, 2003 – UT Board of Regents adopts a resolution “authorizing each institution to develop and propose plans to consider race and ethnicity as part of the admissions process.”

November 13, 2003 – UT Austin submits “Proposal to Consider Race and Ethnicity in the Admission of Graduate Students, Law Students and Freshmen.”

December 2003 – Report of the Task Force on Enrollment Strategy

Fall 2007 – Division of Diversity and Community Engagement established.

Spring 2008 – Abigail Fisher denied admission to UT-Austin, sues school soon thereafter.

December 2009 – Report of the Second Task Force on Enrollment Strategy

¹ Paul Finkelman is a celebrated legal historian and President of Gratz College. He taught at UT from 1978-1984.

² <https://tarlton.law.utexas.edu/hopwood-v-texas/timeline>

Regents of the University of California v. Bakke (1978)

Bakke was the first landmark affirmative action decision. Allan Bakke, who was white, had been rejected by the admissions committee of the Cal-Davis Medical School. Cal-Davis operated a two-tracked admissions program with one track reserved for "'economically and/or educationally disadvantaged' applicants and members of a 'minority group' (blacks, Chicanos, Asians, American Indians)" (*Bakke*, p. 274). Four arguments were made regarding the legality of this program, within the framework of Equal Protection:

We have held that in "order to justify the use of a suspect classification, a **State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment'** of its purpose or the safeguarding of its interest."

The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,"; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. (p. 305-306, internal citations omitted, emphasis added)

There were six separate opinions and two separate majorities in *Bakke*³. Of the four arguments listed, only the final argument was determined to be a compelling state interest by a majority of the justices. Justice Powell, writing for the court, held the following:

While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, **petitioner's special admissions program**, which forecloses consideration to persons like respondent, **is unnecessary to the achievement of this compelling goal** and therefore invalid under the Equal Protection Clause (Justice Powell, p. 267).

In 2003, *Grutter* would be argued on the sole justification of the state's compelling interest in a diverse student body. In *Bakke*, a majority held that race may only be used in this setting if there does not exist an alternate means of achieving this compelling goal. By contrast, four judges in *Bakke* held that race could be used in a remedial setting, in accordance with argument (ii):

Racial classifications call for strict judicial scrutiny. Nonetheless, **the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race**. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions (Justices Brennan, White, Marshall, and Blackmun, p. 267).

³ Justice Powell who wrote the opinion of the court was the swing vote. Justice Powell joined Justices Brennan, White, Marshall and Blackmun on the right to use race; Justice Powell was joined by Justices Burger, Rehnquist, Stewart, and Stevens in rejecting all other arguments for affirmative action.

One of the more odious charges of the *Students for Fair Admissions* case is that UT has systematically discriminated against its black students in modern times, which would be a constitutional violation. Should this charge be sustained, it would be interesting if UT attempted to revive the logic of these four justices. The state could argue that a finding of contemporary discrimination is grounds for the state to take a more active role to secure minority representation in fields with substantial, chronic underrepresentation to vindicate past discrimination. If no race neutral alternative is available, this could potentially include alterations to admission standards. Such a determination must be made by a court, not the university's discretion, and would be subject to continued court oversight:

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. **In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.**

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.

After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, **the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.** Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality (Justice Powell, *Bakke*, p. 307-309).

1st Amendment Rationale for a Compelling Interest in Diversity in *Bakke*

In *Bakke*, the compelling interest in diversity in higher education is at its core justified on 1st Amendment grounds. I find this critical to *Bakke*'s potential application moving forward. I recommend any argument regarding the compelling interest in diversity be firmly rooted in the 1st Amendment with Equal Protection setting parameters.

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. **Academic freedom,**

though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

"It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy v. New Hampshire*.

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*.

"Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *United States v. Associated Press*

The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the "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.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency (Justice Powell, *Bakke*, p. 312-313, emphasis added, internal citations omitted).

I find the citation from *United States v. Associate Press* relevant to the question of if UT may have a system of holds in place to secure admission for the wealthy and well-connected. This may be considered the type of authoritative selection which dampens the *robust exchange of ideas*; there is no rationale here which backs admitting a percentage of well-connected students as adding to the *diversity* of the school by helping the university politically and financially.

On the other hand, the university declaring *diversity* to be part of its core mission does not in of itself give the university the right to expand and apply the meaning of that word however it sees fit, to the point where it is no longer related to the 1st Amendment.

How the current court may view *Bakke*

It is unpredictable how the current Court will incorporate the logic of *Bakke* into the *Students for Fair Admissions* case.⁴ *Bakke* suggests the meaning of “discrimination” is one which is not static. What was discrimination in 1978 may therefore not be applicable today.

The concept of “discrimination,” like the phrase “equal protection of the laws,” is susceptible of varying interpretations, for as Mr. Justice Holmes declared, “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us (Justice Powell, *Bakke*, p. 284, internal citations omitted).

Whittling down the rationale constituting the compelling interest in a diverse student body

Justice Alito homes in on this in his *Fisher II* dissent, questioning the contemporary validity of the original meanings justifying the state’s compelling interest in student body diversity. For example, given the progress on race since 1978 and given the changed demographics of UT’s student body, can it still hold that “promoting cross-racial understanding” or “ending stereotypes” are still valid rationales underpinning the compelling interest in diversity? The 1st Amendment rationale that the “nation’s future depends upon leaders trained through wide exposure” may be on firmer ground, however given UT’s now extremely diverse student body, it may be argued that this goal has been largely achieved (*Bakke*, p. 313).

Justice Alito has expressed the view that in the framework of the 14th Amendment there is a measurability requirement which accompanies any use of race so that a reviewing court may confirm the desired effect is connected to the race-based policies. The rationales which flow from the 1st Amendment are patently unmeasurable. “Cross-cultural understanding” does not lend itself to an empirical examination in the same way as, for example, comparing admissions rates, retention rates and GPAs among diverse categories of students. Such metrics better lend themselves to conversations geared towards determining *substantial, chronic minority underrepresentation* which may relate to contemporary discrimination. For this to come into play, it would be helpful for either party in the *Students for Fair Admissions* case to correctly identify and prove the root of the discrimination.

⁴ The characterization of the modern court as unpredictable comes courtesy Paul Finkelman.

From *Hopwood* to *Grutter* (1996 to 2003)

On March 18th, 1996, the 5th Circuit of Appeals ended affirmative action in Texas and two other states with the *Hopwood v. Texas* decision. This compelled UT-Austin to develop race-neutral admissions guidelines. On June 23, 2003, *Hopwood* was overruled by the Supreme Court in *Grutter v. Bollinger*. UT-Austin conducted its first major review of the post-*Hopwood* period with the December 2003 Report of the Task Force on Enrollment Strategy. This report outlined nine Guiding Principles for a long-term enrollment strategy. Guiding Principle #7 read “The University should be diverse in its students, faculty, and staff. Diversity includes such elements as ethnicity, gender, residency (Texas, U.S., foreign), and socioeconomic status” (p. 4). This is a marker of how UT defined *diversity* in 2003.

***Grutter v. Bollinger* (2003)**

In *Grutter*, Justice O’Connor, speaking for the Court held that the Equal Protection Clause “does not prohibit the [Michigan] law school’s **narrowly tailored** use of race in admissions decisions to **further a compelling interest in obtaining the educational benefits that flow from a diverse student body**” (p.307, emphasis added).

It is essential that UT present an exacting response in *Students for Fair Admission* regarding the meanings and boundaries of these terms of art.

“[The state’s] compelling interest in obtaining the educational benefits that flow from a diverse student body”

In *Grutter* the Opinion of the Court makes four references to the state’s compelling interest in obtaining “the educational benefits that flow from a diverse student body.”⁵

“Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining “the educational benefits that flow from a diverse student body.” Brief for Respondents ... In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity” (p. 327-328).

O’Connor continues that in cases since *Bakke* there has been some suggestion that “remediating past discrimination is the only permissible justification for race-based governmental action” (*Richmond v. J.A. Cronson Co.* “stating that unless classifications based on race are ‘strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility’”), but speaking here for the Court, O’Connor

⁵ p. 317, p. 328, p. 330, and p. 343. The exact phrase is slightly altered on p. 330, “the educational benefits that flow from student body diversity.” Justice O’Connor cites “the educational benefits of diversity” several times.

says “we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination” (*Grutter*, p.328, internal citation omitted).

O’Connor also cites the expertise of the military as noted in *Brief for Julius W. Becton, Jr. et al. as Amici Curiae* 27:

What is more, high-ranking retired officers and civilian leaders of the United States military assert that, [b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security” (p.331)

If the military is given deference, do what extent are public institutions of higher education given deference? For the first time, in *Grutter* the Court’s majority afforded deference to the university’s educational judgment that diversity was necessary to its educational mission. This determination was supported by the Court’s review of both the respondents and their *amici*. The court cited several cases that this ruling was “in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits” (p. 328). On this point, a University is “presumed” to be acting in “good faith” on this issue, absent a “showing to the contrary” (p. 329).

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition (p.329).

O’Connor further cites Justice Powell’s *Bakke* opinion as establishing that the *compelling interest in the educational benefits which flow from diversity* emanates from the 1st amendment.

“The freedom of a university to make its own judgments as to education includes the selection of its student body.” *Bakke, supra*, at 312. From this premise, Justice Powell reasoned that by claiming “the right to select those students who will contribute the most to the ‘robust exchange of ideas,’” a university ‘seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission” (p. 329).

One potential weakness to relying on these passages is if they are undifferentiated from the concept of *critical mass*⁶, which will be discussed in the next topic. A school’s “right to “select those students who will contribute the most to the ‘robust exchange of ideas”” (p.329) is not equivalent to asserting the school’s right to ensure a student has a critical mass of members of their own race in a classroom setting. These rationales as underpinnings to *a state’s compelling interest in diversity* must be differentiated. The workability of *critical mass* has already come under fire in Justice Alito’s *Fisher II* dissent.

⁶ *Critical mass* is mentioned throughout this topic and discussed more fully towards the end of the topic. UT defined *critical mass* in the 2003 Report of the Taskforce on Enrollment Strategy as “an adequate representation of minority students to assure educational benefits deriving from diversity,” which “benefits all students in that they learn that there is not “one” minority or majority view, but many.”

“Narrowly Tailored”

The Supreme Court has “held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny’” (*Grutter*, p. 326). This requires the school to keep records directly showing how specific use of race is relevant as a cure for discrimination, which may later be analyzed by a reviewing court. Under 14th Amendment rationale, the absence of record keeping presumes the school is at fault.

“Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. Lacking this capability, petitioner has not carried its burden of justification on this issue” (*Bakke*, p. 309-310, internal citations omitted).

Under the strict scrutiny standard, it is not enough to simply address a compelling governmental interest; policies must also be narrowly tailored.

“When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied” (*Grutter*, p. 327).

The *Grutter* decision precisely delineates the test for narrow tailoring later in the opinion:

“Petitioner and the United States argue that the Law School’s plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. **Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.** See *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (alternatives must serve the interest “‘about as well’”); *Richmond v. J. A. Croson Co.*, 488 U. S., at 509-510 (plurality opinion) (city had a “whole array of race-neutral” alternatives because changing requirements “would have [had] little detrimental effect on the city’s interests”). **Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks**” (p. 339, emphasis added).

Exploring a major expansion of on-campus housing as proposed by this thesis is offered as a potential defense designed to meet the narrow tailoring standard. Adoption would not be required, simply that the University engage in “serious, good faith consideration of” expanding housing as a “workable race-neutral alternative that will achieve the diversity the university seeks.” This diversity is ultimately defined not by race-balancing but by the 1st Amendment – the well accepted but immeasurable increase in the exchange of views and student engagement that has been the hallmark of the college experience since the days of the Enlightenment. Students who live on campus have more buy-in, or equity, than students who do not⁷. Ultimately, this strategy does not ask the University to choose between academic

⁷ See Topic #8: Defining Relationships between Housing and Equity at UT-Austin

excellence or a commitment to creating opportunities all racial groups: it does both. The university's enrollment expansion of the 1996-2003 period may also be viewed as an attempt to provide educational opportunities to members of all racial groups until the point further expansion became unworkable.

Under Equal Protection, the strict scrutiny standard triggered by race-based admissions and programming policies puts the burden of proof on the University regarding the extent to which these policies measurably enhance diversity. If UT points to, for example, better retention rates and GPAs among minorities, it has the additional burden of proving these benefits stem from the DDCE portfolio or the Student Success Initiative portfolio, and to what degree. Furthermore, the University would have the unenviable task of defending against any other theory put forth, for example that progress on these metrics is largely influenced by grade inflation, and not the DDCE or SSI portfolios.

I encourage the University to pursue a detailed review of these portfolios not only as preparation for pending litigation, but simply for determining their cost effectiveness. This thesis is presented in the marketplace of ideas as a cost-effective, workable alternative, should some current policies or programming be found non-workable under the 14th Amendment in future litigation.

UT Responds to *Grutter*: Report of the Task Force on Enrollment Strategy (2003)

Grutter v. Bollinger was decided in June 2003. Six weeks later, the UT Board of Regents adopted a resolution authorizing component institutions to develop and propose plans to consider race and ethnicity as part of the admissions process.

U. T. Board of Regents: Discussion and appropriate action regarding legal issues related to decision in University of Michigan affirmative action cases

Pursuant to discussion in Executive Session on August 6, 2003, and on behalf of The University of Texas System, Regent Estrada moved that:

- a. Each component institution be and is authorized to develop and propose plans regarding whether to consider an applicant's race and ethnicity as part of the component's admissions or financial assistance policies in accordance with the standards enunciated in the recent Supreme Court cases of *Grutter v. Bollinger* and *Gratz v. Bollinger*. Initial responsibility for developing and proposing such admissions and financial assistance policies may be further delegated within each component to colleges, departments, or other programs.
- b. No component or program shall propose to consider race or ethnicity unless it finds, after serious and good-faith consideration, that race-neutral alternatives are inadequate. This consideration may include the degree of diversity attainable with race-neutral methods and the impact on other academic objectives of exclusive reliance on those race-neutral methods.
- c. Any component or program that proposes to consider race or ethnicity shall propose a written plan. Any such plan must provide for individualized and holistic review of applicant files in which race and ethnicity are among a broader array of qualifications and characteristics considered. Any such plan must also provide for periodic review of whether, and to what extent, the plan is still needed or needs revisions.
- d. Any proposal for admissions or financial assistance policies that considers race and ethnicity among an array of qualifications and characteristics and any subsequent revisions to such policies, must be reviewed and approved by the Office of General Counsel and by the Executive Vice Chancellor for Academic Affairs or the Executive Vice Chancellor for Health Affairs, as appropriate, prior to implementation.
- e. The policy expressed herein shall be reviewed by the Board of Regents in a period not to exceed five years from the date of adoption hereof.

The motion was seconded and carried unanimously.

Fig 6.1, Board of Regents Meeting Minutes, August 6, 2003

In November 2003, UT-Austin responded to the Board's charge by submitting a "Proposal to Consider Race and Ethnicity in the Admission of Graduate Students, Law Students and Freshmen", and in December it submitted the Report of the Task Force on Enrollment Strategy. A significant portion of the Task Force Report, p.34-60, was the Proposal to Consider Race, included as an Appendix.

UT Responds: Proposal to Consider Race and Ethnicity in Admissions (2003)

The Task Force reviewed race-neutral graduate initiatives instituted since *Hopwood* in 1997. There were two such programs, the McNair Scholars Fellowship Program and the South Texas Graduate Fellowship Program. (p. 36)

The McNair Program “is a race-neutral program that assists low-income and first-generation undergraduate college students who wish to prepare for graduate school... [which] includes research opportunities, faculty mentors, opportunities to publish and/or present research findings, and preparation for the Graduate Record Examinations and graduate level coursework.” (p. 36-37) The program was initiated in 1999 for students who were already admitted to a graduate program at UT-Austin and at that time covered all tuition and fees for first year graduate students. (p. 37)

The South Texas Graduate Fellowship Program was instituted in Fall 2002, and the Task Force Report had two years of data on this program at the time of publication. It offered merit-based fellowships to incoming graduate students.

Table 1
McNair Fellowships

	1999		2000		2001		2002		2003	
	N	%	N	%	N	%	N	%	N	%
White	1	33.33			1	14.28	3	37.5	4	40
Native American			1	14.28						
African American	1	33.33	1	14.28	2	28.57	1	12.5	1	10
Asian American			2	28.57						
Hispanic	1	33.33	2	28.57	3	42.86	4	50	5	50
International					1	14.28				
Unknown			1	14.28						
Total	3	100	7	100	7	100	8	100	10	100

Table 2
South Texas Graduate Fellows

	2002		2003	
	N	%	N	%
White	9	45	5	25
Native American				
African American				
Asian American			1	5
Hispanic	11	55	14	70
International				
Unknown				
Total	20	100	20	

Fig. 6.2, McNair Fellowship recipients, by race, 1999-2003

Fig. 6.3, South Texas Graduate Fellowship recipients, by race, 2002-2003

In reference to these programs, the Task Force Report concluded the following:

“Despite efforts with race-neutral initiatives such as these, the Graduate School has not been successful in achieving appropriate levels of diversity. The data from the South Texas initiative offer one example. A third of the graduate students recruited through this program are white. No African American students have been recruited to the University under this race-neutral initiative. Moreover, this type of program is geographically constrained and not replicable in other parts of the state or nation.

Prior to the *Hopwood* decision, enrollment percentages for African Americans and Hispanics were marginal at best. Since that time, these percentages have decreased substantially and remain below the 1996 levels, demonstrating that the current race- neutral admission model has failed to yield a racially diverse student body or to achieve “critical mass.” Enrollment statistics for Fall, 2003, indicate total enrollment percentages of 0.3% for Native Americans, 2.2% for African Americans, and 8.1% for Hispanics; 1996 data indicate 0.3% enrollment for Native Americans, 3.6% for African Americans, and 8.5% for Hispanics.

Another way of looking at the student body profile is to examine the raw numbers of Native Americans, African Americans, and Hispanics enrolled in the colleges and schools at The University of Texas at Austin. These numbers are perhaps even more compelling than the aggregate percentages. Of the fifteen colleges and schools (including Law) fourteen have one or no Native Americans enrolled in either master’s or doctoral degree programs, seven have one or no African Americans enrolled in either master’s or doctoral degree programs, and three have one or no Hispanics enrolled in either master’s or doctoral degree programs” (p. 38-39).

To avoid basing the determination of *critical mass* on quota or race-balancing rationale, the Report benchmarks against pre-*Hopwood* levels, presumably because the level of diversity was found not to have been met at this time. To buttress the idea of *critical mass*, the report cites *Teamsters v. United States* (1977) to say many of UT’s graduate programs approach “the inexorable zero” in its graduate programs (p.41). The workability framework underpinning *the inexorable zero* may be distinct from what is argued here for *critical mass*.

In *Johnson v. Transportation Agency*, Justice Scalia rebuts the concept of *the inexorable zero*, although Scalia’s definition of discrimination requires a conclusive establishment of the unknowable intent of the offender rather than an examination of organizational processes. This seems to give deference to the employer concerning a question of Equal Protection, and does not seem like a workable framework to me:

Justice O'Connor would find a "firm basis" for the agency's belief that sex discrimination existed in the "inexorable zero": the complete absence, prior to Diane Joyce, of any women in the Agency's skilled positions. There are two problems with this: First, even positing a "firm basis" for the Agency's belief in prior discrimination, as I have discussed above, the plan was patently not *designed to remedy* that prior discrimination, but rather to establish a sexually representative workforce. **Second, even an absolute zero is not "inexorable." While it may inexorably provide "firm basis" for belief in the mind of an outside observer, it cannot conclusively establish such a belief on the employer's part, since he may be aware of the particular reasons that account for the zero.** (*Johnson v. Transportation Agency*, p. 665)

The question seems to be in what situations can government consider an inexorable zero to be *prima facie* evidence of the need to remedy past discrimination? To what extent can government take an active role, within the boundaries of the 14th Amendment, to remedy such a default situation? Four justices in *Bakke determined* “the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race” (Brennan, White, Marshall, and Blackmun, Holding 2). Is chronic underrepresentation in undergraduate or graduate programs at a flagship state university sufficiently substantial that the judicial branch may compel a remedy?

Yet another example that UT had not reached full integration in this period is the distribution of PhDs and EdDs Awarded to Blacks in the post-*Hopwood*, pre-*Grutter* period:

Table 5
PhDs and EdDs Awarded to African Americans, 1997-2002

College/School	Number	Percent
School of Architecture	0	0.0
McCombs School of Business	0	0.0
LBJ School of Public Affairs	0	0.0
School of Nursing	0	0.0
College of Fine Arts	1	1.1
School of Information	1	1.1
College of Pharmacy	1	1.1
School of Social Work	2	2.2
College of Natural Sciences	4	4.3
College of Engineering	6	6.5
College of Communication	9	9.7
College of Liberal Arts	19	20.4
College of Education	50	53.8
Total	93	

Source: Office of Graduate Studies

Fig. 6.4, PhDs and EdDs Awarded to African Americans at UT-Austin, 1997-2002

As evidenced here, over half of Black PhD and EdDs awarded were within the College of Education. 84% of Black doctoral degrees were awarded in just three of the thirteen colleges, and seven colleges had either zero or one Black student who achieved a PhD in these five years. This is found to be injurious to all students under the *Grutter* standard because of “a corresponding lack of opportunity for students in all disciplines to engage in learning in the context of diverse points of view, experiences, and values” (p. 41). The Report cites this as a campus culture issue as well:

Race-neutral admission policies have not only failed to increase racial diversity; they have also exacerbated the appearance that the University is largely closed to nonwhite applicants and does not provide a welcoming, supportive environment to underrepresented minority students. (p. 41)

At the undergraduate level, it cannot still be seriously claimed that UT gives the appearance that it is *largely closed to nonwhite applicants*, due to the rate at which UT has moved away from a predominantly white undergraduate student body. It may be claimed however that UT still gives the appearance it is largely closed to Black students, given the remarkable stability of Black enrollment. It would be appropriate to determine in most exacting detail why this is the case, with an analysis that encompasses all undergraduate, graduate, and professional schools, any of which may have decentralized admissions protocols down to the departmental level. As of late UT has still been at the forefront of a public debate that even today it does not provide a *welcoming, supportive environment* for black students.

“The inexorable zero”

The other issue raised is by this data set of Ph.D. and Ed.D. awards is the issue of “the inexorable zero”, or the fact that many of these majors have zero or one Black graduate across 5 years; this means UT has no way to “rebut the inference of discrimination” (*International Board of Teamsters v. United States*, p. 342). *De facto*, the departments are not racially integrated by this measure.

An allegation of a quota similarly claims that there is a default limiting factor at play. Admissions operations at the departmental level may be examined in addition to the overall admissions. Root causes need not be nefarious to be considered in this light. It may be that the computer science department has a certain preparedness requirement for math, and students from low socioeconomic areas do not have the opportunity to take the classes needed to meet the requirement. This could serve as a default for the exclusion of low socioeconomic students. This is one hypothetical, but this is a type of inquiry which may be imagined from any angle if chronic underrepresentation for a racial group is at issue:

Fine tuning of the statistics [do not] obscure the glaring absence of minority [employees].... [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero'"). See *Teamsters*, 431 U.S. 324, 342 n.23 (1977).

Redefining the role of critical mass in obtaining the benefits of diversity

An alternate paradigm to *critical mass* as defined in *Grutter* would be to measure the overall likelihood of encountering critical masses of multiple races in the classroom setting, rather than the likelihood of a minority inhabiting a classroom with other members of their own race. For example, a lone Black student in a classroom of 51 students is potentially more likely to experience spokespersonhood for their race if the other 50 students are all white, rather than if there was a hypothetical cohort of 10 students of each of five different races and the one Black student. It is also worth recognizing that the injury of spokespersonhood is one which decreases with the passage of time. It is certainly not as difficult to be the only member of one's race in a classroom at UT today as it was for Heman Sweatt.

Provided *the inexorable zero* is accounted for, redefining diversity on this basis would largely yield the conclusion that UT has already obtained the benefits of diversity, and the further consideration of race university-wide would be moot; however, because admittance into individual colleges is decentralized, it may be determined that UT still has work to do to obtain the benefits of diversity in individual colleges. The prestigious, high-wage major of computer science would make an interesting case example, given demographics of that major⁸. Hypothetically, the substantial, chronic underrepresentation of Blacks in computer science

⁸ This year, at the behest of student groups, the CS department created a webpage for diversity which contains demographic information for the department. <https://www.cs.utexas.edu/diversity>

could be reviewed concurrently with an overall examination of demographic in that department. The school could additionally choose to take an affirmative action to increase the number of domestic graduate students, which would have indirect racial implications.

Proposed Race-Conscious Admission Process for the School of Law

One particularly pointed charge of the *Students for Fair Admissions* case is that the University has engaged in a quota system for Black enrollment. I believe this is an attempt to be considered a *showing to the contrary* that the University is acting in *good faith*, and if successful is designed to strip UT of the deference it receives as an institutional promoter of the marketplace of ideas. I consider the possibility of strategic ingenuousness here. It may be the petitioners do not even believe this charge, rather they are trying to get the University to use the wrong arguments in defending. Or perhaps they believe it but have not been able to locate the wrongdoing, so they are making the charge without proper evidence in hopes of uncovering wrongdoing during discovery. I do not believe the facial finding that the University has admitted approximately 5% Black enrollment for many years running is sufficient evidence to make this charge. Nor do I believe the timeframe delineated by the plaintiffs is relevant.

The Task Force Report mentions data between 1983-1997 which may be of use to the University in considering how it may respond to this charge:

“The district court opinion in Hopwood, 999 F.Supp. 561 (W.D. Tex. 1994), reports enrollment data for African Americans and Mexican Americans back to 1983. We have similar data for the years since the opinion, providing enrollment data over fourteen years of affirmative action. Enrollment of these two groups fluctuated widely during these fourteen years. Despite aggressive efforts with race-neutral alternatives, for six of the seven race-neutral years (1997 to 2002), enrollment did not reach the lowest levels achieved in any of the fourteen affirmative-action years for either group. In 2003, the Law School re-entered that range. African American enrollment at 6% remains below the mean for the affirmative action years. Mexican American enrollment at 13.9% is, at least for 2003, near the high end of the range of the affirmative action years.” (p. 47)

Regarding race-neutral alternatives, the Report said the following:

Over the past seven years, the Law School has developed an array of alternatives that are formally race-neutral. The most important of these are the prelaw programs at University of Texas System components in El Paso, San Antonio, and the Rio Grande Valley, which help to strengthen the pool of minority applicants. These schools were selected because they serve regions of the state that produce few law students and few lawyers. However, the Law School has no similar program to serve African Americans because there is no similar race-neutral criterion to justify such a program in race-neutral terms. To create such a program that targets African Americans, we will have to consider race explicitly.

A second important part of the Law School's effort has been ever-more-intense recruiting of minority students. There is broad agreement that this should continue.

A third and critical feature of any race-neutral pursuit of diversity is the identification of proxies for minority status. In Texas, the most important such proxy has been geography. Preferring applicants from certain regions of the state increases the number of minority students, especially Mexican Americans. (p. 48)

This section goes into considerable detail and should be reviewed by the defense team for the *Students for Fair Admissions* case.

***Gratz v. Bollinger* (2003)**

The *Gratz v. Bollinger* decision was released the same day as *Grutter v. Bollinger* and concerned undergraduate admissions criteria. The criteria used by the University of Michigan were found to be unconstitutional on the basis that they were not narrowly tailored. The University of Michigan awarded admissions scoring based on race with no other consideration, and therefore it created a decisive factor for students at the cusp of admission.

“Because “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,” *Fullilove v. Klutznick*, 448 U. S. 448, 537 (1980) (STEVENS, J., dissenting), **our review of whether such requirements have been met must entail “a most searching examination.”** *Adarand, supra*, at 223 (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 273 (1986) (plurality opinion of Powell, J.)). We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program” (opinion of the court, p. 270).

Race in Freshman Admissions Policy Recommendations

The First Task Force on Enrollment also gave much consideration to freshman admission in the post-*Hopwood* era, including the effect of the Top 10% rule which guaranteed admission to UT-Austin for any high schooler graduating in the Top 10% of their class. Part of the Task Force’s charge was to determine the ideal size of the student body. This was at issue because the University student body had grown in response to the Top 10% rule. After a two-year lapse, nominal admissions for Blacks and Hispanics returned to pre-*Hopwood* levels in 1999, but this was against a backdrop of an expanded freshman class which was straining the physical plant of the university and hampering academic achievement goals. The university’s commitment to academic excellence was not in alignment with its commitment to provide educational opportunities to members of all racial groups.

It must be remembered that under narrow tailoring, the university is not required to have these goals in alignment if there is no other workable alternative, and the university may

lawfully favor its commitment to academic excellence under the 1st Amendment. The balancing of these countervailing goals is within the university's deference in a way that race-balancing is not. This directly undercuts petitioner's charge that stasis of Black enrollment is proof on the face of a quota system. The university's expansion addressed race issues until reaching the limit that this was no longer workable. Stasis would be the expected result at this point.

Table 6
Entering Freshmen
Summer and Fall Combined
1996-2002

	Enrolled													
	1996		1997		1998		1999		2000		2001		2002	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
White	4,159	65	4,730	67	4,399	65	4,447	63	4,801	63	4,447	61	4,882	62
Native American	34	<1	36	1	37	<1	28	<1	32	<1	34	<1	35	<1
African American	266	4	190	3	199	3	286	4	296	4	242	3	272	3
Asian American	942	15	1,130	16	1,133	17	1,221	17	1,325	17	1,413	19	1,452	18
Hispanic	932	14	892	13	891	13	976	14	1,011	13	1,024	14	1,137	14
International	97	2	107	2	83	1	82	1	217	3	139	2	157	2
Unknown	0	0	0	0	2	<1	0	0	4	<1	38	<1	0	0
Total	6,430	100	7,085	100	6,744	100	7,040	100	7,686	100	7,337	100	7,935	100

Source: The University of Texas at Austin, Office of Institutional Research, *Statistical Handbook*, 1996-2002 editions.

Fig. 6.5, Freshmen enrollment, 1996-2002

Table 7
Growth in the Number and Percentage of
Automatically Admitted Top 10% Students, 1998-2003

Year	Top 10% Enrolled	Total Enrolled	% Who Were Top 10%
1998	2,513	6,744	37%
1999	2,925	7,040	42%
2000	3,346	7,686	44%
2001	3,423	7,337	47%
2002	3,932	7,935	50%
2003	4,279	6,544	65%

Fig. 6.6, Effect of Top 10% Rule, 1998-2003

The report detailed its rationale for the use of race at UT. It included a clear definition for *critical mass* as well as noted the rationale in *the state's compelling interest in diversity* as tied to the state's interest of training the leaders of tomorrow in a more realistic environment:

Why is Race-Conscious Freshman Admission Necessary?

Since the University's educational mission includes the goal of producing future educational, cultural, business, and sociopolitical leaders, the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds. The proposal to consider race in the admission process is not an exercise in racial balancing but an acknowledgment that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission. In short, from a racial, ethnic, and cultural standpoint, students at the University are currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow. **For the University adequately to prepare future leaders, it must include a critical mass of students from traditionally underrepresented backgrounds.**

The United States Supreme Court in *Grutter v. Bollinger* has determined that the use of race is permissible in college admission if race-neutral alternatives are found to be ineffective or unworkable substitutes for race-conscious policies in enrolling a "critical mass" of minority students. The Court also acknowledged that the quality of an education need not be sacrificed in order to implement race-neutrality in an admission process.

The concept of critical mass, which is an adequate representation of minority students to assure educational benefits deriving from diversity, benefits all students in that they learn that there is not "one" minority or majority view, but many. In addition, the Court recognized that critical mass is essential in order to avoid burdening individuals with the role of "spokespersons" for their race or ethnicity. Thus, there is a compelling educational interest for the University not to have large numbers of classes in which there are either no minority students or merely a single student of a given race.

While the numbers of underrepresented minorities at the University have been restored to pre-Hopwood undergraduate levels in the aggregate, the "critical mass" of minority representation has not reached the classroom. (p.58-59, emphasis added)

Considerations from this Period for *Students for Fair Admissions*

One key line of attack in *Students for Fair Admissions* regarding Freshman admissions is that race-based policies are no longer necessary due to the change in demographics. UT's 2020 freshman class was 31% white in a state that is 41% white. Therefore, can race-based admissions protocol be carried forward under the 14th Amendment? Race-based programming and marketing techniques are not directly at issue in this case; however, the progression is somewhat obvious. Will programming such as the Heman Sweatt Center for Black Males or the Fearless Leadership Institute be constitutionally permissible moving forward? More broadly, do these programs, by sequestering students from cross-cultural interaction, offer a college experience which is "separate but equal" or otherwise apart from the 1st Amendment logic

which supports the university's interest in obtaining the benefits of diversity via the cross-cultural interaction of students from different backgrounds?

If established, plaintiff's charge that Black student enrollment has not risen due to hidden racial balancing seems to negate the line of attack that changing demographics preclude the need for race-based consideration. That said, it may be that programming meant to address four-year graduation rates targeted to certain minorities defies the narrow tailoring standard under Equal Protection. Under that standard the University is given no deference, so I question the applicability of research which suggests addressing four-year graduation gaps differently for different racial groups. It is a legalistic distinction to determine how these programs relate to the greater strategy of addressing race, and if they are impermissibly race-based 'benefits' in any way.

For example, there is a strong body of academic research that supports the idea that an aversion to obtaining debt causes certain sub-groups of Hispanics to self-select out of attending college. For UT to incorporate this research into how funds or monied programming is distributed may be reliant on deference to an academic determination which it is not lawfully afforded under narrow tailoring. It must be determined what relationship, if any, exists between data tracked⁹ for anything carrying a monetary note which addresses four-year graduation rate. Until shown otherwise, UT is operating under the afforded deference of the *Fisher II* standard. One potential race neutral alternative to this programming is need-blind admission, which is a needs-based scholarship arrangement increasingly prevalent in higher education.¹⁰

Back to *Bakke* (1978)

As Thurgood Marshall stated regarding *Bakke*, the affirmative action framework "depends on whether you consider the action ... as admitting certain students or as excluding certain other students" (p. 1, April 13, 1978 memorandum). Under UT's holistic review, the assumption is that non-auto-admit students are being affirmatively admitted for their other qualities, to create a more robust and livelier student body. This is a 1st Amendment argument countervailing to what Justice Marshall references in *Bakke*, where he directly ties the necessity for such a scheme to "this Nation's sorry history of racial discrimination" and states affirmative action is "to remove the vestiges of slavery and state imposed segregation by 'root and branch'" (p. 1). For Justice Marshall, there is an additional protection afforded to Blacks under the Equal Protection Clause different from the compelling diversity interest relevant to all students under the 1st Amendment.

⁹ Such as data from the regression analysis discussed in Topic #7.

¹⁰ This point is courtesy Paul Finkelman.

Whereas Justice Alito broadly ties the root justification for affirmative action to the disadvantaged, including the socioeconomically disadvantaged,¹¹ Justice Marshall structures his rationale around the goal of converting from segregation era dual systems to a unitary system.

Brown II was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch (*Green v. County School Board*, p. 437-438).

I do not see how UT's race-based student success initiatives fit in this paradigm. It may be helpful to consider Justice Marshall's *Bakke* framework, which has less to do with the place of Blacks in the university setting and more to do with in the place of Blacks in society as a whole. In nearly all measures, things are better for Blacks in this country than they were in 1978¹², however it would still be useful to consider paralleling the construction of Justice Marshall's *Bakke* opinion to determine the extent that any remedial application of Equal Protection should still apply towards Black Americans specifically:

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely \$110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

¹¹ See p. 100.

¹² Apart from the likelihood to be raised in a two-parent family and perhaps other metrics (See: Bureau of the Census, Statistical Brief "Black Americans: A Profile" March 1993).

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society (*Bakke*, 220-224).

Critical mass as exposure to members of one's own race in the classroom

In the Task Force report, exposure to race was considered in terms of exposure to a given race. This was used to illustrate that the diversity in the classroom was less than pre-*Hopwood* and was not presented as the exclusively relevant measure. I do not believe this constitutes a workable framework moving forward. Its usefulness may be limited to making a comparison between two points in time, and even that may be called into question by conservative justices.

For this period, the Task Force report presented the data as follows:

Table 8
Representation of Racial and Ethnic Groups in UT Austin undergraduate classes
Fall 1996 compared to Fall 2002

Fall 1996	Fall 2002
In classes of 5 or more students (n=4,742): <ul style="list-style-type: none"> • 46% had no African Americans; 73% had one or none; • 10% had no Hispanics; 25% had one or none; • 19% had no Asian Americans; 38% had one or none; • <1% had no whites; 1% had one or none. 	In classes of 5 or more students (n=5,631): <ul style="list-style-type: none"> • 52% had no African Americans; 79% had one or none; • 12% had no Hispanics; 30% had one or none; • 16% had no Asian Americans; 33% had one or none; • <1% had no whites; <1% had one or none.
In classes of 5-24 students (n=2,880): <ul style="list-style-type: none"> • 59% had no African Americans; 86% had one or none; • 16% had no Hispanics; 38% had one or none; • 27% had no Asian Americans; 52% had one or none; • <1% had no whites; 1% had one or none. 	In classes of 5-24 students (n=3,616): <ul style="list-style-type: none"> • 65% had no African Americans; 90% had one or none; • 18% had no Hispanics; 43% had one or none; • 23% had no Asian Americans; 46% had one or none; • <1% had no whites; 2% had one or none.

Fig. 6.7, A decrease in racial representation post-Hopwood and its effect on the classroom environment, 1996-2002

The 2009 Report of the Second Task Force on Enrollment Strategy

In 2008, Provost Steve Leslie created a Second Task Force on Enrollment Strategy, which released its report in December 2009. Following the directive of the Board of Regents, the first Task Force had called for an update after five years to determine long-term strategy. Of the twenty members on the Second Task Force, eleven had served on the First Task Force. The introduction states “this report should be viewed as a companion to the December 2003 Report of the Task Force on Enrollment Strategy” (p. 4).

The Second Task Force adopted the Guiding Principles of First Report, including “UT should be diverse in its students, faculty, and staff. Diversity includes ethnicity, gender, residency (Texas, U.S., foreign), and socioeconomic status, among other factors” (p. 5). In the body of the Second Report discussion of race is notable for its absence. Nowhere are the words *African American*, *Black*, *Asian*, or *Hispanic* found. *Diversity* is substantively mentioned only once. When referencing the 2009 class, which admitted 86% freshmen under the Top 10% rule, the Report says the following:

“The Task Force believes that admitting such a large percentage of students based on a single criterion restricts UT’s ability to admit a diverse class and excludes many outstanding students” (p. 7).

Diversity of admission mechanism is a not directly diversity as defined in the Guiding Principles, so it becomes a point of interest to determine what, if any, indirect impact on diversity differentiates auto-admit students from holistic admittees. Under this standard, the demographics of the holistic admittees may need to either 1) make the student body more diverse in terms of the metrics clearly defined as constituting “diversity” by the First Report, namely ethnicity, gender, residency, socioeconomic factors, and other factors or 2) support the academic excellence of the university, as determined by either the academic achievement of this cohort or the perceived additional non-academic benefits this group would provide. It may be called into question that because diversity in the 2009 report does not parallel the 2003 report in its discussion of ethnicity, gender, residency and socioeconomic factors, the university failed to meet the required standard of periodic review under strict scrutiny.

It is considerably more likely however that this Task Force did not address race and ethnicity directly because of the chilling effect of being under continued pending litigation. A comparison of Top 10% and holistic admittees could be considered a valid way to review race and ethnicity indirectly, and the Second Task Force may have been acting under advisement of General Counsel by not going into greater depth in a public document.

TOPIC #7: EQUITY POLICY AT UT-AUSTIN, 2010-2020

PART I: FISHER I, FISHER II, AND THE FOCUS ON FOUR-YEAR GRADUATION RATES, 2010-2016

Note: I am not a lawyer. This section was greatly improved by feedback from Paul Finkelman¹. I have made extensive use of pull-quotes because of potential relevance to a legal defense for *Students for Fair Admissions, Inc. v. UT et al.*, no. 1:20-cv-763 (w.d. tex.)

Key Dates:

June 2011 –Task Force on Undergraduate Graduation Rates formed. Report issued February 2012

2012 – Student Success Initiative Office Created to “oversee and manage the implementation of programs and initiatives to [increase]” “the 4-year graduation rate for undergraduate students from 52% to 70% in 5 years”²

June 24, 2013 – *Fisher v. University of Texas at Austin et al. (Fisher I)* decided, 7-1. It determined the 5th circuit of Appeals improperly applied “the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal. v. Bakke*”³

June 23, 2016 – *Fisher v. University of Texas at Austin et al. (Fisher II)* decided, 4-3. Alito, Roberts, and Thomas dissenting.

2012 Final Report of the Task Force on Undergraduate Graduation Rates

The documents reviewed by the 2012 Task Force on Undergraduate Graduation Rates include both Task Force Reports on Enrollment Strategy (2003 and 2009), a Report on Curriculum Reform (2005), a Draft Report of a subcommittee of the 2nd Enrollment Strategy Report (2008), and the document “Raising Four-Year Graduation Rates and Increasing Capacity at The University of Texas at Austin” (2011). This last document is included as an appendix in the Report (p. 4).

The 2003 Task Force Report on Enrollment Strategy was generated against a backdrop of enrollment expansion which was straining the university’s resources. Although I feel unable to define the impetus behind the 2012 Report on Undergraduate Graduation Rates, the relationship between graduation rates and overall university capacity is clear. Additionally, there is some relation between four-year graduation rates and admissions; admissions are first noted immediately following the introduction, and preceding discussion of the major thematic elements of the document, retention and throughput (p. 4).

¹ Paul Finkelman is a celebrated legal historian and President of Gratz College. He taught at UT from 1978-1984.

² P.1, Every Student Graduates

³ P. 297, United States Reports 570, Cases Adjudged in The Supreme Court, Oct. Term 2012

Unlike the 2003 Enrollment Strategy Report, there is little mention of race in the 2012 Report⁴. Much more common is use of the term *integration*. The task force included a subcommittee on academic and social integration, which “examined the role that integration plays in the success of students on campus” (p. 12). Integration as considered in this report is never discussed in the context of race, possibly due to the chilling effect of ongoing litigation.

The subcommittee noted “decades of research on student success have shown quite clearly that an important predictor of student success is the connectedness students feel towards the campus, their coursework, other students on campus, and the values of the university community. The subcommittee agreed that for graduation rates to improve, the university must place a renewed emphasis on increasing the integration felt by students” (p.12-13). Nearly identical language is found elsewhere when discussing the effects of living on-campus as compared to off-campus. Integration recommendations proposed by the Report targeted students from smaller high schools and expanded first-year study abroad opportunities (p 13-14).

Appendix B of the Report was entitled “An Analysis of Graduation Rates at The University of Texas at Austin.” The analysis was a “time-consuming effort that required the cooperation of multiple offices” (p. 36) and was limited to first-time-in-college (FTIC) students, excluding transfer students. The report recommended a similar analysis for transfer students be conducted in the future. Section 1 of Appendix B covered “Graduation Rate History.” Section 3 was titled “Predictors of Graduation” and focused on how background characteristics, including race, were correlated to overall and four-year graduation rates.

⁴ The Literature Review does however include three primary sources which explicitly address race: “Increasing Retention and Success of Students of Color at Research-Extensive Universities”, “An Examination of Academic “Nonpersistence Decisions of Latino Undergraduates”, and “The Role of Ethnic Student Organizations in Fostering African American Students’ Cultural Adjustment and Membership at Predominantly White Institutions.”

Appendix B, Section 1: Graduation Rate History

Figure 1.2 Four-Year Graduation Rates & Average SAT Scores among FTIC Students, 1975-2010 Entering Cohorts

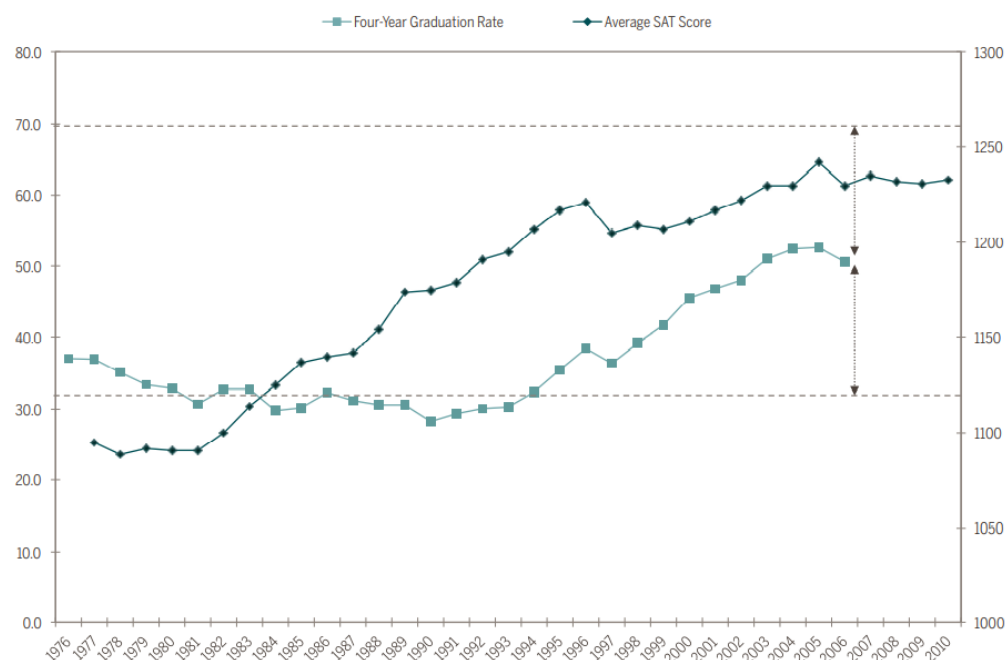


Fig. 7.1, Four-year graduation rates and SAT scores for FTIC students, 1975-2010

The committee's analysis is as follows:

"Since 2005, SAT scores again have been essentially flat, hovering around 1230. In contrast, four-year graduation rates were either flat or declined throughout the 1980s and early 1990s until about 1993. But something peculiar happened at that moment: starting in 1993, four-year graduation rates began to closely mirror the movements of SAT scores. Indeed, every year that SAT scores increased, so did the four-year graduation rate. In the two years (i.e., 1997 and 2006) that SAT scores decreased, four-year graduation rates decreased as well. We would expect that the four-year graduation rate would have mirrored SAT scores throughout the study period, but it was only during 1993 and later that such a pattern appeared.

So what happened in 1993 that fundamentally changed the university and allowed higher SAT scores to translate into higher four-year graduation rates? The discovery of this finding prompted a great deal of thought and discussion, but one possibility rose to the top and remains the most likely explanation. As many of the more experienced advisors know, 1993 was the year that professional advising took hold on campus. Before that year, students could see advisors, but usually those visits were limited to degree checks and other regulatory activities. In contrast, in 1993 advisors were being hired in departments to assist students with registration, course selection, and a variety of other issues. The appearance of advisors on campus and the fundamental change in the nature of four-year graduation rates is no simple coincidence. Rather, the finding is clear: professional advising changed this university for the better and has allowed the relatively high four-year graduation rates that it currently enjoys" (p. 39).

An Alternate Hypothesis: Rising Tuition Costs

Figure 1.4 Four-Year Graduation Rates and Average Tuition Costs in 2010 Dollars, 1976-2010.

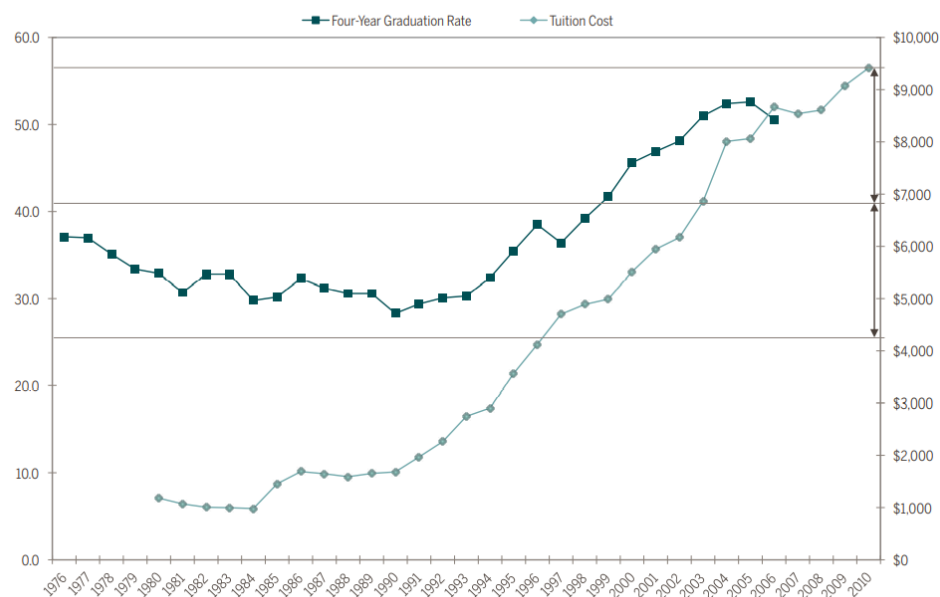


Fig. 7.2, Four-Year Graduation Rates and Tuition Cost in 2010 Dollars, 1976-2010

The theory that the introduction of advising in 1993 is wholly responsible for the increase in four-year graduation rates seems more supportive of a one-time bump in rates rather than a sustained decade-long increase.

This year, in response to the COVID-19 pandemic, UT abandoned the use of SAT scores as a factor in admissions.⁵ Debate on the merits of making such a move permanent is robust. Many claim, including Justice Alito in the *Fisher II* dissent, that “SAT scores clearly correlate with wealth,” and therefore use of the SAT in admissions unfairly disadvantages students from lower socioeconomic backgrounds (p. 36). A significant amount of further research would be required, but it is possible that the increase in SAT scores from 1981 to 1996 has some relationship to increases in tuition costs causing lower socioeconomic status students to self-select out of attending UT.

In the post top 10% rule era, a key metric for determining if this has been a factor would be to examine the attendance rates of the pool of auto-admit students from largely black high schools in urban Houston. UT must determine how its aid package measures up when pit against both high-tier private universities such as the Ivy League, Rice, and SMU, as well as against the cost structures of more affordable options such as University of Houston, Texas Southern, or Prairie View A&M.⁶

⁵ <https://www.texastribune.org/2021/02/25/ut-austin-texas-sat-act-application/>

⁶ This idea comes courtesy Paul Finkelman.

Appendix B, Section 3: Predictors of Graduation

Table 3.1 Average Graduation and Attrition Rates by Demographic Characteristics.

	Cohort Composition		6-Year Status			Graduated		
	#	%	Enrolled	Dismissed	Dropped	4 years	5 years	6 years
Race/Ethnicity								
American Indian	29	0.4%	3.4%	0.0%	10.3%	41.4%	31.0%	13.8%
Asian	1,239	18.4%	2.1%	3.6%	10.3%	54.7%	25.3%	4.1%
Black	307	4.5%	2.9%	13.7%	17.6%	39.1%	23.5%	3.3%
Foreign	128	1.9%	3.9%	5.5%	15.6%	43.8%	28.9%	2.3%
Hispanic	1,143	16.9%	2.5%	11.5%	14.9%	40.1%	24.9%	6.1%
White	3,887	57.6%	2.0%	4.4%	10.9%	56.8%	21.7%	4.3%
Sex								
Female	3,695	54.7%	1.9%	4.3%	11.1%	57.2%	21.5%	4.0%
Male	3,055	45.3%	2.6%	7.7%	12.7%	46.7%	25.2%	5.1%
Parents' Education								
No college	668	9.9%	2.7%	12.7%	17.1%	38.5%	23.7%	5.4%
Some college/no degree	1,194	17.7%	3.1%	9.1%	16.1%	42.7%	23.7%	5.3%
One 4-year+ degree	1,646	24.4%	3.1%	6.7%	12.2%	50.8%	22.5%	4.7%
Two 4-year+ degrees	3,242	48.0%	1.3%	2.7%	9.0%	59.7%	23.3%	3.9%
Pell Eligibility								
Pell eligible	1,311	19.4%	3.5%	10.6%	14.6%	39.1%	25.6%	6.5%
Not Pell eligible	2,346	34.8%	1.8%	5.1%	10.9%	57.2%	21.3%	3.7%
No financial aid application	3,093	45.8%	1.9%	4.4%	11.3%	54.5%	23.6%	4.3%

Fig. 7.3, Graduation and Attrition Rates by Demo, p. 55

The metrics tracked by the study include Race/Ethnicity, Sex, Parents' Education, and Pell Eligibility, which is a common proxy for family wealth. N=6,750 for this data set, except for Race/Ethnicity, where N=6,733. Blacks have the highest dismissal and dropout rates, 13.7% and 17.6%. Hispanic rates for the same metrics are 11.5% and 14.9%.

Regression Analysis

Table 3.9 Estimated Net Effects of Background Characteristics and Other Factors on Four-year Graduation (n = 4,741)^{1,2}

	Model 1		Model 2		Model 3		Model 4		Model 5	
	OR	X ²	OR	X ²	OR	X ²	OR	X ²	OR	X ²
Background Factors										
Female	1.40	30.85	1.43	32.17	1.31	16.86	1.26	10.42	1.26	8.22
Race/Ethnicity (REF: White)										
Asian	1.00	.00	.90	1.57	.92	1.05	1.05	.33	.98	.03
Black	.87	.82	.98	.01	1.02	.01	1.01	.00	1.02	.01
Foreign	.79	.94	.75	1.38	.71	1.79	.69	1.93	.65	2.11
Hispanic	.66	20.18	.65	20.54	.71	12.54	.72	9.92	.76	5.59
Parents' Education (REF: Two 4-year+ degrees)										
No college	.81	2.87	.87	1.24	.96	.12	.96	.09	1.05	.09
Some college	.75	9.58	.81	4.69	.85	2.53	.89	1.27	.89	1.00
One 4-year+ degree	.86	3.87	.93	.94	.96	.32	.95	.33	.97	.10
Pell Grant Eligibility (REF: No application)										
Eligible	.82	5.05	.79	6.12	.81	4.94	.78	5.95	.83	2.90
Not eligible	1.14	3.44	1.06	.58	1.07	.67	1.08	.82	1.04	.15

Fig. 7.4, Estimated Net Effects of Background Characteristics on Four-Year Graduation Rates

A subset of the previous data was used to conduct a regression analysis (N=4,741 for this dataset, or 70.2% of the predictors-of-graduation cohort). The citation for how this N was determined is not included in the Final Report of the Task Force on Undergraduate Graduation Rates. I attempted to determine the use or scoring for this analysis in Open Records Request #R001364-030921, however I received the response that it was “excepted from disclosure by Texas Gov't Code section 552.103” because it was related to pending litigation.⁷

To be clear, this is a single data set. Universities collect data on race to measure how they are doing, and this in of itself does not suggest the University has applied this data in any manner whatsoever. That said, it may come to the Court to determine if certain race-based programming qualifies as benefits tied to this regression analysis. If so, the N=4,741 of *Fig. 7.4* being a subset of the N=6,733 in *Fig 7.3* could potentially be considered to fall under a review which precludes academic deference to UT.

⁷ I believe this is sure to come out in subpoena. It is better to address this now rather than to wait and give the impression the university is hiding something. I would also raise the likelihood that UT will rightly be afforded no deference by the Supreme Court under strict scrutiny as to how it generates or revises such a formula. An N value of only 70% alongside facial discrepancy between Hispanics and Blacks makes this data immediately suspect.

Analysis

Despite similar dropout and dismissal rates between Blacks and Hispanics, slightly worse for Blacks, the regression analysis found that Blacks had a .87 OR score and Hispanics a .66 OR score when compared with Whites. This suggests “Hispanic students are about 34% less likely to graduate in four years than White students” and Black students are 13% less likely to graduate in four years than White students (p. 70). In four of five alternate models, Blacks were determined to be statistically as likely as whites to graduate.⁸ Clearly, this is contradicted by Fig. 7.3. The controls in place to determine these coefficients are not obvious, however if resources were distributed based on these formulas the change in the coefficients may be a problematic point of contention for pending litigation. UT must properly explain this point; otherwise, it may risk losing the protections afforded as a presumed good actor⁹.

Fisher I (2013)

Fischer v. University of Texas at Austin et al. No. 11-345, commonly known as *Fisher I*, was argued October 10, 2012 and decided June 24, 2013. This places the focus on four-year graduation rates and the creation of the Student Success Initiative office squarely within the timeframe of *Fisher’s* litigation. Like the top 10% rule legislation, here we again have a concurrent, innovative response from the University.

Fisher I was remanded to the lower court 7-1 (Ginsburg dissenting) for a new decision which would apply the proper level of strict scrutiny. The seven justices in the majority reaffirmed the holdings of the previous affirmative action cases as follows:

a) *Bakke*, *Gratz*, and *Grutter*, which directly address the question considered here, are taken as given for purposes of deciding this case. In *Bakke’s* principal opinion, Justice Powell recognized that state university “**decisions based on race or ethnic origin . . . are reviewable under the Fourteenth Amendment,**” 438 U. S., at 287, using a strict scrutiny standard, *id.*, at 299. **He identified as a compelling interest that could justify the consideration of race the interest in the educational benefits that flow from a diverse student body, but noted that this interest is complex, encompassing a broad array “of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”** *Id.*, at 315.

In *Gratz* and *Grutter*, the Court endorsed these precepts, observing that an admissions process with such an interest is subject to judicial review and must withstand strict scrutiny, *Gratz, supra*, at 275, *i. e.*, a university must clearly demonstrate that its “‘purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is “necessary . . . to the accomplishment” of its purpose,’ ” *Bakke, supra*, at 305. Additional guidance may be found in the Court’s broader equal protection jurisprudence. See, *e. g.*, *Rice v. Cayetano*, 528 U. S. 495, 517; *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 505. **Strict scrutiny is a searching examination, and the**

⁸ Paul Finkelman suggests looking for a correlation here for athletes, who receive better tutoring and advising, free room and board, and do not have to have an off-campus job. This may skew the data for Black students who are not athletes.

⁹ See “Favoring ‘[t]he African-American or Hispanic child of successful professionals in Dallas’, below

government bears the burden to prove “that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.” Ibid. Pp. 307–310

(b) Under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications. A court may give some deference to a university’s “judgment that such diversity is essential to its educational mission,” 539 U. S., at 328, provided that diversity is not defined as mere racial balancing and there is a reasoned, principled explanation for the academic decision. On this point, the courts below were correct in finding that *Grutter* calls for deference to the University’s experience and expertise about its educational mission. However, **once the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove that the means it chose to attain that diversity are narrowly tailored to its goal. On this point, the University receives no deference.** *Id.*, at 333. It is at all times the University’s obligation to demonstrate, and the Judiciary’s obligation to determine, that admissions processes “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.” *Id.*, at 337. **Narrow tailoring also requires a reviewing court to verify that it is “necessary” for the university to use race to achieve the educational benefits of diversity.** *Bakke, supra*, at 305. **The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity** (p. 297-299, emphasis added).

Relevance of *Fisher I* standard to this thesis

This thesis, *Forward! On-Campus Housing Capacity Expansion as an Anticipatory Model for a Post-Students for Fair Admissions Equity Commitment at The University of Texas* is humbly submitted so that UT may decide if the expansion of on-campus housing is a workable race-neutral alternative which obtains the educational benefits of diversity, thus compelling the University to build¹⁰. I believe it is, and I hope this research will be rigorously tested. UT however is not the final arbiter. Ultimately, a reviewing court must decide if additional housing could workably bring forth the benefits of diversity “about as well” as race-based admissions policies:

Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: **The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If “a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,”** *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (quoting Greenawalt, Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions, 75 Colum. L. Rev. 559, 578–579 (1975)), **then the university may not consider race** (p. 312, emphasis added).

¹⁰ See: Topic #8: Defining Relationships Between Housing and Equity at UT-Austin

“Critical mass”

In *Fisher I*, the Supreme Court deemed the race-based approach used by UT-Austin to be rationalized, at least in part, through the concept of *critical mass*.

“Race is not itself assigned a numerical value for each applicant, but the University has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a “critical mass” (p. 301).

This concept is based on “anecdotal” reports from students regarding their “interaction in the classroom” and a study which determined the likelihood of being in a classroom setting with a member of your own race in “classes containing between 5 and 24 students” (p.305-306). Moving forward, I believe it would be unwise for the University to lean too heavily on this rationale, which may be construed as racial balancing. A better model may consider a student’s likelihood to be enrolled in multi-racial classes. This is relevant to students of all races. Today’s white students benefit from exposure to a multi-racial higher education environment, as they must prepare for lives in a United States with no racial majority. I encourage the University to look deeply into the rationale accepted under *Fisher I* for sustaining diversity as a compelling state interest both under the 14th and 1st Amendments. Arguments against *critical mass* as an underpinning of defining diversity are touched on in this chapter’s discussion of Justice Alito’s *Fisher II* dissent.

***Fisher II* (2016): Opinion of the Court**

Fischer v. University of Texas at Austin et al. No. 14-981, commonly known as *Fisher II*, was argued December 9, 2015 and decided June 23, 2016. *Fisher II* was decided 4-3, with Justices Alito, Roberts, and Thomas in the dissent. Of the four justices in the majority, only Justices Breyer and Sotomayor remains on the court.

Fisher II holdings built on *Fisher I* in several notable ways. The consensus surrounding *Fisher I* is an important guidepost for determining what facets of *Fisher II* may be highlighted in future litigation. *Fisher II* held the following:

(a) *Fisher I* sets out three controlling principles relevant to assessing the constitutionality of a public university’s affirmative action program. First, a university may not consider race “unless the admissions process can withstand strict scrutiny,” *i.e.*, it must show that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary” to accomplish that purpose. Second, “the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.” **Third, when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals, the school bears the burden of demonstrating that “available” and “workable” “race-neutral alternatives” do not suffice.**

(b) The University's approach to admissions gives rise to an unusual consequence here. The component with the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but the Top Ten Percent Plan. Because petitioner did not challenge the percentage part of the plan, the record is devoid of evidence of its impact on diversity. Remand for further factfinding would serve little purpose, however, because at the time of petitioner's application, the current plan had been in effect only three years and, in any event, the University lacked authority to alter the percentage plan, which was mandated by the Texas Legislature. These circumstances refute any criticism that the University did not make good faith efforts to comply with the law. **The University, however, does have a continuing obligation to satisfy the strict scrutiny burden: by periodically reassessing the admission program's constitutionality, and efficacy, in light of the school's experience and the data it has gathered since adopting its admissions plan, and by tailoring its approach to ensure that race plays no greater role than is necessary to meet its compelling interests.**

(c) Drawing all reasonable inferences in her favor, petitioner has not shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

(1) Petitioner claims that the University has not articulated its compelling interest with sufficient clarity because it has failed to state more precisely what level of minority enrollment would constitute a "critical mass." However, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students, but an interest in obtaining "the educational benefits that flow from student body diversity." Since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them. The record here reveals that the University articulated concrete and precise goals—*e.g.*, ending stereotypes, promoting "cross-racial understanding," preparing students for "an increasingly diverse workforce and society," and cultivating leaders with "legitimacy in the eyes of the citizenry"—that mirror the compelling interest this Court has approved in prior cases. It also gave a "reasoned, principled explanation" for its decision in a 39-page proposal written after a year-long study revealed that its race-neutral policies and programs did not meet its goals (p. 2-3, Slip Opinion of the Court, internal citations omitted, emphasis added).

"Continuing obligation to satisfy the strict scrutiny burden"

UT is required to determine if strict scrutiny is satisfied on a rolling basis by "periodically reassessing the admission program's constitutionality, and efficacy, in light of the school's experience and the data it has gathered since adopting its admissions plan" (p.2). It must therefore be determined if the analysis conducted by the 2009 Enrollment Strategy Taskforce or the 2012 Task Force on Undergraduate Graduation Rates satisfies this standard (or if other

qualifying analysis was conducted during this period). It also must be determined how the University has continued to reassess the use of race since 2012.

“Asserting an interest in the educational benefits of diversity writ large is insufficient.”

The University’s previously articulated goals in pursuing an interest in diversity must be regularly reexamined, for they “cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them¹¹” (p. 3). UT-Austin is now in a different demographic environment than during *Fisher II* – in Fall 2020 only 2,764 of 8,459, or 32.6%, of first-time Freshman were White (UT-Austin Statistical Handbook p. 24). For reference, the Census estimated Texas was 42% Non-Hispanic White as of 2018¹².

Does the state of Texas, in this demographic environment, still have a compelling interest in promoting minority enrollment to meet the previously articulated goals of “ending stereotypes, promoting ‘cross-racial understanding,’ preparing students for ‘an increasingly diverse workforce and society,’ and cultivating leaders with ‘legitimacy in the eyes of the citizenry’” (p. 3)? It may be that some, but not all, of these goals are carried forward as sufficiently compelling state interests. What is clear is that in the majority opinion University policies are required to be sufficiently measurable to permit judicial scrutiny.

Claims of past discrimination are more specific than an interest in the *educational benefits of diversity writ large*. Under this paradigm it is useful to consider how the university has historically treated minorities (particularly Blacks, Hispanics, who were previously classified by the university as Mexican-Americans, and Asians) as distinct from each other.

***Fisher II* (2016): Justice Alito’s Dissent**

When UT decided to adopt its race-conscious plan, it had every reason to know that its plan would have to satisfy strict scrutiny and that this meant that it would be its burden to show that the plan was narrowly tailored to serve compelling interests” (Justice Alito, p. 4 slip opinion).

The makeup of the Court is now six conservatives and three liberals. This calls for an examination of Justice Alito’s dissent in *Fisher II*, which more than likely will represent a starting point for many arguments in the *Students for Fair Admissions* case. In this section I raise questions I feel are uncomfortable, yet I believe it is better for the University to address them now rather than wait until these questions are before the Supreme Court. In raising these questions, I offer no opinion of my own, other than the aforementioned opinion that a major on-campus housing expansion as proposed by this thesis may satisfy narrow tailoring as a race-neutral alternative to achieving the benefits of diversity.

¹¹ Echoing Justice Powell in *Bakke*, see p. 68.

¹² Texas Demographic Center. (2020). *Texas Demographic Trends & the Upcoming 2020 Census* (p. 12). Austin, TX

Something strange has happened since our prior decision in this case...In that decision, we held that strict scrutiny requires the University of Texas at Austin (UT or University) to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends. Rejecting the argument that we should defer to UT's judgment on those matters, **we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied.** On remand, UT failed to do what our prior decision demanded. **The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests.** This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request (p. 1-2, emphasis added).

"The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve."

For Justice Alito, the question of what constitutes "the educational benefits of diversity" is an open one. Justice Alito does not accept the paradigm of *critical mass* based on classroom level interaction as a workable or defined metric (p. 2-3). So, what paradigm might be acceptably compelling regarding diversity for Alito? This is where I hypothesize it may be useful to go back to the original 1st Amendment rationale found in *Bakke*.

The university should consider what effect maintaining a large percentage of classes online in a post COVID-19 environment would have on limiting classroom contact with peers of differing racial, ethnic, and cultural backgrounds. A lack of commitment to the in-person classroom environment may be considered a liability in a context which explicitly roots the benefits of diversity in the 1st Amendment.

Further, UT should consider if an equity commitment moving forward should include race-based programming such as the Heman Sweatt Center for Black Males, the Latina/x and Indigenous Leadership Institute, or the Fearless Leadership Institute ("an academic, professional and personal development initiative for African American women and Latinas¹³"). Even explicitly gender-tailored units such as the Kendra Scott Women's Entrepreneurial Leadership Institute may be put into constitutional question. It may be that under Equal Protection as expounded by Justice Marshall, programming targeting Blacks could move forward whereas similar programming targeting other ethnic groups may not.

¹³ <https://diversity.utexas.edu/fli/>

Favoring “[t]he African-American or Hispanic child of successful professionals in Dallas.”

Alito continues:

UT has also claimed at times that the race-based component of its plan is needed because the Top Ten Percent Plan admits *the wrong kind* of African-American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominantly African-American or Hispanic. **As UT put it in its brief in *Fisher I*, the race-based component of its admissions plan is needed to admit “[t]he African-American or Hispanic child of successful professionals in Dallas”** (p. 3, emphasis added, internal citation omitted).

The regression analysis in the 2012 Task Force Report on Undergraduate Graduation rates provides only limited data set. Its existence does not prove anything about how this data was used, only that UT was collecting this data. That said, strict scrutiny places the unenviable burden on the state to prove there has not been a single violation of Equal Protection. The University must defend against the claim that it, for example, determined Black students from wealthy backgrounds were more desirable admittees than their low socioeconomic counterparts due to a greater likelihood of improving the four-year graduation rate; concurrently, the University must defend against a claim that low socioeconomic Hispanic students were deemed to benefit more greatly from financial and programming support through Student Success Initiatives, and therefore received greater disbursements on this basis. Determining what qualifies as “benefits” here seems a deeply legalistic question which requires the analysis of qualified counsel.

An argument may be made that, if UT has used this data as a basis for the disbursement of funds, this is within the University’s deference under the *Fisher II* standard. UT may claim that such a course of action is supported in academic literature, particularly the body of research around the cultural aversion of Hispanics to taking on debt¹⁴. I suspect such an argument would be unconvincingly narrow tailored for Justice Alito. To quote Justice Powell in *Bakke*, “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal” (*Bakke*, p. 289).

Justice Alito continues:

After making this argument in its first trip to this Court, UT apparently had second thoughts, and in the latest round of briefing UT has attempted to disavow ever having made the argument. See Brief for Respondents 2 (“Petitioner’s argument that UT’s interest is favoring ‘affluent’ minorities is a fabrication”). But it did, and **the argument turns affirmative action on its head. Affirmative-action programs were created to help *disadvantaged* students** (p. 3, emphasis added, internal citation omitted).

¹⁴ I have been assured this body of research is well established by multiple administrators, including Dr. Michael Nava, Executive Director of Student Success Initiatives at UT-Austin.

It seems here Alito harkens to the rationale for affirmative action of the *minority* opinion in *Bakke* that “overcoming substantial, chronic minority underrepresentation ...is sufficiently important to justify ... [the] remedial use of race” (Brennan, White, Marshall, and Blackmun holding 2)! There are incongruities here in that the disadvantaged students the *Bakke* minority opinion refers to could be those of all levels of affluence who were disadvantaged by race. Justice Alito uses disadvantaged here to refer to socioeconomic status, rather than the disadvantage structurally generated by a two-tiered system.

The 1st Amendment underpinned argument behind the state’s compelling interest in the benefits of diversity exists largely outside of the paradigm of the advantaged and the disadvantaged.

Alito continues:

Although UT now disowns the argument that the Top Ten Percent Plan results in the admission of the wrong kind of African-American and Hispanic students, the Fifth Circuit majority bought a version of that claim. **As the panel majority put it, the Top Ten African-American and Hispanic admittees cannot match the holistic African-American and Hispanic admittees when it comes to “records of personal achievement,” a “variety of perspectives” and “life experiences,” and “unique skills.”** All in all, according to the panel majority, the Top Ten Percent students cannot “enrich the diversity of the student body” in the same way as the holistic admittees. *Id.*, at 654. As Judge Garza put it in dissent, the panel majority concluded that the Top Ten Percent admittees are **“somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review”** (p.3-4, emphasis added, internal citations omitted).

Does the state have a compelling interest in *diversity* when defined as the difference in auto-admits and non-auto-admits? What limiting factors control the different ways in which *diversity* may be defined and still qualify a compelling interest? *Diversity* is clearly defined in the 2003 Report on Enrollment Strategy as including “such elements as ethnicity, gender, residency (Texas, U.S., foreign), and socioeconomic status” (p. 4). I believe this is what Alito refers to as the university’s shifting rationale on this point. Again, I must note that the University’s unwillingness to include greater discussion of diversity in a measurable context after the 2003 Report may be related to the chilling effect of a constantly litigious environment. That said, the litigious environment does not necessarily relieve UT of the burden of constant measurability.

PART II: THE MODERN EQUITY COMMITMENT, POST-FISHER II, 2016-2020

May 2017 – Division of Diversity and Community Engagement Strategic Plan 2011-2016

February 2018 – University Diversity and Inclusion Action Plan (UDIAP)

2018 – “Every Student Graduates” – UT Strategies to Increase Graduation Rates 2012-2017

July 2019 – Board of Regents announces the Texas Advanced Commitment, providing full tuition waivers for students from families making under \$60,000 per year, as well as partial tuition relief for students from middle-class families

January 2020 – UT and Me Scholarships powered by Dell program announced, providing \$5,000 and supportive technology and programming to students in exchange for meeting requirements to graduate within four years

July 2020 – *Students for Fair Admissions, Inc., v. University of Texas at Austin et al*, is filed in the Western District of Texas.

University Diversity and Inclusion Action Plan (2018)

The purpose of the seven-page University Diversity and Inclusion Action Plan (UDIAP) was “to reflect upon how we can provide the best education possible for students from all backgrounds, especially those that historically have been marginalized” (p. 2). It had eight focus areas, including “university leadership,” “campus climate and culture,” and “students”.

UDIAP: Leadership, Campus Climate and Culture

Under University Leadership the plan states “not only do we want to hire administrators, faculty, and staff from diverse backgrounds, we want to hire those with a demonstrated commitment to diversity” (p. 2). Beyond merely prioritizing a diverse community, I question if there is a universal relevance to considering a *demonstrated commitment to diversity* as a plus factor in all fields. This gives the appearance of a potential content-based litmus test. Dr. Richard Reddick points to work which may be cited as a demonstrated commitment to diversity as “cultural taxation” to be avoided for minority faculty, who are better served focusing their efforts on research which will lead to tenure.¹⁵

The UDIAP states “[UT] is considered one of the most diverse tier-one institutions in the nation. However, there are many areas and fields of study that are not as diverse as they should be” (p.2). I question if diversity in this paradigm is measurable and has a logical stopping point as constitutionally required. Further, if this applies to students from *historically*

¹⁵ “Cultural Taxation” Keynote of the University Innovation Alliance, Purdue University, 2019.

marginalized groups to what extent does this in practice explicitly refer to race? This may potentially fall under a paradigm of race-balancing rather than of obtaining the benefits of diversity.

One current example of a field where diversity targets are described in terms of enrollment goals by race is computer science. The Diversity, Equity, and Inclusion webpage for Computer Science calls for 20% Hispanic and 10% Black enrollment by 2025.

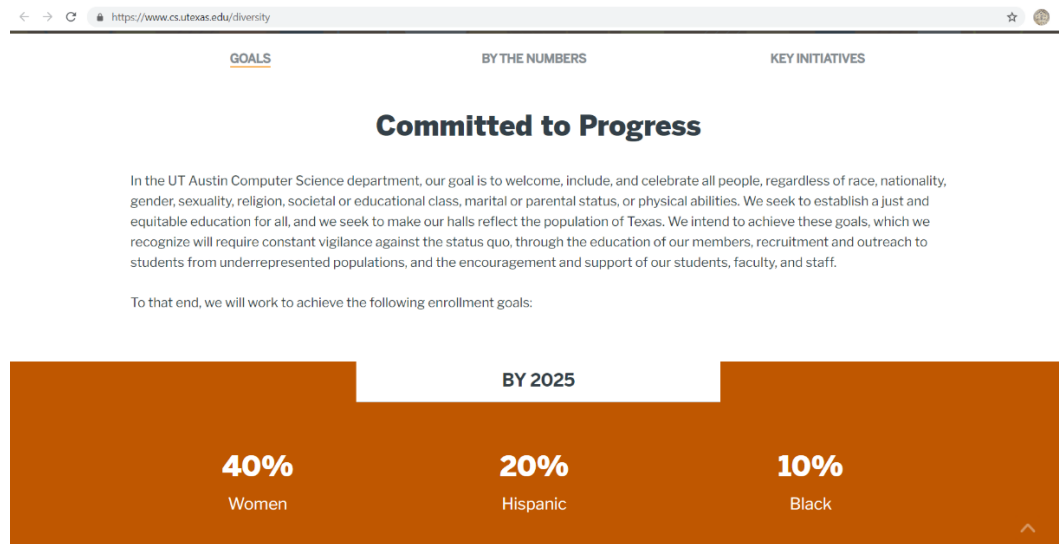


Fig. 7.5, Computer Science Enrollment Goals target race and gender

Race & Ethnicity			
Undergraduate		Graduate	
Asian	56.15%	Asian	12.21%
White	24.03%	White	17.18%
Hispanic	10.87%	Hispanic	3.82%
Unknown or Blank:	3.25%	Unknown or Blank	1.53%
Black*	2.77%	Black*	1.53%
International**	1.17%	International**	62.98%
American Indian or Alaskan Native	0.16%	American Indian or Alaskan Native	0.38%
Multiracial (excl. Black or Hispanic)	1.60%		

*Black includes both "Black or African American Alone" and "Black or African American Multiracial (excluding Hispanic)".

**Students are classified as "International" if they are not U.S. citizens or U.S. permanent residents.

Fig 7.6, Fall 2020 UT Computer science demographic information

The UDIAP recommended investing in on-campus student housing to “to provide a common first-year experience for all [and] to accommodate students with certain disabilities and to provide accommodations for students in the LGBTQA community” (p.3). The plan called to “prioritize safety and maintenance for the Malcolm X Lounge in Jester Residence Hall as well as other spaces where students belonging to underserved communities congregate” suggesting the Black students are considered *underserved* and the term potentially refers to other racial groups as well (p.3).

UDIAP: Student Body

The UDIAP states “after the university’s successful defense of its admissions policy in the Fisher case, we are committed to recruiting more students from backgrounds historically underrepresented at UT Austin” (p.4). Does *underrepresented* have an identical meaning to *underserved* elsewhere in the document, and does this specifically refer to race? The document continues “we also acknowledge the need to include diversity within groups to break down stereotypes. Intragroup diversity also means diversity in economic and geographic backgrounds” (p.4).

I find this paradigm problematic. To me, the state’s compelling interest in diversity must be one in which all aspects – race, socioeconomic status, geographic origin, etc – are considered in one melting pot. What we have here is a two-tiered system – diversity is first defined exclusively in terms of race, and then all other aspects of diversity are defined on a secondary basis¹⁶. Although breaking down stereotypes has previously been accepted as a rationale under the heading of obtaining the benefits of diversity, I believe this is a potential misapplication of that principle. In any case, Justice Alito has shown a hostility to carrying forward this rationale.

The UDIAP does define diversity in a way I believe *is* proper, speaking directly to the state’s compelling interest in diversity under the 1st Amendment: “Lastly, diversity and inclusion play a role beyond academics. Because much of a student’s experience during the college years happens outside the classroom, the more opportunities we provide students to interact with students of other backgrounds, cultures, and perspectives, the broader their education” (p.4). An increase in on-campus housing would be directly aligned with diversity under this definition.

¹⁶ See: *Fisher II*: Justice Alito’s Dissent (p.99)

“Every Student Graduates” – UT Strategies to Increase Graduation Rates 2012-2017

Every Student Graduates (ESG) is a companion document to the work of the 2012 Report of the Taskforce on Undergraduate Graduation Rates. ESG reiterates that the Student Success Initiatives (SSIs) purpose was “to oversee and manage the implementation of programs and initiatives to achieve [the ambitious goal of increasing the 4-year graduation rate for undergraduate students from 52% to 70% in 5 years]” (p.1).¹⁷

ESG uses the terms *underserved* and *underrepresented* somewhat differently. Underserved is the broader term, and underrepresented is used to specifically refer to racial minorities. “Most importantly, the dedicated focus on student success resulted in improvements for traditionally underserved students, including first-generation students, low-income students, and underrepresented minorities” (p.1).

ESG provides an overview of the initiatives of the SSI office, one of which is “the nationally recognized University Leadership Network, which provides incentive-based scholarships combined with experiential learning for UT Austin’s students who are most in need of support” (p.2).

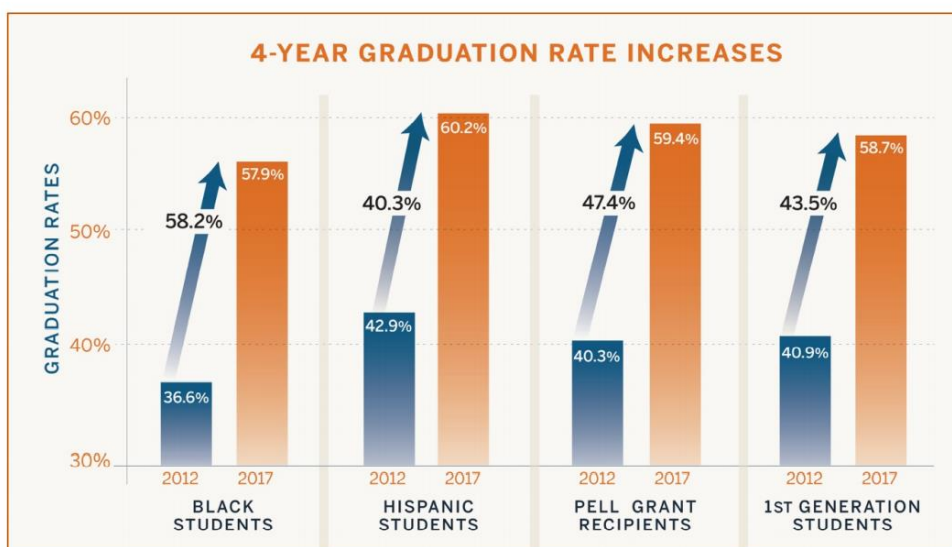


Fig. 7.7, 4-year graduation rate increases, 2012-2017

¹⁷ It is worth considering if giving such institutional weight to a four-year graduation timeframe is an impediment to institutional excellence. Paul Finkelman notes that most schools see five years as more likely for graduation and questions the potential gains of the four-year paradigm. Throughput is one gain, but at some point overfocusing is forced. Tackling student debt by being in school less is a consideration which may be achieved by other means.

The results have been stark. In a short period of time there was significant impact to graduation rates for Black, Hispanic, 1st Generation and Pell Grant recipient students. If it is determined by the Court that race is used in this programming impermissibly moving forward, it must not be a throw the baby out with the bathwater situation. This portfolio more than likely could continue to have its remarkable success with minor tweaks.

Predictive Analytics

The university collects data for the purpose of tracking racial groups. This does not suggest that the data is used in any way. The use of predictive analytics which incorporates race can become problematic if tied to distribution of funds or benefits. ESG had this to say about predictive analytics:

Identifying the students who are most at risk of not persisting is a crucial step in increasing student success. **Predictive analytics calculate the likelihood of graduation in 4 years for each admitted first-year student using statistical models based on more than a decade of historical academic and demographic student data. The ability to assign a predicted 4-year graduation rate to students prior to their arrival at orientation allows the university to proactively connect students with the appropriate college-based academic learning community that also fosters a social community and sense of belonging when they arrive on campus.** The predictive model to determine a student's likelihood of graduating in 4 years has been critical in identifying students who need additional support. **The model includes demographic and academic factors, and there are multiple models based on a student's admitted major since the 4- year graduation rate varies by college.** Each year, the model is updated with the prior year's results, and the predicted 4-year graduation rates continue to climb overall (p.12, emphasis added).

The effects of this policy should therefore be examined on a college-by-college basis. Since the predictive analytics use race as a factor in their models, it must be determined to what extent the University's proactive placement of students in *academic learning communities* qualifies as benefits; this is of particular importance to determine in the case of academic learning community which are themselves race based, such as the Heman Sweatt Center for Black Males the Latina/x and Indigenous Leadership Institute, and the Fearless Leadership Institute, which according to its website is "an academic, professional and personal development initiative for African American women and Latinas."

Expansion of Success Programs

These predictive analytics models were not merely used to track racial data, they were incorporated into determining which students received "significant resources" (p. 16). I believe to avoid Equal Protection issues, the University may persist in using Predictive Analytics, but must no longer incorporate racial demographic data into the matrix.

After the predicted 4-year graduation model identifies the incoming freshmen most likely to benefit from assistance, academic success programs give those students a home on campus and a network of support. Academic success programs provide academic, social, and developmental support to students throughout their first year. In order to broaden the network of opportunities for these students and minimize gaps in opportunity, SSI provided significant resources to expand existing academic success programs and create new programs in the colleges so they could serve 25% of freshmen identified as most at risk of not graduating in 4 years.

Programs now include Texas Interdisciplinary Plan (TIP) Scholars in the College of Natural Sciences, Discovery Scholars in the School of Undergraduate Studies, Foundation Scholars in the College of Liberal Arts, McCombs Success Scholars in the McCombs School of Business, and Ramshorn Scholars in the Cockrell School of Engineering. Two new success programs in the College of Education and the Moody College of Communication will start in Fall 2018. Students in other colleges are served by Gateway Scholars, a success program managed by the Division of Diversity and Community Engagement (Every Student Graduates, p. 16).

University Leadership Network

University Leadership Network is described by ESG thusly:

The most innovative new program created by SSI in 2013 aims at removing non-academic barriers to success for those students who arrive at college with multiple risk factors and the highest financial need. The University Leadership Network (ULN) is a groundbreaking, nationally recognized student success program that combines incentive-based scholarships with leadership training to provide 500 students each year with the support and incentive to graduate in 4 years.

Students selected for ULN demonstrate significant financial need and typically attend under-resourced high schools in Texas, making them great candidates for additional support at UT Austin. A majority of ULN students are first-generation college students. The program provides financial aid that incentivizes behavior consistent with graduating in 4 years, as well as facilitating experiential learning opportunities to help students prepare for their lives after college. The program includes community building to provide these students with a sense of belonging at UT Austin.

The \$5,000 annual ULN incentive scholarship is provided to students in 10 monthly \$500 payments during the academic year and is dependent upon their completion of program requirements (p.31-32)

A November 2020 UTNews article suggests that the predictive analytics uses race as an embedded factor for determining who received these funds, as opposed to simply tracking the effectiveness of race-neutral policies and programming.¹⁸ The program “analyzed statistics and

¹⁸ “University Leadership Network aims to give students confidence, support” by Claire Bills, Nov 1, 2020. <https://news.utexas.edu/2020/11/01/university-leadership-network-aims-to-give-students-confidence-support/>

identified a cohort of students who were the least likely to graduate. These students all had economic disadvantages. They were Pell Grant-eligible, first-generation and students of color. Beginning in 2013, the University Leadership Network offered 500 seats to incoming freshmen who fit those demographics.”

Notwithstanding the overall success of ULN and other programs, the use of a matrix which determines disbursement of funds by race is problematic. It may be that the University Leadership Network cohort moving forward should be determined by all previously considered predictive metrics, excluding race. Under narrow tailoring, deference may not be given to the university for the distribution of these funds if race is one factor considered in identifying student recipients.

Texas Advanced Commitment (2019) and Dell Scholars (2020): Addressing Affordability and Access

On July 9, 2019, the Board of Regents unanimously approved a special supplemental distribution from the Permanent University Fund of \$250 million. By law, two-thirds of this distribution was UT System’s share. This money was allocated to create an endowed fund “to cover the full cost of tuition and fees for low-income, in-state undergraduate students at The University of Texas at Austin...to create a permanent source of funding to improve affordability and access for students” (Board of Regents Meeting 1196, meeting minutes p.2).

This endowment is known as the Texas Advance Commitment. The Texas Advance Commitment “guarantees aid to cover the full cost of tuition and fees for Texas families earning \$65,000 or less.”¹⁹ Under the hypothesis that cost barriers disproportionately hinder minorities, the Texas Advanced Commitment would be viewed as an impactful race neutral policy for obtaining the benefits of diversity.

Announced in January 2020, the UT for Me Powered by Dell Scholars Program provides financial support based on Pell-eligibility. The UT for Me website says, “Each Dell Scholar will receive a financial award of \$20,000 over their time in college that can be applied to their cost of attendance, including room and board, transportation, supplies, and other expenses.”¹⁵ For students who have tuition covered through the Texas Advance Commitment, the largest cost of attending college is room and board. Expanding on-campus housing delivers a greater degree of operational control over rates and allows this program to be operated at greater efficiency.

¹⁹ <https://utforme.utexas.edu/>

Enrollment Stability, 2010-2020

The *Students for Fair Admissions* suit cites statistical evidence that UT-Austin is engaging in racial balancing and is therefore “not using racial preference to pursue ‘critical mass’ or any other diversity goal the Supreme Court has ever found permissible” (p. 33). The suit cites the level of overall Black undergraduate enrollment, which has hovered around 5% virtually unchanged since 2009.

32. There is no non-discriminatory reason that could justify admissions figures this stable year after year given the unique characteristics of each applicant for admission. If UT-Austin were truly treating each applicant for admission as an individual, as it professes to do, “[o]ne would expect the percentage of [African-American] enrollees produced by such a system to vacillate widely from year to year, reflecting changes in each year’s applicant pool.” Alan Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 382 n.13 (1979). That is not happening (*Students for Fair Admissions*, p. 46-47).

This is such an important claim; it is important analyze this claim with extreme care. A fuller review would examine statistical data at the college and program level in addition to the overall university level, particularly because many admission decisions are decentralized. Since there are smaller sample sizes at the college and program level, wider variances would be expected.

More than with undergraduate admissions, the law school has experienced remarkable stability in its percentages of White, Black, Hispanic, and domestic Asian students. From 2014 to 2015, despite a total enrollment dropping from 1,099 to 979, enrollment for major racial groups had a virtually unchanged distribution. Similarly, from 2011 to 2012, enrollment dropped from 1,178 to 1,108 yet all major racial groups had virtually the same distribution.

In Fall 2020, due to coronavirus, international law students dropped from 85 to 27. In that year, domestic Asian students were admitted at their highest rate ever, 8.8% which was 1.8% higher than the previous year. This was the largest leap in domestic Asian enrollment in the dataset. Overall, from 2011 to 2020 Black enrollment was between 4.9% and 6.8%; Asian enrollment was between 5.1 and 7.0%; between 2011 and 2019 Hispanic enrollment between 13.5% and 15.0%. White enrollment at the law school has been stable between 56.1% and 58.7% between 2011-2017, and between 2018-2020 was between 59.9%-62.7%. All of this is suggestive of potential race-balancing. The likelihood of these ratios persisting over a long period of time could be determined with a professional statistical analysis.

In the graduate programs, from Fall 2011-Fall 2016 overall enrollment dropped from 11,497 to 10,352. Despite the drop in enrollment during this period, Black, Hispanic, and domestic Asian enrollment all operated within a razor tight range. Blacks 3.0-3.2%, Asians 7.4-7.8%, and Hispanics 9.6-10.0%. On the face, these examples are strong evidence for the plaintiff.

Enrollment by Level and Race/Ethnicity - Fall Semesters

		Fall 2011		Fall 2012		Fall 2013		Fall 2014		Fall 2015		Fall 2016		Fall 2017		Fall 2018		Fall 2019		Fall 2020	
Undergraduate	White only	19,375	50.4%	19,598	49.1%	19,064	47.7%	18,253	46.2%	17,593	44.4%	17,058	42.5%	16,832	41.6%	16,358	40.1%	15,565	38.8%	14,937	37.3%
	Hispanic/Latinx (any combo)	7,701	20.0%	8,344	20.9%	8,679	21.7%	8,621	21.8%	8,775	22.1%	9,077	22.6%	9,312	23.0%	9,564	23.4%	9,800	24.4%	10,448	26.1%
	Black only	1,758	4.6%	1,763	4.4%	1,701	4.3%	1,622	4.1%	1,647	4.2%	1,672	4.2%	1,632	4.0%	1,712	4.2%	1,686	4.2%	1,796	4.5%
	Black (2 or more, excl. Hisp.)	126	0.3%	197	0.5%	240	0.6%	250	0.6%	262	0.7%	290	0.7%	326	0.8%	336	0.8%	349	0.9%	397	1.0%
	Asian only	6,823	17.8%	7,053	17.7%	7,130	17.8%	7,459	18.9%	7,865	19.9%	8,315	20.7%	8,581	21.2%	8,967	22.0%	9,064	22.6%	9,280	23.2%
	American Indian only	123	0.3%	112	0.3%	91	0.2%	81	0.2%	65	0.2%	57	0.1%	61	0.2%	54	0.1%	54	0.1%	44	0.1%
	Hawaiian/Pac. Islander only	21	0.1%	34	0.1%	44	0.1%	53	0.1%	58	0.1%	59	0.1%	55	0.1%	39	0.1%	32	0.1%	25	0.1%
	2 or more (excl. Hisp./Black)	554	1.4%	801	2.0%	1,006	2.5%	1,105	2.8%	1,143	2.9%	1,153	2.9%	1,149	2.8%	1,169	2.9%	1,176	2.9%	1,190	3.0%
	International	1,796	4.7%	1,914	4.8%	1,888	4.7%	1,877	4.7%	1,944	4.9%	2,120	5.3%	2,183	5.4%	2,248	5.5%	2,099	5.2%	1,602	4.0%
Unknown	160	0.4%	139	0.3%	136	0.3%	202	0.5%	267	0.7%	367	0.9%	362	0.9%	357	0.9%	338	0.8%	329	0.8%	
Total Undergraduates		38,437	100.0%	39,955	100.0%	39,979	100.0%	39,523	100.0%	39,619	100.0%	40,168	100.0%	40,492	100.0%	40,804	100.0%	40,163	100.0%	40,048	100.0%
Graduate	White only	6,045	52.6%	5,777	51.9%	5,519	50.2%	5,199	48.6%	4,838	46.7%	4,614	45.2%	4,499	44.5%	4,306	43.2%	4,208	42.5%	4,067	43.0%
	Hispanic/Latinx (any combo)	1,105	9.6%	1,085	9.8%	1,078	9.8%	1,061	9.9%	1,038	10.0%	1,056	10.4%	1,097	10.9%	1,131	11.3%	1,134	11.4%	1,196	12.7%
	Black only	331	2.9%	316	2.8%	318	2.9%	291	2.7%	297	2.9%	307	3.0%	313	3.1%	321	3.2%	359	3.6%	355	3.8%
	Black (2 or more, excl. Hisp.)	22	0.2%	22	0.2%	25	0.2%	30	0.3%	31	0.3%	42	0.4%	47	0.5%	47	0.5%	49	0.5%	62	0.7%
	Asian only	856	7.4%	815	7.3%	816	7.4%	794	7.4%	812	7.6%	785	7.7%	768	7.6%	817	8.2%	823	8.3%	820	8.7%
	American Indian only	24	0.2%	26	0.2%	18	0.2%	14	0.1%	13	0.1%	17	0.2%	20	0.2%	19	0.2%	17	0.2%	13	0.1%
	Hawaiian/Pac. Islander only	6	0.1%	5	0.0%	5	0.0%	6	0.1%	6	0.1%	7	0.1%	5	0.0%					6	0.1%
	2 or more (excl. Hisp./Black)	118	1.0%	137	1.2%	128	1.2%	142	1.3%	154	1.5%	156	1.5%	151	1.5%	164	1.6%	157	1.6%	160	1.7%
	International	2,755	24.0%	2,721	24.5%	2,817	25.6%	2,892	27.0%	2,908	28.1%	2,957	29.0%	2,961	29.3%	2,917	29.3%	2,905	29.3%	2,544	26.9%
Unknown	235	2.0%	219	2.0%	270	2.5%	272	2.5%	255	2.5%	258	2.5%	244	2.4%	249	2.5%	253	2.6%	226	2.4%	
Total Graduates		11,497	100.0%	11,123	100.0%	10,994	100.0%	10,701	100.0%	10,352	100.0%	10,199	100.0%	10,105	100.0%	9,973	100.0%	9,908	100.0%	9,449	100.0%
Law	White only	670	57.1%	637	57.5%	636	58.7%	616	56.7%	548	56.1%	555	57.8%	539	58.3%	641	61.0%	609	59.9%	612	62.7%
	Hispanic/Latinx (any combo)	167	14.2%	165	14.9%	163	15.0%	154	14.2%	135	13.8%	132	13.8%	125	13.5%	151	14.4%	147	14.5%	152	15.6%
	Black only	51	4.3%	47	4.2%	42	3.9%	46	4.4%	50	5.1%	46	4.8%	45	4.9%	43	4.1%	37	3.6%	39	4.0%
	Black (2 or more, excl. Hisp.)	11	0.9%	12	1.1%	11	1.0%	14	1.3%	17	1.7%	14	1.5%	11	1.2%	14	1.3%	14	1.4%	11	1.1%
	Asian only	60	5.1%	58	5.2%	61	5.6%	70	6.4%	65	6.7%	55	5.7%	50	5.4%	59	5.6%	71	7.0%	66	6.8%
	American Indian only			5	0.5%																
	2 or more (excl. Hisp./Black)	17	1.4%	19	1.7%	31	2.9%	36	3.2%	29	3.0%	28	2.9%	26	2.8%	26	2.5%	23	2.3%	20	2.0%
	International	80	6.8%	87	7.9%	77	7.1%	94	8.6%	81	8.3%	90	9.4%	100	10.8%	87	8.3%	85	8.4%	27	2.8%
	Unknown	117	10.0%	77	7.0%	63	5.8%	56	5.2%	52	5.3%	40	4.2%	28	3.0%	29	2.8%	30	3.0%	29	3.0%
Total Law		1,176	100.0%	1,108	100.0%	1,086	100.0%	1,088	100.0%	979	100.0%	964	100.0%	928	100.0%	1,055	100.0%	1,019	100.0%	979	100.0%
Total UT Austin		51,112	100.0%	52,186	100.0%	52,059	100.0%	51,312	100.0%	50,950	100.0%	51,331	100.0%	51,525	100.0%	51,832	100.0%	51,090	100.0%	50,476	100.0%

Fig. 7.8, Enrollment by Level and Race/Ethnicity data, 2011-2020

Enrollment Stability among First-Time Freshman Black Males

Another potentially problematic example comes from a closer examination of the enrollment rates of Blacks by gender. A closer look at *Figure 7.9* reveals a stability for Black males which is remarkable when contrasted with the variation in Black females. From 2011 to 2020, Black male admittance for First-Time Freshman ranged from 100-142 students. Black female admittance during this period ranged from 148-289 students and varied more greatly from year to year. Due to the low sample size, it would be relevant to understand how many of the Black males are admitted each year for athletics or due to other special skills.

Student Demographics

Enrollment of First-Time Freshman by Gender and Race/Ethnicity - Fall Semesters

		Fall 2011	Fall 2012	Fall 2013	Fall 2014	Fall 2015	Fall 2016	Fall 2017	Fall 2018	Fall 2019	Fall 2020
Men	White only	1,554	1,674	1,434	1,490	1,448	1,563	1,461	1,508	1,303	1,093
	Hispanic/Latinx (any combo)	664	822	706	647	745	844	842	829	832	929
	Black only	118	125	100	110	125	125	139	142	120	129
	Black (2 or more, excl. Hisp.)	20	27	19	20	20	26	36	26	30	33
	Asian only	642	731	717	866	866	1,010	898	1,091	985	998
	American Indian only		10				12	5			5
	Hawaiian/Pac. Islander only	5				7	5				
	2 or more (excl. Hisp./Black)	87	107	91	85	93	129	104	113	108	91
	International	149	152	98	136	166	223	142	186	158	162
	Unknown	11	9	19	27	33	53	22	37	25	38
Women	White only	1,874	2,008	1,875	1,776	1,748	1,870	1,905	1,834	1,647	1,668
	Hispanic/Latinx (any combo)	839	1,085	954	853	965	1,235	1,222	1,327	1,291	1,488
	Black only	208	234	191	148	230	260	227	262	206	289
	Black (2 or more, excl. Hisp.)	30	37	32	28	31	31	49	54	46	61
	Asian only	667	759	740	790	913	923	966	1,146	1,074	1,122
	American Indian only	13	11					10			
	Hawaiian/Pac. Islander only		5		6		5				
	2 or more (excl. Hisp./Black)	104	125	122	129	125	128	122	156	154	159
	International	146	156	123	128	172	229	194	205	151	143
	Unknown	10	12	15	36	25	45	29	33	29	47
Total New Students		7,149	8,092	7,249	7,285	7,743	8,719	8,381	8,960	8,170	8,459

Fig. 7.9, Enrollment of First-Time Freshman by Gender and Race/Ethnicity data, 2011-2020

III. SYNTHESIS

8. DEFINING RELATIONSHIPS BETWEEN HOUSING AND EQUITY AT UT-AUSTIN

9. RECOMMENDATIONS FOR COMPREHENSIVE HOUSING POLICY

TOPIC #8 DEFINING RELATIONSHIPS BETWEEN EQUITY AND HOUSING POLICY AT UT-AUSTIN

Note: I am not a lawyer. This section was greatly improved by feedback from Paul Finkelman.¹

“EQUITY – In its broadest and most general signification, this term denotes the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men, -- the rule of doing to all others as we desire them to do to us; or, as it is expressed by Justinian, “to live honestly, to harm nobody, to render to every man his due.” -Black’s Law Dictionary

We have now considered the meaning of equity at UT-Austin on a deep level. Equity at UT is fundamentally about stakeholderhood. Citizens have a stake in major public institutions, and major public institutions have a responsibility to serve the citizenry. When it comes to Equal Protection, equity fundamentally implies fairness; discrimination unfairly lessens the equity citizens have in major public institutions. In the event of discrimination, the government has a stake in providing a remedy, and aggrieved parties are entitled to vindication.

Fisher I begins with Justice Kennedy recognizing the unique role UT-Austin plays in the state of Texas: “Located in Austin, Texas, on the most renowned campus of the Texas state university system, the University is one of the leading institutions of higher education in the Nation. Admission is prized and competitive” (p. 304). Flagship state research universities occupy a unique role for their states as both a conduit of opportunity and as a concentration of tax dollars and intellectual resources.

Because of its uniqueness, Texas residents have a right to expect the State address any major issue presenting an entry-barrier to attending UT-Austin for large swaths of the population. The extreme delta in the cost of housing in Austin may certainly be considered relevant. UT must make *serious, good faith considerations* of remedies, particularly if it is found that large numbers of auto-admit students are self-selecting out of attending UT due to Austin’s cost of living. Obtaining diversity by removing a barrier is fundamentally different from achieving diversity through race-balancing.

Diversity here is defined broadly under the 1st Amendment. It refers to race but also to ethnicity, geography, and socioeconomic status. UT may track racial demographics to see if self-selecting out due to cost disproportionately affects a particular race. Data from the Texas Advanced Commitment, the Dell Scholars program, and the University Leadership Network should provide a fertile ground to research correlations between ameliorating cost and removing barriers for racial groups.

¹ Paul Finkelman is a celebrated legal historian and President of Gratz College. He taught at UT from 1978-1984.

I believe the fulcrum of UT's obligation is best found in the *Grutter* opinion's delineation of the narrow tailoring standard:

Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (alternatives must serve the interest "'about as well'"); *Richmond v. J. A. Croson Co.*, 488 U. S., at 509-510 (plurality opinion) (city had a "whole array of race-neutral" alternatives because changing requirements "would have [had] little detrimental effect on the city's interests"). **Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks** (p. 27, emphasis added).

Although many Supreme Court judges have felt otherwise, current precedent is that UT may not engage in race-balancing; however, it is within UT's deference to balance its commitment to providing educational opportunities to members of all races with maintaining a reputation for excellence.

In the post-*Hopwood* period, UT expanded its overall enrollment. This was a race-neutral method of increasing equity for all racial groups because it increased the numerical amount of minority students. At this time, the university grew to a size where future increases in enrollment were studied and found to be unworkable without damaging UT's reputation for excellence; the debate over increasing the size of the university is contemporaneously addressed by the 2003 Task Force on Enrollment, which cited the strain on the physical plant as well as student-to-teacher ratios. This conclusion was made within the university's deference, in a process which denoted *serious consideration*.

Having undergone such a process, UT was not required to continue to grow its enrollment at the expense of its academic relationship, simply because it would further increase diversity. The report did however conclude that "[t]echnological changes and improved teaching techniques may suggest then that it is both viable and advisable to increase the size of the University in the long run. The Task Force states emphatically, however, that the University must continue to provide to all its students the high quality of education that it has always made available. In addition, it is essential that the University be a diverse and united community to foster the social growth of all its members" (p.24).

When referencing alignment between equity and housing, I suggest that increasing on-campus housing – a race-neutral policy – would both provide educational opportunities for a diverse group of students and increase the university's reputation for excellence.

It would increase the opportunities for students in two major ways. One, bringing housing costs under the operational control of the university creates a significant ballast against increases in the Austin rental market. This prevents housing costs from becoming a greater structural barrier to low socioeconomic students who are automatic qualifiers under the Top

10% rule. This also is an important move to increase the efficacy of the Dell Scholars UT for Me program, which includes a \$5000 annual stipend which may be applied towards rent. If this money flows into the private market rather than units under UT's operational control, it will have the effect of price support for the student housing niche market and lose efficacy.

Secondly, living on-campus exposes students to a much richer, more interactive, and immersive college experience. This is a benefit shared by all students². Housing generates income and UT may bond out for the expenses. Therefore, UT may pursue housing without straining financial resources which could be applied towards academic excellence elsewhere.

Effect of living on campus: Key academic metrics

First Time Freshman Retention Rate

	Fall 2010	Fall 2011	Fall 2012	Fall 2013	Fall 2014	Fall 2015	Fall 2016
Students who <u>lived</u> in the residence hall	93.3%	94.5%	94.9%	95.8%	96.3%	96.3%	96.5%
Students who <u>did not</u> live in the residence hall	88.1%	89.7%	90.8%	91.3%	92.4%	91.8%	91.9%

Undergraduate Cumulative GPA

	Spring 2011	Spring 2012	Spring 2013	Spring 2014	Spring 2015	Spring 2016	Spring 2017
Students who <u>lived</u> in the residence hall	3.104	3.192	3.198	3.247	3.298	3.302	3.328
Students who <u>did not</u> live in the residence hall	3.088	3.110	3.135	3.162	3.189	3.214	3.234

*Spring GPA is being reported since most first year students do not have a GPA in Fall.

Fig 8.1, Statistics from Housing and Dining Memo, January 9, 2018

Between 2010 and 2016, freshmen who lived in residence halls averaged a 4.5% higher retention rate than their off-campus peers. This was a consistent bonus from year to year. The Student Success Initiative portfolio was explicitly designed to increase four-year graduation rates with an eye towards “traditionally underserved students, including first-generation students, low-income students, and underrepresented minorities.”³ Freshman retention rate has repeatedly been identified as a key metric in the path towards increased graduation rates for all cohorts, including cohorts identified here as *traditionally underserved*.

² See “1st Amendment Rationale for a Compelling Interest in Diversity in *Bakke*” (p. 66-67)

³ “Every Student Can”, p.1.

On-campus GPA advantage more pronounced with apples-to-apples comparison

	ON CAMPUS	OFF CAMPUS
	FALL	FALL
FRESHMAN	3.00	2.84
SOPHOMORE	3.35	3.24
JUNIOR	3.43	3.25
SENIOR	3.42	3.28
	SPRING	SPRING
FRESHMAN	3.24	3.17
SOPHOMORE	3.43	3.18
JUNIOR	3.43	3.26
SENIOR	3.45	3.30

Fall 2012 to Spring 2021

GPA ADVANTAGE OF ON-CAMPUS VS. OFF-CAMPUS STUDENTS AT UT-AUSTIN			
Fall 2012-Spring 2021			
	FALL	SPRING	TOTAL
FRESHMAN	0.165	0.072	0.118
SOPHOMORE	0.111	0.255	0.183
JUNIOR	0.179	0.175	0.177
SENIOR	0.140	0.148	0.144

Fig. 8.2, GPA comparison, by semester

Fig. 8.3, GPA advantage for on-campus student, by semester

I acquired raw GPA data via an open records request. The cumulative on vs. off-campus GPA difference of .09 referenced in *Fig 8.1* is skewed due to the differing number of Freshmen vs. upperclassmen living on-campus. More relevant is to compare students at the same grade level. The most significant GPA boost for living on-campus is for Sophomores (.183) and Juniors (.177). Sophomores would likely be the group most impacted by additional on-campus housing. This benefit of GPA is compounded by the benefits of increased student life which would accompany an on-campus student body more diverse in terms of grade level. On-campus living should not be merely a place for Freshmen, although UT's on-campus population has trended this direction since the 2013 Residence Hall Needs Assessment. Bringing upperclassmen back to campus would lead to greater levels of student life, unlocking the benefits of diversity.

Potential Confound: Grade Inflation

AVERAGE UT-AUSTIN FALL GPA BY YEAR												
1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	
2.91	2.95	2.97	3.00	3.02	3.05	3.08	3.1	3.11	3.11	3.08	3.09	
2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	
3.07	3.08	3.12	3.14	3.17	3.20	3.23	3.26	3.3	3.33	3.35	3.47	

Fig. 8.4, Grade inflation, 1997-2020

It is important to ensure the efficiency of the state's commitment to equity. To isolate the effect of UT's equity programs on student success, one must account for other variables which may skew the data. An important consideration is grade inflation. UT-Austin switched to a plus/minus grade system in Fall 2009.⁴ One of the stated reasons was to reduce grade inflation however the university has experienced significant grade inflation since 2009. I hypothesize the plus/minus system has led to three times as many students with grades close to the cutoff point, many of whom petition their professors for a grade bump each semester. I also believe there is a general reluctance among professors to push back against a student wishing for a raised grade, due to of an unwillingness to get involved in a formal arbitration process. It may also be that students are more incentivized to raise the issue, as their grades may be related to their scholarships. Finally, there simply may have been a cultural shift leading students to question the power dynamic between themselves and professors.

Capturing additional revenue from the above-market segment: The 2400 Nueces Model

HOUSING AND DINING		
	FY 2018-2019	FY 2019-2020
Revenue Sources		
Conferences	\$ 1,944,263	\$ 2,102,381
Dining	\$ 28,066,772	\$ 38,694,863
Halls	\$ 65,305,808	\$ 59,699,129
Bevo Pay	\$ 669,397	\$ 620,000
Student Activity	\$ 85,000	\$ 85,000
Apartments	\$ 6,188,550	\$ 6,089,550
2400 Nueces		\$ 9,912,119
	\$ 102,259,790	\$ 117,203,042

Fig. 8.5, 2400 Nueces provides additional revenue

UT-Austin's most recent housing expansion is an above-market public-private partnership located at 2400 Nueces. This thesis advocates for generating additional housing revenue to apply towards an endowment which would then put downward pressure on housing rates for students. Paul Finkelman proposes the endowment would best fund needs-based cost-of-living scholarships tied to FAFSA in order to target affordability with efficacy.

⁴ May 15, 2009 Memo from Vice Provost Terri Givens to Deans and Department Chairs.

In February 2019, UT finalized the purchase of 2400 Nueces by picking up an option from a February 2011 ground lease deal with developer-led construction⁵. The public partner chosen after a RFQ process was EdR, a publicly traded Real Estate Investment Trust. The utilization of a staggered financial option could prove useful in a rapid expansion model which maxes debt service obligation in the short term. Options could be aligned to come due just as enough debt service was retired from bond financed on-campus housing expansion. This is the model which allows for maximum short-term throughput and housing expansion. In 2019, the 2400 Nueces physical plant acquisition was achieved for \$74.7 million; \$70.2 million was financed through RFS bonds and \$4.5 million was sourced from UT-Austin's AUF reserves⁶. The deal was approved by Senior Vice President and CFO Darrell Bazzell, who assured me in an interview that the numbers made good financial sense for the university.

UT-Austin and private real estate development companies have certainly long been aware of demand for student housing at the high end of the market. In an internal document, UT determined that "there is a large number of Greek sorority students who live in [2400 Nueces], approximately 80%" and set rates against "facilities within a 1-3 mile radius of the main campus that were constructed within the same decade and have comparable amenities and room types."⁷ The profits manifest in the Vice President of Student Affairs portfolio.

The drawback of this model is that if UT has a limited throughput, in the face of a major housing crunch, resources have been applied towards the top of the market. The profit notwithstanding, pursuing future above-market P3s only makes sense in the context of a rapid expansion model which applies resources towards addressing the average student on-campus, including directly addressing affordability. UT should not pursue "market-driven development"⁸ for its own sake.



Fig. 8.6, 2400 Nueces

⁵ "Public/Private Partnerships-Case Study for Student Housing at UT Austin," Presentation for Association of Texas College & University Facilities Professionals, October 2, 2014, p. 29; Open Records Request #R000985-121120

⁶ See: Open Records Request #R000985-121120

⁷ New and Increased Non-Mandatory Fee Request Form, proposed for August 2020.

⁸ "Public/Private Partnerships-Case Study for Student Housing at UT Austin," Presentation for Association of Texas College & University Facilities Professionals, October 2, 2014, p.78.

Equity in *Students for Fair Admissions*

The *Students for Fair Admissions*⁹ suit must be taken seriously, particularly given the current makeup of the Supreme Court. Having done this research, I find several mischaracterizations in this lawsuit; although I am not a lawyer, I am compelled to opine. I find very little significance in which party wins this case and a tremendous amount of significance in the grounds on which the decision will be made. For this reason, I offer this analysis in hopes that lawyers for both the plaintiff and the defendants will consider incorporating these views into their proceedings.

This case has all the opportunity to overturn precedent in a way which damages the legitimacy of the Court, or it can move us all forward. If the key litigant Edward Blum wishes to make the serious charge that UT has discriminated against Blacks, let it not be spurious or cursory. If race is no longer to be used in admission, let it be because we have progressed to the point where we can acceptably address race with race neutral alternatives.

My major qualm with *Students for Fair Admissions* as filed is that at no point does it mention the 1st Amendment. Therefore, its paradigm for basic terms such as *diversity* and *equity* are not grounded in a major thread of precedent. It repeatedly refers to “racial diversity” but there is no such thing under the law, and (ironically) often the model presented is more properly considered racial balancing, which is presumptively what the plaintiff is against. The state’s compelling interest in diversity is more general; in this paradigm race must be only a factor, never considered separately. Diversity in higher education is something that all students have a stake in – it is the exposure to different ideas that is important for a university to be a combustion engine of *speculation, experimentation, and creation*.

There is the potential in this case to revive a very old thread of logic regarding the remedial need to consider race. The school may not make this determination, only a court. Although it is uncertain how the Court may view such an argument, this is a relevant defense UT may employ if it is determined UT has discriminated against Black students as alleged. This would only be relevant to a precise discrimination in modern times, not a more general discrimination related to our nation or UT’s history, unless established as an uninterrupted continuation of an old pattern of discrimination.

This having been said, I will now turn to the numbered paragraphs in the suit which I feel warrant comment:

33. UT-Austin repeatedly acknowledged that, during this time period, its race-neutral admissions process created a more racially diverse environment than existed under the race-based admissions process it used before Hopwood.

Comment: This is during a period that UT addressed the drop in minority enrollment by increasing its overall enrollment. This came to a point of unworkability, as addressed in the

⁹ Included as Appendix D.

2003 Report of the Task Force on Enrollment Strategy. The suit misleadingly combines the percentage of students with data representing the raw number of students.

36. By 2004—the last year that UT-Austin used this race-neutral system—the entering freshman class was 4.5% African American, 17.9% Asian American, and 16.9% Hispanic.

37. The 2004 entering freshman class, in other words, had a higher percentage of African Americans, Asian Americans, and Hispanics than the class that entered in 1996 when UT-Austin last used racial preferences.

Comment: The suit presents the 2004 demographics as if they are an end point of addressing racial diversity, simply by providing a snapshot against a single point in time. I do not prescribe to this paradigm any more than I prescribe to the idea that the critical mass study was anything more than a means of providing a direct comparison with a moment in time when it was generally agreed that diversity had not been achieved. Having achieved higher minority rates than that moment does not preclude the University from seeking to further obtain the benefits which flow from diversity.

38. Despite this success, UT-Austin reflexively jumped at the first chance to reinsert race into its admissions process.

Comment: UT's initial response was quite deliberate at both the System and University level.

46. UT-Austin offered two reasons for why it needed to grant a preference to African-American and Hispanic applicants to achieve student-body diversity. First, it claimed a lack of “sufficient diversity” at the classroom level. Second, it pointed to “significant differences between the racial and ethnic makeup of the University’s undergraduate population and the state’s population.”

Comment: I am unclear if this claim is entirely true. I do not believe the classroom study based on the likelihood of a minority encountering a member of their own race in a classroom setting is a viable paradigm for diversity. A better paradigm would consider the likelihood of a student taking a certain number of classes with three or more races in the class. I suspect that defining diversity in that way would yield the response that UT has achieved diversity in all but a few fields. If Mr. Blum wishes to make the claim that UT has engaged in discriminatory policy, he must look at the college level rather than make sweeping claims on the cursory evidence that the Black enrollment has not greatly increased. This would only apply to diversity in a 1st Amendment paradigm and does not speak to grating preference to Blacks as a remedy to chronic, unyielding underrepresentation.

47. UT-Austin did not project a date when it would stop using race in admissions decisions. Instead, UT-Austin committed to review its policy in five years.

Comment: As discussed elsewhere, it is to be determined if UT has met its burden to properly review its use of race on a rolling basis.

66. [In *Fisher II*,] Justice Alito also dissented, concluding that UT-Austin's admissions system could not satisfy strict scrutiny because the university had not defined any of its alleged interests— "educational benefits of diversity," "demographic parity," "classroom diversity," "intraracial diversity," and "avoiding racial isolation"—with clarity, and had failed to demonstrate that its program was narrowly tailored to achieve any of these interests. *Id.* at 2224 (*Fisher II*, Alito, J., dissenting)

67. "What is at stake," according to Justice Alito, "is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve 'the educational benefits of diversity,' without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives. Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT's position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable—and remarkably wrong." *Id.* at 2242-43

Comment: This is something to take very seriously. I believe if the University does not define the "educational benefits of diversity" in 1st Amendment terms, it is likely fatal. Once defined as such, the argument must still be further refined. It is perhaps not enough for modern conservative jurisprudence to claim an interest in promoting or defining the marketplace of ideas: it may be stronger to argue the importance of removing structural barriers.

The suit here does the disservice of conflating what it calls the university's undefined alleged interests. *Demographic parity*, *classroom diversity*, *intraracial diversity*, and *avoiding racial isolation* are all specific goals under the heading of *the educational benefits of diversity* which Scalia rejects. The state may offer other valid rationales constituting the compelling interest in obtaining the educational benefits which flow from diversity.

In a separate line of logic, four justices in *Bakke* found "Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race" (Brennan, White, Marshall, and Blackmun, holding 2). The term *underrepresented* is applied separately not under the justification of *the state's compelling interest in diversity* but rather under the logic of *remedial necessity*.

Underrepresentation is not a reference to the current moment, but rather a reflection on substantial, chronic issues. I do not believe underrepresentation can apply to a given moment, because, as the plaintiff cites, there is an expected standard deviation for any given population which would then be expected to periodically yield an underweight year. As plaintiff notes, the remarkable stability of Black enrollment is counter to this and perhaps shifts the burden of explaining this prolonged phenomenon to the University. Smaller sample sizes, such as UT Law

admissions, would be expected to have a wider variance in enrollment than the overall undergraduate population, however my research did not find the expected variance.

As filed, the suit contends that the lack of Black enrollment is exactly a substantial, chronic issue. The university cannot make the decision of remedial necessity itself, only a court may do this. I believe UT would be well-served to counter the suit's argument of discrimination against Blacks by reviving the argument of *remedial use of race* found in *Bakke*. This is only if the discrimination at issue is found to be immediate: not the effects of a 100-year-old song, or a 50-year-old racist comment, but rather in response to contemporary admissions policies.

I give little credence to the suits claim that a Black enrollment steady around 5% is in of itself complete enough proof of discrimination; a more exacting examination is necessary. If UT were to defend based on remedying past or current discrimination, it would steel the university in the face of potential damaging information. UT in this way would be the party offering the remedy.

69. The reality, however, is that UT-Austin has used the latitude created by this process to allow politically connected individuals—such as donors, alumni, legislators, members of the Board of Regents, and UT-Austin officials and faculty—to get family members and other friends admitted to UT-Austin, despite having grades and standardized test scores substantially below the median for admitted students.

80. By all indications, then, UT-Austin uses its “diversity” rationale primarily as pretext to justify the admission of underqualified, well-connected applicants.

Comment: To my knowledge, the admittance of a small portion students based on connections is not illegal. It is unclear if the practice continues today; if it has, UT goes to lengths to obscure this fact. If current, the University should be forthright about the practice. The system of holds identified in the Kroll Report is a form of affirmative action that favors students believed to holistically benefit the University, due to their connections. Such a system may be considered out of date by today's electorate, but that does not imply illegality. The university accepts students, including athletes, for a variety of reasons despite substantially below median grades and test scores. The system of holds was found by the Kroll Report to be nondiscriminatory: it is primarily designed to enroll certain students, rather than to keep other students out.

Despite plaintiff's assertion, there is no tie between the genesis of this practice and the use of a holistic admissions which considers diversity, and therefore no indication diversity is used as an integral cover for the continuation of this practice. The practice of holds predates the consideration of minority status as a positive in admissions:¹⁰

¹⁰ Regent Erwin's stark view of the relative importance of minority academic achievement can be found on p. 330 of “The Influence of Frank Erwin on Texas Higher Education” by Deborah Lynn Bay (1988)

Friends further acknowledge that Erwin from time to time helped certain students gain admission into law school or medical school. But they believe that Erwin pragmatically saw it as a trade-off that would pay off handsomely in political benefits to the University.¹⁶

Fig. 8.7, Passage from "The Influence of Frank Erwin on Texas Higher Education" by Deborah Lynn Bay, p.327

82. There is no indication that UT-Austin has discontinued its policy of providing special admissions preferences to underqualified, well-connected applicants.

Comment: This is true, however there is also no indication that UT has continued this policy. I attempted to determine if this practice has been continued in open records requests but was unsuccessful in making a definitive determination.

90. Nevertheless, the UDIAP stated that UT-Austin still needed to use race in its admissions decisions because certain minorities "are underrepresented in certain areas of study, including business, engineering, and the sciences" and there was a "need to include diversity within groups to break down stereotypes." UT-Austin's ultimate goal, according to the UDIAP, was to "achieve a level of enrollment whereby students from underrepresented groups no longer feel isolated." The UDIAP did not identify the level of enrollment necessary to ensure that these groups did not "feel isolated." Despite claiming in 2004 that it would systematically study and review the need for racial preferences every five years, there is no indication that UT-Austin has conducted another study.

Comment: Underrepresented as used here I believe falls under the paradigm which was not the majority opinion of the court in *Bakke*. As mentioned elsewhere, I do not agree with the logic of breaking down stereotypes as presented by the university, because it creates a two-tiered system where race is considered first and other aspects such as socioeconomic status and geography are considered only as a subset of race. I believe all these factors properly must be considered at the same level.

It is notable that the suit does not make a claim of discrimination in these select areas of study where underrepresentation has been most pronounced and most chronic, instead reserving such a claim for the more general undergraduate population. The suit makes the opposite argument here – that there is no need for the consideration of race in the exact prestige majors where discrimination allegedly would be most likely to be occurring at present.

97. From 2008 through 2017, UT-Austin publicly reported that “racial/ethnic status” was a factor that was merely “considered” in the admissions process. Other factors, such as class rank and the rigor of the student’s academic record, were “very important” in the admissions process and thus given more weight in the admissions process.

98. Feeling liberated by Fisher II, however, UT-Austin has increased its reliance on race. UT-Austin now reports that an applicant’s “racial/ethnic status” is a “very important” factor in UT-Austin’s admissions decisions. Thus, to UT-Austin, a student’s skin color is equally important to admissions as class rank, test scores, extracurricular activities, and other accomplishments.

Comment: This seems like a semantic distinction only. A proper allegation would dig into the numbers of admittees and applications to much greater detail. Absent such research, the final claim is spurious.

100. As the following chart shows, there has been a steady increase in racial diversity since 2008:

University of Texas at Austin Admissions Share of Total Students Admitted by Race				
Year (Class Entering in Summer/ Fall)	Race/Ethnicity of Applicant			
	White	Hispanic	African American	Asian
2008	51%	21%	6%	18%
2009	51%	21%	5%	19%
2010	49%	23%	5%	17%
2011	48%	22%	5%	19%
2012	45%	25%	5%	18%
2013	45%	24%	5%	19%
2014	43%	23%	5%	21%
2015	40%	24%	5%	22%
2016	38%	26%	5%	21%
2017	38%	27%	5%	22%
2018	36%	27%	6%	23%

Fig. 8.8, UT-Austin admissions by race, 2008-2018

Comment: The suit must be careful here not to present a definition of diversity which is actually more relevant in a racial-balancing paradigm. This chart shows no increase for blacks at all. Additionally, the numbers don’t align; the 2008 numbers account for 96% of the students and the 2018 numbers for 92%.

107. As the data show, in 2018, there were three times as many white students than Hispanics (45% v. 15%) who were admitted outside of the Top Ten Percent Plan. Indeed, more white students were admitted outside of the Top Ten Percent Plan than were Hispanics, African Americans and Asians combined (45% v. 44%)

Comment: The state of Texas is 41% white, so I fail to see what the suit is getting at here. It suggests elsewhere that a fluctuation around the mean would be a sign of non-discrimination, yet it holds up 45% white holistic admittance as some evidence of malfeasance. The suit gives no thought to what diversity these students may add to the student body and reduces discussion of what the students may add in terms of diversity to their race. This data also shows that virtually no blacks are admitted outside the top 10%, while huge numbers of other races are admitted. Paul Finkelman notes that this seems on the face like discrimination against blacks who are not in the top 10%.

108. Ironically, then, UT-Austin's use of "holistic review" actually diminishes racial diversity in the aggregate, given the success of the Top Ten Percent Plan

Comment: Race must only be one aspect of diversity. I disagree with any paradigm considering "racial diversity" separate from the holistic interest of the state in pursuing diversity, which must be multi-faceted. What the suit characterizes here as racial diversity, separate from a larger paradigm of diversity, is balancing. In the pursuit of diversity under the 1st Amendment, the university may consider race in a holistic context that also considers other factors such as socioeconomic status and geography to generate a diverse student body. The exploration of the minimizing effect on Black enrollment of non-auto-admit holistic admittees is better interpreted in a discrimination paradigm rather than under 1st Amendment rationale.

111. Thus, UT-Austin has a ready-made formula for achieving racial diversity—maintain or increase the use of the Top Ten Percent Plan and admit the rest through race-neutral means.

Comment: Again, it is not "racial diversity" which the university seeks, it is diversity in a more holistic sense. The university has no interest in "racial diversity" separate from a holistic paradigm. Under the *Fisher II* standard, consistent with all major affirmative action cases, race may be considered as a factor to obtain diversity in the holistic paradigm. There are limitations, but it may be considered.

118. Colleges and universities that have eliminated race-based admissions have maintained or increased their student body diversity by placing greater emphasis on socioeconomic factors, which often strongly correlate with race but are not exclusively reserved for applicants of a particular race or ethnicity. Using socioeconomic preferences thus increases racial diversity and achieves the broader diversity that UT-Austin claims to seek by opening the door of opportunity for poor students of all race.

Comment: It may be that UT could maintain or increase “racial diversity”¹¹ by targeting race with a matrix of many proxy measures, such as the ones used in the regression analysis. This also may not be the case. I question the workability of any solution which relies on regression analysis. National evidence is of little use here – the correlation between proxy measures and race must be tailored to the situation in Texas. It is unclear, but here it seems the plaintiff suggests a barrier to entry for low socioeconomic students is an acceptable means of increasing diversity.

123. The national simulation ultimately found that “it is possible to achieve both racial and economic diversity in selective colleges without using race per se as an admissions criterion” and, importantly, that it could be achieved consistent with the understanding “that affirmative action models ought to promote racial diversity as an educational benefit instead of promoting racial diversity for its own sake.”

Comment: This is not known for certain but seems plausible. This is an innovation possible due to data which has been collected on a rolling basis for some time now, however the data collection mechanism (such as a regression analysis) would need rolling court oversight, and workability should not be presumed.

127. In addition to statewide percentage plans, a university can achieve student body diversity by granting a preference based on only community metrics, such as an applicant’s zip code. See Danielle Allen, *Talent Is Everywhere: Using Zip Codes and Merit to Enhance Diversity, The Future of Affirmative Action* (2014).

Comment: Zip codes are not reflective of population, nor are they of equal size. The university is not required to pursue every workable alternative. This proposal has an obvious component which would be expected to increase gamesmanship. The parents of wealthy families could claim property in a poorer zip code to take advantage of this model.

131. By increasing the weight given to an applicant’s socioeconomic status or community of origin, UT-Austin can achieve broader student body diversity (including broader intra-racial diversity), without resorting to the disfavored tool of racial preferences.

Comment: The suit claims to be against admitting less qualified students, preferring standardized test scores as a benchmark, but here suggests disfavoring holistic admittees coming from more affluent households. Justice Alito notes the correlation between SAT scores and family wealth in the *Fisher II* dissent. The current situation at UT is one of excess qualified candidates compared to spots available.

¹¹ Although this term has a clear meaning in common parlance, I use quotations because in this context as a legal term of art it has a different meaning. Again, the suit here seems to support a paradigm of racial balancing, which it is ostensibly against.

132. To ensure that underprivileged minorities that benefit from socioeconomic preferences are in a position to accept an offer of admission and enroll, UT-Austin can also increase its use of financial aid and scholarships.

134. The UT-System has a \$31 billion endowment. This is the second largest endowment in the United States. Only Harvard's is larger.

Comment: This is true, and UT has workably applied energy towards funding financial aid. The available funds from the Permanent University Fund was tapped to create the Texas Advanced Commitment, eliminating tuition expenses for students from families which make less than \$65,000 per year.¹² UT is not required to change its fiduciary standard for maintaining its endowment to address this issue; the balance of the system's excellence with its commitment to diversity is within its discretion. That said, the System has considerable leeway as to what it does with revenues and donations; it may certainly seek to apply a larger portion of these funds towards affordability.

137. UT-Austin can achieve student body diversity by bringing more highly qualified, socioeconomically disadvantaged minorities into its applicant pool. Across the country, there are tens of thousands of socioeconomically disadvantaged, high-achieving minorities who fail to even apply to selective schools, including UT-Austin. If they applied, they would likely be admitted and would enroll if offered sufficient financial aid.

Comment: This strikes me as overly broad. It is within UT's purview to favor the students of Texas over those nationally. To get more applications, UT could make additional outreach efforts, however it may also seek to remove structural barriers, such as the lack of affordable housing.

141. Though UT-Austin has engaged in community college partnerships, it can do far more to recruit high-achieving socioeconomically disadvantaged minority students or high-achieving community college students. For example, in the 2009-2010 academic year, UT-Austin admissions staff attended 58 Texas Community College Fairs. But by 2018-2019, UT-Austin staff attended only 38 Texas Community College Fairs, more than a 34% drop in recruitment of such students.

Comment: There is no workable endpoint to this metric. UT staff could attend 80 such fairs and the suit might allege that it could have attended 100. UT is not required to fully achieve every workable race neutral option and has discretion to determine what would be most effective. It is possible that UT-Austin staff attended less community college fairs after determining that the smaller fairs did not lead to the number of new applicants that would justify the expenditure of resources to participate. If this is the case, UT should produce data to back this claim. As an

¹² <https://texasadvance.utexas.edu/#eligibility>; the Commitment also provides additional tuition relief for families making up to \$125,000

alternative means of achieving the same goal, UT may expand its Coordinated Admissions Program (CAP), which allows select students from component academic institutions to transfer into the flagship.

145. At most universities throughout the country, children of alums and the well-connected are less likely to be socioeconomically disadvantaged or racial minorities than the rest of the student body. Thus, colleges and universities that grant admissions preferences to legacies and well-connected students give a competitive advantage to mainly white, wealthy applicants, while undermining the chances for admission of socioeconomically disadvantaged and minority applicants.

Comment: It is unclear if this process is still in effect. The legacy claim is counter to UT's public claims.¹³ In any case, I do not believe granting preference to well-connected students is discriminatory. This is a policy to admit certain students, not to exclude certain other students. A close examination of the demographics of admissions hold admittees would help determine if the indirect effect of this policy was discriminatory, but the existence of such a program in of itself not enough evidence to complete this claim.

148. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect." Fisher I, 570 U.S. at 309. As a result, the Fourteenth Amendment, and therefore Title VI, "forbids the use even of narrowly drawn racial classifications except as a last resort." Croson, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment)

Comment: I agree with this statement in full. It is important to note that only a court or Congress may decide if the circumstances are such that racial classifications are necessary as a last resort. This is the standard which has been repeatedly reaffirmed under strict scrutiny, but which may be reexamined on a rolling basis. I believe it is more than likely not necessary to directly consider race at this time, because UT could obtain "racial diversity" by use of proxy measure and significant housing expansion. If UT's current demographic situation in its student body is found by a court to be due in part to discrimination, UT may also address race directly in a remedial setting.

156. Racial classifications also have a stigmatizing effect on the supposed beneficiaries of these policies. Irrespective of whether an individual Black or Hispanic applicant is admitted to UT-Austin because of racial preferences, so long as racial preferences exist it will often be assumed that race is the reason for the applicant's admission. This stigma can have a devastating effect on the psyche of young adults.

¹³ Dr. Waseilewski notes that it is against state law to consider legacy status.
<https://thedailytexan.com/2019/04/22/commonly-asked-questions-about-uts-admissions-process/>

Comment: Anecdotally, I do believe it can come up, but devastating is far too strong a word here. I would expect black students to testify that they received support and feedback through the DDCE very early on freshman year that confirmed they belong at UT. This stigma may have been greater in decades past, but we must consider their effects today. Further, this is undercut by the suit's noting that less Hispanics and Blacks are admitted through the holistic process than through the auto-admit process. Plaintiff also assumes that a Black or Hispanic admitted due to a racial preference would feel greater injury from this stigma when compared to the appreciative feelings they may have about being able to go to a school that would not have taken their parents as students.

159. Finally, the “mismatch effect” of racial preferences far too frequently puts the supposed beneficiaries of race-based admissions policies in a position where they cannot succeed academically in order to fulfill the university’s social-engineering vision.

160. This “mismatch” effect happens when a school employs such a large admissions preference that the student is academically harmed in a variety of ways by being placed in an academic environment where most of the student’s peers have substantially stronger levels of academic preparation.

Comment: As just noted, the admissions preference in holistic admission skews away from Black and Hispanic admittees. Also, the Student Success Initiative portfolio has shown great success in getting such students to graduate.

162. As this research demonstrates, African-American college freshman are more likely to aspire to science or engineering careers than are white freshmen, but mismatch causes African Americans to abandon these fields at twice the rate of whites.

163. As a consequence, African Americans who start college interested in pursuing a doctorate and an academic career are twice as likely to be derailed from this path if they attend a school where they are mismatched.

Comment: This is a thinly veiled assertion that Blacks should not be admitted to science or engineering programs because they are more likely to drop-out. This fails to recognize that the University has a multitude of options for raising the retention rate in select programs.

164. Mismatch also creates social problems on campus. The academic research shows that interracial friendships are more likely to form among students with relatively similar levels of academic preparation; thus, African Americans and Hispanics are more socially integrated on campuses where they are less academically mismatched.

Comment: This is also an odious framing which suggests Blacks and Hispanics are academically inferior to others. Even given that, clearly the research speaks to a correlation and not causation.

165. UT-Austin has experienced and continues to experience the “mismatch effect.” For example, the four-year graduation rates of Black students and Hispanic students trail significantly behind the graduation rate of white students.

Comment: This barely warrants a response, but the suit is not using the term “mismatch effect” consistently here. The suit does not note the great strides UT has made in closing the gaps, or the programs responsible. Additionally, money may affect this; poor students generally graduate in lower numbers and have the additional responsibility of working while in school. Plaintiff has suggested elsewhere that UT target lower-socioeconomic students as a proxy for race. An alternative method to address money concerns as correlated with graduation rates would be to raise the wages of student jobs on campus, many of which pay under \$10/hour.

168. UT-Austin’s system of racial balancing is evident from direct statistical evidence. This evidence confirms that UT-Austin is not using racial preference to pursue a “critical mass” or any other diversity goal the Supreme Court has ever found permissible. It is using racial preferences instead to achieve a quota of African-American students.

171. This uniform consistency in the admission of African-American students does not happen by accident.

172. Indeed, there is evidence to suggest that UT-Austin uses its holistic admissions process to ensure that its admitted class of African Americans never strays from this historic range.

Comment: The suit wishes to levy a most serious charge – that UT has systematically discriminated against Blacks in admittance – yet it offers only the most cursory, spurious explanation. This is such a serious charge it requires a tremendous amount of research and thought, none of which the suit has engaged in. I hope elsewhere in this thesis there is some research which will help the plaintiff give this claim the necessary attention. Due to the construction of this argument and inconsistencies elsewhere, I question if the plaintiff truly believes this charge. To make such a charge ingenuously is a legal strategy deserving of no respect.

Response to Claims for Relief

213. Statistical and other evidence shows that each applicant is not evaluated as an individual. Instead, race or ethnicity is the defining feature of the application. Only using race or ethnicity as a dominate factor in admissions decisions could account for the decision to admit certain African-American and Hispanic applicants and deny admission to certain white and Asian-American applicants.

Comment: The suit has not shown that race is a defining or dominate feature of the application. Holistic admittees do not skew towards favoring Black or Hispanic admittees. Race is used as a factor of a factor and could only be a defining point for a very small number of students. The plaintiff does not support the claim that applicants are not evaluated as individuals; there is certainly no support offered here that race or ethnicity is a dominant factor.

214. Plaintiff's members have been and will continue to be injured because UT-Austin's intentionally discriminatory admissions policies and procedures continue to deny them the opportunity to compete for admission to UT-Austin on equal footing with other applicants on the basis of race or ethnicity.

Comment: The allegation here is that UT is operating in accordance with the *Fisher II* standard. This is in opposition to plaintiff's claims of a quota scheme.

220. UT-Austin's use of racial preferences is narrowly tailored only if using them is necessary to achieve student body diversity. If UT-Austin can achieve student body diversity without resorting to racial preferences, it is required to do so as a matter of law. Moreover, UT-Austin must have a strong basis in evidence that a non-racial approach will not work about as well as a race-based approach before turning to the use of racial preferences. And it must continually reevaluate that evidence as it changes.

221. There is no evidence that UT-Austin studied all of the available race-neutral alternatives and had a strong basis in evidence that none would work about as well before turning to racial preferences.

222. Whether UT-Austin considered them or not, there are a host of race-neutral alternatives that if implemented can achieve student body diversity without resorting to racial preferences. Among these alternatives, both individually and collectively, are (a) increased use of non-racial preferences, including increased use of the percentage plan UT-Austin already has in place, (b) increased financial aid, scholarships, and recruitment efforts, and (c) elimination of admissions policies and practices that negatively affect minority applicants.

Comment: There are some fine distinctions missing here. UT-Austin's use of racial preferences is narrowly tailored only if it has seriously considered the other workable alternatives. It is not required to act on every workable alternative, if it is thought that the alternative in some way negatively effects the University's reputation for excellence. This determination is within the University's deference.

The university is, as it is claimed, required to continually reevaluate evidence as it changes and consider non-race-based approaches. I claim in this thesis that a major on-campus housing expanding qualifies. To say there is no evidence that UT-Austin studied all available race-neutral alternatives is not for the suit to determine but for a court. The Supreme Court has now multiple times determined that UT did in fact study available race-neutral alternatives, such as scholarship programs, and find that they did not address the issue to scale in a way which would preclude the use of race elsewhere. Additionally, I contend the expansion of overall undergraduate enrollment in the post-Hopwood era was a significant race-neutral attempt at obtaining diversity which the University pursued to the brink of workability. The particular methods the suit suggests have already been discussed.

231. The remarkable stability of UT-Austin's admissions figures for African-American students demonstrates that UT-Austin is seeking proportional representation of African Americans and therefore is engaged in racial balancing.

232. There is no non-discriminatory reason that could justify admissions figures this stable year after year given the unique characteristics of each applicant for admission. If UT-Austin were truly treating each applicant for admission as an individual, as it professes to do, "[o]ne would expect the percentage of [African-American] enrollees produced by such a system to vacillate widely from year to year, reflecting changes in each year's applicant pool."

Comment: The claim of a racial balancing system must not be looked at through the lens of one race. Plaintiff refers here only to undergraduate admissions; remarkable stability exists elsewhere much more clearly for all major groups: White, Black, Hispanic, and Asian.

UT should carefully consider what legal strategy the suit is pursuing here and the best way to counter it. As already mentioned, the lack of detail around such a major claim may signal that it serves a particular purpose for legal proceedings. Perhaps the plaintiff is hoping to find something later in a fishing expedition. If there does exist discrimination within the admissions system, which given the decentralized nature of admissions into preferred majors is plausible although certainly unproven, UT must be the party to bring this to light before the suit does. UT must be a good actor in all ways, but particularly on this point.

233. The pursuit of "critical mass" could never justify admissions figures this stable.

Comment: I agree; I do not believe the concept of *critical mass* will be unchanged at the end of this lawsuit. Comparing classroom interaction with members of one's own race may be a workable method to compare two points in time, but it is not a workable paradigm to determine diversity on a rolling basis. In any case, critical mass has surely been achieved for all racial groups at UT except possibly Blacks. In general, the concept of *critical mass* may be considered discrimination in 1978 but not in 2021 due to changes in society. It is not as injurious to be the only black student in a law class as when Herman Sweatt first matriculated into UT law. *The inexorable zero* is a firmer baseline for determining what intervention the government should sanction.

240. The Supreme Court's decisions holding that there is a compelling government interest in using race as a factor in admissions decisions in pursuit of "diversity" should be overruled. Those decisions were wrongly decided at the time they were issued, and they remain wrong today. "Diversity" is not an interest that could ever justify the use of racial preferences under the Fourteenth Amendment and federal civil rights laws.

241. Even if there were a compelling government interest in "diversity" in the abstract, however, the use of racial preferences in the educational setting nevertheless should be forbidden for several important reasons.

242. The Supreme Court's jurisprudence in this area has been built on mistakes of fact and law.

Comment: These are unserious claims to make in a lawsuit that does not mention the 1st Amendment a single time, even though the state's compelling interest in diversity is underpinned by the 1st Amendment. Diversity may properly be considered under the 1st Amendment, with the 14th Amendment setting boundaries for how diversity may be applied in practice. One would suspect in a direct faceoff between the 1st and 14th Amendments, that the 1st Amendment would control, but that is not really what is happening here.

244. Ultimately, there is overwhelming evidence that colleges and universities will take advantage of any leeway given by the Supreme Court to use the dangerous tool of racial preferences in inappropriate ways. Colleges and universities, if given the chance, will use racial preferences "for the ostensible purpose of enhancing education diversity of the student body" with the true "goal of simply increasing the number of minority persons in the universities and in the professions that these universities feed." Alan Dershowitz and Laura Hanft, Affirmative Action and the Harvard College Diversity Discretion Model: Paradigm or Pretext, 1 Cardozo L. Rev. 379, 385 (1979).

Comment: It is interesting that in a case about how things have changed since the 1970s the suit repeatedly relies on quotes from the 1970s. Another way to say "universities will take advantage of any leeway given by the Supreme Court" is to say that universities will comply and adapt to the rulings of the Supreme Court. Facially, UT has done just that.

247. In the end, the costs of allowing racial preferences in admissions decisions—even in a limited way—far exceed any rapidly diminishing benefits. No principle of *stare decisis* counsels in favor of retaining decisions allowing their use. Those decisions were not well reasoned, were predicated on mistakes of fact, have been undermined by more recent developments, and have proven to be unworkable. Any decision allowing the use of racial preferences in the educational setting should be overruled.

Comment: We now get to the suit’s true goal, which is to overturn in full all affirmative action rulings dating to *Bakke*. The suit claims to know more than *Bakke*, *Grutter*, *Gratz*, *Fisher I*, and *Fisher II*, among many other cases not in the direct line. The suit offers only the flimsiest of evidence. To overturn these rulings based on this case would rightfully create a Supreme Court perceived as without any real legitimacy. The suit eschews a statutory resolution and wishes specifically for a constitutional ruling, even in the event the case is found to be spurious. This is not law practiced as a noble profession. The suit offers no paradigm that the benefits of allowing racial preferences are rapidly diminishing.

I offer no comment on counts 5-8, which have to do with the Texas Constitution.

TOPIC #9: RECOMMENDATIONS FOR COMPREHENSIVE HOUSING POLICY



Fig. 9.1, Janet Yellen, US Secretary of the Treasury

"With interest rates at historic lows, the smartest thing we can do is act big. In the long run, I believe the benefits will far outweigh the costs, especially if we care about helping people who have been struggling for a very long time."

-Janet Yellen, Remarks before the Senate Finance Committee, 1/19/2021

My recommendation is to build. No matter what the cost-per-bed in this moment, UT best ensures long-term affordability and access for low-socioeconomic communities in Texas by undertaking an aggressive on-campus housing expansion campaign without delay. Additionally, I contend that such a housing expansion qualifies as a workable, race-neutral alternative to obtaining the state's compelling interest in diversity. UT must therefore consider how this plan may preclude the consideration of race in other instances. If adopted, the ability of this plan to meet the narrow tailoring standard may provide a modicum of defense in the *Students for Fair Admissions* case.

RECOMMENDATION 1: BUILD AT 2015 STUDENT LIFE MASTER PLAN PRIORITY LOCATIONS

I recommend expediting projects at Creekside East, Creekside West, Clark Field, and 2609 University as outlined in the 2015 Student Life Master Plan. Whitis Court is not recommended, because it is cost-prohibitive on a net basis. Greater density at Creekside is viable, but I believe the 2015 models align with best practices. This recommendation increases on-campus housing capacity by 1,553 beds at an estimated cost of \$159,000 per bed, or \$247m total. This should be financed entirely with RFS bonds.

RECOMMENDATION 2: BUILD A NEW STUDENT LIFE NEIGHBORHOOD AROUND THE THOMPSON CONFERENCE CENTER; CONSIDER ADJACENT LAND ACQUISITION



Fig. 9.2, Detail of proposed land acquisition site, Dean Keeton Neighborhood

I recommend building a new student life neighborhood centered around the Thompson Conference Center. An expansion of student life at this location would anchor future densification of Central Campus. This increases capacity by 1,280. I believe this location is well-positioned on campus to function as a “Fine Arts Dorm” and should include interactive, collaborative facilities geared towards the fine arts, such as group music practice rooms and dance studios. These specialized amenities in support of academic achievement encourage community building and provide a marketable, segmented alternative to the attractive offerings of the private market. The Thompson Conference Center would be remodeled to support a profitable dining operation.

UT should investigate acquiring the triangular parcel north of Thompson and stretching to I-35. The Brackenridge Tract Fund provides an appropriate mechanism for such an acquisition. A new anchor of student residences at this location would require facilities supportive of student life, namely a hybrid recreation/student services facility and a parking garage. I recommend the parking garage be located north of Dean Keeton and east of Red River. UT should attempt to land a prestige project in the triangular parcel north of Thompson; my suggestion is to rekindle discussion of the UT Music Academy which appeared on the 2011 Capital Improvement Program but was not completed.

Beyond a prestige project and a parking garage, the parcel north of Thompson provides a great location to build apartments earmarked for law students. By creating housing at this location under UT’s operational control, UT could better target the law school’s affordability barrier, as well as market additional student life benefits to prospective law students.

Together, Recommendations 1 and 2 generate an estimated 2,833 undergraduate beds on-campus and additional apartments for law students with the land acquisition.

The University of Texas System
FY 2012-2017 Capital Improvement Program
Individual Project Summary - Major Construction Projects

Name of Institution	The University of Texas at Austin		
Project Name	U. T. Academy of Music		
Management Type	OFPC Managed	Gross Square Feet	60,000
OFPC Project Number	102-624	Assignable Square Feet	0
Designer		BOR CIP Approval	02/18/2011
Constructor		Design Development Approval	05/17/2012
Category	BOR Approved - Not Started	THECB Approval	07/26/2012
Type of Project	New	Issue NTP - Construction	10/01/2012
Project Delivery Method	Design/Build	Achieve Substantial Completion	07/01/2013
Historically Significant	No	Achieve Final Completion	08/01/2013
		Achieve Operational Occupancy	08/15/2013

Source of Funds	Amount
Gifts	\$20,000,000
Total Project Cost	\$20,000,000

Project Description

The U. T. Academy of Music (Academy) will provide approximately 60,000 gross square feet of classroom, rehearsal, and performance facilities along with administrative and support space. The building will include a 300-seat concert hall that, when not in use by the Academy, would be available as a performance space for the Sarah and Ernest Butler School of Music. This facility will be located on property east of Interstate Highway 35 and will house all noncredit instruction as well as provide pedagogical training for graduate music students. The Academy will generate significant job opportunities for instructors for graduate students and provide quality noncredit musical instruction to children and adults in Greater Austin, a service to the community U. T. Austin is uniquely qualified to fill.

Project Justification

With its current enrollment of 250 students, the UT String Project provides approximately \$100,000 in financial aid to graduate students who teach in it, while the other programs provide another \$20,000 each year. With the availability of an adequate facility and the establishment of a comprehensive Academy of Music, it is projected that within five years more than 2,500 children and adults will be enrolled. The revenue from the proposed Academy is expected to increase financial aid for graduate students to more than \$1,000,000 per year. It is anticipated that approximately 90% of instructional funds and approximately 25% of administrative funds will go to graduate students in the Butler School of Music in the form of financial aid. Such an increase would be a major step in achieving the goal of fully funding all graduate students in the Butler School of Music.

The UT String Project, a pre-college program in the Butler School of Music, has for more than 60 years provided quality instruction on violin, viola, cello and double bass to children of Greater Austin. The String Project has provided invaluable pedagogical training and financial aid for UT music students for many years. In the past decade the Butler School has developed other small projects and programs patterned after the String Project, including a Guitar Project, a Piano Project and the Austin Live Music Academy (ALMA). The String Project currently has an enrollment of approximately 250 children and a waiting list of 700 due to the lack of available space in the music building. There are sufficient graduate students to double or triple the enrollment in the current non-credit programs. A number of new programs could be organized for very young children and for adults to address the expanding musical needs of the Greater Austin community.

Music Academy (ALMA). The String Project currently has an enrollment of approximately 250 children and a waiting list of 700 due to the lack of available space in the music building. There are sufficient graduate students to double or triple the enrollment in the current non-credit programs. A number of new programs could be organized for very young children and for adults to address the expanding musical needs of the Greater Austin community.

Fig 9.3, U.T. Academy of Music project summary sheet, 2011 CIP

RECOMMENDATION 3: AFTER RFS-FINANCED EXPANSION HITS THE MAXIMUM ALLOWABLE DEBT RATIO, UTILIZE PUBLIC-PRIVATE PARTNERSHIPS TO OBTAIN ADDITIONAL CAPACITY FOR GRADUATE HOUSING

Former Assistant Dean of Graduate Studies John Dalton believes that UT should house 5,000 graduate students, well above the current capacity of 1,119 beds¹. The need proposition for graduate housing is different than with undergraduate housing. Proximity to campus does not carry the same level of concern and student life is not weighted so heavily.

Public Private Partnerships (P3s) can be appropriate for graduate housing in a way they are not for undergraduate. For undergraduate, P3s can create a lack of alignment between the profit motive of the private partner and the university's commitment to providing the holistic community benefits so essential to the undergraduate experience.

The graduate experience by contrast focuses heavily on research and academic work. Housing management for graduate students need not differ tremendously from standard apartment management. The main benefits of additional graduate housing are the ability to control price long-term and the ability to use housing as a recruitment tool.

This thesis calls for maximum throughput of student housing capital projects, effectively limited only by the maximum allowable debt ratio.

The Business Plan for the Graduate Student Housing Complex notes the traditional motivators for P3s "are lack of access to capital and speed to market." If UT maxed its debt ratio in the short term, lack of access to capital would be at issue. Speed to market is in play both for phasing with Brackenridge Tract, as well as more generally when considering interest rates and the rapid transformation of the Austin market. **The time to act is now.**

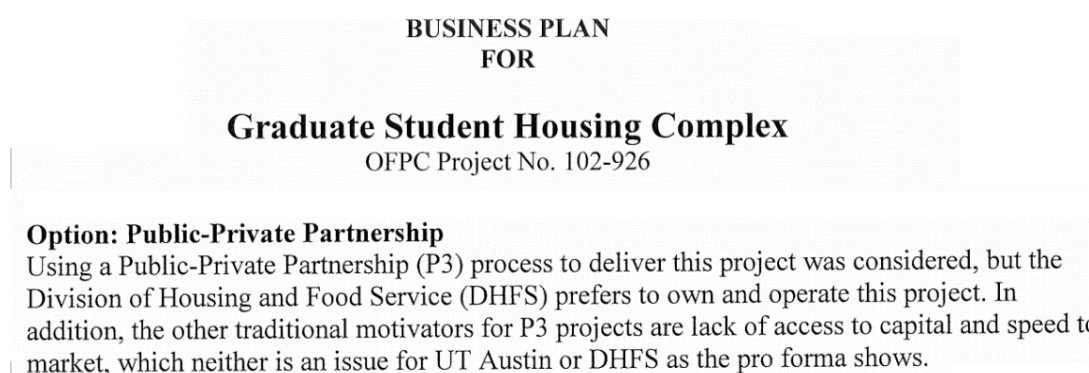


Fig. 9.4, Consideration of P3 for East Campus Graduate Student Housing Complex

¹ See Appendix B. I share Dean Dalton's view. Dean Dalton traveled to peer institutions to research graduate housing as a member of the 2009 Brackenridge Committee.

RECOMMENDATION 4a: PUBLIC-PRIVATE PARTNERSHIP AT HEALTHSOUTH – A SUPERIOR MODEL FOR EQUITY

The City of Austin is well into a process to award the HealthSouth tracts, located at 1215 Red River and 606 East 12th Street, to a private developer, Aspen Heights Partners. The Request for Proposal was issued November 2019 and closed April 2020, with the highest scoring proposal coming from Aspen Heights. Their proposal calls for 420,000 sf of housing (348 apartments and 160 condos), and 170,000 sf of office space. 25% of apartments are reserved for residents earning 50% and 60% of the area median family income.²

My hope is that the city will delay making this deal official until August and align with the University's overarching strategic planning timetable under President Hartzell. HealthSouth is two blocks from the medical school, and I believe presents a huge opportunity if considered in the context of the Brackenridge Tract negotiations. The location has the potential to support further maturation of the medical school. Negotiations over the tract would not be a zero-sum game, since at this time it is understood the University will not acquire this parcel. This gives the city leverage to negotiate a greater density of housing, should it desire to do so.

A P3 with Aspen Heights would have the potential to offer considerably more equity than the current proposal, *even while enhancing the bottom-line of the private partner*. For UT, the City of Austin, and Aspen Heights, it is a win-win-win. Rather than hamper the revenue generation of the project with 25% of units offered based on reduced median family incomes, the entire building should be rented at market rate. Additional revenues generated would funnel through UT into FAFSA-tied, needs-based scholarships ameliorating housing costs.

With UT's involvement, there would be no property tax. Nearly half of Austin's property tax leaves the city with Robin Hood.³ This model reverses the flow of money between city and state. Profits through this development, including the Robin Hood margin, would go directly to addressing affordability for students on a needs-basis, thus ensuring greater efficacy and distribution than models which define equity as tied to the metric of median family income.

Building additional graduate housing would also relieve pressure on public housing provided through the City of Austin, allowing better use of those assets. Given that this process is so far along with Aspen Heights, I believe UT, as a good community partner, would best seek a P3. By unlocking a larger revenue stream, as well as profit margin, UT's involvement does not need to impinge on the profit projections of the private partner. In fact, I believe involving UT students would add value for the developer.

² Public Briefing for Austin City Council, "Staff Recommendation on Development Team for 1215 Red River & 606 East 12th Streets (former HealthSouth tracts)" December 1, 2020 Item #B2 and December 3, 2020 Item #9

³ <https://www.texastribune.org/2019/01/31/texas-robin-hood-recapture-villain-texas-fix-school-finance/#:~:text=Last%20year%2C%20the%20district%20sent,taxes%20to%20run%20its%20schools.>

RECOMMENDATION 4b: PUBLIC-PRIVATE PARTNERSHIP AT HEALTHSOUTH – A CATALYTIC BRIDGE SOLUTION FOR THE BRACKENRIDGE TRACT

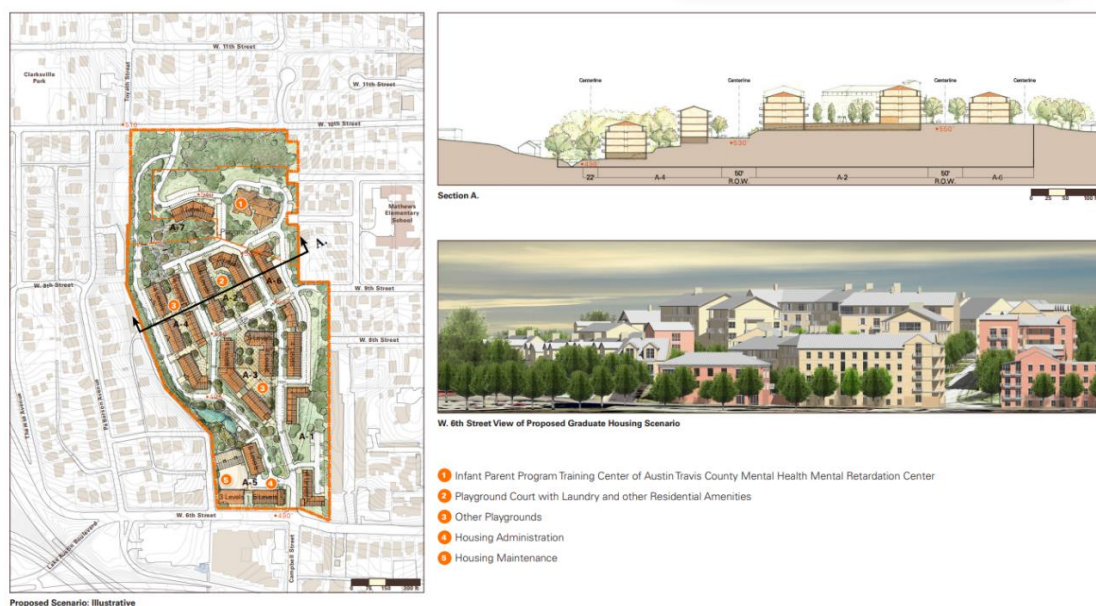


Fig. 9.5, Gateway mockups from 2009 Brackenridge Report

Generating housing at HealthSouth also solves a phasing problem with the graduate housing on the Brackenridge Tract. There are currently 715 units with 1,119 beds between the Colorado, Brackenridge, and Gateway apartments. The 2009 Brackenridge Report determined Gateway could be redeveloped to have more than 715 units on the tract (p. 8.25). UT is incentivized to redevelop the Lake Austin tract as swiftly as possible, however if Gateway is redeveloped concurrently with development on the Lake Austin tract, there will be a period where there is no graduate housing at all, hence a phasing issue.

HealthSouth addresses this in the short term and allows Gateway's timetable to be decoupled from the Lake Austin timetable. It also increases UT's final graduate housing capacity, regardless of what other solutions have been offered. HealthSouth is not a zero-sum game for space on campus. If other locations are under current consideration for additional housing, those sites could still be utilized as such, or those sites could be used for other revenue generating projects.

HealthSouth should initially be used for graduate housing to address the phasing issue; however, it would eventually pivot to its best use of housing medical students and first-year faculty. This long-term arc incentivizes UT to build additional housing at Gateway for graduate students to obtain the best use for HealthSouth. The HealthSouth site should include a childcare facility as a recruitment tool.

Additionally, a P3 at HealthSouth allows UT to maintain its long-standing ties with Matthews Elementary, which is seen as a recruitment asset for graduate students.

RECOMMENDATION 5: EXPEDITE A TARGETED UPDATE OF THE 2013 RESIDENCE HALL NEEDS ASSESSMENT

The September 2013 Residence Hall Needs Assessment conducted by Barnes Gromatzky Kosarek Architects with Brailsford & Dunlavey undoubtedly represents the most in-depth analysis of UT's student housing market ever conducted. It includes extensive on- and off-campus market analysis of all neighborhoods where UT students are known to reside, as well as a demand analysis. The Project Team consulted with a large UT Steering Committee.

Updating this document would be quite useful for all stakeholders. I recommend commissioning a targeted, expedited update of this document to better understand how changes in the Austin rental market are affecting students. This would be particularly valuable in creating apples-to-apples comparisons for Riverside and West Campus, both of which have seen significant developments since 2013. Greenlighting projects need not be predicated on the completion of this assessment; however, it would prove a valuable tool to inform policy moving forward.

RECOMMENDATION 6: WIDEN HOUSING AND DINING'S PROFIT MARGIN AND COLLECT THE ANNUAL PROFITS INTO AN EQUITY ENDOWMENT TARGETING HOUSING RELIEF

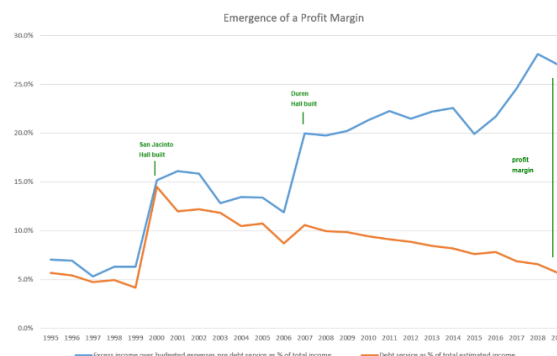


Fig. 9.6, Profit margin in Housing and Dining budget, 1995-2020

Although counterintuitive, my research points towards market rate pricing for on-campus housing as the most supportive model for long-term affordability goals, provided this pricing structure is accompanied by significant capacity growth and the profits are earmarked towards an equity commitment. This recommendation does not disturb current revenue flows; rather it recognizes that significant additional profits would flow from an increase in housing capacity as well as rates. These additional funds should be captured in an endowment to put permanent downward pressure on rates, with use similar to the Dell Scholars program. One recommended mechanism is the creation of a scholarship-yielding endowment tied to FAFSA which may be applied towards offsetting on-campus housing costs⁴.

⁴ This idea is courtesy Paul Finkleman.

This would align with recent moves to increase the graduate housing fee structure towards market rate, as well as the 2400 Nueces above-market segment capture. The efficacy of such a mechanism is most effective with on-campus housing which is within UT's operational control; much as is the case with the Dell Scholars program, efficacy is at risk if the additional funds simply flow into the private market, which would incorporate the influx of capital by raising rates.

RECOMMENDATION 7: CREATE A MULTI-GENERATIONAL EXPANSION MODEL FOR UT-AUSTIN IN ACCORDANCE WITH PROJECTED STATE POPULATION GROWTH

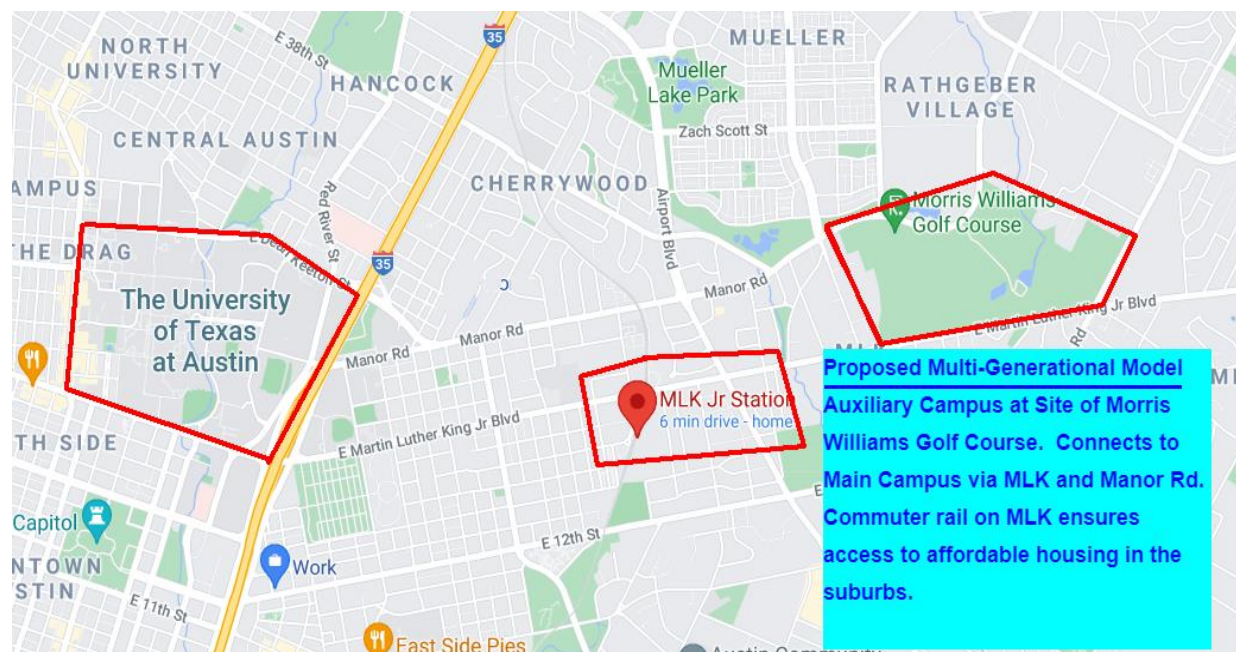


Fig. 9.7, A proposed future auxiliary campus may address state population growth

Texas is a growing state, with growing needs for higher education. The state has several options for addressing this issue. One of these options is to eventually grow the size of its main flagship research university. I believe the University should explore the idea of an auxiliary campus located at the Morris Williams golf course to accommodate multi-generational population growth. Morris Williams is the only tract of its size near enough to UT to accommodate an educational environment tied to main campus. A bus system connecting the campuses would include a stop at the MLK Jr. Capital MetroRail commuter station, ensuring student access to affordable housing in the greater Austin area, and supporting city ridership goals.

RECOMMENDATION 8: MAXIMIZE VALUE OF THE BRACKENRIDGE TRACT BY ACQUIRING FUTURE RIGHTS TO MORRIS WILLIAMS AS PART OF NEGOTIATIONS.

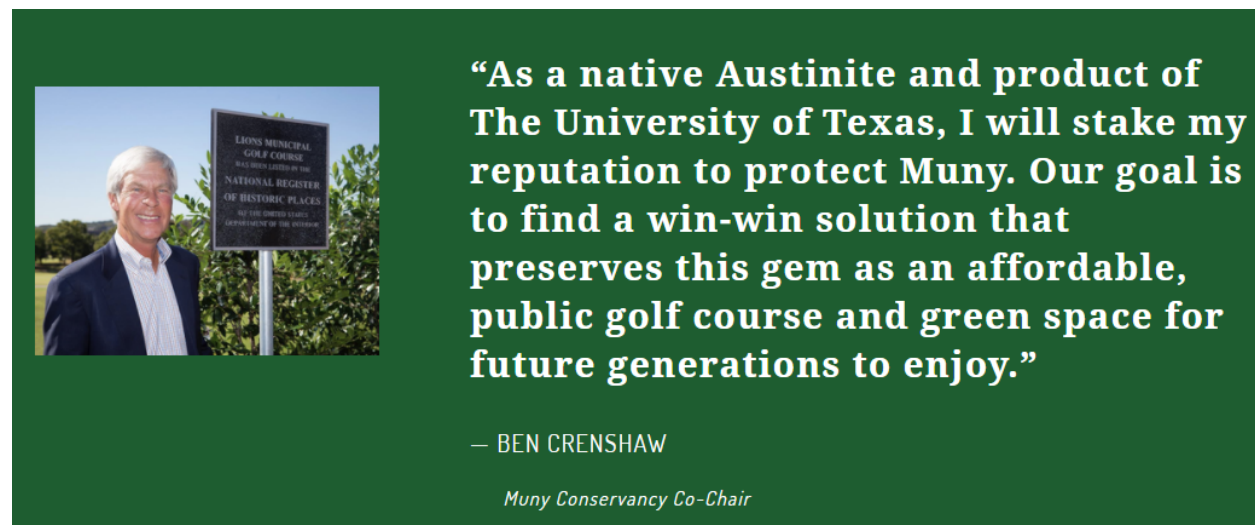


Fig. 9.8, Muny Conservancy Co-Chair and two-time Masters champion Ben Crenshaw

I believe the Brackenridge negotiations create the opportunity to acquire Morris Williams. I recommend UT structure the acquisition on a time delay so that it does not acquire Morris Williams for 20-30 years. UT has no need to develop Morris Williams in the near term, and such a delay would make this arrangement considerably more politically palatable for stakeholders.

Currently, the Muny Conservancy (aka Save Muny) is negotiating to acquire rights to steward the Lions Golf Course for about \$100 million. This is a fraction of the actual value but represents the best solution in the context of the entire Brackenridge tract because of the limiting factor of maximum plausible density. So far, the best model calls for maximum density on the lakeside tract and getting the most possible money in return for the golf course. \$100 million is doable, but quite burdensome for the Muny Conservancy group. Optics of granting rights to Save Muny are poor, because it looks like a sweetheart deal to the largely affluent and well-connected golfing community. Such a deal does not seem centered around the Board of Regent’s fiduciary duty, which is to the University of Texas.

I believe the price tag given to Save Muny is not what is important here. A model which transfers Morris Williams on a time delay to UT is more central to the fiduciary duty. Were such a deal to come on the table, I feel it would be appropriate to reduce the amount of money Save Muny would need to raise, and possibly throw in preservation of the Hancock golf course under the Save Muny umbrella. This can be leveraged into a win-win and speak directly to access and affordability issues at UT-Austin for generations to come.

RECOMMENDATION 9: SEEK A QUALIFIED LEGAL OPINION TO DETERMINE IF THIS THESIS CONSTITUTES A WORKABLE, RACE-NEUTRAL ALTERNATIVE TO RACE-BASED ADMISSIONS POLICIES, THEREFORE PRECLUDING VARIOUS USES OF RACE UNDER STRICT SCRUTINY. DETERMINE IF THIS COMPELS THE UNIVERSITY TO ADOPT THIS PLAN, OR IF THE ADOPTION OF THIS PLAN WOULD POTENTIALLY AID THE UNIVERSITY’S DEFENSE IN THE *STUDENTS FOR FAIR ADMISSIONS* CASE.

RECOMMENDATION 10: THE EAST MALL REDESIGN SHOULD INCLUDE BICYCLE THOROUGHFARES TO ALLOW FOR REDUCED TRAVEL TIME BETWEEN CORE AND CENTRAL CAMPUS.

AFTERWORD

This thesis is a culmination of so many things. Given that I returned to college to retrain outside of the service industry, I certainly hope this work will be a gateway for me professionally. I chose to conduct research on UT-Austin because I have a deep love for this place. My hope is that in some way, large or small, this thesis contributes to the many ongoing processes which seek to push this school from near elite to truly elite status.

I was born in Brackenridge Hospital just across the street from UT. UT is the only school I applied to. If I had not been admitted, I would have gone to UTSA for a year and tried to make the grades necessary to qualify as an automatic transfer. I can truly say that to seek a job at UT with this thesis as my calling card has been a humbling experience. It is not encouraged, no – it is *required* I do not get out over my skis with a single person, a single claim, or a bad characterization, lest my desired job prospects vanish into the ether. **Exactly as it should be.**

After the past year’s intense discussions about race, we must all recommit ourselves to the highest standard of excellence and best practices to guide our policies. To be truly elite we must address our school’s nagging equity issues head-on, until there is no work left to do. We must diligently research that our equity portfolio is working as cost-effectively as possible. I believe that the best policy UT could engage in for addressing campus culture issues happens to be race neutral. A major expansion of on-campus housing ensures access and equity for future generations. Audacity is our brand, and I believe while bold, this is a workable solution, socially, fiscally, and politically.

I approach the coming year with cautious optimism. Despite all odds, it may be our hard conversations and taxing obligations have us on the cusp of seeing each other more deeply as one community. What starts here changes the world. Here is to UT leading the way **forward.**

BIBLIOGRAPHY

ACADEMIC LITERATURE

- Archibald, R. B., & Feldman, D. H. (2008). Explaining Increases in Higher Education Costs. *The Journal of Higher Education*, 79(3), 268-295. doi:10.1080/00221546.2008.11772099
- Bay, D. L. (1988). *The influence of Frank Erwin on Texas higher education* (Unpublished doctoral dissertation). University of Texas at Austin.
- Bourgeois, E., & Nizet, J. (1993). Influence in Academic Decision-Making: Towards a Typology of Strategies. *Higher Education*, 26(4), 387-409. doi:10.1007/bf01383735
- Cameron, K. S. (1981). Domains of Organizational Effectiveness in Colleges and Universities. *Academy of Management Journal*, 24(1), 25-47. doi:10.5465/255822
- Cheslock, J. J., & Gianneschi, M. (2008). Replacing State Appropriations with Alternative Revenue Sources: The Case of Voluntary Support. *The Journal of Higher Education*, 79(2), 208-229. doi:10.1080/00221546.2008.11772092
- Delaney, J. A., & Doyle, W. R. (2011). State Spending on Higher Education: Testing the Balance Wheel over Time. *Journal of Education Finance*, 36(4), 343-368. doi:https://jstor.org/stable/23018116
- Delaney, J. A. (2014). The Role of State Policy in Promoting College Affordability. *The Annals of the American Academy of Political and Social Science*, 655(1), 56-78. doi:10.1177/0002716214535898
- Hartzell, J. C., Sun, L., & Titman, S. (2009). Diversification, Corporate Governance and Firm Performance in Real Estate Investment Trusts.
- Hartzell, J. C., Sun, L., & Titman, S. (2006). The Effect of Corporate Governance on Investment: Evidence from Real Estate Investment Trusts. *Real Estate Economics*, 34(3), 343-376. doi:10.1111/j.1540-6229.2006.00170.x
- John, E. P. (1991). A Framework for Reexamining State Resource-Management Strategies in Higher Education. *The Journal of Higher Education*, 62(3), 263. doi:10.2307/1982282
- Kettunen, J. (2015). Stakeholder Relationships in Higher Education. *Tertiary Education and Management*, 21(1), 56-65. doi:10.1080/13583883.2014.997277
- Lawless, D. J. (1982). The Process of Decision-Making in Universities. *The Canadian Journal of Higher Education*, XII(3), 1-9.
- Maassen, P. (2000). The Changing Roles of Stakeholders in Dutch University Governance. *European Journal of Education*, 35(4), 449-464. doi:10.1111/1467-3435.00039
- Maassen, P. A., & Potman, H. P. (1990). Strategic Decision Making in Higher Education. *Higher Education*, 20(4), 393-410. doi:10.1007/bf00136220
- McClure, K. R., Ryder, A. J., & DeVita, J. M. (2017). Public-Private Partnerships in College Student Housing: Lessons from Three Institutions. *The Journal of College and University Student Housing*, 43(2), 72-93.
- Monks, J. (2014). The Role of Institutional and State Aid Policies in Average Student Debt. *The Annals of the American Academy of Political and Social Science*, 655(1), 123-142. doi:10.1177/0002716214539093
- Revington, N., & August, M. (2019). Making a Market for Itself: The Emergent Financialization of Student Housing in Canada. *Environment and Planning A: Economy and Space*, 52(5), 856-877. doi:10.1177/0308518x19884577
- Tandberg, D. A. (2010). Politics, Interest Groups and State Funding of Public Higher Education. *Research in Higher Education*, 51(5), 416-450. doi:10.1007/s11162-010-9164-5
- Tandberg, D. A., & Ness, E. C. (2011). State Capital Expenditures for Higher Education: "Where the Real Politics Happens". *Journal of Education Finance*, 36(4), 394-423. doi:https://www.jstor.org/stable/23018118

- Waldron, R. (2018). Capitalizing on the State: The Political Economy of Real Estate Investment Trusts and The 'Resolution' of the Crisis. *Geoforum*, 90, 206-218. doi:10.1016/j.geoforum.2018.02.014
- Weerts, D. J., & Ronca, J. M. (2006). Examining Differences in State Support for Higher Education: A Comparative Study of State Appropriations for Research I Universities. *The Journal of Higher Education*, 77(6), 935-967. doi:10.1353/jhe.2006.0054
- White, F. C., & Musser, W. N. (1978). Business Cycles and State Governmental Finances: Implications for Higher Education. *Higher Education*, 7(2), 177-192. doi:10.1007/bf00129417

UT LITERATURE

- Regent Erwin's Review of the History of the Brackenridge Tract (1973)
- Brackenridge Development Agreement (1988)
- UT-Austin Master Plan, Pelli and Associates (1999)
- Brackenridge Taskforce Report (2007)
- Brackenridge Report (2009)
- Final Report of the Taskforce on Undergraduate Graduation Rates (2012)
- Residence Hall Master Plan (2012)
- UT-Austin Master Plan (2013)
- UT Residence Hall Needs Assessment Final Report (2013)
- UT Austin – Investigation of Admissions Practices and Allegations of Undue Influence (2015)
- UT Austin Student Life Master Plan (2015)
- UT-Austin East Campus Master Plan (2015)
- UT-Austin Athletics Master Plan (2016)
- The Permanent University Fund and Available University Fund Issue Brief Update (2018)
- UT Strategies to Increase Graduation Rates 2012-2017 ("Every Student Graduates") (2018)
- Graduate Education Task Force Report (2019)
- UT System Permanent University Fund Investment Policy Statement (2020)
- UT System Capital Improvement Programs (1991-2020)
- Selected Board of Regents Meeting Minutes, using various keyword searches related to housing (1961, 1962, 1964, 1965, 1970, 1971, 1972, 1976, 1978, 1980, 1981, 1982, 1986, 1990, 2002, 2004, 2005, 2011, 2015, 2018, 2019, 2020)

MISCELLANEOUS LITERATURE

- Bureau of the Census, Statistical Brief "Black Americans: A Profile" (March 1993)
https://www.census.gov/prod/1/statbrief/sb93_2.pdf
- Overview of the University Neighborhood Overlay (UNO) – City of Austin Planning Commission Briefing (December 2018)
- Comparing the Costs of On-Campus and Off-Campus Student Housing: An Analysis of Housing Options at 22 Universities – National Multifamily Housing Council White Paper (2018)
- Texas Higher Education Coordinating Board Capital Expenditure Plans FY 2020-2024
- Regents of the University of California v. Bakke* (1978)
- Grutter v. Bollinger* (2003)
- Gratz v. Bollinger* (2003)
- Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013)
- Fisher v. University of Texas at Austin*, 579 U.S. ____ (2016)
- Students for Fair Admissions, Inc. v. UT et al.*, No. 1:20-cv-763 (W.D. Tex.) (2020)

OPEN RECORDS REQUESTS – November 2020 through April 2021

R000926-112720 – Request for select Housing and Dining budgets

R000927-112720 – Pertaining to the finances of the Texas Advanced Commitment

R000967-120820 – Request for longitudinal set of Housing and Dining Budgets

R000968-120820 – Request for Capital Improvement Programs (referred to System ORR office)

R000984-121120 – Request regarding itemization of Auxiliary Enterprises line item in H&D budget

R000985-121120 – Request for finance sources of 2400 Nueces

R001022-122120 – Request for demographic information regarding graduate apartments residents and wait-listees.

R001030-122420 – Request for information about 36-xxxx-xxxx accounts in Housing and Dining budget

R001036-123020 – Request for longitudinal budget set for University Leadership Network

R001043-123020 – Request for interdepartmental communications between VPSA and President's office regarding recommendations for room and board rates. Includes market data.

R001058-010421 – Request for strategic capital projects list maintained by UT-Austin, THECB

R001061-010421 – Request for historical room and board rates

R001071-010621 – Select itemized Maintenance and Operations budgets from Housing and Dining

R001073-010621 – Budget info for VPSA and VPBA Priority funding accounts

R001075-010721 – Itemized Auxiliary Enterprises by revenue type for select years

R001103-011321 – Request for 2013 Residence Hall Needs Assessment

R001104-011321 – Request for housing market research conducted by UT

R001129-012021 – Request for clarification on Housing and Dining budget FY 2017-18

R001137-012121 – Request for inventory of unit type and rates, UT Housing and Dining

R001147-012421 – Request for scoring matrix on likelihood to graduate in 4 years of incoming students. Request was confirmed to be denied in on the basis that it relates to pending litigation

R001151-012521 – Request for Student Success Initiative green sheets with funding sources 2012-2020

R001155-012521 – Request for 2012 Residence Hall Master Plan

R001161-012621 – Request for 2015 Student Life Master Plan

R001176-012821 – Request for Non-Mandatory Fee Increases communication between VPSA and President's office for select years

R001177-012821 – Request for the First and Second Task Force on Enrollment Reports, from 2003 and 2009. Request denied on the basis that these documents could not be located.

R001194-020121 – Request for itemizations of large expenses from the Graduate Student Success Initiative and Graduate Studies budges for select years.

R001218-020321 – Request for data on historical GPA comparisons of on-campus vs off campus students, by grade level

R001225-020421 – Request for select Housing and Dining rate schedules

R001238-020621 – Request for information regarding the use and current balance of the University Strategic Priorities and the Repair and Replacement Reserve accounts

R001241-020821 – Confirming that the litigation at issue for **R001147-012421** was *Students For Fair Admissions, Inc. v. UT et al.*, No. 1:20-cv-763 (W.D. Tex.)

R001242-020821 – Request for information regarding non budgeted expenses related to Student Success Initiatives, with funding sources

R001252-020921 – Request for policy clarifications related to *Students For Fair Admissions, Inc. v. UT et al.*, No. 1:20-cv-763 (W.D. Tex.)

R001259-021021 – Request for 2009 Cockrell School of Engineering Master Plan
R001278-021721 – Request for budgetary information regarding 2400 Nueces
R001305-022621 – Request for Graduate Student Success Initiative budgets 2018-2020
R001320-030121 – Request for data concerning the Repair and Replacement Reserve
R001331-030321 – Request for clarification on bond debt-structuring of 2400 Nueces
R001334-030321 – Request for clarification regarding a line item in the Housing and Dining budget
R001357-030821 – Request for 2016 Cockrell School of Engineering Master Plan
R001364-030921 – Request for scoring matrix for predictive analytics referenced in Every Student Graduates
R001402-031821 – Request for data regarding finance evaluations projections of debt service ratios
R001403-031821 – Request for spring semester GPAs since 2012
R001404-031821 – follow-up to **R001238-020621**, includes request pertaining to Student Affairs Strategic Priorities account
R001422-032221 – Request for hourly wages of certain entry level employees
R001588-042521 – Request for GPAs, 1990-2020
R001602-042821 – Request for documentation regarding the active or inactive status of the system of holds explored in the Kroll Report

Texas Public Information Act (TPIA) requests for UT-System are submitted via e-mail and do not have a numbered tracking system. In early 2021, I filed a handful of TPIA requests with UT-System Public Information Coordinator and Assistant General Counsel Cynthia Tynan. These requests provided historical Capital Improvement Programs dating to 1989, and other documents related to the process a student housing project goes through for approval at UT-System.

APPENDICES

APPENDIX A

**THE PROCESS TO UPDATE THE
CAPITAL IMPROVEMENT
PROGRAM**

**SUMMARY OF THE BIENNIAL PROCESS TO UPDATE THE
CAPITAL IMPROVEMENT PROGRAM OF
THE UNIVERSITY OF TEXAS SYSTEM**

OVERVIEW OF THE CAPITAL IMPROVEMENT PROGRAM

The Capital Improvement Program (CIP) details the U. T. System's long-range plan to preserve and enhance facility assets. The CIP is a six-year projection of major repair and rehabilitation and new construction projects to be implemented and funded from component and System-wide revenue sources. Major repair and rehabilitation projects are defined in the Regents' Rules and Regulations as projects with a cost in excess of \$2,000,000. Major new construction projects are defined as projects with a cost in excess of \$1,000,000. Projects that are architecturally or historically significant are identified as major projects regardless of cost. In order to meet reporting requirements of the Texas Higher Education Coordinating Board, major and minor projects that are financed by bonds, regardless of the amount, will also be included in the CIP.

Included with the CIP is the Capital Budget, which sets out the anticipated capital expenditures during the first two fiscal years of the CIP. At the time that the Board of Regents is asked to approve the CIP, it is also asked to approve the Capital Budget and appropriate project funds for major repair and rehabilitation projects that are not architecturally significant. Authorization of these projects and appropriation of the necessary funds allow those projects to be presented to the Chancellor for approval of design development plans, authorization for expenditure of funds, and execution of the projects by the administrative staff without returning to the Board of Regents for further approvals. For new construction projects and for repair and rehabilitation projects that are architecturally significant, the Board of Regents considers design development approval, which includes appropriation of project funds and authorization of expenditures, at a later date.

Adoption of the CIP provides authority for the U. T. System Administration and the institutional administration to expend institutional funds up to 3% of the anticipated preliminary project cost to develop the formal Facility Program document, select the project architect, and develop preliminary project plans. These funds will be provided by the component initially but may be reimbursed to the component from applicable bond proceeds after design development approval and appropriation of project funds by the Board of Regents.

The CIP and Capital Budget are updated System-wide every two years. The CIP and Capital Budget are typically presented to the Board of Regents for review and approval at the Board's August meeting in odd-numbered years.

THE PROCESS TO UPDATE THE CAPITAL IMPROVEMENT PROGRAM

The Role of the Component Institution

The process to update the CIP begins at the component institution level, with each component institution evaluating its facility needs internally. Each component institution's process is tailored to meet the specific needs of the institution and to leverage its particular resources.

While each institution's process is unique, the process typically involves the consideration of similar matters, such as the following:

- Review and evaluation of compatibility of proposed project with the campus master plan, campus goals and objectives, or the campus mission;
- Review and evaluation of existing facilities;
- Identification of current and projected needs, based on a variety of data, which may include projected enrollment or future growth projections, strategic initiatives, and technological innovation;
- Identification and evaluation of justification for a proposed project;
- Identification and evaluation of funding sources and available resources; and
- Establishment of priorities.

As a general rule, each component institution's process includes input from appropriate individuals, councils, or committees, such as faculty representatives, departmental representatives, administrative officers, and committees or councils charged with duties pertaining to space planning and facilities. Project proposals and requests are typically reviewed and evaluated by executive officers or by councils or committees of executive officers with respect to various matters such as need, funding sources, and priorities. Final institutional review rests with the president of the institution, with the advice and assistance of the institution's executive officers.

The results of the process conducted by each component institution to identify and evaluate projects serve as the basis for the institution's submission of its proposed updated CIP to the Office of Facilities Planning and Construction. Further refinement of the projects occurs as the CIP update process continues at the System Administration level, as discussed in the following paragraphs.

The Role of the Office of Facilities Planning and Construction

The formal process at U. T. System Administration to update the CIP begins in December of each even-numbered year when the Office of Facilities Planning and Construction (OFPC) sends submission instructions to each component representative on the schedule, process, and forms required to gather information to update the CIP.

The Project Planning Form. The submission instructions that OFPC sends to each component institution include a Project Planning Form. The component is required to submit a completed Project Planning Form on the OFPC website for each project that the institution proposes to add to the CIP. The form requires the component to provide detailed information on the proposed project, including the following:

- Determination of the relative priority of the project;
- Description of the project, including the gross square feet in the project and the proposed use of the space;
- Cost of the project; note that although project costs are requested and discussed, the practice varies from institution to institution with respect to the costs stated by the institution, with some cost estimates serving more of a "placeholder" purpose than being a representation of the actual cost estimate;
- Detailed justification of the project, including an explanation of how the project serves the mission of the institution, an explanation of the need for the project, a discussion of options other than new construction, a discussion of the Texas Higher Education Coordinating Board's funding criteria, and a description of the condition of existing facilities; System staff often work with the institution to obtain complete information regarding the project's justification;
- Description of the project site and location and confirmation of whether the site complies with the institution's campus master plan objectives;
- Proposed project delivery method for the project, such as competitive sealed proposals, design/build, or construction manager at risk;
- Identification of sources of funding for the project; if revenue bond financing is proposed, identification of the source of revenue to pay the debt service and a five-year forecast of revenues and expenses for the project with a list of assumptions is required; and
- Determination of whether enabling legislation for the project is required and, if so, whether the legislation has been adopted.

The Work Sheet for Preliminary Project Cost. Those projects for which there will be expenditures during the succeeding two fiscal years must be included in the Capital Budget. For each such project, OFPC requires the institution

to complete a Work Sheet to establish the preliminary project cost. The Work Sheet requires the institution to provide detailed financial information on the proposed expenditures for the project, including the following:

- Description of any known site problems, such as easements, utilities, and environmental conditions, that may affect project cost; for renovation projects the institution must identify any facility issues that may affect renovation costs, such as abatement of asbestos or lead-based paint;
- Description of any known geotechnical problems that may affect project cost;
- Description and estimate of new construction, renovation, or addition costs, including the cost of all fixed equipment to be installed as part of the project; and
- Description and estimate of construction costs for site work and infrastructure, including site grading, utilities, thermal energy lines, expansion of thermal energy plant, streets, walks, landscaping, parking and site lighting.

The information submitted on the Project Planning Form and the Work Sheet serves as the basis for the evaluation of the project proposals. Because accuracy and completeness of the information are critical to the process to update the CIP, OFPC staff work with the component institution's staff on several levels during the initial submission process to gather and refine the information. OFPC project management staff and project controls staff provide budget and schedule information to the component for the potential CIP projects.

OFPC manages a web-based database on which all CIP submissions or updates are placed. From February through April, OFPC concentrates on the completeness and quality of the information of all submissions. OFPC staff usually meet with each campus on site or by phone conference in order to ensure that the information and the projects submitted are technically and financially feasible. Once the submissions are reasonably complete, the draft CIP is forwarded to the Office of Academic Affairs, the Office of Health Affairs and the Office of Finance for evaluation and review.

The Role of the Offices of Academic Affairs and Health Affairs

The Offices of Academic Affairs and Health Affairs evaluate and review the proposed projects and consult with each component concerning the need for the proposed projects. Further refinements of the plan are made as a result of the evaluation and review, which focuses on a variety of issues, including:

- Whether there is sufficient justification for the project;
- Whether the project is consistent with the mission and strategic plan of the institution;
- Whether proposed projects about which the office had previously been advised are included in the plan; if projects have been omitted, staff discuss with the institution the reason for the change in plans;

- Whether a new project has been assigned a higher priority than that of projects previously listed in the CIP; in that event, staff seek an explanation of the reason for the reordering of priorities; and
- Whether the project funding is adequate and achievable; in particular, staff members review the level of commitment of any proposed gift pledges on which the project may depend.

The Role of the Office of Finance

The Office of Finance reviews all proposed projects that are to be funded in part or in whole with Revenue Financing System bond proceeds. Such projects must receive a recommendation for allocation of debt proceeds from the Office of Finance prior to being approved by the Board of Regents for inclusion in the CIP. Each request for formal approval from the Board of Regents for expenditure of funds for construction expenses is accompanied by a “finding of fact” from the Office of Finance concerning the use of Revenue Financing System bond proceeds. The Office of Finance gives its “finding of fact” based upon a financing evaluation concluding that the individual component proposing the project can service its proportionate share of debt with its own financial resources.

The Office of Finance’s evaluation includes three levels of debt capacity and repayment analysis: the System level, the component level, and the project level. The System and component levels are evaluated through an analysis of each component’s historical financial statements and projected pro-forma statements, or “Six-Year Forecast,” which each component updates annually. The project level evaluation is based on the component’s submission of the specific project’s forecasted revenues and expenses (shown in the Work Sheet) to determine the net cash flow available to meet debt service obligations. Revenue Financing System bonds that receive tuition revenue reimbursement for debt service from the state are excluded from the project-level analysis.

Completion of Review and Revision of Proposed Projects

Upon completion of review and revision by the Offices of Academic Affairs, Health Affairs, Finance, and Facilities Planning and Construction, OFPC sends a revised draft of the proposed CIP to the components for approval of the changes that were made during the review process. After the components have approved the revisions, the proposed CIP is reviewed with the Executive Vice Chancellor for Business Affairs and the Chancellor. Upon approval by the Executive Vice Chancellor for Business Affairs and the Chancellor, the proposed CIP is scheduled for presentation to the Board committees in July and to the full Board in August for adoption.

Presentation to the Board of Regents

The CIP document submitted to the Board of Regents for review and approval is a compilation of the data collected and refined during the staff evaluation and review process. The data presented is comprehensive and includes the following information:

- Summary of major construction projects by each institution for the six-year CIP, together with the total project cost and the projected expenditures during the first two fiscal years of the CIP;
- Information about the enrollment history of each institution and the current square footage of campus facilities; and
- Detailed information about each institution's proposed projects, including sources of funds, project schedule, and a narrative description of each project scheduled to receive design development approval and authorization to expend funds in the Capital Budget, the goal or need that the project is intended to meet, the way that the project fulfills the mission or strategic plan of the institution, and the manner in which each project complies with the campus master plan.

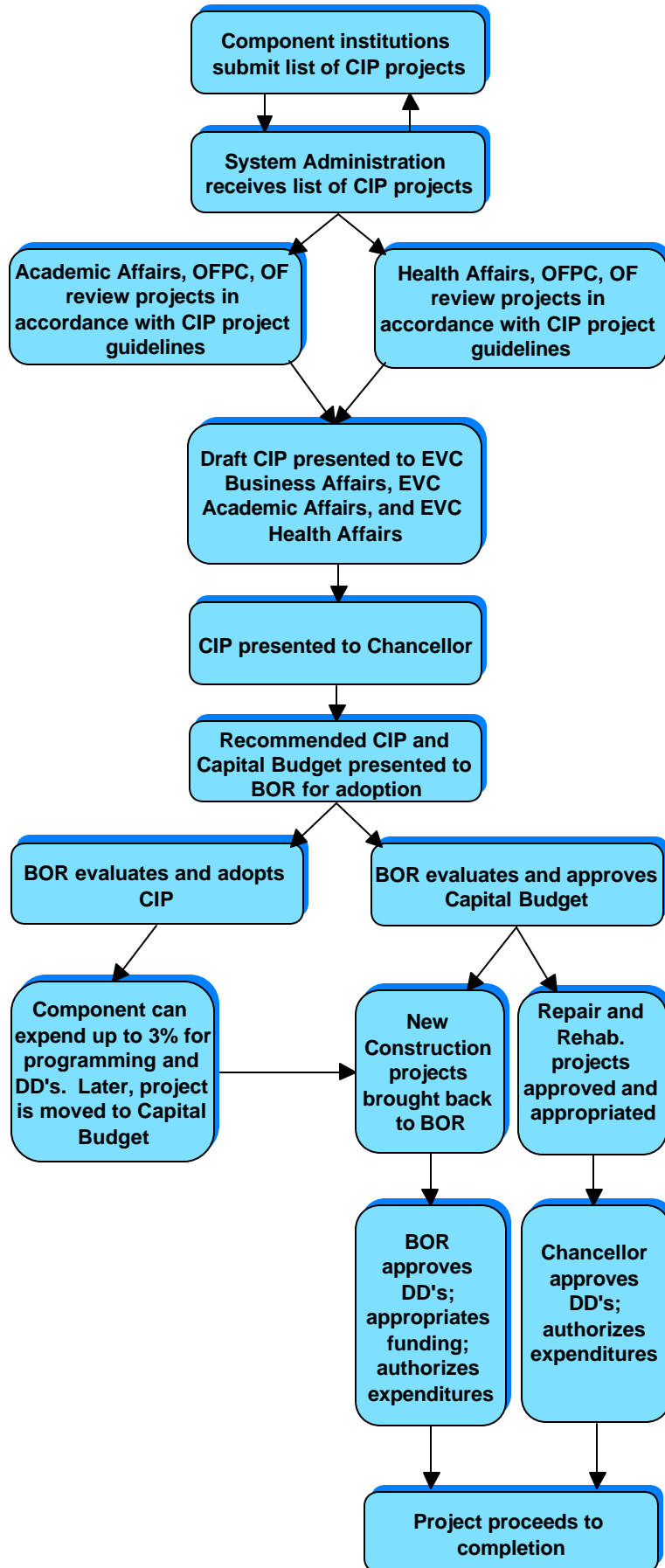
A verbal summary of the CIP is presented to the Board of Regents by the Chancellor and System staff, with presidents of some of the institutions making presentations about their particular proposals. After those presentations, the Board of Regents considers approval of the CIP and Capital Budget.

Once the Board of Regents approves the CIP and Capital Budget, any actions that are taken by the Board or the Chancellor with respect to the CIP or the Capital Budget are reflected in quarterly updates to the CIP document. OFPC manages and distributes the quarterly updates.

The Role of the Texas Higher Education Coordinating Board

Major projects (greater than \$1,000,000 for new construction and greater than \$2,000,000 for repair and rehabilitation) approved by the Board of Regents are subsequently reviewed and approved on an individual basis by the Texas Higher Education Coordinating Board (THECB) before construction may commence, except that projects financed with tuition bonds are reviewed only. The THECB evaluates construction applications for major new construction projects, and major repair and rehabilitation projects based on institutional campus master plans submitted to the THECB each October, as well as space needs, efficiency construction cost, and deferred maintenance. U. T. System is also required to report all bond financed construction projects annually. The U. T. System Capital Improvement Program serves as a foundation for the preparation of the THECB campus master plan.

CIP Project Process



Ad Hoc Committee on Capital Improvement Program (CIP) Process Review
Proposed Changes to “Off-Cycle” CIP Process

The major differences between the proposed CIP “off-cycle” process and the process that has been in effect since February 2000 for adding projects to the CIP are:

After the appropriate Executive Vice Chancellor received the institution’s letter request and project planning form, the information is forwarded to a committee of Senior System Officials¹ that reviews the request based on the following justification criteria:

- a) Consistency with institution’s mission;
- b) Project need;
- c) Unique opportunity that justifies off-cycle consideration;
- d) Matching funds/leverage;
- e) Cost effectiveness, to include
 1. addressing new construction versus renovation of existing construction
 2. addressing Texas Higher Education Coordinating Board Formula Funding criteria;
- f) State of existing facility condition; and
- g) Other available funding sources.

This step was added to ensure a thorough review of projects prior to submission to the Chancellor.

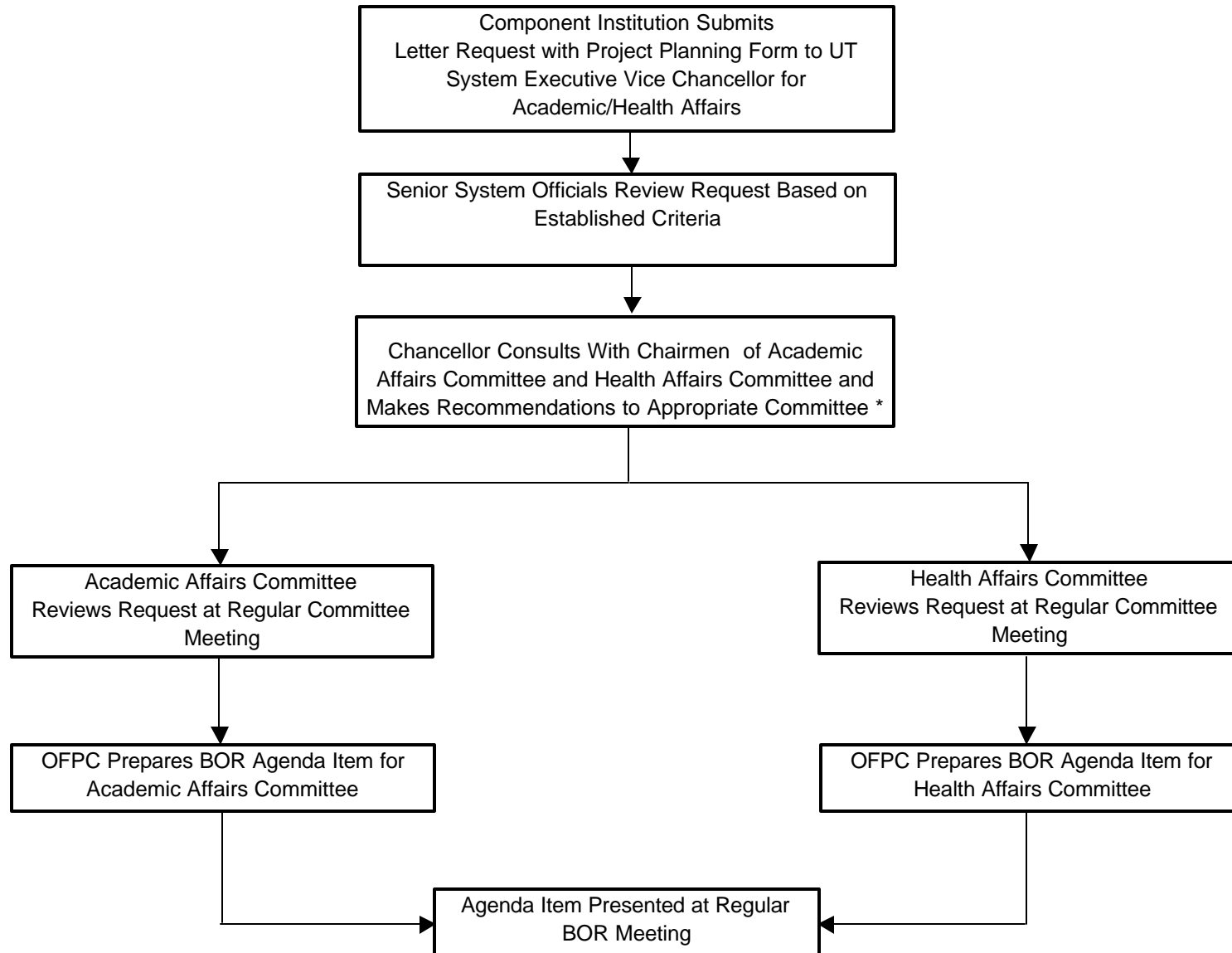
If the project includes PUF funding, the committee of Senior System Officials will also review the request in light of previous unfounded PUF requests from other institutions and the history of PUF allocations to the requesting institution. This step was added to ensure that the request was not considered in a vacuum, but in light of other previously proposed institutional projects.

If the committee of Senior System Officials recommends the project for consideration, the request and other information would be forwarded to the Chancellor for review and consultation with the chairmen of the appropriate standing committees of the U. T. Board of Regents.

If the Chancellor chooses to forward the recommendation to the appropriate committee for consideration, the funding request, recommendation, and other information would be distributed to all Board members notifying them that either the Academic Affairs or Health Affairs Committee would be considering an institution’s request for project funding. This would give all Board members an opportunity to be involved in the review process and discussion of the project at the appropriate committee meeting if they so desired.

¹ To include at a minimum the following individuals: Executive Vice Chancellor for Health Affairs, Executive Vice Chancellor for Academic Affairs, Executive Vice Chancellor for Business Affairs, Assistance Vice Chancellor for Facilities Planning and Construction, and the Assistant Vice Chancellor for Finance, or their delegates.

Process for Adding Projects To CIP Between Cycles



*NOTE: Copy of funding request and recommendation sent to all Board members

APPENDIX B

MEETINGS AND INTERVIEWS

2020-2021

MEETINGS

UT AFFILIATED

Leadership

Darrell Bazzell, Senior Vice President, Chief Financial Officer

Carlos Martinez, Chief-of-Staff to the President

Dr. LaToya Smith, Vice President for Diversity and Community Engagement

Dr. Gage Paine, Vice President of Student Affairs, 2012-2016

Jody Hughes, Associate Vice President for Legal Affairs

Dr. Richard Reddick, Associate Dean for Equity, Community Engagement, and Outreach, College of Education; Eyes of Texas History Committee Chairperson

Provost's Office

Dr. Miguel Wasielewski, Executive Director of Admissions

Dr. Michael Nava, Executive Director of Student Success Initiatives

Student Affairs

Carol Longoria, Deputy to the Vice President of Student Affairs

Tom Dison, Senior Associate Vice President and Director of Rec Sports

Kevin Price, Senior Associate Vice President for Housing and Campus Services at UTSA

Dr. Marilyn Tyus, Assistant Vice President of Housing and Dining

Dr. Mylon Kirksey, Assistant Director of Housing and Dining

Dr. Brandon Jones, Director of Living-Learning Communities

Graduate School

John Dalton, Assistant Dean of Graduate School

Michelle Broadway, Assistant Dean Graduate School

Scholl of Fine Arts

Dr. Douglass Dempster, Dean of Fine Arts

Dr. Holly Williams, Senior Assistant Dean of Fine Arts

Cathy Kothlow, Assistant Dean of Business Affairs

Dr. Mary Ellen Poole, Director of Bulter School of Music

Dr. Tina Curren, Clinical Assistant Professor in Dance and Dance Education

Campus Real Estate Office

Amy Wanamaker, Director of Real Estate, Campus Real Estate Office

NON-UT AFFILIATED

Jacob Cottingham, Chief-of-staff for Rep. Donna Howard, Texas House of Representatives

Mark Walters, Principal Planner, Inclusive Planning Division, Housing and Planning Department, City of Austin

Scott Sayers, The Muny Conservancy, Co-Chair

Mike McHone, Mike McHone Real Estate, University Area Partners

INTERVIEWS

Questionnaire responses provided by Kevin Price, Senior Associate Vice President for Housing and Campus Services at University of Texas at San Antonio, April 3, 2021. Vice President Price is the designated point-person, or “project advocate” for the Guadalupe Hall on-campus residence expansion at UTSA.

Why build instead of relying solely on the private market (I’ll note the private market remains very much in play housing most students, particularly upper-class students at most state universities), how is the decision made, is there a need for additional housing at UTSA?

The data at UTSA aligns with the national data that shows students, particularly freshmen, living on-campus have higher retention and graduation rates. UTSA has been becoming a more residential campus for several years as our enrollment from outside the metro area continues to climb, increasing the need, especially, for freshmen housing. Demand, as indicated by waiting lists, warranted additional housing. The number of beds in Guadalupe roughly aligns with the numbers on the waiting lists in the 2-3 years leading up to the decision to build Guadalupe Hall. Enrollment projections suggest that additional housing will be necessary in the coming years.

Can you detail the process of being a project advocate? Who is the supervisor of a project advocate? Is the President’s office involved? What team do you activate to produce the work which moves this process forward? What is the role of Facilities Planning and Management?

I can discuss my experience on this project. The President chooses the project advocate. My supervisor is the Sr. Vice President for Business Affairs and CFO. We were looking at expanding housing due to demand. Our then new President prioritized additional housing and directed us to pursue it. Given my administrative role overseeing university housing finances and facilities and my previous role serving in a similar capacity for Alvarez Hall (the project advocate role was formalized after that project began), I was chosen.

There are a number of stakeholders involved in designing and constructing a capital project. As project advocate I seek to assure all relevant needs and requirements are appropriately met and to facilitate the resolution of any conflicts among shareholders related to the project. For any building a number of university departments are involved in the ultimate operation—e.g. public safety, environmental safety, facilities maintenance, IT and facilities planning. As project advocate, I also seek to assure the project proceeds on time, within budget and that the priorities and purposes of the project are achieved.

In addition to the building codes and fire/life safety codes that must be adhered to, both the University and the UT-System have design standards and construction standards that must be met. The various stakeholders are the content experts in their respective areas. Any capital project is a massive team effort. As project advocate, my role was much greater during the design phase. Once construction begins, the senior project manager for capital projects plays a

greater role with my role being more involved when things arise that require a possible change order or adjustment to the plan.

Are student housing projects in competition for RFS funding with other projects at the school? Are student housing projects in competition with other projects for locations on campus?

Student housing projects are wholly self-funded. The Revenue Financing System (RFS) is a debt program managed by the UT-System. A self-funded project such as this develops a business plan (pro forma) that outlines how it will repay the debt over the period of time the funds are borrowed. Most nonrevenue generating buildings in the UT-System are funded through some combination of Tuition Revenue Bonds (TRBs) and the Permanent University Fund (PUF).

Theoretically student housing can be in competition for locations, although if an institution has an up-to-date master plan that reflects current priorities, it should set those parameters. The site for Guadalupe was slotted in the master plan as a location for student housing.

Who writes the “Executive Summary for Addition to CIP”?

In the case of Guadalupe Hall, it was largely jointly drafted by the then project manager from OFPC, the assistant vice president for facilities at UTSA and me.

How is the appropriate cost per bed for the project determined? How is the amount of RFS bonds used for the project determined? How is the amount and source of non-RFS bond funding determined? How are room and board rates determined for students? In what ways, if any, is the cost per bed tied to room and board rates?

For a revenue generating project, absent donated funds, the funds typically come from reserves and debt paid by revenue received through rental rates. The more reserve funds available to fund the project, the greater flexibility exists in rental rates and needed occupancy levels. Rental rates need to be in line with existing facilities on a campus as well as institutions students may see as competitors.

A large housing program with a number of debt-free residence halls may be able to subsidize the cost of a new facility with a comparatively high cost per bed without having comparatively high rental rates.

The cost per bed may vary significantly based on the type of project, how that project meets a need for the institution and how it fits within the existing housing portfolio. For example, an institution may feel the need to build graduate student housing due to the high costs of the surrounding market. Graduate student housing typically involves more square footage per bed which often translates into a higher cost per bed. The institution may deem the cost of such a project appropriate given its need to attract strong graduate students.

Generally, the amount of RFS bonds is determined by the cost of the project less other available funds—e.g. reserves, donations.

In general, typically the higher the cost per bed, the greater the board rates unless there is funding from other sources.

What component metrics generate the formula for Debt Service Coverage? What can an AVP do to improve the Debt Service Coverage ratio of a project? If the project's debt service ratio meets the 1.3x requirement, is there any incentive to exceed the 1.3x requirement?

The metrics are described here:

<https://www.utsystem.edu/offices/finance/institutional-debt-capacity-methodology>

The more the cost of a project can be paid for with existing funds (e.g. reserves or donated funds), the easier it is to meet or exceed the 1.3x requirement. The less debt service incurred will allow greater flexibility in rates charged and occupancy levels required to meet the 1.3x requirement.

From "Request for Qualifications" to "Occupancy" took 3 years and 5 months for Guadalupe Hall. I am curious the practical limit for expediting projects. What is the quickest it would be possible to go from "Request for Qualifications" to "Addition to CIP"? What about from "Addition to CIP" to "Occupancy"?

That's difficult for me to say. For a residence hall (or any other self-funded building, including fee-funded buildings), the substantial completion date is critical. A residence hall completed after the fall semester begins would pose significant funding challenges on most campuses unless there are ample reserves and a large portfolio of residential communities with little or no debt. Any self-funded building needs to be operational before a semester to begin charging rent or any fee.

The delivery method utilized for the multiple projects I have been involved with is known as construction manager at risk. With this method a design firm is first hired and begins the design process. The precise point can vary, but generally about midway through the design process a construction firm is brought on and then participates in the remaining design process. The thinking here is that the added perspective of the contractor can assist in finding design efficiencies that result in a better product at a somewhat lower cost.

It is generally thought that the fastest delivery method is design build. You can read more about that here: <https://dbia.org/what-is-design-build/>

Construction method can greatly impact the time frame. For example, while not always suitable for institutional buildings, using tilt-wall/tilt-up construction in some contexts can be quicker and less costly: <https://tiltwall.ca/blog/tilt-up-construction-for-multi-story-residential-buildings>

Other factors impacting the time to deliver a project can include site conditions and the use of prefab components. You can read more about that method here:

http://www.modular.org/htmlPage.aspx?name=Modular_dorms_greener_faster_smart

In a May 2020 follow-up correspondence, then Assistant Dean of the Graduate School John Dalton detailed the rationale behind setting UT's ideal graduate bed count at 5,000.

In our meeting in the spring, you mentioned 5000 as the ideal number of graduate students that UT could house. What are the peer institutions that you compare us to, or things unique to UT / the Austin market which have you arrive at this number? The peer institutes in the report had much lower numbers, except for UCLA. I could not determine the thread that tied these schools together, and why they were picked as the peer institutions, since some were much smaller schools.

The 5000 number was based on a percentage of the graduate student population that would live in University owned or controlled housing. This would put us at housing roughly 45% of the graduate population. I compared with institutions such as Stanford, which houses more than 85% of their graduate students. I also looked at UC San Diego, University of Wisconsin, University of Michigan, and perhaps UC Berkeley. UT Austin houses less than 10% of their graduate population, and all of these schools house a larger percentage.

As a quick follow up -- I supposed the thread that ties those other schools to UT is that they are all large schools (and except for Stanford, all public?

In addition to Stanford having highly ranked graduate programs, I included it because Palo Alto is a city where they experienced a significant increase in housing and property values because of the tech industry. Austin has also experienced a similar cost escalation, but at a slower pace. When we're thinking about housing, we think 20 or more years into the future, so Austin has potential to escalate beyond normal market rates because of the high earnings of tech industry employee salaries.

APPENDIX C

***Students for Fair Admissions,
Inc.***

v.

***The University of Texas, et al.
(2020)***

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

STUDENTS FOR FAIR ADMISSIONS,)
INC.,)

Plaintiff,)

v.)

Case No. 1:20-cv-763

UNIVERSITY OF TEXAS AT AUSTIN;)
JAMES B. MILLIKEN, Chancellor of the)
University of Texas System in his)
Official Capacity; STEVEN LESLIE,)
Executive Vice Chancellor for Academic)
Affairs of the University of Texas System)
in his Official Capacity; DANIEL H.)
SHARPHORN, Vice Chancellor and)
General Counsel of the University of Texas)
System in his Official Capacity;)
JAY HARTZELL, Interim President of the)
University of Texas at Austin in his)
Official Capacity; BOARD OF REGENTS)
OF THE TEXAS STATE UNIVERSITY)
SYSTEM; DAVID J. BECK, CHRISTINA)
MELTON CRAIN, KEVIN P. ELTIFE, R.)
STEVEN HICKS, JODIE LEE JILES,)
JANIECE LONGORIA, NOLAN PEREZ,)
KELCY L. WARREN, AND JAMES C.)
“RAD” WEAVER, as Members of the Board)
of Regents in Their Official Capacities;)
DANIEL JAFFE, Interim Executive Vice)
President and Provost; RACHELLE)
HERNANDEZ, Senior Vice Provost for)
Enrollment Management and Student)
Success; and MIGUEL WASIELEWSKI,)
Executive Director for Office of Admissions,)

COMPLAINT

Defendants.)

Plaintiff, Students for Fair Admissions, Inc., brings this action to obtain, among other relief, a declaratory judgment that Defendants racially discriminate in their administration of the undergraduate admissions program at the University of Texas at Austin (“UT-Austin”). That

discrimination violates the Equal Protection Clause of the U.S. Constitution; 42 U.S.C. §1981; 42 U.S.C. §1983; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*; the Equal Protection Guarantee of the Texas Constitution; the 1972 Equal Rights Amendment to the Texas Constitution; and Texas Civil Practice and Remedies Code §106.001. UT-Austin's undergraduate admissions policies have injured and continue to injure Plaintiff's members.

I. Jurisdiction and Venue

1. This Court has subject matter jurisdiction over the federal claims under 28 U.S.C. §§1331 and 1343, and it has supplemental jurisdiction over the state claims under 28 U.S.C. §1367.

2. Venue is proper in the Western District of Texas under 28 U.S.C. §1391 because the events giving rise to Plaintiff's claims occurred in the Western District of Texas.

II. The Parties

A. Plaintiff

3. Students for Fair Admissions, Inc. ("SFFA") is an Internal Revenue Code Section 501(c)(3), voluntary membership organization formed for the purpose of defending human and civil rights secured by law, including the right of individuals to equal protection under the law, through litigation and other lawful means. More specifically, SFFA promotes and protects the right of the public to be free from discrimination on the basis of race in higher-education admissions.

4. SFFA is a nonprofit membership group of more than 20,000 students, parents, and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional. SFFA has members in Texas and throughout the country.

5. SFFA has at least two members ("Applicants") who applied for and were denied admission to UT-Austin's 2018 and 2019 entering classes.

6. Applicants, who are white, were denied the opportunity to compete for admission to UT-Austin on equal footing with other applicants on the basis of race or ethnicity because of UT-Austin's discriminatory admissions policies.

7. Applicants were accepted to and enrolled at another university in Texas.

8. Applicants are ready and able to apply to transfer to UT-Austin when it stops discriminating against applicants on the basis of race and ethnicity.

B. Defendants

9. UT-Austin is a public educational institution authorized by Article 7, section 10 of the Texas Constitution and is funded by the State of Texas.

10. The Board of Regents is responsible for the central management and coordination of the University of Texas System's component institutions. The Board of Regents promulgates regulations that authorize the colleges, departments, and other programs in the University of Texas System to develop and implement undergraduate admissions policies.

11. David J. Beck, Christina Melton Crain, Kevin P. Eltife, R. Steven Hicks, Jodie Lee Jiles, Janiece Longoria, Nolan Perez, Kelcy L. Warren, and James C. "Rad" Weaver are the nine members of the Board of Regents, the governing body of the University of Texas System. The members of the Board of Regents are all named defendants in their official capacities.

12. James B. Milliken is the Chancellor of the University of Texas System. As Chancellor, Milliken serves as the chief executive officer of the University of Texas System charged with instituting the policies and procedures of the Board of Regents. Milliken is responsible for all aspects of the University of Texas System's operations, including oversight and implementation of the admissions policy at UT-Austin. Milliken is sued in his official capacity.

13. Steven Leslie is the Executive Vice Chancellor for Academic Affairs of the University of Texas System. According to the Rules and Regulations of the Board of Regents, Leslie is responsible for the review and approval of any proposal for admissions policies. He is sued in his official capacity.

14. Daniel H. Sharphorn is the Vice Chancellor and General Counsel of the University of Texas System. According to the Rules and Regulations of the Board of Regents, Sharphorn is responsible for the review and approval of any proposal for admissions policies. He is sued in his official capacity.

15. Jay Hartzell is the Interim President of UT-Austin. As President, Hartzell is responsible for the implementation and administration of undergraduate admissions at the UT-Austin. He is sued in his official capacity.

16. Daniel Jaffe is the Interim Executive Vice President and Provost of UT-Austin. In this role, Jaffe coordinates the academic mission of the university, managing all aspects of the academic experience for students, including undergraduate enrollment and curriculum management. He is sued in his official capacity.

17. Rachelle Hernandez is the Senior Vice Provost for Enrollment Management and Student Success at UT-Austin. In this role, she oversees, among other things, admissions, enrollment, and financial aid programs. She is sued in her official capacity.

18. Miguel Wasielewski is the Executive Director for Office of Admissions at UT-Austin. Wasielewski administers UT Austin's undergraduate admissions office and implements the undergraduate admissions policies promulgated by the University System. Wasielewski is sued in his official capacity.

III. The History of UT-Austin's Race-Based Admissions Policies

A. Pre-1997: UT-Austin's Race-Based Admissions Before *Hopwood*

19. Before 1997, UT-Austin used race as part of the general admissions process, and it was frequently a controlling factor in the university's admissions decisions.

20. UT-Austin used two criteria when evaluating applicants: (1) the applicant's Academic Index ("AI"), which was computed from standardized test scores and high school class rank; and (2) the applicant's race.

21. In 1996, the last year UT-Austin used this particular race-based system, 4.1% of the enrolled freshmen were African American, 14.7% were Asian American, and 14.5% were Hispanic.

B. 1997: UT-Austin's Race-Neutral AI/PAI Plan After *Hopwood*

22. In 1996, the U.S. Court of Appeals for the Fifth Circuit issued its decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which held that the University of Texas School of Law could not use race as a factor in deciding which applicants to admit.

23. In response to *Hopwood*, UT-Austin ceased using race as a factor in its undergraduate admissions decisions.

24. Instead, for the 1997 admissions cycle, UT-Austin instituted a race-neutral "holistic review" process in which it considered an applicant's AI score as well as a Personal Achievement Index ("PAI").

25. The PAI was a composite of scores from two essays and a personal achievement score. The personal achievement score, in turn, was based on a "holistic" review of an applicant's leadership qualities, extracurricular activities, honors and awards, work experience, community service, and special circumstances, such as whether the applicant came from a poor family, a single-parent household, or a home in which a language other than English was customarily spoken.

26. This new race-neutral admissions process was known as the "AI/PAI Plan."

27. Because the AI/PAI Plan gave an admissions preference to disadvantaged students, it had the effect of disproportionately benefiting minority applicants.

28. In 1997, under the AI/PAI Plan, 2.7% of the enrolled freshmen were African American, 15.9% were Asian American, and 12.6% were Hispanic.

C. 1998-2004: UT-Austin's Race-Neutral Admissions Policy (Top Ten Percent Plan Plus the AI/PAI Plan) Before Grutter

29. In 1997, the Texas Legislature adopted a law known as the “Top Ten Percent Plan,” which mandated that UT-Austin admit all Texas seniors who rank in the top 10% of their high school classes. See House Bill 588, Tex. Educ. Code §51.803 (1997).

30. In 1998, UT-Austin began admitting all applicants who were in the top 10% of their high school classes, as required by the Top Ten Percent Plan.

31. Because applicants admitted pursuant to the Top Ten Percent Plan did not fill UT-Austin's entire incoming freshman class, UT-Austin continued to use the race-neutral AI/PAI Plan to fill the remainder of its incoming freshman class.

32. From 1998-2004, UT-Austin admitted applicants under this race-neutral system.

33. UT-Austin repeatedly acknowledged that, during this time period, its race-neutral admissions process created a more racially diverse environment than existed under the race-based admissions process it used before *Hopwood*.

34. In 2000, UT-Austin announced that its “enrollment levels for African American and Hispanic freshmen ha[d] returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies.”

35. In 2003, UT-Austin proclaimed that it had “effectively compensated for the loss of affirmative action” by bringing “a higher number of freshman minority students—African Americans, Hispanics, and Asian-Americans—to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university's enrollment process.”

36. By 2004—the last year that UT-Austin used this race-neutral system—the entering freshman class was 4.5% African American, 17.9% Asian American, and 16.9% Hispanic.

37. The 2004 entering freshman class, in other words, had a higher percentage of African Americans, Asian Americans, and Hispanics than the class that entered in 1996 when UT-Austin last used racial preferences.

D. 2004-2008: UT-Austin’s Race-Based Admissions Policy After *Grutter*

38. Despite this success, UT-Austin reflexively jumped at the first chance to reinsert race into its admissions process.

39. On June 23, 2003, the U.S. Supreme Court decided *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld the University of Michigan Law School’s race-based admissions system under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court held that “student body diversity is a compelling state interest that can justify the use of race in university admissions,” *Grutter*, 539 U.S. at 325, and enrolling a “‘critical mass’ of underrepresented minorities is necessary to further [a university’s] compelling interest in securing the educational benefits of a diverse student body,” *id.* at 333.

40. The Supreme Court warned, however, that a university contemplating the use of race as a factor in admissions must engage in “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” *Id.* at 339.

41. Nevertheless, on the very same day that *Grutter* was decided, UT-Austin’s president announced that “[t]he University of Texas at Austin will modify its admissions procedures” in light of *Grutter*, including by “implementing procedures at the undergraduate level that combine the benefits of the Top 10 Percent Law with affirmative action programs.”

42. In June 2004, UT-Austin formally adopted a policy to reintroduce race into the admissions process, starting with applicants in the 2004-2005 admissions cycle.

43. Under the new admissions system, UT-Austin continued to admit applicants under the Top Ten Percent Plan and to fill the remaining seats based on an applicant's AI and PAI scores.

44. Unlike the year before, however, an applicant's AI/PAI score was not calculated based on race-neutral criteria. UT-Austin instead began to use an applicant's race as a factor in his or her PAI score. Under UT-Austin's system, an applicant's race appeared on the front of every application file and reviewers were aware of it throughout the evaluation.

45. UT-Austin began using this new race-based admissions system to benefit African-American and Hispanic applicants (groups it considered "underrepresented") over applicants of other races, including Whites and Asian Americans. UT-Austin did so even though there were fewer Asian-Americans than Hispanics enrolled at the university. UT-Austin deemed Asian-Americans "overrepresented" based on state demographics. At the same time, UT-Austin continued to recognize Asian Americans as a minority in its diversity statistics, marketing materials, and in analyzing classroom diversity.

46. UT-Austin offered two reasons for why it needed to grant a preference to African-American and Hispanic applicants to achieve student-body diversity. First, it claimed a lack of "sufficient diversity" at the classroom level. Second, it pointed to "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population."

47. UT-Austin did not project a date when it would stop using race in admissions decisions. Instead, UT-Austin committed to review its policy in five years.

E. 2008-2016: The *Fisher* Litigation

48. In the spring of 2008, Abigail Fisher, a white high school student from Sugar Land, Texas, was denied admission to UT-Austin.

49. Shortly thereafter, Ms. Fisher sued UT-Austin in this Court, claiming that UT-Austin's use of race in admissions violated her rights under the Equal Protection Clause and Title VI. Ms.

Fisher did not seek to overturn the Supreme Court's precedent that universities have a compelling interest in using race as a factor in admissions decisions to pursue "diversity."

50. During the litigation, UT-Austin conceded that "it is undisputed that race is a meaningful factor that can make a difference in the evaluation of a student's application."

51. UT-Austin claimed, however, that its use of race was narrowly tailored to pursue a compelling interest in racial diversity. In particular, UT-Austin claimed that it needed to use race in the admissions process to achieve a "critical mass" because its enrollment of African Americans and Hispanics lagged behind each group's segment of Texas's population, and because a significant number of its small classes did not have at least two African Americans, two Hispanics, and two Asian Americans.

52. UT-Austin further argued that its use of race was "narrowly tailored" to advance these interests because its admissions program was holistic, was not a quota, and included a plan to review the need for racial preferences every five years.

53. This Court granted UT-Austin summary judgment, and the U.S. Court of Appeals for the Fifth Circuit affirmed. The U.S. Supreme Court, however, granted certiorari and vacated the Fifth Circuit's decision. The Supreme Court held that the court of appeals had failed to apply the correct standard of strict scrutiny. *See Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013) ("*Fisher I*").

54. In a majority opinion authored by Justice Kennedy and joined by seven Justices, the Supreme Court instructed the Fifth Circuit on remand to review the summary-judgment record under traditional strict scrutiny, which required a determination of "whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Id.* at 314.

55. The Court explained that "strict scrutiny" required UT-Austin "to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use

of the classification is necessary ... to the accomplishment of that purpose.” *Id.* at 309. That meant the reviewing court must “verify that it is ‘necessary’ for [UT-Austin] to use race to achieve the educational benefits of diversity,” and demand proof from UT-Austin that “no workable race-neutral alternatives would produce the educational benefits of diversity.” *Id.* at 312.

56. Justice Scalia concurred, noting that Ms. Fisher had not “ask[ed] us to overrule *Grutter*’s holding that a ‘compelling interest’ in the educational benefits of diversity can justify racial preferences in university admissions” and stressing his view that “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.” *Id.* at 315 (Scalia, J., concurring).

57. Justice Thomas also concurred, writing separately to explain that he would overrule *Grutter*, find UT-Austin’s admissions policies unconstitutional, and hold that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.” *Id.* (Thomas, J., concurring).

58. Justice Ginsburg dissented. Justice Ginsburg would have affirmed on the basis that UT-Austin’s admissions policies were narrowly tailored to achieve a compelling interest of student-body diversity.

59. On remand, UT-Austin abandoned its claimed interests in “demographic parity” and “classroom diversity” and forwarded a new defense: intra-racial diversity. According to UT-Austin, it needed to use racial preferences to enroll underrepresented minorities that come from “an integrated community” and who are “not the first in their family to attend college.” More specifically, UT-Austin claimed that it needed to enroll underrepresented minorities who, unlike those admitted via the Top Ten Percent Plan, do not reinforce stereotypes that Hispanics come from “the valley or African-Americans from the inner city.” In short, UT-Austin claimed that racial preferences were needed not to ensure a critical mass of underrepresented minorities, but to ensure it enrolls enough minorities

with “a different set of experiences and backgrounds” from those admitted through the Top Ten Percent Plan.

60. Over Judge Garza’s dissent, the Fifth Circuit again affirmed the grant of summary judgment to UT-Austin, and the U.S. Supreme Court again granted certiorari. In a 4-3 decision, the U.S. Supreme Court affirmed. *See Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016) (“*Fisher II*”).

61. Writing for the majority, Justice Kennedy ruled that UT-Austin’s use of racial classifications and admissions preferences—as implemented in 2008—satisfied strict scrutiny. The Supreme Court warned, however, that “affirmance of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement.” *Id.* at 2215. UT-Austin has an “ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.” *Id.*

62. In particular, the Court stressed that “studies undertaken over the eight years since” 2008, when Ms. Fisher applied to UT-Austin, “may be of significant value in determining the constitutionality of the University’s current admissions policy.” *Id.* at 2209. Unlike the record before the Court, which was “almost devoid of information about the students who secured admission to the University through the [Top Ten Percent] Plan,” future courts would be able to assess “how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review.” *Id.*

63. Thus, the Court cautioned, “[t]he type of data collected [since 2008], and the manner in which it is considered, will have a significant bearing on how [UT-Austin] must shape its admissions policy to satisfy strict scrutiny in the years to come.” *Id.* at 2210. UT-Austin’s admissions policies would survive strict scrutiny only if the university “tailor[ed] its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest,” and used the “valuable data” it collected to “scrutinize the fairness of its admissions program;

to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.” *Id.* at 2210, 2214-15.

64. Justice Thomas dissented, writing separately to reiterate that the Court should overrule *Grutter*, hold “that a State’s use of race in higher education admissions decision is categorically prohibited by the Equal Protection Clause,” and find UT-Austin’s admissions system unconstitutional. *Id.* at 2215 (Thomas, J., dissenting).

65. According to Justice Thomas, “[t]he Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. That constitutional imperative does not change in the face of a ‘faddish theory’ that racial discrimination may produce ‘educational benefits.’” *Id.*

66. Justice Alito also dissented, concluding that UT-Austin’s admissions system could not satisfy strict scrutiny because the university had not defined any of its alleged interests— “educational benefits of diversity,” “demographic parity,” “classroom diversity,” “intraracial diversity,” and “avoiding racial isolation”—with clarity, and had failed to demonstrate that its program was narrowly tailored to achieve any of these interests. *Id.* at 2224 (Alito, J., dissenting).

67. “What is at stake,” according to Justice Alito, “is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve ‘the educational benefits of diversity,’ without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives. Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT’s position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable—and remarkably wrong.” *Id.* at 2242-43.

F. The Kroll Report: Uncovering Admissions Preferences for the Privileged

68. UT-Austin has described its “holistic” admissions process as an objective evaluation in which “trained admissions officers” evaluate each applicant as a “whole person” to determine whether he or she has “a genuine commitment to [the university’s] core values—learning, discovery, freedom, leadership, individual opportunity and responsibility.” UT-Austin claims that it uses this process to, among other things, admit underrepresented minorities who have qualities that underrepresented minorities admitted under the Top Ten Percent Law uniquely lack.

69. The reality, however, is that UT-Austin has used the latitude created by this process to allow politically connected individuals—such as donors, alumni, legislators, members of the Board of Regents, and UT-Austin officials and faculty—to get family members and other friends admitted to UT-Austin, despite having grades and standardized test scores substantially below the median for admitted students.

70. UT-Austin never disclosed this secret admissions process during the *Fisher* litigation.

71. The secret practice came to light only because a former admissions officer became a whistleblower, and then public pressure forced UT-Austin to independently investigate this surreptitious practice.

72. Known as the “Kroll Report,” the investigation revealed that UT-Austin’s “holistic review” process is regularly overridden through application “holds” placed at the request of the university’s president.

73. The Kroll Report was published during the *Fisher II* litigation, but given the late timing, the *Fisher II* majority declined to consider it in that case. *See* 136 S. Ct. at 2211-12; *see also id.* at 2240 & n.18 (Alito, J., dissenting).

74. The Kroll Report found that UT-Austin’s president, William Powers, placed “holds” on about 150 to 300 in-state applicants each year from 2009 to 2014. If a student received a “hold,”

UT-Austin's admissions office could not deny the student admission to the university without first speaking with President Powers.

75. The Kroll Report found that most "holds" were "based on requests from Texas legislators and members of the Board of Regents." For example, in one "brazen" incident, a former elected official emailed UT-Austin to say a member of an "important" committee had a strong interest in seeing a student admitted and that there were "political and funding implications" tied to the student's admission. The student was then admitted.

76. These well-connected individuals had an incredibly strong chance of receiving admission to UT-Austin. In particular, the Kroll Report found that UT-Austin admitted 73 percent of the applicants who received presidential "holds" and who did not qualify for automatic admission under the Top Ten Percent Plan. This acceptance rate was significantly higher than the acceptance rate for applicants undergoing "holistic review" during a similar period.

77. Many of these well-connected "holds" secured admission despite grades and test scores substantially below the median for admitted students. For example, two underqualified applicants were admitted because they had "close ties to state legislators," despite having "very low high school grades (GPA range of 1.8 to 2.2) combined with SAT scores in the 800s (combined math and verbal)" and no "other obvious holistic attributes, other than positive letters of recommendation referencing the applicants' ties to the legislators."

78. The Kroll Report found that UT-Austin's admissions office admitted these "holds" because of "frequent pressure placed on [it] to admit certain applicants." Indeed, in numerous cases, when the admissions office hesitated, President Powers overrode the "holistic review" process and ordered the applicants "admitted over the objection of the Admissions Office." For example, when the admissions director objected that one student was "so bad for so many reasons, there is no way I can admit this student," President Powers intervened and ordered that the student be admitted.

79. The Kroll investigation also found that race was a central consideration in many of these admissions decisions. Investigators conducted detailed reviews of 73 applicants who were admitted “despite grades and test scores substantially below the median for admitted students” and found that “[i]n approximately 29%, or 21 of the 73 files reviewed, the contents of the files suggest that ethnic, racial, and state geographical diversity may have been an important consideration.”

80. By all indications, then, UT-Austin uses its “diversity” rationale primarily as pretext to justify the admission of underqualified, well-connected applicants.

81. Despite the damning evidence contained in the Kroll Report, President Powers defended his admissions decisions. Admitting these well-connected applicants was appropriate, President Powers believed, because “relationships matter” and because the number of these students admitted was relatively small given the size of UT-Austin. According to Powers, “a similar process exists at virtually every selective university in America, and it does so because it serves the best interests of the institutions.”

82. There is no indication that UT-Austin has discontinued its policy of providing special admissions preferences to underqualified, well-connected applicants.

83. Following the embarrassing Kroll Report, UT-Austin purported to enact “reforms” to prevent this favoritism. But the new policies still allow UT-Austin leadership to override admissions decisions and admit students who otherwise would have been considered unqualified.

84. According to a former member of the Board of Regents, UT-Austin’s admissions policies are a “joke” and “don’t have the appropriate safeguards in place to ensure the wealthy and powerful can’t short circuit the normal admissions process.”

85. And the university president is not the only one with the demonstrated power to play favorites or to exert undue influence on the admissions process. In 2019, UT-Austin was part of the scandal in which school administrators, athletics officials, and coaches were accused of accepting

bribes in order to circumvent the admissions process. The investigation found that then-UT-Austin's men's tennis coach had accepted a bribe to admit a student under the guise of recruiting him.

G. Post-*Fisher II*: UT-Austin Continues to Rely on Race-Based Admissions

86. Since *Fisher II* was decided, UT-Austin has repeatedly acknowledged that it continues to use race in the admissions process.

87. On June 23, 2016, the same day *Fisher II* was issued, UT-Austin's President, Gregory Fenves, applauded the decision, claiming that the Court had recognized "the university's right to continue using race and ethnicity as one factor in our holistic admissions process."

88. In March 2017, UT-Austin released its "University Diversity and Inclusion Action Plan" ("UDIAP"), in which it outlined its plan to continue using race in its admissions decisions as a result of "the university's successful defense of its admissions policy in the *Fisher* case." The UDIAP's discussion of the need for race-based admissions was less than one page.

89. In the UDIAP, UT-Austin acknowledged that its student body (which is admitted largely through the race-neutral Top Ten Percent Plan) consists of "a majority of non-white students."

90. Nevertheless, the UDIAP stated that UT-Austin still needed to use race in its admissions decisions because certain minorities "are underrepresented in certain areas of study, including business, engineering, and the sciences" and there was a "need to include diversity within groups to break down stereotypes." UT-Austin's ultimate goal, according to the UDIAP, was to "achieve a level of enrollment whereby students from underrepresented groups no longer feel isolated." The UDIAP did not identify the level of enrollment necessary to ensure that these groups did not "feel isolated." Despite claiming in 2004 that it would systematically study and review the need for racial preferences every five years, there is no indication that UT-Austin has conducted another study.

91. For recent admissions cycles, UT-Austin has continued to ask students to classify themselves from among a select group of broad racial categories on the application, *see Fisher I*, 570 U.S. at 306, and it still discriminates on the basis of race in admitting the portion of the freshman class enrolled outside the operation of the Top Ten Percent Plan.

92. In other words, UT-Austin gives special preference to applicants who fall within racial categories that the university considers “underrepresented.” Given the limited number of spaces in UT-Austin’s freshman class, granting a racial preference to African-American and Hispanic applicants diminishes the chances of admission for White and Asian-American applicants.

93. In 2009, the Texas Legislature authorized UT-Austin to cap the number of students it admitted through the Top Ten Percent Plan at 75% of the entering class. *See* Tex. Educ. Code §51.803(a-1). In practice, this means that students now must be ranked higher than the top ten percent of their graduating classes to be admitted through the Top Ten Percent Plan. For example, in the most recent class, the Top Ten Percent Plan provided automatic admission to Texas students in the top 6% of their graduating high school classes.

94. Since 2010, the Top Ten Percent Plan has given automatic admission to students in the follow percentages of their graduating classes:

Admitted Class	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Rank Needed for Auto Admission	Top 10%	Top 8%	Top 9%	Top 8%	Top 7%	Top 7%	Top 8%	Top 7%	Top 7%	Top 6%	Top 6%

95. Under Texas law, the 75% cap on admissions under the Top Ten Percent Plan will be removed if “a final court order applicable to the institution prohibits the institution from considering an applicant’s race or ethnicity as a factor in the institution’s decisions relating to first-time undergraduate admissions.” Tex. Educ. Code §51.803(k)(1).

96. UT-Austin has been transparent about its continued—indeed, its *increased*—reliance on race in other ways as well.

97. From 2008 through 2017, UT-Austin publicly reported that “racial/ethnic status” was a factor that was merely “considered” in the admissions process. Other factors, such as class rank and the rigor of the student’s academic record, were “very important” in the admissions process and thus given more weight in the admissions process.

98. Feeling liberated by *Fisher II*, however, UT-Austin has increased its reliance on race. UT-Austin now reports that an applicant’s “racial/ethnic status” is a “very important” factor in UT-Austin’s admissions decisions. Thus, to UT-Austin, a student’s skin color is equally important to admissions as class rank, test scores, extracurricular activities, and other accomplishments.

IV. UT-Austin’s Race-Neutral Alternatives to Achieve Student Body Diversity

A. The Combination of the Top Ten Percent Plan and Race-Neutral Holistic Admissions Can Achieve Student Body Diversity on UT-Austin’s Campus.

99. Things have changed dramatically since 2008 when Abigail Fisher was rejected by UT-Austin and filed her lawsuit.

100. As the following chart shows, there has been a steady increase in racial diversity since 2008:

University of Texas at Austin Admissions Share of Total Students Admitted by Race				
Year (Class Entering in Summer/ Fall)	Race/Ethnicity of Applicant			
	White	Hispanic	African American	Asian
2008	51%	21%	6%	18%
2009	51%	21%	5%	19%
2010	49%	23%	5%	17%

2011	48%	22%	5%	19%
2012	45%	25%	5%	18%
2013	45%	24%	5%	19%
2014	43%	23%	5%	21%
2015	40%	24%	5%	22%
2016	38%	26%	5%	21%
2017	38%	27%	5%	22%
2018	36%	27%	6%	23%

101. As the data show, in 2008, the majority of those admitted to UT-Austin (51%) were white. Only 21% of admitted students were Hispanic and 18% of admitted students were Asian.

102. By 2018, however, barely a third of those admitted to UT-Austin (36%) were white. But the Hispanic and Asian share of the admitted class had increased to 27% and 23%, respectively.

103. The race-neutral Top Ten Percent Plan has driven this increased diversity. The following chart shows the racial makeup of those students admitted through the Top Ten Percent Plan:

University of Texas at Austin Admissions Share of Students Admitted Via Top Ten Percent Plan by Race				
Year (Class Entering in Summer/Fall)	Race/Ethnicity of Applicant			
	White	Hispanic	African American	Asian
2010	44%	28%	6%	17%
2011	41%	29%	6%	19%
2012	39%	31%	6%	18%
2013	38%	31%	5%	20%
2014	36%	30%	5%	22%

2015	34%	33%	7%	21%
2016	33%	34%	6%	21%
2017	33%	34%	6%	21%
2018	30%	35%	6%	23%

104. As the data show, in 2010, among those students admitted through the Top Ten Percent Plan, 44% were white, but only 28% were Hispanic and 17% were Asian.

105. By 2018, however, those numbers had changed dramatically. Among those students admitted through the Top Ten Percent Plan, 35% were Hispanic, 30% were white, and 23% were Asian.

106. The racial makeup of those admitted through the Top Ten Percent Plan contrasts starkly with the makeup of the rest of the admitted students. The following chart shows the racial makeup of those students admitted outside of the Top Ten Percent Plan:

University of Texas at Austin Admissions Share of Students Admitted Outside the Top Ten Percent Plan by Race				
Year (Class Entering in Summer/Fall)	Race/Ethnicity of Applicant			
	White	Hispanic	African American	Asian
2010	62%	10%	3%	17%
2011	60%	11%	4%	18%
2012	57%	13%	4%	17%
2013	58%	11%	4%	19%
2014	54%	12%	4%	20%
2015	50%	11%	3%	24%
2016	47%	13%	4%	22%

2017	47%	15%	5%	24%
2018	45%	15%	5%	24%

107. As the data show, in 2018, there were *three times as many* white students than Hispanics (45% v. 15%) who were admitted outside of the Top Ten Percent Plan. Indeed, more white students were admitted outside of the Top Ten Percent Plan than were Hispanics, African Americans and Asians *combined* (45% v. 44%).

108. Ironically, then, UT-Austin’s use of “holistic review” actually *diminishes* racial diversity in the aggregate, given the success of the Top Ten Percent Plan.

109. In the most recent admissions cycle (2019), this pattern has continued. The following chart shows the share of students from Texas admitted to UT-Austin by race and automatic admission status:

2019 Admitted Students from Texas by Race and Automatic Admission Status				
Method of Admission	Race/Ethnicity of Applicant			
	White	Hispanic	African American	Asian
Admitted Via Top Ten Percent Plan	29%	36%	6%	24%
Admitted Outside the Top Ten Percent Plan	42%	22%	6%	24%

110. Moreover, many of the underrepresented minority students admitted through “holistic review” would have been admitted regardless of whether UT-Austin used race as a factor in admissions, due to their academic achievements, extracurricular activities, and other non-race-based factors.

111. Thus, UT-Austin has a ready-made formula for achieving racial diversity—maintain or increase the use of the Top Ten Percent Plan and admit the rest through race-neutral means.

112. UT-Austin does not need to continue its odious reliance on race in order to achieve a diverse class.

B. UT-Austin Has Additional Race-Neutral Alternatives Available That Can Achieve Racial Diversity.

113. The Top Ten Percent Plan is not the only race-neutral alternative available to UT-Austin.

114. UT-Austin could achieve racial diversity by employing race-neutral alternatives *in addition to* the Top Ten Percent Plan.

115. UT-Austin also could achieve racial diversity by eliminating the Top Ten Percent Plan and adopting new race-neutral admissions policies.

116. Available race-neutral alternatives include but are not limited to: increased use of non-racial preferences; increased use of financial aid, scholarships, and recruitment to attract and enroll minority applicants; and elimination of admissions policies and practices that operate to the disadvantage of minority applicants.

117. Furthermore, eliminating racial preferences at UT-Austin will alleviate the substantial harm that these discriminatory policies cause to those minority applicants who receive admissions preferences, to the Texas community, and to society as a whole.

1. UT-Austin Can Achieve Student Body Diversity Without Using Race as a Factor in Admissions Decisions by Making Greater Use of Non-Racial Preferences.

118. Colleges and universities that have eliminated race-based admissions have maintained or increased their student body diversity by placing greater emphasis on socioeconomic factors, which often strongly correlate with race but are not exclusively reserved for applicants of a particular race or ethnicity. Using socioeconomic preferences thus increases racial diversity *and* achieves the broader diversity that UT-Austin claims to seek by opening the door of opportunity for poor students of all races.

119. In one study of ten leading public universities that ended race-based admissions preferences, researchers found that seven of these schools maintained or increased their enrollment of African-American and Hispanic students by adopting strategies that target socioeconomic inequality. See Halley Potter, *Transitioning to Race-Neutral Admissions: An Overview of Experiences in States Where Affirmative Action Has Been Banned*, *The Future of Affirmative Action* (2014).

120. For example, the University of Colorado has devised an admissions formula that gives a significant preference to students from socioeconomically disadvantaged backgrounds. This refined formula considers numerous socioeconomic factors, including single-parent status, parents' education level, family income, native language, the number of dependents in the family, whether the applicant attended a rural high school, the percentage of students from the applicant's high school who are eligible for free or reduced-price lunch, the school-wide student-to-teacher ratio, and the size of the twelfth-grade class.

121. Under this admissions program, the University of Colorado increased not only the socioeconomic diversity of its incoming class but also its racial and ethnic diversity. African-American and Hispanic acceptance rates to the University of Colorado increased from 56 percent under race-based admissions to 65 percent under class-based admissions. See Matthew N. Gaertner, *Advancing College Access with Class-Based Affirmative Action*, *The Future of Affirmative Action* (2014).

122. Similarly, researchers conducted a national simulation of elite universities to determine whether the use of socioeconomic preferences could achieve student body diversity without the use of racial preferences. See Anthony P. Carnevale, Stephen J. Rose, Jeff Strohl, *Achieving Racial and Economic Diversity with Race-Blind Admissions Policy*, *The Future of Affirmative Action* (2014). The study simulated various admissions models at the top-rated 193 colleges and universities "because the dialogue about affirmative action often implies that it is access to these schools and the opportunities they provide in business, social and career advancement that truly matters." The study examined,

among other things, the effect of substituting socioeconomic preferences for race-based preferences at America's elite college and universities using test scores and high-school grades as measures of merit.

123. The national simulation ultimately found that “it is possible to achieve both racial and economic diversity in selective colleges without using race *per se* as an admissions criterion” and, importantly, that it could be achieved consistent with the understanding “that affirmative action models ought to promote racial diversity as an educational benefit instead of promoting racial diversity for its own sake.”

124. Another study found that increased focus on parental education and wealth—as opposed to income—as a measure of socioeconomic status also can help achieve student body diversity without the use of racial preferences. *See* Dalton Conley, *The Why, What, and How of Class-Based Admissions Policy*, *The Future of Affirmative Action* (2014). The study found that “the most important factor in predicting individual academic success is the education of a parent” and the “economic factor” that mattered most was “parental net worth (that is, wealth) and not income.” Indeed, “wealth conceptually captures the legacy of historical inequalities of opportunity better than aspects of class that cannot be literally transferred directly from one generation to the next by signing a check (or a deed or a will).” While African Americans make on the order of 60 to 70 percent of what whites make in income, the median African-American family wealth is just 10 percent of median white family wealth.

125. Finally, placing greater emphasis on community-based preferences—via the Top Ten Percent Plan that UT-Austin already has in place, or other means—would promote greater socioeconomic, geographic, and racial diversity in the student body. UT-Austin's own data, as well as the studies of scholars and universities, support this principle.

126. Community-based preferences result in the admission of more socioeconomically disadvantaged students. *See* Sheryll Cashin, *Place, Not Race: A New Vision of Opportunity in America* (2014). African Americans and Hispanics are much more likely to live in neighborhoods with concentrated poverty than whites. *See* John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics, and Asians in Metropolitan America* (2011), Table 2.

127. In addition to statewide percentage plans, a university can achieve student body diversity by granting a preference based on only community metrics, such as an applicant's zip code. *See* Danielle Allen, *Talent Is Everywhere: Using Zip Codes and Merit to Enhance Diversity*, *The Future of Affirmative Action* (2014).

128. Studies show that students admitted based on socioeconomic as opposed to racial criteria regularly outperform all other admitted students. These students drop out at lower rates, graduate in shorter time periods, and receive better grades.

129. Indeed, one benefit of UT-Austin's Top Ten Percent Plan is that it broadens racial and socioeconomic diversity, which can be reinforcing. In 2019, for example, Texas students admitted through the Top Ten Percent Plan were far more likely to be socioeconomically disadvantaged than those admitted outside of the Plan:

University of Texas at Austin Admissions 2019 Admitted Students from Texas		
Annual Household Income	Admitted via Top Ten Percent Plan	Admitted Outside Top Ten Percent Plan
Less than \$20,000	7%	3%
\$20,000 - \$39,999	12%	6%
\$40,000 - \$59,999	10%	5%
\$60,000 - \$79,999	7%	5%
\$80,000 - \$99,999	7%	5%

\$100,000 - \$149,999	14%	12%
\$150,000 - \$199,999	8%	9%
More than \$200,000	15%	28%

130. As the data show, the Top Ten Percent Plan admits *more than twice* as many students coming from households reporting less than \$60,000 than those admitted through “holistic review” (29% v. 14%). By contrast, *nearly twice as many* students coming from households making more than \$200,000 are admitted through “holistic review” (28% v. 15%).

131. By increasing the weight given to an applicant’s socioeconomic status or community of origin, UT-Austin can achieve broader student body diversity (including broader intra-racial diversity), without resorting to the disfavored tool of racial preferences.

2. UT-Austin Can Achieve Student Body Diversity Without Using Race as a Factor in Admissions Decisions by Making Greater Use of Financial Aid and Scholarships to Attract Minority Candidates.

132. To ensure that underprivileged minorities that benefit from socioeconomic preferences are in a position to accept an offer of admission and enroll, UT-Austin can also increase its use of financial aid and scholarships.

133. Colleges and universities that have eliminated racial preferences have maintained or increased student body diversity by offering more financial aid to socioeconomically disadvantaged students. For example, the University of California system, which does not use race-based preferences, covers tuition for students from families with incomes below \$80,000.

134. The UT-System has a \$31 *billion* endowment. This is the second largest endowment in the United States. Only Harvard’s is larger.

135. As the director of the Center for College Affordability and Productivity has explained, “UT is one of the most well endowed universities.... But if you look at the use of the funds, very little of that money is used for financial aid.” See Maria Mendez, *Balancing UT’s Budget and Rising Tuition:*

Where Does the University's Money Come From and Where Does It Go?, Daily Texan (Feb. 23, 2018), <https://bit.ly/3cvfE0r>.

136. UT-Austin has the economic resources to increase its financial aid far beyond current levels. Doing so would make it possible for underprivileged minorities, especially those in the lower middle class and those who may have slightly higher income levels but less wealth, admitted to UT-Austin through the increased use of socioeconomic preferences (as opposed to the affluent minorities currently being admitted due to racial preferences) to be in a position to accept an offer of admission and enroll at UT-Austin.

3. UT-Austin Can Achieve Student Body Diversity Without Using Race as a Factor in Admissions Decisions Through Increased Recruitment and Other Steps Designed to Encourage More Qualified Minority Students to Apply for Admission.

137. UT-Austin can achieve student body diversity by bringing more highly qualified, socioeconomically disadvantaged minorities into its applicant pool. Across the country, there are tens of thousands of socioeconomically disadvantaged, high-achieving minorities who fail to even apply to selective schools, including UT-Austin. If they applied, they would likely be admitted and would enroll if offered sufficient financial aid.

138. One study found that between 25,000 and 35,000 socioeconomically disadvantaged high school seniors obtained an SAT or ACT in the 90th percentile or higher and have a GPA of A- or better. Nearly 6 percent of this group is African American and nearly 8 percent is Hispanic. A great many of these socioeconomically disadvantaged students “undermatch” by applying to and enrolling at colleges and universities less selective than the ones to which they could have been admitted. *See* Caroline Hoxby, Christopher Avery, *The Missing “One-Offs”: The Hidden Supply of High Achieving, Low-Income Students*, Brookings Papers on Economic Activity (Spring 2013).

139. Another way to reach potential applicants both inside and outside of Texas is by mailing a well-designed, targeted brochure to high-achieving, socioeconomically disadvantaged students. *See* Sheryll Cashin, *Place, Not Race, A New Vision of Opportunity in America* 49 (2014).

140. Universities also have achieved student body diversity by aggressively recruiting high-achieving community college students, who are more likely to be African American or Hispanic. For example, in 1997, after California banned racial preferences, the University of California substantially increased its recruitment and enrollment of community college students. As a result of its efforts, by 2012, about 29 percent of new students enrolling in the University of California system were transfers from community colleges. *See* Preparing California for Its Future: Enhancing Community College Student Transfer to the University of California (2014).

141. Though UT-Austin has engaged in community college partnerships, it can do far more to recruit high-achieving socioeconomically disadvantaged minority students or high-achieving community college students. For example, in the 2009-2010 academic year, UT-Austin admissions staff attended 58 Texas Community College Fairs. But by 2018-2019, UT-Austin staff attended only 38 Texas Community College Fairs, more than a 34% drop in recruitment of such students.

142. UT-Austin could achieve student body diversity without the use of racial preferences by improving its recruitment of socioeconomically disadvantaged, high-achieving minorities and community college students.

4. UT-Austin Can Achieve Student Body Diversity Without Using Race as a Factor in Admissions Decisions Through Elimination of Admissions Policies and Practices That Harm Minorities.

143. UT-Austin employs admissions practices and policies that make it more difficult for socioeconomically disadvantaged minorities to gain admission. Eliminating these practices and policies would allow UT-Austin to achieve greater student body diversity without using racial preferences.

144. UT-Austin purports not to grant admissions preferences based on legacy status. Yet the Kroll Report exposes that UT-Austin uses the latitude created by the cover of “holistic review” to allow politically connected individuals to get family members and other friends admitted to UT-Austin. UT-Austin claims to have reduced this practice, yet it concedes that such favoritism to the well-connected still occurs.

145. At most universities throughout the country, children of alums and the well-connected are less likely to be socioeconomically disadvantaged or racial minorities than the rest of the student body. Thus, colleges and universities that grant admissions preferences to legacies and well-connected students give a competitive advantage to mainly white, wealthy applicants, while undermining the chances for admission of socioeconomically disadvantaged and minority applicants. *See* John Brittain and Eric L. Bloom, *Admitting the Truth: The Effect of Affirmative Action Legacy Preferences, and the Meritocratic Ideal on Students of Color in College Admissions*, Affirmative Action for the Rich (2010).

146. As a consequence, eliminating connection preferences—be they legacy, donor, political, or other—in conjunction with other race-neutral admissions policies can achieve greater student body diversity.

5. Achieving Student Body Diversity Through Race-Neutral Means Eliminates the Serious Harms Caused by Racial Preferences.

147. Any assessment of the feasibility of race-neutral alternatives must also take into account the heavy costs of *not* employing them. The costs of continuing to use racial preferences when workable race-neutral alternatives exist are high.

148. “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect.” *Fisher I*, 570 U.S. at 309. As a result, the Fourteenth Amendment, and therefore Title VI, “forbids the use even of narrowly drawn racial classifications except as a last resort.” *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment).

149. UT-Austin's practice of labeling all applicants with broad racial categories illustrates why such classifications are pernicious and always create the "danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics." *Croson*, 488 U.S. at 510.

150. These racial categories lump students together in categories such as "Black or African American" or "Hispanic" or "Asian," even though students in these categories come from vastly different cultures, experiences, and backgrounds.

151. For example, UT-Austin's category of "Asian" comprises roughly 60 percent of the world's population, including individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, and Indian descent.

152. While many Asian Americans have been in the United States for generations, others are recent immigrants or children of immigrants. Some Asian Americans came to the United States to escape communism, authoritarianism, war, and poverty, while others simply sought out greater opportunities. Some Asian Americans came from highly educated families, but many others did not. Asian Americans also have a wide range of religious beliefs, including Christianity, Islam, Buddhism, Judaism, Hinduism, and many others.

153. Indian-American students are different from Chinese-American students, for example; and students from Mainland China, Hong Kong, and Taiwan all have unique perspectives and cultural experiences.

154. Similar diversity exists within broad categorical labels like "Black or African American" and "Hispanic."

155. Given this diversity, it is lamentable that UT-Austin lumps broad racial groups together in the admissions process. Yet this categorization is the inevitable byproduct of using group-based racial classifications instead of employing race-neutral alternatives that are able to account for the vast differences among applicants.

156. Racial classifications also have a stigmatizing effect on the supposed beneficiaries of these policies. Irrespective of whether an individual Black or Hispanic applicant is admitted to UT-Austin because of racial preferences, so long as racial preferences exist it will often be assumed that race is the reason for the applicant's admission. This stigma can have a devastating effect on the psyche of young adults.

157. For example, according to one African-American student who attended an elite liberal arts college, upon arriving at school, "I was immediately stereotyped and put into a box because I was African-American. And that made it harder to perform.... There was a general feeling that all blacks on campus were there either because they were athletes or they came through a minority-recruitment program and might not really belong there." Shaken by the experience, the student dropped out after his freshman year.

158. UT-Austin can eliminate the harmful effects that these unfair stereotypes cause by using race-neutral alternatives.

159. Finally, the "mismatch effect" of racial preferences far too frequently puts the supposed beneficiaries of race-based admissions policies in a position where they cannot succeed academically in order to fulfill the university's social-engineering vision.

160. This "mismatch" effect happens when a school employs such a large admissions preference that the student is academically harmed in a variety of ways by being placed in an academic environment where most of the student's peers have substantially stronger levels of academic preparation.

161. The "mismatch effect" has been documented in dozens of studies. *See, e.g.,* Peter Arcidiacono, Esteban M. Aucejo, and Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice* (2012); U.S. Commission on Civil Rights, *Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers*, Briefing Report

(October 2010); Richard Sander and Roger Bolus, *Do Credential Gaps in College Reduce the Number of Minority Science Graduates?* (2009); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004); Stephen Cole and Elinor Barber, *Increasing Faculty Diversity* (2003); Roger Elliot, A. Christopher Strenta, Russell Adair, Michael Matier, and Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Educ. 681 (1996).

162. As this research demonstrates, African-American college freshman are more likely to aspire to science or engineering careers than are white freshmen, but mismatch causes African Americans to abandon these fields at twice the rate of whites.

163. As a consequence, African Americans who start college interested in pursuing a doctorate and an academic career are twice as likely to be derailed from this path if they attend a school where they are mismatched.

164. Mismatch also creates social problems on campus. The academic research shows that interracial friendships are more likely to form among students with relatively similar levels of academic preparation; thus, African Americans and Hispanics are more socially integrated on campuses where they are less academically mismatched.

165. UT-Austin has experienced and continues to experience the “mismatch effect.” For example, the four-year graduation rates of Black students and Hispanic students trail significantly behind the graduation rate of white students.

166. UT-Austin can eliminate this harmful mismatch and allow students to excel at schools for which they are most prepared by eliminating the use of racial preferences and employing race-neutral alternatives that bring high-performing socioeconomically disadvantage minorities into the applicant pool.

V. UT-Austin Is Engaging in Racial Balancing.

167. Not only does UT-Austin discriminate on the basis of race in its admissions decisions, but it racially balances its entering freshman class to ensure a specific proportional representation of African-American students.

168. UT-Austin's system of racial balancing is evident from direct statistical evidence. This evidence confirms that UT-Austin is not using racial preference to pursue a "critical mass" or any other diversity goal the Supreme Court has ever found permissible. It is using racial preferences instead to achieve a quota of African-American students.

169. As shown in the following table, the representation of African-American students among admitted and enrolled students remained remarkably stable over the past decade.

University of Texas at Austin Admissions Share of Total Students Admitted Who Are African American	
Year (Class Entering in Summer/Fall)	African American
2009	5%
2010	5%
2011	5%
2012	5%
2013	5%
2014	5%
2015	5%
2016	5%
2017	5%
2018	6%

170. As the data show, UT-Austin's admission of African-American students has been remarkably stable. Indeed, UT-Austin's admitted class was 5% African American in *nine out of the past ten years*. The only exception was 2018, when UT-Austin's admitted class was 6% African American.

171. This uniform consistency in the admission of African-American students does not happen by accident.

172. Indeed, there is evidence to suggest that UT-Austin uses its holistic admissions process to ensure that its admitted class of African Americans never strays from this historic range.

173. For example, in 2015, when the Top Ten Percent Plan caused the admission of an uncharacteristically high percentage of African-American admissions (7%), UT-Austin correspondingly admitted its lowest ever percentage of African-Americans outside of the Top Ten Percent Plan (3%). Not surprisingly, the total share of African-American admits balanced out to 5% of the total admissions.

174. The minor and often non-existent year-to-year deviations in admission numbers demonstrate UT-Austin's commitment to maintaining racial stability among African Americans, which is a distinct impermissible purpose from pursuing diversity.

VI. Governing Law

A. Federal Law

175. The Fourteenth Amendment provides, in relevant part, that no person shall be denied "the equal protection of the laws."

176. Section 1981 of Title 42 of the U.S. Code provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

177. Section 1983 of Title 42 of the U.S. Code provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

178. Title VI of the Civil Rights Act of 1964 provides: “No person in the United States shall, on the ground 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.” 42 U.S.C. §2000d.

179. Under Title VI, “the term ‘program or activity’ and the term ‘program’ mean all of the operations ... of a college, university, or other postsecondary institution, or a public system of higher education ... any part of which is extended Federal financial assistance.” 42 U.S.C. §2000d-4a.

180. An institution that accepts federal funds violates Title VI when it engages in racial or ethnic discrimination that violates the Equal Protection Clause. *See Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.” (citing *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001))).

181. The “central mandate” of equal protection is “racial neutrality” by the government or institution subject to the Fourteenth Amendment. *Miller v. Johnson*, 515 U.S. 900, 904 (1995). “[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-30 (1995).

182. “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect.” *Fisher I*, 570 U.S. at 309 (cleaned up). Thus, “any official action that treats a person differently on account of race or ethnic origin is inherently suspect.” *Id.* at 310. In other words, “because racial classifications so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications be subjected to the most rigid scrutiny.” *Id.* at 309-10 (cleaned up).

183. “[A]ll racial classifications ... must be analyzed by a reviewing court under strict scrutiny.” *Adarand*, 515 U.S. at 227. “Strict scrutiny is a searching examination, and it is the government that bears the burden to prove that the reasons for any racial classification are clearly identified and unquestionably legitimate.” *Fisher I*, 570 U.S. at 310 (cleaned up). Strict scrutiny thus requires a “detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.” *Adarand*, 515 U.S. at 227.

184. In particular, strict scrutiny requires a “detailed examination, both as to ends and to means.” *Id.* at 236. When governmental institutions implement policies and practices that “touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.” *Fisher I*, 570 U.S. at 307-08. Racial “classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.” *Grutter*, 539 U.S. at 326.

185. “Strict scrutiny requires the university to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose.” *Fisher I*, 570 U.S. at 309 (cleaned up).

186. To meet strict scrutiny, the end must be “compelling”—not merely legitimate or important. To be narrowly tailored, “the means chosen” must “fit” the unmet compelling interest “so closely that there is little or no possibility that the motive for the classification was illegitimate racial

prejudice or stereotype.” *Croson*, 488 U.S. at 493. In other words, “racial classification, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.” *Grutter*, 539 U.S. at 342.

187. “To survive strict scrutiny,” moreover, the institution “must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest.” *Burson v. Freeman*, 504 U.S. 191, 199 (1992). The government must establish the necessity of using race by a “strong basis in evidence” because “the mere recitation” of a compelling interest is “not an automatic shield which protects against any inquiry” into the justification for race-based action. *Croson*, 488 U.S. at 495, 500. Strict scrutiny “forbids the use even of narrowly drawn racial classifications except as a last resort.” *Id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment).

188. Racial quotas violate the Fourteenth Amendment. In the educational setting, then, “universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission.” *Grutter*, 539 U.S. at 334 (citation omitted).

189. Moreover, a university’s policy violates the Fourteenth Amendment if it amounts to “racial balancing, which is patently unconstitutional.” *Id.* at 330. Racial balancing is a program designed “to assure within [the school’s] student body some specified percentage of a particular group merely because of its race or ethnic origin.” *Id.* at 329. “[P]roportional representation” is never a constitutional “rationale for programs of preferential treatment.” *Id.* at 343.

190. The only interest in using racial preferences in higher education that the Supreme Court has accepted as “compelling” is the interest “in obtaining the educational benefits that flow from a diverse student body.” *Id.* Redressing past discrimination does “not serve as a compelling interest, because a university’s broad mission of education is incompatible with making the judicial,

legislative, or administrative findings of constitutional or statutory violations necessary to justify remedial racial classification.” *Fisher I*, 570 U.S. at 308 (cleaned up).

191. The interest in student body diversity the Supreme Court has found compelling “is not an interest in simply ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students.” *Id.* “[C]ritical mass is defined by reference to the educational benefits that diversity is designed to produce.” *Grutter*, 539 U.S. at 330.

192. Even in the pursuit of critical mass, the Supreme Court has permitted race to be used only as a “plus” factor in admissions decisions. *Id.* at 334. “[I]t remains at all times the University’s obligation to demonstrate, and the Judiciary’s obligation to determine, that admissions processes ‘ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.’” *Fisher I*, 570 U.S. at 311-12 (quoting *Grutter*, 539 U.S. at 337). Thus, even if “the University has established that its goal of diversity is consistent with strict scrutiny, ... there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal.” *Id.* at 311.

193. “Narrow tailoring also requires that the reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.” *Id.* at 312. Accordingly, strict scrutiny “require[s] a court to examine with care, and not to defer to, a university’s ‘serious, good faith consideration of workable race-neutral alternatives.’” *Id.* (quoting *Grutter*, 539 U.S. at 339-40).

194. “Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral

alternative would produce the educational benefits of diversity. If a nonracial approach ... could promote the substantial interest about as well and at tolerable administrative expense, then the university may not consider race.” *Id.* (cleaned up).

195. As a consequence, “strict scrutiny imposes on the university the ultimate burden of demonstrating, *before turning to racial classifications*, that available, workable race-neutral alternatives do not suffice.” *Id.* (emphasis added).

196. Moreover, that burden is “ongoing.” *Fisher II*, 136 S. Ct. at 2215.

B. State Law

197. Section 3 of the Texas Bill of Rights states, “All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.” Texas Const. art. 1, §3.

198. This provision has been referred to as “the equal protection guarantee of the Texas Constitution.” *Comm’n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998). Like its federal counterpart, the Texas Constitution’s equal-protection guarantee “requires a multi-tiered analysis.” *Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 264 (Tex. 1994). Under this approach, when the State classifies individuals “on a ‘suspect’ basis such as race or national origin,” it “is subjected to strict scrutiny, requiring that the classification be narrowly tailored to serve a compelling government interest.” *Richards v. League of United Latin Am. Citizens (LULAC)*, 868 S.W.2d 306, 311 (Tex. 1993).

199. To be “compelling,” the government’s interest must be “both constitutionally permissible and substantial.” *Hernandez v. Houston Indep. Sch. Dist.*, 558 S.W.2d 121, 123 (Tex. Civ. App. 1977). It cannot rely on generalizations or stereotypes, it must have a logical stopping point, and it cannot be amorphous.

200. To be “narrowly tailored,” the government’s use of race must be “necessary to the accomplishment of its” compelling interest. *Hernandez*, 558 S.W.2d at 123. The use of race, in other words, is not narrowly tailored unless “there is no other manner to protect the state’s compelling interest.” *In Interest of McLean*, 725 S.W.2d 696, 698 (Tex. 1987). Accordingly, if “the state’s interest can be protected without discriminating solely on the basis” of race, racial preferences are not narrowly tailored. *Id.* Narrow tailoring also requires that the means chosen to accomplish the government’s asserted purpose be specifically and narrowly framed to accomplish that purpose. For that reason, the use of race is not narrowly tailored if it has only a minimal effect in advancing the State’s interest.

201. The Supreme Court of Texas has never held that “student body diversity” is a compelling enough interest to warrant racial classifications by a Texas university.

202. The Supreme Court of the United States has concluded that “student body diversity” is a compelling government interest. *See Grutter*, 509 U.S. at 343. But although federal equal-protection decisions can be “instructive” when interpreting Texas’s equal-protection guarantee, *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 n.8 (Tex. 2015), they are not controlling, *see Davenport v. Garcia*, 834 S.W.2d 4, 13-16 (Tex. 1992). Texas courts, in other words, are “not bound by ... federal decisions which construe the United States Constitution.” *Trapnell v. Sysco Food Servs., Inc.*, 850 S.W.2d 529, 545 (Tex. App. 1992). Texas has its “own, independent constitution with rights which are different and sometimes greater than those found in the federal constitution.” *Id.*; *accord City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982) (“[A] state court is entirely free ... to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.”); Bryan A. Garner et al., *The Law of Judicial Precedent* 662 (2016) (“As independent court systems, the state courts remain free to ignore federal precedents in construing their own constitutions.”).

203. In 1972, Texas amended the Constitution to provide that “[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.” Tex. Const. art. I, §3a. At the time of its passage, this Equal Rights Amendment was publicly understood to be “consistent with the 14th Amendment to the United States Constitution and The Civil Rights Act, but ... designed expressly to provide protection which supplements the federal guarantees of equal treatment.” Tex. Leg. Council, 14 *Proposed Constitutional Amendments Analyzed for Election—November 7, 1972*, at 24 (1972).

204. Accordingly, there is no justification for giving “the Texas Equal Rights Amendment an interpretation identical to that given state and federal due process and equal protection guarantees.” *McLean*, 725 S.W.2d at 697-98. “Both the United States Constitution and the Texas Constitution,” after all, “had due process and equal protection guarantees before the Texas Equal Rights Amendment was adopted in 1972. If the due process and equal protection provisions and the Equal Rights Amendment are given identical interpretations, then the 1972 amendment, adopted by a four to one margin by Texas voters, was an exercise in futility.” *Id.* In short, “the Equal Rights Amendment is more extensive and provides more specific protection than both the United States and Texas ... equal protection guarantees.” *Id.*

205. Texas Civil Practice & Remedies Code Section 106.001 provides, in relevant part, that “[a]n officer or employee of the state ... who is acting or purporting to act in an official capacity may not, because of a person’s race, religion, color, sex, or national origin” “refuse to permit the person to participate in a program owned, operated, or managed by or on behalf of the state”; “refuse to grant a benefit to the person”; or “impose an unreasonable burden on the person.” Tex. Civ. Prac. & Rem. Code Ann. §106.001.

206. Section 106.001 creates a broad statutory “right to be free of official discrimination,” *Mauldin v. Tex. State Bd. of Plumbing Examiners*, 94 S.W.3d 867, 871 (Tex. App. 2002), and, as a result,

“generally prohibits the state or its agents from discriminating against persons because of race, religion, color, sex, or national origin,” *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 244 n.2 (Tex. 1994). Section 106.001 “relates to, but stands independent of, the Equal Rights Amendment to the Texas Constitution.” *Bd. of Trustees of Bastrop Indep. Sch. Dist. v. Toungate*, 958 S.W.2d 365, 368 (Tex. 1997).

207. Furthermore, the statute’s prohibition on imposing an “unreasonable burden” reaches even “unintentional racially discriminatory impact[s].” *Richards v. Mena*, 907 S.W.2d 566, 569 (Tex. App. 1995). In other words, state action that has a disparate impact on an individual because of her race violates Section 106.001.

208. A violation of Section 106.001 “is a misdemeanor punishable by: (1) a fine of not more than \$1,000; (2) confinement in the county jail for not more than one year; or (3) both.” Tex. Civ. Prac. & Rem. Code Ann. §106.003.

VII. Claims for Relief

209. UT-Austin’s use of racial preferences in admissions violates the Fourteenth Amendment, federal civil rights laws, and Texas law for multiple reasons.

First, UT-Austin’s use of racial preferences is not narrowly tailored because UT-Austin is not pursuing the critical-mass interest found permissible in *Grutter* by failing to use race merely as a “plus” factor and by failing to continually justify the need for using race at all.

Second, UT-Austin is not fully utilizing a number of race-neutral alternatives that can achieve student body diversity.

Third, UT-Austin is racially balancing African-American students.

Fourth, whether or not UT-Austin is acting permissibly under Supreme Court precedent, the Supreme Court should overrule any decision holding that the Fourteenth Amendment or federal civil rights law ever permit the use of racial preferences to achieve “diversity.”

Fifth, any use of race in admissions violates the Equal Rights Amendment of the Texas Constitution.

Sixth, UT-Austin's use of race in admissions cannot survive strict scrutiny under the equal-protection guarantee of the Texas Constitution because student body diversity is not a compelling state interest.

Seventh, even if student body diversity is a compelling state interest, UT-Austin's use of race violates the equal-protection guarantee of the Texas Constitution because its system is not narrowly tailored to achieve that interest.

Eighth, and last, any use of race in admissions violates Section 106.001 of the Texas Code.

COUNT I

Violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and 2000d *et seq.* (Failure to Use Race Merely as a “Plus” Factor in Admissions Decisions and Failure to Continually Reevaluate the Basis for Relying on Race)

210. Plaintiff reincorporates and realleges all prior allegations.

211. UT-Austin has intentionally discriminated against certain of Plaintiff's members on the basis of their race, color, or ethnicity in violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and §2000d *et seq.*, by employing an undergraduate admissions policy that does not merely use race as a “plus” factor in admissions decisions to achieve student body diversity.

212. Statistical and other evidence shows that UT-Austin can no longer justify using race at all, or at least must justify it differently, which it has failed to do.

213. Statistical and other evidence shows that each applicant is not evaluated as an individual. Instead, race or ethnicity is the defining feature of the application. Only using race or ethnicity as a dominate factor in admissions decisions could account for the decision to admit certain African-American and Hispanic applicants and deny admission to certain white and Asian-American applicants.

214. Plaintiff's members have been and will continue to be injured because UT-Austin's intentionally discriminatory admissions policies and procedures continue to deny them the opportunity to compete for admission to UT-Austin on equal footing with other applicants on the basis of race or ethnicity.

215. Defendants acted under color of law in developing and implementing race-based policies that led UT-Austin to deny Plaintiff's members equal protection of the laws and to discriminate against them in violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and §2000d *et seq.*

216. Plaintiff is entitled to a declaratory judgment and a permanent injunction because there is no plain, adequate, or speedy remedy at law to prevent UT-Austin from continuing to use admissions policies and procedures that discriminate on the basis of race or ethnicity in violation of the Fourteenth Amendment and because the harm Plaintiff's members will otherwise continue to suffer is irreparable.

217. Plaintiff is entitled to attorneys' fees and costs pursuant to 42 U.S.C. §1988.

COUNT II
Violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and 2000d *et seq.*
(Race-Neutral Alternatives)

218. Plaintiff reincorporates and realleges all prior allegations.

219. UT-Austin has intentionally discriminated against certain of Plaintiff's members on the basis of their race, color, or ethnicity in violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and §2000d *et seq.*, by employing racial preferences in undergraduate admissions when there are available race-neutral alternatives capable of achieving student body diversity, as its own practices already demonstrate.

220. UT-Austin's use of racial preferences is narrowly tailored only if using them is necessary to achieve student body diversity. If UT-Austin can achieve student body diversity without

resorting to racial preferences, it is required to do so as a matter of law. Moreover, UT-Austin must have a strong basis in evidence that a non-racial approach will not work about as well as a race-based approach before turning to the use of racial preferences. And it must continually reevaluate that evidence as it changes.

221. There is no evidence that UT-Austin studied all of the available race-neutral alternatives and had a strong basis in evidence that none would work about as well *before* turning to racial preferences.

222. Whether UT-Austin considered them or not, there are a host of race-neutral alternatives that if implemented can achieve student body diversity without resorting to racial preferences. Among these alternatives, both individually and collectively, are (a) increased use of non-racial preferences, including increased use of the percentage plan UT-Austin already has in place, (b) increased financial aid, scholarships, and recruitment efforts, and (c) elimination of admissions policies and practices that negatively affect minority applicants.

223. The use of race-neutral alternatives instead of racial preferences would not only achieve student body diversity, it would eliminate the heavy costs that using race as a factor in admissions decisions imposes on minority applicants who receive such admissions preferences, on the Texas community, and on society as a whole.

224. Plaintiff's members have been and will continue to be injured because UT-Austin has and will continue to deny them the opportunity to compete for admission to UT-Austin on equal footing with other applicants on the basis of race or ethnicity due to its intentionally discriminatory admissions policies and procedures.

225. Defendants acted under color of law in developing and implementing race-based policies that led UT-Austin to deny Plaintiff's members equal protection of the laws and to

discriminate against them in violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and §2000d *et seq.*

226. Plaintiff is entitled to a declaratory judgment, pursuant to 28 U.S.C. §2201, and a permanent injunction because there is no plain, adequate, or speedy remedy at law to prevent UT-Austin from continuing to use admissions policies and procedures that discriminate on the basis of race or ethnicity in violation of the Fourteenth Amendment and federal civil rights laws and because the harm Plaintiff's members will otherwise continue to suffer is irreparable.

227. Plaintiff is entitled to attorneys' fees and costs pursuant to 42 U.S.C. §1988.

COUNT III

Violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and 2000d *et seq.* (Racial Balancing)

228. Plaintiff reincorporates and realleges all prior allegations.

229. UT-Austin has intentionally discriminated against certain of Plaintiff's members on the basis of their race, color, or ethnicity in violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and §2000d *et seq.*, by employing an undergraduate admissions policy that balances the percentage of African-American students in each entering class.

230. A university that uses its admissions system to pursue quotas or proportional representation of racial or ethnic groups either in the entering class or in the overall student body violates the Fourteenth Amendment and therefore violates Title VI.

231. The remarkable stability of UT-Austin's admissions figures for African-American students demonstrates that UT-Austin is seeking proportional representation of African Americans and therefore is engaged in racial balancing.

232. There is no non-discriminatory reason that could justify admissions figures this stable year after year given the unique characteristics of each applicant for admission. If UT-Austin were truly treating each applicant for admission as an individual, as it professes to do, "[o]ne would expect

the percentage of [African-American] enrollees produced by such a system to vacillate widely from year to year, reflecting changes in each year's applicant pool." Alan Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 382 n.13 (1979). That is not happening.

233. The pursuit of "critical mass" could never justify admissions figures this stable.

234. Plaintiff's members have been and will continue to be injured because UT-Austin has and will continue to deny them the opportunity to compete for admissions to UT-Austin on equal footing with other applicants on the basis of race or ethnicity due to its intentionally discriminatory admissions policies and procedures.

235. Defendants acted under color of law in developing and implementing race-based policies that led UT-Austin to deny Plaintiff's members equal protection of the laws and to discriminate against them in violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and §2000d *et seq.*

236. Plaintiff is entitled to a declaratory judgment, pursuant to 28 U.S.C. §2201, and a permanent injunction because there is no plain, adequate, or speedy remedy at law to prevent UT-Austin from continuing to use admissions policies and procedures that discriminate on the basis of race or ethnicity in violation of the Fourteenth Amendment and federal civil rights laws and because the harm Plaintiff's members will otherwise continue to suffer is irreparable.

237. Plaintiff is entitled to attorneys' fees and costs pursuant to 42 U.S.C. §1988.

COUNT IV

Violation of the Fourteenth Amendment and 42 U.S.C §§1981, 1983, and 2000d *et seq.* (Any Use of Race as a Factor in Admissions)

238. Plaintiff incorporates the allegations and averments contained in the prior paragraphs as if fully set forth herein.

239. UT-Austin has intentionally discriminated against certain of Plaintiff's members on the basis of their race, color, or ethnicity in violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and §2000d *et seq.*, by employing an undergraduate admissions policy that uses race as a factor in admissions.

240. The Supreme Court's decisions holding that there is a compelling government interest in using race as a factor in admissions decisions in pursuit of "diversity" should be overruled. Those decisions were wrongly decided at the time they were issued, and they remain wrong today. "Diversity" is not an interest that could ever justify the use of racial preferences under the Fourteenth Amendment and federal civil rights laws.

241. Even if there were a compelling government interest in "diversity" in the abstract, however, the use of racial preferences in the educational setting nevertheless should be forbidden for several important reasons.

242. The Supreme Court's jurisprudence in this area has been built on mistakes of fact and law. The Supreme Court first accepted the use of racial preferences in admissions on the assumption that they would be used consistent with the "Harvard Plan," which purported to use race merely as a contextual factor in filling the final few places in the entering class. But the Harvard Plan itself was created in order to hide racial and ethnic discrimination. Thus, it is far from certain that Harvard itself *ever* used race in this fashion. "The *raison d'être* for race-specific affirmative action programs has simply never been diversity for the sake of education." Alan Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 407 (1979). It is instead "a clever post facto justification for increasing the number of minority group students in the student body." *Id.*

243. In any event, neither Harvard nor UT-Austin nor any other college or university uses race in this manner now. Indeed, UT-Austin denies that it uses race as a "tie breaker" to fill the

remaining few seats in the entering class. Instead, college and universities, including UT-Austin, claim to use race in order to pursue a “critical mass” of underrepresented minorities in the student body. But UT-Austin is not pursuing this interest. Even when this interest is actually being pursued, moreover, it is nothing more than racial balancing because it necessarily seeks to ensure a proportional number of students of certain races or ethnicities in the entering class. Critical mass is a formula for ensuring “a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students.” *Bakke*, 438 U.S. at 315 (Powell, J.).

244. Ultimately, there is overwhelming evidence that colleges and universities will take advantage of any leeway given by the Supreme Court to use the dangerous tool of racial preferences in inappropriate ways. Colleges and universities, if given the chance, will use racial preferences “for the ostensible purpose of enhancing education diversity of the student body” with the true “goal of simply increasing the number of minority persons in the universities and in the professions that these universities feed.” Alan Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 385 (1979).

245. There simply is no practical way to ensure that colleges and universities will use race in their admissions processes in any way that would meet the narrow tailoring requirement. The strong medicine of strict scrutiny has proven insufficient to ensure that the Fourteenth Amendment and federal civil rights laws operate in conformity with racial neutrality except in those rare circumstances that justify the use of this disfavored remedy. Time after time, courts have been either unwilling or unable to force these colleges and university to provide a strong evidentiary basis for their conclusion that use of racial preferences is necessary to achieve diversity. Nor have they been willing to engage in the close review of admissions programs to ensure that schools are treating each applicant as an individual.

246. There also have been important factual developments since this question was last considered by the Supreme Court. There is now much evidence that race-neutral alternatives can achieve the benefits of diversity. This is crucially important in light of the equally compelling evidence that racial preferences impose significant costs on the university community, society in general, and the very minority students these programs are purported to benefit.

247. In the end, the costs of allowing racial preferences in admissions decisions—even in a limited way—far exceed any rapidly diminishing benefits. No principle of *stare decisis* counsels in favor of retaining decisions allowing their use. Those decisions were not well reasoned, were predicated on mistakes of fact, have been undermined by more recent developments, and have proven to be unworkable. Any decision allowing the use of racial preferences in the educational setting should be overruled.

248. Plaintiff's members have been and will continue to be injured because UT-Austin has and will continue to deny them the opportunity to compete for admission to UT-Austin on equal footing with other applicants on the basis of race or ethnicity due to its intentionally discriminatory admissions policies and procedures.

249. Defendants acted under color of law in developing and implementing race-based policies that led UT-Austin to deny Plaintiff's members equal protection of the laws and to discriminate against them in violation of the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and §2000d *et seq.*

250. Plaintiff is entitled to a declaratory judgment, pursuant to 28 U.S.C. §2201, and a permanent injunction because there is no plain, adequate, or speedy remedy at law to prevent UT-Austin from continuing to use admissions policies and procedures that discriminate on the basis of race or ethnicity in violation of the Fourteenth Amendment and because the harm Plaintiff's members will otherwise continue to suffer is irreparable.

251. Plaintiff is entitled to attorneys' fees and costs pursuant to 42 U.S.C. §1988.

COUNT V

Violation of the Equal Rights Amendment of the Texas Constitution

252. Plaintiff reincorporates and realleges all prior allegations.

253. The individual Defendants can be sued for violations of the Texas Constitution. *See Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69, 77 (2015).

254. The Equal Rights Amendment creates protections against racial discrimination that go above and beyond the Texas Constitution's equal-protection guarantee. Otherwise, the Equal Rights Amendment would be superfluous.

255. The Texas Constitution's equal-protection guarantee, like its federal counterpart, already imposes traditional "strict scrutiny" on racial classifications. In order to give it effect, therefore, the Equal Rights Amendment must prohibit the use of race, including in University admissions, altogether.

256. In the alternative, the Equal Rights Amendment can be given independent meaning by interpreting it to prohibit the use of race unless there is a "pressing public necessity"—review that is more rigorous than traditional strict scrutiny. *Grutter*, 539 U.S. at 351 (Thomas, J., concurring in part and dissenting in part).

257. In either case, UT-Austin's use of racial preferences in admissions violates the Equal Rights Amendment. At most, "national security" and "a government's effort to remedy past discrimination for which it is responsible" qualify as a "compelling state interest" under the pressing-public-necessity standard. *Id.* at 351-52. Student body diversity does not come close to meeting that rigorous standard. *See id.* at 354-64. "No one would argue that a university could set up a lower general-admissions standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admissions standard and grant exemptions to favored races." *Id.* at 350.

258. UT-Austin treats some applicants for admission, including at least one of Plaintiff's members, less favorably because of their race.

259. Plaintiff is entitled to declaratory and injunctive relief, as well as attorneys' fees and costs.

COUNT VI
Violation of the Equal-Protection Guarantee of the Texas Constitution
(Compelling State Interest)

260. Plaintiff reincorporates and realleges all prior allegations.

261. The individual Defendants can be sued for violations of the Texas Constitution. *See Patel*, 469 S.W.3d at 77.

262. UT-Austin has claimed that it needs to use race in its admissions process to obtain a “critical mass” of underrepresented minorities and to achieve “the educational benefits of diversity.” But student body diversity is not a compelling state interest under the equal-protection guarantee of the Texas Constitution.

263. First, critical mass is so broad, vague, and imprecise, that it cannot possibly justify UT-Austin's use of race in admissions. The amorphous “critical mass” rationale makes it impossible for courts to “meaningfully evaluate whether a university's use of race fits its asserted interest narrowly. In short, it is impossible to subject such uses of race to strict scrutiny. *Grutter* rewards admissions programs that remain opaque.” *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 253 (2011) (Garza, J., specially concurring). Indeed, “by using metaphors, like ‘critical mass,’ and indefinite terms that lack conceptual or analytical precision, but rather sound in abject subjectivity, to dress up constitutional standards, *Grutter* fails to provide any predictive value to courts and university administrators tasked with applying these standards consistently.” *Id.* at 258. Not surprisingly, then, no university—including UT-Austin—has so far been able to define “in anything other than the vaguest terms what it means by ‘critical mass.’” *Fisher II*, 136 S. Ct. at 2222 (Alito, J., dissenting). “A court cannot ensure that an

admissions process is narrowly tailored if it cannot pin down the goals that the process is designed to achieve.” *Id.* at 2223.

264. Second, while “the worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities,” *Fisher I*, 570 U.S. at 328 (Thomas, J., concurring), racial preferences harm their intended beneficiaries. “[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.” *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in judgment). Racial preferences in admissions “stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.” *Id.*

265. Third, student body diversity is not a compelling government interest given the “few crude, overly simplistic facial and ethnic categories” that UT-Austin uses to label applicants. *Fisher II*, 136 S. Ct. at 2229 (Alito, J., dissenting). There is no compelling interest in misleadingly labeling applicants White, Asian, Hispanic, or African American. “[B]oth the favored and disfavored groups are broad and consist of students from enormously diverse backgrounds.” *Id.* Indeed, “Texas today is increasingly diverse in ways that transcend the crude White/Black/Hispanic calculus that is the measure of [UT-Austin’s] race conscious admissions program. The state’s Hispanic population is predominately Mexican American, including not only families whose Texas roots stretch back for generations but also recent immigrants. Many other Texas Hispanics are from Central America, Latin America, and Cuba. To call these groups a ‘community’ is a misnomer; all will acknowledge that social and cultural differences among them are significant.” *Fisher v. Univ. of Texas at Austin*, 644 F.3d 301, 303-04 (5th Cir. 2011) (Jones, J., dissenting from denial of rehearing en banc). The same is true of

Asian Americans. To collectively label “people from East Asia, South Asia and the Middle East” all as simply Asian American, and then declare them all to be overrepresented at UT-Austin, is offensive. *Id.* at 304.

266. Fourth, after decades of using racial preferences in order to achieve “cross-racial understanding,” *Grutter*, 539 U.S. at 330, it is beyond dispute that racial preferences are incapable of achieving that goal. Racial preferences have had “[t]he unhappy consequence” of “perpetuat[ing] the hostilities” that pursuit of student body diversity promised to end. *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). Indeed, racial preferences are having the opposite effect. Cross-racial understanding on campus is getting worse—not better.

267. Fifth, and last, the Kroll Report shows the kind of systematic abuse that is possible when universities are permitted to use racial preferences. “When affirmative action programs were first adopted, it was for the purpose of helping the disadvantaged. Now we are told that a program that tends to admit poor and disadvantaged minority students is inadequate because it does not work to the advantage of those who are more fortunate. This is affirmative action gone wild.” *Fisher II*, 136 S. Ct. at 2232 (Alito, J., dissenting); Kroll Report at 38 (“[A]dmitting less-qualified applicants simply because they are connected to persons of influence” is “affirmative action for the advantaged.”).

268. Plaintiff is entitled to declaratory and injunctive relief, as well as attorneys’ fees and costs.

COUNT VII
Violation of the Equal-Protection Guarantee of the Texas Constitution
(Narrow Tailoring)

269. Plaintiff reincorporates and realleges all prior allegations.

270. The individual Defendants can be sued for violations of the Texas Constitution. *See Patel*, 469 S.W.3d at 77.

271. Even if student body diversity is a compelling state interest, UT-Austin's use of racial preferences is not narrowly tailored to achieve it. Foremost, UT-Austin has already achieved (and can continue to achieve) student body diversity.

272. UT-Austin's freshman class would be more than fifty percent non-White without the use of racial preferences. By any measure, that is enough diversity to ensure "that underrepresented minority students do not feel isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. "It is one thing ... to accept 'diversity' and achieving a 'critical mass' of preferred minority students as acceptable University goals. It is quite another to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." *Fisher*, 644 F.3d at 307 (5th Cir. 2011) (Jones, J., dissenting from denial of rehearing en banc). Thus, "the state's interest can be protected without discriminating solely on the basis" of race. *McLean*, 725 S.W.2d at 698.

273. Relatedly, though it harms the individuals affected, UT-Austin's use of racial preferences is not narrowly tailored because it is having a minimal impact on overall student body diversity. "The additional diversity contribution of [UT-Austin's] race-conscious admissions program is tiny, and far from indispensable." *Fisher*, 644 F.3d at 307 (Jones, J., dissenting from denial of rehearing en banc). That is, even if UT-Austin has not yet achieved student body diversity, UT-Austin's use of race in admissions is not materially advancing that purported interest given the miniscule number of underrepresented minorities being admitted and enrolled because of racial preferences.

274. Any argument that UT-Austin has not reached critical mass because its freshman class does not mirror the State's racial demographics fails strict scrutiny. Student body diversity is about ensuring "that underrepresented minority students do not feel isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. But achieving demographic parity is about racial balancing. There is no

compelling interest in balancing UT-Austin's freshman class based on a "simple racial census." *Fisher II*, 136 S. Ct. at 2225 (Alito, J., dissenting).

275. Any argument that UT-Austin has not reached critical mass because it has not yet achieved classroom diversity fails strict scrutiny. Student body diversity is about enrolling a critical mass of underrepresented minorities in the class. There is no compelling interest in ensuring that each classroom at UT-Austin has a critical mass of underrepresented minorities. The "unachievable and unrealistic goal of racial diversity at the classroom level" is "without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs." *Fisher*, 644 F.3d at 303, 308 (Jones, J., dissenting from denial of rehearing en banc). Regardless, UT-Austin's use of race in admissions is not narrowly tailored to achieving that purported interest given, among other reasons, the ad hoc admission and enrollment of underrepresented minorities based on racial preferences.

276. Any argument that UT-Austin has not reached critical mass because it has not yet achieved intra-racial diversity fails strict scrutiny. This defense of UT-Austin's system "relies on the unsupported assumption that there is something deficient or at least radically different about the African-American and Hispanic students admitted through the Top Ten Percent Plan." *Fisher II*, 136 S. Ct. at 2230 (Alito, J., dissenting). There is no basis for using racial preferences on the ground that the Top Ten Percent Law admits "the wrong kind of African-American and Hispanic students." *Id.* at 2231. The only difference between minorities admitted under the Top Ten Percent Law and those admitted outside of it is that the latter "disproportionally come from families that are wealthier and better educated than the average Texas family." *Id.* at 2233. There is no compelling interest in using racial preferences to ensure that a handful of underrepresented minority applicants from wealthy, well-connected families are admitted to UT-Austin.

277. Plaintiff is entitled to declaratory and injunctive relief, as well as attorneys' fees and costs.

COUNT VIII

Violation of Texas Civil Practice & Remedies Code §106.001

278. Plaintiff reincorporates and realleges all prior allegations.

279. Texas Civil Practice & Remedies Code §106.001 prohibits discrimination based on race.

280. The State is a proper Defendant because Section 106.001 waives sovereign immunity. *See Camarena v. Texas Employment Comm’n*, 754 S.W.2d 149, 152 (Tex. 1988).

281. Defendants are “acting or purporting to act in an official capacity” within the meaning of Section 106.001.

282. Section 106.001 fully applies to the use of racial preferences in education, including university admissions. If it did not, the statute’s exemption for “a public school official who is acting under a plan reasonably designed to end discriminatory school practices” would be unnecessary. Tex. Civ. Prac. & Rem. Code Ann. §106.001(b).

283. The use of racial preferences in admissions to promote “diversity” is not “a plan reasonably designed to end discriminatory school practices.” *Beaumont Indep. Sch. Dist. v. Wortham*, No. 09-05-443 CV, 2006 WL 2623077, at *5 (Tex. App. Sept. 14, 2006). The University is not using race as part of a desegregation plan.

284. Any discrimination on the basis of race, including in university admissions, violates Section 106.001. Discrimination against an individual “*because of* their race” occurs when the decision-maker “treats some people less favorably” on that basis. *Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 426 (Tex. 2011).

285. UT-Austin treats some applicants for admission, including at least one of Plaintiff’s members, less favorably because of their race.

286. Section 106.001 does not generally exempt from this statutory prohibition the use of racial preferences in admissions to promote “diversity.” Otherwise, the statute’s proviso that it “does not prohibit the adoption of a program designed to increase the participation of businesses owned and controlled by women, minorities, or disadvantaged persons in public contract awards” would be unnecessary. Tex. Civ. Prac. & Rem. Code Ann. §106.001(c).

287. By using race as a factor in admissions to the detriment of some applicants, including at least one of Plaintiff’s members, Defendants are “refus[ing] to permit” non-preferred applicants from “participat[ing] in a program owned, operated, or managed by or on behalf of the state” because of their race.

288. By using race as a factor in admissions to the detriment of some applicants, including at least one of Plaintiff’s members, Defendants also (or in the alternative) are “refus[ing] to grant a benefit to” non-preferred applicants.

289. By using race as a factor in admissions to the detriment of some applicants, including at least one of Plaintiff’s members, Defendants also (or in the alternative) are “impos[ing] an unreasonable burden” on non-preferred applicants.

290. Even if Section 106.001 allows UT-Austin to consider race in the admissions process, UT-Austin’s use of racial preference is not narrowly tailored to achieve any permissible goal.

291. Plaintiff is entitled to declaratory and injunctive relief, as well as attorneys’ fees and costs.

WHEREFORE, SFFA prays for the following relief as to all counts:

- a. A declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201, that Defendants’ admissions policies and procedures violate the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, federal civil rights statutes 42 U.S.C. §§1981 and 1983, the Equal Protection Guarantee of

the Texas Constitution, the 1972 Equal Rights Amendment to the Texas Constitution, and Texas Civil Practice and Remedies Code §106.001;

- b. A declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201, that any use of race or ethnicity in admissions in the educational setting violates the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, federal civil rights statutes 42 U.S.C. §§1981 and 1983, the Equal Protection Guarantee of the Texas Constitution, the 1972 Equal Rights Amendment to the Texas Constitution, and Texas Civil Practice and Remedies Code §106.001;
- c. A permanent injunction barring Defendants from using race as a factor in future undergraduate admissions decisions at UT-Austin;
- d. A permanent injunction requiring Defendants to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission;
- e. Attorneys' fees and costs pursuant to 42 U.S.C. §1988, Texas Civil Practice & Remedies Code §106.002, and any other applicable legal authority; and
- f. All other relief this Court finds appropriate and just.

Respectfully submitted,

/s/ Cameron T. Norris

William S. Consovoy (*pro hac vice* forthcoming)

Cameron T. Norris

Steven C. Begakis (*pro hac vice* forthcoming)

CONSOVOY MCCARTHY PLLC

1600 Wilson Blvd., Suite 700

Arlington, VA 22209

(703) 243-9423

will@consovoymccarthy.com

cam@consovoymccarthy.com

steven@consovoymccarthy.com

Dated: July 20, 2020

Counsel for Plaintiff Students for Fair Admissions, Inc.