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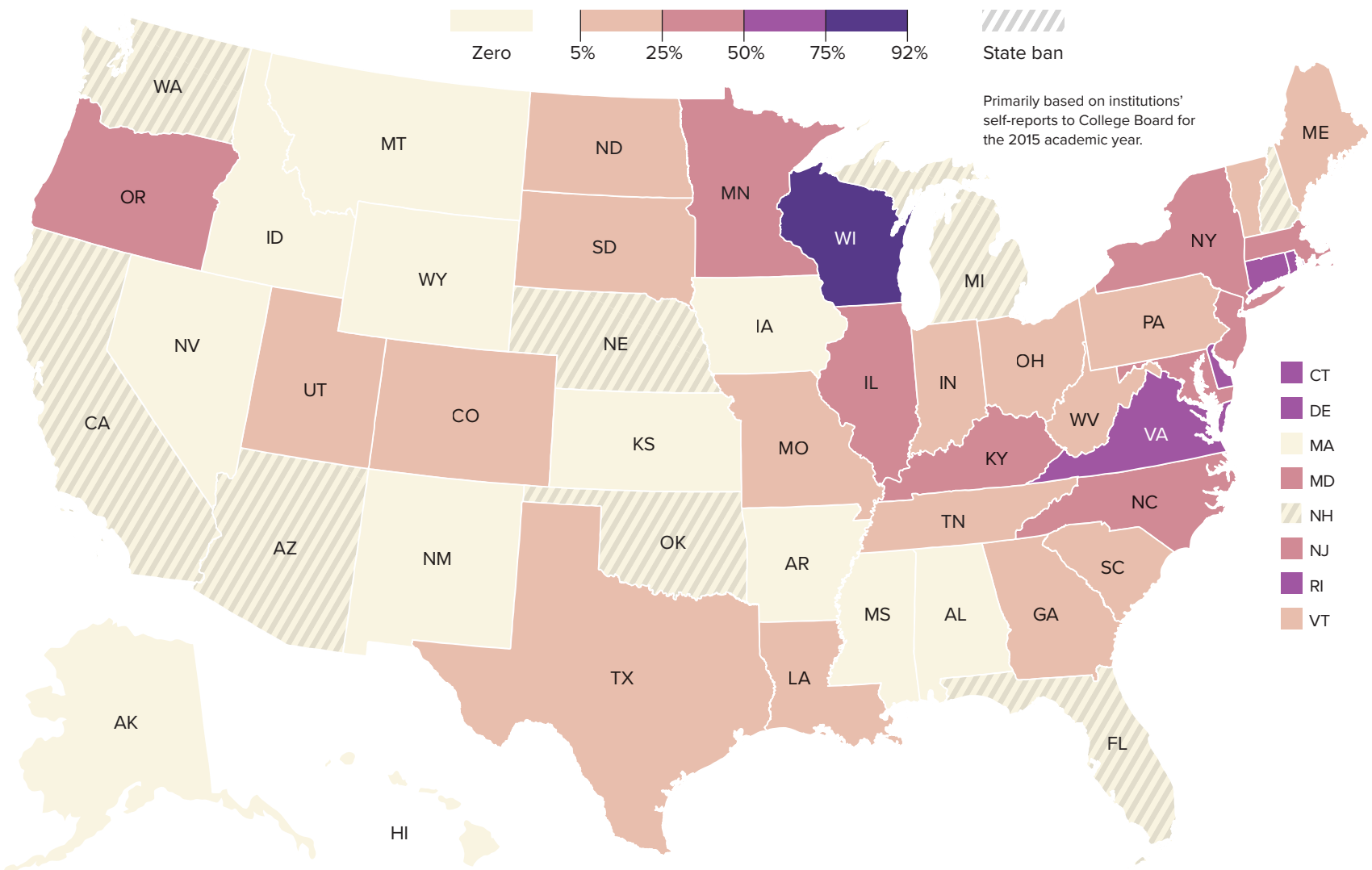
The Landscape of Affirmative Action in U.S. Higher Education

Colleges and universities that practice race-conscious "affirmative action" policies — favoring members of disadvantaged racial minority groups in the admissions process — have spent decades navigating a legal minefield of constitutional law.

While the Supreme Court has affirmed the legality of affirmative action since 1978, the retirement of Justice Anthony Kennedy raises the possibility that a new conservative majority could add new limits or overturn old precedents. Under President Donald Trump, the Department of Education rescinded Obama-era guidance promoting best-practices for race-conscious admissions, and the Justice Department's civil rights division is planning to open new investigations into race-based university admissions policies.

Most legal challenges have targeted public institutions, which are held to a higher standard. Approximately 20 percent of public four-year colleges consider race in their admissions, and eight states have passed laws or referendums banning the practice at public institutions.

Share of public four-year colleges that consider race in admissions



Affirmative action has been repeatedly challenged and redefined by the courts

The first Supreme Court ruling upholding affirmative action in 1978 resulted in a controversial split — Justice Lewis Powell wrote a compromise decision, with four liberal justices concurring with the sections that upheld affirmative action generally, and four conservative justices concurring with the sections that struck down policies that rely on racial quotas.

In the decades that followed, this unusual outcome created substantial legal ambiguity. A major legal victory by conservative activists in 1996 spurred further challenges to race-based admissions policies, several of which were appealed to the Supreme Court.

The most recent decisions have been closely divided between the liberal and conservative wings of the court, and have further clarified the constitutional limits to affirmative action.

Under existing precedent, affirmative action policies at public institutions must survive a standard known as "**strict scrutiny.**" Affirmative action policies must target a compelling state interest, must be narrowly tailored to accomplish that goal, and are required to use the least restrictive means possible. In the table to the right, these terms are further defined.

Key constitutional concepts for affirmative action policies at public universities

COMPELLING STATE INTEREST

The policy must target an acceptable goal. The Supreme Court has ruled that student body diversity is a valid goal, whereas "racial balancing" to match the broader population is not a valid goal.

NARROWLY TAILORED

The policy must be constructed so that the primary goal is substantially achieved, while also minimizing harm to those who do not benefit. Policymakers should avoid rigid quotas.

LEAST RESTRICTIVE MEANS

Goals should be accomplished by whatever method least infringes on individual rights and liberties. If a race-blind system could achieve the same results, schools should opt for that approach instead.

Timeline of key legal decisions on affirmative action in higher education

1980 | 1990 | 2000 | 2010

1978

Regents of U.C. v. Bakke

As the first Supreme Court decision on affirmative action in the modern era, *Bakke* sets the most important precedents on the issue.

In a compromise decision, the court holds that classroom diversity is a valid interest for the government to pursue, but that public universities must achieve that goal in a way that minimizes discrimination against individuals.

The University of California's strict racial quota system was ruled unconstitutional, but schools may consider race as part of a holistic assessment of each applicant.

1996

Hopwood v. Texas

A U.S. appeals court rules that public universities cannot consider race in their admissions. The opinion acknowledges the earlier *Bakke* decision, but argues it does not set a firm precedent on the issue of affirmative action generally.

The Supreme Court declines to review the case on technical grounds — the university has substantially changed its admissions process by the time the court receives the case. As a result, the appeals court decision is the law of the land in the three states under its jurisdiction: Louisiana, Mississippi and Texas.

2003

Gratz, Grutter v. Bollinger

In two cases challenging the Univ. of Michigan's affirmative action system, the Supreme Court upholds many of the standards it laid out in *Bakke*.

The university's automatic points- based admissions system for undergraduates, which gave minority students extra points for their race, is ruled unconstitutional on the same grounds as racial quotas.

However, the law school's holistic use of race in admissions for the purpose of student body diversity is upheld. As a result, the appeals court decision in *Hopwood* is also overturned.

2013 and 2016

Fisher v. University of Texas

The Supreme Court upholds the University of Texas' admissions process, which includes a holistic consideration of race to achieve student body diversity.

The court hears the case twice, sending it back to lower courts the first time and issuing a final opinion after the second argument.

The opinion outlines key standards: Public universities must give a reasonable justification, narrowly design programs to achieve that goal, and prove that other methods cannot achieve the same result.

After legal challenges in the 1990s, many schools stopped considering race in their admissions process

Race-based affirmative action has largely been a phenomenon among the most elite universities.

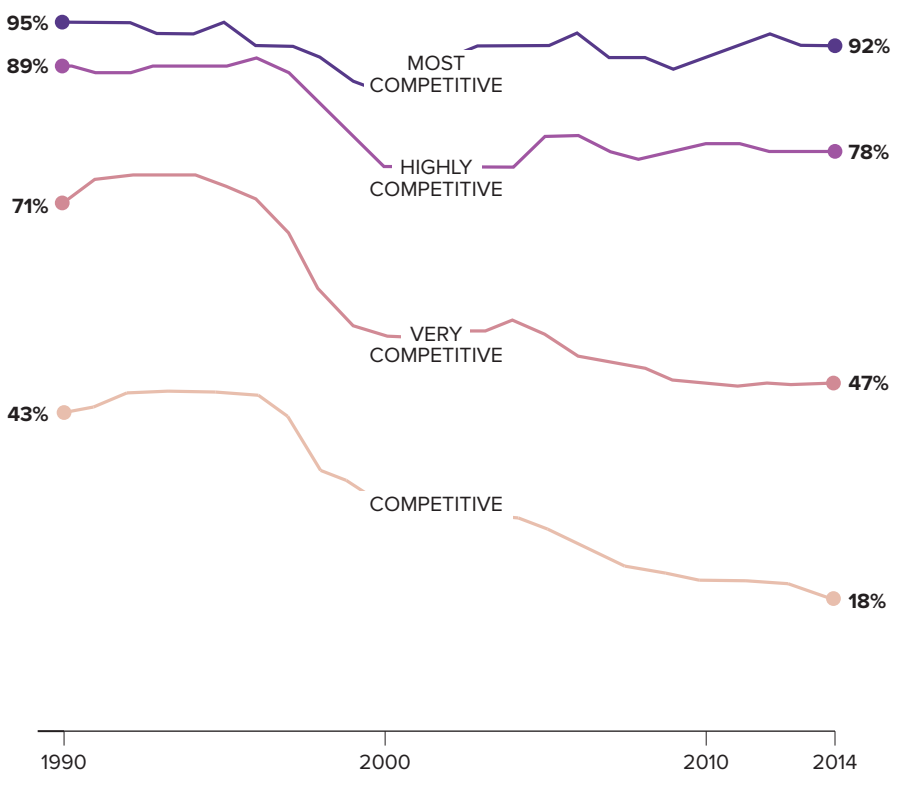
Approximately 65 percent of undergraduates attend institutions that accept 85 percent or more of their applicants, leaving little room for race-based selectivity.

The chart on the right shows recent trends at the remaining schools with more selective admissions. Affirmative action is ubiquitous at top-ranked schools that only accept a small share of applicants, but is less common at less elite schools.

A growing conservative political backlash against affirmative action, beginning with the *Hopwood* case in 1996, prompted many schools to end their race-based admissions policies. Public universities were the most likely to drop their policies, even in states that did not pass laws banning the practice.

Share of universities that consider race in admissions, by selectivity rating

Selectivity categories from Barron's Profile of American Colleges



Sources: Ballotpedia; National Conference of State Legislatures; Daniel Hirschman and Ellen Berrey, "The partial deinstitutionalization of affirmative action in U.S. higher education, 1988-2014"

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