

AFFIRMATIVE ACTION ON LIFE SUPPORT: *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN* AND THE END OF NOT-SO-STRICT SCRUTINY

JONATHAN W. RASH*

I. INTRODUCTION

In *Fisher v. University of Texas at Austin*,¹ the Supreme Court is obliged to opine once again on the constitutionality of affirmative action in higher education. While the potential outcome of this case is nearly impossible to predict, insight into how the Court might decide *Fisher* can be found in an unlikely place. Twenty years ago, the Court decided a case that in almost every way has nothing to do with affirmative action, but in one important respect is conveniently illustrative of the path the Court might choose to take.

In *Planned Parenthood v. Casey*,² the Court chose to resolve the fate of a constitutionally embattled, politically charged principle: that the Constitution protects the right to have an abortion. In a now-famous opinion, the Court averted the extreme path of disavowing the abortion right and opted instead for a more moderate approach—it reaffirmed the core of the right,³ but significantly altered the doctrinal rules insulating it.⁴ This term, the Court faces a similar task, and will likely take a similar path. In *Fisher*, the Court is confronted

* 2014 J.D. Candidate, Duke University School of Law. I thank Professor Joseph Blocher for his guidance and support and for teaching me most of what I know about constitutional law. I also thank Andrew Hand, Aaron Johnson, Matt Waldrop, Patrick Jamieson, Elisa Sielski, and Sitara Witanachchi for their helpful comments and edits.

1. *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012). Justice Kagan is recused from this case, and a four-to-four split at the Supreme Court would result in the lower court opinion being affirmed. Because the Fifth Circuit ruled in favor of UT on all relevant issues, any decision reversing any of the Fifth Circuit’s holding will require at least five votes.

2. 505 U.S. 833 (1992).

3. *See id.* at 846 (reaffirming “the essential holding of *Roe v. Wade*” that the Constitution protects a woman’s right to have an abortion).

4. *See, e.g., id.* at 873 (rejecting the trimester framework, which the Court endorsed in *Roe*, but which was not “part of the essential holding of *Roe*”).

with a case that could potentially spell the end of affirmative action in higher education. As it did in *Casey*, the Court seems likely to sidestep the extreme route, this time by reaffirming the constitutional validity of affirmative action, while recalibrating, and making more rigorous, the rules by which race-conscious admissions policies must abide.

The specific question in *Fisher* is whether the University of Texas at Austin's (UT) use of race as a factor in admissions is constitutionally permissible.⁵ UT modeled its admissions policy after that of the University of Michigan Law School, which the Court approved nearly a decade ago in *Grutter v. Bollinger*.⁶ Because *Grutter* left much to be desired by way of a workable analytical framework,⁷ *Fisher* is likely to focus just as much on clarifying (or “gutting”⁸) *Grutter* as on using it as a basis of decision. Accordingly, this commentary focuses on how the Court could use this case to rework *Grutter*, and on the potential impact of a *Grutter* makeover on UT's use of race in admissions. In the end, just as abortion survived *Casey*, affirmative action in higher education probably will survive *Fisher*—at least in theory.⁹ The Court is likely to uphold *Grutter*'s central teaching—that the Constitution permits narrowly tailored affirmative action policies—while striking down UT's idiosyncratic use of race. Doing so will require a nuanced analysis, to say the least.

5. Brief for the Petitioner at i, *Fisher*, No. 11-345 (U.S. Sept. 19, 2011).

6. 539 U.S. 306 (2003); see *infra*, notes 59–77 and accompanying text (discussing *Grutter*).

7. See Libby Huskey, Note, *Constitutional Law—Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact?* *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), 4 WYO. L. REV. 439, 473–76 (2004) (arguing that the *Grutter* decision would have been less murky if the Court had applied intermediate scrutiny); Mark T. Terrell, *Bucking Grutter: Why Critical Mass Should Be Thrown Off the Affirmative Action Horse*, 16 TEX. J. ON C.L. & C.R. 233, 234 (2011) (arguing that *Grutter*'s “critical mass is too illusory to be a useful doctrinal tool”). See generally Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn its Flawed Decision in Grutter*, 15 TEX. REV. L. & POL. 437 (2011) (criticizing *Grutter*).

8. See Transcript of Oral Argument at 81, *Fisher*, No. 11-345 (U.S. argued Oct. 10, 2012) (Sotomayor, J.) (“So you don’t want to overrule *Grutter*, you just want to gut it.”).

9. See, e.g., Lyle Denniston, *Argument recap: Will Grutter be reshaped?*, SCOTUSBLOG (Oct. 10, 2012, 12:55 PM), <http://www.scotusblog.com/?p=153589> (noting that “[a]ffirmative action is alive” but that *Grutter* “may have to be reshaped in order to survive”); Jeffrey Toobin, *At the Supreme Court, A Timid Defense*, THE NEW YORKER (Oct. 11, 2012), <http://www.newyorker.com/online/blogs/comment/2012/10/affirmative-action-supreme-court.html> (concluding that even though affirmative action is in a “perilous state,” it will probably “survive in some form or another”).

II. FACTUAL BACKGROUND

Petitioner Abigail Fisher, a white Texas resident, was denied undergraduate admission to UT in 2008.¹⁰ She then filed suit, alleging that UT's use of race as a factor in admissions violates the Equal Protection Clause of the Fourteenth Amendment.¹¹

A. History of UT's Admissions Policies

Until 1996, UT made admissions decisions using two metrics: the "Academic Index" (AI) and the applicant's race.¹² The AI, which is still employed today, is a composite score based on the applicant's high school class rank, standardized test scores, and the rigor of the applicant's high school curriculum.¹³ Between 1989 and 1995, black and Hispanic enrollment hovered around twenty percent under this policy.¹⁴

In 1997, UT altered its admissions policy to comply with *Hopwood v. Texas*,¹⁵ a decision of the U.S. Court of Appeals for the Fifth Circuit, which invalidated the use of race in admissions at UT's law school and held that diversity in higher education was not a compelling government interest.¹⁶ Consequently, UT replaced the race factor with the "Personal Achievement Index" (PAI), which was (and still is) used with the AI "to identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores."¹⁷ The PAI was designed to increase minority enrollment by accounting for factors that could serve as proxies for race.¹⁸ The PAI is based on three scores: one for each of two essays and a separate

10. Another applicant, former co-plaintiff Rachel Michalewicz, is no longer party to this case. Brief for the Petitioner, *supra* note 5, at ii.

11. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction equal protection of the laws.").

12. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011).

13. *Id.* at 596.

14. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 631 F.3d 213, 222 n.47 (5th Cir. 2011) ("Minority enrollment was fairly consistent from 1989 until 1993, with some slight decreases in 1994 and 1995." (citations omitted)), *cert. granted*, 132 S. Ct. 1536 (U.S. Feb. 21, 2012) (No. 11-3345). During this time race "was often a controlling factor in admission." See *id.* at 223.

15. 78 F.3d 932 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

16. *Id.* at 944-48.

17. *Fisher I*, 645 F. Supp. 2d at 591.

18. See *id.* at 591-92 (explaining that factors such as "socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household" disproportionately affect minority candidates).

“personal achievement score.”¹⁹ The personal achievement score is based on several “soft” factors, such as leadership experience, awards and honors, work experience, community circumstances, and a number of “special circumstances.”²⁰ The special circumstances element includes socioeconomic status, family status, and standardized test scores compared to the average in the applicant’s high school.²¹ As a result of substituting the PAI for race, combined black and Hispanic enrollment dropped from 18.6% in 1996 to 15.3% in 1997.²²

Later that year, in its own response to *Hopwood*, the Texas legislature passed what became known as the Top Ten Percent Law,²³ under which all Texas seniors graduating in the top ten percent of their high school class are guaranteed admission to UT.²⁴ Because Texas high schools remain highly segregated, the Top Ten Percent Law succeeded at increasing minority enrollment.²⁵ By 2004—the last year before UT implemented its current policy—black and Hispanic enrollment reached 21.4%,²⁶ returning UT to pre-*Hopwood* diversity levels without the explicit use of racial preferences. Then, in 2003, in response to the Supreme Court decision in *Grutter*,²⁷ UT decided to reintroduce race as a minor factor in admissions.²⁸

19. *Fisher II*, 631 F.3d at 227–28.

20. *Id.* The applicant’s race became a “special circumstance” in 2003. *See infra* note 34 and accompanying text.

21. *Id.* UT also attempted to increase minority enrollment with targeted scholarship programs, focused outreach in underrepresented areas, and additional recruiting at underperforming schools. *Id.* at 592.

22. Brief for the Petitioner, *supra* note 5, at 3–4; *see also Fisher II*, 631 F.3d at 224 (expressing the change in total-number terms).

23. *See* TEX. EDUC. CODE § 51.803 (West 2012) (requiring that public universities admit in-state students that graduate in the top ten percent of their high school class); *accord Fisher II*, 631 F.3d at 224 (“The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose.”).

24. TEX. EDUC. CODE at § 51.803(a).

25. *See Fisher II*, 631 F.3d at 224 (“[T]he Top Ten Percent Law [increased] minority enrollment . . .”).

26. *Id.* at 223.

27. *See infra* notes 59–77 and accompanying text (summarizing the Court’s decision in *Grutter*).

28. *See Fisher II*, 631 F.3d at 224 (discussing studies that were used in UT’s proposal to reintroduce race as an admissions factor).

B. Race as a Factor in UT's Current Policy

UT sought to model its current admissions policy after the one approved in *Grutter*.²⁹ Applicants are now divided into three pools: (1) Texas residents, (2) domestic non-Texas residents, and (3) international students.³⁰ Applicants compete only against other applicants in their respective pool.³¹ Texas residents are further divided into two subgroups: (a) those in the top ten percent of their high school class and (b) those outside the top ten percent.³² Non-top ten percent Texas residents, such as Abigail Fisher, are evaluated on the basis of their AI and PAI scores.³³

Unlike in UT's previous policy, race is now a special circumstance that can be a plus factor in an applicant's personal achievement score, which remains part of the PAI. None of the personal achievement score factors, including race, is given a numerical value, nor is any one factor dispositive to the admission decision.³⁴ Race "can positively impact applicants of all races, including Caucasian[s], or it may have no impact whatsoever."³⁵

Some applicants are accepted based on their AI score alone, but no applicant is denied solely on that basis.³⁶ The AI and PAI scores of all non-top ten percent applicants are plotted on a grid, one on each axis. A staircase-shaped cutoff line is drawn, and all applicants in the included cells are admitted.³⁷ Because race is considered only as part of the PAI score, it has no direct bearing on where the cutoff line is drawn. For purposes of admission to UT, the AI and PAI scores are relevant only for non-top ten percent applicants; but admission to particular majors is still determined by the AI and PAI scores, making

29. *See id.* (recognizing that UT had "one eye on *Grutter*" when developing its current race-conscious admissions policy); *id.* at 247 (noting that the UT policy is "in some respects superior" to the *Grutter* plan).

30. *Id.* at 227.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.* at 228–29 (explaining that race is only one of many factors used in the context of a holistic review).

35. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 645 F. Supp. 2d 587, 597 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011).

36. *Fisher II*, 631 F.3d at 227 ("If an application is presumptively denied [due to a low AI score], senior admission staff review the file [before making a final admissions decision].").

37. The position of the cutoff line varies from major to major. *Id.* at 229. "Relatively rarely," after a review of the entire file, UT admits applicants whose scores fall below the official cutoff. *See Fisher I*, 645 F. Supp. 2d at 599.

race, to some extent, a factor for everyone.³⁸

In stark contrast to UT’s pre-*Hopwood* use of race—where it was “often a controlling factor”—race is now merely “a factor of a factor of a factor.”³⁹ Thus, the number of applicants for which race is decisive is arguably negligible.⁴⁰ An applicant with the highest possible personal achievement score will still be denied admission, for example, if her AI and essay scores are too low.⁴¹

UT does not monitor the racial makeup of the class during the admissions cycle, and it does not set numerical targets for minority enrollment.⁴² UT reviews its current policy “formally” every five years and “informally” every year, in order “to assess whether consideration of an applicant’s race [continues to be] necessary in order to create a diverse student body.”⁴³

III. LEGAL BACKGROUND

A. Analytical Framework

Government-sponsored⁴⁴ affirmative action plans are subject to strict scrutiny, the most exacting standard of judicial review.⁴⁵ Strict scrutiny mandates that racial classifications be narrowly tailored to

38. Top Ten Percent Law applicants are guaranteed admission only to the University, not to the program or school of their choice. If these applicants do not receive admission to their first choice program, they compete for admission on the basis of their AI and PAI scores. “Top ten percent applicants not admitted to either their first- or second-choice program are automatically admitted as Liberal Arts Undeclared majors.” *Fisher II*, 631 F.3d at 229; see also Brief for the Petitioner, *supra* note 5, at 8 (“[R]ace is a factor in admission, placement, or both for every in-state undergraduate applicant.”).

39. See Brief for the Respondent at 13, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. Sept. 19, 2011) (quoting *Fisher I*, 645 F. Supp. 2d at 608).

40. See Brief for the Petitioner, *supra* note 5, at 10 (arguing that race has affected 0.5% of the student body as a whole). *But see* Brief for the Respondent, *supra* note 39, at 14 (“[A]lthough petitioner claims that the consideration of race in holistic admissions has had an ‘infinitesimal’ impact on diversity at UT, the record shows otherwise.”).

41. *Fisher II*, 631 F.3d at 228–29 (citing *Fisher I*, 645 F. Supp. 2d at 608).

42. *Id.* at 230.

43. Brief for the Petitioner, *supra* note 5, at 8 (citations omitted).

44. Because the Fourteenth Amendment applies only to state-sponsored action, the entity doing the discriminating must be either a state actor or a private actor acting with the imprimatur of the state. See, e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (holding that the injury “did not constitute state action and hence was not subject to judicial scrutiny under the Fourteenth Amendment”).

45. E.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (reaffirming that affirmative action plans in education are reviewed under strict scrutiny); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

achieve a compelling government interest,⁴⁶ regardless of the race of the person advantaged or disadvantaged by the plan.⁴⁷ The Court has held that universities can have a compelling interest in creating a diverse student body⁴⁸ (the interest UT invokes here), but strict scrutiny requires that universities traverse a constitutionally narrow path in pursuit of that interest.⁴⁹ This section describes that path and explains the cases that shaped it.

B. Regents of University of California v. Bakke

The Supreme Court first addressed affirmative action in higher education in *Regents of University of California v. Bakke*.⁵⁰ The petitioner, a white medical school applicant, challenged the constitutionality of the University of California at Davis Medical School's race-conscious admissions policy, which set aside sixteen slots (out of a class of 100) for minority students.⁵¹ The Court produced six opinions, none of which was joined by a majority of the Justices. Justice Powell, writing for himself, concluded that the set-aside was unconstitutional, but that race could be used as one factor in admissions decisions, so long as it was considered in the context of an individualized review process.⁵² Because the rigid sixteen-person quota did not allow for this sort of holistic review, Justice Powell provided a fifth vote to strike it down, and his opinion came to be regarded as controlling.⁵³

46. *E.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005).

47. *Fullilove v. Klutznick*, 448 U.S. 448, 525–26 (1980) (“The guarantee of equal protection is ‘universal in [its] application, to all persons . . . without regard to any differences of race, color, or of nationality.’” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))).

48. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). The Supreme Court has also recognized a compelling interest in remedying the effects of past discrimination. *See, e.g.*, *Fullilove*, 448 U.S. at 450. Even though Texas has a well-documented history of *de jure* segregation, UT does not aver that it has a compelling interest in remedying the effects of past discrimination. *But see* Brief for *Amici Curiae* NAACP, et al. In Support of Respondents at 23, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. Aug. 13, 2012) (arguing that UT has a compelling interest in remedying the effects of past discrimination in state-funded education).

49. In *Grutter*, however, that path was considerably wider than is usually permitted under strict scrutiny. *See, e.g.*, Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. PITT. L. REV. 1, 38–39 (2010) (arguing that “the scrutiny the Court applies to diversity-based affirmative action programs is quite different from the scrutiny it applies” in other race cases).

50. 438 U.S. 265 (1978).

51. *Id.* at 275.

52. *See id.* at 318 (Powell, J., concurring) (invalidating the minority set-aside, but noting that “no such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighted fairly against other elements—in the selection process”).

53. *See, e.g.*, *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1199 (9th Cir. 2000); *see*

Justice Powell's opinion in *Bakke* established that universities may use race in order to attain a diverse student body.⁵⁴ He reasoned 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."⁵⁵ But Justice Powell was careful to note that racial diversity could not be pursued merely for its own sake: "It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups."⁵⁶ The diversity Justice Powell envisioned focused instead on "a far broader array of qualifications and characteristics of which race . . . is but a single though important element."⁵⁷

C. *Grutter v. Bollinger* and *Gratz v. Bollinger*⁵⁸

In 2003, the Supreme Court's twin decisions in *Grutter* and *Gratz v. Bollinger*⁵⁹ reaffirmed that diversity in higher education is a compelling government interest.⁶⁰ In *Gratz*, the undergraduate admissions policy at the University of Michigan assigned an automatic twenty points (out of 150 possible points) to minority applicants.⁶¹ The Court held that this policy was not narrowly tailored, because race was often the decisive factor in admission.⁶² The Court reiterated that race can be used only as one of many factors in a system "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."⁶³

In *Grutter*, a white applicant claimed that the University of Michigan Law School denied her application because race was a

also *Grutter*, 539 U.S. at 325 (endorsing Justice Powell's opinion in *Bakke*).

54. See *Bakke*, 438 U.S. at 311–12 (Powell, J., concurring) (concluding that student body diversity "clearly is a constitutionally permissible goal for an institution of higher education").

55. *Id.* at 313 (citation omitted).

56. *Id.* at 315.

57. *Id.*

58. For excellent discussions of these two cases, see Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459 (2004); Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 362–81 (2003).

59. 539 U.S. 244 (2003).

60. *Id.* at 275; *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). There is reason to believe, however, that the diversity rationale for affirmative action policies in education is on shaky ground. In *Parents Involved*, four Justices rejected the proposition that diversity is a compelling interest for state elementary and high schools. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733 (2007).

61. 539 U.S. at 255, 275.

62. See *id.* at 271–72 (finding that race was decisive "for virtually every minimally qualified underrepresented minority applicant" (citation omitted)).

63. *Id.* at 271 (quoting *Bakke*, 438 U.S. at 317 (Powell, J., concurring)).

dominant factor in admissions.⁶⁴ The Court disagreed, finding that the law school's use of race embodied the type of policy of which Justice Powell spoke so highly in *Bakke* and therefore was constitutionally permissible.⁶⁵ The difference between *Grutter* and *Gratz* turned on the extent to which race was used in the context of a holistic review.⁶⁶

The law school's race-conscious policy, which would later serve as a model for UT's, required that admissions staff consider "the ways in which the applicant will contribute to the life and diversity of the Law School."⁶⁷ This factor was considered along with the applicant's GPA and LSAT scores, personal statement, letters of recommendation, and various "soft factors."⁶⁸ Race was not the predominant factor in the admissions decision, but it was "an extremely strong factor."⁶⁹ The law school did not establish a numerical target for minority enrollment; rather, it pursued what it called a "critical mass" of minority students—defined as "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."⁷⁰

Applying strict scrutiny,⁷¹ the Court first held that the law school had "a compelling interest in attaining a diverse student body."⁷² Because "universities occupy a special niche in our constitutional tradition," the Court concluded that the law school was free "to make its own judgments as to . . . the selection of its student body," absent a showing of bad faith.⁷³ The Court went on to hold that the law school's

64. *Grutter*, 539 U.S. at 317.

65. *Id.* at 333–40.

66. Interestingly, seven Justices found no meaningful difference between the two admissions policies. Only Justices O'Connor and Breyer saw distinguishing characteristics. See Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT 221, 244 n.104 (2004); cf. Ian Ayres & Sidney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517 (2007) (arguing that the *Gratz* policy was actually more narrowly tailored than the policy in *Grutter*).

67. *Grutter*, 539 U.S. at 315.

68. These soft factors included "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the . . . difficulty of undergraduate course selection." *Id.*

69. *Id.* at 320. An expert witness for *Grutter* testified at trial that "applicants from [underrepresented] minority groups are given an extremely large allowance for admission." *Id.*

70. *Id.* at 318. Because the law school required high GPA and LSAT scores for admission, it claimed it could not reach critical mass without using race as a "plus factor." See *id.* (discussing trial testimony by the law school's Director of Admissions).

71. Justice O'Connor was careful to point out that "[s]trict scrutiny is *not* 'strict in theory, but fatal in fact.'" *Id.* at 326 (emphasis added).

72. *Id.* at 328.

73. *Id.* at 329 (citations omitted).

policy was narrowly tailored.

“[S]atisfied that its admissions program . . . [did] not operate as a quota,”⁷⁴ the Court found that the law school did not define diversity “solely in terms of racial and ethnic status,” consistent with the broad view of diversity approved in *Bakke*.⁷⁵ The Court also found that the law school’s policy endorsed a forward-looking concept of diversity, focused on the educational benefits flowing therefrom, as opposed to achieving racial balance.⁷⁶ And the Court determined that the law school had given sufficient consideration to race-neutral alternatives before electing to use race.⁷⁷ Having satisfied both prongs of strict scrutiny, the race-conscious admissions policy survived a somewhat watered-down version of strict scrutiny.

D. Parents Involved in Community Schools v. Seattle School District No. 1⁷⁸

After *Grutter* and *Gratz*, the Court—in another five-to-four decision—struck down the use of race in two public school-choice programs on narrow tailoring grounds.⁷⁹ Justice Kennedy concurred in the judgment, but thought the plurality was “too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of race.”⁸⁰ Although *Grutter* apparently was not controlling in *Parents Involved*,⁸¹ it became evident that at least four Justices would have no problem doing away with affirmative

74. *Id.* at 335 (“Properly understood, a ‘quota’ is a program in which a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups.’” (citations omitted)).

75. *Id.* at 316, 334–35.

76. *Id.* at 330.

77. *See id.* at 339–40 (recognizing that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative” but only a “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks” (citations omitted)). The Court also noted that there would be a substantial drop-off in minority enrollment—from fourteen percent of the student body to only four percent—if the law school could not consider race directly. *See id.* at 320.

78. For more in-depth discussions of this case, see Maria Funk Miles, *Confusing Means With Ends: How the Ninth Circuit Continues the Tradition of Mistaking Diversity As An Ends in Parents Involved in Community Schools v. Seattle School District, No. 1*, 2005 B.Y.U. EDUC. & L.J. 245 (2005) (discussing the lower court opinions); Michelle Renee Shamblin, *Silencing Chicken Little: Options for School Districts After Parents Involved*, 69 LA. L. REV. 219 (2008).

79. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007). For a good discussion of the relation between *Parents Involved* and affirmative action in higher education, see generally Andrew LeGrand, *Narrowing the Tailoring: How Parents Involved Limits the Use of Race in Higher Education Admissions*, 21 NAT’L BLACK L.J. 53 (2009).

80. *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring).

81. *Id.* at 725 (majority opinion) (“The present cases are not governed by *Grutter*.”).

action in education.⁸² Thus, the future of race-conscious admissions at UT—and perhaps affirmative action in general—will likely rest with Justice Kennedy.⁸³

IV. HOLDING

On January 18, 2011, the U.S. Court of Appeals for the Fifth Circuit affirmed⁸⁴ a district court holding⁸⁵ that UT's use of race in admissions was constitutional.⁸⁶ Like the district court, the Fifth Circuit concluded that UT's policy was essentially modeled on the one the Supreme Court approved in *Grutter*, and therefore must fall within that case's rule.⁸⁷ The more difficult question—addressed by both courts—was whether the Top Ten Percent Law, which has by itself a substantial effect on minority enrollment, renders UT's

82. See *id.* at 748 (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

83. See *infra* notes 137–141 and accompanying text (noting that, since *Grutter*, Justice Kennedy has replaced Justice O'Connor as the swing vote in affirmative action cases). See generally Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937 (2008) (discussing the importance of Justice Kennedy's concurrence in *Parents Involved* to the future of affirmative action in higher education); Kimberly A. Pacelli, *Fisher v. University of Texas at Austin: Navigating the Narrows Between Grutter and Parents Involved*, 63 ME. L. REV. 569 (2011) (discussing how *Parents Involved* might inform the Court's application of *Grutter* to the present case).

84. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 631 F.3d 213, 247 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (U.S. Feb. 21, 2012) (No. 11-3345).

85. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 645 F. Supp. 2d 587, 613 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011).

86. *Fisher II*, 631 F.3d at 247. (“[A]s long as *Grutter* remains good law, UT's current admissions program remains constitutional.”). This case produced two concurring opinions. Judge King concurred fully in the judgment and in the *Grutter* analysis discussed above, but declined to join Judge Higginbotham's discussion of the Top Ten Percent Law. *Id.* at 247 (King, J., concurring). Judge Higginbotham observed that the Top Ten Percent Law, although technically race-neutral, does not leave room for the use of race in the context of a holistic review and “is at best a blunt tool for securing the educational benefits that diversity is intended to achieve.” *Id.* at 238–42 (majority opinion). Because “[n]o party challenged . . . the validity or wisdom of the Top Ten Percent Law,” Judge King did not join that part of Judge Higginbotham's opinion. *Id.* at 247 (King, J., concurring). Judge Garza, in a lengthy opinion, agreed that UT's admissions policy was constitutional under *Grutter*, but wrote separately to advocate that *Grutter* itself was unconstitutional and should be overruled. *Id.* (Garza, J., concurring); see also Joshua Thompson, *Fisher v. University of Texas at Austin: Could the Supreme Court Revisit Its Decision in Grutter?*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 57, 59–60 (2011) (summarizing Judge Garza's concurrence).

87. See *Fisher I*, 645 F. Supp. 2d at 612 (“[T]he Court has difficulty imagining an admissions policy that could more closely resemble the Michigan Law School's admissions policy upheld . . . by the Supreme Court in *Grutter*.”); *Fisher II*, 631 F.3d at 243 (referring to UT's policy as “a *Grutter*-style admissions system”).

explicit consideration of race constitutionally infirm.⁸⁸

The Fifth Circuit began by outlining the appropriate standard of review. Adhering to well-established precedent,⁸⁹ the court subjected UT's use of race to strict scrutiny.⁹⁰ The court invoked *Grutter* for the proposition that educational institutions are entitled to "a degree of deference to [their] academic decisions," such as whether and how to factor race into admission decisions.⁹¹ The court went on to determine that such deference applies not only to whether UT has a compelling interest in using race, but also to the means by which it chooses to pursue that interest.⁹² Armed with this especially deferential form of strict scrutiny, the court undertook an evaluation of UT's race-conscious admissions policy.⁹³

The court first concluded that UT's policy, contrary to Fisher's assertion, did not amount to racial balancing.⁹⁴ The court found that UT was not using race simply to match student body demographics to those in the State of Texas, but rather in pursuit of the educational benefits of diversity.⁹⁵ Although racial balancing cannot be the end goal of an admissions scheme, "[s]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota."⁹⁶ It follows then that UT may consider Texas demographics—but only to discern which minorities are underrepresented. Because UT did no more than that, its plan did not amount to unconstitutional racial balancing.⁹⁷

88. See *Fisher II*, 631 F.3d at 243 (noting that the Top Ten Percent Law "places at risk UT's race-conscious admissions policies").

89. See *supra* notes 44–47 and accompanying text.

90. *Fisher II*, 631 F.3d at 231 ("It is a given that as UT's *Grutter*-like admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny . . .").

91. *Id.* at 232.

92. *Id.* ("That is, the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to [UT's] constitutionally protected, presumably expert academic judgment.")

93. See *id.* at 234 (applying strict scrutiny while "mindful of a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body").

94. *Id.* at 238 ("[UT] adhered to *Grutter* when it reintroduced race into its admissions process based in part on an analysis that devoted special attention to those minorities which were significantly underrepresented on its campus.")

95. See *id.* at 236–37 ("UT properly concluded that these individuals from the state's underrepresented minorities would be most likely to add unique perspectives that are otherwise absent from its classrooms.")

96. *Id.* at 235 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003)).

97. See *id.* at 238 ("Although a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the

In deferring to “UT’s considered, good faith” judgment, the court next rejected Fisher’s contention that UT had already achieved a critical mass of minority students on campus when it adopted its current policy.⁹⁸ Although UT had in fact achieved impressive levels of diversity prior to reintroducing race as a factor in admissions,⁹⁹ the court found that “social changes” in Texas supported UT’s apparent conclusion that critical mass means something different today than it did then.¹⁰⁰ Finding support in *Grutter*, the court went on to note that critical mass refers to diversity as opposed to mere numbers, making Fisher’s attempt to define critical mass in numerical terms unavailing.¹⁰¹ The court determined that seemingly adequate levels of minority enrollment might not reflect the “true level of diverse interaction” at UT and thus might be a poor proxy for critical mass.¹⁰² Lastly, the court held that small gains in minority enrollment attributable to race-conscious policies did not themselves present constitutional problems, nor did they belie UT’s “good faith conclusion” that critical mass had not yet been achieved.¹⁰³

degree of disparity into account.”).

98. *Id.* at 244 (citations omitted); *see also id.* at 242–43 (outlining Fisher’s arguments). Its ruling in favor of UT notwithstanding, the court was obviously concerned about the Top Ten Percent Law’s substantial effect on minority enrollment. *See id.* at 245 (noting that “UT’s claim that it has not yet achieved critical mass is less convincing when viewed against the backdrop of the Top Ten Percent Law”). Nevertheless, it recognized that the Top Ten Percent Law, standing alone, would not include the type of individualized review necessary to achieve a student body that is diverse, not only racially, but in myriad other ways. Consequently, the court reasoned that UT could supplement the Top Ten Percent Law by considering race directly. *See id.* at 239 (citing *Grutter*, 539 U.S. at 340).

99. *See supra* note 26 and accompanying text.

100. *See Fisher II*, 631 F.3d at 244 (“[W]hatever levels of minority enrollment sufficed more than a decade ago may no longer constitute critical mass today, given the social changes Texas has undergone during the intervening years.”).

101. *See id.* (“*Grutter* pointedly refused to tie the concept of ‘critical mass’ to any fixed number. The *Grutter* Court approved of the . . . goal of attaining critical mass even though the school had specifically abjured any numerical target.” (citing *Grutter*, 539 U.S. at 318)).

102. *See id.* at 245 (discussing UT’s “appropriate consideration [of] whether aggregate minority enrollment is translating into adequate diversity in the classroom”).

103. *See id.* at 246 (“The [*Grutter*] Court did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small.”). *Compare* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring) (approving of race-conscious policies that produce small gains, so long as race is part of a “nuanced, individual evaluation of school needs and student characteristics”), *with id.* (“[T]he small number of assignments affected suggests that the schools could have achieved their stated ends through other means.”).

V. ARGUMENTS

A. *Petitioner's Arguments*

Fisher's overarching contention is that UT's use of race in admission decisions violates the Equal Protection Clause.¹⁰⁴ She first alleges that "[n]either of UT's justifications for restoring race to its admission system is a constitutionally compelling state interest."¹⁰⁵ Fisher contends that UT engages in constitutionally proscribed "racial balancing" by "using race in admissions to mirror the demographics of Texas."¹⁰⁶ UT's goal (so the argument goes) is not racial diversity for the sake of educational benefits—the only interest recognized as compelling in *Grutter*—and therefore is constitutionally deficient.¹⁰⁷ Fisher goes on to argue that UT's interest in achieving "classroom diversity" is outside the scope of *Grutter's* recognized interest. Under *Grutter*, a university may seek to enroll a critical mass of minority students as a percentage of the total student body but not "major-by-major and classroom-by-classroom."¹⁰⁸

Moving to the second prong of strict scrutiny, Fisher contends that even if UT can articulate a compelling interest for using race, the means by which it seeks to achieve its goal of racial diversity is not narrowly tailored, for several reasons. First, UT's race-conscious admissions policy is not narrowly tailored because it has too *small* of an impact on minority enrollment.¹⁰⁹

Second, "UT's admissions system could never achieve 'classroom diversity' through constitutional means."¹¹⁰ In order to diversify the classroom, UT would have to make race a dominant factor in either admissions or major selection, both of which would be clearly unconstitutional, given that race cannot be more than a minor factor considered in the context of a holistic review.¹¹¹

Third, "[e]ven if UT has a compelling interest in proportional representation based on Texas demographics . . . such a goal could not possibly be implemented in a narrowly tailored way."¹¹² To achieve

104. Brief for the Petitioner, *supra* note 5, at 24.

105. *Id.* at 19.

106. *Id.*

107. *Id.*

108. *Id.* at 19–20.

109. *Id.* at 20–21.

110. *Id.* at 21.

111. *Id.*

112. *Id.* at 45.

such racial balance would require implementing different targets for each minority group and such a practice would lead to more discrimination based on race—this time among the various minority groups.¹¹³

Fisher next argues that the Fifth Circuit turned conventional strict scrutiny analysis on its head by showing too much deference to UT's race-conscious policies. Under *Grutter*, a university is entitled to a degree of deference to its decision that it has a compelling interest in achieving racial diversity. But, as Fisher points out, "that is about as far as deference should go."¹¹⁴ To defer to UT's judgment that its race-conscious system is narrowly tailored is to abandon the essence of strict scrutiny.

Finally, Fisher proposes that the Court either clarify or overrule *Grutter*.¹¹⁵ In effect, Fisher argues that *Grutter* and strict scrutiny are incompatible, and, unless the Court elects to substantially revamp *Grutter*, one of them must go.¹¹⁶

B. Respondent's Arguments

UT begins by arguing that its race-conscious admissions policy "exemplifies the type of plan" that the Supreme Court approved in *Grutter*.¹¹⁷ Implicit in this argument is that if affirmative action in higher education is to survive as a matter of constitutional law, so must UT's admissions policy.

After pointing out that Fisher cannot "challenge the individualized nature of UT's consideration of race,"¹¹⁸ UT attacks Fisher's arguments for the admissions policy's unconstitutionality. First, UT argues that its policy is not tantamount to "racial balancing," because in the past the Court has found racial balancing only where the policy set a racial quota tied to demographics.¹¹⁹ Although Fisher contends that "mirror[ing] the demographics of Texas" is "UT's acknowledged goal,"¹²⁰ UT disagrees. It claims it has not established a racial quota, so its admissions policy cannot amount to racial

113. *Id.*

114. *Id.* at 50.

115. *Id.* at 53.

116. Fisher refers multiple times to the *Grutter* standard as "unworkable." *See, e.g., id.* at 53–56.

117. Brief for the Respondent, *supra* note 39, at 19.

118. *Id.* at 28.

119. *Id.*

120. Brief for the Petitioner, *supra* note 5, at 19.

balancing.¹²¹ *Grutter* does not foreclose UT’s ability to consider state demographics, so long as it does not work backward to achieve a racial target based on those demographics.¹²²

Second, that a substantial majority of applicants are admitted under the Top Ten Percent Law does not prohibit UT from considering race in the context of a “holistic review process.”¹²³ According to UT, the Top Ten Percent Law does not permit the type of individualized review necessary to achieve diversity *within* underrepresented minority groups and thus is not a race-neutral alternative that works “about as well.”¹²⁴ UT concludes that to adopt Fisher’s position would preclude the very type of individualized review that the Court found so important in *Bakke* and *Grutter*.

Third, UT attacks Fisher’s assertion that UT’s admissions system is not narrowly tailored because it has too small an effect on minority enrollment. As UT puts it, “the modest manner in which race may impact holistic admissions is a constitutional virtue, not a vice.”¹²⁵ UT argues that it would be strange if its race-conscious plan could be unconstitutional because race was not given *enough* weight.¹²⁶ UT further asserts that its nuanced consideration of race is important “to assembl[ing] a student body that is broadly diverse—including within different minority groups.”¹²⁷ In other words, just because UT’s modest use of race does not account for a substantial increase in minority enrollment does not mean that it fails to account for a substantial increase in student body diversity.

121. Brief for the Respondent, *supra* note 39, at 28. UT does admit that it considers Texas demographics when determining which minorities are underrepresented, but points out that “some attention to numbers” does not “transform a flexible admissions system into a rigid quota.” *Id.*

122. *See id.* at 29 (averring that UT does not engage in racial balancing because it has not established a “goal, target, or other quantitative objective” for minority admissions).

123. *See id.* at 31–32 (“Indeed, in *Grutter* this Court specifically rejected the argument that percentage plans are a complete, workable, and constitutionally required alternative to the individualized consideration of race in holistic review.” (citing *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003))).

124. *See id.* at 33–35 (“[For example], the [black] or Hispanic child of successful professionals in Dallas who has strong SAT scores and has demonstrated leadership ability in extracurricular activities but falls in the second decile of his or her high school class . . . cannot be admitted under the top 10% law.”).

125. *Id.* at 36.

126. *See id.* (pointing out the inherently flawed nature of Fisher’s assertion that “UT’s consideration of race in holistic admissions is too modest to pass muster”).

127. *Id.* at 33.

Fourth, a paucity of classroom diversity is evidence that UT has not yet attained a critical mass. UT asserts that its “objective was the educational benefits of a richly diverse student body—the very interest held compelling in . . . *Grutter*.”¹²⁸ Because diverse interactions leading to educational benefits mostly occur in the classroom, UT argues that it may focus on achieving more diversity in particular classes without running afoul of *Grutter* or the Constitution.

Fifth, UT maintains that the Fifth Circuit did not abandon strict scrutiny in its review of UT’s admissions policy.¹²⁹ UT agrees with Fisher that “[a] university does not get deference on the ultimate question whether the means through which it pursues its compelling interest are narrowly tailored,”¹³⁰ but argues that the Fifth Circuit gave no such deference.

UT ends with a brief discussion of reasons the Court should refrain from overruling *Grutter*, and observes that the doctrine of *stare decisis* counsels against overruling such an important decision, decided less than a decade ago.¹³¹

VI. ANALYSIS

Abigail Fisher’s challenge invites the Supreme Court to clean up its affirmative action jurisprudence by producing a more workable standard concerning when and how race can be used as a factor in university admissions. Before deciding the fate of UT’s policy, the Court will probably discuss whether diversity remains a compelling interest in higher education, the degree of deference universities should receive in the adoption and implementation of race-conscious polices, and the precise requirements of narrow tailoring. When the dust settles, a majority of the Court will probably have found a way to invalidate UT’s policy by substantially recalibrating the analysis in *Grutter*. Nevertheless, this case probably will not be the death of affirmative action, and *Grutter* (albeit with a different look) is likely to survive as binding precedent. But going forward, university affirmative action programs might have to find a way to withstand a

128. *See id.* at 21 (highlighting the “stark racial isolation in [UT] classrooms”).

129. *Id.* at 21, 47.

130. *Id.* at 48.

131. *Id.* at 51–53; *cf.* *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992) (noting that reexamination of precedent involves, *inter alia*, an inquiry into “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”).

form of judicial review that is tantamount to “strict in theory, but fatal in fact.”¹³²

A. Revamping the Grutter Analysis

1. Diversity as a Compelling Interest

As a threshold matter, if UT’s policy is to have any chance of survival, the Supreme Court will have to reaffirm that diversity is a compelling interest that a university may pursue. Because there do not seem to be enough votes in support of the alternate view,¹³³ the foundation of *Grutter* and *Bakke* probably will remain intact. The Court is likely, however, to cabin the compelling interest to the pursuit of *student body* diversity, as opposed to diversity in the *classroom*. To hold otherwise would permit a university to use race in admissions indefinitely—until “educators [can] certif[y] that the elusive critical mass ha[s] finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom.”¹³⁴

2. Deference and Strict Scrutiny

Under *Grutter*’s deferential treatment of university decision-making, establishing a compelling interest in diversity was practically a formality, and as evidenced by the Fifth Circuit decision, such deference has carried over to the narrow tailoring inquiry.¹³⁵ This probably will not be true after *Fisher*. The Court will likely recast the deferential standard it adopted in *Grutter* by bringing both the compelling interest and narrow tailoring analyses closer in line with conventional strict scrutiny. Consequently, a university may no longer be afforded ample deference in determining whether it has reached a

132. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” (citation omitted)).

133. Assuming the “liberal” wing of the Court votes as expected, ending diversity’s tenure as a compelling government interest would require Justice Kennedy’s vote. Although Justice Kennedy has never voted to uphold an affirmative action policy, he has consistently endorsed the notion that a university’s interest in diversity can, in some instances, be compelling. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting). There is no reason to think he will change his mind in this case.

134. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 631 F.3d 213, 254 (5th Cir. 2011) (Garza, J., concurring) (“Allowing race-based social engineering at the university level is one thing, but not nearly as invasive as condoning it at the classroom level.”), cert. granted, 132 S. Ct. 1536 (U.S. Feb. 21, 2012) (No. 11-3345).

135. See *id.* at 232 (majority opinion).

critical mass of minority enrollment.¹³⁶ In addition, the Court will likely make clear that whatever minimal deference applies to the compelling interest analysis does not apply to the narrow tailoring prong.

Perhaps the most important difference between *Grutter* and *Fisher* is that Justice Kennedy now occupies Justice O'Connor's former seat as the swing Justice in affirmative action cases. Justice O'Connor, in her majority opinion in *Grutter*, was content to defer to Michigan Law School on several fronts: whether it had enrolled a critical mass of minority students,¹³⁷ whether it had appropriately considered race-neutral alternatives,¹³⁸ and whether it "w[ould] terminate its race-conscious admissions program as soon as practicable."¹³⁹ Justice Kennedy, on the other hand, dissented in *Grutter* precisely because he thought that the majority "refuse[d] to be faithful to the settled principle of strict review designed to reflect [important] concerns."¹⁴⁰ His vote could allow the *Fisher* Court to rewrite the deferential standard espoused in prior cases.¹⁴¹

If such a revision does occur, the Court probably will start by embracing the idea that deference, even at the compelling interest stage, cannot coexist with strict scrutiny. This seems a simple proposition at first glance, but the Court will have to find a way around the fact that universities, for First Amendment reasons, must be afforded some level of deference in creating the type of student body that best fosters their educational objectives.¹⁴² This would

136. Notably, several Justices at oral argument seemed hostile to the idea of critical mass, intimating that it is virtually indistinguishable from a quota. *See, e.g.*, Transcript of Oral Argument at 45, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012) (Roberts, C.J.) ("[Y]ou won't tell me what the critical mass is. How am I supposed to do the job that our precedents say I should do?"). Although *Grutter* recognized the distinction, 539 U.S. at 335–36, it is conceivable that the Court could scrap the critical mass concept in favor of a more useful analytical tool. *Cf. Terrell, supra* note 7, at 234 (criticizing critical mass).

137. *Grutter*, 539 U.S. at 329–30.

138. *Id.* at 340, 343.

139. *Id.* at 343.

140. *See id.* at 388 (Kennedy, J., dissenting). Notably, Justice Kennedy seems to accept *Grutter*-level deference "to a university's definition of its educational objective." *See id.* However, because he is a strong proponent of rigorous judicial review when racial classifications are at issue, he will likely not object to a decision that removes some of the deferential gloss from the compelling interest analysis.

141. *Cf.*, Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 *How. L.J.* 241, 248 (2006) (discussing the "more flexible, contextualized version of strict scrutiny" embraced in *Grutter*).

142. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–14 (1978) (Powell, J., concurring) ("The freedom of a university to make its own judgments as to education includes

require squaring deference to a university's educational decisions with strict scrutiny review, which requires more than a good faith assurance that the explicit use of race is necessary.¹⁴³ Under *Grutter*'s overly deferential standard, it is virtually impossible for courts to ensure that a university's nebulous claim of insufficient diversity is not pretextual. After *Fisher*, by contrast, future courts probably will be forced to evaluate rigorously whether a university actually needs more diversity in order to attain the educational benefits that flow therefrom (as opposed to simply taking the university at its word), even before reaching the question of whether the particular policy at issue is narrowly tailored.

3. Narrow Tailoring

Any deference the Court is willing to grant UT at the compelling interest stage almost certainly will stop there. While *Grutter* said that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,”¹⁴⁴ the *Fisher* Court may hold that racial classifications can be employed only as “a last resort.”¹⁴⁵ The last resort inquiry would entail a thorough examination of possible race-neutral alternatives, require empirical evidence showing that race is not a dominant admissions factor, and look unfavorably upon race-conscious policies that have only a small effect on minority enrollment.

the selection of its student body.”). A burden-shifting analysis, like the following, could help balance these competing standards. A university's assertion that it needs a more diverse student body (i.e., that it has not yet reached critical mass) would create a rebuttable presumption that it has established a compelling interest in pursuing that goal. An applicant-plaintiff could rebut that presumption with evidence showing that the university can achieve the educational benefits of diversity without using race as a factor in admissions. If the applicant-plaintiff succeeds, the burden would then fall on the university to identify specific educational goals it would achieve by increasing student body diversity through the use of racial preferences. Upon such a showing, a university will have established its compelling interest in creating a more diverse student body. All that would be left is an inquiry into whether the policy the university chose to adopt is narrowly tailored.

143. See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 501 (1989) (“The history of racial classifications in this country suggests that blind judicial deference to . . . pronouncements of necessity has no place in equal protection analysis.”); see also Transcript of Oral Argument at 49, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012) (Sotomayor, J.) (“[W]hen do we stop deferring to the University's judgment that race is still necessary? That's the bottom line of this case.”).

144. *Grutter*, 539 U.S. at 339.

145. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring) (“[I]ndividual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest.”).

After *Fisher*, narrow tailoring could require not only consideration, but attempted implementation of race-neutral alternatives. These alternatives may not be identical for each institution of higher education, depending on its educational mission; but virtually any university will need to have exhausted certain alternatives—like targeted scholarship programs, focused marketing campaigns, and using race-neutral criteria as proxies for race¹⁴⁶—before resorting to racial classifications. As part of this analysis, the Court will want to consider the administrative burden a university might be forced to shoulder in enacting race-neutral policies.¹⁴⁷ Unlike *Grutter*, however, *Fisher* will likely mandate a showing that all practical race-neutral alternatives failed in attaining adequate diversity before permitting the resort to racial classifications.

In response to Justice Kennedy’s dissent in *Grutter*, the Court might also elect to be more skeptical when a university claims that race is only a minor factor in the admission decision. Justice Kennedy, in voting to invalidate Michigan Law School’s race-conscious policy, was concerned that the “Law School made no effort to guard against [the] danger” of race “becom[ing] divorced from individual review.”¹⁴⁸ He premised this conclusion on the law school’s insistence on tracking minority enrollment throughout the admissions cycle, which he thought made race a decisive factor in many admission decisions towards the end of the cycle.¹⁴⁹ In order to guarantee that race never becomes too dominant a factor in admissions, the Court could conclude that tracking the racial composition of the incoming class, when paired with an admissions policy in which race is considered, is a *per se* violation of the narrow tailoring requirement. Under this standard, a university would have to show that it does not “keep ongoing tallies of racial or ethnic composition of [its] entering

146. *Cf. id.* at 789 (suggesting other race-neutral means by which an educational institution “may pursue the goal of bringing together students of diverse backgrounds”).

147. Of course, universities would not be required to implement particularly burdensome race-neutral policies just to “try them out.” A graduate or professional school, for example, would probably not be required to enact a percentage plan, which may be a workable race-neutral alternative only for an undergraduate state institution. *See Grutter*, 539 U.S. at 340 (indicating that the law school is not expected to adopt race-neutral alternatives that would effectively compromise its educational integrity and/or alter the inherent nature of the institution).

148. *Id.* at 392 (Kennedy, J., dissenting).

149. *See id.* at 392–93 (expressing concern that the law school provided no safeguard against the admissions officers’ use of “the [daily] reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School’s goal of critical mass”).

students,”¹⁵⁰ and it would be required to identify sufficient safeguards that protect against an applicant’s race being given too much weight.¹⁵¹ The practical upshot would be that university race-conscious admissions policies would have to be more transparent than was necessary under *Grutter*.

Finally, the Court could further heighten the narrow tailoring standard by concluding that gains in minority enrollment resulting from race-conscious policies must be large enough to warrant the use of race—“a highly suspect tool.”¹⁵² Although this reasoning was implicit in *Grutter*, the Court did not expressly endorse a cost-benefit analysis in that decision. In *Parents Involved*, however, the Court hinted that this reasoning was legitimate.¹⁵³ Fleshed out, the rationale would look like this: Because there is great inherent cost in treating persons differently based on their race, the benefits resulting from such disparate treatment must be at least equally great. How the Court will decide when the effect of race is neither too small nor too large is difficult to predict. It could find that narrow tailoring now requires that race (1) be used in the context of individualized review¹⁵⁴ and (2) effectuate more than a negligible increase in minority enrollment. Although the second requirement begs the initial question (by merely substituting one subjective determinate for another—“negligible” for “too small”), it comports with strict scrutiny by ensuring that race is being used only to the extent necessary to achieve meaningful increases in diversity, as opposed to being used

150. *Id.* Tracking the racial composition of the incoming class creates a significant risk that, until critical mass is attained, race will be given increasingly greater weight as the end of the admissions cycle approaches. Requiring that universities wait until the end of the cycle to evaluate the racial makeup of the incoming class would allow courts to ensure that a university is not pursuing race-based numerical targets under the guise of a holistic review system. If admissions officers do not know how many minority applicants have been admitted, there would be no reason for the weight given to race to change as the cycle wanes.

151. As a practical matter, this may require admissions data showing significant yearly fluctuation in minority enrollment that does not correlate directly with yearly fluctuation in the percentage of underrepresented minorities in the applicant pool. A consistent pattern of minority enrollment that falls within a tight range over a multiple-year span suggests that the university may be pursuing race-based numerical targets. *See Grutter*, 539 U.S. at 384–85 (Rehnquist, C.J., dissenting).

152. *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989).

153. The Court suggested that the “minimal impact” of racial classifications could “cast doubt on [their] necessity,” and noted that “[i]n *Grutter*, the consideration of race was viewed as indispensable in more than tripling minority representation.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734–35 (2007).

154. *See supra* notes 59–63 and accompanying text (highlighting the importance of the individualized review requirement).

for some other, more insidious reason.

In short, after *Fisher*, a university that wants to factor race into admissions will probably have to (1) present tangible evidence that it had not reached a critical mass prior to implementing a race-conscious policy; (2) show that it tried every practical race-neutral alternative before resorting to racial classifications; (3) prevent admissions staff from ever knowing the racial composition of the class prior to the end of the admissions cycle; (4) ensure that race is given just the right amount of weight; and (5) guarantee that its race-conscious policy will continue only for as long as is absolutely necessary.¹⁵⁵

B. Application to UT's Admissions Policy

Armed with a considerably less-deferential standard of review, the Court probably will invalidate UT's use of race in admissions on narrow tailoring grounds. Although the Court might not be willing to defer completely to UT's assertion that it cannot achieve all the educational benefits of diversity at current diversity levels, it will likely be satisfied that UT has done enough to establish a compelling interest in pursuing diversity. The Court could rely, for example, on two studies UT commissioned in 2003, both of which showed that contemporaneous diversity levels were insufficient.¹⁵⁶ That would seem to be enough to pass constitutional muster, even under a less-deferential standard. The decision is well within UT's "expert academic judgment"¹⁵⁷ and moreover is supported with tangible evidence. By pointing to the two studies, the Court can say it is applying strict scrutiny while still acknowledging that universities receive special treatment under the First Amendment. Because UT's policy probably will not survive the narrow tailoring inquiry, it will not be necessary for the Court to spend much time here.

The Court could decide that UT's policy is not narrowly tailored for several reasons. It could hold, for example, that UT has not met its burden of showing that it tried all practical race-neutral alternatives

155. The *Grutter* Court made clear that race-conscious admissions policies, in order to be constitutional, must include "sunset provisions." See *Grutter*, 539 U.S. at 342 ("[A]ll governmental use of race must have a logical end point.").

156. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 631 F.3d 213, 225 (5th Cir. 2011) (noting that the study found that ninety percent of these smaller classes had either one or zero black students), *cert. granted*, 132 S. Ct. 1536 (U.S. Feb. 21, 2012) (No. 11-3345).

157. *Id.* at 232.

before adopting its current race-conscious policy. By trotting out a laundry list of suggestions, the Court could simply say, “try these first.” The Court could hold that the Top Ten Percent Law yields sufficient numbers of minority students each year and therefore precludes UT from experimenting with race-conscious policies. The Court could hold that UT must, at the very least, be able to show the precise effect of its use of race on enrollment numbers, and that its failure in this regard is detrimental to the claim that its policy is narrowly tailored.¹⁵⁸ These possibilities notwithstanding, the Court is likely to focus on the fact that UT’s race-conscious admissions policy has produced only a small increase in minority enrollment.

As discussed above, the Court will likely emphasize that narrow tailoring is “about balancing constitutional costs and benefits.”¹⁵⁹ UT’s use of race may only be a small factor in a system that epitomizes individualized review, but race still has to make more than a negligible difference in minority enrollment, given the inherent cost associated with race-based preferences. UT’s pre-*Grutter* admissions policy produced a class that was 21.4% black and Hispanic.¹⁶⁰ It is true that minority enrollment had reached 25.5%¹⁶¹ by the time Abigail Fisher applied, but all of that increase cannot definitively be attributed to the explicit use of race.¹⁶² Judge Garza estimated that, in the year Fisher applied, the number of minority applicants admitted *because of* race was probably not more than one percent of the incoming class.¹⁶³ Consequently, the Court could conclude that UT’s use of race does not contribute to any meaningful educational benefits that cannot be achieved at current diversity levels, and therefore fails the narrow tailoring test.

In *Grutter*, the law school’s use of race boosted minority enrollment from four percent to fourteen percent.¹⁶⁴ Race was used in the context of a holistic review, and the increases wrought in minority enrollment contributed in a significant way to diverse interaction on

158. *See id.* at 252–53 (Garza, J., concurring) (“[W]ithout the ability to measure the number of ‘but-for’ admits . . . , courts cannot meaningfully evaluate whether a university’s use of race fits its asserted interest narrowly.” (citations omitted)).

159. *Id.* at 263.

160. *Id.* at 224 (majority opinion).

161. *Id.* at 226.

162. *See id.* (“Because of the myriad programs instituted, it can be difficult to attribute increases in minority enrollment to any one initiative.”).

163. *See id.* at 259–62 (Garza, J., concurring) (discussing UT admissions data supporting that estimation).

164. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

campus. It seems that UT, by contrast, cannot credibly argue that enrolling approximately 200 more minority students (assuming, unrealistically, that race was the “but for” cause of admission for all of these applicants) in a class of over 6,000 is tied to any discernible educational benefit. And even if it could, there is no reason to think the same small increase in racial diversity could not be achieved through race-neutral means.

VII. CONCLUSION

What specific educational benefits of diversity does the student body lack? How does the increase in minority enrollment resulting from a race-conscious admissions policy produce such benefits? And why could those benefits not be achieved through race-neutral means? In asking these (or similar) questions, the Court could recast *Grutter* by requiring a closer fit, not just between diversity and the means by which it is pursued, but between diversity and its purported educational benefits. Since *Bakke*, it has been axiomatic that racial diversity cannot be pursued for its own sake; it must be tied to the academic good that justifies racial classifications in higher education.¹⁶⁵ The Court will probably hold that UT’s race-conscious system conflicts with this principle and therefore violates the Equal Protection Clause.

In deciding *Fisher*, the Court likely will put to rest, at least for now, doubts surrounding the constitutional legitimacy of affirmative action. But after *Fisher*, the explicit use of race in university admissions, like abortion after *Casey*, may be subject to a new, more stringent set of rules.

165. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J., concurring).