

# *FISHER V. UNIVERSITY OF TEXAS:* WHO PUT THE HOLES IN “HOLISTIC”?

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## INTRODUCTION

In *Fisher v. University of Texas at Austin*,<sup>1</sup> the Supreme Court altered, in subtle but important ways, the constitutional principles governing race-conscious affirmative action programs at American universities. This Article charts the history of the *Fisher* litigation, examines the Supreme Court’s holding and its consequences, explores the factors that contributed to the deep skepticism held by a majority of the Justices on the Supreme Court to “holistic” race-conscious admissions programs, and reflects on the future of holistic admissions in American higher education.

It may be tempting to dismiss *Fisher* as a “non-event” that avoided any genuine examination of the principles governing affirmative action in higher education, effectively maintaining the status quo.<sup>2</sup> Such a minimalist reading of *Fisher*, however, would be a mistake. *Fisher* did alter the law, by eliminating the substantial deference the Supreme Court had previously been willing to extend to university

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1. 133 S. Ct. 2411 (2013).

2. On September 27, 2013, the Civil Rights Division of the United States Department of Justice and the United States Department of Education issued a letter to American college and university presidents providing “guidance” on *Fisher* that took the position that *Fisher* did not alter existing law. Letter from U.S. Dep’t of Justice and U.S. Dep’t of Educ. to College and Univ. Presidents (Sept. 27, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201309.html>. Specifically, the letter notes that the Supreme Court affirmed that “colleges and universities have a compelling interest in achieving the educational benefits that flow from a racially and ethnically diverse student body and can lawfully pursue that interest in their admissions programs,” and that the educational benefits of diversity recognized by the Court “include cross-racial understanding and dialogue, the reduction of racial isolation, and the breaking down of racial stereotypes.” *Id.*

educators on whether race-conscious programs are necessary to achieve the benefits of a diverse student body. *Fisher* replaces that deference with a rigorous rendition of strict scrutiny equal protection review that will prove, in future cases, to exert a potent presumption against the validity of race-conscious affirmative action programs. The Supreme Court's new skepticism is fueled by a deep suspicion on the part of a majority of the current Justices that the "holistic" approach to affirmative action admissions does not live up to its advertising. *Fisher* portends significant future restrictions on race-conscious affirmative action admissions programs—perhaps their full demise. American universities are themselves complicit in this demise, for having failed in the eyes of a majority of the Justices to convincingly "walk the walk" on holistic admissions, despite an exuberant tendency to "talk the talk."

Although the legal battles in *Fisher*, and in other challenges to affirmative action, will continue to play out in courts, those of us in higher education will do well to rethink our own commitments to genuinely holistic approaches to admissions, entirely aside from what the courts finally tell us we may or may not do. Authentically holistic admissions programs that treat students as more than mere numbers hold great promise for the nation, and for higher education. Yet, the *Fisher* litigation teaches that federal courts—including a majority of the Justices on the Supreme Court—may not be willing to accept, as a matter of deferential good faith, the claim by those in higher education that approaches to holistic admissions are, "on the street," quite as idealistically holistic as advertised. Perhaps that is not such a bad thing.

## I. THE LEGAL BACKDROP TO THE *FISHER* LITIGATION

Understanding the Supreme Court's decision in *Fisher* requires some historical context. This Part discusses the Court's affirmative action jurisprudence leading up to *Fisher* and highlights the incremental development of race-conscious admissions policies by state universities in Texas.

## A. Bakke

*Regents of the University of California v. Bakke*<sup>3</sup> was a challenge to the affirmative action admissions program of the Medical School of the University of California at Davis, in which sixteen admissions seats at the Medical School were reserved for members of minority groups.<sup>4</sup> The Supreme Court was sharply divided in the case, with six Justices issuing separate opinions, none of which commanded more than four votes. Justice Lewis Powell was the man in the middle. His opinion controlled the outcome, and largely set the stage for the next three decades of affirmative action law and policy in American higher education.<sup>5</sup>

Justice Powell’s fateful opinion in *Bakke* rejected a two-tiered approach to racial classifications, which would have distinguished between benign and invidious classifications.<sup>6</sup> Powell insisted instead that all racial classifications be measured under the strict scrutiny test, though he at times used the phrase “most exacting scrutiny.”<sup>7</sup> Powell thereby rejected the view that the Constitution was colorblind and that absolutely all racial classifications were invalid, without exception.<sup>8</sup>

The Medical School proffered four justifications for its affirmative action program: (1) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession”; (2) “countering the effects of societal discrimination”; (3) “increasing the number of physicians who will practice in communities currently underserved”; and (4) “obtaining the educational benefits that flow from an ethnically diverse student

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3. 438 U.S. 265 (1978).

4. *Id.* at 277–79.

5. *Id.* at 269; see also Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 23 (1979); John Jeffries, *Bakke Revisited*, 55 SUP. CT. REV. 1, 10 (2003) (“Powell’s fifth vote rested on a narrower rationale and a more demanding standard of review. Even though no one shared Powell’s position, it nevertheless ended up defining the kind of affirmative action that a majority of the Court was prepared to uphold.”).

6. *Bakke*, 438 U.S. at 294–95 (“It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. The Fourteenth Amendment is not directed solely against discrimination due to a two-class theory . . . .” (citation omitted) (internal quotation marks omitted)).

7. *Id.* at 300.

8. *Id.* at 272 (“I also conclude for the reasons stated in the following opinion that the portion of the court’s judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed.”).

body.”<sup>9</sup> Justice Powell rejected the first three justifications. He did accept as a constitutionally permissible “compelling interest,” however, the Medical School’s pursuit of educational benefits, formal and informal, that flow from a more diverse student body.<sup>10</sup> Powell argued that an affirmative action program could pass constitutional muster if it used race as a flexible “plus factor” in admissions, employed a broad definition of diversity that included characteristics other than race, and avoided strict quotas or set-asides of the sort utilized by the Medical School.<sup>11</sup>

Powell concluded that “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.”<sup>12</sup> Arguing that the pursuit of a diverse student body was of “paramount importance” to the fulfillment of the university’s mission,<sup>13</sup> Powell stated that “even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial.”<sup>14</sup> Even so, Powell held that in setting aside a specific number of minority seats, the Medical School violated the Equal Protection Clause:

[T]he state interest that would justify consideration of race or ethnic background . . . 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, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner’s special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.<sup>15</sup>

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9. *Id.* at 306.

10. *Id.* at 312–21.

11. *Id.*

12. *Id.* at 313.

13. *Id.*

14. *Id.*

15. *Id.* at 315.

Holding up the Harvard admissions program as a foil, Justice Powell asserted that at Harvard, “ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats.”<sup>16</sup> Although Justice Powell did not use the word “holistic” in his opinion, universities and subsequent judicial opinions would come to use the term as shorthand for the approach Justice Powell endorsed.

### *B. Hopwood and the Texas Top Ten Percent Law*

In *Hopwood v. Texas*,<sup>17</sup> decided in 1996, the Court of Appeals for the Fifth Circuit held that the University of Texas Law School’s race-conscious admissions program was unconstitutional.<sup>18</sup> *Hopwood* was a bold decision for its time. In the mid-1990s most American universities, public and private, had been using the holistic approach to race-conscious admissions approved by Justice Powell in *Bakke*.

Nonetheless, the Fifth Circuit struck down the Texas Law School admissions program in an unflinching decision that held, first, that Justice Powell’s solo opinion was simply the vote of one Justice and not binding as precedent,<sup>19</sup> and second, that it was not sound constitutional law.<sup>20</sup> Most pointedly, the Fifth Circuit flatly rejected the argument that the pursuit of a diverse student body qualified as a compelling governmental interest sufficient to justify the race-conscious admissions program under strict scrutiny.<sup>21</sup> Though technically binding only on the Texas Law School, *Hopwood* was interpreted by the Texas Attorney General as effectively banning race-conscious admissions programs in all of the state’s public universities and colleges, at all levels of higher education.

*Hopwood* had a short shelf life. The Texas state legislature dealt the first blow by crafting an end-run around the decision in 1997 by

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16. *Id.* at 317.

17. 78 F.3d 932 (5th Cir. 1996).

18. *Id.* at 955, 962.

19. *Id.* at 944 (“[A]ny consideration of race . . . for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell’s argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case.”).

20. *Id.* at 944–48 (concluding that “the use of race to achieve a diverse student body, [even] as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny”).

21. *Id.* at 945 (“In short, there has been no indication from the Supreme Court, other than Justice Powell’s lonely opinion in *Bakke*, that the state’s interest in diversity constitutes a compelling justification for governmental race-based discrimination.”).

passing “The Top Ten Percent Law.”<sup>22</sup> This statute provided that any student finishing in the top ten percent of his or her high school class must be granted automatic admission to any Texas state university.<sup>23</sup> Although the Fifth Circuit’s ruling in *Hopwood* remained the governing law in Texas, the impact of *Hopwood* was muted by the legislative enactment.<sup>24</sup>

The Top Ten Percent Law was in a curious sense both race-neutral and race-based. On its surface it was entirely race-neutral, creating a reward for any student finishing in the top ten percent of his or her class. Yet race was indisputably the animating purpose behind the law.<sup>25</sup> In operation it served, at least modestly, to enhance diversity at Texas public universities (including the University of Texas at Austin), because some Texas high schools were predominantly populated by students of only one race.<sup>26</sup> The Rio Grande Valley, for example, is overwhelmingly Hispanic, and certain urban areas in large cities such as Dallas and Houston are overwhelmingly African-American.<sup>27</sup> Given that Texas contained a share of high schools that were almost entirely African-American, Hispanic, or Caucasian, the basic math of the Top Ten Percent Law was quite simple. In offering automatic admission to top-ten-percent students from each high school in the state, the diversity in the top ten percent pool, and by extension, the diversity in the entering college class at the University of Texas at Austin, would be enhanced. With some irony, the Top Ten Percent Law promoted diversity precisely because so much of the State of Texas was still *de facto* segregated.<sup>28</sup>

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22. TEX. EDUC. CODE ANN. § 51.803 (West 2013).

23. *Id.* § 51.803(a).

24. See Gerald Torres, “Examining Diversity” in *Education: Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Edge*, 103 COLUM. L. REV. 1596, 1600–01 (2003) (“The University of Texas has created a more racially, geographically, and socioeconomically diverse class, and it has expanded the number of feeder high schools yielding an academically successful student body.”).

25. See Brief for the Respondent at 8, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (“An acknowledged purpose of the law was to increase minority admissions given the loss of race-conscious admissions.” (citation omitted)).

26. Texas public high schools are highly segregated in certain regions of the state. The predominance of public schools dominated by students from one racial group reflects the long-standing segregated housing patterns that are common throughout the United States. See generally Rodney Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980s*, 55 S. CAL. L. REV. 947 (1985); Rodney Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891, 892 n.1 (1981).

27. See Brief for the Respondents, *supra* note 25, at 8.

28. See Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation*,

### C. Grutter and Gratz

The second blow to *Hopwood* was judicial. In 2003, the Supreme Court rendered its bookend decisions in *Grutter v. Bollinger*<sup>29</sup> and *Gratz v. Bollinger*.<sup>30</sup> In *Grutter*, the Court, in a five-to-four decision, upheld the University of Michigan Law School’s affirmative action admissions program.<sup>31</sup> Justice O’Connor, writing for a five-Justice majority (comprised of Justices O’Connor, Breyer, Ginsburg, Stevens, and Souter), embraced Justice Powell’s approach in *Bakke*, sustaining as constitutionally legitimate the Michigan Law School’s aspiration to enroll a “critical mass” of minority students.<sup>32</sup> The Michigan Law School’s admission committee focused on a combination of traditional indicia of academic ability, such as LSAT scores and undergraduate GPA, and a more flexible assessment of the applicant’s talents, experiences, and potential.<sup>33</sup> The process involved weighing both “hard data” and “soft variables,” which included “the enthusiasm of the recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, and the areas and difficulty of undergraduate course selection.”<sup>34</sup>

In so doing, the Michigan Law School sought to achieve a “mix of students with varying backgrounds and experiences who [could] respect and learn from one another.”<sup>35</sup> It aspired to “achieve diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”<sup>36</sup> The language of the Michigan Law School’s policy included both a broad conception of diversity not limited to race and ethnicity, and a *special emphasis* on racial and ethnic diversity.<sup>37</sup> The policy thus acknowledged “many possible bases for diversity admissions,” and allowed substantial

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*Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1817–19 (2004).

29. 539 U.S. 306 (2003).

30. 539 U.S. 244 (2003).

31. *Grutter*, 539 U.S. at 343–44.

32. *Id.* at 323–35.

33. *Id.* at 314.

34. *Id.* at 315.

35. *Id.* at 314. In addition, the Michigan Law School considered letters of recommendation, a personal statement, and an essay describing what the applicant could contribute to life and diversity at the school. *Id.* at 315.

36. *Id.* (citation omitted) (internal quotation marks omitted).

37. *Id.* at 315–16 (“The policy does, however, reaffirm the Law School’s longstanding commitment to . . . racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, . . . who without this commitment might not be represented in our student body in meaningful numbers.” (citation omitted)).

weight to be given in the admissions process to a wide array of experiences and backgrounds.<sup>38</sup> Yet at the same time, the policy reaffirmed and entrenched the Michigan Law School's commitment to the enrollment of a "critical mass" of racial or ethnic minority students.<sup>39</sup>

Whereas the Fifth Circuit in *Hopwood* had argued that the diversity rationale embraced by Powell in *Bakke* had garnered only his one vote, now there were five votes.<sup>40</sup> The majority in *Grutter* held that the Michigan Law School's compelling interest in creating a diverse student body was being pursued in a constitutionally allowable manner. The admissions regime met strict scrutiny's test of narrow tailoring—no quotas or set-asides were used, every student's file was considered holistically and individually, and race was not an exclusive factor but simply one ingredient in a complex bouillabaisse.<sup>41</sup>

Conversely, the Court in *Gratz* struck down the University of Michigan's undergraduate admissions program.<sup>42</sup> Although the undergraduate program also sought a diverse student body, the admissions program for undergraduates appeared more mechanistic than holistic. Michigan's undergraduate admissions system used a selection method under which every applicant from an "under-represented" racial or ethnic minority group was automatically awarded twenty points of the one hundred needed to guarantee admission,<sup>43</sup> rendering the program dangerously close to the sort of

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38. *Id.* at 316.

39. *Id.*

40. Commentators have often stressed the linkage between the Court's opinion in *Grutter* and Justice Powell's opinion in *Bakke*. See Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 548 (2003) ("Justice O'Connor quoted extensively from Justice Powell a whopping sixteen times. To endorse and cite [*Bakke*] and suggest independent agreement with it is one thing; to cannibalize all its key formulations suggests that the case is doing a great deal of the work."); Susan Low Bloch, *Looking Ahead: The Future of Affirmative Action*, 52 AM. U. L. REV. 1507, 1513 (2003) (stating that the Court in *Grutter* "made the very significant decision that the University's desire to achieve diversity in its student body was in fact a compelling governmental interest, relying heavily on the reasoning of Justice Powell's lone opinion in *Bakke*"); Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1590–91 (2003); Erwin Chemerinsky, *October Term 2002: Value Choices by the Justices, Not Theory, Determine Constitutional Law*, 6 GREEN BAG 2D 367, 369 (2003) ("The bottom line is that the Court adhered to the position articulated by Justice Lewis Powell in *Bakke* a quarter century ago: Diversity is a compelling interest in education and universities may use race as a factor to ensure diversity, but quotas or numerical quantification of benefits is impermissible.").

41. *Grutter*, 539 U.S. at 335–44.

42. *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003).

43. *Id.* at 255 ("Under this new system, applicants could receive points for



quota disapproved by Justice Powell in *Bakke*.<sup>44</sup> The undergraduate admissions program appeared to favor race for the sake of race alone, at least to the extent that in a quantifiable sense, points were explicitly awarded for membership in certain racial groups.<sup>45</sup>

## II. ABIGAIL FISHER’S SUIT AGAINST THE UNIVERSITY OF TEXAS

In 2008, Abigail Fisher sued the University of Texas on the ground that she was denied undergraduate admission because she was white. She claimed that the University’s race-conscious admissions program violated the Equal Protection Clause of the Fourteenth Amendment.<sup>46</sup>

Fisher was in the top twelve percent of her high school class, and thus could not benefit from Texas’s Top Ten Percent Law.<sup>47</sup> But Fisher wanted to attend the University of Texas, so she applied for admission for one of the remaining seats in the freshman class.<sup>48</sup> That year, approximately eighty-one percent of the incoming class would be filled by the system mandated by the Top Ten Percent Law.<sup>49</sup> Thus, nineteen percent of the admission slots in the entering class were left open for students admitted outside the Ten Percent Law regime; Fisher could only compete for one of these remaining slots.<sup>50</sup> To determine admissions for the remaining slots, the University

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underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying . . .”).

44. Interestingly, seven Justices saw no meaningful difference between the admissions policies at issue in *Grutter* and *Gratz*. Only Justices O’Connor and Breyer were in the majority in both cases. 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, 518 (2007) (arguing that the *Gratz* policy was actually more narrowly tailored than the policy in *Grutter*).

45. *Gratz*, 539 U.S. at 274–75.

46. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009).

47. See Second Amended Complaint at 3, *Fisher*, 645 F. Supp. 2d 587 (No. 1:08-cv-00263-SS) (“At the time of her application to UT Austin, Ms. Fisher was ranked 82 out of 674 students in her graduating class. Thus, Ms. Fisher was ranked in approximately the top 12 percent of her class . . .”).

48. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013) (noting that Fisher applied to the University in 2008 and was rejected).

49. *Fisher*, 645 F. Supp. 2d at 595.

50. See *id.* at 596 (“The [Academic Index/Personal Achievement Indices] system is used to make admission decisions as to . . . non-Top Ten Percent Texas resident applicants . . .”). The University’s individual academic programs admit students using the AI/API standards which combine two metrics: the Academic Index (AI), a combination of (1) high school GPA, (2) completion of the University’s required high school curriculum, (3) student’s extent of exceeding that curriculum, and (4) SAT Score; and the Personal Achievement Indices, reflecting scores on two essays and a “personal achievement score, representing a holistic evaluation of the applicant’s entire file.” *Id.*

incorporated race-conscious affirmative action policies, claiming to employ a holistic approach that included race as one “plus factor” in admissions, of the sort approved by the Supreme Court in *Grutter*.<sup>51</sup>

The manner in which Fisher framed her claim proved to be extremely important. She could have launched a frontal assault on *Grutter*, inviting the Supreme Court to repudiate it.<sup>52</sup> Justice O’Connor’s opinion in *Grutter* had suggested, after all, that the holding might not always be valid: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>53</sup> Fisher might have tried to persuade the Court that twenty-five years should be reduced to ten, and that the experiment in Texas, with its Top Ten Percent Law, demonstrated that viable race-neutral alternatives could substitute for holistic race-conscious affirmative action. The gamble with such a strategy would have been that with Justice O’Connor’s departure from the Court, there were now five votes poised to end affirmative action: Chief Justice Roberts, and Justices Kennedy, Scalia, Thomas, and Alito.

Fisher, however, chose a more constrained litigation strategy. Rather than staking her claim on the overruling of *Grutter*, she argued that the Texas admissions program violated the Equal Protection Clause even if *Grutter* remained good law.<sup>54</sup> In essence, Fisher argued that because the Top Ten Percent Law *already* increased racial diversity at Texas, the University could not engage in what was akin to piling on—seeking yet additional diversity in rounding out the profile of the student body.<sup>55</sup>

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51. See *Fisher*, 133 S. Ct. at 2416 (noting the University’s method of employing race as a “plus” factor in the Personal Achievement Index is the “program at issue here”).

52. Under this approach, she would have almost certainly lost in the district court and court of appeals, for those lower courts would have been without authority to disobey the standing law of the land. Yet she might still have framed her case in a manner that built a record and positioned her claim to urge the Supreme Court to overrule *Grutter*.

53. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

54. See Brief for the Petitioner at 26–27, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (arguing that *Grutter* permits race to be used as a factor to achieve diversity but that the University’s asserted interests for considering race do not relate to the internal university experience, and are thus outside the scope permitted by *Grutter*).

55. *Id.* at 34 (“With the Top 10% Law in operation then, UT was one of the most diverse public universities in the nation . . . . Neither *Grutter* nor any of this Court’s other decisions authorizes ‘gratuitous racial preferences’ . . . .” (citation omitted)).

For its part, Texas argued that the Top Ten Percent Law did not achieve *sufficient* diversity, either quantitatively or qualitatively, to satisfy its compelling interest in achieving a more diverse student body.<sup>56</sup> Texas also argued that the admissions system it used was precisely what the Supreme Court had already approved in *Grutter*.<sup>57</sup> If Fisher was not challenging the ruling in *Grutter*, Texas reasoned, and if Texas was simply following *Grutter*'s roadmap, then it had done nothing unconstitutional.<sup>58</sup>

### III. THE ORAL ARGUMENT IN THE SUPREME COURT

Oral arguments in the Supreme Court are frequently parsed in news reports on the day or two after they take place. Typically, however, once a decision in a case is handed down, it is the decision itself, and not the briefs or oral arguments that preceded it, that is analyzed and examined. Thus, the exercise that follows is “extra-legal” in that it is offered for insight, not precedent. The oral argument in *Fisher* is worth parsing in some detail, for what it reveals about the majority opinion that later emerged, and for what it may tell us about the future of affirmative action after *Fisher*.

Two phrases rose to special prominence during the oral argument in *Fisher*. The first was the term “critical mass” of minority students, the *achievement* of which came as a pre-approved goal for universities under *Gutter*.<sup>59</sup> The second was the term “holistic admissions,” the shorthand commonly employed to describe the means approved in *Grutter* for the attainment of a critical mass.<sup>60</sup> The oral argument in

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56. See, e.g., Brief for the Respondent, *supra* note 25, at 9 (“Even with the top 10% law and UT’s race-neutral diversity initiatives, African-American and Hispanic enrollment at best remained stagnant compared to the pre-*Hopwood* period.”).

57. *Id.* at 11 (“The 2004 Proposal [challenged here] embraced the diversity interest that this Court found compelling in *Grutter* . . .”).

58. *Id.* at 38 (“UT has carefully followed this Court’s teachings [in *Grutter*] to ensure that race is only one factor among many . . . . In petitioner’s view, those instructions were not a road map to the safe harbor recognized by *Bakke* and *Grutter*, but a trap leading to unconstitutionality.”).

59. See, e.g., Transcript of Oral Argument at 10, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter *Fisher* Oral Argument] (Bert Rein, counsel for Fisher) (“In order to satisfy *Grutter*, you first have to say that you are not just using race gratuitously, but it is in the interest of producing a critical mass of otherwise underrepresented students. . . . [T]he first question is, absent the use of race, would we be generating a critical mass.”).

60. See, e.g., *id.* at 65 (Donald Verrilli, Solicitor General) (“There’s no quota. Everyone competes against everyone else. Race is not a mechanical automatic factor. It’s an holistic individualized consideration. And because of the way the process is structured, they do not monitor the racial composition on an ongoing basis.”).

*Fisher*, on its face, appeared to be an exercise in exploring whether the University of Texas admissions regime was faithful to those concepts within the confines of *Grutter*. Yet there was brightly visible an undercurrent of deep cynicism—so brightly visible as to not really be fairly called “beneath the surface” of the questions of the most skeptical Justices<sup>61</sup>—regarding the practical, moral, and legal legitimacy of the terms themselves.

The anti-affirmative action Justices thus challenged the University of Texas and its defenders to articulate how and when the University would know that a “critical mass” of minority students had been enrolled.<sup>62</sup> The oral argument is telling in its lack of any clear and crisp answer. Solicitor General Donald Verrilli gave the question a valiant try. In an elegant soliloquy, General Verrilli argued that America’s national “strength comes from people of different races, different creeds, different cultures, uniting in a commitment to freedom, and to more a perfect union.”<sup>63</sup> This statement conjured the fervor of affirmative action’s most passionate proponents, in arguing that meaningful diversity—diversity that will genuinely enrich the educational experience of students at American universities, exposing students to a rainbow tapestry of fellow students from diverse races, ethnic groups, religions, cultures, nations, or life experiences—necessitates that there be a sufficient representation of each group in the mix to make the cross-exposure meaningful. To these arguments, Texas and its supporting amici also argued that a critical mass of representation is required to ward off the pernicious side-effects of tokenism and isolation.<sup>64</sup>

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61. I count as the most openly skeptical Justices Chief Justice Roberts, Justice Alito, Justice Scalia, and Justice Kennedy. Justice Thomas was, as is his custom, quiet during the oral argument, though his past writings on affirmative action leave no doubt that he is a passionate opponent of affirmative action—as affirmed in his concurring opinion in *Fisher* itself, in which he again declared that he would overrule *Grutter*. *Fisher*, 133 S. Ct. at 2429 (Thomas, J., concurring).

62. See, e.g., *Fisher* Oral Argument, *supra* note 59, at 20 (Alito, J.) (“Mr. Rein, do you understand what the University of Texas thinks is the definition of a critical mass? Because I don’t.”).

63. *Id.* at 72.

64. See, e.g., Brief for the Respondent, *supra* note 25, at 41 (“[UT] based its determination that UT had not yet reached a critical mass in 2004 on hard data on minority admissions, enrollment and racial isolation at UT.”); Brief Amicus Curiae of the Society of American Law Teachers in Support of Respondents at 11, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (“Campus diversity permits more engaging and eye-opening classroom discussions, breaks down stereotypes, and prepares students to be leaders in an increasingly globalized and diverse business world. A diverse classroom also prevents racial isolation and tokenism, which can hinder learning environments for all students.”).

A palpable suspicion on the part of the skeptical Justices permeated the oral argument, however, as those Justices asked questions manifestly distrustful of both the conceptual coherence and practical execution of the goals of the University.<sup>65</sup> Fisher’s advocate, Bert Rein, repeatedly argued that the University had abdicated its threshold responsibility under *Grutter* to define or establish a working target for obtaining a critical mass of minority students.<sup>66</sup> Chief Justice Roberts questioned how the Supreme Court was supposed to perform its task of deciding whether the University’s pursuit of a critical mass of minority students was constitutional if the University would not or could not explain how it would know when it achieved a critical mass.<sup>67</sup>

Additionally, the critical Justices were openly antagonistic to the University’s approach to gathering data about the profile of its student body. The University relied entirely on an applicant’s *self-description* of racial or ethnic identity.<sup>68</sup> Chief Justice Roberts was plainly disturbed by the lack of any objective standard to determine whether a student was appropriately classified. “I need to figure out exactly what these numbers mean,”<sup>69</sup> the Chief Justice stated. “Should someone who is one-quarter Hispanic check the Hispanic box or some different box?”<sup>70</sup> Pressing the point, the Chief Justice asked if it would violate the University’s honor code for someone who is one-eighth Hispanic to check the Hispanic box.<sup>71</sup> Justice Scalia pushed the fraction to 1/32nd.<sup>72</sup> The University’s counsel ultimately conceded that the University made no effort to verify the declared racial identification of students, but sought refuge in the fact that it was not

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65. See, e.g., *Fisher* Oral Argument, *supra* note 59, at 46 (Roberts, C.J.) (“I understand my job, under our precedents, to determine if your use of race is narrowly tailored to a compelling interest. The compelling interest you identify is attaining a critical mass of minority students at the University of Texas, but you won’t tell me what the critical mass is.”).

66. *Id.* at 13. Bert Rein made this point repeatedly in his argument on Fisher’s behalf, including to questions posed by Justices Sotomayor and Scalia. See *id.* (Bert Rein, counsel for Fisher) (“[T]here was no effort in this case to establish even a working target for critical mass. . . . They just used words and they said we’ve got to do more. So they never answered the predicate question which *Grutter* asks: Absent the use of race, can we generate a critical mass?”).

67. *Id.* at 32 (Roberts, C.J.) (“So how are we supposed to tell whether this plan is narrowly tailored to that goal?”).

68. *Id.* at 32–34.

69. *Id.* at 32.

70. *Id.*

71. *Id.* at 33.

72. *Id.* at 35 (Scalia, J.) (“[D]id they require everybody to check a box or they have somebody figure out, oh, this person looks 1/32nd Hispanic, and that’s enough?”).

alone. According to the University's counsel, "no college in America," including the Ivy Leagues and the Little Ivy Leagues,<sup>73</sup> engaged in such verification.<sup>74</sup>

The oral argument grew particularly poignant when the questioning turned to differences in the approach the University took toward students from different ethnic groups, most notably students of Asian descent. Fisher argued that the University effectively discriminated *against* Asian Americans, who did not receive any plus points for being members of an ethnic minority. The University argued that it did not need to prime the pump to enroll more students of Asian descent, as their numbers were already robust.<sup>75</sup> Riding this point, Justice Alito asked the lawyer for the University, "How do you justify lumping together all Asian Americans?"<sup>76</sup> Did the University believe, Justice Alito asked, that it had a critical mass of Filipino Americans?<sup>77</sup> Cambodian Americans?<sup>78</sup>

The questions asked by the skeptical Justices plainly exposed their concern that "critical mass" was largely a euphemism invoked to disguise what was really going on: the use of a numbers-driven quasi-quota in which the actual goal, though never explicitly articulated, was to achieve a student body that roughly mirrored the demographics of the State of Texas. Such a regime would plainly be forbidden—it would constitute the very pursuit of race for the sake of race alone that Justice Powell had rejected as constitutionally impermissible in *Bakke*.<sup>79</sup>

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73. *Id.* at 33.

74. *Id.* Additionally, Justice Scalia, exploring the granular texture of the critical mass concept, asked whether the critical mass determination should be made in reference to the "school at large," or rather "class by class." *Id.* at 34. The University's counsel stated that the University only asserted a compelling interest in the diversity of its student body as a whole, and not classroom by classroom. *Id.*

75. *See id.* at 29 (Bert Rein, counsel for Fisher) ("They say, we don't worry about Asians, there are a lot of Asians, it's a demographic measure, which is a forbidden measure. They are in excess of their share of the Texas population.").

76. *Id.* at 52.

77. *Id.*

78. *Id.*

79. *See, e.g.,* *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2424 (2013) (Thomas, J., concurring) ("Attaining diversity for its own sake is a nonstarter. As even *Grutter* recognized, the pursuit of diversity as an end is nothing more than impermissible 'racial balancing.'"). The University insisted that it had not adopted such a simplistic system designed to achieve racial balance, notwithstanding questions asking whether this was really so. *Fisher* Oral Argument, *supra* note 59, at 39–40 (Alito, J.) ("Is the critical mass for the University of Texas dependent on the breakdown of the population of Texas?"). Justice Alito, for example, asked pointedly whether the definition of critical mass in Texas would be different from the definition in neighboring New Mexico: "But would 3 percent be enough in New Mexico, your bordering

The most telling moment in the oral argument surrounded a hypothetical. Counsel for the University was drawing a comparison between the results obtained under the Top Ten Percent Law, in which minority students “tend to come from segregated, racially-identifiable schools,”<sup>80</sup> and the characteristics of minority students who are admitted under the holistic approach to admissions.<sup>81</sup> In its principal brief, the University went to great lengths to explain how the minority students admitted under holistic review are generally more academically qualified than the minority students admitted under the Top Ten Percent Law:

African-American and Hispanic students admitted through holistic review are, on average, more likely than their top 10% counterparts to have attended an integrated high school; are less likely to be the first in their families to attend college; tend to have more varied socioeconomic backgrounds; and, on average, have higher SAT scores than their top-10% counterparts.<sup>82</sup>

These more qualified students, the University argued, have great potential to serve as a “bridge” for promoting cross-racial understanding, which in turn might help break down racial stereotypes—stereotypes that the University argued are often reinforced by the results achieved under the Top Ten Percent Law.<sup>83</sup>

The University in its brief then posed a hypothetical:

The African-American 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 (or attends an elite private school that does not rank) cannot be admitted under the top 10% law. Petitioner’s position would forbid UT from considering such a student’s race in holistic review as well, even though the admission of such a student could help dispel stereotypical assumptions (which actually may be reinforced by the top 10% plan) by increasing diversity within diversity.<sup>84</sup>

This hypothetical drew fire in the oral argument. Should such an applicant be the beneficiary of racial “plus points” in the admissions process? What all the Justices surely knew was that American

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state, where the African American population is around 2 percent?” *Id.* at 48.

80. *Fisher* Oral Argument, *supra* note 59, at 42.

81. *Id.*

82. Brief for the Respondent, *supra* note 25, at 33–34.

83. *Id.* at 34.

84. *Id.*

universities typically perceive such an applicant as highly desirable. The brief argued such students tend to be heavily recruited because they are often academically strong students who tend to promote cross-racial understanding and break down stereotypes. Even so, there is a more cynical narrative: that admission of such students improves both a university's diversity and academic profiles, enhancing its rankings and prestige. When the "privileged Dallas student" hypothetical came up in the oral argument, Justice Alito lamented: "I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds."<sup>85</sup> The University, Justice Alito complained, was making the claim that the Top Ten Percent Law did not admit enough African-American or Hispanic students from *privileged* backgrounds, an argument that Justice Alito found deeply troubling.<sup>86</sup>

When counsel for the University responded that the Court had approved this practice in *Grutter* and in *Bakke*, Justice Kennedy, who would emerge as the author of the *Fisher* majority opinion, made a statement that proved highly prescient: "So what you're saying is that what counts is race above all."<sup>87</sup> Riding over the advocate's denial, Justice Kennedy insisted that this was the necessary conclusion to be drawn from Texas's answer to Justice Alito's questions. "You want underprivileged of a certain race and privileged of a certain race," Kennedy observed. "So that's race."<sup>88</sup>

## VI. A CLOSE ANALYSIS OF THE SUPREME COURT'S DECISION IN *FISHER*

### A. *Fisher's Three Key Questions*

At least as measured by the vote, *Fisher* was a surprise to many. The decision was seven-to-one, with only Justice Ginsburg dissenting.<sup>89</sup> Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts, and Justices Scalia, Thomas, Breyer, Alito, and

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85. *Fisher* Oral Argument, *supra* note 59, at 43.

86. *Id.* at 44 (Alito, J.) (questioning whether a minority applicant, whose parents may both have graduate degrees and earn income that puts the family in the top one percent of earners in the country, "deserve[s] a leg-up against . . . an Asian or a white applicant whose parents are absolutely average in terms of education and income").

87. *Id.* at 45.

88. *Id.*

89. Because Justice Kagan had participated in earlier stages in the litigation while serving as Solicitor General in the early years of the administration of President Obama, she recused herself from the case in the Supreme Court.



Sotomayor.<sup>90</sup> Justices Scalia and Thomas, though joining in the opinion of Justice Kennedy, also wrote concurring opinions.<sup>91</sup>

To clearly define what *Fisher* portends, it is useful to tease out the three critical and distinct issues addressed in the case. First, in applying the compelling governmental interest requirement of the first prong of the strict scrutiny test, may universities continue to rely on the goal of “diversity,” defined to include overt consideration of race and ethnicity, as a compelling governmental interest?<sup>92</sup> Second, in applying the narrow tailoring requirement of the second prong of strict scrutiny, what level of deference must courts show to a university’s decision to adopt a race-conscious admissions program, as opposed to a race-neutral alternative?<sup>93</sup> Third, in applying the narrow tailoring requirement of the second prong of strict scrutiny, what level of deference must courts show to a university’s decisions regarding the specific elements of its particular race-conscious admissions program?<sup>94</sup> Each question will be explored in turn.

### 1. The Status of “Diversity” as a Compelling Interest

The answer to the first of the three questions posed above—whether universities may continue to rely on “diversity,” defined to include race and ethnicity, as a compelling governmental interest—is: “Yes, but only for the time being, and stay tuned for further developments.” The Court in *Fisher* accepted diversity as a compelling interest only because *Fisher* chose not to frontally assault this aspect of *Grutter*.<sup>95</sup> But there is language in *Fisher* clearly signaling the Court’s willingness to revisit this issue, and also clearly signaling the Court’s suspicion that the invocation of diversity by American universities may be a sleight-of-hand, a euphemism disguising what may really be going on—the pursuit of the unconstitutional goal of

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90. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2414 (2013).

91. *Id.* at 2422.

92. *See id.* at 2419 (“There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity.”).

93. *See id.* at 2419–20 (recognizing, on the one hand, that the University’s academic judgment identifying diversity as “integral to its mission” warrants some judicial deference, but cautioning, on the other hand, that a court must engage in “a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications”).

94. *Id.* at 2420 (stating that the University receives no deference with respect to the question of whether “the means chosen to achieve diversity are narrowly tailored to [the] goal [of diversity in the student body]”).

95. *See id.* at 2419 (“[T]he parties here do not ask the Court to revisit that aspect of *Grutter*’s holding.”).

racial balancing for its own sake.<sup>96</sup>

Justice Kennedy's seven-Justice majority opinion, as well as the concurrences of Justices Scalia and Thomas, revealed the significance of Fisher's strategic decision to refrain from asking the Supreme Court to overrule *Grutter*. Justice Scalia's short concurrence noted that though he continued to adhere to the views he expressed in *Grutter*, that a university's interest in the educational benefits of diversity could not justify racial preferences in university admissions, Fisher had not asked the Court to overrule *Grutter*. In that posture, he fully joined the majority opinion.<sup>97</sup> Justice Thomas, in a much longer and more impassioned concurrence, also openly declared that he would vote to overrule *Grutter*.<sup>98</sup>

If Fisher's decision not to challenge *Grutter* took the Court off the hook, however, Justice Kennedy's majority opinion contained many signals as to where the Court would likely go if it were on the hook. In roundly criticizing the good faith standard invoked by the Fifth Circuit,<sup>99</sup> the *Fisher* Court conspicuously invoked the long line of equal protection cases treating racial classifications as inherently odious and suspect.<sup>100</sup> Moreover, despite the fact that Fisher's lawyers

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96. The Court relied on two cases to suggest that diversity as a justification for the use of race in college admissions remains suspect. It began by emphasizing that a university's good faith in using race as a factor in admissions does not operate as a shield, because "the mere recitation of a benign or legitimate purpose for a racial classification is entitled to little or no weight." *Id.* at 2421 (quoting *City of Richmond v. Croson*, 488 U.S. 469, 500 (1989)) (internal quotation marks omitted). The Court noted that "[t]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable. . . . While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982)) (internal quotation marks omitted).

97. *Id.* at 2422 (Scalia, J., concurring).

98. *Id.* at 2429 (Thomas, J., concurring) ("I would overrule *Grutter* and hold that the University's admissions program violates the Equal Protection Clause because the University has not put forward a compelling interest that could possibly justify racial discrimination.").

99. The Court criticized the Fifth Circuit because "rather than perform this searching examination, [it] held petitioner could challenge only 'whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith.'" *Id.* at 2420 (majority opinion) (alteration in original) (quoting *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 236 (5th Cir. 2011)). "These expressions of the controlling standard are at odds with *Grutter*'s command that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny." *Id.* at 2421 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003)) (internal quotation marks omitted).

100. *Id.* at 2419 ("[A]dditional guidance may be found in the Court's broader equal protection jurisprudence which applies in this context. '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[]' . . ." (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954))). That the Court cited to

did not seek an outright overruling of the *Bakke/Grutter* diversity rationale, there were hints in Justice Kennedy’s opinion that continued adherence to that rationale could be very much in play. Justice Kennedy’s opinion included this obscure sentence: “We take those cases as given for purposes of deciding this case.”<sup>101</sup> If this was not damning by faint praise, it was at the least signaling by faint phrase. Note the careful wording: The Court did not say “we reaffirm those cases.” Rather, the Court chose a more cramped, cryptic wording, stating that it would simply “take” the cases “as given *for the purposes of deciding this case*,” leaving open the possibility that the Court would *not* take those cases as given in deciding future cases.

## 2. The Status of Deference on Issues of Narrow Tailoring

The appropriate role of deference to the educational judgments of universities was in play on two levels in *Fisher*. The more important issue was whether to defer to universities on the threshold question of whether race-conscious admissions practices are necessary *at all*.<sup>102</sup> The *Fisher* Court’s response to this question is not entirely plain. The soundest reading of *Fisher*, in my view, is that the Court no longer approves of deference to universities on *any* aspect of the application of the strict scrutiny test to race-conscious affirmative action programs, including the threshold question of whether they are necessary at all.

This question, though it falls under the rubric of the narrow tailoring requirement, is of course very closely connected to the question of whether the pursuit of diversity should remain cognizable as a compelling governmental interest. Texas’s Top Ten Percent Law raised the possibility, however, that even if the pursuit of diversity is not decommissioned as a compelling interest, a university might still be unable to justify resort to race-conscious admissions policies to achieve the diverse student body it seeks. This was the approach Justice Kennedy, the key swing vote in the public school integration

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these cases highlights the general antagonism to race-conscious thinking that has dominated the thought of the Court’s most vocal opponents of affirmative action. *See* Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 428 (1997) (noting that “the entire set of arguments” most commonly invoked by the Justices, “both for and against [affirmative action], is in fact constitutionally irrelevant”).

101. *Fisher*, 133 S. Ct. at 2417.

102. *See id.* at 2420 (“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.” (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978))).

cases,<sup>103</sup> took in his concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>104</sup> in which he supported the educational interests of school districts in achieving more racially balanced schools, but ruled they must pursue that goal without using race-conscious measures.<sup>105</sup>

In determining how best to interpret *Fisher* on this threshold race-conscious versus race-neutral point, it is helpful to begin with how the Court interpreted the Fifth Circuit ruling in the case. The Court found the Fifth Circuit had wrongly held the University of Texas to a standard less rigorous than traditional strict scrutiny, requiring only that the University demonstrate that its decision to reintroduce race as a factor in admissions was made “in good faith.”<sup>106</sup>

This was a *fair* reading of the Fifth Circuit’s opinion, but by no means a *necessary* one. The Fifth Circuit’s legal analysis opened, for example, with an extensive discussion of the strict scrutiny test it claimed to be applying, and went out of its way to insist that the rigor with which strict scrutiny must be applied is no less strict within the special circumstances of higher education.<sup>107</sup> Yet, its invocation of strict scrutiny did indeed seem watered down by its simultaneous insistence that the University was entitled to deference in its judgments, that what *Grutter* required was simply a good-faith consideration by the University of race-neutral alternatives, and that the University was entitled to a rebuttable presumption that it had indeed acted in good faith.<sup>108</sup>

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103. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

104. 551 U.S. 701 (2007).

105. *Id.* at 797 (Kennedy, J., concurring) (noting that “[t]he idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward,” and that if this seems to frustrate “the Equal Protection Clause[,] it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it”). The plurality opinion in *Parents Involved*, written by Chief Justice Roberts, went beyond Justice Kennedy’s position, adopting what was essentially a colorblind position, ending with the declaration: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Id.* at 748 (plurality opinion). That statement echoed a similar expression made by Professor William Van Alstyne many years earlier. See William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809–10 (1979) (“[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one’s own life—or in the life or practices of one’s government—the differential treatment of other human beings by race.”).

106. *Fisher*, 133 S. Ct. at 2420.

107. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231 (5th Cir. 2011).

108. *Id.* at 231–32 (“Rather than second-guess the merits of the University’s decision, . . . we instead scrutinize the University’s decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the University acted in good faith, [which] Appellants are free to rebut.”)

The Fifth Circuit cannot be too severely condemned for superimposing the good faith test, along with a presumption of good faith, on its strict scrutiny review, for there was in fact language in *Grutter*—language drawn from Justice Powell’s opinion in *Bakke*—seeming to endorse such a test. As *Grutter* put it:

Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.”<sup>109</sup>

The Fifth Circuit concluded its analysis by again quoting the standard articulated in *Grutter*, holding that “we cannot say that under the circumstances before us UT breached its obligation to undertake a ‘serious, good faith consideration’ before resorting to race-conscious measures.”<sup>110</sup>

The Fifth Circuit clearly *thought* it was doing what *Grutter* instructed it to do—but the Supreme Court in *Fisher* was adamant that the Fifth Circuit got *Grutter* exactly wrong.<sup>111</sup> Strict scrutiny, the *Fisher* Court instructed, “does require a court to examine with care, and *not* defer to, a university’s ‘serious, good faith consideration of workable race-neutral alternatives.’”<sup>112</sup> This enormously important passage in *Fisher*, which includes the word “not” smack dab in the center, turns out to *not* be in *Grutter*! The *Fisher* opinion does accurately quote *Grutter*’s use of the phrase “serious, good faith consideration of workable race-neutral alternatives.” The clear insistence that courts must *not* defer to that good-faith consideration is *Fisher*’s new invention. It does not come from *Grutter*. What *Grutter* actually said on point is only this: “Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”<sup>113</sup> There is no “not” in that sentence.

The Supreme Court, of course, is master of its own precedents, and free to adjust those precedents as it deems wise. My point here is simply this: It would seriously under-read and trivialize *Fisher* to see

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109. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318–19 (1978)).

110. *Fisher*, 631 F.3d at 246.

111. *Fisher*, 133 S. Ct. at 2421 (“[The Fifth Circuit’s] expressions of the controlling standard are at odds with *Grutter*’s command . . .”).

112. *Id.* at 2420 (quoting *Grutter*, 539 U.S. at 339) (emphasis added).

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

the case as merely reversing and remanding the Fifth Circuit's decision for failing to apply the law as laid down in *Grutter*. The opinion did much more. *Fisher* is a deliberate *adjustment* to *Grutter*, an adjustment that goes to the heart of one of *Grutter*'s analytic mainstays: its standard of deference to the educational judgments of universities. That deference, so important to the Powell opinion in *Bakke* and the majority opinion of Justice O'Connor in *Grutter*, has been repudiated in *Fisher*.<sup>114</sup>

Indeed, the *Fisher* Court went out of its way to distinguish between those genuinely academic judgments on which courts appropriately defer to universities, and those judgments that implicate constitutional standards on which courts must not defer.<sup>115</sup> The Court in *Fisher* noted *Grutter*'s mandate that judges defer to the educational judgment of university educators regarding the benefits that flow from a diverse student body: "*Grutter* concluded that the decision to pursue 'the educational benefits that flow from student body diversity,' that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*."<sup>116</sup> Yet after this bone is tossed, the opinion goes on to recite what the Court really feels—that universities should *not* receive the deference to which they had become accustomed.<sup>117</sup>

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114. See *Bakke*, 438 U.S. at 313 ("The freedom of a university to make its own judgments as to education includes the selection of its student body."); see also *Grutter*, 539 U.S. at 329 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

115. See *Fisher*, 133 S. Ct. at 2419.

116. *Id.*

117. The Court immediately limits the amount of deference owed to universities, emphasizing that "[a] court, of course, should ensure that there is a reasoned, principled explanation for the academic decision." *Id.* It notes that "[t]here is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity," and it proceeds to qualify the way a university may define diversity. *Id.* ("A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' 'That would amount to outright racial balancing, which is patently unconstitutional.'" (quoting *Grutter*, 539 U.S. at 330; *Bakke*, 438 U.S. at 307)).

Tellingly, on this point, the Supreme Court appeared to be dealing with two questions of deference—on whether race-conscious programs are required at all, and on the merits of a particular program’s actual design:

[Though] a court can take account of a university’s experience and expertise in adopting or rejecting certain admissions processes[,] . . . as the Court said in *Grutter*, it remains at all times . . . 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.” 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.<sup>118</sup>

Driving home this point, the *Fisher* Court instructed that if a race-neutral alternative will accomplish the University’s goals roughly as well as a race-conscious system, the race-neutral alternative must be chosen.<sup>119</sup>

Perhaps because the Court appreciated that the lower courts in the litigation and the litigants themselves may have been somewhat blind-sided by the Court’s abrupt instruction that courts must *not* defer to universities’ good-faith judgments that race-based admissions programs are necessary, the *Fisher* Court chose to simply remand the case for further proceedings under its newly-clarified standards. It observed that “fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis.”<sup>120</sup>

That *Fisher* should be understood as a major shift away from deference to universities, portending the demise of *Grutter*, is further evidenced by the dissenting opinion of Justice Ginsburg. Her opinion was a vigorous defense of both *Grutter* and the Texas admissions system.<sup>121</sup> What is striking is not that Justice Ginsburg would author

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118. *Id.* at 2419–20 (quoting *Grutter*, 539 U.S. at 333, 337).

119. *Id.* at 2440 (“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,’ . . . then the university may not consider race.” (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986))).

120. *Id.* at 2421.

121. Justice Ginsburg defended the University’s admissions system, noting that “[t]he University has steered clear of a quota system like the one struck down in *Bakke*,” and that “[it] has taken care to follow the model approved by the Court in *Grutter*.” *Id.* at 2432–33 (Ginsburg,

such a dissent, for her views on the matter are well known.<sup>122</sup> What is striking—and particularly noteworthy for predicting the future of race-based admissions programs—is that not a single other Justice on the Court joined her.

Justice Ginsburg stated in her dissent: “Texas’ percentage plan was adopted with racially segregated neighborhoods and schools front and center stage.”<sup>123</sup> To the extent that Fisher’s claim was distilled in the notion that race-conscious plans were not needed because solutions such as the Top Ten Percent Law demonstrated how race-neutral plans would work just as well, Justice Ginsburg argued that “[i]t is race consciousness, not blindness to race, that drives such plans.”<sup>124</sup> Further elaborating, Justice Ginsburg chided:

The notion that Texas’ Top Ten Percent Law is race neutral calls to mind Professor Thomas Reed Powell’s famous statement: “If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind.”<sup>125</sup>

Only such a legal mind, Justice Ginsburg quipped, “could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious.”<sup>126</sup> Whether one regards Justice Ginsburg’s point here as persuasive or not, there is surely significance in the fact that she, and she alone, was willing to make it.

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J., dissenting). She advocated for a more faithful application of *Grutter*, claiming that “[t]he Court rightly declines to cast off the equal protection framework settled in *Grutter* . . . . Yet it stops short of reaching the conclusion that framework warrants.” *Id.*

122. *See id.* at 2433 (“I have several times explained why government actors, including state universities, need not be blind to the lingering effects of ‘an overtly discriminatory past,’ the legacy of ‘centuries of law-sanctioned inequality.’” (quoting *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J. dissenting))); *see also* *Adarand Constructors v. Peña*, 215 U.S. 200, 273, 374 (1995) (Ginsburg, J., dissenting) (“Given this history [of racial discrimination] and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the ‘equal protection of the laws’ the Fourteenth Amendment has promised since 1868.” (quoting U.S. CONST. amend. XIV, § 1)).

123. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (“Many regions of . . . Texas are still predominantly composed of people from a single racial or ethnic group. Because of [this] . . . admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities.” (citation omitted)).

124. *Id.*

125. *Id.* at 2433 n.2 (citation omitted).

126. *Id.*



## VI. WHAT HAPPENED TO DEFERENCE AND ACADEMIC FREEDOM?

### A. *The Loose Invocation of Academic Freedom that Began in Bakke*

If the biggest doctrinal casualty in *Fisher* is the end of deference to universities on the question of the need for race-conscious affirmative action measures, what caused the demise of that deference? This question takes on additional intensity when we consider that in Justice Powell’s opinion in *Bakke* and in the Court’s opinion in *Grutter*, this deference was informed by notions of academic freedom.<sup>127</sup>

One of the most famous lines from Justice Powell’s *Bakke* opinion was his homage to academic freedom. Justice Powell began by stating: “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”<sup>128</sup> Powell did not actually say, of course, that academic freedom was a freestanding constitutional right guaranteed in the First Amendment, with distinct content and meaning, different from the rights of freedom of speech or freedom of assembly that actually *are* enumerated in the First Amendment. He instead used the softer phrase—“special concern of the First Amendment.”<sup>129</sup> This phrasing paralleled Powell’s jurisprudence in an analogous First Amendment arena, in which he joined a majority opinion rejecting the claim that journalists enjoyed a special First Amendment “reporter’s privilege” to maintain the confidentiality of their sources.<sup>130</sup> But he also authored a short and cryptic concurring opinion<sup>131</sup> that some lower courts would interpret as supporting the creation of a qualified reporter’s privilege,<sup>132</sup> and others would treat as meaningless dicta of no formal legal consequence.<sup>133</sup>

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127. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (“The freedom of a university to make its own judgments as to education includes the selection of its student body.”); see also *Grutter*, 539 U.S. at 329 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

128. *Bakke*, 438 U.S. at 312.

129. *Id.*

130. See *Branzburg v. Hayes*, 408 U.S. 665, 709–10 (Powell, J., concurring).

131. *Id.*

132. See, e.g., *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980).

133. See, e.g., *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993); *In re Grand Jury Proceedings*, 810 F.2d 580, 585 (6th Cir. 1987).

The loose invocation of academic freedom in *Bakke* as the basis for deference to a state university's decision whether to employ race-conscious admissions programs came back to haunt affirmative action as laid out in *Fisher*. When the term "academic freedom" is used without sufficient legal precision or analytic rigor, it begins to unravel as an effective legal construct. In the specific context of affirmative action, the loose invocation of academic freedom tends to paper over two vexing problems: (1) whether academic freedom is an institutional right possessed by universities in their corporate sense, or an individual right possessed by individual actors within the university community, such as professors and students;<sup>134</sup> and (2) whether the institutional versus individual conundrum turns on whether the matter at issue arises in the context of a public university or a private university.<sup>135</sup>

### *B. The Significance of the Dual System of Public and Private Higher Education*

The major higher education affirmative action cases decided by the Supreme Court—*Bakke*, *Grutter*, *Gratz*, and *Fisher*—all involved programs at state universities. Yet the decisions also bind most private universities.<sup>136</sup> In thinking about the roles of academic freedom and deference in the context of affirmative action, it is worth reconsidering how this parallelism between public and private institutions with regard to affirmative action came about. Indeed, looking back over the decades, the failure to account for differences between the missions and the sheer sizes of public and private universities may have contributed, at least in part, to the undoing of affirmative action.

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134. See RODNEY SMOLLA, *THE CONSTITUTION GOES TO COLLEGE: FIVE CONSTITUTIONAL IDEAS THAT HAVE SHAPED THE AMERICAN UNIVERSITY* 17–38 (2011); David Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 *LAW & CONTEMP. PROBS.* 227, 229 (1990).

135. SMOLLA, *supra* note 134, at 42–44.

136. Private universities receiving federal funding are bound by the Court's decisions on the constitutionality of affirmative action admission policies because the Civil Rights Act of 1964, discussed *infra*, mandates that any organization receiving federal funding may not discriminate on the basis of race, national origin, sex, or religion, thereby extending the constraints of the Fourteenth Amendment to private parties.

In *Bakke*, Justice Stevens, in an opinion joined by Chief Justice Burger and Justices Rehnquist and Stewart,<sup>137</sup> reasoned that the Davis Medical School admissions program was proscribed by a federal statute, Title VI of the Civil Rights Act of 1964, which declares: “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.”<sup>138</sup> The four Justices joining in the Stevens opinion relied on the legislative history of the Act, including remarks from one of its principal proponents, Senator Hubert Humphrey, to reach the conclusion that Congress, in passing Title VI, intended American universities receiving federal funds to be colorblind.<sup>139</sup> It may well have been, these Justices reasoned, that the proponents of Title VI assumed that the Constitution *itself* imposed a colorblind standard.<sup>140</sup> But whether Congress was right or wrong in its assumption as to what the Constitution required, Title VI was a law standing on its own bottom, imposing a prohibition by its own force, and if Congress enacted a colorblind law (even if it did so because it felt it had no choice), then Congress had enacted a colorblind law. These four Justices thus did not reach the question of whether, under the Equal Protection Clause, the Medical School’s affirmative action program was unconstitutional. Title VI was enough to do the trick.<sup>141</sup>

At the other end of the spectrum in *Bakke*, Justices Brennan, White, Marshall, and Blackmun voted to uphold the Medical School’s admissions program.<sup>142</sup> Responding to Justice Stevens, they reasoned that in passing Title VI, Congress sought only to deny federal money to universities that engaged in discrimination that violated the Constitution.<sup>143</sup> Title VI, in their view, merely mimicked the constitutional standard, whatever it might be, and if the Medical School program did not violate the Equal Protection Clause, by definition it did not violate Title VI.<sup>144</sup> Then, turning to the constitutional issue, those four Justices distinguished between the “benign” and “invidious” use of race, holding that benign racial

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137. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 408 (1978) (Stevens, J., concurring in part and dissenting in part).

138. 42 U.S.C.A. § 2000d (West 2013).

139. *Bakke*, 438 U.S. at 415–16 (Stevens, J., concurring in part and dissenting in part).

140. *Id.* at 416.

141. *Id.* at 411–12, 421.

142. *Id.* at 325–26 (Brennan, J., concurring in part and dissenting in part).

143. *Id.* at 328.

144. *Id.* at 353.

classifications—those seeking to assist groups that had historically been victims of discrimination—should be judged under a more lenient “intermediate scrutiny” standard.<sup>145</sup> Applying intermediate scrutiny, they would have upheld the Medical School program, reasoning that government “may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.”<sup>146</sup>

Justice Powell supplied the key fifth vote on this issue—agreeing with Justices Brennan, White, Marshall, and Blackman that Title VI and the Constitution were coextensive.<sup>147</sup> This was one of the few load-bearing legal propositions in *Bakke* that actually commanded a five-Justice majority in the case. And now in 2013, it may be the only legal proposition in *Bakke* that remains, at least for the time being, unthreatened as good law.<sup>148</sup> Though it might have seemed a subordinate point at the time—noisome legal underbrush to be cleared away by the five Justices who wanted to reach the weighty constitutional question posed by affirmative action—the decision that Title VI and the Equal Protection Clause are coextensive has significant practical consequences for higher education in America, putting virtually all public and private universities on the same plane when it comes to the use of race in admissions. Only the very rare bird—the exceptionally independent school that refuses to accept federal aid at all—is out from under the national legal standard. Unlike some other aspects relating to the values and identity of universities, in which private schools are free to engage in practices not permitted for public schools, when it comes to race, one size must fit more-or-less all. Private universities, for example, even those receiving federal aid, may remain exclusively female, or exclusively male, and a few still do.<sup>149</sup> And private universities, even those receiving federal aid, may choose to be overtly religious in their

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145. *Id.* at 359.

146. *Id.* at 325.

147. *Id.* at 287 (plurality opinion).

148. See Levin v. Madigan, 692 F.3d 607, 619 (7th Cir. 2012); Thomas v. Salem State Univ., No. 11-10748-DJC, 2013 WL 3404331, at \*6 (D. Mass. July 2, 2013); Davis v. City of New York, No. 10 Civ. 0699(SAS), 2013 WL 1288176, at \*21 n.210 (S.D.N.Y. Mar. 28, 2013); Aguirre v. San Leandro Police Dep’t, No. 10-04364 CW, 2011 WL 738292, at \*3 (N.D. Cal. Feb. 22, 2011).

149. The Supreme Court has yet to address the status of private single-sex education. See Respondents’ Brief at 35–36, United States v. Virginia, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107) (explaining that “[t]he unconstitutionality of the MUW women-only admissions policy invalidated in *Hogan* does not affect the continued legality of private single-sex education”).

mission and programming.<sup>150</sup> But when it comes to race and affirmative action policies, *Bakke* held and still holds that public and private schools must behave the same.

This linkage between the admissions programs of private and public universities was not merely *legal*, in the sense that five Justices in *Bakke* used Title VI to create a unifying bridge, putting private and public schools on a formal legal par. The linkage went deeper than that. Justice Powell held up as a constitutionally approved admissions model the lofty ideals behind the admissions programs of elite *private* universities, as exemplars of what the public universities should be doing.<sup>151</sup> An amicus brief submitted by Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, for example, proved to be among the most frequently cited sources in Justice Powell’s opinion,<sup>152</sup> along with quotations from the President of Princeton,<sup>153</sup> and a wholesale reproduction of the Harvard Admissions program in its Appendix.<sup>154</sup> This conflation of public and private universities may not have appeared like much at the time—and indeed, it seemed to go largely unnoticed. With the benefit of decades of hindsight, however, it may have been a contributing cause to the slow unraveling of the holistic admissions affirmative action ideal.

In accepting the pursuit of diversity as a compelling governmental interest, Justice Powell again conflated the world of private universities with the world of public universities, treating notions of *institutional* academic freedom as essentially identical for private and public schools alike.<sup>155</sup> This loose use of the phrase “academic freedom” as a justification for judicial deference to the academic judgment of educators was, as a strict matter of constitutional doctrine, conceptually unsound from the beginning, and would prove, as I hope to demonstrate later, to be yet another contributing factor to the demise of affirmative action.

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150. See generally *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

151. *Bakke*, 438 U.S. at 316–17 (citing Appendix to Brief for Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae at 2–3, *Bakke*, 438 U.S. 265 (No. 76-811)).

152. *Id.* at 317.

153. *Id.* at 314 n.48.

154. *Id.* at 321–24 (appendix to opinion of Powell, J.).

155. See *id.* at 311–12.

At its core, the great conceptual oversight in Justice Powell's invocation of academic freedom in *Bakke* was his failure to grapple with the fundamental constitutional divide between public and private actors. It is conceptually coherent to speak of academic freedom as a constitutional right possessed by universities as *institutions* if they are private.<sup>156</sup> Duke University, a private institution, certainly possesses rights of institutional autonomy derived from the First Amendment that it may assert against governments—against the City of Durham, the State of North Carolina, or the United States. Current First Amendment doctrine suggests that these rights are not so much distinct, free-standing First Amendment freedoms with content over and above Duke's rights of free speech or association, but are instead derivative of those established rights, translations of the meaning and application of those rights in the context of private higher education.<sup>157</sup> Individuals within Duke—professors or students on the campus—by contrast, have no First Amendment academic freedom rights they may assert against Duke itself, because Duke is not a state actor and is not bound by the First Amendment. Though Duke faculty and students may well possess some enforceable legal entitlements to academic freedom, the legal source of those entitlements will essentially derive from the law of contracts, as informed by Duke's key documents (bylaws, regulations, handbooks, and the like), practices, and customs.<sup>158</sup>

A few miles down the road, at the University of North Carolina, the pattern is reversed. Now it becomes incoherent to speak of the University of North Carolina as possessing First Amendment rights as an institution. This is an issue that has been litigated with special intensity in Michigan, in which the question posed was whether Michigan's state universities possessed constitutionally enforceable rights against the State of Michigan itself.<sup>159</sup> To the extent that such rights are described as First Amendment rights enforceable by, say, the University of Michigan against the State of Michigan, the claim at its core must be unsound. For surely the University of Michigan or the

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156. SMOLLA, *supra* note 134, at 42–44.

157. See *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. Wyman*, 354 U.S. 234, 250 (1957).

158. SMOLLA, *supra* note 134, at 42–44.

159. See *Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491, 498 (Mich. 1999); *Mich. United Conservation Clubs v. Bd. of Trs. of Mich. State Univ.*, 431 N.W.2d 217, 219 (Mich. Ct. App. 1988); *Regents of Univ. of Mich. v. State*, 419 N.W.2d 773, 777–78 (Mich. Ct. App. 1988).

University of North Carolina, themselves state agencies and creatures of their states, cannot have First Amendment rights enforceable against the very state entities that created them. Again in contrast to the world of private universities, it *is* sound to treat the individual actors at public institutions as possessing constitutional rights, including First Amendment rights, which may be asserted against their state universities.

What this discussion reveals is that when a *state* university, such as the University of California, the University of Michigan, or the University of Texas, invokes “academic freedom” as a First Amendment right to buttress the institution’s defense of affirmative action, it is talking legal gibberish. A *private* university, in contrast, could plausibly interpose a First Amendment entitlement to shape its own student body as it deems fit as a defense to a federal statute interpreted as requiring colorblind admissions.

To the extent that a state university might assert an entitlement to deference by courts regarding its educational judgments, that entitlement to deference resides not in the First Amendment, but in structural conceptions of separations of powers and federalism. In *Fisher*, for example, the State of Texas as a sovereign within the federal system is certainly entitled to some respect and deference in deciding for itself how best to shape its state system of higher education, including the character and identity of its student bodies.<sup>160</sup> Once that deference is conceptualized as an incident to *federalism*, however, and not the First Amendment, its force is diminished. And the force is diminished because of yet another fundamental precept of constitutional law—that the Equal Protection Clause of the Fourteenth Amendment stands as an explicit and powerful constraint on federalism and “state’s rights” in all matters germane to classifications based on race.<sup>161</sup>

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160. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

161. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 472 (1989) (“[Section] 1 of the Amendment, which includes the Equal Protection Clause, is an explicit constraint upon the power of States and political subdivisions, which must undertake any remedial efforts in accordance with the dictates of that section.”).

*Schuette v. Coalition to Defend Affirmative Action*,<sup>162</sup> which was placed on the Supreme Court docket for the October 2013 term, will test these propositions. *Schuette* raises the question of whether Michigan voters may ban affirmative action in admissions at the state's public universities.<sup>163</sup> A deeply divided lower court ruled that even though affirmative action in university admissions is presently deemed constitutional, but not constitutionally required, the Michigan electorate, in adopting a preemptive statewide ban on racial preferences in admissions, nonetheless violated equal protection principles by removing from state university boards, administrators, and faculty the power they traditionally possessed to set admissions policies.<sup>164</sup> The Supreme Court in *Schuette* will have the opportunity to clarify the principles explored here, including whether a state university has any federal constitutional entitlement to resist the policy choices imposed upon it by the state itself.

### C. *The Role of Size and Scale*

Yet another practical aspect of the conflation of public and private universities with regard to affirmative action law and policy is that it is indifferent to issues of size and scale. On a simple, pragmatic level, when it comes to admissions, size and scale matter. Smaller universities, or smaller units within universities (such as law schools), have a much easier time implementing a genuinely holistic approach to admissions than larger ones. Giant state university systems, or individual state university campuses with tens of thousands of students, will often feel hydraulic pressure to automate more of the admissions process.

The University of Michigan Law School in *Grutter* was able to make a winning case in the Supreme Court that its approach to admissions was sufficiently "Harvard-like" to meet the standard Justice Powell had held up as permissible in *Bakke*.<sup>165</sup> The University of Michigan undergraduate admissions program, which relied on a more mechanical point system for admissions, by contrast looked more like a quota—preference of race for its own sake—which Powell had found offensive in *Bakke*.<sup>166</sup> But surely the differences in the two

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162. 133 S. Ct. 1633 (2013).

163. Petition for Writ of Certiorari at i, *Schuette v. Coal. to Defend Affirmative Action*, No. 12-682 (U.S. Nov. 28, 2012).

164. *Schuette v. Coal. to Defend Affirmative Action*, 701 F.3d 466, 487–88 (6th Cir. 2012).

165. *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).

166. *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003).



systems at the same University in Ann Arbor were not attributable to the Michigan Law School’s superior virtue or understanding of constitutional law (notwithstanding that it was the *law* school). Rather, the difference, in large part, was a product of the sheer difference in scale—and in turn, the different challenges admissions departments face in providing authentically individualized consideration to all candidates in the applicant pool of a law school versus the applicant pool of a major state undergraduate program. Indeed, in *Gratz* the University of Michigan made exactly this argument, claiming that it was simply not practical for it to employ an individualized approach to holistic admissions.<sup>167</sup> But under *Gratz*, this mere administrative inconvenience is not, as a matter of law, a sufficient justification for adopting race-conscious admissions programs that would otherwise violate the Equal Protection Clause.<sup>168</sup>

#### CONCLUSION: WHERE DO WE GO FROM HERE?

While the remand ordered by the Supreme Court in *Fisher* proceeds and the *Fisher* case moves through the next stages of litigation, a broader, more figurative “remand” will also proceed, as all of us in American higher education consider what we will do if, as the analysis above suggests, race-conscious affirmative action programs as we have known them are not long for this world.<sup>169</sup>

If race-conscious affirmative action programs come to be eliminated entirely, or are severely curtailed, does that mean American universities should abandon admissions policies that are “holistic”? In my view, the answer must be “No!” There are great benefits to holistic admissions programs, even when stripped of any consideration of race or ethnicity. Our system of higher education, our very constitutional democracy, is strengthened by university admissions policies that are not single-mindedly driven by academic numbers, such as test scores, grade point averages, or Advanced

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167. *Id.* at 275.

168. *Id.* (“[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”).

169. This introspection may force more transparency with regard to what diversity really means in the day-to-day decisionmaking of admissions officials in higher education. See Devon Carbardo, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1181–82 (2013) (“When a school says it is committed to diversity, few stop to ask precisely what that actually means. . . . Deference to expert decisionmakers is often rational. But should we not have a better sense of what is going on behind the closed door of admissions?”).

Placement courses. Qualities of character, including leadership, altruism, civic engagement, public service, passion for social justice, creativity, entrepreneurial spirit, resiliency, drive, ambition, the capacity to overcome adversity—all the polymath possibilities that might comprise true grit—should also matter. These are factors resonant in their connection to our most enduring renditions of the American dream.<sup>170</sup> If those of us in higher education pick up our marbles, leave the game, and pout, abandoning holistic admissions because the law evolves to require race-neutral alternatives, we will have to ask ourselves, poignantly, who *really* put the “holes in holistic”?

If time proves me right, and courts do in fact build on *Fisher* to effectively end race-conscious affirmative action programs, we may predict a cacophony of shrill critics claiming that the judiciary has inflicted on the nation a grievous wound, forcing the premature demise of a holistic approach to admissions that has served the country passably well, and pragmatically, is still needed. Yet what if those of us in higher education were to take a truth serum, and engage in our own candid introspective strict scrutiny, asking ourselves, who actually caused the demise of the holistic approach? Might we not be haunted by the suggestion of Queen Gertrude in *Hamlet*, that it is we who “doth protest too much”?<sup>171</sup> Might we not reach the troubling judgment that in our often numbers-driven obsession to serve the two masters of elevating the objective academic credentials of our students and enhancing the statistical diversity profiles of our student bodies, when we ask, *really*, who put the holes in holistic, the uncomfortable answer just might be: we did.

Affirmative action in admissions in American higher education may be on its way out in part because the ideal of a genuinely holistic approach to admissions has not been matched by the realities of admissions programs in practice at many universities. As with so many human enterprises, the reality on the ground is not as pure or pleasing as the lofty ideal considered as an abstraction. The walk does not entirely match the talk. That dissonance has contributed to a gap in trust and credibility between many of the leading institutions in

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170. Rodney Smolla, *The Legal Future of Affirmative Action*, INSIDE HIGHER EDUC. (June 27, 2013), <http://www.insidehighered.com/views/2013/06/27/essay-meaning-supreme-court-ruling-affirmative-action>.

171. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2, l. 179 (W. J. Craig, ed., Oxford Univ. Press 1914) (1600).

higher education and leaders in American politics, culture, and, most critically for legal purposes, the judiciary. Now we must walk the walk—though after *Fisher*, down a new path.

I have no doubt that the many superb educators who crafted the admissions policies for the University of Texas acted exactly as the Fifth Circuit described, with the utmost good faith and with the highest hopes for all the students of that great University in their pursuit of their dreams. We now know, however, that such good faith is not enough, and it will be incumbent on those of us in higher education to obey the evolving law of the land, and to craft policies that enhance diversity in ways that will remain constitutionally permissible—policies sufficiently holistic to continue to provide broad access to the promise of the nation’s rich tapestry of public and private education.