

# FERGUSON, FISHER, AND THE FUTURE: DIVERSITY AND INCLUSION AS A REMEDY FOR IMPLICIT RACIAL BIAS

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## INTRODUCTION

Virtually every discussion of race and racial justice in this nation now takes place in the long shadows cast by events like the death of Michael Brown in Ferguson, Missouri.<sup>1</sup> As one observer declared after the murder of nine people in a Charleston, South Carolina church, “America is living through a moment of racial paradox” within which “Black culture has become . . . mainstream. . . [but] the situation of black America is dire.”<sup>2</sup> The Supreme Court, in turn, has been repeatedly criticized for “often rul[ing] against those most in need of its protection”<sup>3</sup> and, especially in matters of racial justice, having a “blinkered view” and “naive vision.”<sup>4</sup> Its critics argue that it is a “Court [that] in closely-contested rulings, has weakened or even wiped out affirmative action’s race-conscious policies designed to overcome and rebalance our history of discrimination in employment and admissions.”<sup>5</sup>

It is then hardly surprising that the Court’s decision to once again take up the contentious issue of affirmative action in college admissions was viewed with alarm by those who support admissions preferences.<sup>6</sup> As is invariably the case, the Court did not explain why it agreed to reexamine the admissions regime at the University of Texas at Austin in what is now styled as *Fisher II*.<sup>7</sup> It simply

1. See, e.g., Michael Eric Dyson, *Where Do We Go After Ferguson?*, N. Y. TIMES, Nov. 30, 2014, at SR1 (discussing “clashing perceptions [that] underscore the physics of race” within which “[t]he instrument through which one perceives race – one’s culture, one’s experiences, one’s fears and fantasies – alters in crucial ways what it measures”).

2. Lydia Polgreen, *From Ferguson to Charleston, Anguish About Race Keeps Building*, N.Y. TIMES, June 21, 2015, at A17.

3. Editorial, *Ten Years of an Activist Court*, N.Y. TIMES, July 5, 2015, at SR8.

4. Editorial, *Racial Equality Loses at the Court*, N.Y. TIMES, April 23, 2014, at A22.

5. Carla Seaquist, *Racist Police, Courts, Fraternities: Who Says We Don’t Need Affirmative Action Anymore?*, HUFFINGTON POST (March 25, 2015, 12:04 PM), [http://www.huffingtonpost.com/carla-seaquist/racist-police-courts-fraternities-who-says-we-don-t-need-affirmative-action-anymore\\_b\\_6929038.html](http://www.huffingtonpost.com/carla-seaquist/racist-police-courts-fraternities-who-says-we-don-t-need-affirmative-action-anymore_b_6929038.html).

6. See, e.g., Adam Liptak, *Supreme Court to Weigh Race in Admissions*, N.Y. TIMES, June 30, 2015, at A1 (in a “move [that] supporters of race-conscious admissions programs called baffling and ominous,” the Supreme Court “agreed to . . . take a second look at the use of race in admission decisions by the University of Texas at Austin”).

7. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014), *reh’g en banc denied*, 771 F.3d 274, *cert. granted*, 135 S. Ct. 2888 (2015) (*Fisher II*). The policy at issue initially came to the Court in *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (*Fisher I*). It did not reach the merits, remanding the case to the Court of Appeals for the Fifth Circuit so that it could “apply the correct standard of strict scrutiny.” *Id.* at 2415. The case originated in 2008 when Ms. Fisher filed suit. The District Court held that the policy was constitutional. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009). That decision that was affirmed, 631 F. 3d 213 (5th Cir. 2011), rehearing was denied, 644 F.3d 301 (5th Cir. 2011), and it was taken to the Court, resulting in *Fisher I*.

announced that the petition for a writ of certiorari had been granted,<sup>8</sup> presumably to undertake the inquiry suggested by the Question Presented crafted by counsel for Abigail Noel Fisher: to determine “[w]hether the Fifth Circuit’s re-endorsement” of the Texas policy “can be sustained under this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment.”<sup>9</sup>

That suggests that diversity will remain a constitutionally permissible goal. But supporters of affirmative action are at best skeptical. They believe the decision to take the case reflects a considered strategy by the Court’s conservative members to find a way to end race-conscious admissions policies in higher education.<sup>10</sup> That sentiment is understandable given recent events and the manner in which the Court has approached many of these issues over the past several Terms. It is also incorrect and short-sighted. The real problem confronting diversity’s supporters is not the potential demise of the Court’s holding in *Grutter v. Bollinger* that this nation’s colleges and universities have “a compelling interest in attaining student body diversity.”<sup>11</sup> It lies rather, in what a victory for Texas might portend.

My thoughts on *Fisher II* in this Article will be somewhat unusual. My threshold assumption is that the Court will use the case to reaffirm *Grutter* and clarify what is required when a college or university decides to adopt an affirmative admissions policy as a means of attaining student body diversity. As I will explain, the decision to grant review was both logical and necessary. It is actually a welcome opportunity for the Court to give badly needed guidance to both sides in this debate about how best to go about implementing those policies. Indeed, I believe that for those who wish to preserve the diversity victory in *Grutter*, the best possible outcome will be to have their implementation feet held to the fire of intense judicial scrutiny in *Fisher II*. That said, there are substantial perils in this process given the lackadaisical manner in which virtually all institutions have approached their actual educational obligations once they have taken the steps required to admit a diverse group of students.<sup>12</sup>

I will also argue that this new round of litigation offers an important opportunity for affirmative action’s proponents to do two interrelated things. The first is to recognize, account for, and undertake key obligations imposed by *Grutter*

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8. See *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015) (“Petition for a writ of certiorari . . . [is] granted.”). The Court also noted that “Justice Kagan took no part in the consideration or decision of this petition.” *Id.* Her recusal was due to her prior involvement in the case during her service as Solicitor General of the United States.

9. Petition for a Writ of Certiorari at i, *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014) (No. 14-981) [hereinafter *Fisher II* Petition].

10. See, e.g., Editorial, *Why another look at affirmative action?*, L.A. TIMES, (July 2, 2015, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-affirmative-action-texas-case-supreme-court-20150630-story.html>. (Stating that among the four or more members of the Court who voted to grant the writ “[s]ome clearly hope that this time around the court will endorse” the “extreme view that ‘a State’s use of race in higher education admissions decisions is categorically prohibited by the equal protection clause’ of the 14th Amendment.”) (quoting *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring)).

11. 539 U.S. 306, 328 (2003).

12. See *infra* Part III-A, discussing the importance of programming for educational outcomes and rigorous assessment.

and *Fisher I*. The second is to seize the opportunities presented in the wake of *Fisher II* to strengthen their case for the value of diversity as a matter of educational policy by focusing our attention on implicit racial bias. The virtues of educational diversity identified by Justice Sandra Day O'Connor in her opinion for the Court in *Grutter* had solid social science foundations.<sup>13</sup> The evidence cited by the Court at that time did not, however, account for an important aspect of our national malaise, the corrosive impact of implicit racial bias and stereotyping.<sup>14</sup> Significant developments in this body of knowledge have the potential to bolster the Court's prior determination that diversity's "benefits are not theoretical but real."<sup>15</sup> This knowledge can, and should, be part of the dialogue as we reexamine these issues.

Part I of this Article sets the stage for this discussion by identifying what *Fisher II* is and is not about. In particular, I argue that supporters of affirmative action should set aside their fears that the Court will abolish affirmative action in higher education admissions systems and concentrate instead on what the Court will likely tell them about how such programs should be implemented. *Fisher II* is a case that verifies the maxim that "the devil is in the details." In this instance, that demon is the need for colleges and universities to do with care what the Supreme Court expected when it decided *Grutter*: namely, adopt "means chosen to accomplish [their] asserted purpose [that are] specifically and narrowly framed to accomplish that purpose."<sup>16</sup>

Part II connects *Fisher II* to what I believe to be two important lessons posed by the differences between *Grutter* and the Court's first take on this issue in *Regents of University of California v. Bakke*.<sup>17</sup> The first is its focus on the reality that the case for affirmative action and diversity in *Grutter* turns on the premise that it will actually generate beneficial educational outcomes. *Bakke*, on the other hand, simply took higher education's embrace of diversity at face value and spoke in vague terms of things that were "widely believed to be promoted by a diverse student body."<sup>18</sup> The second is to recognize and account for an important way in which *Grutter* expanded the case for diversity. *Bakke* focused almost exclusively on "[t]he atmosphere of 'speculation, experiment and creation'" that arises from "a diverse student body."<sup>19</sup> *Grutter* did more, extending the justifications for and

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13. See *infra* text accompanying notes 20–21.

14. As I note, see *infra* text accompanying note 359, the Court did receive a brief discussing implicit bias and the distinction between "'discrimination' [which] describes unequal treatment [and] 'prejudice' [which] has to do with thoughts and feelings." See Brief Amicus Curiae of the American Psychological Association at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) [hereinafter APA *Grutter* Brief]. Justice O'Connor did not cite it or discuss the issues posed.

15. *Grutter*, 539 U.S. at 330.

16. *Id.* at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

17. 438 U.S. 265 (1978).

18. *Id.* at 312.

19. *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1967)). See also *id.* at 313 (discussing the goal of "select[ing] those students who will contribute most to the 'robust exchange of ideas'" (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))).

acknowledged benefits of a diverse learning environment beyond the college years in ways that make its potential benefits all the more compelling.

Part III explores two aspects of the case for diversity. My goal is not to make that case. Rather, I explore its dimensions and, more importantly, discuss its implications. In each instance, the focus is on the evidence presented to the Court suggesting that the benefits of diversity are real. The social science foundations for Justice Sandra Day O'Connor's opinion for the Court in *Grutter* were important. They were also limited in two key respects. The first was its reliance on contact theory, a body of research that emphasizes the impact of "engaging and interacting with diverse peers."<sup>20</sup> The second was the failure to account for key aspects of how prejudice and stereotypes actually operate. In particular, the materials cited in *Grutter* did not acknowledge implicit bias, the "unwitting, unintentional, and uncontrollable" impulses that infect "normal, everyday human thought and activity" of even "the most well-intentioned people."<sup>21</sup> Careful attention to that phenomenon – and the development of interventions designed to deal with it – has the potential to go a long way toward explaining the promise of *Grutter* in an era where "racial discrimination [is pervasive] in a society that favors formal racial equality."<sup>22</sup>

Part IV reexamines all of this in the special and informative contexts provided by the obligations imposed on this nation's schools and colleges of law by their primary accrediting agency, the American Bar Association (ABA). Legal education is one of the very few segments of the higher education community where both the need for affirmative action and its use are routine. The ABA treats the use of affirmative action in pursuit of diversity as a duty, not an option,<sup>23</sup> and its current rules track closely the outcomes-based approach taken by Justice O'Connor in *Grutter*.<sup>24</sup> There are also aspects of how law schools are structured and operate that make them especially suitable venues for assessment and documentation. Taken together, these realities have important consequences and make legal education an especially apt exemplar of the obligations, challenges, and opportunities that lie ahead.

## I. FISHER II: FICTIONS AND FACTS

Many observers suspect that the Court's decision to hear *Fisher II* does not bode well for the future of affirmative action in higher education admissions.

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20. Brief of the American Educational Research Association et al. at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter AERA Brief]. Justice O'Connor cited this brief in her opinion. See *Grutter*, 539 U.S. at 330.

21. Curtis D. Hardin & Mahzarin R. Banaji, *The Nature of Implicit Prejudice: Implications for Personal and Public Policy*, in *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* (Eldar Shafir ed., 2013), at 13, 14 [hereinafter Hardin & Banaji].

22. Darren Leonard Hutchinson, "Continually Reminded of Their Inferior Position": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 *WASH. U.J.L. & POL'Y* 23, 28 (2014) [hereinafter Hutchinson].

23. See *infra* text accompanying note 399 (discussing the obligations imposed by ABA accreditation Standard 206, which addresses "Diversity and Inclusion").

24. See *infra* text accompanying notes 409–10 (discussing the current ABA accreditation Standard 302, which focuses on "Learning Outcomes").

Their focus and fear is the prospect that the four most conservative members of the Court – Chief Justice John Roberts and Associate Justices Antonin Scalia, Clarence Thomas, and Samuel Alito – will use *Fisher II* as an opportunity to bring Justice Anthony Kennedy fully into their fold and craft a holding that rejects the use of race as a factor in the college and university admissions process.

That could prove to be the case. The Court will do what a majority of its members wishes, and it is abundantly clear that four of its members are adamantly opposed to the use of race as a factor in the admissions process. Justice Thomas stated in no uncertain terms in *Fisher I* that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”<sup>25</sup> Justice Scalia repeated there the position he took in *Grutter*, that “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”<sup>26</sup> Neither Chief Justice Roberts nor Justice Alito have written separately in a case where the constitutionality *per se* of a college or university affirmative action policy was the focus.<sup>27</sup> But their views are clear, captured most memorably in the declaration that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>28</sup> Moreover, the group that hears *Fisher II* will not include Justice Elena Kagan, a recusal that significantly reduces the number of reliable pro-affirmative action votes. That magnifies the importance of Justice Anthony Kennedy, who, as one of the prophets of possible doom has observed, “has never voted to uphold an affirmative action program.”<sup>29</sup>

That said, the issue actually before the Court is not the constitutional propriety of affirmative action and diversity. Rather, it is the manner in which the University of Texas has pursued that goal. The Question Presented in *Fisher II* was carefully framed. It focuses on whether the manner in which Texas proceeded

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25. *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring).

26. *Id.* at 2422 (Scalia, J., concurring) (quoting *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part)).

27. Chief Justice Roberts wrote separately in *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), where he observed that “racial preferences may . . . do more harm than good.” *Id.* at 1638–39 (Roberts, C.J., concurring). The focus there was not, however, the constitutionality of admissions preferences, but rather whether the people of Michigan could make the decisions that state institutions could not grant preferences on the basis of “race sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” *Id.* at 1629 (quoting MICH. CONST. art. I, § 26).

28. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). The two school districts in that case did ask the Court to recognize the “educational and broader socialization benefits flow from a racially diverse learning environment.” *Id.* at 725. The Chief Justice rejected that request in his plurality opinion, stating that there was no need to resolve it since “the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.” *Id.* at 726.

29. Liptak, *supra* note 6. See also Scott Jaschik, *Supreme Court will once again consider affirmative action in college admissions*, INSIDE HIGHER ED, (June 30, 2015), <https://www.insidehighered.com/news/2015/06/30/supreme-court-will-once-again-consider-affirmative-action-college-admissions> (noting that while Justice Kennedy “has voted with the liberal wing on issues such as same-sex marriage, that is not the case when it comes to race”).

“can be sustained under this Court’s decisions,”<sup>30</sup> not on “whether there is a compelling interest in diversity,” which “Ms. Fisher ha[s] no need to challenge.”<sup>31</sup> It also recognizes the fact that the Court had previously reviewed the Texas policy and determined that “the Court of Appeals [for the Fifth Circuit] did not apply the correct standard of strict scrutiny.”<sup>32</sup>

Writing for the Court in *Fisher I*, Justice Kennedy stated “we take [*Bakke* and *Grutter*] as given for the purposes of deciding this case.”<sup>33</sup> That is, it remained the rule that colleges and universities could “consider[] racial minority status as a positive or favorable factor in [their] admissions process, with the goal of achieving the educational benefits of a more diverse student body.”<sup>34</sup> He emphasized, however, that the rigors of strict scrutiny applied and concluded that the lower court had been unduly deferential in its assessment of how Texas implemented its constitutionally protected decision to make the pursuit of diversity part of its institutional mission.<sup>35</sup> The University, he stressed, “must prove that the means chosen . . . to attain diversity are narrowly tailored to that goal.”<sup>36</sup> That is, there must be a “judicial determination that the admissions process meets strict scrutiny in implementation.”<sup>37</sup> The current appeal tracks that history. It focuses exclusively and narrowly on “the use of racial preferences in admissions decisions where, as here, they are neither narrowly tailored nor necessary to meet a compelling, otherwise unsatisfied, educational interest.”<sup>38</sup> That is, Ms. Fisher and her legal team accept that diversity is a compelling interest and are concerned only with the manner in which the University of Texas is trying to meet what it claims is an unmet goal, the need to enroll “a ‘critical mass’ of minority students.”<sup>39</sup>

There are then only two questions actually before the Court in *Fisher II*: whether the particular approach adopted by Texas in the wake of *Grutter* is

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30. *Fisher II* Petition, *supra* note 9, at i.

31. Reply Brief at 7, *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014) (No. 14-981). *See also id.* at 8 (“A constitutional battle over the validity of a racial diversity interest may someday be fought.”). Counsel for Ms. Fisher open the door slightly for that result when they argue that “[i]f *Fisher I* permits UT to prevail here, the Court will need to rethink its endorsement of *Grutter*’s diversity interest given the diminished force of ‘stare decisis when fundamental points of doctrine are at stake.’” *Fisher II* Petition, *supra* note 9, at 30 (quoting *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring)).

32. *Fisher I*, 133 S. Ct. at 2415.

33. *Id.* at 2417.

34. *Id.*

35. *See id.* at 2419 (stressing that “a university’s ‘educational judgment that such diversity is essential to its educational mission is one to which we defer’” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003))).

36. *Id.* at 2420.

37. *Id.* at 2419–20.

38. *Fisher II* Petition, *supra* note 9, at 2.

39. *Fisher I*, 133 S. Ct. at 2416. The assumption informing “critical mass” is that it is a positive good, given that “meaningful numbers” and/or “meaningful representation” means that “underrepresented minority students do not feel isolated or like spokespersons for their race.” *Grutter*, 539 U.S. at 319. As I note *infra* at text accompanying notes 73–74, there may be a downside to critical mass that must be taken into account.

“narrowly tailored” and whether the Court of Appeals correctly applied that standard on remand. That technical reality has provided scant comfort for affirmative action’s champions, who suspect that something more is afoot.<sup>40</sup> But it is worth recalling that many of the same observers treated *Fisher I* as a case where “the future of affirmative action in higher education [is] hanging in the balance.”<sup>41</sup> They made those claims even though the attorneys for Ms. Fisher denied – multiple times – that they were challenging the core holding in *Grutter*.<sup>42</sup> Those observers were wrong then and, I believe, are likely wrong again.

That does not mean that those who favor admissions preferences can rest easy. Indeed, the fact that *Fisher II* will focus on implementation is arguably an even more dire reality than the one envisioned by those who fear that affirmative action’s days are numbered. I say that for many of the reasons that led me to previously characterize *Grutter* as “*Bakke* with Teeth.”<sup>43</sup> Specifically, *Grutter* was a holding that imposed substantial obligations on institutions that opt to embrace diversity as part of their institutional mission and then employ race-conscious criteria as part of the admissions process. In particular, as I will discuss in greater detail in Part II-A, *Grutter* tied its approval of affirmative action in pursuit of diversity to a need to design and implement systems that will actually produce documented educational outcomes.

The stakes are magnified by a closely related doctrinal reality: the degree of scrutiny that courts must utilize when assessing whether a given college or university has made its case. The *Grutter* Court emphasized that all of the rigors traditionally associated with strict judicial scrutiny applied: “Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still ‘constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must

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40. See, e.g., Liptak, *supra* note 6 (musing about the “consequences . . . if the court . . . did away with racial preferences in higher education”); Tamar Lewin & Richard Pérez-Peña, *Colleges Brace for Uncertainty as Court Reviews Race in Admissions*, N.Y. TIMES, July 1, 2015, at A14 (noting that the “decision to reconsider” the case “has universities around the country fearing that they will be forced to abandon what remains of race-based admission preferences”).

41. Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, Oct. 11, 2012, at A1.

42. See, e.g., Brief for Petitioner at 26, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (expressly recognizing the Court’s determination in *Grutter* “that universities have ‘a compelling interest in obtaining the educational benefits that flow from a diverse student body’” (quoting *Grutter*, 539 U.S. at 343)); Reply Brief for Petitioner at 1, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (characterizing “defen[ses of] racial diversity in higher education as a compelling interest” as “tilt[ing] at self-created windmills” and stressing that “Petitioner has not contested the [core] holding of *Grutter*”); Transcript of Oral Argument at 8, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter *Fisher I* Transcript] (pressed by Justice Stephen Breyer, Bert W. Rein, representing Ms. Fisher, stressed that “we have said, very carefully, we were not trying to change the Court’s disposition of the issue in *Grutter*”). The Court subsequently expressly acknowledged that “the parties here do not ask the Court to revisit that aspect of *Grutter*’s holding.” *Fisher I*, 133 S. Ct. at 2419.

43. Ann M. Killenbeck, *Bakke, with Teeth?: The Implications of Grutter v. Bollinger in an Outcomes-Based World*, 36 J.C. & U.L. 1 (2009).

be specifically and narrowly framed to accomplish that purpose.”<sup>44</sup> Justice O’Connor went to elaborate lengths to describe “the contours of the narrow-tailoring inquiry”<sup>45</sup> and list “the hallmarks of a narrowly tailored plan.”<sup>46</sup> That stood in sharp contrast to *Bakke*, where the narrow tailoring analysis began and ended with a discussion of the flaws in a two-track admissions process<sup>47</sup> and of a “quota” system that “tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of seats in an entering class.”<sup>48</sup>

*Grutter* and *Fisher I* are much more demanding. An institution that decides that diversity is “integral to its mission”<sup>49</sup> and wishes “to use race to achieve the educational benefits of diversity”<sup>50</sup> is not entitled to simply demonstrate that these decisions were made “in good faith.”<sup>51</sup> Rather, that college or university must prove that its affirmative admissions scheme “was not a quota, was sufficiently flexible, was limited in time, and followed ‘serious, good faith consideration of workable race-neutral alternatives.’”<sup>52</sup> Emphasizing the need for “giving close analysis to the evidence of how the process works in practice,”<sup>53</sup> the *Fisher I* Court sent the case back to “the Court of Appeals [so that it could] assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”<sup>54</sup>

On remand, a majority of the panel hearing the cases decided that the University had met its burden. Writing for himself and Judge Carolyn Dineen King, Judge Patrick E. Higginbotham stated that Texas – an elite, flagship institution<sup>55</sup> – had justified “its necessary use of race in a holistic process and the want of workable alternatives that would not require even greater use of race.”<sup>56</sup> That phrasing was telling. It was calculated to track two of the lines set by the

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44. *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

45. *Id.*

46. *Id.* at 334.

47. *Bakke*, 438 U.S. at 274–77 (documenting the different processes and standards).

48. *Id.* at 319.

49. *Fisher I*, 133 S. Ct. at 2419.

50. *Id.* at 2420.

51. *Id.* (quoting *Fisher*, 631 F.3d at 236).

52. *Id.* at 2421 (quoting *Grutter*, 539 U.S. at 339).

53. *Id.*

54. *Id.*

55. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 225 (5th Cir. 2001) (noting that diversity is “especially important at UT because [of] its ‘mission and . . . flagship role’”) (quoting Univ. of Tex. at Austin, *Proposal to Consider Race and Ethnicity in Admissions* (June, 2004)). The mission in question, as embodied in the “Compact with Texans” required by state law – is to provide “superior and comprehensive educational opportunities” and to “contribute to the advancement of society.” Its core values include: “*Leadership*”; “*Individual Opportunity* – Many options, diverse people and ideas, and one University”; and “*Responsibility* – To serve as a catalyst for positive change in Texas and beyond.” Brief for Respondents at 5, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2241 (2013) (No. 11-345) (quoting U[niversity of] T[exas], *Compact with Texans*) [hereinafter *UT Fisher I* Brief].

56. *Fisher*, 758 F.3d at 660.

Court in *Grutter*. The first is the requirement that the admissions evaluation process be “holistic,” that is “highly individualized . . . giving serious consideration to all the ways an applicant might contribute to a diverse educational environment” and does not make “an applicant’s race or ethnicity the defining feature of his or her application.”<sup>57</sup> The second is that the institution give “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”<sup>58</sup> That “does not require [the] exhaustion of every conceivable race-neutral alternative.”<sup>59</sup> But it does mandate “sufficient consideration” of those that are “workable.”<sup>60</sup>

The panel majority believed that Texas had met its burden. A key element in their analysis was their take on the Top Ten Percent Plan, which “guarantees Texas residents graduating in the top ten percent of their high school class admission to any public university in Texas.”<sup>61</sup> That legislative mandate was adopted in the wake of *Hopwood v. Texas*,<sup>62</sup> which held that Justice Powell’s opinion in *Bakke* was not controlling and that “any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”<sup>63</sup> The Ten Percent Plan was a calculated attempt to increase minority enrollment, reflecting as it does “a fundamental weakness in the Texas secondary education system,” the “de facto segregation of schools in Texas.”<sup>64</sup> That “mechanical admissions program”<sup>65</sup> had the advantage of “increas[ing the number of] minorities in the [admissions] mix [but] ignore[d] contributions to diversity beyond race.”<sup>66</sup>

Allowing the consideration of race in a supplemental holistic review, the majority concluded, allowed Texas “to look beyond class rank and focus upon individuals.”<sup>67</sup> As a result, Texas could “reach [and admit] a pool of minority and non-minority students with records of personal achievement, higher average test scores, or other unique skills.”<sup>68</sup> Characterizing the Texas system as a “unique creature,”<sup>69</sup> the majority concluded it was narrowly tailored within the parameters imposed by the Supreme Court in both *Grutter* and *Fisher I*.

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57. *Grutter*, 539 U.S. at 337.

58. *Id.* at 339.

59. *Id.*

60. *Id.* at 340.

61. *Fisher*, 758 F.3d at 645.

62. 78 F.3d 932 (5th Cir. 1996), *reh’g denied*, 84 F.3d 720, *cert. denied*, 518 U.S. 1033 (1996).

63. *Id.* at 944.

64. *Fisher*, 758 F.3d at 650. At least one of the individuals involved in crafting the Ten Percent Plan disagrees, maintaining that the goal, and result, was “to plot a completely race-neutral response.” Michael L. Olivas, *The Burden of Persuasion: Affirmative Action, Legacies, and Reconstructing History* (Book Review), 40 J.C. & U.L. 381, 392 (2014).

65. *Fisher*, 758 F.3d at 645.

66. *Id.* at 651.

67. *Id.*

68. *Id.* at 653.

69. *Id.* at 659.

Judge Emilio M. Garza disagreed. In particular, he took issue with what he believed was “the majority’s failure to make a meaningful inquiry into the nature of ‘critical mass.’”<sup>70</sup> Judge Garza stressed that “[h]ere, the University has framed its goal as obtaining a ‘critical mass’ of campus diversity.”<sup>71</sup> The majority characterized “critical mass” as “the tipping point of diversity,” the “minimum threshold at which minority students do not feel isolated or like spokespersons for their race.”<sup>72</sup> But, as was the case when *Fisher I* was argued,<sup>73</sup> Judge Garza believed that the University had not provided a constitutionally appropriate definition of what that term meant.<sup>74</sup> Judge Garza rejected the University’s approach. He emphasized that “[u]nder the rigors of strict scrutiny, the judiciary must ‘verify that it is necessary for a university to use race to achieve the educational benefits of diversity.’”<sup>75</sup>

In particular, Judge Garza criticized two aspects of the University’s ambiguous position about what constituted a critical mass. First, given the *Grutter* mandate that an affirmative admissions scheme “must be limited in time,”<sup>76</sup> he argued that “the University explains only that it will ‘cease its consideration of race when it determines . . . that the educational benefits of diversity can be achieved . . . through a race-neutral policy.’”<sup>77</sup> This variation on the “I know it when I see it”<sup>78</sup> trope was unacceptable given the judiciary’s obligation to “‘verify’ that the admissions program is ‘‘necessary.’”<sup>79</sup> “It is not possible to perform this function,” Judge Garza argued, “when the University’s objective is unknown, unmeasurable, or unclear.”<sup>80</sup>

Judge Garza also took issue with the University’s argument that the supplemental admissions policy would “promot[e] the *quality* of minority enrollment – in short, diversity within diversity.”<sup>81</sup> The University, he stressed,

70. *Id.* at 667 (Garza, J., dissenting).

71. *Id.* at 666.

72. *Id.* at 656.

73. For example, during oral argument the Chief Justice asked “[w]hat is that number . . . [w]hat is the critical mass . . . you are working toward” and counsel for Texas responded “[y]our Honor, we don’t have one.” *Fisher I* Transcript, *supra* note 42, at 39. *See also id.* at 46 (“The compelling interest you identify is attaining a critical mass of minority students . . . but you won’t tell me what the critical mass is.”).

74. *See, e.g., id.* at 667 (recognizing that “critical mass does not require a precise numerical decision” but criticizing Texas for “fail[ing] to objectively articulate its goal”).

75. *Fisher*, 758 F.2d at 667 (Garza, J., dissenting) (quoting *Fisher I*, 133 S. Ct. at 2420)).

76. *Grutter*, 539 U.S. at 342.

77. *Fisher*, 758 F.3d at 667 (Garza, J., dissenting).

78. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The focus here was on pornography and obscenity and, in Justice Stewart’s words, a “court . . . faced with the task of trying to define what may be indefinable,” *id.*, an observation that may ultimately prove to be telling given the myriad problems posed by the concept of “critical mass.”

79. *Fisher*, 758 F.3d. at 667. (quoting *Fisher I*, 133 S. Ct. at 2420).

80. *Id.*

81. *Id.* at 669.

“has not shown that qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law” because it “does not evaluate the diversity present in this group before deploying racial classifications to fill the remaining seats.”<sup>82</sup> Tellingly – for reasons I will explain in Part III-A – Judge Garza tied that missing evaluation dimension to educational outcomes identified by Justice O’Connor in *Grutter*: “whether the requisite ‘change agents’ are among [the group admitted], and whether these admittees are able, collectively or individually, to combat pernicious stereotypes.”<sup>83</sup>

The focus in *Fisher II* will accordingly be on whether Texas can convince a majority of the Court that it needed to adopt what it characterizes as a very limited consideration of race in an attempt “to admit students who are more likely, because of their background, qualifications, and experiences, to enrich the educational experience for all students at [the] U[niversity of] T[exas].”<sup>84</sup> Was the addition of a holistic review within which race is considered actually necessary? Were appropriate alternatives considered? In particular, just what does Texas mean by a “critical mass”?

Lurking within each of these questions is the jurisprudential elephant in the room. The goal of the Texas program is an “enriched educational experience for all students,” which requires a “critical mass” of minority students. Tellingly, and tracking *Grutter*, the university’s attempts to explain its conception of critical mass focus on the end point: “[Texas] explains only that its ‘concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.’”<sup>85</sup> That is, the proper focus “is a university’s own first-hand assessment of the educational benefits flowing from student body diversity at a given point in time.”<sup>86</sup> Those assessments, at least to date, have “looked to several data points . . . including hard data on minority admissions, enrollment, racial isolation in classrooms at UT, and reports of racial hostility on campus at UT, as well as direct feedback from students and faculty.”<sup>87</sup>

I believe that that type of information can be helpful, but it is not dispositive. It allows one to sketch a static picture of the demographics of a college or university at a “given point in time.” But it most assuredly does not reflect, at least in any meaningful way, actual educational outcomes that can be attributed to the presence, or absence, of “student body diversity [that] promotes learning.”<sup>88</sup> And that, I believe, was ultimately what *Grutter* both contemplates and requires.

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82. *Id.*

83. *Id.* See also *Grutter*, 539 U.S. at 330 (“the Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races’) (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001)).

84. Brief in Opposition at 24, *Fisher II* (No. 14-981) [hereinafter Brief in Opposition].

85. *Fisher*, 758 F.3d at 667 (quoting *Grutter*, 539 U.S. at 330).

86. UT Fisher I Brief, *supra* note 55, at 41.

87. Brief in Opposition, *supra* note 84, at 24–25.

88. *Grutter*, 539 U.S. at 330.

## II. BAKKE TO GRUTTER

There is a strong temptation to treat *Grutter* as a decision that simply revisited and reaffirmed *Bakke*. Justice O'Connor's opinion for the Court did indeed state that she and her colleagues were "endors[ing] Justice Powell's view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>89</sup> In that limited respect, it is correct to treat her opinion as an "unapologetic embrace" of *Bakke*.<sup>90</sup> The manner in which she wrote was nevertheless distinctive for two telling reasons that have significant implications for *Fisher II*: her emphasis on the need for actual educational outcomes, and the implications of her focus on the need to "better prepare[] students for an increasingly diverse workforce and society, and better prepare[] them as professionals."<sup>91</sup>

### A. Not Theoretical But Real: The Importance of Outcomes

The first significant difference between *Bakke* and *Grutter* is one I have already briefly noted: *Grutter* is *Bakke* with teeth. In particular, the *Grutter* Court's embrace of diversity as a compelling educational interest reflected its belief that there was "detailed evidentiary support for [the] claim that diversity had real, demonstrable, and positive effects."<sup>92</sup>

Justice Powell's opinion in *Bakke* treated the value of diversity largely as a matter of faith. His controlling opinion was predicated on "the assumption that diversity is a compelling interest because certain institutions thought it was a good idea" and accepted the argument that "minority students might bring . . . an unspecified 'something' to such institutions."<sup>93</sup> That made *Bakke* an exercise in intuition. Various elite colleges and universities and their leaders spoke eloquently about an "atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – [that] is widely believed to be promoted by a diverse student body."<sup>94</sup> Justice Powell was willing to simply accept these beliefs and representations. That does not make them wrong. It does make the principle articulated in *Bakke* subject to the telling criticism that "race may be taken into account in university admissions, so long as it makes no perceptible difference, and nothing is done in an un-Harvard-like manner."<sup>95</sup>

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89. *Id.* at 325.

90. John C. Jeffries, Jr., *Bakke Revisited*, 2003 S. Ct. Rev. 1, 16.

91. *Grutter*, 539 U.S. at 330 (quoting AERA Brief, *supra* note 20, at 3).

92. Killenbeck, *supra* note 43, at 30.

93. *Id.* at 36.

94. *Bakke*, 439 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). The two main sources for Justice Powell were a brief article by the then President of Princeton University, *see id.* at 312 n. 48 (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY at 7, 9 (Sep. 26, 1977) [hereinafter Bowen, Admissions], and the Harvard College admissions statement. *See id.* at 321–24 (Appendix, Harvard College Admissions Program).

95. Daniel G. Maguire, *The Triumph of Unequal Justice*, 95 THE CHRISTIAN CENTURY 882, 882 (1978). For perspectives on whether the use of the Harvard model was wise, see Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL

Justice O'Connor's opinion in *Grutter* had echoes of this approach. She noted, for example, that the "educational judgment that such diversity is essential to [an] educational mission is one to which we defer."<sup>96</sup> That particular form of deference must, however, be understood for what it actually was: a statement that an individual college or university is free to adopt affirmative admissions measure if it wishes to do so. That is, as Justice Kennedy belatedly recognized in *Fisher I*, "the decision to pursue 'the educational benefits that flow from student body diversity' . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*."<sup>97</sup> The qualification that followed is an important one. Institutions must provide "a reasoned, principled explanation for the academic decision . . . that a diverse student body would serve its educational goals."<sup>98</sup>

*Grutter* articulated "a standard within which diversity is accepted as a compelling interest because the assumptions for which it stands are supported by positive evidence regarding actual outcomes."<sup>99</sup> Justice O'Connor made it quite clear that a key factor in her analysis was the recognition of "the educational benefits that flow from student body diversity."<sup>100</sup> These were, she emphasized, "not theoretical but real,"<sup>101</sup> documented by "expert studies and reports entered into evidence at trial"<sup>102</sup> and "bolstered by . . . amici."<sup>103</sup> That is, the value of diversity lies in what it actually accomplishes, not simply in what it promises. It is, at the risk of repetition, a constitutionally permissible goal precisely because its benefits are both "real" and "substantial."<sup>104</sup> Indeed, the key future vote of Justice Kennedy on this issue may well turn on the extent to which colleges and universities can demonstrate exactly how "racial diversity among students can further [their] educational task . . . supported by empirical evidence."<sup>105</sup>

The good news is that this emphasis made the case for diversity something more than an article of faith. The use of social science evidence by the Supreme Court to suggest or bolster a holding has been an important device over the years. The technique originated in *Muller v. Oregon*,<sup>106</sup> in which the Court noted "abundant testimony of the medical fraternity" as part of its determination that there was a sound policy basis for a state measure limiting the number of hours a woman may work.<sup>107</sup> The focus was the "Brandeis Brief," filed by future Justice

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L. Rev. 463, 470–73 (2005).

96. *Grutter*, 539 U.S. at 328.

97. *Fisher I*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 330).

98. *Id.*

99. Killenbeck, *supra* note 43, at 36.

100. *Grutter*, 539 U.S. at 330.

101. *Id.*

102. *Id.*

103. *Id.* See also *id.* at 387–88 (Kennedy, J., dissenting) (stressing "acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence").

104. *Grutter*, 539 U.S. at 330.

105. *Id.* at 387–88 (Kennedy, J., dissenting).

106. 208 U.S. 412 (1908).

107. *Id.* at 421–23.

Louis D. Brandeis, which consisted of “three pages . . . devoted to a statement of the constitutional principles involved and 113 pages . . . devoted to the presentation of facts and statistics, backed by scientific authorities, to show the evil effects of too long hours on women.”<sup>108</sup>

Justice Brandeis subsequently described this as a judicial obligation “to determine, in the light of all the facts which may enrich our knowledge and understanding, whether [a given] measure . . . transcends the bounds of reason.”<sup>109</sup> That tracks Judge Richard Posner observation that in many constitutional cases “[t]he big problem is not lack of theory, but lack of knowledge – lack of the very knowledge that academic research . . . is best designed to produce.”<sup>110</sup> The technique is not universally embraced.<sup>111</sup> Thoughtful critics have argued “that social science evidence provides a weak and relatively unstable foundation for legal rules.”<sup>112</sup> I disagree, at least in this instance. Rigorous studies that document actual educational outcomes provide appropriate foundations for the precise constitutional questions posed by affirmative admissions policies: is a group classification actually relevant, given the decisions that must be made and the goals that are sought?<sup>113</sup> Or is the use of the classification “in fact motivated by illegitimate notions of racial inferiority or simple racial politics”?<sup>114</sup>

Justice O’Connor’s use of social science evidence in *Grutter* provides a basis for educators to insist that their belief in and use of admissions preferences is something more than simple “racial experimentation.”<sup>115</sup> The evidence in question may well prove to be mixed,<sup>116</sup> and its embrace or rejection may be influenced by the views individual Justices bring to the debate. But its presence as part of the dialogue offers the opportunity to shift the terms of the discussion from the “theoretical” to the “real.”<sup>117</sup>

108. Edwin S. Corwin, *Social Planning Under the Constitution – A Study in Perspectives*, 26 AM. POL. SCI. REV. 1, 17 (1932).

109. *Burns Baking Co. v. Bryant*, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting).

110. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 3 (1998).

111. See, e.g., Carl Brent Swisher, *THE SUPREME COURT IN MODERN ROLE* 158 (1958) (criticizing the use of such materials in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) as “based on neither the history of the [Fourteenth A]mendment nor on precise textual analysis” but on the “highly evanescent grounds” of “psychological knowledge”).

112. Steven L. Willborn, *Social Science in the Courts: The View from Michigan*, in *SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES*, 143, 145 (Richard L. Wiener et al. eds., 2007) [hereinafter *Social Consciousness*].

113. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (characterizing “government action[s] based on race” as “a group classification long recognized as in most circumstances irrelevant and therefore prohibited”).

114. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

115. *Grutter*, 539 U.S. at 364 (Thomas, J., dissenting).

116. See, e.g., *id.* at 364–65 (Thomas, J., dissenting) (discussing and citing “growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students”).

117. *Id.* at 330.

That is not an outright blessing. Having relied on “social science data . . . [that] significantly extend[s] our understanding of just how *social* learning turns out to be,”<sup>118</sup> colleges and universities assume the obligation to document the effectiveness of the policies they have adopted. In particular, they labor under the expectations created by Justice O’Connor’s characterization of the benefits that follow from diversity as “substantial.”<sup>119</sup> Each institution must be prepared to defend its use of admissions preferences on the basis of real educational benefits that are directly attributable to actual diversity. In particular, they must document the cause-effect relationships that follow from the policies they have embraced.

Studies of this sort should avoid the problems inherent in surveys within which students (or faculty, for that matter) simply “self-assess.” Virtually everyone wants “to be and appear to be good people.”<sup>120</sup> In particular, “self-reports of any socially sensitive topic, including race, are subject to social desirability pressures.”<sup>121</sup> Surveys linked specifically to diversity or racial climate at an institution that has made its commitment to affirmative action known pose risks, given that “[t]he more transparent or obvious the purposes of a questionnaire, the more likely respondents are to provide the answers they want others to hear about themselves rather than the ones that may be true.”<sup>122</sup> That does not mean that surveys identifying how students “feel about their experience at the university”<sup>123</sup> or “how they feel in the classroom”<sup>124</sup> have no value. It does mean that they must be crafted and used with care.

These studies and assessments should also be longitudinal. They should identify the characteristics, strengths, and weaknesses of the students admitted before they begin their education. They should then document the changes these same students experience – positive or negative – during their time at the institution. Diversity is valued precisely because it is believed that it will have an impact. The assumption is that it will create benefits and outcomes that would not otherwise occur. If the goal is to produce beneficial educational outcomes, then “meaningful data must be collected both before and after exposure to the diversity experience in order to determine whether the experience itself produced the [desired] learning outcomes.”<sup>125</sup>

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118. Nancy Cantor, *Introduction*, in *DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN* 8, 8–9 (Patricia Gurin et al. eds., 2004) [hereinafter Cantor Introduction and Defending Diversity].

119. *Grutter*, 539 U.S. at 330.

120. SEYMOUR SUDMAN & NORMAN H. BRADBURN, *ASKING QUESTIONS: A PRACTICAL GUIDE TO QUESTIONNAIRE DESIGN* 6 (1982).

121. Maria Krysan, *Prejudice, Politics, and Public Opinion: Understanding the Sources of Racial Policy Attitudes*, 26 *ANN. REV. SOC.* 135, 138 (2000).

122. BRUCE W. TUCKMAN, *CONDUCTING EDUCATIONAL RESEARCH* 235 (4th ed. 1994) [hereinafter Tuckman].

123. Joint Appendix at 267a, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (Deposition of Dr. Bruce Walker (Oct. 7, 2008)) [hereinafter respectively Walker Deposition and Joint Appendix]. Dr. Walker was at the time Vice Provost and Director of Undergraduate Admissions.

124. *Id.*

125. Killenbeck, *supra* note 43, at 55.

The assessments must also provide context, in this instance, a means for differentiating between what occurs with and without diversity. It is a basic social science principle that “[c]omparisons need to be made between students who experience different types of education” given that “survey research done on a single group often leads to invalid conclusions about cause-and-effect relationships.”<sup>126</sup> Too often, diversity assessments focus on diversity itself to the exclusion of other factors, “interpreting outcomes . . . as the effects of diversity alone.”<sup>127</sup> In doing so, they tend to ignore the importance of determining “what type of response is ‘normal.’”<sup>128</sup> Information derived from classes or situations where diversity is minimal or nonexistent can, accordingly, provide “an objective indicator revealing how people would ideally respond or behave in a given group setting.”<sup>129</sup> Even here, care must be exercised:

One of the problems in communicating the messages of [intervention] research is that experimental design in itself encourages disproportionate attention to be directed toward the critical manipulated variable as *the* cause of observed differences between experimental and control groups, no matter how remote in time or nature the outcome measures are from the intervention.<sup>130</sup>

Finally, the studies and assessments should be tied to the compelling interest that the Court has recognized: “the educational benefits that diversity is designed to produce.”<sup>131</sup> *Bakke* spoke simply of the “robust exchange of ideas”<sup>132</sup> made possible by a “heterogeneous student body.”<sup>133</sup> Justice O’Connor repeated a portion of this notion, stressing that “‘classroom discussion is livelier, more spirited, and simply more interesting’ when students have ‘the greatest possible variety of backgrounds.’”<sup>134</sup> But she also enumerated a series of specific, measurable educational outcomes, including: promoting of cross-racial understanding; breaking down racial stereotypes; enabling students to better understand persons of different races; preparing students for an increasingly

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126. Tuckman, *supra* note 122, at 235.

127. Evan P. Apfelbaum et al., *Rethinking the Baseline in Diversity Research: Should We Be Explaining the Effects of Homogeneity?*, 9 PERSPECTIVES ON PSYCHOL. SCI. 235, 236 (2014). The authors note that in a sample of “240 research articles on group diversity capturing the wide range of social, educational, and organizational contexts in which it is examined . . . 205 of the . . . articles interpreted their results as the effect of diversity alone.” *Id.*

128. *Id.*

129. *Id.*

130. Martin Woodhead, *When Psychology Informs Public Policy: The Case of Early Childhood Intervention*, 43 AM. PSYCHOL. 443, 452 (1988).

131. *Grutter*, 539 U.S. at 330. See also *Parents Involved*, 551 U.S. at 725 (characterizing the interest as the “educational and broader socialization benefits [that] flow from a racially diverse learning environment”).

132. *Bakke*, 438 U.S. at 313.

133. *Id.* at 314.

134. *Grutter*, 539 U.S. at 330 (quoting *Grutter*, 137 F. Supp. 2d at 849).

diverse workforce and society; and instilling the skills needed in a global marketplace.<sup>135</sup>

The extent to which these outcomes have been achieved are the sorts of “determination[s that] . . . trained educators make . . . all the time.”<sup>136</sup> The evidence Texas has offered to date in support of their case – “hard data on minority admissions, enrollment and racial isolation at UT, as well as discussions with students about their experiences”<sup>137</sup> – does not actually focus on educational outcomes attributable to a diverse learning environment. That is perhaps understandable given the current focus of the litigation, which is much more about the overall design of the admissions policy than the extent to which the benefits associated with diversity have actually been realized.

That said, both *Grutter* and *Fisher I* contemplate the production of such evidence as part of the narrow tailoring inquiry. For example, Justice O’Connor made it clear that the implementation portion of the constitutional calculus requires that the entity adopting a race-conscious policy must show how the admissions policies are “specifically and narrowly framed to accomplish [their] purpose.”<sup>138</sup> In a similar vein, Justice Kennedy spoke directly in *Fisher I* of the need to determine “whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”<sup>139</sup>

Those purposes and educational outcomes are not documented by admissions and enrollment data, commonly described as “structural” or “numerical” diversity.<sup>140</sup> Simply increasing minority enrollments to the level of a critical mass poses two problems. The first is a significant constitutional difficulty: “[a] university is not permitted to define diversity as ‘some specified percentage of a particular group merely because of its race or ethnic origin.’”<sup>141</sup> Rather, “[t]he attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes.”<sup>142</sup> The second is practical. The diversity interest recognized by Justice Powell in *Bakke* was intuitive and informal.<sup>143</sup> The one embraced in

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135. *Id.*

136. UT Fisher I Brief, *supra* note 55, at 41.

137. *Id.*

138. *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

139. *Fisher*, 133 S. Ct. at 2421.

140. Professor Patricia Gurin and her colleagues, for example, describe three types of diversity, one of which is “structural diversity. . . the numerical representation of diverse groups.” Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 332–33 (2002) [hereinafter Gurin et al.]. The other two are “informal interactional diversity” and “classroom diversity.” *Id.* at 333.

141. *Fisher*, 133 S. Ct. at 2419 (quoting *Bakke*, 438 U.S. at 307).

142. *Id.* at 2418.

143. *See, e.g., Bakke*, 438 U.S. at 312 n. 48 (characterizing “some of the benefits derived from a diverse student body” as “learning [that] occurs informally” but also cautioning that “[i]n the nature of things, it is hard to know how, and when, and even if, this informal ‘learning through’ diversity actually occurs”) (quoting Bowen, Admissions, *supra* note 94, at 7, 9).

*Grutter* was more structured and nuanced. It focused on the extent to which diversity fosters positive learning outcomes. That reformulation of the diversity rationale imposes important and special obligations to articulate the expected benefits and document that they have been realized.

Texas may well have such evidence in hand, or at least be planning to acquire it. That evidence may well meet the requirements associated with quality social science findings that are tied directly to the sorts of concrete educational outcomes the Court discussed in *Grutter*. And it may well have been gathered in the sound, longitudinal ways I have discussed.

As matters currently stand, however, the record does not reflect such findings, with two possible exceptions.<sup>144</sup> The first is the University's reliance on student anecdotal evidence about "how they feel."<sup>145</sup> Once again, such information helps to provide perspectives. But it is most certainly not the sort of rigorous and reliable findings that can tell us whether a diversity program is generating actual educational outcomes. That will be especially true if there are no baselines for establishing a before and after matrix, and no comparison groups to determine if diversity did, or did not, actually matter.

The second is the University's attempt to document the demographics in individual classes as part of its argument that "there was jarring evidence of racial isolation at UT."<sup>146</sup> The proposal that led to the creation of the policy now at issue stated that "there is a compelling educational interest for the University not to have large numbers of classes in which there are no students – or only a single student – of a given underrepresented race or ethnicity."<sup>147</sup> Texas thus emphasized at numerous points over the course of the litigation that classroom demographics mattered,<sup>148</sup> in particular as part of its efforts to determine if its minority enrollments had reached a critical mass.<sup>149</sup> Texas now appears to have abandoned

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144. My focus here is on the evidence that Texas gathered as it crafted the admissions scheme, rather than the social science findings provided to the Court about diversity in general in *Fisher I*, materials likely to be replicated as *Fisher II* is briefed.

145. Walker Deposition, *supra* note 123, at 267a–68a ("We talk to them all the time about how they feel about their experience at the university, how they feel in the classroom" and "have students who tell us they feel isolated in the classroom, that they are the only, or the majority of students tell us that there is no diversity in the classroom.").

146. UT Fisher I Brief, *supra* note 55, at 43.

147. UNIVERSITY OF TEXAS AT AUSTIN, PROPOSAL TO CONSIDER RACE AND ETHNICITY IN ADMISSIONS at 25 (June 25, 2004), *reprinted in* Supplemental Joint Appendix at 24a, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2241 (2013) (No. 11-345) [hereinafter Supplemental Joint Appendix].

148. *See, e.g.*, UT Fisher I Brief, *supra* note 55, at 43–44 (arguing that "[i]f '[a] compelling interest exists in avoiding racial isolation' . . . then surely a university may take into account blatant racial isolation in its classrooms") (quoting *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring)); *Fisher*, 631 F.3d at 225 (noting that as part of the plan developmental process Texas "commissioned two studies to explore whether [it] was enrolling a critical mass of underrepresented minorities").

149. *See, e.g.*, Walker Deposition, *supra* note 123, at 266a. When asked if "the university ha[s] any means of measuring . . . progress towards critical mass," Dr. Walker responded "Yes . . . there is one window . . . through which we can see how we're doing . . . the classroom." *Id. See also id.* ("[W]e have far too many classrooms

any attempt to tie the justifications for and potential benefits of its diversity policy to individual class demographics.<sup>150</sup> The enrollment data and class numbers will nevertheless be useful as part of the debate about critical mass. That information does not, however, help when the focus shifts to educational outcomes attributable to diversity.

### B. Preparing for Work and Citizenship: Beyond the College Years

A second and potentially very significant difference between *Bakke* and *Grutter* is found in Justice O'Connor's decision to look beyond the college years. This was not a complete departure from Justice Powell's opinion in *Bakke*. He noted, for example, that "[p]hysicians serve a heterogeneous population" and that by "enrich[ing] the training of its student body" medical schools could "better equip [their] graduates to render with understanding their vital service to humanity."<sup>151</sup> He also made passing references to "leaders" and the "nations's future."<sup>152</sup> That discussion was, however, exceedingly brief and offered no empirical support for the proposition that diversity "better equip[s] students to render with understanding their vital service[s] to humanity."<sup>153</sup>

Justice O'Connor made the "long view" a much more integral part of her argument for the value of diversity. She emphasized "the overriding importance of preparing students for work and citizenship."<sup>154</sup> "Education," she stressed, is "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."<sup>155</sup> She stressed that "student body diversity . . . 'better prepares students for an increasingly diverse workforce and

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where there's still no or only one minority student."). As the Court of Appeals noted the first time it had *Fisher* before it, "UT commission two studies to explore whether the University was enrolling a critical mass of underrepresented minorities." *Fisher*, 631 F.3d at 225. The first

focus[ed] on classes of "participatory size," which it defined as between 5 and 24 students. UT analyzed these classes, which included most of its undergraduate courses, because they offered the best opportunity for robust classroom discussion, rich soil for diverse interactions. According to the study, 90% of these smaller classes . . . had either one or zero African-American students, and 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students.

*Id.*

150. For example, in response to a question from Justice Scalia about whether Texas "want[s] not just a critical mass in the school at large, but class by class," Gregory Garre, representing Texas, responded:

No, Your Honor, and let me try to be clear on this. The university has never asserted a compelling interest in any specific diversity in every single classroom. It has simply looked to classroom diversity as one dimension of student body diversity.

*Fisher I* Transcript, *supra* note 55, at 34.

151. *Bakke*, 438 U.S. at 314.

152. *Id.* at 312–13 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

153. *Id.* at 314.

154. *Id.* at 331.

155. *Grutter*, 539 U.S. at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

society, and better prepares them as professionals.”<sup>156</sup> The “real” benefits of diversity, she noted, included the attainment of “the skills needed in today’s increasingly global marketplace [which] can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>157</sup> And she emphasized the need to promote “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation,” stressing the role of diverse colleges and universities as “the training ground for a large number of our Nation’s leaders.”<sup>158</sup>

The case for diversity embraced in *Grutter* involved, accordingly, a quest for post-graduation skills and perspectives that are instilled as part of “the diffusion of knowledge and opportunity through [diverse] institutions of higher education.”<sup>159</sup> A portion of the evidence marshaled for these educational outcomes came from the same sources that documented general learning outcomes: a friend of the Court brief,<sup>160</sup> a book reporting the results of a major study,<sup>161</sup> and two books that collected individual social science studies.<sup>162</sup> I will discuss these materials in more depth in Part III-A. It is enough for current purposes to note that these sources contained information on, for example, “the ways in which diversity at colleges and universities affects lives, policies, and issues beyond the walls of the university.”<sup>163</sup>

Another set of sources came in the form of information and perspectives gleaned from a series of briefs filed by businesses<sup>164</sup> and, in particular, “former high-ranking officers and civilian leaders of the United States military.”<sup>165</sup> The two businesses’ briefs stressed both operational and economic benefits for companies that are able to hire “the most qualified and talented diverse students . . . possible.”<sup>166</sup> Such hires bring “cross-cultural competenc[ies] [that] directly affect[ the] bottom line.”<sup>167</sup> In particular, these businesses stressed the

156. *Id.* at 330 (quoting AERA Brief, *supra* note 20, at 3).

157. *Id.*

158. *Id.* at 332.

159. *Id.* at 331.

160. See AERA Brief, *supra* note 20.

161. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) [hereinafter Bowen & Bok].

162. See *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell J. Chang et al. eds., 2003) [hereinafter *Compelling Interest*]; *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield ed., 2001) [hereinafter *Diversity Challenged*].

163. Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sources*, in *Compelling Interest*, *supra* note 162, at 126, 129.

164. See Brief for Amici Curiae 65 Leading American Businesses, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter 3M Brief]; Brief of General Motors Corporation as Amicus Curiae, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter GM Brief].

165. See Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) [hereinafter *Military Leaders’ Brief*].

166. 3M Brief, *supra* note 164, at 9.

167. GM Brief, *supra* note 164, at 12. See also *id.* at 14 (“a business’ lack of

need for “entrants into the managerial levels of the business world [who] come equipped with the abilities to work creatively with persons of any race, ethnicity, or culture and to understand views influenced by those traits.”<sup>168</sup>

The perspectives offered were a mixture of “practical experience”<sup>169</sup> and [a]bundant research [that] has verified [the] conclusion that racial and ethnic diversity is institutions of higher education assist students in developing the skills that . . . are so essential in the success in business world: (1) understanding the views of persons from different cultures and (2) addressing issues from multiple perspectives.<sup>170</sup>

These corporations also made it clear that they looked to colleges and universities to provide this sort of education: “Businesses are primarily commercial, not educational, entities, incapable of replicating the safe academic environments that foster the ‘robust exchange of ideas which discovers truth out of multiple tongues.’”<sup>171</sup>

The brief filed by former military leaders was more pointed and, at least in terms of volume of discussion in the opinion, more significant.<sup>172</sup> It highlighted a long and troubling history of intentional invidious discrimination in the military that required positive intervention, the end result of which is that “[t]oday, the military is one of the most integrated institutions in America.”<sup>173</sup> That produced, in turn, a need for “a highly qualified, racially diverse officer corps educated and trained to command our nation’s racially diverse ranks [which] is essential to the military’s ability to fulfill its principal mission to provide national security.”<sup>174</sup> This requires both “qualified minority officer candidates”<sup>175</sup> and white officers capable of understanding “what the black man and woman in the service [is] thinking.”<sup>176</sup> This meant, Justice O’Connor stressed, that “[t]o fulfill its mission, the military ‘must be selective in admissions for training and education for the

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sensitivity to culturally based beliefs may disaffect an entire market and result in decreased sales”).

168. *Id.* at 12.

169. 3M Brief, *supra* note 164, at 5.

170. GM Brief, *supra* note 164, at 17–18.

171. *Id.* at 21 (quoting *Keyishian*, 385 U.S. at 603). *See also id.* (“Only schools, not businesses, offer a forum for cross-cultural contact among a society of equals, free of hierarchy.”).

172. Several individuals have argued that the military brief played a significant role in the decision. *See, e.g.,* Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 ST. LOUIS U. L.J. 889, 893–94 (2004) (noting that while the military brief “had no direct relevance to the law school program” it provided “persuasive” evidence of the value of diversity); Joel K. Goldstein, *Beyond Bakke: Grutter-Gratz and the Promise of Brown*, 48 ST. LOUIS U. L.J. 899, 946–47 (2004) (noting that the military brief “tied race-sensitive admissions to national security” and bolstered the case for diversity as “help[ing to] develop a cadre of African-American leaders”).

173. Military Leaders’ Brief, *supra* note 165, at 12.

174. *Id.* at 5.

175. *Id.* at 29.

176. *Id.* at 16 (quoting BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* 317 (1986)).

officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.”<sup>177</sup>

*Grutter’s* emphasis on matters that lie beyond the college and university years is important for two reasons. As a practical matter, it broadens the range of educational outcomes associated with diversity and the contexts within which they are realized. More importantly, a focus on day-to-day, post-graduate life ties the diversity debate more tightly into one of the nation’s most important problems: the need to deal with “[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought [that] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.”<sup>178</sup>

### III. DIVERSITY AND INCLUSION: FROM THEORY TO FACT?

I believe it is one thing to seek “enhanced classroom dialogue[,] . . . lessening of racial isolation and stereotypes”<sup>179</sup> and the “promot[ion of] learning outcomes.”<sup>180</sup> It is quite another to effectively “prepare students for an increasingly diverse workforce and society.”<sup>181</sup> *Grutter* did a good job marshaling evidence in support of the former. It was less effective in doing the latter. In particular, it did not account for the realities posed by implicit bias, the “unwitting, unintentional, and uncontrollable” impulses that infect “the normal, everyday human thought and activity” of even “the most well-intentioned people.”<sup>182</sup> This is an important insight, given its implications for Justice O’Connor’s expansion of the argument for diversity beyond the confines of classroom and campus.

My goal in this Part is to outline what social scientists claim that their work tells us about the educational value of diversity. The qualification is intentional. The bitter divide between the supporters and opponents of affirmative action on the normative side of the debate actually spills over into the social sciences. Professor Mitchell Chang, for example, is a supporter of these policies who has conducted research “suggest[ing] that the benefits associated with racial diversity may be even more far-reaching than previously documented.”<sup>183</sup> He also contends that “[i]t is nearly impossible to find a published study grounded in the field of higher education research that rejects Justice Powell’s diversity rationale.”<sup>184</sup> Professors Abigail and Stephen Thernstrom, in turn, are opponents of affirmative action who

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177. *Grutter*, 539 U.S. at 331 (quoting Military Leaders’ Brief, *supra* note 165, at 29).

178. *Adarand Constrictors, Inc. v. Pena*, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting).

179. *Fisher I*, 133 S. Ct. at 2418.

180. *Grutter*, 539 U.S. at 330.

181. *Id.* (quoting AERA Brief, *supra* note 20, at 3).

182. *Hardin & Banaji*, *supra* note 21, at 14.

183. Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 AM. EDUC. RES. J. 322, 344 (2009) [hereinafter Denson & Chang].

184. Mitchell James Chang, *Quality Matters: Achieving Benefits Associated With Racial Diversity* 9 (Oct., 2011) [hereinafter *Quality Matters*].

have published studies of their own<sup>185</sup> and reviewed those of others.<sup>186</sup> Based on their work and expertise, they contend that “[i]n reality . . . research on race and diversity in the educational context indicates that diversity as generated by race-based admissions simply does not lead to those purported benefits.”<sup>187</sup>

Their respective claims are carefully qualified. Professor Chang’s statement about the studies available speaks in terms of the “rationale” for affirmative action, not its actual results. The Thernstrom rhetoric in turn can plausibly be read to reject simply the structural consequences of “race-based admissions,” as opposed to outcome associated with proactive programming.

The truth likely lies somewhere in between. The question I want to explore is whether there is a body of evidence that supports granting admissions preferences in the name of diversity. The answer is yes. But the collateral reality is that such materials provide only a necessary first step for any institution that wishes to adopt or retain such preferences in the current legal environment.

#### A. *Grutter*: The Benefits of Contact Are Real

The prominence and protected place of the diversity rationale in the affirmative action debate is a relatively recent development. It has been thirty-seven years since Justice Powell accepted diversity as a compelling interest for constitutional purposes in *Bakke*. But his opinion was controversial and did not command widespread support. Critics found the rationale “weak”<sup>188</sup> and “totally disappointing.”<sup>189</sup> As one of the individuals who represented the University of California observed, *Bakke* “makes a good deal of intuitive sense [b]ut its justification on a principled, constitutional level is more problematic.”<sup>190</sup>

Many of affirmative action’s most ardent supporters accordingly continued to press their case for admissions preferences as “a strategy for justice.”<sup>191</sup> In

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185. See, e.g., STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* (1997).

186. See, e.g., Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River* (Book Review), 46 U.C.L.A. L. REV. 1583 (1999).

187. Brief of Abigail Thernstrom et al. at 4, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2414 (2013) (No. 11-345) [hereinafter Thernstrom Brief].

188. Ronald Dworkin, *The Bakke Decision: Did It Decide Anything?*, N.Y. REV. BOOKS, Aug. 17, 1978, at 20, 22 (stating that “the argumentative base of” the Powell opinion “is weak” because “it does not supply a sound intellectual foundation for the compromise the public found so attractive”).

189. Guido Calabresi, *Bakke As Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 427 (1979).

190. Paul J. Mishkin, *The Use of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 924 (1983).

191. Owen M. Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL. 37 (1997). He states that “[t]he diversity rationale seems shallow, for it lacks the normative pull necessary to justify the costs inevitably entailed in a system of preferential treatment.” *Id.* at 37. See also JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 228 (1979) (arguing that “[n]one of America’s traditional victims [are] winners in the Bakke case” and that the “real winners [are] the country’s economically and educationally privileged”); Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1243 (2010) (arguing for the need for a system

particular, they argued that “blacks and Hispanics are the fortuitous beneficiaries of [rulings] motivated by other interests that can and likely will change when different priorities assert themselves.”<sup>192</sup> And they looked with disdain on the notion that the ability of underrepresented minorities to find a place at the academic table somehow depends on the extent which their presence “sounds in *noblesse oblige*, not legal duty, and suggests the giving of charity rather than the granting of relief.”<sup>193</sup>

The Supreme Court, however, has refused to characterize any of the interests associated with the normative case for affirmative action as “compelling” for constitutional purposes.<sup>194</sup> For four members of the current Court, the *niciest* thing they can say about affirmative action is that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>195</sup> A fifth, Justice Anthony Kennedy, has made what is at best a cautious and limited case for “a moral and ethical obligation to fulfill [this Nation’s] historic commitment to creating an integrated society,”<sup>196</sup> even as he condemns “crude measures [that] threaten to reduce [individuals] to racial chits.”<sup>197</sup>

Colleges and universities are not likely to argue that their admissions preferences have been implemented with a view toward “the compelling interest of remedying the [present] effects of [their own] past intentional discrimination.”<sup>198</sup> Sound recruitment strategies do not include luring underrepresented minority students to campus by touting “the present continuing manifestations of past discrimination.”<sup>199</sup> This leaves the diversity rationale as the only viable game in town as both a legal and practical matter.

within which “remediation diversity can be accepted, and social justice achieved”); Colin S. Diver, *From Equality to Diversity: The Detour From Brown to Grutter*, 2004 U. ILL. L. REV. 691, 717 (2004) (declaring that diversity’s “moral claim” is “not . . . trivial” but nevertheless “pales in significance when set against the corrective justice claim on which the remedial justification rests”).

192. Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1625 (2003).

193. Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 8 (1979).

194. See, e.g., *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–22 (2007) (stressing that the only two compelling interests supporting the use of race as a decision-making criterion are “remedying the effects of past intentional discrimination” and the interest in “diversity in higher education”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76 (1986) (rejecting a “role model” justification for minority preferences); *Bakke*, 438 U.S. at 307–11 (rejecting “societal discrimination” and “improving the delivery of health-care services to communities currently underserved” as compelling interests).

195. *Parents Involved*, 551 U.S. at 748 (plurality opinion of Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito).

196. *Id.* at 797 (Kennedy, J., concurring).

197. *Id.* at 798.

198. *Id.* at 720 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

199. *Podberesky v. Kirwan*, 956 F.2d 52, 56 (4th Cir. 1992). The University of Maryland, to its credit, admitted its undeniable history of intentional discrimination and created the “Banneker scholarship program, which is a merit-based program for which only African-Americans are eligible.” *Podberesky v. Kirwan*, 38 F.3d 147, 152 (4th

There is nothing necessarily wrong with that. Elements of what we now recognize as “the educational benefits of a diverse student body”<sup>200</sup> have been part of the higher education calculus for a considerable period of time. In an important joint statement issued in 1997, sixty-two of the nation’s most prestigious institutions declared that “[f]or several decades – in many cases, far longer – our universities have assembled their student bodies to take into account many aspects of diversity.”<sup>201</sup> During that same period the then-President of Harvard, Neil L. Rudenstine, argued that the intellectual principles supporting diversity could be traced back over three centuries and that Harvard itself had valued and practiced diverse admissions going back to the Civil War.<sup>202</sup>

The problem in the wake of *Bakke* and before *Grutter* was the need to tie general statements about the desire to create “a truly heterogen[e]ous environment that reflects the rich diversity of the United States”<sup>203</sup> to actual evidence documenting individual educational accomplishments and outcomes. The University of Michigan recognized early in the development of its defense strategy in *Grutter* and *Gratz* that its case would be immeasurably strengthened if it could show that “education and learning are socially shared activities that depend in large part on the quality and effectiveness of the mix of people and ideas in the environment.”<sup>204</sup> That realization tracked a collateral development: the response by the higher education community and leading social scientists to what was characterized as the “Hopwood Shock”: the realization that “no consensus existed on the benefits of diversity” and that “[t]he research had not been done to prove the academic benefits and the necessity of affirmative action policies.”<sup>205</sup>

Several national conferences were convened and initiatives were undertaken with a view toward “increas[ing] the sophistication with which society addresses the key issues of fairness, merit, and the benefits of diversity as they pertain to higher education.”<sup>206</sup> Those efforts did two things. First, they focused attention on an existing body of knowledge documenting the importance of the concepts of

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Cir. 1994), *cert. denied*, 514 U.S. 1128 (1996). However, its focus on “high achieving African-American students” and allocation of a substantial number of scholarships to “non-residents of Maryland” meant that it was “not narrowly tailored to correct[] the conditions” that arguably justified it. *Id.* at 158–159.

200. *Grutter*, 539 U.S. at 333.

201. *On the Importance of Diversity in University Admissions*, ASSOCIATION OF AMERICAN UNIVERSITIES (April 14, 1997), <https://www.aau.edu/WorkArea/DownloadAsset.aspx?id=1652>.

202. Harvard University, *The President’s Report 1993-1995*, at 3–6 (1996).

203. *Bakke*, 438 U.S. at 323 (quoting Harvard College Admissions Program).

204. Cantor Introduction, *supra* note 118, at 8.

205. Gary Orfield, *supra* note 162, at 1, 3–4. *See also* Jonathan R. Alger, *Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73, 74 (1998) (“the unfinished homework in the affirmative action debate concerns the development of an articulated vision – supplemented by a strong evidentiary basis – of the educational benefits of diversity in higher education.”).

206. Kenji Hakuta et al., *Preface*, in *Compelling Interest*, *supra* note 162, at xiii, xv. The history and strategies are described in this Preface and in the Orfield Introduction, *supra* note 205.

“identity” and “discontinuous intellectual growth.”<sup>207</sup> Second, they generated a series of studies that addressed directly the central question posed by the affirmative action litigation: are there in fact specific, positive educational outcomes associated with diversity?

Many of these materials played a direct role in *Grutter*. As indicated, Justice O’Connor cited three books and a friend of the court brief as evidence that the benefits of diversity are “real.”<sup>208</sup> Much of this material drew on “contact theory,” a body of research that emphasizes the value and impact of “engaging and interacting with diverse peers.”<sup>209</sup> An integral part of this is the recognition that “[h]igher education is more than lectures, lab exercises, and reading lists. The highest quality education is achieved through interaction among students and faculty.”<sup>210</sup> Many students “reach college without sustained contact with people of other races.”<sup>211</sup> Thus, “contact between students of different racial and ethnic backgrounds”<sup>212</sup> matters, given that “unconscious racial and ethnic stereotyping and prejudice are pervasive and persistent in our society”<sup>213</sup> and “research shows . . . that these implicit attitudes and responses can be ameliorated when students from diverse racial and ethnic backgrounds live and work with each other intensively, both in and out of the classroom.”<sup>214</sup>

Drawing on the work of Erik Erikson<sup>215</sup> and Jean Piaget,<sup>216</sup> one of the key experts in the Michigan cases, Patricia Y. Gurin, captured the significance of this established body of work for college and university diversity:

[I]dentity develops best when young people are given a psycho-social moratorium – a time and place in which they can experiment with different social roles before making permanent commitments to an occupation, to intimate relationships, to social groups and communities, and to a philosophy of life.

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207. Faye J. Crosby & Amy E. Smith, *The University of Michigan Case: Social Scientific Studies of Diversity and Fairness*, in *Social Consciousness*, *supra* note 112, at 121, 126 [hereinafter Crosby & Smith].

208. *See supra* note 20 and accompanying text.

209. AERA Brief, *supra* note 20, at 7.

210. Brief of the American Sociological Association et al. as Amici Curiae at 20, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

211. *Id.* at 21. Texas, for example, argued strenuously that there is “well-known de fact segregation throughout much of Texas’s secondary school system” and that it “produces clusters of overwhelmingly majority-minority schools.” UT Fisher I Brief, *supra* note 55, at 33.

212. APA *Grutter* Brief, *supra* note 14, at 3.

213. *Id.* at 15.

214. *Id.*

215. *See, e.g.*, ERIK H. ERIKSON, *YOUTH: CHANGE AND CHALLENGE* (1963); ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (2d ed. 1963); ERIK H. ERIKSON, *IDENTITY AND THE LIFE CYCLE: SELECTED PAPERS* (1959).

216. *See, e.g.*, JEAN PIAGET, *THE EQUILIBRATION OF COGNITIVE STRUCTURES: THE CENTRAL PROBLEM OF INTELLECTUAL DEVELOPMENT* (1985); JEAN PIAGET, *THE STAGES OF COGNITIVE DEVELOPMENT*, in *MEASUREMENT AND PIAGET* (Dennis Ross Green et al. eds., 1971)

Ideally, the moratorium will involve confrontation with diversity and complexity, lest young people passively make commitments that follow their past, rather than being obliged to think and make decisions that fit their talents and feel authentic.<sup>217</sup>

One of the key strengths in these materials is that they are not tied to conceptions of race or racial justice. Rather, they reflect generally accepted understandings of how all individuals progress through a series of developmental stages.<sup>218</sup> In particular, they focus on the potential significance of encountering new ideas, information, and individuals during the college years, a time when “students from varied backgrounds [come] together to create a diverse and complex learning environment.”<sup>219</sup> This requires that the college “social milieu [be] different from the home and community background . . . diverse and complex enough to encourage intellectual experimentation and recognition of varied future possibilities.”<sup>220</sup> If it is, developmental theory suggests that an impact on what Professor Gurin described as “learning outcomes”<sup>221</sup> and “democracy outcomes”<sup>222</sup> can occur “in institutions explicitly constituted to promote late-adolescent development.”<sup>223</sup>

This strength is also a potential weakness. These approaches are constrained by the reality that they are tied to the “transition to adulthood,” a time during which “events . . . were more meaningful than those in other periods.”<sup>224</sup> This makes this body of research valuable if the focus is undergraduate education, in particular the experiences of “typical” students who matriculate directly from or shortly after high school. Such materials have less force when the focus shifts to graduate and professional education. They also tend to reflect an emphasis on what is known as

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217. Expert Report of Patricia Gurin, *in* THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION (John A. Payton ed., 1999), *reprinted in* 5 MICH. J. RACE & L. 363, 368 (1999) [hereinafter Gurin Report].

218. *But see*, Thernstrom Brief, *supra* note 187, at 10 (arguing that “this ‘contact hypothesis’ has been discredited by more than half a century of research and is no longer accepted by any reputable social scientist”). They argue that “contact” will succeed “[o]nly under very specific conditions, ones that are unlikely to be met when racial preferences are used.” *Id.* This may well be true if a given college or university practices only structural diversity. It is a less tenable objection if these institutions practice what I characterize as “principled diversity.” *See infra* text accompanying note 300.

219. Gurin Report, *supra* note 217, at 369.

220. *Id.*

221. Gurin et al., *supra* note 140, at 336–39. She describes these outcomes as, among other things, “effortful, mindful, and conscious modes of thought,” *id.* at 337, a “stronger sense of individuality and a deeper understanding of the social world,” *id.*, “opportunities to identify discrepancies between students with distinctive pre-college experiences,” *id.* at 338, and “multiple and different perspectives.” *Id.*

222. *Id.* at 339–41. She describes these as the orientations that students will need to be citizens and leaders in the post collegiate world: perspective-taking, mutuality and reciprocity, acceptance of conflict as a normal part of life, capacity to perceive differences and commonalities both within and between social groups, interest in the wider social world, and citizen participation. *Id.* at 341.

223. *Id.* at 334.

224. Abigail J. Stewart & Joseph M. Healy, Jr., *Linking Individual Development and Social Change*, 44 AM. PSYCHOL. 30, 39 (1989).

“structural diversity,” a concept that focuses largely on “the numerical representation of diverse groups.”<sup>225</sup>

That sort of diversity has been a frequent focus for both litigation<sup>226</sup> and research.<sup>227</sup> Structural diversity is important. The simple presence of students from a variety of backgrounds, races, and ethnicities matters: “a diverse student body is a necessary condition for interactions among diverse groups.”<sup>228</sup> Viewed in this manner, structural diversity can be “a catalyst for promoting a more hospitable racial climate.”<sup>229</sup> But, as numerous researchers have emphasized, “necessary [it is] not sufficient” if it is actually to lead to “a more comfortable and less hostile environment for all.”<sup>230</sup>

The research shows that “the educational benefits associated with diversity are not guaranteed, but conditional.”<sup>231</sup> The interactions must be controlled and meaningful,<sup>232</sup> and “institutional support may be an especially important condition for facilitating positive contact effects.”<sup>233</sup> More tellingly, it is extremely important to do this with care, especially at institutions that have made support for diversity central to their identity.<sup>234</sup> Some individuals come to the diversity table

225. Gurin et al., *supra* note 140, at 332–33.

226. *See, e.g.*, *Smith v. Univ. of Washington Law School*, 233 F.3d 1188, 1191 (9th Cir. 2000) (“Law School . . . use[s] race as a criterion in its admission process so that it could assure the enrollment of a diverse student body”); *Johnson v. Bd. of Regents of the Univ. of Georgia System*, 106 F. Supp. 2d 1362, 1371 (S.D. Ga. 2000) (“[t]he record shows that UGA is plying a ‘diversity = proportionalism’ rationale”); *Podberesky v. Kirwan*, 764 F. Supp. 364, 367 (D. Md. 1991) (Banneker Scholarship program “aimed at increasing the representation of historically underrepresented racial groups at public higher education institutions in Maryland”).

227. *See, e.g.*, Anthony Lising Antonio, *The Influence of Friendship Groups on Intellectual Self-Confidence and Educational Aspirations in College*, 75 J. HIGHER EDUC. 446 (2005); L. Flowers & Ernest T. Pascarella, *Does College Racial Composition Influence the Openness to Diversity of African-American Students?*, 40 J. C. STUDENT DEV. 405 (1999); Gary R. Pike & George D. Kuh, *Relationships among Structural Diversity, Informal Peer Interactions and Perceptions of Campus Environment*, 29 REV. HIGHER EDUC. 425, 427 (2006) [hereinafter Pike & Kuh].

228. Pike & Kuh, *supra* note 227, at 427.

229. Sylvia Hurtado et al., *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. DIVERSITY IN HIGHER EDUC. 204, 207 (2008) (hereinafter Hurtado et al.). *But see*, Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, 30 SCANDINAVIAN POL. STUD. 137 (2007) (major study documenting that “in the short run . . . ethnic diversity tend[s] to reduce social solidarity and social capital” based on census data “suggest[ing] that in ethnically diverse neighborhoods . . . [t]rust (even of one’s own race) is lower, altruism and community cooperation rarer, friends fewer”). As Hardin and Banaji observe, Putnam’s research “show[s] the unsavory result that ethnic diversity may actually increase social distrust.” Hardin & Banaji, *supra* note 21, at 13.

230. Hurtado et al., *supra* note 229, at 207.

231. Quality Matters, *supra* note 184, at 10.

232. *See, e.g.*, Denson & Chang, *supra* note 183, at 343 (emphasizing the positive role of “workshops of classes geared toward diversity”).

233. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 766 (2006).

234. As some scholars in the field have noted, there is a real danger of “diversity

with pre-existing antipathies toward particular groups and “[t]he deeply prejudiced both avoid intergroup contact and resist positive effects from it.”<sup>235</sup> In others, “[t]he human mind automatically and unintentionally reacts to different groups in divergent ways, a process that can have unfortunate consequences.”<sup>236</sup> Still others respond even more negatively when larger numbers of the groups they dislike are present,<sup>237</sup> a reality that may have great bearing given the importance ascribed to “critical mass” in these debates.<sup>238</sup> The proverbial bottom line is, as Gurin has emphasized, that simply “[t]alking about these topics can blow up if you don’t do it right.”<sup>239</sup>

Perhaps the most important outcome in the wake of *Grutter* and *Gratz* was the extent to which it generated a veritable diversity assessment cottage industry. In the period leading up to those cases the group of social scientists that focused on these issues was relatively small. Much of their work sounded in contact theory.<sup>240</sup> But over the course of the 1990s the number of individuals doing focused research increased. They began to develop a “broad range of social science evidence”<sup>241</sup>

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burn-out.” See, e.g., Marcia B. Baxter Magolda, *Facilitating Meaningful Dialogues About Race*, *About Campus*, Nov.-Dec. 1997, 14, 18 (“I hear students whisper to confidants that they are ‘sick of diversity discussions,’ and my graduate students share that their undergraduate staff and students complain about attending diversity workshops.”).

235. Thomas F. Pettigrew, *Intergroup Contact Theory*, 29 *ANN. REV. PSYCHOL.* 65, 80 (1998).

236. Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith eds., 2012), at 9, 10 [hereinafter *Implicit Bias Across the Law*].

237. See Maureen A. Craig & Jennifer A. Richeson, *More Diverse Yet Less Tolerant? How the Increasingly Diverse Racial Landscape Affects White Americans’ Racial Attitudes*, 40 *PERSONALITY & SOC. PSYCHOL. BULL.* 750, 751 (2014) (noting that “decades of survey research are consistent with the proposition that minority group size is associated with prejudice”).

238. See *id.* at 759 (noting that the studies performed provide “insight into how Whites may react to . . . demographic shift[s] and highlights potential for perceived threat and intergroup hostility”). The focus in this study was on demographics writ large, rather than on classroom interactions and/or diversity in a postsecondary setting. It is nevertheless important to note and account for the reality that “exposure to the changing racial demographics of the United States and, most notably, the impending ‘majority-minority’ U.S. population leads White Americans to express greater racial bias.” *Id.* at 758.

239. Quoted in Peter Schmidt, *‘Intergroup Dialogue’ Promoted as Using Racial Tension to Teach*, *CHRON. HIGHER EDUC. DAILY NEWS*, June 16, 2008, available at <http://chronicle.com/daily/2008/07/3829n.htm>. So, for example, “[a]t least in some situations, it appears that attempts to control automatic stereotyping may actually set people on a path toward stereotyping, especially under conditions where control is difficult to achieve.” Brandon D. Stewart & B. Keith Payne, *Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control*, 34 *PERSONALITY & SOC. PSYCHOL. BULL.* 1332, 1333 (2008) [hereinafter Stewart & Payne]. College classes in general, and campuses in particular, are of course classic examples of environments where “control” may well be “difficult to achieve.”

240. See, e.g., Gurin Report, *supra* note 217.

241. See, e.g., Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sources*, in *Compelling Interest*, *supra* note 162, at 126.

and, in a limited number of instances, generate diversity focused surveys<sup>242</sup> and studies.<sup>243</sup>

Since that time researchers have published hundreds of studies, papers, and commentaries, focusing on these issues.<sup>244</sup> Indeed, in 2008 the American Psychological Association initiated a scholarly publication devoted exclusively to issues of diversity, the *Journal of Diversity in Higher Education*. Thus, the *Fisher I* Court had available to it, directly through the parties and amicus briefs, a substantial body of social science information and research on both sides of the debate. The Court did not actively discuss that supporting evidence, with the single exception of Justice Thomas, who spoke in passing of “the *educational benefits* allegedly produced by diversity”<sup>245</sup> and “the putative educational benefits of diversity.”<sup>246</sup> But it did receive a significant number of briefs on both sides of the diversity debate attesting to the large and growing body of studies attempting to document, and dispute, both premise and results.

The good news for diversity’s proponents, then, is that there is a substantial body of evidence they can draw on as they develop their admissions policies and educational programs within the constitutional parameters outlined by the Court. The bad news is that none of this actually matters if the question is whether a

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242. See, e.g., Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *Diversity Challenged*, *supra* note 162, at 143, 172 (reporting the results of a Gallop Poll of law students at Harvard and Michigan showing “that large majorities have experienced powerful educational experiences from interaction with students of other races”) [hereinafter Orfield & Whitley].

243. Mitchell J. Chang, *The Positive Educational Effect of Racial Diversity on Campus*, in *Diversity Challenged*, *supra* note 162, at 175, 182 (reporting the findings of a longitudinal study showing “that socializing with someone of another race is positively related to . . . educational outcomes”).

244. See, e.g., Brief for the American Psychological Association as Amicus Curiae at 3, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2414 (2013) (No. 11-345) (noting that the brief provided “scientific conclusions . . . grounded in 79 peer-reviewed studies reflecting the contemporary social science research on campus diversity” and that “[n]early all of these studies have been conducted or published since . . . Grutter”); Brief of the American Educational Research Association et al. as Amici Curiae at 5, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2414 (2013) (No. 11-345) (stating that “[t]he literature has expanded considerably since Grutter”) [hereinafter AERA Fisher I Brief].

245. *Fisher*, 133 S. Ct. at 2424 (Thomas, J., concurring).

246. *Id.* at 2426. Justice Thomas did take a proactive stand on one major dispute in the social science literature when he claimed that “the University’s discrimination has a pervasive shifting effect.” *Id.* at 2431. This statement reflected his agreement with the “mismatch” theory, which postulates that “large racial preferences . . . systematically put minority students in academic environments where they feel overwhelmed.” RICHARD H. SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP AND WHY UNIVERSITIES WON’T ADMIT IT* 4 (2012). The theory predates *Bakke*. See, e.g., Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. TOL. L. REV. 377, 395 (1970) (discussing the problems posed by admitting students “to a ‘better’ school” than those that “would admit [them] under normal standards”). *But see*, AERA Fisher I Brief *supra* note 244, at 26 (“Recent research also undermines the so-called mismatch hypothesis proposed by opponents of race-conscious admissions.”).

*specific* affirmative action admissions policy at a *specific* college or university is both constitutional and educationally sound. As Justice O'Connor stressed in *Grutter*:

Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . [S]trict scrutiny must take "relevant differences' into account." . . . Indeed . . . that is its "fundamental purpose." Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the government decisionmaker for the use of race in that particular context.<sup>247</sup>

In *Fisher II*, for example, the decisionmaker is the University of Texas and the "particular context" is the actual need for and professed goals of an affirmative admissions system designed to meet the specific educational needs of the students at that institution, not at the ones where the published studies were conducted. For Texas, and for every other institution that actively seeks diversity, the decision to do so must be principled, by which I mean three things. It must reflect a considered judgment that diversity is part of that institution's mission.<sup>248</sup> It must be pursued for educational reasons pertinent to the students enrolled at Texas and the programs they are actually enrolled in.<sup>249</sup> And it must be proactive, that is, "positive steps [must be taken] to see that there is *substantial* and *meaningful* interaction between students of different racial and ethnic groups."<sup>250</sup>

This requires more than attaining a critical mass of previously underrepresented students.<sup>251</sup> That is simple structural diversity, which is at best a necessary precondition to the sorts of deliberate and carefully controlled interventions that will make possible the attainment of positive educational outcomes. As Chang emphasizes, "attending to the quality of student's own cross-racial interactions and the quality of the institutional context for diversity is critically important."<sup>252</sup>

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247. *Grutter*, 539 U.S. at 327 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1993)).

248. *See Fisher I*, 133 S. Ct. at 2419 (stressing that the compelling interest recognized in *Grutter* protects a judgment that diversity is "integral to [an institution's] mission").

249. *Id.* (stressing the need for "a reasoned, principled explanation for the academic decision . . . that a diverse student body would serve [the institution's] educational goals").

250. Killenbeck, *supra* note 43, at 49.

251. Some people disagree, at least in terms of whether such programming is required to comply with the Constitution. Professor Evan Caminker, for example, while still Dean of the Michigan Law School, expressed support for such programming even as he noted that the Law School's "admissions program passed constitutional muster despite the absence of [proactive programming.]" Evan Caminker, *Post-Admissions Educational Programming in a Post-Grutter World: A Response to Professor Brown*, 43 HOUS. L. REV. 37, 50 (2006). I disagree, and it is entirely possible that the manner in which the Court resolves *Fisher II* will foreclose that option.

252. Quality Matters, *supra* note 184, at 18.

It also requires that the program be implemented and pursued with longitudinal assessments of actual educational outcomes as an integral part of its construction. As I have stressed, the theory is that diversity has an actual, hopefully positive, effect on actual students. Those effects must be postulated and then measured over time, based on pre- and post-diversity profiles of the students in question. A survey that asks students at a given point in time how often they studied with individuals of a different race,<sup>253</sup> and/or whether diversity “affected their ability to work more effectively and/or get along better with members of other races,”<sup>254</sup> may tell us something about the extent to which they “have experienced powerful educational experiences from interaction with students of other races.”<sup>255</sup> But it tells us very little about whether the behaviors and attitudes in question were actually shaped by the time the students spent at the institution, as opposed to simply reflecting values and habits acquired long before.<sup>256</sup>

Institutions practicing principled affirmative action must accordingly be willing to devote the time and resources necessary to collect appropriate data, over time. The information they collect should provide a profile of the students both when they enter and after they graduate, keyed to the educational benefits the institution expects to be associated with diversity. For example, one of the outcomes many of diversity’s proponents champion is the extent to which it promotes “critical thinking.”<sup>257</sup> Recent research seems to support that conclusion, showing that “[t]he cognitive effect of diversity experiences appears to be sustained during 4 years of college and may even increase in magnitude over time.”<sup>258</sup> The authors cautioned, however, “that [individual] students’ characteristics may often shape the developmental influence of postsecondary education” and “that purposefully programming exposure to diversity into the undergraduate experience may not yield the same benefits to all students.”<sup>259</sup>

The studies that have been presented to the Court help inform the debate about whether diversity is a compelling educational interest in the abstract. They cannot provide the sort of institution-specific perspectives required to document the value of diversity as an educational matter for that institution and its students.

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253. Orfield & Whittle, *supra* note 242, at 158.

254. *Id.* at 159.

255. *Id.* at 172.

256. Controlling for this is especially important given the findings of some studies documenting the importance of pre-enrollment experiences and attitudes. See, e.g., Elizabeth J. Whitt et al., *Student’s Openness to Diversity and Challenge in the Second and Third Years of College*, 72 J. HIGHER EDUC. 172, 188 (2001) (“[T]he most significant positive influence on a student’s openness to diversity and challenge during the first three years of college was the student’s openness before college.”) [hereinafter Whitt et al.].

257. See, e.g., Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction among Undergraduates*, 77 J. HIGHER EDUC. 430, 449 (2006) (study documents that “students who have higher levels of [cross-racial interaction] tend to report significantly larger gains . . . in critical thinking ability”).

258. Ernest T. Pascarella et al., *Effects of Diversity Experiences on Critical Thinking Skills Over 4 Years of College*, 55 J. C. STUDENT DEV. 86, 90 (2014) [hereinafter Pascarella, Critical Thinking].

259. *Id.* at 91.

Ultimately, a complete answer in *Fisher II* to the question of whether the Texas policy is narrowly tailored will require that Texas secure that information. But it is critically important to look beyond the narrow confines of that case and recognize that each institution that uses preferences is vulnerable, and that each must be prepared to document that its educational intuition is backed up by the achievement of actual educational outcomes.

### B. Unappealing Truths: Implicit Bias, Neuroscience, and Diversity

One of the recurring themes in the current national dialogue is the disconnect between views expressed “by confident commentators who tout America’s successful retreat from its racist past”<sup>260</sup> and the reality that “[m]assive racial disparities in America persist – in the criminal justice system, in economic advancement, in property ownership, and beyond.”<sup>261</sup> Recent events notwithstanding, “hostile acts of race discrimination in the United States have steadily declined during the past century.”<sup>262</sup> Most Americans are accordingly shocked when they occur.<sup>263</sup>

Traditional understandings of human behavior and the sources of prejudice emphasized conscious choices. In his classic work, *The Nature of Prejudice*, Gordon Allport stated that “prejudice contains two essential ingredients . . . an *attitude* of favor or disfavor” that is “related to an overgeneralized (and therefore erroneous) *belief*.”<sup>264</sup> Traditional social science research focused on gathering information about overt beliefs and attitudes. Within that regime, “[t]he most commonly used technique to determine the extent of racial prejudice has been the survey in which respondents are asked directly to express their racial attitudes.”<sup>265</sup> That reflected the reality that “[a] quarter century ago, most psychologists believed that human behavior was primarily guided by conscious thoughts and feelings.”<sup>266</sup>

This posed two problems. One was methodological. In general, people want “to be and appear to be good people.”<sup>267</sup> This means that “[t]he more transparent or obvious the purposes of a questionnaire, the more likely respondents are to

260. Justin D. Levinson, *Introduction: Racial Disparities, Social Science, and the Legal System*, in *Implicit Bias Across the Law*, *supra* note 236, at 1 [hereinafter Levinson, Introduction].

261. *Id.*

262. Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some*, 69 AM. PSYCHOL. 669, 680 (2014) [hereinafter Greenwald & Pettigrew].

263. Luciana Lopez, Harriet McLeod, & Alana Wise, *Families of South Carolina Church Massacre Victims Offer Forgiveness*, YAHOO! NEWS, June 19, 2015, <http://news.yahoo.com/white-suspect-arrested-killing-nine-black-u-church-000635210.html>

264. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 13 (25th ed. 1979).

265. Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 547 (1980).

266. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* xiv (2013) [hereinafter *BLIND SPOT*].

267. SEYMOUR SUDMAN & NORMAN H. BRADBURN, *ASKING QUESTIONS: A PRACTICAL GUIDE TO QUESTIONNAIRE DESIGN* 6 (1982).

provide the answers they want others to hear about themselves rather than the ones that may be true.”<sup>268</sup> It is not, therefore, surprising that “people tend to report only a slight preference for white Americans over black Americans.”<sup>269</sup>

The more serious difficulty is that traditional understandings and techniques do not account for the reality “that prejudice can operate unwittingly, unintentionally, and unavoidably.”<sup>270</sup> A growing body of studies “consistently reveal[s] a disquieting but potent truth: despite cultural progress in reducing overt acts of racism, the effects of implicit racial attitudes and stereotypes are powerful and pervasive.”<sup>271</sup> This divorce between general support for equality and the reality of persistent stark problems “reveals the complexity of America’s racial challenges and the legal system’s unwitting complicity in the persistence of racial disparities.”<sup>272</sup> The United States is “a country that for all its progress has yet to completely shed the burden of hatred and division.”<sup>273</sup> This should not come as a great surprise. We have known for quite some time that there are “unappealing truths about the nature of the brain and mind that originate from its bounded rationality and largely unconscious operation.”<sup>274</sup> It is accordingly important to recognize that “human mental machinery can be skewed by lurking stereotypes, often bending to accommodate hidden biases reinforced by years of social learning.”<sup>275</sup> These are especially pronounced when the focus is “social judgment, including, but not limited to, ethnicity and race.”<sup>276</sup>

Systematic attention to this reality has increased in recent years, as “new techniques . . . opened up the black box of cognition, marrying the insights of traditional psychology with a functional analysis of the biology of brain activity.”<sup>277</sup> This emerging body of knowledge includes two distinct but interrelated fields. The first is “implicit social cognition,” which involves “a new generation of discoveries about automatic, nonconscious, or implicit preferences and beliefs.”<sup>278</sup> The second is “cognitive neuroscience,” defined as “the study of thought and behavior informed by the discoveries of neurosciences about the physical nature of the brain process.”<sup>279</sup>

Two types of cognitive constructs factor into these discussions. The first are “implicit attitudes,” defined as “introspectively unidentified (or inaccurately identified) traces of past experiences that mediate favorable or unfavorable feeling,

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268. Tuckman, *supra* note 122, at 235.

269. Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 431 (2007) [hereinafter Lane et al.].

270. Hardin & Banaji, *supra* note 21, at 14.

271. Levinson, *Introduction*, *supra* note 236, at 2.

272. *Id.* at 1.

273. Peter Baker, *After Charleston Shooting, a Sense at the White House of Horror, Loss and Resolve*, N.Y. TIMES, June 19, 2015, at A18.

274. Lane, *supra* note 269, at 427–28.

275. Levinson, *supra* note 236, at 2.

276. Hardin & Bannaji, *supra* note 21, at 5.

277. Oliver R. Goodenough & Micaela Tucker, *Law and Cognitive Neuroscience*, 6 ANN. REV. L. & SOC. SCI. 61, 62 (2010) [hereinafter Goodenough & Tucker].

278. Lane, *supra* note 269, at 429.

279. Goodenough & Tucker, *supra* note 277, at 62.

thought, or action toward social objects.”<sup>280</sup> Attitudes, sometimes characterized as “preferences,” describe the way we think about things. Attitudes are “favorable or unfavorable dispositions toward social objects, such as people, places, and policies.”<sup>281</sup> Explicit attitudes are the product of deliberation and choice. Implicit attitudes, in turn, are “automatically triggered” and “can influence behavior without our awareness.”<sup>282</sup>

The second construct is “implicit stereotypes,” which “are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category.”<sup>283</sup> Stereotypes are just what the term implies: beliefs about people that assign specific qualities to an individual based on that person’s membership in a group. They are also pervasive, as “stereotyping by social category is so widely practiced as to deserve recognition as a universal human trait.”<sup>284</sup>

Attitudes and stereotypes are central facets of the diversity debate. *Grutter*, for example, spoke expressly of the ability of an affirmative “admissions policy [that] promotes ‘cross-racial understanding,’ helps break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”<sup>285</sup> As part of this, one of the “unappealing truths” that must be taken into account in the quest for diversity is the extent to which “nonconscious stereotypes or shortcuts embedded in the human mind cause the individual to evaluate members of different social groups in a disparate manner.”<sup>286</sup> This insight is especially important if, as is too often the case, an institution pursues simple structural diversity under the assumption that “‘unplanned, casual encounters . . . can be subtle and yet powerful sources of improved understanding and personal growth.’”<sup>287</sup>

The pervasiveness and potential impact of implicit bias is then a source of concern. Fortunately, the same work that has facilitated identification of the phenomenon has generated a reasonable understanding of its sources and methods for its detection. In turn, this work suggests strategies and interventions that may reduce implicit bias. Interestingly, these studies have also called into question a series of traditional assumptions about both human behavior and the brain.

The traditional view was that “[o]nce a stereotype is so entrenched that it becomes activated automatically, there is really little that can be done to control its influence.”<sup>288</sup> The thinking was that “[r]ealistically, there is little that will be done

280. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *PSYCHOL. REV.* 4, 8 (1995) [hereinafter Greenwald & Banaji].

281. *Id.* at 7.

282. Damian Stanley et al., *The Neural Basis of Implicit Attitudes*, 17 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 164, 164 (2008).

283. Greenwald & Banaji, *supra* note 280, at 15.

284. *BLIND SPOT*, *supra* note 264, at 89.

285. *Grutter*, 539 U.S. at 330 (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001)).

286. Hutchinson, *supra* note 22, at 37.

287. *Bakke*, 438 U.S. at 312 n. 48 (quoting Bowen, *ADMISSIONS*, *supra* note 94, at 9).

288. John A. Bargh, *The Cognitive Monster: The Case Against the Controllability*

about such nonconscious effects in the real world – mainly because, in the words of Hall of Fame baseball pitcher Bob Feller, ““You can’t hit what you can’t see.””<sup>289</sup> Initial research on implicit bias seemed consistent with this, suggesting that “automatic biases were likely to be very rigid and require arduous learning processes to change.”<sup>290</sup> Indeed, some studies suggested a ““backfire’ effect[],” that is, an actual increase in stereotyping.<sup>291</sup>

That has given way to a growing consensus that “implicit preferences and beliefs . . . despite their seemingly uncontrollable nature, are malleable”<sup>292</sup> and “[d]espite their prevalence and magnitude . . . are not impervious to change.”<sup>293</sup> The predicates for potential change are both personal and situational.<sup>294</sup> In particular, they are subject “to social influence,”<sup>295</sup> with the research showing “that changes in social organization . . . predict corresponding changes in implicit prejudice.”<sup>296</sup> Various factors – virtually all of which are the hallmarks of student body diversity – come into play, including “the context surrounding the stimulus”<sup>297</sup> and “promotion of counter-stereotypes.”<sup>298</sup> In particular, positive changes are associated with “effortful practice,”<sup>299</sup> a characteristic central to what I have characterized as principled diversity.<sup>300</sup>

Individuals who study implicit bias have developed ways to detect it and interventions designed to ameliorate it. Detection and measurement techniques avoid using the self-report approach.<sup>301</sup> Instead, they focus on “the outcome[s] of a measurement procedure that is causally produced by psychological attributes in an automatic manner.”<sup>302</sup> The focus is “on obtaining evidence for the causal

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*of Automatic Stereotype Effects, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 361, 378 (Shelly Chaiken & Yaacov Trope eds. 1999).

289. *Id.*

290. Stewart & Payne, *supra* note 239, at 1333.

291. *Id.*

292. Lane, *supra* note 274, at 429.

293. *Id.* at 437.

294. *See e.g.,* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 257 (2002) (discussing the focus on both individual “motives” and “social context”).

295. Hardin & Banaji, *supra* note 21, at 15.

296. *Id.* at 21.

297. Stewart & Payne, *supra* note 239, at 1333.

298. *Id.*

299. *Id.* *See also* Robyn K. Mallett & Timothy D. Wilson, *Increasing Positive Intergroup Contact*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 382 (2009) [hereinafter Mallett & Wilson]. They stress that given inherent “anxiety about inter-racial interactions” one key factor in such programming is “to improve the quality of th[e] interaction.” *Id.* at 383.

300. *See supra* text accompanying note 218.

301. *See* Robert J. Snowden & Nicola S. Gray, *Implicit Social Cognition in Forensic Settings, in HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS* 522, 522-523 (Bertram Gawronski & B. Keith Payne eds., 2010) [hereinafter Handbook] (discussing the shortcomings in self-reports given the human tendency to harbor bias “but choose to state a quite different proposition”).

302. Jan De Houwer & Agnes Moors, *Implicit Measures; Similarities and*

relation between the to-be-measured attribute and the measure.”<sup>303</sup> The most important of these is the Implicit Association Test (IAT), which “provides a measure of strengths of automatic associations”<sup>304</sup> The IAT “infers . . . associations from performances that are influenced by those associations in a manner that is not discerned by respondents.”<sup>305</sup> The Race IAT, for example, “assesses implicit attitudes toward African Americans (AA) relative to European Americans (EA).”<sup>306</sup> It asks individuals to distinguish African-American faces from European American faces and “pleasant-meaning from unpleasant-meaning words.”<sup>307</sup> The measures it produces are “based on the relative speeds of responding” and the strength of the associations observed reveal “implicit attitudinal preferences.”<sup>308</sup>

Various interventions, in turn, can be used to alter attitudes and beliefs.<sup>309</sup> One of the most useful involves what the research characterizes as “counter-stereotypical exemplars,” a process in which individuals are shown images of (for example) “admired African American[s] and disliked European American[s].”<sup>310</sup> A variation on this approach involves having individuals “imagine a positive interaction with a Black person [and] a negative interaction with a White person.”<sup>311</sup> Post-exposure testing using the Race IAT can then identify whether the interventions had any impact of implicit attitudes. Initial studies showed “modest . . . reduction, but not elimination, of implicit biases.”<sup>312</sup> More recent work, this time focusing on first year, first semester college students “demonstrated a simple way of correcting Whites’ negative expectations about inter-racial interactions and increasing the positivity of those interactions.”<sup>313</sup>

Another approach especially suitable in the context of student body diversity involves creating situations in which individuals work together toward a common goal. The underlying theory is that “the recategorization of former out-group members as in-group members should result in more positive attitudes toward them.”<sup>314</sup> In particular, “group membership is internalized as a social identity and

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*Differences*, in HANDBOOK, *supra* note 301, at 176–77.

303. *Id.*

304. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

305. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952 (2006).

306. *Id.*

307. *Id.*

308. *Id.* at 953.

309. *See, e.g.*, Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOL. 1765 (2014) [hereinafter Lai].

310. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 802 (2001).

311. Lai, *supra* note 309, at 1770.

312. Greenwald & Krieger, *supra* note 305, at 964.

313. Mallett & Wilson, *supra* note 299, at 380.

314. Samuel L. Gaertner et al., *Reducing Intergroup Bias: The Benefits of Recategorization*, 57 J. PERSONALITY & SOC. PSYCHOL. 239, 240 (1989).

subsequent group functioning . . . shifts from individual to collective self-definitions.”<sup>315</sup> The net result is that “positive intergroup attitudes [are] fostered by linking the self to outgroups through common ingroup membership. . . .”<sup>316</sup>

In one experiment white students used computer models to form groups. Those who “formed a group including several Black individuals and practiced associating themselves and the Black group members subsequently scored lower on a prejudice IAT than participants in a control condition.”<sup>317</sup> The conclusion was “that practicing counterstereotyping and conditioning a link between the self and outgroup members significantly reduced implicit prejudice.”<sup>318</sup> In another, “non-Latino American [students] freely took part in a cooperative cultural activity with a Latino American (Mexican American) peer.”<sup>319</sup> The study found that “freely working . . . on a . . . cultural task reduced implicit . . . prejudice” and “led to more positive intergroup attitudes half a year later.”<sup>320</sup>

A final representative approach has special salience in the light of current events. A long line of studies and experiments have documented the connection between negative stereotypes and reflexive responses in stress situations.<sup>321</sup> In particular, researchers have focused on “speculation that officers use race when making the decision to shoot.”<sup>322</sup> They developed various controlled experiments to test whether an individual would be more likely to reflexively shoot based on the race of the individual posing the threat. In one, involving “a simple videogame . . . participants shot armed Blacks more quickly than armed Whites, and decided not to shoot armed Whites more quickly than armed Blacks.”<sup>323</sup> In another, participants were asked to “categorize[] pictures of either handguns or hand tools following the presentation of White or Black faces.”<sup>324</sup> The studies found “that the presence of racial information systematically biases . . . the

315. Lowell Geartner et al., *Us Without Them: Evidence for an Intragroup Origin of Positive In-Group Regard*, 90 J. PERSONALITY & SOC. PSYCHOL. 426, 427 (2006).

316. Anna Woodcock & Margo J. Monteith, *Forging Links with the Self to Combat Implicit Bias*, 16 GROUP PROCESSES & INTERGROUP REL. 445, 446 (2012) [hereinafter Woodcock & Monteith].

317. *Id.* at 457.

318. *Id.* at 456.

319. Tiffany N. Brannon & Gregory M. Walton, *Enacting Cultural Interests: How Intergroup Contact Reduces Prejudice by Sparking Interest in an Out-Group’s Culture*, 24 PSYCHOL. REV. 1947, 1949 (2013).

320. *Id.* at 1955.

321. See, e.g., B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001) (noting interest in “the relationship between automatic and controlled cognition” in the context of the Amadou Diallo shooting) [hereinafter Payne].

322. Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 210 (2005).

323. *Id.* at 126.

324. David M. Amodio et al., *Neural Signals for the Detection of Unintentional Race Bias*, 15 PSYCHOL. SCI. 88, 89 (2004).

identification of weapons” with “non-Black participants . . . faster to identify guns when they were primed by Black versus White faces.”<sup>325</sup>

Subsequent work has focused on interventions, including, the impact of “training.”<sup>326</sup> In one especially interesting study involving 75 undergraduates, researchers “used different versions of a newspaper article to link Blacks or Whites [as suspects] to the concept of danger and crime.”<sup>327</sup> The study group was divided into “novices” and “experts,” with the results showing that “novices were highly sensitive to the manipulation of stereotype[s]” while “expert[s] . . . were essentially unaffected by the newspaper manipulation.”<sup>328</sup>

As is to be expected, this body of work has its limits. Critics have, for example, argued that “the IAT provides little insight into who will discriminate against whom, and provides no more insight than [other] explicit measures. . . .”<sup>329</sup> That may or may not be the case.<sup>330</sup> What is clear is that this body of work needs to be supplemented with precisely the same sorts of studies I have argued are required to establish the validity of contact theory’s benefits: “large-scale, well-controlled longitudinal investigations that model IAT prediction of socially meaningful criteria in organizations, schools, hospitals, and other contexts in which implicit bias is of direct concern.”<sup>331</sup>

A more telling critique is that the interventions have only limited effects. Two of the most important scholars in this area, for example, have observed that “[l]ike stretched rubber bands, the associations modified . . . likely soon return to their earlier configuration. Such elastic changes can be consequential, but they will require replication prior to each occasion on which one wishes them to be in effect.”<sup>332</sup> There is, however, an important difference between many of the studies that have been done in this field and what is likely to occur if the techniques are employed routinely in multiple courses during the full span of undergraduate, graduate, or professional education. This assumes commitments of the sort that many colleges and universities have not made to date. But if undertaken, there is

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325. Payne, *supra* note 321, at 187.

326. See, e.g., Jessica J. Sim et al., *Understanding Police and Expert Performance: Whether Training Attenuates (vs. Exacerbates) Stereotype Bias and the Decision to Shoot*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 291 (2013) [hereinafter Sim]; Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007).

327. Sim, *supra* note 326, at 300.

328. *Id.*

329. Frederick L. Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Scores*, 105 J. PERSONALITY & SOC. PSYCHOL. 171, 188 (2013).

330. See, e.g., Anthony G. Greenwald et al., *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 560 (2015) (arguing that even in the light of the Oswald et al., *supra* note 329, criticisms the “level of correlational predictive validity of IAT measures represents potential for discriminatory impacts with substantial societal significance”).

331. Frederick L. Oswald et al., *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Social Significance*, 108 J. PERSONALITY & SOC. PSYCHOL. 562, 569 (2015).

332. BLIND SPOT, *supra* note 264, at 152.

reason to believe that “given sufficient practice and training . . . implicit attitude changes can remain stable over time.”<sup>333</sup>

The insights gleaned from implicit social cognition are supplemented by a second recent body of work, cognitive neuroscience, which has been made possible by significant advances in “functional human brain imaging.”<sup>334</sup> The underlying assumption is “that the approach taken by the individual’s mind to solve a problem will be physically present in the workings of her brain.”<sup>335</sup> The application of knowledge about the brain to these matters had been hampered by the “[l]ong-held scientific paradigm that the brain stops growing or changing early in life, and as a result you could not actually ‘change’ your brain no matter what you thought.”<sup>336</sup> That tracked a core criticism of the early diversity studies, that its effects are much more robust for late adolescents or young adults—individuals who have not reached a stage in life where their attitudes, beliefs, and perspectives have solidified – than they are for true adults. In this instance, however, scientific developments reveal a basis for believing that the potential for individual development continues over time.

The focus here is a body of work that makes use of technology that now allows “neuroscientists . . . to ‘see inside’ the brain, *while it was working*.”<sup>337</sup> In particular, the technology has enabled researchers to identify and focus on areas of the brain associated with mental inferences about individuals and groups.<sup>338</sup> It also led to the rejection of “the ‘old dogma’ that there is a fixed number of neurons in the adult brain that cannot be replaced when the cells die.”<sup>339</sup> Instead, “scientists [now see] that the human brain, instead of being set and static, continually reprogram[s] and restructure[s] itself . . . gr[owing] and chang[ing], moment by moment, input by input, and thought by thought.”<sup>340</sup> Originally referred to simply as “plasticity,” what is now characterized as “neuroplasticity” or “neuronal plasticity” is a body of research based on the realization “that learning occurs because of changes in the efficacy of synaptic transmission along specific brain pathways.”<sup>341</sup>

Individuals interested in implicit bias can accordingly now use “[n]euroscientific techniques such as functional magnetic resonance imaging (fMRI) and electroencephalography (EEG) . . . to begin to elucidate the neural

333. Sabine Glock & Carrie Kovacs, *Educational Psychology: Using Insights from Implicit Attitude Measures*, 25 EDUC. PSYCHOL. REV. 503, 515 (2013).

334. Michael I. Posner & Gregory J. DiGirolamo, *Cognitive Neuroscience: Origins and Promise*, 126 PSYCHOL. BULL. 873, 874 (2000).

335. Goodenough & Tucker, *supra* note 277, at 62.

336. Shad Helmstetter, *THE POWER OF NEURO-PLASTICITY* 12 (2014) [hereinafter *POWER OF NEURO-PLASTICITY*].

337. *Id.* at 14.

338. *See generally*, Juan Manuel Contreras et al., *Common Brain Regions with Distinct Patterns of Neural Responses during Mentalizing about Groups and Individuals*, 25 J. COGNITIVE NEUROSCIENCE 1406 (2013).

339. Eberhard Fuchs & Gabrielle Flugge, *Adult Neuroplasticity: More Than 40 Years of Research*, 2014 NEURAL PLASTICITY 1.

340. *POWER OF NEUROPLASTICITY*, *supra* note 336, at 14.

341. G. Berlucchi & H. A. Buchtel, *Neuronal Plasticity: Historical Roots and Evolution of Meaning*, 192 EXPERIMENTAL BRAIN RES. 307, 308 (2009).

systems involved in the expression and regulation of implicit attitudes.”<sup>342</sup> In particular, neuroscience has “identif[ied]. . . the amygdala as a brain region involved in the expression of implicit attitudes.”<sup>343</sup> The amygdala is “a small group of nuclei” that “is well situated to combine social and cognitive input and to modulate cognition and automatic aspects of behavior” and “is sensitive to the types of social cues imperative in the formation of implicit attitudes.”<sup>344</sup> Research has shown, for example, that “[v]iewing images of racial out-group members activates the amygdala more than does viewing of racial in-group members . . . and [that] this difference in amygdala activity correlates with implicit measures of racial bias.”<sup>345</sup>

It has also been shown that the amygdala is “flexible” and “can respond to positive and negative stimuli, stimulus intensity, and, more generally, the motivational relevance of stimuli.”<sup>346</sup> The research shows that “[i]ndividual differences, stimulus context, and social goals all influence relatively automatic biases.”<sup>347</sup> This means that interventions can be developed to moderate and even possibly eliminate biased responses. In one study differentiating between “[s]imple visual inspection”<sup>348</sup> and “social categorization of . . . faces”<sup>349</sup> showed “that a stereotyped or prejudiced response to an out-group member requires, at a minimum, that the stimulus . . . be processed deeply enough that it represents a social target.”<sup>350</sup> That meant that “perceivers can change the social context in which they view a target person” and that “regardless of an individual’s long-term tendencies toward prejudice, responses to the target person varied with controllable processing goals.”<sup>351</sup> That will particularly be the case where care is taken to direct “attention . . . away from social category and toward the individual person.”<sup>352</sup>

This is consistent with the general belief that “[r]esearch on plasticity has revealed new information about and realistic hope for ways to shape the circuitry of emotion to promote increased well-being and positive affect.”<sup>353</sup> It is also significant in the light of two aspects of Justice O’Connor’s opinion for the Court in *Grutter*. The first is the assumption that one important value of diversity is its

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342. Damian Stanley et al., *The Neural Basis of Implicit Attitudes*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 164, 165 (2008) [hereinafter Stanley].

343. *Id.* at 165.

344. *Id.*

345. Jay J. Van Bavel et al., *The Neural Substrates of In-Group Bias: A Functional Magnetic Resonance Imaging Investigation*, 19 PSYCHOL. SCI. 1131, 1132 (2008) (citations omitted).

346. *Id.* at 1337.

347. Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 PSYCHOL. SCI. 56 (2005).

348. *Id.* at 61.

349. *Id.* at 58.

350. *Id.* at 61.

351. *Id.*

352. Stanley, *supra* note 342, at 167.

353. Richard J. Davidson et al., *Emotion, Plasticity, Context, and Regulation: Perspectives From Affective Neuroscience*, 126 PSYCHOL. BULL. 890, 904 (2000).

ability to “diminish[] the force of . . . stereotypes”<sup>354</sup> and eliminate situations where previously “underrepresented minority students [are viewed as] spokespersons for their race.”<sup>355</sup> An institution that treats diversity as an opportunity for creative and proactive education, rather than as simple numbers, can use the sorts of approaches described in the implicit bias literature to work toward the elimination of inappropriate attitudes and beliefs. The American Psychological Association made that point in a brief filed in *Grutter*, observing that “one promising strategy for attacking unconscious social biases is to ‘create the social conditions that allow new associations and new learning about social groups that blur the bright line that demarcates social groups.’”<sup>356</sup>

The second element of *Grutter* worth noting here is its emphasis on much more than a simple “robust exchange of ideas” in class and during campus life.<sup>357</sup> Justice O’Connor’s opinion for the Court made post-enrollment perspectives and skills a central element in her declaration that the “benefits [of diversity] are not theoretical but real.”<sup>358</sup> Cognitive neuroscience tells us that human development is a lifelong process. It is accordingly significant that the transformations required to detect and move beyond implicit biases can occur after maturation. Student body diversity can – if handled properly – promote “cultural competence and ‘pluralistic orientation,’”<sup>359</sup> characteristics that “prepar[e] students for the challenges and complexities of a diverse society.”<sup>360</sup>

#### IV. THINKING LIKE A LAWYER? LEGAL EDUCATION AND DIVERSITY

Justice Brandeis famously observed that “[i]t is one of the happy incidents of our federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”<sup>361</sup> His observation stands for the notion that individual states might serve as laboratories of democracy, places where we can develop “policies

354. *Grutter*, 539 U.S. at 333.

355. *Id.* at 319.

356. APA *Grutter* Brief, *supra* note 14, at 12–13 (quoting Mahzarin R. Banaji et al., *The Social Unconscious*, BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY (A[braham] Tesser & N[orbert] Schwartz eds., 2001)).

357. *Bakke*, 438 U.S. at 312–13 (focusing almost exclusively on “‘exposure’ to the ideas and mores of students as diverse as this Nation of many peoples”).

358. *Grutter*, 539 U.S. at 330.

359. Brief of Amicus Curiae the American Psychological Association at 34, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). Both this brief and the APA *Grutter* Brief, *supra* note 14, discussing the significance and potential malleability of implicit bias at some length. It is surprising that Justice O’Connor did not at least note the existence of the phenomenon in her opinion in *Grutter*, much less cite the APA Brief.

360. Mark E. Engberg, *Educating the Workforce for the 21<sup>st</sup> Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students’ Development of a Pluralistic Orientation*, 48 RES. HIGHER EDUC. 283, 285 (2007).

361. *New State Ice Co. v. Liebman*, 285 U.S. 262, 386–87 (1932) (Brandeis, J. dissenting).

‘more sensitive to the diverse needs of a heterogeneous society’ [and experience] ‘innovation and experimentation’ . . . .”<sup>362</sup>

I suggest in this final Part that this nation’s law schools can, and should, serve as the laboratories within which the view of affirmative action and diversity I have sketched in this Article can be tested and refined. This will not, I hasten to add, be an act of courage on their part. Rather, it is now a requirement imposed on them by the current accreditation standards adopted by the ABA.<sup>363</sup> This is not to say that most law schools in this nation are not enthusiastic supporters and practitioners of preferential admissions. They have in fact been so for a considerable period of time.<sup>364</sup> Rather, I am arguing that the current ABA accreditation regime imposes a combination of obligations on every law school to both pursue diversity and document educational outcomes. That reality, coupled with unique aspects of how virtually all law schools operate provides a matrix within which the assumptions and obligations of a truly narrowly tailored approach to diversity and inclusion can be implemented and assessed.

#### A. Legal Education, Diversity, and Outcomes: An Obligation, Not a Choice

One of the most interesting and overlooked realities in the debate about affirmative admissions policies is that there are actually two groups of institutions. The first are those that champion diversity, arguably virtually every one of this nation’s colleges and universities. The second is those that have an actual need to use preferences in admissions. That is not a problem for most institutions. In their path-breaking study, *The Shape of the River*, William G. Bowen and Derek Bok stressed that “[o]ne of the most common misunderstandings concerns the number of institutions that actually take account of race in making admissions decisions. Many people are unaware of how few colleges and universities have enough applicants to be able to pick and choose among them.”<sup>365</sup> Noting that “[t]here is no single, unambiguous way of identifying the number of such schools,” they stated that “we estimate that only about 20 to 30 percent of all four-year colleges and universities are in this category.”<sup>366</sup>

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362. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

363. *See infra* Section IV-A.

364. *See e.g.*, Brief Amicus Curiae for the Association of American Law Schools at 22, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811) [hereinafter AALS Bakke Brief] (“[r]esponding to the moral pressures of the civil rights movement . . . in the mid-1960s, . . . law schools began in a variety of ways to take affirmative steps to attain more than a token enrollment of minority students”).

365. Bowen & Bok, *supra* note 161, at 15.

366. *Id.* The actual number may well be much smaller. In an important pre-*Grutter* survey, Michael T. Nettles and his colleagues determined that only about 6.6% of this nation’s colleges and universities are “‘serious affirmative action institutions’ . . . meaning that they are the institutions where there has been the greatest gain in numbers of African American and Hispanic students in the past decade or so.” Karin Chenoweth, *Not Guilty!*, BLACK ISSUES IN HIGHER EDUC., Oct. 30, 1997, at 10 (Vol. 14, No. 18).

This changes when the focus shifts to the schools and colleges that offer the first professional degree in law. All of these are by nature and design both selective and routinely confronted by an excess of applications from qualified applicants. As Bowen and Bok emphasized “[i]n law and medicine, all schools are selective.”<sup>367</sup> This is true even for institutions that are widely viewed as having lax standards. The rate of acceptance may be high, but not all who apply are admitted.<sup>368</sup>

Law schools in particular are avid supporters and practitioners of affirmative admissions. In the brief it filed in the *Bakke* litigation, the Association of American Law Schools (AALS) stated that “almost all accredited American law schools have adopted ‘special admissions programs’ which give preference in admissions to blacks and members of other ‘discrete and insular’ minorities.”<sup>369</sup> That has not changed. The belief that “diversity . . . contributes to a better legal education . . . has become conventional wisdom that is warmly embraced by the vast majority of leaders in higher education today.”<sup>370</sup> It is, the AALS declared in *Fisher I*, one of legal education’s “core values.”<sup>371</sup>

Diversity is also a goal that requires “explicit measures to achieve racially diverse student bodies.”<sup>372</sup> The two basic statistical admissions rubrics for law schools are undergraduate grade point averages and scores on the Law School Admissions Test. Those “raw numbers are startling”<sup>373</sup> and “[t]he simple, demonstrable statistical fact is that most selective law schools in this country will have almost no students of a certain race unless they adopt admissions policies designed to alter that outcome.”<sup>374</sup> It is accordingly hardly surprising that the studies show that “[r]acial preferences are particularly large and mechanical at law schools.”<sup>375</sup>

The interplay between legal education’s support for diversity and the reality that principled diversity is grounded in educational values will soon become a

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367. Bowen & Bok, *supra* note 161, at 282. I discuss medical school accreditation and diversity *infra* at text accompanying note 420.

368. For example, the most recently available ABA data show that while Western Michigan University Cooley Law School admits slightly over 85% of the people who apply, it nevertheless did reject 216 applicants. See Western Michigan University Cooley Law School – 2014 Standard 509 Information Report, [http://www.cooley.edu/publicinformation/docs/2014\\_aba\\_standard\\_509\\_information.pdf](http://www.cooley.edu/publicinformation/docs/2014_aba_standard_509_information.pdf).

369. AALS *Bakke* Brief, *supra* note 359, at 3.

370. Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549, 1553 (2011).

371. Brief for Amicus Curiae Association of American Law Schools at 1, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2414 (2013).

372. Brief of the Law School Admission Council as Amicus Curiae at 2, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2414 (2013).

373. *Id.* at 10.

374. *Id.* at 2.

375. Peter Arcidiacono, *A Conversation on the Nature, Effects, and Future of Affirmative Action in Higher Education Admissions*, 17 U. PA. J. CONST. L. 683, 686 (2015). This conclusion was based on the results of a forthcoming study, Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff*, J. ECON. LIT. (forthcoming 2015).

pressing matter for every law school in the nation given the combined effect of two provisions in the most recent iteration of the American Bar Association's *Standards and Rules of Procedure for Approval of Law Schools*.<sup>376</sup> The first is Standard 206, which addresses "Diversity and Inclusion."<sup>377</sup> The second is Standard 302, which focuses on "Learning Outcomes."<sup>378</sup> Taken together, these accreditation rules have profound implications. Under them, what was once simply an article of faith has become a series of positive obligations. It is no longer enough for a law school to embrace diversity as a value and take only those steps it deems appropriate to admit a diverse entering class. Rather, after first actually achieving that goal – a result that is now required – a law school must create and maintain proactive educational programs that produce actual educational outcomes, documented by rigorous, ongoing assessment.

This becomes apparent when we examine how the ABA standards have evolved over the years. The pre-*Bakke* diversity formulation spoke simply of the need to "maintain equality of opportunity in legal education without discrimination or segregation on the ground of race, color, religion, national origin, or sex."<sup>379</sup> As phrased, that standard reflected "classic liberalism's command not to discriminate."<sup>380</sup> That began to change after *Bakke*, as the ABA made two changes in the standards. The first was to broaden the non-discrimination mandate into a more proactive policy:

Consistent with sound educational policy and the Standards, the law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms.<sup>381</sup>

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376. A. B. A., *ABA Standards and Rules of Procedure for Approval of Law Schools, 2014-2015* (2014) [hereinafter Current ABA Standards]. Compliance with the ABA standards and rules is incredibly important. The ABA is the only accrediting body for law schools recognized by the United States Department of Education. *Id.* at vii ("Since 1952, the [ABA] has been approved by the United States Department of Education as the recognized national agency for the accreditation of programs leading to the J.D. degree."). A degree from an accredited law school is, in turn, a prerequisite for taking the bar examination in virtually every state. *Id.* ("Almost all jurisdictions rely exclusively on ABA approval of a law school to determine whether the jurisdiction's legal education requirement for admission to the bar is satisfied.").

377. *Id.* at 12–13.

378. Current ABA Standards, *supra* note 376, at 15–16.

379. A.B.A., *Approval of Law Schools, American Bar Associations Standards and Rules of Procedure*, Standard 211 (1979). The same language recurred in the 1983 version.

380. Hugh Davis Graham, *The Origins of Affirmative Action: Civil Rights and the Regulatory State*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 54 (1992).

381. A. B. A., *Standards and Rules of Procedure for the Approval of Law Schools and Interpretations*, Standard 212 (Aug. 1981).

The second was to add the admonition that a “law school shall not use admission policies that preclude a diverse student body in terms of race, color, religion, national origin, or sex.”<sup>382</sup>

These two requirements remained in place leading up to *Grutter*, albeit with some minor changes. In the last iteration before *Grutter* the ABA dropped the reference to “diversity” from what had been Standard 211(b) and spoke simply of a need not to discriminate in admissions on the basis of various characteristics as part of “Equality of Opportunity.”<sup>383</sup> The “concrete action” provision remained in the Standards virtually verbatim, albeit now styled as part of a requirement that law schools demonstrate an “Equal Opportunity Effort.”<sup>384</sup>

Neither the Standards nor the Interpretations fleshing them out expressly commanded any particular result. Law schools were required to “exhibit a special concern for determining the potential of these applicants through the admissions process”<sup>385</sup> and to “prepare a written plan describing its current program and efforts.”<sup>386</sup> They were also given a series of examples of “the kinds of actions that can demonstrate” such a commitment.<sup>387</sup> That list included such traditional process elements as recruitment,<sup>388</sup> participation in programs and efforts that would “encourage [minority students] to study law,”<sup>389</sup> and “enable . . . disadvantaged students to attend law school,”<sup>390</sup> and the creation of “programs that assist in meeting the unusual financial needs of many minority law students.”<sup>391</sup>

That changed in the wake of *Grutter*. Consistent with the theory embraced by the majority in that decision, the initial post-*Grutter* iteration changed the name of the standard from “Equal Opportunity Effort” to “Equal Opportunity and Diversity.”<sup>392</sup> It continued the requirement for “concrete action” directed toward “full opportunities for the study of law and entry into the profession.”<sup>393</sup> But for the first time, it added the need to “demonstrate . . . a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.”<sup>394</sup> In particular, expressly citing *Grutter*, the ABA transformed Justice O’Connor’s statement there that laws schools should “aspire to ‘achieve that diversity which

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382. *Id.*, Standard 211(b).

383. A.B.A., *Standards for Approval of Law Schools 2001-2002*, at 19, Standard 210(b) [hereinafter 2001-2002 ABA Standards]. One important development was the addition of the category “sexual orientation” to the list of protected classes.

384. *Id.* at 21, Standard 211.

385. *Id.*

386. *Id.* at 22, Interpretation 211-2.

387. *Id.* at 21, Interpretation 211-1.

388. *Id.*, Interpretation 211-1(c).

389. *Id.*, Interpretation 211-1(d).

390. *Id.*, Interpretation 211-1(e).

391. *Id.*, Interpretation 211-1(i).

392. A. B. A., Section of Legal Education and Admissions to the Bar, *Standards and Rules of Procedure for Approval of Law Schools 2006-2007* at 15, Standard 212 [hereinafter 2006-2007 ABA Standards].

393. *Id.*, Standard 212(a).

394. *Id.*

has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts"<sup>395</sup> into something much stronger.

Two things made the new standards and interpretations especially noteworthy. Before *Grutter* the ABA had not spoken in terms of anything that sounded like an actual preference. The new approach changed that, expressly adding the observation that it contemplated an "admissions process" within which "a law school *may* use race and ethnicity . . . to promote equal opportunity and diversity."<sup>396</sup> The second was to make it clear that the focus had shifted from process to results:

[t]hrough its admissions policies and practices, a law school *shall* take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups, and backgrounds.<sup>397</sup>

The shift from "may" to "shall" in these provisions was clearly significant. Under the previous standards a determination that a law school had met its obligations was "based on the totality of its actions."<sup>398</sup> Post-*Grutter*, now styled as a call for "Diversity and Inclusion,"<sup>399</sup> that metric became "the totality of the law school's actions *and* the results achieved."<sup>400</sup>

In *Fisher I* the ABA characterized this as an approach that simply "urges law schools . . . 'to enroll a diverse student body.'"<sup>401</sup> The reality is something different. Results matter. Indeed, as I have previously argued, "the ABA does not appear to treat the pursuit of diversity as optional."<sup>402</sup> The requirements imposed by Standard 206(a) apply even in the face of "a constitutional provision or statute that *purports* to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions."<sup>403</sup>

The significance of the ABA diversity mandate is magnified by a relatively new requirement, Standard 302, which states that law schools must now adopt and

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395. *Grutter*, 539 U.S. at 315 (quoting Univ. of Michigan Law School Admissions Policy).

396. Current ABA Standards, *supra* note 376, at 16, Interpretation 212-2 (emphasis added).

397. *Id.* (emphasis added).

398. 2001-2002 ABA Standards, *supra* note 383, at 21, Interpretation 211-1.

399. Current ABA Standards, *supra* note 376, at 12, Standard 206.

400. 2006-2007 ABA Standards, *supra* note 392, at 16, Interpretation 212-3 (emphasis added).

401. Brief of the American Bar Association as Amicus Curiae at 5, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (quoting Interpretation 212-2).

402. Killenbeck, *supra* note 43, at 41. This article focuses on a prior iteration of the ABA Standards, within which the diversity provisions were designated as Standard 212(a) and Interpretation 212-1.

403. Current ABA Standards, *supra* note 376, at 13, Interpretation 206-1 (emphasis added). This provision refers to measures like Michigan's Proposal 2, which the Court sustained in *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014). The ABA will, presumably, revisit this question in the wake of that decision.

pursue “Learning Outcomes.”<sup>404</sup> This closely tracks Justice O’Connor’s emphasis in *Grutter* on the link between diversity and educational outcomes. Indeed, when read in the light of *Grutter*, the diversity mandate in Standard 206 fits comfortably within the outcomes requirement in Standard 302, which states that “[a] law school shall establish and publish learning outcomes designed to achieve [its educational and professional] objectives.”<sup>405</sup>

The curious thing about the current standards is the total lack of connection between the outcomes the ABA specifies as essential in Standard 302 and Standard 206’s focus on the supposedly essential educational and professional outcomes associated with diversity. The interpretation fleshing out Standard 206 does tip its hat toward those outcomes, stating that “the enrollment of a diverse student body promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds.”<sup>406</sup> But none of these objectives appear in Chapter 3 of the Standards, which sets out the required elements of a “Program of Legal Education.” In particular, they do not form part of what the ABA describes as a “rigorous program of legal education” designed to “prepare[] . . . students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”<sup>407</sup>

Standard 302 requires each “law school [to] establish and publish learning outcomes designed to achieve [its] objectives.”<sup>408</sup> Those “outcomes . . . shall, at a minimum, include competency”<sup>409</sup> in four areas:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.<sup>410</sup>

Each of these is important. Each is, in pertinent respects, an aspect of the goal articulated in *Grutter*, to “better prepare students for an increasingly diverse workforce and society, and better prepare them as professionals.”<sup>411</sup>

404. Current ABA Standards, *supra* note 376, at 15. This standard was approved by the ABA in August, 2014 and will be applied as part of the accreditation process in 2016-2017. See A. B. A., Section of Legal Education and Admissions to the Bar, *Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools*, Aug. 13, 2014, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2014\\_august\\_transition\\_and\\_implementation\\_of\\_new\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.authcheckdam.pdf).

405. Current ABA Standards, *supra* note 370, at 15, Standard 301(b).

406. *Id.* at 13, Interpretation 206-2.

407. *Id.* at 15, Standard 301(a).

408. *Id.*, Standard 301(b).

409. *Id.*, Standard 302.

410. *Id.* at 15.

411. *Grutter*, 539 U.S. at 330 (quoting Brief of the American Educational

But none of the educational outcomes the ABA actually expects laws schools to pursue speak directly to either the values or outcomes associated with diversity. The one possible exception is an option to include “cultural competency” as a possible subset of “other professional skills.”<sup>412</sup> In a similar vein, the balance of Chapter 3 in the current Standards describes a curriculum within which neither the general outline<sup>413</sup> nor any of the component parts of “a rigorous program of legal education”<sup>414</sup> describe or require anything that remotely resembles the diversity interests articulated in *Grutter* or Standard 206.<sup>415</sup> Individual law schools are free to “identify any additional learning outcomes pertinent to its program of legal education.”<sup>416</sup> But the manner in which the ABA has approached the combination of diversity and actual educational outcomes leaves the distinct impression that all it really cares about is structural or numerical diversity.

The ABA approach stands in stark contrast to the one taken by the Liaison Committee on Medical Education (LCME),<sup>417</sup> the accrediting body for the other set of professional colleges and schools where selectivity and the need for affirmative action is the rule. Medical schools also have a long-standing commitment to “provide opportunities for obtaining a medical education to applicants of diverse racial and ethnic backgrounds who are qualified to perform successfully as medical students.”<sup>418</sup> That is both necessary and appropriate, they believe, in the light of “numerous studies [that] have demonstrated that minority physicians are more likely than their non minority counterparts to serve minority populations.”<sup>419</sup> It also reflects “empirical studies indicat[ing] that minority patients express greater reluctance to accept physician recommendations or seek medical care than their white counterparts,” but “[w]hen given the choice . . . tend to choose, and be more satisfied with, physicians of their own race or ethnic background.”<sup>420</sup>

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Research Association et al. at 3, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

412. See Current ABA Standards, *supra* note 376, at 16 (noting that the “other professional skills,” Standard 302(d), as “determined by the [individual] law school . . . may include . . . cultural competency”)(emphasis added).

413. See Current ABA Standards, *supra* note 370, at 16, Standard 303 (Curriculum).

414. *Id.* at 15, Standard 301(a).

415. See generally *id.* at 17–20, Standards 304–307.

416. *Id.* at 16, Interpretation 302–2.

417. Like the ABA, the LCME is recognized by the Department of Education as the accrediting body for medical schools located in the United States and Canada. See <http://www.lcme.org/about.htm>. It is a joint undertaking of the American Medical Association and the Association of American Medical Colleges.

418. Brief of the Association of Medical Colleges Amicus Curiae at 2, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811).

419. Brief of the Association of American Medical Colleges et al. at 9, *Fisher v. Univ. of Tex.* at Austin, 133 S. Ct. 2411 (2013) (No. 02-241) [hereinafter AAMC Fisher I Brief].

420. *Id.* at 11. See generally Jordan J. Cohen, *Statistics Don't Lie: Anti-Affirmative Action is Bad for Our Health*, 78 ACAD. MED. 1084, 1084 (1997); Dean K. Whitla et al., *Educational benefits of Diversity in Medical Schools: A Survey of Students*, 78 ACAD. MED. 460, 461 (2003) (arguing and noting research in support of

The current iteration of the LCME standards describes the need for “medical education program [that] occurs in professional, respectful, and intellectually stimulating academic and clinical environments, recognizes the benefits of diversity, and promotes students’ attainment of the competencies required of future physicians.”<sup>421</sup> Each medical school is required to have “effective policies and practices in place” for “ongoing, systematic, and focused recruitment and retention activities’ that will “achieve mission-appropriate diversity outcomes among its students.”<sup>422</sup> The net result is a system within which “diversity in medical and other health professional school admissions is not itself an end goal, [but rather simply] an essential mechanism for helping to produce a culturally aware workforce of future health care professionals.”<sup>423</sup>

As part of this accreditation system, the LCME lists detailed educational outcomes closely tied to the values associated with diversity. Its description of expected “Curricular Content” emphasizes what it characterizes as “cultural competence.” Medical school faculty must “ensure that the medical curriculum provides opportunities for medical students to learn to recognize and appropriately address gender and cultural biases in themselves, in others, and in the health care delivery process.”<sup>424</sup> The curriculum, in turn, should include instruction regarding:

- The manner in which people of diverse cultures and belief systems perceive health and illness and respond to various symptoms, diseases, and treatments.
- The basic principles of culturally competent health care.
- The recognition and development of solutions for health care disparities.
- The importance of meeting the health care needs of underserved populations.
- The development of core professional attributes (e.g., altruism, accountability) needed to provide effective care in a multidimensional,

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the proposition that “affirmative action in medical school admissions . . . expand[s] health care delivery to traditionally underserved communities, generating social benefits that go beyond the individual physician”).

421. See Liaison Committee on Medical Education, *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the M.D. Degree* at 4, Standard 3 (March 2014, Effective July 1, 2015) [hereinafter Current LCME Standards]. This is a new formulation, replacing one that required “policies and practices to achieve appropriate diversity” and stated that medical schools “must engage in ongoing, systematic, and focused efforts to attract and retain students . . . from demographically diverse backgrounds.” Liaison Committee on Medical Education, *Functions and Structure of a Medical School: Standards for Accreditation of Medical Educational Programs Leading to the M.D. Degree*, at 4, (June 2008).

422. Current LCME Standards, *supra* note 421, at 4, Standard 3.3. The primary focus is on so-called “pipeline” programs “aimed at achieving diversity among qualified applicants for medical school admission.” *Id.*

423. AAMC Fisher I Brief, *supra* note 419, at 18.

424. Current LCME Standards, *supra* note 421, at 12, Standard 7.6.

diverse society.<sup>425</sup>

My point is not (necessarily) to praise the LCME and condemn the ABA. It is rather to stress that it is possible to approach these matters in a way that emphasizes the value of diversity and describes curriculum and educational outcomes within which the elements associated with diversity are present. That combination is essential in the light of what I believe *Grutter* requires if a given institution opts to pursue diversity and, as part of that process, decides to employ a race-conscious admissions process.

It is also critical given three realities. The first is that it is entirely up to each institution whether it will engage in proactive diversity, by which I mean employ preferences in the admissions process, which are almost certain to be race-conscious. *Fisher I* requires that there be “a reasoned, principled explanation for the academic decision . . . that a diverse student body would serve [a given institution’s] educational goals.”<sup>426</sup> If there is, “*Grutter* calls for deference to [that] conclusion.”<sup>427</sup> This means that as long as the interest in diversity is recognized as compelling for constitutional purposes, an individual college or university may – or may not – opt to go down that path (law schools excepted given the ABA standards).

The problem for each institution is the second reality: the rigors of strict scrutiny require that each individual institution that embraces diversity and employs such preferences must be able to defend its own policy. It is one thing to benefit from the deference afforded in making the initial decision to use preferences. It is quite another to fashion an approach that can be defended, either as a matter of educational policy or in a court of law. Both are important. Both require that the diversity regime be keyed to educational outcomes, actively program for such outcomes, and actively and continuously assesses whether and why outcome are (or are not) occurring.

The third is that accreditation standards that direct attention to outcomes can and should be more than a knee-jerk reaction to public calls for “accountability.” In a recent op-ed, for example, a dean asked whether “anyone [has] looked into whether assessing student-learning outcomes over many years has made American colleges, or students, better in some way?”<sup>428</sup> The answer is yes, and that the “evidence [demonstrates] a connection between changes in accreditation and the subsequent improvement of programs, curricula, teaching, and learning in undergraduate programs.”<sup>429</sup> The focus in that study was on a new iteration of the accreditation standards for “undergraduate engineering programs [that] shift[ed] the emphasis from curricular specifications to student learning outcomes and

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425. *Id.*

426. *Fisher I*, 133 S. Ct. at 2419.

427. *Id.*

428. Erik Gilbert, *Does Assessment Make Colleges Better? Who Knows?*, THE CHRON. OF HIGHER EDUC., Aug. 14, 2015, [http://chronicle.com/article/Does-Assessment-Make-Colleges/232371/?cid=at&utm\\_source=at&utm\\_medium=en](http://chronicle.com/article/Does-Assessment-Make-Colleges/232371/?cid=at&utm_source=at&utm_medium=en).

429. J. Fredericks Volkwein et al., *Measuring the Impact of Professional Accreditation on Student Experiences and Learning Outcomes*, 48 RES. HIGHER EDUC. 251, 277 (2006). One of the student outcomes in question was “[a]wareness of societal and global issues that can affect (or be affected by) engineering decisions,” an area especially pertinent in the context of diversity. *Id.* at 271.

accountability.”<sup>430</sup> The study found that the revised standards were “indeed a catalyst for change” and “provide[d] additional convincing evidence supporting the important role that accreditation has played in engineering programs.”<sup>431</sup> This suggests that the sorts of changes being made by both the ABA and LCME can matter, and should be treated as a welcome opportunity rather than an onerous obligation.

### B. Legal Education, Diversity, and Outcomes: Obligations Create Opportunities

The ABA’s approach to diversity reveals the dangers that arise when an otherwise intelligent and well-meaning group assumes that a simple commitment to “diversity and inclusion” is all that is required. Although the recent change in the accreditation standards renders a great service by recognizing the importance of diverse learning environments and the fundamental need for assessment, two significant flaws emerge.

The first is the fact that the ABA does not expressly connect the dots between learning outcomes associated with diversity and professional skills. For example, will a racially diverse law school environment produce attorneys who are more skilled at assessing the strength of a witness, finding facts, negotiation, structuring settlements, and giving persuasive closing arguments? Will future prosecutors and defense attorneys fully understand the role unconscious bias plays in day to day events that give rise to criminal prosecutions? Will future legislators be better able to create fair and impartial laws?

Each institution faces both the challenge and opportunity of crafting learning outcomes tied to its unique institutional mission. However, it seems to me that the ABA could acknowledge and set out more concrete learning outcomes tied to substantive legal knowledge and key professional skills. Not only would the standards garner more respect across a range of constituencies, but the articulation of discrete knowledge and skills is the vital first step in any assessment plan. Correcting this oversight in the accreditation scheme should be a fairly simple process. The ABA recently announced that the Council for its Section of Legal Education and Admissions to the Bar has asked its Standards Review Committee to “review” three of the current Standards.<sup>432</sup> That process should be expanded to include crafting a link between the diversity obligations imposed by Standard 206 and the educational outcomes contemplated within Standard 302.

The harder question is how to structure curriculum and courses in ways that would achieve these goals. The materials I have discussed suggest that a comprehensive educational plan should emphasize two particular programming

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430. *Id.* at 254.

431. *Id.* at 278.

432. A.B.A STANDARDS REVIEW COMMITTEE, *2015-16 Academic Year Agenda*, available at [http://search.americanbar.org/search?q=standards+review+committee&client=default\\_frontend&proxystylesheet=default\\_frontend&site=default\\_collection&output=xml\\_no\\_dtd&oe=UTF-8&ie=UTF-8&ud=1](http://search.americanbar.org/search?q=standards+review+committee&client=default_frontend&proxystylesheet=default_frontend&site=default_collection&output=xml_no_dtd&oe=UTF-8&ie=UTF-8&ud=1). The review will include Standard 206, but not Standard 302.

approaches: “interventions . . . designed to change the biases themselves,”<sup>433</sup> and “decision-making strategies [that] prevent the unwanted biases from being activated or influenc[ing] judgment.”<sup>434</sup>

Changing biases is admittedly not an easy task, particularly when the goal is to change *unconscious* biases that operate outside our explicit awareness.<sup>435</sup> However, as we proceed to develop interventions designed to reduce unconscious racial bias, we can take comfort in the fact that research supports the notion that fundamental cognitive change of this sort is attainable in law student populations. As indicated earlier in this article, human development theory generally posits that “late adolescence and early adulthood are the unique times when a sense of personal and social identity is formed.”<sup>436</sup> A substantial body of the social science evidence arguing for the value of diversity is accordingly predicated on the assumption that “late adolescence is a time for the formulation of a person’s adult identity, with “the identity formation process . . . enhanced when young adults have the opportunity to experiment with life within different and diverse environments.”<sup>437</sup> The pre-college years remain important given the general consensus that undergraduate education “increase[s] learning outcomes and depth of analysis” when young people are exposed “to diverse ideas and novel situations.”<sup>438</sup>

That said, these parameters apply equally well in the unique environment of a law school. One of the central elements in contact and developmental theory is the assumption that the benefits of diversity are associated with “discontinuity and discrepancy,” which “spur[s] cognitive growth.”<sup>439</sup> Characterized as “disequilibrium,” the focus is on “transitions [which] are significant because they present new situations about which individuals know little and in which they will experience uncertainty.”<sup>440</sup> Law school is traditionally described as having precisely that purpose and effect.<sup>441</sup> This means that while law students may well be adults for traditional developmental theory purposes, the peculiar nature of legal education provides opportunities “to experiment with new ideas, new relationships, and new roles.”<sup>442</sup>

Further, our evolving understanding of brain growth and neuroplasticity suggests that change in cognitive structures is possible even in the “mature

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433. Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL. REV. 113, 129 (2012) [hereinafter Nosek & Richmond].

434. *Id.*

435. *See supra*, text accompanying notes 288, 290 (discussing initial assumptions that implicit biases were “entrenched” and “likely to be very rigid”).

436. Gurin Report, *supra* note 217, at 368.

437. Crosby & Smith, *supra* note 207, at 126.

438. *Id.*

439. Gurin, *supra* note 141, at 335.

440. *Id.*

441. *See* Killenbeck, *supra* note 41, at 46 (discussing the idea that law schools can have “a particularly strong socializing influence on their students” grounded in “the extraordinary psychological impact” in can have on them).

442. Gurin, *supra* note 141, at 335.

adult,”<sup>443</sup> a characterization that describes the majority of law students. It also suggests that skills and perspectives developed and acquired during law school have the capacity to shape behavior and values over time, an important parameter given *Grutter’s* emphasis on the real benefits of diversity persisting into post-educational work environments.<sup>444</sup>

With these points in mind, legal education may prove to be an especially apt venue developing models for effective interventions. Law schools typically assert an interest in justice and social responsibility. An appropriately “rigorous program of legal education”<sup>445</sup> should then be about more than simple “[k]nowledge and understanding of substantive and procedural law.”<sup>446</sup> It is, for example, one thing to learn what is required to prove that an individual has committed the crime of “distribu[ting] . . . or possess[ing]” crack cocaine “with intent to . . . distribute or dispense.”<sup>447</sup> It is quite another to recognize how stark cultural differences between individuals who routinely use crack versus powdered cocaine “can unjustly and disproportionately penalize African American defendants for drug trafficking comparable to that of white defendants.”<sup>448</sup> In a similar vein, it is one thing to profess allegiance to the general notion that “[o]ur constitution is color blind and neither knows nor tolerates classes among citizens.”<sup>449</sup> It is quite another to understand why a key element in the argument for affirmative action and diversity may well be that “[i]n order to get beyond racism, we must first take account of race.”<sup>450</sup> In each instance, the manner in which law schools approach teaching these matters may prove to be at least as important as the fact that they are included in the curriculum. As I noted when discussing the research and findings associated with implicit bias and neuroscience, one very promising intervention involves the use of counter-stereotypical exemplars.<sup>451</sup> In Constitutional Law, for example, the back stories behind the development of many important substantive rules may be at least as important as the rules themselves. So, for example, identifying and focusing on the contributions of individuals like Thurgood

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443. See *supra* text accompanying notes 339–41.

444. See *supra* text accompanying notes 155–59.

445. Current ABA Standards, *supra* note 376, at 15, Standard 301(a).

446. *Id.*, Standard 302(a).

447. 21 U.S.C. § 841(a)(1).

448. AMERICAN CIVIL LIBERTIES UNION, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* (2006). The original sentencing disparity between crack and powdered cocaine of 100 to 1 was reduced to 18 to 1 by the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). For a discussion of the politics and bias informing the original regime, see Charles Ogletree et al., *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in *Implicit Bias Across the Law*, 45, 50–52. A recent study indicates that even with the 2010 reduction the combination of low socioeconomic status and race/ethnicity continues to produce “disproportionate numbers [of blacks] incarcerated for crack offenses.” Joseph J. Palamar et al., *Powder cocaine and crack use in the United States: An examination of risk for arrest and socioeconomic disparities in use*, 149 DRUG & ALCOHOL DEPENDENCE 108, 114 (2015).

449. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

450. *Bakke*, 438 U.S. 407 (Blackmun, J., concurring).

451. See *supra* text accompanying notes 279–84.

Marshall and Ruth Bader Ginsburg to the development of widely accepted constitutional doctrines can help dispel “stereotypic images of minorities and women.”<sup>452</sup>

A second possible intervention strategy involves the formation of links between individuals and others who were previously perceived as members of “outgroups.”<sup>453</sup> There are any number of courses in law school where collaboration is an essential part of the instructional process. That will be especially the case in “skills” courses, a subset of the curriculum that has become increasingly important in recent years as law schools have been admonished to provide education and training that has “real world” dimensions. By working closely in such classes with individuals from different races and cultures, law students can achieve precisely the sorts of “group formation and in-group regard” described in the implicit bias literature. It is important, however, that this intervention establish contexts within which students classify other students, including majority-minority students, as part of their group.<sup>454</sup>

Research supports a variation on this intervention where individuals of different races become allies or team members.<sup>455</sup> The trials resulting in decreased implicit bias among majority members placed white students in hypothetical scenarios that “linked positively with Black people *and* negatively with White people.”<sup>456</sup> As the authors to the study note, “interventions that reduce relative preferences by increasing negativity toward the more positively valued group may not be desirable for application.”<sup>457</sup> Indeed, this approach would be unethical in practice.

Law schools could, however, use videotaped simulation exercises where teams of individuals traditionally assumed to be less than able are seen to be highly skilled, well prepared, and successful. The images conveyed would be those associated with successful attorneys: individuals who are articulate, discerning, and smart. In particular, interactive simulations could allow student teams to participate in the simulation as team members or allies with the group on the video. The students would be familiar with the law and facts of the case. The end result is that the “team” consisting of the video characters and on-site law students would be successful against another team in the simulation who is less prepared and inspiring.

In addition to interventions designed to reduce implicit bias, the second programming track focuses on strategies to constrain behavior.<sup>458</sup> This track acknowledges that implicit biases are difficult to change. Although altering behavioral tendencies resulting from implicit biases is similarly complex, the combined tracks are more likely to achieve positive outcomes.

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452. Dasgupta & Greenwald, *supra* note 310, at 308.

453. See Woodcock & Monteith, *supra* note 316, at 446 (noting that “positive intergroup attitudes [are] fostered by linking the self to outgroups through common ingroup membership”).

454. *Id.* at 447.

455. See, e.g., Lai, *supra* note 309, at 16.

456. *Id.*

457. *Id.*

458. See, e.g., Nosek & Riskind, *supra* note 433, at 129.

Studies suggest that individual “motivation to respond without prejudice can be effective at reducing discriminatory behavior.”<sup>459</sup> Thus, successful strategies to constrain behavior focus on educational programming to alert individuals to the negative consequences and outcomes of unconscious bias. For example, a one-hour interactive lecture that was part of college orientation and featured “experiential illustrations of automaticity as well as group demonstrations of the I[mplicit] A[ssociation] T[est].”<sup>460</sup> Here, “participants’ beliefs about bias and motivation to address bias changed immediately following the presentation, and that change was durable at a follow-up assessment two to four months later.”<sup>461</sup> The law school environment provides ample opportunities to provide students with this information and, in turn, allows students to reflect on their own judgments within practice scenarios. Through peer and faculty input students learn to intentionally conform behavior to objective standards.

The examples above provide initial thoughts about research-based interventions and strategies that may provide the link between diversity goals and outcomes. Individual institutions, however, must consider strategies that fit within their overall educational program and are targeted to produce the kind of learning outcomes suggested by their unique institutional mission. It is worth recalling here Justice Kennedy’s admonition that judicial “acceptance of a university’s considered judgment that racial diversity among students can further its educational task” is appropriate “when supported by empirical evidence.”<sup>462</sup> Fortunately, the typical hallmarks of legal education are actually conducive to developing this body of evidence. For example, the crack cocaine and color-blind Constitution issues I noted above are central elements in two courses that every law student takes: Criminal Law and Constitutional Law.<sup>463</sup> Criminal Law is almost always a first year course, while Constitutional Law may or may not be in the first year but is invariably required. Both tend to be sectioned courses, meaning that they will be both large and that students will be assigned to them. They will also, consistent with one of legal education’s central traditions, be graded on a “blind” basis, with the identity (much less characteristics) of each student unknown as the professor teaching the course reads their examinations and assigns a grade for the course.

This makes such courses ideal for precisely the sorts of pre- and post-enrollment assessment that is central to developing sound assessments of both proposed and actual educational outcomes. A law school willing to do so, for example, could administer a survey at the beginning of the semester in which the course is taken that provides a wealth of information about the background, characteristics, and perspectives of the students enrolled. That would then be repeated at the end of the course, allowing the institution (and the instructor) to identify key changes, both positive and negative. The law school should also

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459. *Id.*

460. *Id.* at 132. I discuss the IAT at text accompanying notes 304–331.

461. *Id.*

462. *Grutter*, 539 U.S. 388–89 (2003) (Kennedy, J., dissenting).

463. These are two of the seven subjects that are part of the Multistate Bar Examination, a 200 objective question examination that individuals must take in order to pass the bar examination in every state except Louisiana. As “bar courses” they are accordingly courses all students will take, whether required to do so or not.

document the presence, or absence, of a number of diversity elements within the course. In this regard it is important to keep in mind that it will be an advantage to have individual courses or law school student cohorts with greater or lesser degrees of diversity, given that meaningful studies must provide “comparisons . . . between students who experience different types of education.”<sup>464</sup> It is also important to probe with care the composition of the classes and the outcomes in each, given the benefits that follow when “both diversity and homogeneity can be compared.”<sup>465</sup>

The pre- and post-experience surveys can also document a variety of personal attitudes and educational outcomes associated with both education per se and diversity in particular. There are a variety of instruments and survey techniques already available that a law school can use. Individuals interested in these matters have, for example, assessed “critical thinking skills,”<sup>466</sup> “cognitive development,”<sup>467</sup> support for or opposition to social change,<sup>468</sup> and “democratic citizenship.”<sup>469</sup> The core problem of implicit bias could in turn be revealed and measured by having students to take one or more of the on-line IAT tests.<sup>470</sup> The time commitment is minimal, often just ten or fifteen minutes per test. The results are immediate. And the information conveyed is instructive and, almost certainly for most students, compelling.

The social sciences resources are available. The only question is whether a given law school is willing to undertake the work required to document what it is doing and what it achieves. The obligations imposed on law schools by the accreditation standards are arguably unique, coupling as they do simultaneous mandates to enroll a diverse class and to document its educational outcomes. The opportunities they have to do that are also unique and, if acted on, can do a long way toward answering key questions in this important and contentious area.

## CONCLUSION

I began this Article with the observation that arguably both the best and worst result for diversity’s champions is that the Court does not use *Fisher II* to repudiate the diversity rationale and simply refines the narrow tailoring inquiry. I also noted the problems posed by what scholars characterize as “aversive racism,” a phenomenon that goes a long way toward explaining the disconnect between social norms that stress general support for equality and recent episodes of race-motivated violence. Americans in general “sympathize with victims of past

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464. Tuckman, *supra* note 122, at 235.

465. Apfelbaum, *supra* note 127, at 240.

466. See, e.g., Pascarella Critical Thinking, *supra* note 258.

467. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RES. 4 (2010).

468. See, e.g., Gary D. Malaney & Joseph B. Berger, *Assessing How Diversity Affects Students’ Interest in Social Change*, 6 J. C. STUDENT RETENTION 443 (2005); Biren (Ratnesh) A. Nagda et al., *Learning about Difference, Learning with Others, Learning to Transgress*, 60 J. SOC. ISSUES. 195 (2004).

469. Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17 (2004).

470. For information about these tests, see Project Implicit, *available at* <https://implicit.harvard.edu/implicit/> (last visited Oct. 14, 2015).

injustice, support principles of racial equality, and genuinely regard themselves as non-prejudiced.”<sup>471</sup> They are also human beings, individuals who regardless of race or ethnicity “possess conflicting, often non-conscious, negative feelings and beliefs about Blacks that are rooted in basic psychological processes that promote racial bias.”<sup>472</sup>

The core assumption that animates the pursuit of diversity and the use of admissions preferences is that they provide an essential path through which “all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”<sup>473</sup> My “good news - bad news” perspective about all of this is deeply influenced by my recognition that the pursuit and implementation of principled diversity is a complicated process that imposes substantial obligations on any institution that undertakes it. It is also informed by my suspicion that few if any of this nation’s colleges and universities – and virtually none of its law schools – are engaged in principled diversity.

The social science suggests that there may well be good reasons to promote diversity. It also tells us that doing it right is a difficult process and that doing it badly could be dangerous. We do not at this point know what the Court will do in *Fisher II*. Regardless, this nation’s colleges and universities have an obligation to act in educationally sound ways. If, as will almost inevitably be the case, a given institution lauds and pursues diversity it has a concomitant to engage in the sorts of programming and assessment I have described.

There are good reasons to debate diversity and affirmative action as matters of social policy and constitutional law. Principled diversity is more than simple numbers. Acceptance of diversity as a compelling interest and articulation of a legal narrow tailoring rubric are necessary first steps. Conscious programming and systematic assessment are their necessary companions. Indeed, they are essential elements for any institution that is required to defend its particular approach in a court of law. The fact that most institutions will not face that particular problem does not excuse them from undertaking the work. Sound educational policy requires every institution that embraces diversity must take care that what they do in the name of diversity is truly principled.

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471. Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 10 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 316 (2009).

472. *Id.*

473. *Grutter v. Bollinger*, 539 U.S. 306, 332–33 (2003).

