

# SEARCHING FOR RACE-NEUTRAL ALTERNATIVES: THE COLLEGE AND UNIVERSITY AMICUS BRIEFS IN *FISHER V. UNIVERSITY OF TEXAS*

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The Supreme Court’s decision on the constitutionality of affirmative action at the University of Texas has reach well beyond that one university. In *Fisher v. University of Texas*, the affirmative action case before the Supreme Court in 2013, seventy–three outside groups filed amicus briefs in support of the University of Texas, including eight amicus briefs filed by one hundred seventeen undergraduate, four–year colleges and universities.<sup>1</sup> There was good reason for these institutions to express their opinions; the Supreme Court has carefully considered the amicus briefs of colleges and

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

universities when making decisions about the constitutionality of affirmative action in the past.

In *Grutter v. Bollinger*, the landmark affirmative action case in 2003, both the majority opinion by Justice Sandra Day O'Connor and the dissent by Justice Anthony Kennedy relied on amicus briefs from colleges and universities.<sup>2</sup> O'Connor wondered whether the affirmative action tools at one university may work equally well at other kinds of universities.<sup>3</sup> She questioned, for example, the appellant Barbara Grutter's argument that a race-neutral percentage plan, whereby students in the top decile of their high school class would receive automatic admission to a college or university without any additional consideration of race, could work equally well for an undergraduate institution as for a graduate or professional school.<sup>4</sup> She also was skeptical about how such a program could work for selective institutions with more qualified applicants than places in the class. Percentage plans, she wrote, "would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."<sup>5</sup> The experiences of other colleges and universities, she envisioned, would help inform affirmative action practices going forward.

Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Colleges and universities in other states can and should draw on the most promising aspects of these race-neutral alternatives as they develop.<sup>6</sup>

Kennedy, similarly, cited an amicus brief filed by Amherst College and twenty-seven other colleges and universities as evidence of alternative affirmative action programs that may require more nuanced analysis than the affirmative action program at the University of Michigan Law School.<sup>7</sup> Kennedy noted that Amherst College, unlike the University of Michigan Law School, did not run daily queries for race when admitting its class, nor did it have consistent numbers of black students year-to-year, and this changed Kennedy's perception of the constitutionality of the various programs.<sup>8</sup> And Justice Lewis Powell's opinion in *Regents of the University of California v. Bakke*, the 1978 predecessor to *Grutter*, relied extensively on a description of Harvard University's affirmative action

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2. 539 U.S. 306 (2003).

3. *See id.* at 340.

4. *See id.*

5. *Id.* at 340.

6. *Id.* at 342.

7. *See Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting).

8. *See id.* at 391–92 (Kennedy, J., dissenting).

program as portrayed through its amicus brief.<sup>9</sup>

In *Fisher*, however, Kennedy did not reference any amicus briefs. Writing for the majority, which upheld *Grutter*, Kennedy emphasized the long-standing requirement that colleges and universities employ workable race-neutral means of selecting their classes before resorting to race-conscious methods.<sup>10</sup> But instead of deciding whether the University of Texas had workable race-neutral tools at its disposal, Kennedy remanded the case to the Fifth Circuit Court of Appeals.<sup>11</sup>

Kennedy's lack of reference to the eight college and university amicus briefs is telling. A decision on the constitutionality of affirmative action impacts all of higher education and institutions of varying size, shape, mission, and selectivity. In this article, I argue that Kennedy did not have the information to determine the workability of race-neutral alternatives because the amicus briefs filed by colleges and universities failed to address this question. I examine, first, how Kennedy subtly shifted the emphasis to these race-neutral alternatives in *Fisher* and how he defined race-neutral alternatives for the first time. Second, I show how the college and university amicus briefs did not fully tackle the question of race-neutral alternatives, but then also how the briefs contained clues about these alternatives for the Fifth Circuit to parse on remand. Lastly, I look at the failure of the Fifth Circuit to meaningfully apply the standard described by Kennedy in *Fisher*.

## I. RACE-NEUTRAL ALTERNATIVES IN *GRUTTER* AND *FISHER*

### A. *Grutter*: O'Connor and Kennedy Disagree on Race-Neutral Alternatives

In *Grutter*, the Supreme Court held that colleges and universities may use race-conscious admissions policies in order to reap the educational benefits that flow from a diverse community.<sup>12</sup> The *Grutter* court ruled that the University of Michigan Law School's practice of giving applicants from underrepresented racial and ethnic groups a boost in admissions was constitutional. Because government action based on race is suspect under the Equal Protection Clause, the Court decided that the Law School must meet the exacting standard of strict scrutiny: the Law School must show that (1) it has a compelling interest and that (2) its race-conscious program is narrowly tailored to achieve that interest.<sup>13</sup> On the first point, O'Connor,

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9. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–17 (1978) (opinion of Powell, J.).

10. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

11. *Id.*

12. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

13. *Id.*

writing for the majority, held that those educational benefits that flow from a diverse class are a compelling interest, deferring to the Law School's judgment about its educational mission.<sup>14</sup> On the second, O'Connor went through a multistep process to determine that the Law School's race-conscious admissions program was narrowly tailored. She held that "[n]arrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks,"<sup>15</sup> and found that the Law School "sufficiently considered workable race-neutral alternatives" before resorting to a race-conscious program.<sup>16</sup> The Law School's chosen race-conscious program—one that used race as a plus factor in an individualized, holistic process where race is not the determinative factor, and also one that will terminate as soon as practicable—was narrowly tailored.<sup>17</sup>

Kennedy dissented in *Grutter*. Calling the majority's application of strict scrutiny "perfunctory," Kennedy argued that the Law School's race-conscious admissions program failed to satisfy the narrow tailoring prong of strict scrutiny.<sup>18</sup> Kennedy did not believe that the Law School had adequately considered race-neutral alternatives to its race-conscious admissions program, and that O'Connor simply deferred to the Law School's judgment that race-neutral alternatives would be unworkable. "Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School's profession of its own good faith."<sup>19</sup> Kennedy would have put the Court to work looking for race-neutral alternatives as opposed to simply trusting that the Law School had adequately considered them.

#### B. *Fisher*: Kennedy Wins, Placing Greater Emphasis on Race-Neutral Alternatives

In *Fisher*, the plaintiff accused the University of Texas of using a race-conscious admissions program that violated the Equal Protection Clause.<sup>20</sup> The University of Texas's admissions program consisted of two parts. First, the University admitted the top ten percent of students in every high school in Texas. Facially race-neutral, the percentage plan was designed to take advantage of racial segregation in Texas high schools by admitting a

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14. *See id.* at 333.

15. *Id.* at 339.

16. *Id.* at 340.

17. *Grutter*, 539 U.S. at 340, 343.

18. *See id.* at 388–89 (Kennedy, J., dissenting).

19. *Id.* at 394.

20. *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

diverse group of high school seniors at the top of their classes.<sup>21</sup> Second, the University reserved a number of seats in the freshman class for students who were not in the top ten percent of their high school classes, but who, on an individualized, holistic read of the application—a read that included consideration of race—were determined meritorious by the admissions office.<sup>22</sup> The district court granted summary judgment to the University of Texas, concluding its program was consistent with *Grutter*.<sup>23</sup> The Fifth Circuit affirmed.<sup>24</sup>

Kennedy, writing for the Court's majority in *Fisher*, upheld the foundation laid in *Grutter*.<sup>25</sup> He reaffirmed that the standard of review is strict scrutiny, that the educational benefits that flow from a diverse student body are a compelling interest, and that the compelling interest must be narrowly tailored.<sup>26</sup>

But instead of determining whether the University of Texas met the standard, Kennedy criticized the Fifth Circuit for improperly applying the narrow tailoring prong of the strict scrutiny and remanded the case. The Fifth Circuit had deferred to the University of Texas, taking at face value the University's good-faith claim that race-neutral alternatives were unworkable.<sup>27</sup> As Kennedy wrote: "[t]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."<sup>28</sup>

Compare O'Connor's opinion in 2004 to Kennedy's in 2013. O'Connor in *Grutter* stated: "Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."<sup>29</sup> Kennedy in *Fisher* stated: "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."<sup>30</sup>

These statements do not conflict, nor do they exactly align. Kennedy's allows for less ambiguity than O'Connor's. Based on O'Connor's language, the Fifth Circuit in *Fisher* placed the emphasis on the University's good faith, stating:

*Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or

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21. *See id.*

22. *Id.*

23. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d. 587 (W.D. Tex. 2009) [hereinafter *Fisher I*].

24. *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011) [hereinafter *Fisher II*].

25. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) [hereinafter *Fisher*].

26. *See id.* at 2413

27. *Fisher II*, 631 F.3d at 213.

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

29. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

30. *Fisher*, 133 S. Ct. at 2414.

fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.<sup>31</sup>

O'Connor never mentioned *deference* to a college or university's good faith judgment on the effectiveness of race-neutral alternatives in *Grutter*. The Fifth Circuit made this leap on its own. And in *Fisher*, Kennedy wrote that the Fifth Circuit's interpretation of O'Connor was wrong.<sup>32</sup> It was the same interpretation he attacked in his *Grutter* dissent.

Compare Kennedy in both *Grutter* and *Fisher*. Kennedy stated in *Grutter*: "The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based in empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued."<sup>33</sup> In *Fisher*, Kennedy stated: "The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."<sup>34</sup>

We can see the *Fisher* decision as round two in O'Connor and Kennedy's 2003 disagreement over race-neutral alternatives, but this was an unfair fight: with O'Connor no longer sitting on the Court, Kennedy easily won. In O'Connor's absence, Kennedy could re-shape *Grutter* to incorporate the principles set forth in his dissent. Going forward, Kennedy clearly put the onus on the institution to demonstrate that its programs are, indeed, narrowly tailored to achieve a diverse student body.<sup>35</sup> He left the application of strict scrutiny on the narrow-tailoring prong to some future decision.<sup>36</sup>

### C. Defining "Race Neutral"

An unspoken assumption in *Fisher* was that race-neutral alternatives are a clearly-defined category.<sup>37</sup> They are not. The Supreme Court had not been consistent about its use of the term "race neutral." Sometimes, to be race neutral required the motivating factor behind any policy to be

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31. *Fisher II*, 631 F.3d at 233.

32. *Fisher*, 133 S. Ct. at 2414.

33. *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

34. *Fisher*, 133 S. Ct. at 2414.

35. *See id.*

36. *Id.*

37. *Id.*

something other than race.<sup>38</sup> Notably, Justice Ruth Bader Ginsburg dissented in *Fisher* by saying that “only an ostrich could regard the supposedly neutral alternatives as race unconscious.”<sup>39</sup> As Ginsburg noted, the entire reason the University of Texas had a percentage plan is because the admissions office was race conscious.<sup>40</sup> The racial segregation of Texas public schools allowed the University of Texas to use the percentage plan as a proxy for race.

*Fisher* is a turning point in how we understand “race neutral.” In his opinion, Kennedy told colleges and universities that the goal of racial diversity is constitutionally acceptable.<sup>41</sup> In the same breath, he told colleges and universities that the methods used to attain this racial diversity should be race neutral.<sup>42</sup> The Court could not possibly mean that race-neutral alternatives must be blind to race, as Kennedy envisions a schema where these alternatives are being expressly used for the purpose of creating racial diversity, among other kinds of diversity. Race-neutral alternatives are only facially race-neutral; in *Fisher*-speak, race-neutral can still mean motivated by race-consciousness.

Crucially, in using the term “race-neutral,” Kennedy is not pretending that race is absent from the University of Texas’ percentage plan. He is not an “ostrich.” This is not affirmative action by “subterfuge.”<sup>43</sup> Notably, the amicus brief filed by Harvard University in *Grutter* called proxies for race “disingenuous” and not truly race neutral because the motivating factor behind the proxies are racial diversity.<sup>44</sup> My understanding of Kennedy: categorization of applicants by racial groups is extremely problematic under the Equal Protection Clause, and facially race-neutral programs that are racially motivated are somewhat less problematic. As George La Noue

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38. See e.g., Arthur L. Coleman, Scott R. Palmer, & Steven Y. Winnick, *Race-Neutral Policies in Higher Education: From Theory to Action*, COLL. BD. (June 2008), available at [http://professionals.collegeboard.com/profdownload/Race-Neutral\\_Policies\\_in\\_Higher\\_Education.pdf](http://professionals.collegeboard.com/profdownload/Race-Neutral_Policies_in_Higher_Education.pdf) (arguing race-neutral alternatives cannot be motivated by race).

39. See *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

40. See *id.*

41. *Id.* at 2420.

42. *Id.*

43. See Chapin Cimino, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1290–91 (1997) (calling race-neutral alternatives relying on socioeconomic status race-conscious affirmative action by “subterfuge”). See also Richard Thompson Ford, *The Secret Danger in the Supreme Court’s Affirmative Action Ruling*, SLATE (June 27, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/06/supreme\\_court\\_and\\_affirmative\\_action\\_will\\_only\\_elite\\_wealthy\\_colleges\\_end.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_affirmative_action_will_only_elite_wealthy_colleges_end.html) (calling race-neutral alternatives “transparent evasions”).

44. See Brief of Harvard University Amicus Curiae Supporting Respondent, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

and Kenneth Marcus write: “[f]acially race-neutral procedures may have some advantages over racially explicit classifications, even if such procedures are adopted with a race-conscious goal.”<sup>45</sup> For example, explicit racial categories may be particularly disfavored, promote racial stigma, and increase racial hostility.<sup>46</sup> In general, the Supreme Court tells us that facially race-neutral alternatives motivated by race, while still suspect and subject to strict scrutiny, are less suspect than explicitly race-conscious programs that divide applicants by racial groups.<sup>47</sup>

Unfortunately, in *Fisher* the Court gave few examples of these race-neutral alternatives that are motivated by race consciousness. In *Grutter*, O’Connor suggested that (1) percentage plans, like the one used in Texas, and (2) lottery programs are “race neutral,” even though these methods are explicitly motivated by race.<sup>48</sup> O’Connor also used the term “race-neutral” when describing an admissions schema that would “decreas[e] the emphasis for all applicants on undergraduate GPA and LSAT scores.”<sup>49</sup> Not to be boxed in, though, she never fully committed, merely, as she said, “assuming such plans are race-neutral.”<sup>50</sup>

In *Fisher*, Kennedy did not comment on the specific race-neutral practices of which he approved.<sup>51</sup> But the cases he cited are illustrative. In *Parents Involved in Community Schools v. Jefferson County Board of Education*, the Court reprimanded a school district using a race-conscious school assignment system for “fail[ing] to show that they considered methods other than explicit racial classifications to achieve their stated [race-conscious] goals.”<sup>52</sup> Kennedy, concurring, noted that “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and

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45. George La Noue & Kenneth L. Marcus, “*Serious Consideration*” of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991, 1014 (2008).

46. *See id.*; *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 214 (1995) (“distinctions between citizens solely because of their ancestry are by their very nature odious to a free people who institutions are founded upon the doctrine of equality”); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (racial classifications promote “notions of racial inferiority and lead to a politics of racial hostility”).

47. *See* La Noue & Marcus, *supra* note 45; *see also* Brian T. Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & L. 277, 288 (2007).

48. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

49. *Id.* (quoting App. to Pet. for Cert. 251a).

50. *Id.* at 340.

51. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

52. 551 U.S. 701, 735 (2007).



tracking enrollments, performance, and other statistics by race.”<sup>53</sup> He drew a distinction between facially race-neutral programs with racially-motivated intent and programs that explicitly divide people on the basis of race.<sup>54</sup>

In *City of Richmond v. Croson*, the Court found that the city failed to consider race-neutral means of increasing the number of bids from black contractors.<sup>55</sup> The Court proposed a number of race-neutral alternatives: “[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.”<sup>56</sup>

Based on such Supreme Court precedent, some scholars have seen a plethora of potential race-neutral alternatives for admissions. Universities in Michigan, for example, have “identified a number of criteria which would appear to correlate fairly well with African American, Hispanic, and Native American applicants: bilingualism, residency on an Indian reservation or in Detroit, and experience overcoming discrimination.”<sup>57</sup> As one scholar wrote, such proxies for race “will satisfy strict scrutiny rather easily.”<sup>58</sup>

The Court’s definition of “race neutral” in *Fisher* thus has precedent in decisions such as *Parents Involved*<sup>59</sup> and *Croson*<sup>60</sup>, but is a departure from what many have assumed “race-neutral” might mean. Kennedy now has given permission for colleges and universities to look more closely at such proxies.

## II. THE VALUE OF THE *FISHER* AMICUS BRIEFS FROM COLLEGES AND UNIVERSITIES

### A. The College and University Amicus Briefs in *Fisher* Miss Race-Neutral Alternatives

There were eight amicus briefs filed with the Supreme Court in *Fisher* by undergraduate, four-year colleges and universities, with the lead amici

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53. *Id.* at 789 (Kennedy, J., concurring); see also Andrew LeGrand, *Narrowing the Tailoring: How Parents Involved Limits the Use of Race in Higher Education Admissions*, 21 NAT’L BLACK L.J. 53, 65 (2009).

54. *See id.*

55. *See City of Richmond v. Croson*, 488 U.S. 469, 509 (1989).

56. *Id.* at 509–10.

57. Fitzpatrick, *supra* note 47, at 292.

58. *Id.*

59. 551 U.S. 701 (2007).

60. *Croson*, 488 U.S. at 469.

being Appalachian State University, Fordham University, the University of North Carolina, the University of Delaware, California Institute of Technology, Amherst College, Brown University, and the University of California. Only the University of California adequately explained how race-neutral alternatives could be employed in admissions.<sup>61</sup> The briefs left Kennedy in the uncomfortable position of having a large evidentiary record related to the University of Texas (and arguably other large, public colleges and universities like the University of California) but little data on how race-neutral alternatives might work in other settings, especially selective, private colleges and universities with national (and international) applicant pools.<sup>62</sup>

Appalachian State University's brief, joined by thirty-five other institutions, did not attempt to show the workability of race-neutral alternatives.<sup>63</sup> Fordham University's brief, joined by seven other colleges and universities, also failed to make this showing. Instead, Fordham made the grand argument that the First Amendment protects its right as an educational institution to decide the methods of selecting its students.<sup>64</sup> A race-neutral admission plan, such as a percentage plan premised on the segregation of public schools as in Texas, "renders *amici* complicit in the underlying societal inequities from which it arises" and "*amici* could easily conclude that use of such 'race-neutral' plans to achieve diversity conflicts irreconcilably with their educational mission."<sup>65</sup>

The University of North Carolina's brief only considered one race-neutral alternative: a percentage plan.<sup>66</sup> That brief concluded that "mechanical" percentage plans would increase racial diversity by a single percentage point while "simultaneously depress[ing] almost every other indicator of academic quality."<sup>67</sup> Similarly, the University of Delaware's brief, joined by ten other colleges and universities, criticized the "blunt instrument" of percentage plans.<sup>68</sup> And again, California Institute of

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61. See Brief Amicus Curiae of the President and Chancellors of the Univ. of Cal. in Support of Respondents at 22, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Univ. of Cal.].

62. See Briefs filed as Amici Curiae, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

63. See Brief for Appalachian State Univ. et al. as Amici Curiae in Support of Respondents, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

64. See Brief for Fordham Univ. et al. as Amici Curiae Supporting Respondents at 26, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

65. *Id.* at 25.

66. See Brief for the Univ. of N.C. at Chapel Hill as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

67. *Id.* at 34.

68. Brief for Leading Pub. Research Univ. the Univ. of Del. et al. as Amici Curiae in Support of Respondents at 28-29, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013)

Technology's brief, joined by nine other colleges and universities, focused on how percentage plans, using "strictly numerical criteria," are infeasible for selective institutions drawing national student bodies.<sup>69</sup>

The remaining briefs from Amherst College, Brown University, and the University of California also attacked the notion that percentage plans are workable race-neutral alternatives for their institutions. Amherst College's brief, joined by thirty-six other colleges and universities, argued that even if percentage plans could work at large state colleges and universities, "*neither they nor any other alternatives of which we are aware could conceivably work at small, highly selective schools like amici.*"<sup>70</sup> Brown University's brief, joined by thirteen other colleges and universities, included three pages under the title: "Mechanistic, Ostensibly Race-Neutral Policies Are Not Constitutionally Required Alternatives For Achieving Diversity."<sup>71</sup> Brown said that percentage plans would not work for selective, private institutions because the size, selectivity, and national and international applicant pools make such a program impracticable.<sup>72</sup> "Were each Amicus to guarantee admission to just the top student at each of the nation's secondary schools, that would require admitting many more than 20,000 students."<sup>73</sup> The University of California's brief noted that percentage plans in California failed to produce equivalent diversity to what had been achieved with race-conscious measures.<sup>74</sup>

North Carolina, Delaware, the California Institute of Technology, Amherst, Brown, and the University of California all made compelling arguments about why percentage plans are not workable for their institutions by contrasting such a "mechanistic" admissions program with the holistic systems they use right now. As Brown succinctly put their collective argument: "[t]he admissions policies of Amici vary somewhat, but each is firmly committed to individualized, holistic review. . . Amici do not place dispositive weight on objective numerical measures. . . in addition to seeking students who are qualified, each institution also looks to compose a student body that is exceptional, complementary, and diverse in

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(No. 11-345).

69. Brief for Cal. Inst. of Tech. et al. as Amici Curiae in Support of Respondents at 22, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Cal. Inst.].

70. Brief for Amherst Coll. et al. as Amici Curiae Supporting Respondents at 21, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Amherst].

71. Brief for Brown Univ. et al. as Amici Curiae in Support of Respondents at 14, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Brown].

72. *See id.* at 15.

73. *Id.* at 15–16.

74. *See* Brief for Univ. of Cal., *supra* note 61, at 22.

many ways.”<sup>75</sup>

But only Amherst, Brown, and the University California took their arguments past the so-called “mechanistic” admission programs. Amherst said that “it is unrealistic to believe that highly selective institutions could retain diversity, while not taking it directly into account, by improving search techniques [for black and Hispanic prospective students], or focusing even more than they now do on low socio-economic rank. . . .”<sup>76</sup> The brief cited a Williams College plan “based solely on socio-economic disadvantage” and a book that made the same point that “class-based preferences cannot be substituted for race-based policies.”<sup>77</sup>

Brown expounded upon its race-neutral programs in greater detail than most, but the conclusion paralleled Amherst.

Amici do extensively consider a wide range of race-neutral factors in seeking to compose broadly diverse and excellent student bodies. For example, Amici consider whether the applicant is the first in the family to attend college, whether he or she comes from a disadvantaged background, and whether languages other than English are spoken in the home. Amici also engage in substantial outreach and recruiting efforts aimed at increasing the size and diversity of the applicant pool. Furthermore, Amici have adopted financial aid policies designed to enable a wide variety of admitted students from all backgrounds to attend. These efforts have played an important role in contributing to the diversity, including racial and ethnic, of the student bodies of Amici institutions. But racial and ethnic diversity are a distinct kind of difference in background, and reliance on such race-neutral measures alone cannot substitute for individualized, holistic review that takes account of race and ethnicity of the type approved of by *Grutter*.<sup>78</sup>

The only citation was to a law review article “collecting studies showing that reliance on socioeconomic status as an admissions factor alone cannot produce racial diversity.”<sup>79</sup>

Beyond percentage plans, we might draw from Amherst and Brown that socioeconomic status, on its own, is not a sufficient proxy for race-conscious admissions, and the cost is the diversity of their institutions. This opinion has been footnoted, with sources, in those two briefs. The nightmare scenario described in Amherst’s brief, where the number of black and Hispanic admitted students are cut in half, those admitted are

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75. Brief for Brown, *supra* note 71, at 7–8.

76. Brief for Amherst, *supra* note 70, at 22.

77. *Id.* at 22–23.

78. Brief for Brown, *supra* note 71, at 16–17.

79. *Id.* at 17.

more poorly prepared, yield on black and Hispanic students plummets, and the only black and Hispanic students in selective colleges and universities are poor, is limited to a system where socioeconomic factors are the sole race-neutral ones.<sup>80</sup>

Only the University of California's amicus brief comprehensively tackles the question of race-neutral alternatives. The University of California, uniquely among amici, had been banned under California's Constitution from using race-conscious admissions policies since 1996.<sup>81</sup> Instead, the University expanded outreach efforts to "low-income families or those with little or no previous experience with higher education, or attend a school that is educationally disadvantaged."<sup>82</sup> It adopted a plan analogous to the Texas percentage plan.<sup>83</sup> It reduced emphasis on standardized testing.<sup>84</sup> Finally, it implemented a holistic system where

'merit should be assessed in terms of the full range of an applicant's academic and personal achievements and likely contribution to the campus community, viewed in the context of the opportunities and challenges that the applicant has faced'; and that '[c]ampus policies should reflect continued commitment to the goal of enrolling classes that exhibit academic excellence as well as diversity of talents and abilities, personal experience, and backgrounds.'<sup>85</sup>

The University concluded that these policies were not sufficient—black enrollment at UC Berkeley, for example, never recovered to race-conscious levels, falling from 7.3% in 1995 to 3.4% in 2012.<sup>86</sup>

Even if Kennedy had been inclined to strike down the University of Texas program, there are serious questions about whether the race-neutral alternatives used in Texas are workable for all colleges and universities, particularly private and selective colleges and universities outside of Texas. The University of California's amicus brief is somewhat instructive on this front—its experience using race-neutral alternatives has been less successful than in Texas—but not only does the University of California's experience raise questions about what counts as workable (is a drop in black enrollment from 7.3% to 3.9% workable, for instance?), the University of California is also a large, public university that has at its

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80. *See id.* at 22–23.

81. CAL. CONST. art. 1, § 31.

82. Brief for Univ. of Cal., *supra* note 61, at 22.

83. *See id.* at 23.

84. *See id.* at 22.

85. *Id.* at 26 (quoting Guidelines for Implementation of University Policy on Undergraduate Admissions, <http://www.ucop.edu/sas/adguides.html>).

86. *See id.* at 22; *UC Berkeley Fall Enrollment Data*, BERKELEY OFFICE OF PLANNING & ANALYSIS, <http://opa.berkeley.edu/statistics/enrollmentdata.html> (last visited Dec. 3, 2013).

disposal race-neutral tools like percentage plans that other private colleges and universities cannot use. The amicus briefs from every other college and university filed in *Fisher* failed to adequately address the issue of race-neutral alternatives.

#### B. Hidden Race-Neutral Alternatives in the College and University Amicus Briefs

As we have seen, race-neutral alternatives include any admissions tools that may increase racial diversity as long as they do not divide applicants by race-based categories, even if those tools are motivated by race consciousness. But this subtlety, which only became fully clear with Kennedy's decision in *Fisher*, means that the focus of the college and university amicus briefs on percentage plans and socioeconomic affirmative action was far too narrow. The briefs assumed that race-neutral alternatives and race consciousness are incompatible. For example, Amherst said that "if liberal arts institutions are to fulfill their educational missions, colleges *have to* be sensitive to race in making admissions decisions."<sup>87</sup> That need "stems directly from continuing disparities in pre-collegiate academic achievements of black and white students' as presently measured."<sup>88</sup> In assembling a class,

there is really no possibility of a *race-blind* admission process: consciousness of *all* the diversity each applicant would contribute is unavoidable. There is no alternative for these colleges but to accept the reality of this consciousness of differences (including racial or ethnic background) and to use it intelligently as part of their complex weighing of multiple factors leading to admission decisions.<sup>89</sup>

Similarly, Brown wrote that it is not apparent "why universities should, at this point in our nation's evolving understanding of race, be forced to will ignorance with respect to race. As this Court has recognized, race continues to influence our experiences."<sup>90</sup> Brown's brief worried that "racial and ethnic diversity are a distinct kind of difference in background, and reliance on such race-neutral measures alone cannot substitute for individualized, holistic review that takes account of race and ethnicity. . . ."<sup>91</sup>

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87. Brief for Amherst, *supra* note 70, at 15.

88. *Id.* (quoting WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 51 (1998)).

89. *Id.* at 21.

90. Brief for Brown, *supra* note 71, at 12.

91. *Id.* at 17.

When the college and university amicus briefs used terms such as “race-neutral” and “race-blind” and “race consciousness,” they betray a miscommunication between court and amici about the definition of race-neutral. In fact, many of the admissions tools described by the briefs are race-neutral, even if the briefs do not recognize them as such. And presumably there are more tools being used that amici simply failed to mention.

Looking back at Amherst’s brief, we see a host of race-neutral alternatives that are already being employed by the amici but not acknowledged as race-neutral.<sup>92</sup> For instance, Amherst considers “the extent and depth of the candidate’s nonacademic achievement and leadership,” “the candidate’s socio-economic status,” “particular personal, family, and economic hurdles faced by the candidate and/or immediate or extended family,” “ongoing and prospective support from extended family, community based organizations, opportunity programs, or religious organizations,” and “educational attainment of siblings.”<sup>93</sup> In assessing these characteristics, amici rely on demographic factors, essays, resumes, and recommendations.<sup>94</sup> When an applicant writes about the cultural traditions in her family, reveals that her parents did not attend college or university, is connected with community organizations that work, in particular, with black and Hispanic students—these factors may closely parallel race, but they are race-neutral.

While Brown only describes “whether the applicant is the first in the family to attend college, whether he or she comes from a disadvantaged background, and whether languages other than English are spoken in the home” as race-neutral, its brief references other race-conscious programs that are facially race neutral.<sup>95</sup> As already noted, Brown’s brief highlights the holistic application reading process where amici “looks to compose a student body that is exceptional, complementary, and diverse in many ways. In service of this goal, each institution seeks, and invites applicants to submit, any relevant information about their background to understand how the applicant might contribute to the vibrancy of the student body.”<sup>96</sup> Of course under a race-neutral regime the check box where an applicant might reveal race can no longer be a factor in admission, but all of that “relevant information” includes “weighing your many talents, your academic and extracurricular interests, your diverse histories.”<sup>97</sup>

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92. Brief for Amherst, *supra* note 70, at 11–12.

93. *Id.* at 12.

94. *Id.*

95. Brief for Brown, *supra* note 71, at 16.

96. *Id.* at 8.

97. *Id.* at 10 (quoting Shirley M. Tilghman, 2005 *Opening Exercises Greeting and Address*, PRINCETON UNIV. (Sept. 2005), <http://www.princeton.edu/president/tilghman/speeches/20050911/>).

The California Institute of Technology mistakes programs that are race-neutral for race-conscious.

[T]he race of an applicant is considered along with the candidate's other characteristics to determine the contribution that student would likely make to the university community. For example, a white student from a majority-minority high school might write an essay that illustrates how this combination of race and experience would make a particularly interesting addition to the dialogue on campus.<sup>98</sup>

While race is a subject of the student's essay in the example, the student's understanding of race and the student's experiences, as expressed in her essays, are race-neutral. The brief similarly mentions race-neutral alternatives that are already part of amici's repertoire, without calling them race-neutral. Notably, "[a]dmissions officers at the amici universities consider a wide range of information that provides them a sense of the student as an individual."<sup>99</sup> Among those mentioned are application essays, recommendations, additional letters of recommendation, and electronic media.<sup>100</sup>

Indeed, Harvard's *Grutter* amicus brief contained this sentence:

[t]he United States cites as possible [race-neutral alternative] factors, 'a history of overcoming disadvantage, geographic origin, socioeconomic status, challenging living or family situations, reputation and location of high school, volunteer and work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to a particular cause, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected by essays.' Amici already give significant favorable consideration to all of these factors.<sup>101</sup>

What Harvard missed in 2004 was how these factors and more could be used as deliberate proxies for race.

### III. THE FIFTH CIRCUIT ON REMAND

A year after the *Fisher* decision, the Fifth Circuit issued its decision on remand. The Fifth Circuit was charged with determining if there were any

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98. Brief for Cal. Inst. of Tech., *supra* note 69, at 25.

99. *Id.* at 26.

100. *See Id.* at 26–27.

101. Brief for Harvard Univ. et al. as Amici Curiae Supporting Respondents at 22 n. 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (internal citation omitted).



workable race-neutral alternatives to the University of Texas's race-conscious affirmative action program, but it seemed to miss its charge again. In upholding the University of Texas's program for the second time, the court continued to defer to the University's summary conclusion that race-neutral alternatives are insufficient.<sup>102</sup>

The court devoted significant time outlining all of the University of Texas's race-neutral efforts, from the top ten percent plan to other forms of recruitment and outreach.<sup>103</sup> Were these efforts insufficient to bring diversity to the University of Texas without race-conscious affirmative action? The Fifth Circuit never answered the question. Noting that the number of black and Latino students actually increased using exclusively race-neutral methods, the court then lamented how the percentage of these students then became stagnant.<sup>104</sup> As the dissent pointed out, the University of Texas's goal is entirely unclear.<sup>105</sup> What population of black and Latino students would indicate the race-neutral methods were working? The University of Texas never defined its goal, and now the court deferred to a vague notion that the status quo is not enough.

The Fifth Circuit proposed an alternative rationale for why the top ten percent plan was insufficient for achieving diversity:

[A] significant number of students excelling in high performing schools are passed over by the Top Ten Percent Plan although they could bring a perspective not captured by the admissions along the sole dimension of class rank. For example, the experience of being a minority in a majority-white or majority-minority school and succeeding in that environment offers a rich pool of potential UT Austin students with demonstrated qualities of leadership and sense of self.<sup>106</sup>

The court saw the race-conscious program as a way of fine tuning the quality of diversity present in the class. But when Fisher presented counter arguments, suggesting, for example, that perhaps an admissions program that uses socioeconomic factors instead of race could be equally as effective at boosting this form of diversity, the court demurred: “[w]e are ill-equipped to sort out race, class, and socioeconomic structures.”<sup>107</sup> This is the definition of deference.

Should the Fifth Circuit have remanded to the district court? It decided that “there are no new issues of fact that need to be resolved, nor is there

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102. See *Fisher v. Univ. of Tex.*, 758 F.3d 633, 661 (5th Cir. 2014).

103. See *id.* at 647–49.

104. See *id.* at 648–50.

105. See *id.* at 667 (Garza, J., dissenting).

106. *Id.* at 653.

107. *Fisher*, 758 F.3d. at 657.

any identified need for additional discovery. . . .”<sup>108</sup> But if the Fifth Circuit had followed the instructions of the Supreme Court, then there are many unresolved issues of fact: what is the ultimate goal of race-conscious affirmative action, what constitutes a critical mass of black and Latino students, what race-neutral alternative means could be used to achieve that goal or critical mass, what race-neutral tools can work in various collegiate settings? These are the very things that amicus briefs could reveal.

#### IV. CONCLUSION

The examples drawn from the *Fisher* amicus briefs are perhaps just the tip of the iceberg for race-neutral alternatives already being employed by colleges and universities. This is the true face of affirmative action—and much of it is already race neutral. Colleges and universities do not have to be shy about the importance of race in their diverse communities. Thanks to *Grutter* and *Fisher*, serious, thoughtful consideration of the place of race in colleges and universities is a constitutionally protected compelling interest. The Supreme Court has made a distinction between the legitimate goal of diversity and the methods by which it can be achieved, but has given broad latitude to colleges and universities by asking them to find workable, facially race-neutral alternatives. *Fisher* suggests that proxies for race are not off limits, and while some justices and past cases have given mixed messages about the constitutionality of proxies for race, and this fact warrants a degree of caution, *Fisher* encourages racially motivated, yet facially race-neutral, admissions practices. To date, most colleges and universities have not shown the Court how many of their admissions practices, while racially motivated, may in fact conform to Kennedy’s definition of race-neutral.

Not only are colleges and universities constitutionally required to use workable race-neutral alternatives before employing race-conscious affirmative action, there may be huge advantages for the institutions that discover many of their current policies are facially race-neutral. First and foremost, proving that there are no workable race-neutral alternatives is not likely to be easy. How should a college or university prove a negative? At what point have all workable race-neutral alternatives been exhausted? Can socioeconomic affirmative action bring the same kind of diversity as selecting a class using race as one explicit criterion? Colleges and universities can hardly show the workability of race-neutral alternatives without talking about the goal of those alternatives—the notion of a critical mass of black and Latino students—and the nebulous nature of “critical mass” has been hotly debated. In essence, *Fisher* gives colleges and universities permission to ignore these complex issues—and the extensive

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108. *Id.* at 641.

literature addressing them—because these institutions do not need to demonstrate workability as long as the tools are facially race-neutral. Indeed, in *Grutter*, O'Connor placed an endpoint on the use of race-conscious affirmative action. Her admonition that “race-conscious admissions policies must be limited in time”—she proposed twenty-five years with the clock beginning in 2003—may not apply to such race-neutral alternatives.<sup>109</sup> Of course a future court may establish limits on race-neutral alternatives; for example, just because a college or university uses race-neutral alternatives likely does not mean they can use these to create unconstitutional racial quotas. But if used properly, race-neutral alternatives may open up new, constitutional pathways to diversity unhindered by many of the complications of earlier affirmative action jurisprudence.

The day will come when Kennedy, or his successor, will apply the standard described in *Fisher*, and that Justice will rely on college and university amicus briefs in crafting his or her opinion. Going forward, colleges and universities should embrace the freedom that *Grutter* and *Fisher* have afforded them by remaining conscious of race while examining which systems, many of which are already in place, are race-neutral. The framework for such a system is already at the core of a holistic admissions process.

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109. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

